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PLAGIARISM: LEGAL AND ETHICAL IMPLICATIONS FOR THE UNIVERSITY

AUDREY WOLFSON LATOURETTE*

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“*[T]here is an upstart crow, beautified with our feathers . . .*” - Robert Greene, an English dramatist and contemporary of William Shakespeare, opining on the Bard of Avon¹

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“‘West Side Story’ is a thinly veiled copy . . . of ‘Romeo and Juliet,’ which in turn plagiarized Arthur Brooke’s ‘The Tragical Historye of Romeo and Juliet,’ . . . which in turn copied from several earlier *Romeo and Juliets*, all of which were copies of Ovid’s story of *Pyramus and Thisbe*.” - Richard A. Posner, Judge, U.S. Court of Appeals, Seventh Circuit²

“Edgar A. Poe, while ‘shaming Longfellow for copying Tennyson’ engaged in ‘wholesale pilfering of long stretches of descriptive material from other books.’ The Tribune tartly observed that Poe’s ‘hunting after coincidence of idea or phrase [in Longfellow’s work], often unavoidable, between authors, is the least endurable.’” - Kenneth Silverman, Professor Emeritus of English at New York University and noted Poe biographer³

INTRODUCTION

The topic of plagiarism has garnered increasing attention prompted by a veritable plethora of high-profile instances of perceived or proven plagiarism, the increased media attention directed to the outing of malfactors, and the publication by scholars of statistics demonstrating a growing inclination on the part of college and university students to engage in a variety of cheating mechanisms. The “plague of plagiarism”⁴ has been deemed the “hot, new crime du jour”⁵ that, according to commentators, has prompted an “escalating war against academic plagiarism.”⁶ In an era in which scholars appear increasingly prepared to report alleged acts of plagiarism by their peers,⁷ the concept of the “plagiarism hunter,” who

be viewed as both an effort to comport with the standards of legal scholarship and to serve as a bona fide attempt to duly credit all utilized sources.

1. ALEXANDER LINDEY, *PLAGIARISM AND ORIGINALITY* 74–75 (1952) (arguing that Greene “violently resented Shakespeare’s free-and-easy ways.”). Lindey further opines that with respect to the alleged charges of plagiarism directed to Shakespeare, “Time has rendered its verdict. . . . Greene himself is no more than a name in the annals of letters. Shakespeare lives.” *Id.*

2. Richard A. Posner, *The Truth About Plagiarism*, *NEWSDAY*, Combined Editions, May 18, 2003, at A34.

3. KENNETH SILVERMAN, *EDGAR A. POE: MOURNFUL AND NEVER-ENDING REMEMBRANCE* 147, 237 (1991).

4. Kimberly Embleton & Doris Small Helfer, *The Plague of Plagiarism and Academic Dishonesty*, 15 *SEARCHER* 23 (June 2007).

5. K. Matthew Dames, *Understanding Plagiarism and How It Differs from Copyright Infringement*, 27 *COMPUTERS IN LIBRARIES* 25 (June 2007). Dames notes that plagiarism is an act that “suggests immorality and often scandal.” *Id.*

6. Phil Baty & Jon Marcus, *US War on Plagiarism Takes First UK Scalp*, *TIMES HIGHER EDUC. SUPP.*, April 15, 2005, at 1.

7. *Id.*

determinedly seeks out wrongdoers by utilizing software created to snare plagiarists, has emerged.⁸ So intense on occasion is the search conducted by the media for unattributed passages that one commentator deemed the goal of exposing a particular author “a participation sport.”⁹

In the latter part of 2006, acclaimed author Ian McEwan’s novel, *Atonement*, was cited for plagiarism with respect to passages similar to those found in a World War II memoir by Lucilla Andrews entitled *No Time For Romance*.¹⁰ In recent years, popular historians Doris Kearns Goodwin and the late Stephen Ambrose, both regarded as “credentialed scholars,”¹¹ confronted substantial criticism for failing to properly attribute their sources.¹² Edward Waters College in Jacksonville, Florida was

8. Paula Wasley, *The Plagiarism Hunter*, 52 CHRON. HIGHER EDUC., Aug. 11, 2006, at A8. A former graduate student at Ohio University examined master’s theses from a twenty-year period and discovered numerous instances of plagiarism in theses emerging from the mechanical-engineering department, prompting a plagiarism scandal at his university. *Id.*; see *infra* notes 291, 321, and 432. Two NIH scientists, Walter Stewart and Ned Feder, devised a plagiarism computer program intended to discern scientific misconduct. They utilized the program to determine that the 1978 work of noted historian Stephen B. Oates, entitled *With Malice Toward None: The Life of Abraham Lincoln*, included plagiarized material, which prompted a lengthy investigation of Oates by the American Historical Society, resulting in his ultimate vindication, and the censure of the plagiarism hunters. See Aaron Epstein, *Fraud-Busters Go Too Far at NIH*, WASH. POST, April 20, 1993, at B1; see also *infra* note 96.

9. Michael Nelson, *The Good, the Bad, and the Phony: Six Famous Historians and Their Critics*, 78 VA. Q. REV. 377, 383 (2002). Nelson describes the hunt that ensued among the media as they sought to unearth lifted passages in the works of popular historian Stephen Ambrose. *Id.*

10. Charles McGrath, *Plagiarism: Everybody Into the Pool*, N.Y. TIMES, Jan. 7, 2007, at A33. Defenders note that McEwan acknowledges indebtedness to Andrews in his book, see Eugene Volokh, *Plagiarism and ‘Atonement,’* WALL ST. J. ABSTRACTS, Dec. 12, 2006, at A18, the disputed passages are but a small section of a voluminous work, McGrath, *supra*, and that he merely borrowed facts that had been described by an earlier author. Volokh, *supra*. This climate of intense scrutiny and plagiarism allegations has prompted authors of fiction novels to add extensive bibliographies to their work, in part to substantiate their labor and expertise and in part to defuse or discourage charges of careless attribution. Julie Bosman, *Loved His Novel, And What a Bibliography*, N.Y. TIMES, Dec. 5, 2006, at E1.

11. Nelson, *supra* note 9, at 383.

12. In response, both denied the charge of plagiarism, asserting that due recognition had been afforded prior authors via footnotes, and that any failure to place copied passages in quotation marks was inadvertent. *Id.* Ambrose was charged with utilizing in his work entitled *The Wild Blue: The Men and Boys Who Flew the B-24s over Germany*, without proper attribution, lines from the *Wings of Morning: The Story of the Last American Bomber Shot Down over Germany in World War II*, authored by University of Pennsylvania Professor Thomas Childers. It is interesting to note that some students at the University of Pennsylvania, held to a strict standard of academic honesty, viewed any tolerance by Childers of Ambrose’s plagiarism as a clear case of the application of double standards to student and faculty transgressions. See Jonathan Margulies, *When Plagiarism and Dishonesty Pay Off*, DAILY PENNSYLVANIAN, Opinion, Jan. 9, 2002, available at <http://thedp.com/node/25363>; see also Dina Ackerman, *Ambrose Faces More Charges of Plagiarism*, DAILY PENNSYLVANIAN, Jan.

subject to a revocation of its accreditation when it was demonstrated that the document it submitted to the accrediting agency was in large part plagiarized from that of Alabama A&M University.¹³ Harvard University has witnessed a variety of allegations grounded in plagiarism, from challenges to faculty scholars on their failure to attribute sources¹⁴ or to indicate that they relied on another's use of secondary sources,¹⁵ to

8, 2002, available at <http://thedp.com/node/25338> (where Rutgers University Professor Donald McCabe observed that a professor would not regard a student's offer to apologize for plagiarizing as sufficient atonement for the offense). Goodwin was cited for using passages in *The Fitzgeralds and the Kennedys* that emanated from *Kathleen Kennedy: Her Life and Times*, written by Lynne McTaggart, among other works. Nelson, *supra* note 9, at 385–86. McTaggart asserted a copyright-infringement claim against Goodwin, and stated that even if Goodwin had properly attributed her passages with quotation marks and footnotes, the citations would not have defeated her copyright claim for “[i]t was the sheer volume of the appropriation—thousands of my exact or nearly exact words—that supported my copyright infringement claim.” Lynne McTaggart, *Fame Can't Excuse a Plagiarist*, N.Y. TIMES, March 16, 2002, at A15. Proper attribution would have, in fact, served to defeat a charge of plagiarism, but would be rendered irrelevant in the context of a copyright-infringement claim where substantial portions of one's work are appropriated by another without permission. See *infra* notes 241–242 and accompanying text.

13. *Edward Waters College Loses Accreditation Appeal, Files Lawsuit*, 22 BLACK ISSUES IN HIGHER EDUC., Mar. 24, 2005, at 11. Subsequent to that revocation, the college filed a lawsuit against the Southern Association of Colleges and Schools premised on the assertion that the college had been denied due process; the plagiarism charge was not disputed. See Kelly Field, *Florida College Reaches Tentative Settlement*, CHRON. HIGHER EDUC., June 17, 2005, at 21. The U.S. District Court Judge issued a temporary restraining order and ordered mediation, which resulted in the reinstating of Edward Waters College. Doug Lederman, *Edward Waters College Regains Accreditation*, INSIDE HIGHER ED, June 24, 2005, available at <http://www.insidehighered.com/news/2005/06/24/waters>.

14. Sara Rimer, *When Plagiarism's Shadow Falls on Admired Scholars*, N.Y. TIMES, Nov. 24, 2004, at B9. Both Harvard professors Charles J. Ogletree, Jr. and Laurence H. Tribe publicly acknowledged that they had unintentionally failed to attribute sources that were used in their works. *Id.* Ogletree faulted the work of his research assistants in their attempt to meet the publishing deadline for his book *All Deliberate Speed: Reflections on the First Half-Century of Brown v. Board of Education*; the book utilizes several verbatim paragraphs from the work of Jack M. Balkin, a Yale law professor, entitled *What Brown v. Board of Education Should Have Said*. *Id.* Tribe suggested that his failure to attribute some of the material in his book *God Save This Honorable Court* to Henry J. Abraham, a University of Virginia professor, was premised on his desire to write a book “accessible to a lay audience” and devoid of the typical scholarly footnotes. *Id.* Tribe did in his work laud Abraham's book, upon which he relied, as the most prominent source regarding the Supreme Court's appointments. *Id.*

15. Harvard Professor Alan M. Dershowitz was accused by a DePaul University professor, Norman G. Finkelstein, of excessive reliance on the source material of another author. Finkelstein charged that Dershowitz in his book *The Case for Israel* lifted substantial amounts of source material from the work of Joan Peters entitled *From Time Immemorial*. In essence, Finkelstein alleges that Dershowitz cites more than twenty quotes and references to primary and secondary sources that directly mirror Peters' quotes and footnotes. Dershowitz asserts that while he did utilize Peters' book,

revocation of an offer of acceptance to a high-school student whose published work in a local newspaper plagiarized sources,¹⁶ to the downfall of a Harvard sophomore whose first novel, *How Opal Mehta Got Kissed, Got Wild, and Got a Life*, was deemed to have plagiarized books by Megan McCafferty, Sophie Kinsella, and Meg Cabot.¹⁷ Journalists Jack Kelley of *USA Today* and Jayson Blair of *The New York Times* seemingly excelled in obtaining extraordinary interviews; scandalous revelations indicated that many of their published works were either fabrications or plagiarized from other authors.¹⁸ And the pervasive embrace of plagiarism allegations has included Martin Luther King, Jr. with respect to his doctoral dissertation,¹⁹ then-Senator Joseph Biden with regard to both his law-school research and political speech making,²⁰ and ironically, the writer for Katie Couric's blog,

he checked each original source to confirm the citation and that this does not constitute plagiarism. That denial appears to have resolved the issue. Lauren A.E. Schuker, *Dershowitz Accused of Plagiarism*, HARV. CRIMSON, Sept. 29, 2003, available at <http://www.thecrimson.com/article/2003/9/29/dershowitz-accused-of-plagiarism-a-depaul>.

16. Elizabeth W. Green and J. Hale Russell, *Harvard Takes Back Hornstine Admission Offer*, HARV. CRIMSON, July 11, 2003, available at <http://www.thecrimson.com/article/2003/7/11/harvard-takes-back-hornstine-admission-offer>. Blair Hornstine, a senior at Moorestown High School in New Jersey in 2003, had been accepted as a prospective member of the Class of 2007 at Harvard University. Subsequently it was revealed that several of her published articles in a local newspaper contained paragraphs lifted from both a speech by President Clinton and writings of several Supreme Court justices. Admitting to the plagiarism, Hornstine defended that she was unaware journalistic writings needed to comport with the same attribution standards as scholarly works. *Id.*; see also John Sutherland, *Clever Girl Destroyed*, THE GUARDIAN, July 21, 2003, available at <http://www.guardian.co.uk/education/2003/jul/21/highereducation.uk>.

17. Jeannie Keever, *When Words Aren't Yours—Plagiarism Goes Beyond Issue of Academic Honesty*, HOUSTON CHRON., May 7, 2006, at 10. The article describes the manner in which Harvard sophomore Kaavya Viswanathan's debut novel was pulled by her publisher Little Brown and Company amidst the plagiarism allegations. *Id.* Subsequent to this event, it was determined that the work of Harvard student Kathleen Breedon, political cartoonist for *The Harvard Crimson*, bore similarities to the work collected on a Professional Cartoonists Index. Breedon was vilified by fellow students as "Kaavyarific," among other terms of derision. Rachel Aspden, *Ivy League Redemption*, NEW STATESMAN, Nov. 13, 2006, at 19.

18. Alfred Lubrano, *Journalists Work to Stop Plagiarism, Keep Trust*, PHILA. INQUIRER, April 25, 2004, at A10; David Mehegan, *The Purloined Letters: With Writers Under Increased Scrutiny, Why Do So Many Resort to Stealing Others' Words?*, BOSTON GLOBE, June 11, 2003, at F1.

19. Chris Raymond, *Discovery of Early Plagiarism by Martin Luther King Raises Troubling Questions for Scholars and Admirers*, CHRON. HIGHER EDUC., Nov. 21, 1990, at 1. Raymond noted that while Dr. King did acknowledge the use of various sources, he apparently, according to the analysis conducted by scholars, did not afford specific attribution to passages that he utilized. *Id.*

20. Jonathan D. Salant, *Biden's Quitting Clouds '88 Race For Presidency: Democratic Candidate Vows To Try National Campaign Again*, THE POST-STANDARD, Sept. 24, 1987, at A1; Kenneth C. Petress, *Academic Dishonesty: A Plague On Our*

which purportedly is written by Couric.²¹

In the college and university context, assertions of plagiarism, and statistics demonstrating an increasing incidence of plagiarism by students, abound.²² Faculty and administrators nationwide are not immune from charges of plagiarism, and many careers have been tainted or terminated by such revelations.²³ Honor codes, academic honesty boards, and plagiarism-detection devices, created to address, define, and punish offenders, permeate the landscape in an effort to stem the perceived tide of unethical behavior.²⁴ Cries of theft, criminal wrongdoing, and moral turpitude on the part of wrongdoers are asserted by academic authorities when referencing incidents of student and faculty plagiarism.²⁵ Some in the college and

Profession, 123 EDUC. 624, 626 (2003).

21. Suzanne Goldenberg, *CBS Anchor Embarrassed by Plagiarism*, THE GUARDIAN, April 12, 2007, at 19. A commentary called Katie's Notebook, purportedly written by Katie Couric, which was posted on her blog, was, in fact, written by a producer at CBS. The producer fashioned "Couric's" statement by heavily relying on work of another unattributed author, Jeffrey Zaslow, whose commentary appeared in the *Wall Street Journal*. See Bill Carter, *After Couric Incident, CBS News To Scrutinize Its Web Content*, N.Y. TIMES, Apr. 12, 2007, at E6.

22. See Embleton & Helfer, *supra* note 4, quoting Professor Donald McCabe of the Center for Academic Dishonesty at Duke University, whose surveys of students conducted since 1990 indicate a growing percentage of students engage in forms of cheating including plagiarism. While in 1999 ten percent of students surveyed stated they had plagiarized from the Internet, that figure increased to forty-one percent by the year 2001. *Id.*

23. See, e.g., Courtney Leatherman, *At Texas A&M, Conflicting Charges of Misconduct Tear A Program Apart*, 46 CHRON. HIGHER EDUC., Nov. 5, 1999, at A18; Footnote: *The Head of Boston University's Mass Communications Department Has Resigned the Post After He Failed to Attribute a Quote He Used in a Guest Lecture to 400 Freshmen*, CHRON. HIGHER EDUC., Dec. 17, 1999, at A18; Thomas Bartlett, *Theology Professor Is Accused of Plagiarism in His Book on Ethics*, CHRON. HIGHER EDUC., Jan. 21, 2005, at A10.

24. ANN LATHROP & KATHLEEN FOSS, *STUDENT CHEATING AND PLAGIARISM IN THE INTERNET ERA, A WAKE-UP CALL 106-07* (2000) (providing examples of university academic-integrity policies); Verity J. Brown & Mark E. Howell, *The Efficacy of Policy Statements on Plagiarism: Do They Change Students' Views?*, 42 RESEARCH IN HIGHER EDUC. 103 (2001); Mary Pilon, *Anti-plagiarism Programs Look Over Students' Work, Copying Is Easier to Do—and Catch*, USA TODAY, May 23, 2006, at 10D; Scott Carlson, *Journal Publishers Turn to Software to Root Out Plagiarism by Scholars*, CHRON. HIGHER EDUC., June 10, 2005, at A27.

25. Dames defines plagiarism as "the act of stealing and passing off someone else's ideas or words as one's own without crediting the source . . ." Dames, *supra* note 5, at 26 (quoting the Merriam-Webster Online definition); McGrath notes that "[w]e talk to [students] about plagiarism in absolute terms, as if we were all agreed on what it was, and yet the literature suggests that once you're out of school, it proves to be a crime like any other, with the punishment partly depending on whom you know and on how well you pull it off." McGrath, *supra* note 10. Lipson and Reindl observe that "[i]n the academic community, there may be no higher crime or baser act than plagiarism." Abigail Lipson & Sheila M. Reindl, *The Responsible Plagiarist: Understanding Students Who Misuse Sources*, 8 ABOUT CAMPUS 7 (July 2003).

university context aggressively pursue alleged plagiarists, exulting in the detection and capture of the miscreants.²⁶ Findings of plagiarism have fomented litigation arising from the college and university context with both students and faculty asserting due-process violations challenging the findings, hearings, and corrective action taken by colleges and universities.²⁷ Clearly, some academics regard plagiarism as a capital offense potentially meriting the academic death knell for students and for faculty.

An examination of the historical underpinnings of plagiarism, and the varied definitions which are ascribed to plagiarism, indicates that it is a far more nuanced phenomenon than is frequently suggested. Contemporary language describing plagiarism in terms of a crime or against the law is routinely employed, and yet this ethical offense has never been construed as such under the law.²⁸ The many forms that encompass the current definition of plagiarism include far more than literal copying from another, ranging from self-plagiarism to imitating the architecture of another's work.²⁹ In addition to providing clarification with respect to these issues,

26. Gail Wood, *Academic Original Sin: Plagiarism, the Internet and Librarians*, 30 J. ACAD. LEADERSHIP 237, 239 (2004) (urging that discussions of plagiarism should "abandon the highly colored, emotional language that labels all plagiarists, intentional and unintentional alike, with criminal language Faculty have strong emotional responses to plagiarism. These range from a gleeful 'gotcha!' to feelings of anger, betrayal and dismay."); PATRICK ALLITT, I'M THE TEACHER, YOU'RE THE STUDENT 95 (2004) (noting that "they think the professors aren't clever enough to catch them. That's why, when you *do* catch one, it's hard not to feel at least a little gleeful pleasure. You know: 'Gotcha!'""); see also Augustus M. Kolich, *Plagiarism: The Worm of Reason*, 45 C. ENG. 141, 142 (1983) (noting that earlier in his academic career, "Like an avenging god I have tracked plagiarists with eagerness and intensity, faced them with dry indignation when I could prove their deception, and failed them with contempt.").

27. See Audrey Wolfson Latourette & Robert D. King, *Judicial Intervention in the Student-University Relationship: Due Process and Contract Theories*, 65 U. DET. L. REV. 199, 206, n.31 (1988). Cases including faculty assertions of due-process violations include *Newman v. Burgin*, 930 F.2d 955 (1st Cir. 1991) and *Yu v. Peterson*, 13 F.3d 1413 (10th Cir. 1993).

28. RICHARD A. POSNER, THE LITTLE BOOK OF PLAGIARISM 33–34 (2007). Judge Posner observes that "[f]raud is a tort—a civil wrong for which damages or other legal relief can be obtained in a lawsuit—and often a crime. Plagiarism as such is neither . . ." *Id.* Posner does note that plagiarism can serve as the basis of a lawsuit if it rises to the level of copyright infringement or breach of contract. *Id.*; see also 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, 234 (2002) (concluding that plagiarism should not be treated as a form of theft and it is not so harmful that we would wish to use the criminal law for purposes of deterrence).

29. Scott McLemee, *What Is Plagiarism?*, CHRON. HIGHER EDUC., Dec. 14, 2004, at A9 (reviewing several definitions, including that from the Oxford English Dictionary: "the wrongful appropriation or purloining, and publication as one's own, of the ideas, or the expression of the ideas . . . of another."). Self-plagiarism is defined by Alexander Lindey as altering a published work and "put[ting] it forward under a

this article seeks to address: an analysis of the term “plagiarism,” distinguishing it from crimes and copyright violations; a discussion of the incidence of plagiarism, the technologies used to combat it, and the perceived deficiencies in those technologies; a study of some of the high-profile cases addressing plagiarism from the perspective of the plagiarism hunter, the victim, and the perpetrator; an examination of the academic institutions that serve as a venue for hearings on the matter, noting disparities between repercussions for faculty and students; and an analysis of the college and university definition of plagiarism with respect to the matters of intent, carelessness, and lack of knowledge regarding attribution norms.

In the end, I suggest that armed with a thorough knowledge of the history, complexities, and repercussions of plagiarism, colleges and universities can fashion policies that both uphold the tenets of academic honesty and equitably serve their institutional population. At its heart, I contend, the ethical violation of plagiarism is premised on a knowing, dishonorable form of misappropriation of another’s words or ideas. We should, of course, oppose blatant attempts to pass off the words or ideas of others as one’s own, but we should also recognize that not all so-called plagiarism is worthy of equal condemnation. Indeed, it does not constitute a crime and may or may not represent a copyright violation; hence, the language we employ in castigating malfeasors should be tempered.³⁰ Faculty and administrators should avoid maintaining the vigilance of a “shark looking for violators,” which harms the trust between professors and their students,³¹ or employing a “bring out the hounds”³² mentality, and constructing academic honesty policies rife with criminal connotation. Instead, they should engage in the lengthy and difficult process of distinguishing on a case-by-case basis whether a potential act of plagiarism was executed intentionally or in a manner grossly indifferent to academic standards of scholarship, or conducted in a negligent fashion or without command of the fundamental standards of citation, and deem only the

new title,” wronging the first publisher, cheating the second, and swindling the readers. LINDEY, *supra* note 1, at 218. *But see* PETER CHARLES HOFFER, PAST IMPERFECT 181 (2004) (contending that “[w]e cannot plagiarize our own work.”). Conceptual plagiarism is alleged when one appropriates the concepts and ideas that emanated from the research of another. *See* Jeff Gammage, *Who Owns an Idea? Researchers at Prestigious Universities Are Choosing Up Sides in a Dispute Between a Sociologist and a Colleague*, WIS. ST. J., November 29, 2005, at A1.

30. Judge Posner writes that “copying with variations is an important form of creativity, and this should make us prudent and measured in our condemnations of plagiarism.” Posner, *supra* note 2.

31. Kolich, *supra* note 26, at 148.

32. James P. Purdy, *Calling Off the Hounds: Technology and the Visibility of Plagiarism*, 5 PEDAGOGY: CRITICAL APPROACHES TO TEACHING LITERATURE, LANGUAGE, COMPOSITION, AND CULTURE 275, 277, 290 (2005) (suggesting that the role of a teacher should not be that of a sleuth seeking the capture of a criminal).

former acts plagiaristic. If a tendered apology of mistake or inadvertence can serve to exonerate an esteemed legal scholar,³³ then surely the academy can conduct its plagiarism inquiries with respect to students and faculty with equal rigor, discernment, and compassion.

I. HISTORICAL PERSPECTIVES

Examining plagiarism from a historical perspective reveals that this present scourge of academia has not “gone on forever,”³⁴ and has, in fact, at points in history engendered laughter rather than lambasting;³⁵ that the rise in plagiarism allegations is inextricably intertwined with the advent of the printing press and its concomitant revolutionizing view of one’s authorship as one’s sole property rather than one’s knowledge to be shared with, and improved upon, by others;³⁶ that the Romantic period, which some contemporary scholars regard as representing the quintessence of the solitary genius disdaining reliance on the work of the past, exhibited significant unattributed absorption of others’ work;³⁷ and that finally, even where plagiarism was decried as wrongful, the opposition to plagiarism was not marked by the fervor and moral castigation it currently

33. Harvard Professor and constitutional scholar Laurence Tribe acknowledged, after the report of an anonymous tipster to the magazine *The Weekly Standard*, that his book *God Save This Honorable Court* borrowed from the work of another scholar, and lifted one nineteen-word passage from Henry Abraham’s book, *Justices and Presidents*. See *supra* note 14. Subsequent to this declaration, Tribe purportedly received a “mild” reprimand from his Dean. See POSNER, *supra* note 28, at 7. The offended scholar, a professor at the University of Virginia, asserted that he had known of the plagiarism for twenty years and deemed Tribe’s conduct “inexcusable”; he did, however, accept the apology tendered by Tribe. See Marcella Bombardieri, *Tribe Admits Not Crediting Author, Harvard Scholar Publicly Apologizes*, BOSTON GLOBE, Sept. 28 2004, at B1.

34. Andre Wakefield, *Letter to the Editor: The History of Plagiarism*, CHRON. HIGHER EDUC., Sept. 4, 2001, at A21 (quoting Donald L. McCabe, *Fighting Online Plagiarism*, CHRON. HIGHER EDUC., July 27, 2001, at B17 (noting that contrary to Rutgers University Professor Donald L. McCabe’s pronouncements, issued with respect to his research regarding the incidence of plagiarism—“Clearly, plagiarism has gone on forever,” a view Wakefield deems both commonly held and “pernicious”—we ignore the history of plagiarism “at our peril.”)).

35. THOMAS MALLON, *STOLEN WORDS, THE CLASSIC BOOK ON PLAGIARISM* 4 (1989) (observing that “[j]okes about out-and-out literary theft go back all the way to Aristophanes and *The Frogs*, but what we call plagiarism was more a matter for laughter than litigation.”).

36. THE CONSTRUCTION OF AUTHORSHIP, TEXTUAL APPROPRIATION IN LAW AND LITERATURE 8 (MARTHA WOODMANSEE & PETER JASZI, EDS. 1999), (quoting ELIZABETH L. EISENSTEIN, *THE PRINTING REVOLUTION IN EARLY MODERN EUROPE* 84 (1983)).

37. *Id.* at 3–4. Woodmansee and Jaszi observe that “William Wordsworth’s . . . extensive reliance on the writing of his sister Dorothy is now also beginning to come to light.” *Id.*

engenders.³⁸

In the ancient world, the prevailing view was that art was imitative and thus, mimesis or copying from, and improving upon, the work of others was recommended as the vehicle whereby “Western writers established their authority.”³⁹ The Roman poet Horace characterized the servile imitator in the image of a crow who has donned the stolen colors of another.⁴⁰ There is a general consensus among commentators that the first written use of the word plagiarism was offered by the first-century-A.D. Roman poet Martial, who utilized the term *plagiarius*⁴¹ to mock a competitor, Fidentinus.⁴² Harold Ogden White considers Martial’s protests

38. Bruce Whiteman, *High-Born Stealth and Other Readerly and Writerly Matters*, 38 EIGHTEENTH-CENTURY STUDIES 333, 333 (2005). Whiteman states in his review of *Plagiarism in Early Modern England* (2003), edited by Paulina Kewes, that “plagiarism is not, nor ever has been, uniformly scorned or reviled in any predictable way.” *Id.* According to Library Company librarian James N. Green and Peter Stallybrass, a humanities professor at the University of Pennsylvania, Benjamin Franklin, although an esteemed original writer, borrowed liberally from others and explicitly defended plagiarism, urging that “everybody does it, and secondly, the people who attack it are plagiarists themselves.” See Stephan Salisbury, *Exhibit Shines Light on Original Who Didn’t Mind Some Plagiarism*, PHILA. INQUIRER, May 16, 2006, at B1.

39. Rebecca Moore Howard, *Plagiarism, Authorships, and the Academic Death Penalty*, 57 C. ENG. 788, 789 (1995). Such copying does not constitute plagiarism where no reader is deceived as to a work’s authorship and no such deception is intended. Borrowing, among writers including Plato, Euripides, and Aristotle, was the norm, and indeed served as the exemplar of creative endeavor. LINDEY, *supra* note 1, at 15, 42, 64–66. It should be noted that the concept of mimesis in Greek aesthetics reflected a far more complex definition than mere copying. Mimesis, as originally advocated by Plato and Aristotle, referenced the manner in which the artist should seek to reproduce or reflect that which is evident in nature. For a discussion of the breadth of the term “mimesis,” see David Konstan, *The Two Faces of Mimesis*, 54 PHIL. Q. 301 (2004) (reviewing *The Aesthetics of Mimesis: Ancient Texts and Modern Problems*, by Stephen Halliwell (2002)). Further, research suggests that the original notion of mimesis as mimicking aspects of nature and the creative forces therein evolved into one that advocated imitating the original authors who had advocated copying nature; seventeenth-century English critics, for example, argued that “since Homer and Virgil give us a perfect view of ‘Nature methodized,’ let us copy them instead of Nature.” See John W. Draper, *Aristotelian ‘Mimesis’ in Eighteenth Century England*, 36 PMLA 372, 373 (1921). For a contemporary advocacy of a return to this philosophy, see Susan H. Greenberg, *Second-Hand Prose: In our mash-up world, why can’t literature do some creative borrowing?*, NEWSWEEK, March 11, 2010, at 63.

40. C.W. MacLeod, *The Poet, the Critic, and the Moralist: Horace, Epistles 1.19*, 27 CLASSICAL Q. 359, 362, 366 (1977). The crow metaphor for literary plagiarism was subsequently utilized by Robert Greene in disparagingly referring to William Shakespeare. See LINDEY, *supra* note 1.

41. Its original meaning referred to one who stole another’s slave or child. MALLON, *supra* note 35, at 6.

42. Martial ridiculed Fidentinus for endeavoring to “enslave those [servants of the imagination] who serve the mind of a master.” HAROLD OGDEN WHITE, *PLAGIARISM AND IMITATION DURING THE ENGLISH RENAISSANCE* 16 (1935); Kolich, *supra* note 26, at 142.

against the piracies of his contemporary as the “most famous in all literature,” because he framed the charge utilizing the word *plagiarius*.⁴³

During the Middle Ages, reverent adherence to the philosophy of antiquity continued. While some medieval writers sought to protect their writings from unauthorized copying,⁴⁴ in the absence of modern ideas of literary property, individualism, and originality, the contemporary notion of plagiarism did not exist.⁴⁵ The invention by Johannes Gutenberg of the printing press in 1440, deemed a “crucial precondition of modern authorship,”⁴⁶ supported a “growing artistic consciousness, albeit one not yet . . . protected by copyright laws.”⁴⁷ Despite the foregoing, the classical style remained the primary model for authorship as Renaissance authors sought to imitate classical texts.⁴⁸ The quintessence of the imitative strategy employed by the Renaissance author is represented by the work produced by the ultimate borrower, William Shakespeare; “[w]hatever he wanted, he took; . . . literary excellence depends, not on the writer’s ability to fabricate plots, but on his power to do something original *with* a plot, wherever he gets it.”⁴⁹ Judge Posner, in comparing Sir Thomas North’s translation of Plutarch’s life of Marc Antony with Shakespeare’s brilliant transformative creation of the same lines, observes, “If this is plagiarism, we need more plagiarism.”⁵⁰

43. WHITE, *supra* note 42, at 16.

44. LISA EDE & ANDREA LUNSFORD, SINGULAR TEXTS/PLURAL AUTHORS: PERSPECTIVES ON COLLABORATIVE WRITING 78 (1990). The authors recount how troubadours in medieval France created complicated rhyme schemes to deter unscrupulous copying, quoting H.J. Chaytor, *From Script to Print: An Introduction to Medieval Vernacular Literature*, 119 (1950). *Id.*

45. *Id.* at 78–79; Howard, *supra* note 39, at 790 (asserting, however, that “the history of Western letters . . . is punctuated by writers’ complaints about their plagiarists.”). Moreover, Howard urges that as the classical theory required that one improve upon the work that one copied, an element of individual authorship still existed. *Id.*

46. EDE & LUNSFORD, *supra* note 44, at 79. A confluence of factors contributed, during the Renaissance, to the developing notion of literary work as property from which one could derive a monetary benefit, and as a reflection of one’s distinctively individual writing abilities. MALLON, *supra* note 35, at 4 (there existed a “discernibly rising premium on uniqueness.”).

47. EDE & LUNSFORD, *supra* note 44 at 79.

48. *Id.* White highlights, nonetheless, how Ludovico Castelvetro in 1570 denounced Seneca, Virgil, Boccaccio, and Petrarch, among other followers of the classical theory of imitation, as “thieves.” WHITE, *supra* note 42, at 26.

49. WHITE, *supra* note 42, at 106.

50. POSNER, *supra* note 28, at 53. Posner also notes that Shakespeare, who utilized borrowed ideas, plot lines, and “verbatim copies” of thousands of lines in his plays, would be deemed a plagiarist by modern standards. *Id.* at 53. It should be noted that this period evidenced the second recorded use of the term “plagiary” and the first in English, when voiced by Ben Jonson, in the satiric play “Poetaster.” Jonson wrote, “‘Why? The ditti’s all borrowed; ‘tis Horaces: hang him plagiary.’” MALLON, *supra* note 35, at 6 (quoting Jonson, “Poetaster,” IV, iii). Lindey ironically observes that this

The period that is inextricably intertwined with the modern view of the author as the solitary genius is the Romantic period, encompassing a period commencing in the latter part of the eighteenth century and concluding in the late nineteenth to early twentieth centuries. It is this era in which “‘authorship’ and ‘originality’ emerged as significant cultural values” and in which “the norm of attribution and the taboo of plagiarism came to the fore.”⁵¹ The British enactment of copyright law, as evidenced in the 1710 Statute of Anne,⁵² extended protection and rights of reproduction to the author, thus fortifying the notion of literary production being construed as property from which the creator could profit.⁵³ As authorship defined by Romantic literary theory merged with personal virtue, the divine gifts of the original genius were extolled; the slavish adherence to revising the classics was denigrated, and plagiarism commenced to be viewed as a moral offense.⁵⁴

Yet an examination of the authorial vision of the Romantics against their actual writing strategies presents a far more ambiguous portrait.

self-made classical scholar’s “*Timber*, which contains his memorable tribute to Shakespeare . . . comprises more plagiarized material than any other book of its size by an author of rank” LINDEY, *supra* note 1, at 78. One could argue that Jonson expected his readers to recognize his sources, thus mitigating any such charge of plagiarism.

51. Green, *supra* note 28, at 176. External factors that helped to engender this revolutionary redefining of the notion of authorship, with its concomitant demand for attribution, included the application of the philosophy of Renaissance philosopher Rene Descartes. EDE & LUNSFORD, *supra* note 44, at 79 (“[I]t was [Descartes] who placed the individual human being at the very center of the universe”). This served as a precursor to the notion of the solitary genius writer of the subsequent Romantic period, changes in production of written works, and modifications in copyright law.

52. Copyright Act, 1709, 8 Anne c. 19 (1709), available at http://press-pubs.uchicago.edu/founders/documents/a1_8_8s2.html. It vested authors with copyright protection for the period of twenty-one years for existing works, and for fourteen years for all works published subsequent to its enactment. *Id.* Ede and Lunsford recounted that the proposed adoption of Queen Anne’s Act of 1710 was a divisive issue as society, which had formerly viewed the writer as merely one of many craftsmen responsible for the creation of a book, and which had deemed the ideas expressed therein as communal property, had to acknowledge a writer’s unique and privileged relationship to the creation of a text. EDE & LUNSFORD, *supra* note 44, at 81–82.

53. WOODMANSEE & JASZI, *supra* note 36, at 6–7. Rebecca Moore Howard observes that in England, rights for printing were historically extended via royal patents to printers (commencing with the first royal patent issued in 1518) and not authors, in order that the state be able to determine legal responsibility should a text be deemed seditious. See REBECCA MOORE HOWARD, *STANDING IN THE SHADOW OF GIANTS: PLAGIARISTS, AUTHORS, COLLABORATORS* 78 (1999) (quoting Mark Rose, *Authors and Owners* (1993)).

54. HOWARD, *supra* note 53, at 86–87. Howard notes that the nineteenth-century essayist and poet, Ralph Waldo Emerson, asserted that the gifts of the writer are derived through personal virtue that is attuned with nature; Howard concludes that by “[a]ssociating personal virtue with true authorship . . . [one] makes it possible to assert an absence of virtue for authorship’s opposite, plagiarism.” *Id.* at 87.

Perhaps most illustrative of the seeming dichotomy that existed in this era between the purported idealization of the figure of the original author and the writing practices engaged in by such authors is the assault leveled by Edgar Allan Poe against Henry Wadsworth Longfellow. Lindey terms this “Little Longfellow War” as the pivotal event that brought the issue of plagiarism to the fore in the American context.⁵⁵ Poe in 1845 launched a series of vituperative attacks against the popular Longfellow⁵⁶ for engaging in plagiarism of Tennyson⁵⁷ “too palpable to be mistaken, and which belongs to the most barbarous class of literary robbery.”⁵⁸ Ironically, Silverman sets forth examples of Poe’s “flagrant plagiarism” where he borrowed from the poems of others,⁵⁹ engaged in “wholesale pilfering of long stretches of material from other books,”⁶⁰ and practiced self-plagiarism.⁶¹

And yet it is the Romantic period that serves as the polestar for the contemporary cultural definition of authorship as one that essentially reveres the originality of the “true” solitary author and emphasizes, in a corollary fashion, the need for the derivative author to acknowledge one’s sources in order to avoid the scourge of plagiarism. Recent research, however, by Tilar J. Mazzeo, in *Plagiarism and Literary Property in the Romantic Period*, suggests that writers of that period, while praising the value of originality, freely borrowed and appropriated text and did not view strategies of assimilation as anathema, or as mutually exclusive with that of originality.⁶² Mazzeo’s study indicates that the Romantics neither defined

55. LINDEY, *supra* note 1, at 93. It is believed that Poe utilized the pseudonym Outis, a Greek word for “nobody,” to engage in a lengthy exchange in the *Broadway Journal*, wherein Outis defended Longfellow, and Poe leveled his charges against the bard and ridiculed the defenses proffered by Outis. MALLON, *supra* note 35, at 119–20. See also Silverman, *supra* note 3, at 250–52.

56. Lindey describes the attacks thusly: “No writer of consequence in this country was ever more savagely set upon or more persistently pounded for his borrowings than was Longfellow by Poe.” LINDEY, *supra* note 1, at 93.

57. SILVERMAN, *supra* note 3, at 145. Yet Silverman observes that the poems in question, Longfellow’s *Midnight Mass for the Dying Year*, and Tennyson’s *The Death of the Old Year*, bear only a slight resemblance to one another. *Id.*

58. *Id.* The biographer contends that Poe’s savage attacks against the extremely successful Longfellow were fueled in part by envy, and not prompted by moral or philosophical urgencies. *Id.* at 146 (internal quotation marks omitted).

59. *Id.* at 71. Silverman writes that a poem in an 1827 volume of Poe’s begins “I saw thee on the bridal day-/When a burning blush came o’er thee,” which lines come from a poem published in 1826 by John Lofland that commences, “I saw her on the bridal day/In blushing beauty blest.” *Id.* at 71.

60. *Id.* at 256. Silverman cites, as an example, Poe’s description of a mummy’s grave windings as a near replication of that description found in the *Encyclopedia Americana*. *Id.*

61. *Id.* at 147, 256. Silverman states Poe would frequently shift paragraphs from one of his reviews to another. *Id.*

62. TILAR J. MAZZEO, *PLAGIARISM AND LITERARY PROPERTY IN THE ROMANTIC*

plagiarism in ways that conform to modern definitions nor primarily associated such acts with moral depravity.⁶³ While valuing originality, they deemed improvement upon the original as justification for borrowing.⁶⁴ In contrast, Mazzeo notes that today, “questions of improvement” are no longer operative; the focus now lies on the appropriation of specific language.⁶⁵

Mazzeo’s conclusions in questioning assumptions regarding Romanticism are striking: the glamour of the Romantic ideology of the solitary, original genius does not, in fact, comport with the historical reality of the authors of that era, which reflects a pattern of collaboration and competitive textual interpenetration.⁶⁶ The term Romanticism, urges Mazzeo, is an “aesthetic fantasy,” a set of cultural and ideological formations that came into prominence after that period but have been ascribed to that period.⁶⁷ Most significantly for purposes of this article is Mazzeo’s contention that contemporary professors “hold our undergraduates to higher standards of *ex nihilo* originality than those to

PERIOD 10 (2007). See also Michael Wiley, *Romantic Amplification: The Way of Plagiarism*, 75 ENG. LITERARY HIST. 219 (Spring 2008) (opining that romantic writers, while championing originality and genius, actively appropriated material from one another). In Wiley’s view, such appropriation, which “has long been one of the embarrassments of romanticism,” “provoke[d] poets to new stages of poetic development.” *Id.* at 219, 221.

63. MAZZEO, *supra* note 62, at 7. Two types of plagiarism prompted criticism by the Romantics: culpable plagiarism, which was defined as “borrowings that were simultaneously unacknowledged, unimproved, unfamiliar, and conscious,” and poetical plagiarism wherein “borrowings were simply unacknowledged and unimproved.” *Id.* at 2 (emphasis omitted). The latter form of plagiarism held no moral connotations; such authors were deemed guilty of poor writing by failing to achieve aesthetic objectives that included “questions of voice, persona, and narrative or lyric mastery.” *Id.*

64. *Id.* at 5–6. Mazzeo observes that “writers who did not acknowledge their borrowings, even implicitly (implicit avowal was a means of acknowledgement), were not considered plagiarists, no matter how extensive the correspondences, if they had improved upon their borrowed materials. Where improvement existed, acknowledgement was irrelevant because improvement was understood as a *de facto* transformation of the borrowed materials.” *Id.* at 2.

65. *Id.* at 5. The author cites Stuart Green’s work in “Plagiarism, Norms, and the Limits of Theft Law,” *supra* note 28, at 200 and 205, for the propositions that plagiarism can be defined as the failure to acknowledge the “source of facts, ideas, or specific language” and that pursuant to the Berne Convention for the Protection of Literary and Artistic Rights, the European doctrine of moral rights includes a right to attribution. Such an emphasis on the appropriation of specific language differs markedly from the Romantic definition of plagiarism which focused more on the appropriation of style or “spirit”, which regarded transformative improvements to the borrowed materials as constituting new and “original” property, notwithstanding the existence of verbatim parallels, and which did not construe plagiarism primarily in a moral context. MAZZEO, *supra* note 62, at 6–7, 184.

66. MAZZEO, *supra* note 62, at 187.

67. *Id.*

which the Romantics ever held each other,"⁶⁸ and do so under the erroneously perceived mandates of the legacy of the Romantic solitary genius.

II. CONTEMPORARY DEFINITION OF PLAGIARISM

A review of the literature suggests that no universal understanding exists with respect to plagiarism; rather, it is a term that encompasses a variety of permutations that extend beyond the mere appropriation of another's specific language.⁶⁹ Indeed, the definitions set forth in *Black's Law Dictionary*—"The deliberate and knowing presentation of another person's original ideas or creative expression as one's own"⁷⁰—and in case law—"it is not necessary to exactly duplicate another's literary work in order to be liable for plagiarism, it being sufficient if an unfair use of such work is made by the lifting of a substantial portion of it"⁷¹—do not fully reflect the multifaceted aspects of plagiarism as evidenced in college and university plagiarism policies, guidelines of professional organizations, opinions of media commentators, and analyses by scholars.⁷²

68. *Id.*

69. PERSPECTIVES ON PLAGIARISM AND INTELLECTUAL PROPERTY IN A POSTMODERN WORLD xvii (Lise Buranen & Alice M. Roy, eds., 1999). The editors note that the definition of plagiarism is not as "monolithic and uncomplicated" as it is presented in college and university publications. *Id.*; see also Zorana Ercegovac & John V. Richardson Jr., *Academic Dishonesty, Plagiarism Included, in the Digital Age: A Literature Review*, 65 C. & RES. LIBR. 301, 304–05 (July 2004) (illustrating that scholars in the field have proffered a variety of definitions of plagiarism).

70. BLACK'S LAW DICTIONARY 1187 (8th ed. 2004). *Black's* references Christopher Ricks, *Plagiarism*, 97 PROC. OF THE BRIT. ACAD. 149, 151 (1998), who stated, "It may be perfectly clear what constitutes plagiarism ('using the work of another *with an intent to deceive*') without its being clear that what faces us is truly a case of this."

71. *O'Rourke v. RKO Radio Pictures, Inc.*, 44 F. Supp. 480, 482–83 (D. Mass. 1942). This case typifies the manner in which the terms of "copyright" and "plagiarism" are sometimes used interchangeably. In this particular case, the plaintiff writer sought damages pursuant to a copyright-infringement claim rather than grounding his claim in allegations of plagiarism. *Id.* at 480. While it is true that the conduct engendering accusations of copyright infringement and the ethical violation of plagiarism may, in fact, overlap, they are distinctly different entities, with the law of copyright protection, as embodied in Article I, Section 8, Clause 8 of the Constitution and the Copyright Act of 1976, 17 U.S.C. § 102, encompassing protection of the tangible expression of ideas in an effort to protect the market of the author, and to encourage further original work, through the vehicle of copyright infringement litigation; whereas plagiarism is an ethical violation which seeks to properly credit authors' ideas and expressions, and which is typically addressed in the university or professional organization context, and does not serve as a legal cause of action. See *infra* Part VI. See also Audrey Wolfson Latourette, *Copyright Implications for Online Distance Education*, 32 J.C. & U.L. 613 (2006).

72. See, e.g., WILFRIED DECOO, CRISIS ON CAMPUS 71–98 (2002). He sets forth an exhaustive array of mechanisms by which one may engage in plagiarism, including: linguistic manipulation of source materials; extended use without attribution; use of

Plagiarism as defined in some college and university or professional contexts is an intentional omission of one's sources;⁷³ in other colleges and universities or associations, the act of appropriating another's ideas or expression, regardless of intent, prompts condemnation as plagiarism.⁷⁴ Moreover, faculty, students, and authors have on occasion been deemed culpable of self-plagiarism, although Lindey observes that such self-plagiarism lacks the requisite of false assumption of ownership.⁷⁵ Some

tables and figures; and copying from oneself. *Id.*

73. JUDY ANDERSON, *PLAGIARISM, COPYRIGHT VIOLATION AND OTHER THEFTS OF INTELLECTUAL PROPERTY* 27 (1998) (noting the disparities in the definitions of scientific misconduct as set forth in the policies of the Office of Research Integrity (ORI) and the National Science Foundation (NSF)). While both agencies define plagiarism to include the "theft of words, ideas, findings or methods without giving the original source," the agencies differ with respect to the issue of a finding of intent. *Id.* The ORI deems a finding of intent to deceive a requisite to a determination of plagiarism and hence, research misconduct, which includes plagiarism, does not include "honest error or differences of opinion." See Office of Research Integrity, *Finding Research Misconduct, Questions and Answers: 42 CFR Part 93*, available at <http://ori.dhhs.gov/documents/QandA.reg.6-06.pdf> (last visited Sept. 27, 2010). The NSF, in contrast, does not regard intent to deceive as an element of plagiarism. ANDERSON, *supra*, at 27.

74. Kevin J. Worthen, Associate Dean for Academic Affairs at Brigham Young University Law School, in Note and Comment, "states that intent to deceive does not constitute a factor with respect to making a determination as to plagiarism. Kevin J. Worthen, *Discipline: An Academic Dean's Perspective on Dealing with Plagiarism*, 2004 BYU EDUC. & L.J. 441 (2004). In contrast, New York University School of Law states in its "Policies and Procedures" that student misconduct, including "[c]heating, plagiarism, forgery of academic documents, or multiple submissions of substantially the same work for duplicate credits" must be accompanied by an intent to defraud. See NYU School of Law, *School of Law Policies and Procedures*, available at http://www.law.nyu.edu/ecm_dlv2/groups/Public/@nyu_law_website_students_students_affairs/documents/Documents/ECM_DLX_010208.pdf (last visited Sept. 27, 2010). Specifically, "Plagiarism occurs when one, either intentionally or through gross negligence, passes off someone else's words as one's own, or presents an idea or product copied or paraphrased from an existing source without giving credit to that source." *Id.*

75. LINDEY, *supra* note 1, at 218. However, putting forth a prior work or part of a prior work under a new title, Lindey contends, "wrong[s] [one's] first publisher, cheats the second, and swindles [one's] readers." *Id.* Self-plagiarism occurs when an author reuses prior writings, presents them in an allegedly new format, and deceives the reader into believing that the publication is, in fact, new. Ronald Standler delineates two forms of self plagiarism: "(1) for students self-plagiarization is taking a term paper or essay that was written for one class and submitting substantial parts of that work for credit in a second class, without informing the instructor; and (2) for professionals self-plagiarization is using part of one publication in a subsequent publication, without the indicia of a quotation or citation to a paraphrase of an earlier publication." RONALD B. STANDLER, *PLAGIARISM IN COLLEGES IN USA, SELF-PLAGIARIZATION*, available at <http://www.rbs2.com/plag.htm> (last visited Oct. 10, 2010). *But see*, NYU School of Law, *Pledge of Academic Honesty*, Part II. A. 4., available at http://www.law.nyu.edu/ecm_dlv3/groups/public/@nyu_law_website_llm_jsd/documents/documents/ecm_pro_062457.pdf ("Although not within the definition of plagiarism, it is also forbidden, without permission of the instructor, to submit the same

commentators and professional organizations state that “plagiarism is a species of intellectual fraud,”⁷⁶ while others contend that the repetition of even commonplace words, use of another’s apt term, paraphrasing, or incorporating another’s line of thinking are correctly deemed acts of plagiarism.⁷⁷ Laurie Stearns describes plagiarism as imitative of another’s structure, research, and organization.⁷⁸ Allegations of architectural or conceptual plagiarism, wherein one adopts the analytic or creative scheme of another, have been raised, for example, by authors Michael Baigent and Richard Leigh against author Dan Brown with respect to his use in *The DaVinci Code* of their ideas regarding the relationship of Jesus and Mary Magdalene and their resulting bloodline, ideas that were first articulated in their 1982 work entitled *Holy Blood, Holy Grail*.⁷⁹ In the sciences,

work or a portion of the same work for academic credit in more than one setting, whether the work was previously submitted at the school or elsewhere.”) (last visited Sept. 27, 2010).

76. POSNER, *supra* note 28, at 106.

77. MODERN LANGUAGE ASSOCIATION, *MLA HANDBOOK FOR WRITERS OF RESEARCH PAPERS as reprinted in McLemee, supra* note 29, at 9 (discussing the “sweeping catalog of varieties of plagiarism” in the Modern Language Association’s plagiarism policy set forth in the *MLA Handbook for Writers of Research Papers*).

78. Laurie Stearns, *Copy Wrong: Plagiarism, Process, Property and the Law*, 80 CALIF. L. REV. 513, 525 (1992). Thus, one can even plagiarize facts or quotations by “citing to a quotation from a primary source rather than to the secondary source in which the plagiarist found it in order to conceal [the plagiarist’s] reliance on the secondary source.” *Id.* at 525–26. See Schuker, *supra* note 15.

79. See *infra*, notes 227–30 and accompanying text; see also Jeff Gammage, *An Academic Shoot-out on the Ethical Frontier*, PHILA. INQUIRER, Nov. 13, 2005, at A1 (describing the charges of conceptual plagiarism, wherein one appropriates the concepts and ideas of another, leveled against a University of Pennsylvania sociology scholar by her colleague, Professor Elijah Anderson). Professor Anderson asserted that fellow Penn Professor Kathryn Edin and her coauthor, Maria Kefalas, a St. Joseph’s University professor, had inadequately credited his groundbreaking work, *Code of the Street: Decency, Violence, and the Moral Life of the Inner City*, in their book, *Promises I Can Keep: Why Poor Women Choose Motherhood Before Marriage*. *Id.* While *Promises* cited Anderson’s work in its Bibliography and in three footnotes, Anderson claimed that it employed his analytic scheme, concepts, and ideas and did not afford sufficient credit to its author. Elijah Anderson, *Professor Anderson Responds*, ALMANAC, Oct. 11, 2005, at 2, available at http://www.upenn.edu/almanac/volumes/v52/n07/pdf_n07/101105.pdf. See also Mara Gordon, *Prof Declares Himself Victim of Plagiarism*, DAILY PENNSYLVANIAN, Oct. 11, 2005, available at <http://thedp.com/node/46814>. Initially the matter was resolved via confidential internal mediation within the Sociology Department at Penn, a mechanism employed throughout academia. Mara Gordon, *Department Chair Defends Accused Prof*, DAILY PENNSYLVANIAN, Oct. 6, 2005, available at <http://thedp.com/node/46739>. Subsequently, a Penn professor emeritus forwarded a memo to the Penn Sociology Department, which was allegedly leaked to *The Daily Pennsylvanian*, the student newspaper, asserting that the coauthors had engaged in conceptual plagiarism. *Id.* Scholars representing a variety of prestigious colleges and universities, such as Princeton and Harvard Universities, stated in a letter to *The Daily Pennsylvanian* that “[t]he idea that [Edin and Kefalas’] new book, . . . is ‘conceptual plagiarism’ of Elijah Anderson’s work is absurd” Sara McLanahan, *Letter to the Editor: Not*

plagiarism frequently refers to the “content of discovery or the interpretation of data,”⁸⁰ rather than the duplication of specific phraseology. Plagiarism, according to some commentators, includes the type of managed book⁸¹ wherein graduate students essentially construct the work that will ultimately bear the name of the faculty member who serves as editor or overseer of the process.⁸² The plagiarism-definition landscape is further obfuscated by the colloquial practice of imprecisely garbing the term “plagiarism” in the mantle of criminal theft connotation.⁸³

A. Plagiarism Regarded as a Potential Criminal Offense

While the commentary regarding plagiarism often links it to criminality,⁸⁴ it does not satisfy the basic requisites of criminality,

Plagiarism, DAILY PENNSYLVANIAN, Oct. 6, 2005, available at <http://thedp.com/node/46749>. Anderson responded by setting forth twenty-two instances where similarities in idea and language were evident in the two works in the *Penn Almanac*. Elijah Anerson, *Professor Anderson Responds*, ALMANAC, Oct. 11, 2005, at 2, available at http://www.upenn.edu/almanac/volumes/v52/n07/pdf_n07/101105.pdf.

80. Stearns, *supra* note 78, at 525.

81. *E.g., id.*; Richard Posner, *Plagiarism—Posner Post*, THE BECKER-POSNER BLOG, (Apr. 24, 2005, 7:51 PM), <http://www.becker-posner-blog.com/archives/2005/04/plagiarismposne.html> (likening the role of the nominal author of a managed book to that of a movie director who “presides over the composition of the work rather than being the composer”). Posner asserts that the primary issue with respect to the managed book is whether such an endeavor satisfies the requisites of fraud: does the failure to disclose that other persons constructed most of the writing mislead readers to their detriment? *Id.* Posner advocates scholars in such contexts acknowledge “the coauthorship or first-draft responsibility of their students, in order to avoid a charge of plagiarism.” *Id.*

82. Joseph Bottum, *Another Harvard Copycat*, THE WKLY. STANDARD, Sept. 20, 2004 (opposing “psuedo-production” of books and terming the reproduction of Balkin’s words as “double plagiarism”). Harvard professor Charles Ogletree’s 2004 work, *All Deliberate Speed: Reflections on the First Half-Century of Brown v. Board of Education*, it emerged via an anonymous tipster, contained three pages of Yale professor Jack M. Balkin’s work entitled *What Brown v. Board of Education Should Have Said*. *Id.* Ogletree purportedly attributed his inadvertent failure to properly oversee the graduate assistants to a pressing deadline and not to deliberate intent, a defense that would be deemed unacceptable for similar conduct on the part of students. *Id.*

83. *E.g., Green, supra* note 28, at 169–70 (noting that plagiarists are repeatedly referred to as thieves and criminals culpable of stealing, robbery, piracy, or larceny). Green queries whether the idea of plagiarism as a theft crime is “anything more than a recurring metaphor,” since it does not satisfy the legal definition of theft nor is it prosecuted as such. *Id.* at 170. *See also* N.Y. Univ. Sch. of Law, *School of Law Policies and Procedures*, at 6 (1970), available at <http://www.law.nyu.edu/students/studentaffairs/publicationsandresources/studenthandbook/nyu0073chooloflawpoliciesprocedures/index.htm> (follow “ECM_DLV_010208.pdf” hyperlink) (defining plagiarism as “an academic crime and a serious breach of Law School rules.”).

84. HOWARD, *supra* note 53, at 107 (recounting the “judiciomoral vocabulary”

notwithstanding declarations to the contrary. Marilyn Randall terms plagiarism a crime against authors and copyright infringement a crime against owners.⁸⁵ Abigail Lipson and Sheila M. Reindl label intentional plagiarism as “criminal plagiarism.”⁸⁶ Thomas Mallon decries the kidnapping writer who imprisons the words of the original author, viewing him as an “audacious predator.”⁸⁷ Yet Lindey notes that while plagiarism is described as literary theft, literary larceny, and literary piracy, this has “no precise legal signification.”⁸⁸ Indeed, plagiarism, although often described as violative of the law, is not a legal term that would constitute a cause of action in a court of law;⁸⁹ it is instead an ethical or moral offense whose proper hearing venue is that of the college or university or professional association.⁹⁰ Judge Posner contends that although plagiarism is neither theft nor always synonymous with copyright infringement, it is confused with both, which has raised the level of contempt with which this

that commentators employ with respect to plagiarism, citing among others, “crime and honor” (Frank J. McCormick in the *Journal of Teaching Writing*, 1989); and “crime, theft, and the plagiarist as ‘less of a person’ ” (Edith Skom in the *AAHE Bulletin* 1986)). Such commentary may be traced in part to Martial’s metaphorical use of the term “plagiaries” as kidnapper, *see supra* notes 41-43, or the sense of violation experienced by victims of the plagiarist. *See, e.g.*, William W. Savage, Jr., *My Favourite Plagiarist: Some Reflections of an Offended Party*, 34 *J. SCHOLARLY PUBLISHING* 214–21 (2003).

85. MARILYN RANDALL, *PRAGMATIC PLAGIARISM: AUTHORSHIP, PROFIT, AND POWER* 268 (2001). Victims of plagiarism often couch their reactions to the misappropriation in the context of criminal offenses. *See, e.g.*, Tanuja Desai Hidier, *How It Felt to be Plagiarized By Another Desi Novelist*, 31 *INDIA – WEST JUNE* 23, 2006, at A5 (“The feeling was almost as if someone had broken into your home . . .”); *A Funny Thing Happened on the Way to the Web: A Cautionary Tale of Plagiarism*, 93 *L. LIBR. J.* 525, 525 (2001) (“When confronted with this blatant theft of my work, however, I was shocked and genuinely hurt.”).

86. Lipson & Reindl, *supra* note 25, at 8.

87. MALLON, *supra* note 35, at xii-xiv. Mallon contends that plagiarism, a “fraternal crime,” where writers steal from their peers, merits the strongest form of deterring punishment, which is publication that will expose the wrongdoer. While indicating such penalties may appear “Draconian,” Mallon cites them as merited by the severity of the crime. *Id.*; *see also* David Edelstein, *Where Have I Read That Before? The Scourge of Plagiarism is Plaguing All Writers. Thanks to Kaavya, Everyone’s a Suspect*, *N.Y. MAGAZINE*, May 16, 2006, available at <http://nymag.com/arts/books/features/16932>.

88. LINDEY, *supra* note 1, at 3.

89. *See* Stearns, *supra* note 78, at 514 (noting that although people think plagiarism is “against the law,” it is not a legal offense and it may not rise to the level sufficient to constitute copyright infringement).

90. *See* McLemee, *supra* note 29 (“Even when an offender is caught red-handed, plagiarism itself is not a matter for the courts. Strictly speaking, plagiarism, as such, is not illegal—although copyright infringement is.”). *See also* Gammage, *supra* note 79 (“Plagiarism is an ethical concept, not a legal term. The police don’t arrest people for plagiarism Punishment is meted out in the form of damaged reputations and lost jobs.”).

ethical offense is viewed.⁹¹ Stuart P. Green concludes that this ethical offense has never been prosecuted as a crime of theft, nor should it be regarded as such.⁹² Likening the characterization of plagiarism as larceny to metaphorical language such as “a lawyer’s fees constituted ‘highway robbery,’”⁹³ Green argues that if plagiarism is to be treated as a form of theft, then the intent requisite to the commission of a theft crime should be a mandated element of the definition of plagiarism.⁹⁴ And yet there exists no uniformity with respect to this aspect of the definition of plagiarism, with some university codes mandating a finding of intentional plagiarism, with others prohibiting plagiarism prompted by unintentional or inadvertent conduct, and others failing to indicate what, if any, mental element is requisite to the commission of the act.⁹⁵ Inasmuch as so many legal terms

91. Richard A. Posner, *The Abuses—and Uses—of Plagiarism*, THE RECORD, May 27, 2003, at L07. Further, plagiarism is not an act which unequivocally merits condemnation, for depending upon the “conventions, and hence expectations” of a particular discipline or field, the act of employing another’s words may be regarded as acceptable conduct and not fraught with the fraud which engenders societal disapproval. Posner, *supra* note 81.

92. Green, *supra* note 28, at 241.

93. *Id.* at 170.

94. *Id.* at 181–86. Green states:

I would argue that, just as morality informs law, so too should law inform morality. If theft requires intent, and plagiarism derives much of its meaning from theft law, it seems to follow that plagiarism should also require intent. At the same time, I would modify this requirement to say that the element of intent can be satisfied by “deliberate indifference” to the obligation to attribute. That is, if the reason a person was unaware that he was copying or failing to attribute is that he was deliberately indifferent to the requirements of attribution, he should be viewed as having committed plagiarism.

Id. at 182.

Applying these standards to the cases of alleged plagiarism attributable to the works of Doris Kearns Goodwin and the late Stephen Ambrose, Green suggests that the approach employed by Ambrose and his children, who served as collaborators, may have reflected a rather determined desire to avoid awareness of possible plagiarism. *Id.* at 182–83. With respect to Goodwin, Green wonders “how a writer could have included as many as fifty improperly attributed passages in a single book without being deliberately indifferent to the rules of attribution.” *Id.* at 184. *See also supra* note 12. Green dismisses the possibility of treating plagiarism as a theft crime, concluding plagiarism poses a threat to the “narrow world of the intelligentsia” and advocates the continued self-policing by academic institutions. *Id.* at 234–35.

95. Green, *supra* note 28, at 181–82. Examples of the spectrum of definitions related to the issue of intent (or the lack thereof) that Green cites include, the University of Maryland Code of Academic Integrity, which defines plagiarism as “intentionally or knowingly representing the words or ideas of another as one’s own in any academic exercise” Univ. of Md., *Code of Academic Integrity*, at 1 (amended May 5, 2005), available at <http://www.president.umd.edu/policies/docs/III-100A.pdf>, and Louisiana State University, *Understanding and Avoiding Plagiarism*, which addresses the question of intent as the “unacknowledged inclusion of someone else’s words, structure, ideas, or data,” La. State Univ., *LSU Code of Student Conduct*, at 19, available at <http://mba.lsu.edu/pdf/CodeofConduct.pdf> (last visited Oct. 11, 2010).

are deemed words of art, it is incongruous that criminal terminology—such as theft and robbery—would be so broadly applied to the ethical violation of plagiarism, a term that bears no uniformly accepted definition.⁹⁶

Plagiarism is solely an ethical offense that deprives an author of proper recognition for his or her creations and ideas; one's words can be liberally employed by others as long as the requirements of attribution are satisfied—unless, of course, the amount used rises to the level requisite to a copyright infringement claim.⁹⁷ Intentional plagiarism is a serious academic offense on its own merits; it need not be falsely garbed in the cloak of criminality, nor should its perpetrators, particularly students with varying acquaintanceship with the methodology of attribution, be scorned as “criminals.” And certainly, acts of unauthorized copying of another's words or ideas without attribution when prompted by lack of knowledge or carelessness (albeit not the type of gross carelessness suggestive of

96. See, e.g., Philip J. Hilts, *When Does Duplication of Words Become Theft?*, N.Y. TIMES, March 29, 1993, at A10 (describing the difficulties confronted by the American Historical Society (AHA), in applying the definition of plagiarism to the charges against historian Stephen B. Oates as allegedly found in his 1978 work *With Malice Toward None: The Life of Abraham Lincoln*). Purportedly, Oates employed words and “felicitous phrases” totaling one hundred seventy five words that originated in the Benjamin P. Thomas' 1952 work entitled *Abraham Lincoln: A Biography*. An example, as quoted in *The New York Times*, included the following from Thomas: “Herndon was something of a dandy in his younger years, affecting a tall silk hat, kid gloves and patent-leather shoes . . . Dark-skinned, with raven hair, he had sharp black eyes set deep in crater-like circles.” *Id.* From Oates: “Herndon stepped about in fancy clothes, a big silk hat, kid gloves, and patent leather shoes. He was thin, stood about five feet nine, and had raven hair and black eyes.” *Id.* Oates deemed the charges “specious” as no whole paragraphs or sentences had been lifted from his predecessor's work. *Id.* After an exhaustive review, with scholars lining up in opposition to and in support of Oates, the AHA concluded Oates did not give sufficient attribution to Thomas, but declined to term it plagiarism. *Id.* See also Richard Wightman Fox, *A Heartbreaking Problem of Staggering Proportions*, 90 J. AM. HIST. 1341, 1345 (2004) (wherein Fox asserts, with respect to the Oates affair, that plagiarism is contextual, and that if one quotes from a common body of knowledge of which the reader is assumed to know the provenance of the phrases, there exists no need for footnoting as one is not then stealing or borrowing). Fox advocates “restricting plagiarism to cases in which one author does not credit another author at all.” *Id.*

97. See Barbara Rockenbach, *Plagiarism, Copyright Violation and Other Thefts of Intellectual Property: An Annotated Bibliography with a Lengthy Introduction*, 31 J. SCHOLARLY PUB. 102, 104 (2000) (book review) (citing John Henry Merryman and Albert E. Eisen, *Law, Ethics, and the Visual Arts*, 399 (1987)) (stating that in contrast to France and Germany, which recognize a moral right on the part of authors, artists, and other creators to control the use of their work, the United States affords no protection to the author aside from what can be garnered via copyright statutes). Cf. Carolyn Davenport, *Judicial Creation of the Prima Facie Tort of Plagiarism in Furtherance of American Protection of Moral Rights*, 29 CASE W. RES. L. REV. 735, 736–37, 765–67 (1979) (suggesting that potentially a judicially recognized prima facie tort of plagiarism could afford the author or creator, separate and apart from any rights derived from copyright or other intellectual property law, a right of recognition for one's work product, akin to what is provided by the European doctrine of moral right).

indifference to the norm of attribution) should not be deemed “criminal behavior” by either the college or university or a professional association.

B. Plagiarism and the Matter of Intent

As observed by Stuart P. Green, “there is a good deal of confusion over whether copying or failure to attribute must be ‘intentional’ or ‘knowing,’ or whether plagiarism is committed even when such acts are inadvertent.”⁹⁸ Authorities in the field have reached disparate conclusions. Alexander Lindey, author of the cornerstone work *Plagiarism and Originality*, asserts that while copyright law merely queries whether the alleged wrongdoer has copied an essential or substantial portion of copyrighted material, ethics “is primarily concerned with intent It condemns him only if he steals knowingly and willfully.”⁹⁹ Laurie Stearns asserts that “[p]lagiarism means intentionally taking the literary property of another without attribution and passing it off as one’s own”¹⁰⁰ Henry L. Wilson, in urging that intent is crucial to a finding of plagiarism, observes that the *Oxford Dictionary* defines plagiarism as knowingly presenting the work as one’s own.¹⁰¹ Finally, Green, in urging that plagiarism should require intent, states that “there is a legitimate distinction to be made between mere influence, unconscious imitation, and inadvertent failure to attribute (on the one hand), and extensive copying that is intended to convey the impression that the copier is the original author (on the other).”¹⁰²

In marked contrast is the stance adopted by advocates for a plagiarism policy that would encompass intentional, negligent, and unknowing failure¹⁰³ to attribute within the definition of plagiarism. The rationale

98. Green, *supra* note 28, at 173.

99. LINDEY, *supra* note 1, at 232.

100. Stearns, *supra* note 78, at 516. Seton Hall Law School, in endeavoring to provide guidance to its students with respect to plagiarism, cites the above noted Stearns quote and adds that “[t]o plagiarize, the copier must not only copy another’s work but also attempt to pass off the copied work as his or her own.” Memorandum from Charles A. Sullivan, Associate Dean of Seton Hall Law School (July 4, 1994), <http://law.shu.edu/Students/academics/Plagiarism-Memo.cfm>. Seton Hall warns, “Observers and critics are sometimes reluctant to accept the plagiarist’s claim of lack of intent, but their reluctance is more likely due to an inability to believe the excuse than to a conviction that accidental copying is equivalent to plagiarism.” *Id.* But see *infra* notes 103–07 (noting that commentators express the conviction that accidental and unintentional failure to attribute do fall within the rubric of plagiarism).

101. Henry L. Wilson, *When Collaboration Becomes Plagiarism: The Administrative Perspective*, in PERSPECTIVES ON PLAGIARISM AND INTELLECTUAL PROPERTY IN A POSTMODERN WORLD 211, 213 (Lise Buranen & Alice M. Roy eds., 1999). Accord Patrick J. Kelley, *Another Meaning of Plagiarism*, CHI. TRIB., Oct. 31, 2007, at 26 (asserting that plagiarism, in its core and primary meaning, refers to “deliberately passing off, as your own, words that you know were written by someone else.”).

102. Green, *supra* note 28, at 181.

103. For example, in Lipson and Reindl, *supra* note 25, at 8, the authors relate that

underlying this position appears to be the notion that plagiarism constitutes such an egregious academic offense that it cannot be condoned under any circumstances.¹⁰⁴ To some, the damage sustained by victims of plagiarism warrants a blanket condemnation of the act.¹⁰⁵ Others clearly harbor doubts regarding the proffered excuses of inadvertence, with one stating, “there is no possibility of unintentional plagiarism.”¹⁰⁶ Hildegard Bender rejects the notion that lack of knowledge, accompanied by lack of intent, affords the student an immunity from a plagiarism charge. Bender states, “If you give me plagiarism, I will give you an ‘F.’ I am not concerned with the idea of ‘intent to deceive’ since my experience tells me two things: the world doesn’t care about intent; and since I give very thorough instruction regarding plagiarism prior to expository writing, if it occurs, there *is* intent to deceive.”¹⁰⁷ Interestingly, some authorities adopt the position that intent is irrelevant with respect to a finding of the act of plagiarism, but can play a role in terms of assessing appropriate punishments for such conduct. Terri LeClerc, for example, in providing a comparison of the practice of law

colleges and universities rely on three explanations for academic misconduct, which include criminal plagiarism, sloppy scholarship, and ignorance of the rules. The latter excuse is, according to Lipson and Reindl, “considered a weak explanation given the pains to ensure students’ awareness of the importance and mechanisms of proper citation.” *Id.* Even when it becomes clear that “a student really is at a loss regarding the basic conventions of source use, perhaps because of poor precollege preparation or widely divergent cultural assumptions about the nature of knowledge or the role of a student . . . students are generally still held accountable for their inappropriate use of sources . . .” *Id.*

104. James Thomas Zebroski states that plagiarism is serious regardless of intent. See Buranen & Roy, *supra* note 69, at 31. One author ruefully observed, in a case where an article he wrote for *The New York Times* carelessly contained plagiarized material, that “[t]he moral for me is that carelessness is almost as great a sin in writers as deceit.” Noel Perrin, *How I Became a Plagiarist*, 61 AM. SCHOLAR 257, 259 (1992). Perrin submitted an article to the travel section of the *Times*, describing a trip on the historic barque called *Sea Cloud*. Accompanying his submission he attached passages from Richard Henry Dana’s *Two Years Before the Mast* to be used as a sidebar to his article. Perrin’s words were inadvertently merged with those of Dana, making it appear as though he were claiming credit for what he deems “the best description of a ship under sail ever written in English.” *Id.* at 257–58. The public response to his perceived plagiarism was uniform; people assumed he had perpetrated the plagiarism maliciously and in his words, he was treated with “icy contempt.” *Id.*

105. See Savage, *supra* note 84, at 214–15 (critiquing the manner in which a plagiarist’s chairperson and journal editor failed to issue the type of denunciation which the author believed was merited). In contrast, Savage asserts, the institution employing the plagiarist in all likelihood “sent dozens of students home for crimes no greater than the ones that made him [the plagiarist] a distinguished professor.”) *Id.* at 218.

106. Alice M. Roy, *Whose Words These Are I Think I Know*, in PERSPECTIVES ON PLAGIARISM AND INTELLECTUAL PROPERTY IN A POSTMODERN WORLD 55, 57, 61 (Lise Buranen & Alice Roy eds., 1999) (reporting results of faculty interviews wherein she sought the professors’ opinions regarding the role of intent in plagiarism findings).

107. Hildegard Bender, *Letter*, COUNCIL CHRON., Sept. 1994, at 11, *as reprinted in* Howard, *supra* note 53, at 22, 109–10.

schools, which seeks to avoid plagiarism, and the practice of law, which routinely employs the use of others' work product in the form of model briefs and form books, asserts that plagiarism should be a no-fault offense with intent affecting punishment.¹⁰⁸ Concurring that intent to deceive should play a role in the sanction stage of the wrongdoing, Kevin J. Worthen, Associate Dean for Academic Affairs at Brigham Young University Law School, advocates that plagiarism, whether prompted by laziness, sloppiness, ignorance, or dishonesty, merits consequences.¹⁰⁹

One can appreciate that those who espouse a strict-liability approach to defining plagiarism seek to establish the highest standards of academic integrity in the college or university context. The inherent difficulty that one confronts with this approach, even with the policies that consider intent in the penalty phase, is that this type of all-encompassing definition of plagiarism still labels the individual who may have minimally or innocently erred with the title of plagiarist, an appellation that reflects serious academic dishonor. At its core, I would urge, the definition of plagiarism demands a deceitful passing off of the ideas or words of another as one's own.¹¹⁰

C. Defining Plagiarism with Regard to Intent: Determining Factors

Determining an author's subjective intent, while admittedly a

108. Terri LeClercq, *Failure to Teach: Due Process and Law School Plagiarism*, 49 J. LEGAL EDUC. 236, 246 (1999).

109. Worthen, *supra* note 74, at 443. Brigham Young Law School defines plagiarism as follows:

Plagiarism is the failure to give sufficient attribution to the words, ideas, or data of others that have been incorporated into a work which an author submits for academic credit or other benefit. Attribution is sufficient if it adequately informs and, therefore, does not materially mislead a reasonable reader as to the source of the words, ideas or data.

Id. at 448 n.8. Worthen characterizes the consequences experienced by students found to have plagiarized as disciplinary and educational rather than punitive, as they are designed to shape the habits an attorney would require to excel in the profession. *Id.* at 442–43. At Brigham Young an ad hoc committee of three makes the determination in each plagiarism case as to whether a student intended to mislead the professor as to the origin of the submitted work, with resulting penalties for intentional plagiarism including dismissal with the opportunity to apply for readmission should the student demonstrate “sincere internal restructuring.” *Id.* at 446–48.

110. *Cf.* Green, *supra* note 28, at 182 (indicating that he would define intent to include the type of conduct that reflects deliberate indifference to the demands of attribution). New York University School of Law employs a similar approach to its definition of plagiarism, where its School of Law Policies and Procedures states: “Plagiarism occurs when one, either intentionally or through gross negligence, passes off someone else’s words as one’s own, or presents an idea or product copied or paraphrased from an existing source without giving credit to that source.” N.Y. Univ. Sch. Of Law, *supra* note 83.

challenging task,¹¹¹ is a task consistent with the historical meaning of plagiarism—the purposeful misrepresentation of another’s words or ideas as one’s own. Excluded from the reach of the term “plagiarism” would be that failure to attribute which constitutes a purposeful allusion to a prior work, where the audience or readership would fully be expected to recognize the original source of the language and would appreciate and be enriched by its new application.¹¹² Thus, for example, readers of Robert Frost’s poem entitled “Out, Out—” would recognize the allusion to the soliloquy uttered by Macbeth,¹¹³ signifying both the brevity and meaninglessness of life.

Reasonably included within the scope of the definition of plagiarism would be conduct exhibiting the reckless or “deliberate” indifference to the norms of citation advocated by Green.¹¹⁴ What then are some of the factors that might aid in such a determination of intent to plagiarize? Many commentators refer to the volume of the borrowed words and phrases as indicative of a writer’s intent. Decoo suggests that as “no mathematical criterion” yet exists as to the required quantity of questionable material,¹¹⁵ the context, such as the background and behavior of participants, must be considered before one concludes plagiarism has occurred.¹¹⁶ If dozens of

111. *E.g.*, Worthen, *supra* note 74, at 446 (“Because it involves subjective intent, and because the consequences are so great, a finding of intentionality is not easy to make.”).

112. *See infra* note 258.

113. Valerie Rosendorf & William Freedman, *Frost’s OUT, OUT...* 39 EXPLICATOR 10 (Fall 1980).

114. Green, *supra* note 28, at 174. If, for example, a student were to employ footnotes in close proximity to borrowed material, but failed to place specific borrowed words in quotation marks, such conduct would not satisfy the requirements of reckless indifference to the norms of citation. Further, if a student were to generously cite sources throughout his or her paper, but neglected to cite those same sources on occasion within the confines of the same paper, such conduct would not exhibit the type of deliberate disregard of the norms of attribution. The foregoing represents a text-only approach to determining plagiarism. *Cf.* Decoo, *supra* note 72, at 117 (advocating that the entire context of the situation be appraised, including, among others, the credibility of the student’s explanation for the appearance of the borrowed language or ideas, an assessment of the student’s prior record, and recommendations from professors with regard to the student’s character, integrity and likelihood of having intentionally committed the ethical offense of plagiarism); Howard, *supra* note 53, at 164 (same).

115. Decoo, *supra* note 72, at 129.

116. Decoo suggests that one determine, for example, if professional antagonisms preceded an accusation mounted by a colleague. *Id.* See, for example, *Abdelsayed v. Narumanchi*, 668 A.2d 378 (Conn. App. Ct. 1995), where, in an action to recover damages for defamation, the defamatory statement asserted by the defendant professor regarding his faculty colleague was proven demonstrably untrue; the fact that the defendant refused to retract the statement, coupled with evidence of ill will between the parties, establishes proof of “convincing clarity” that the defamatory falsehood regarding plaintiff’s alleged plagiarism issued by the defendant was published with

slightly paraphrased sentences appear without attribution,¹¹⁷ Decoo would conclude that “flagrant plagiarism” has occurred.¹¹⁸

Green states that in minor cases, plagiarism can consist of a small number of words or ideas utilized without proper attribution; in “most serious cases” a significant portion of an entire work is copied and presented as one’s own.¹¹⁹ Indeed, employing his articulated standard, Green opines that in the case of Doris Kearns Goodwin,¹²⁰ wherein the author attributed uncited passages in *The Fitzgeralds and the Kennedys* to sloppy note-taking, “it seems hard to imagine how a writer could have included as many as fifty improperly attributed passages in a single book without being deliberately indifferent to the rules of attribution.”¹²¹ Similarly, David Edelstein, addressing the plagiarism committed by Harvard student Kaavya Viswanathan of works of Megan McCafferty and other writers,¹²² observes, “Now, pinching one or two phrases from another book in the course of writing a 320-page novel might be accidental. But by the time a novelist does it 29 times, the effort is transparently intentional and conscious.”¹²³

actual malice. *Id.* at 381.

117. Decoo suggests that a strictly quantitative criterion for determining plagiarism is rendered more elusive by a variety of factors that may or may not mitigate the weight of unattributed passages; those include the degree of paraphrasing (which can be construed as an effort to avoid plagiarism or may be reflective of an intent to deceive), and whether the purloined sentence represents original information or the realm of common knowledge (the latter of which is often cited by specialists as so obvious as to void the need for citation). *Id.* at 129–30.

118. *Id.* at 131.

119. Green, *supra* note 28, at 174.

120. *See supra* note 12.

121. Green, *supra* note 28, at 183–84. Green argues intent to commit plagiarism exists when one possesses the knowledge that a high probability existed that one’s sources had been inadequately acknowledged. *Id.*

122. *See supra* note 17.

123. Edelstein, *supra* note 87. Lindey states:

The quantity and nature of the borrowed material are often telling—but not necessarily conclusive—indications of the presence or absence of intent. It’s easy enough to set down a phrase, a line, a paragraph, a simple image, a few musical notes, without knowing that they’re borrowed. As the quantity of the taking increases, the likelihood that the taking is involuntary decreases.

LINDEY, *supra* note 1, at 253. Courts have weighed in on the issue of whether intent to plagiarize, as evidenced in the amount of copying, had been demonstrated on the part of two lawyers, whose bar membership was imperiled by their acts of plagiarism during law school. *In re Lamberis* involved a practicing attorney who had been expelled from the LL.M. program at Northwestern Law School for plagiarism, and who argued that his plagiarism was fueled by “academic laziness” rather than intent. *In re Lamberis*, 443 N.E.2d 549, 550 (Ill. 1982). The court premised its concurrence with the Hearing Board that intent had been demonstrated by the extent of the copying (pages 13 through 59 of a 93 page thesis were substantially verbatim and devoid of citation) and by Lamberis’ academic background, which the court presumably thought should have rendered him more informed about citation procedures. *Id.* at 550–51. In a similar

Rebecca Moore Howard, in urging that authorial intent and context be considered in making a plagiarism finding,¹²⁴ contends that where the student is writing from assigned sources, “it is highly unlikely that she intended to deceive.”¹²⁵ Yet this precise factual scenario formed the foundation of a plagiarism case at Princeton University, where a senior honors student was deemed guilty of plagiarizing from a text assigned for a final project. In Gabrielle Napolitano’s lawsuit premised, in part, on breach of contract as to whether the finding of plagiarism and the penalty imposed by Princeton violated the university’s rules and regulations,¹²⁶ the ultimate findings of the Chancery Court and the Appellate Division of the Superior Court of New Jersey were that, despite the fact that the material in question was taken from the assigned text, the extensive use of unattributed material warranted a conclusion that the student had intentionally presented the quoted material as her own.¹²⁷ As noted by the Appellate Division, her

fashion, *In re Petition of Zbiegien* involved a law graduate who appealed from the denial of admission to the bar for lacking the requisite character. The denial had been based upon an act of plagiarism in law school where most of the first twelve pages of a paper were taken verbatim from law review articles without attribution. *In Re Petition of Zbiegien*, 433 N.W.2d 871, 872 (Minn. 1988). The court concurred with the Associate Dean of William Mitchell College of Law that the unattributed reproduction of published passages and footnotes equaled “unstated intent.” *Id.* at 874–76. *See also infra*, Part X.

124. *See* HOWARD, *supra* note 53, at 164. Howard contends that one must seek an author’s intent in cases of plagiarism, and if intentional plagiarism is determined, one must discern the writer’s motivation. *Id.* at 161–64. She recognizes that considering variables as authorial intent, motivation, and reader’s reaction (“the professorial reader will respond with emotion because he or she will feel personally affronted, his or her intelligence insulted, his or her values degraded”) serves to make educators embrace a far simpler text-only approach to defining plagiarism. *Id.* at 163–64. But, Howard warns, “after a century of adjudicating student plagiarism, the academy has not yet been able to adduce unified, stable criteria for defining and responding to plagiarism.” *Id.* *See also*, with regard to the reader variable, Kolich, *supra* note 26, who recalled the “dry indignation” he experienced as an “avenging god” seeking out the contemptible student plagiarists.

125. *See* HOWARD, *supra* note 53, at 164.

126. *See* Napolitano v. Trs. of Princeton Univ., 453 A.2d 263, 268 (N.J. 1982). The student’s complaint employed a variety of legal theories in addition to those premised on contract in her attempt to attack both the plagiarism finding and the resultant penalty imposed, including causes of action arising under the N.J. CONST. art. I, § I (1947) (declares all persons have “certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property”), the law of associations, the Fifth and Fourteenth Amendments to the U.S. Constitution, defamation, intentional infliction of emotional harm, invasion of privacy, malicious interference with her prospective economic advantage, and malicious interference with plaintiff’s contractual relationship. *Id.*

127. *See* Napolitano, 453 A.2d at 282, where the Superior Court of New Jersey, Chancery Division stated, “[T]here is no question, from plaintiff’s extensive use of unattributed material, that the committee was justified in concluding that she committed the offense with the intention to pass off the quoted material as her own.” As to the Appellate Division’s findings, see *infra* note 128.

paper, which “constitutes a mosaic of the [assigned] work . . . itself is the loudest argument” against her protestation that she did not intend to plagiarize.¹²⁸ It is significant to note that while the trial court concurred that the weight of unattributed material justified a conclusion of intended plagiarism,¹²⁹ it reflected its distaste for the harshness of the penalty imposed: “As this court has noted in prior hearings and conferences,

128. See *Napolitano*, 453 A.2d 263, at 276. Ms. Napolitano, as stated by the Chancery Division, was an outstanding student, with no prior academic blemish on her record. She argued that while she had cited the source in question several times in footnotes and text, she had regarded other citations for the remainder of the disputed material unnecessary. She stated she spoke only halting Spanish of which the professor was aware, that she utilized the book which the professor had placed on reserve for her, and she fully expected that the sophisticated style from that source would be recognized by her professor. *Id.* at 280. Findings by the Faculty Student Committee on Discipline, which conducted the hearings regarding Napolitano’s case, were cited by the Appellate Division as evidence of the plaintiff’s intent to deceive her professor. These findings were text-oriented and included the following:

(1) A few statements from the source had been put in quotation marks but not the rest. This could indicate, on the other hand, that Ms. Napolitano had made an effort to use outside sources, and on the other, that the portions of the paper that were not in direct quotations were her own work; (2) The use, in the paper, of phrases such as ‘it is evident that,’ ‘it is important to note that,’ ‘one can assume that,’ etc. suggests that what follows is Ms. Napolitano’s own thoughts and words, when in fact, in virtually all instances, what follows is words borrowed from the one source without attributions; (3) In several instances there are quotes from the novel which is the subject of the paper. These quotes were used by the secondary source [the Ludmer text] to illustrate various points. In making these same points (usually using the words of the secondary source), Ms. Napolitano used the same quotes but changed the page numbers of the quotes to correspond to the edition of the novel used in the course. This gives the appearance that Ms. Napolitano had found the quotes herself in the novel, which, in fact, she did not.

Id.

129. See *supra* note 127. The issue of whether intent was a required component of Princeton’s definition of plagiarism was raised in the context of Napolitano’s challenge to the manner in which Princeton’s rules had been applied to her case. Princeton had utilized a definition of plagiarism, which emanated from the 1978 edition of the university regulations, that deemed intent to deceive the reader irrelevant. In the 1980 edition, however, as argued by Napolitano and as accepted by the Chancery Division, the definition of plagiarism required “deliberate” use of an outside source without proper acknowledgement. In remanding the matter to Princeton’s Committee on Discipline for a rehearing for the plaintiff, the committee was directed to apply the 1980 definition of plagiarism, which mandated a finding of intent to plagiarize. 453 A.2d at 281. It is interesting to note that the current Princeton University publication, “Academic Integrity at Princeton” makes it quite clear that intent has been reduced to an irrelevancy in a finding of plagiarism: “The most important thing to know is this: if you fail to cite your sources, whether deliberately or inadvertently, you will still be found responsible for the act of plagiarism. Ignorance of academic regulations or the excuse of sloppy or rushed work does not constitute an acceptable defense against the charge of plagiarism.” Princeton Univ., *Academic Integrity*, available at http://www.princeton.edu/pr/pub/integrity/08/academic_integrity_2008.pdf, at 10 (last visited Oct. 10, 2010) (emphasis in original).

Princeton might have viewed the matter of the penalty with a greater measure of humanity and magnanimity, with a greater recognition of the human frailties [sic] of students under stress, as the university apparently has done in many cases in the past. This court cannot mandate compassion, however, and will not, nor should not, engraft its own views on Princeton's disciplinary processes"¹³⁰

Many espouse the view that plagiarism can be easily detected,¹³¹ incidents suggest plagiarism cannot be so readily discerned. Walter Stewart and Ned Feder of the National Institute of Health, for example, applied a plagiarism-detection program they devised to the writings of historian Stephen B. Oates, and concluded that he had, by virtue of the number of passages similar to other works, plagiarized in several of his books.¹³² The American Historical Association, in marked contrast, and after extensive review of these allegations with experts divided on the issue, found that plagiarism was not so readily discernible in Oates' work and concluded, in fact, while Oates was short on attribution, he had not engaged in plagiarism.¹³³ Finally, if one moves beyond a textual analysis that solely compares words, ideas, and rules of citation, and considers, as suggested here, the author's intent, then clearly discerning plagiarism becomes a challenging task.

III. INCIDENCE OF PLAGIARISM

Much of the concern voiced regarding plagiarism emanates from the perceived marked increase in the incidence of plagiarism, evidenced in, among other indicators, highly publicized cases involving journalists,¹³⁴ politicians,¹³⁵ administrators,¹³⁶ and faculty and students.¹³⁷ Deemed a

130. See *Napolitano*, 453 A.2d at 283.

131. See, for example, Debra Parrish, *Scientific Misconduct and the Plagiarism Cases*, 21 J.C. & U.L. 517, 553 (1995), who states, "Plagiarism often is touted as one of the easiest forms of scientific misconduct to detect and investigate, primarily because although most allegations of fabrication and falsification require expertise in the relevant scientific discipline to grasp the nuances of a scientific experiment, most people can compare two sets of words and determine whether they are identical, substantially the same, or convey similar thoughts." Parrish notes that there exists no single government-wide definition of scientific misconduct and plagiarism, leading to "virtually identical allegations of plagiarism" receiving "disparate treatment" premised on which agency funded the research. *Id.* Such differences in definition and consequences, she contends, "perpetuate confusion in the scientific community regarding what constitutes plagiarism and scientific misconduct." *Id.*

132. See *supra* note 8, indicating that ultimately the two scientists faced censure with respect to their use of their software program as applied to Oates. See also Christopher Anderson, *NIH Fraudbusters Get Busted*, 260 SCI. 288 (1993).

133. See *supra* notes 8 and 96.

134. See *supra* note 18.

135. See *supra* notes 20–23.

136. See *supra* note 23.

serious problem¹³⁸ that has “increased over the past decades,”¹³⁹ “a worrisome trend”¹⁴⁰ suggesting “epidemic proportions,”¹⁴¹ and exhibiting a “relentless increase,”¹⁴² plagiarism has been attributed by many commentators to the ease with which individuals can access the seemingly limitless resources of the Internet,¹⁴³ as it both facilitates and tempts¹⁴⁴ the commission of the act of plagiarism. Contributing to the perception of plagiarism intensifying is the exposure afforded such cases (and the glee, or “schadenfreude,”¹⁴⁵ that often seems to accompany such exposés), which gives the public eye the opportunity to examine instances of academic

137. See *infra* Parts VIII, IX, and X. See also Green, *supra* note 28, at 192, notes 96–111, wherein the author sets forth numerous references related to the commission of plagiarism by historians, college professors and administrators, scientists, biographers, novelists, poets, journalists, cookbook authors, screenwriters, translators, clergy, mathematicians, economists, lawyers, and fashion designers. Such anecdotal reports, Green urges, help convey the notion that plagiarism is “on the rise” in the United States today. *Id.* at 193.

138. See Rosemary Talab, *Copyright and You, A Student Online Plagiarism Guide: Detection and Prevention Resources (and Copyright Implications!)*, 48 TECH TRENDS 15, 15 (Nov/Dec 2004) (citing Professor Donald McCabe’s several studies regarding the incidence of plagiarism).

139. See David F. Martin, *Plagiarism and Technology: A Tool for Coping with Plagiarism*, 80 J. EDUC. FOR BUS. 149 (Jan./Feb. 2005) (citing a variety of researchers that have proffered that suggestion, including Ashworth, Bannister & Thorne (1997), Larkham & Manns (2002), and McCabe et al., (2001)). *Id.*

140. Mark Edmundson, *How Teachers Can Stop Cheaters*, N.Y. TIMES, Sept. 9, 2003, at A29 (referencing an essay on academic cheating that could be purchased in its entirety at DirectEssays.com, and statistics compiled by Donald L. McCabe in 2003 regarding the amount of plagiarism conducted by students in colleges and universities).

141. See DECOO, *supra* note 72, at 17 (citing Paul Desruisseaux, *Cheating Is Reaching Epidemic Proportions Worldwide, Researchers Say*, CHRON. HIGHER EDUC., April 30, 1999, at A45). One university attributes the “rampant” increase to large classes, which limit the type of personal faculty student contact which would promote ethical behavior. See *Plagiarism Common Among Students*, NEW STRAITS TIMES-MANAGEMENT TIMES, <http://www.accessmylibrary.com/article/print/1G1-109303763> (Aug. 8, 2003) (citing Dr. Khong Kim Hoong, academic director at the HELP Institute in Malaysia).

142. Donald L. McCabe & Patrick Drinan, *Toward a Culture of Academic Integrity*, CHRON. OF HIGHER EDUC., Oct. 15, 1999, at B7.

143. Scott Schuer, *Plagiarism Replaces Hard Work*, UNIV. WIRE, Sept. 23, 2003, <http://www.highbeam.com/doc/1P1-81847165.html>.

144. See Univ. of Tenn. Knoxville Libr., *Understanding Plagiarism*, available at <http://www.lib.utk.edu/instruction/plagiarism/> (last visited Oct. 10, 2010) (stating, “Though academic dishonesty is not a new problem, it is acknowledged that access to online databases, electronic journals, and the Internet has made copying another person’s original work without attribution easier and more tempting.”). See also Michael Hastings, *Cheater Beaters*, NEWSWEEK, Sept. 8, 2003, at E16.

145. See Kurt Andersen, *Generation Xerox: Youth May Not Be An Excuse for Plagiarism, But it is an Explanation*, N.Y. MAG., May 15, 2006, at 26 (referring to the suggestion of righteous delight exhibited in publicizing the downfall of Harvard student Kaavya Viswanathan).

misconduct that heretofore would have been handled quietly¹⁴⁶ in house, either through university mediation¹⁴⁷ or other mandated procedures, professional organization rules,¹⁴⁸ or negotiations with publishing houses.¹⁴⁹

Quantitative figures regarding the incidence of plagiarism have been proffered by an array of sources. Dalhousie University, via a 2004 survey conducted among eleven Canadian universities, presented figures that indicated that thirty-two percent of undergraduates and twenty-one percent of graduate students had plagiarized at least once in the three prior academic years.¹⁵⁰ Robert Marquand suggests that research fraud is “rampant” in China, reflecting a “deeply ingrained habit of plagiarism, falsification and corruption,” specifically pointing to a study of 180 Ph.D. candidates who admitted plagiarizing and paying bribes in order to ensure their work was published.¹⁵¹ And Arthur Sterngold reports that the 2003 National Survey of Student Engagement results indicate “87 percent of college students who took the survey online said their peers copied data from the Internet without citing sources at least some of the time.”¹⁵² The source most frequently cited by colleges and universities and by those who express concern with perceived plagiarism trends¹⁵³ for statistical evidence

146. See RON ROBIN, SCANDALS & SCOUNDRELS: SEVEN CASES THAT SHOOK THE ACADEMY 6 (2004).

147. See *supra* note 79, which discusses charges of conceptual plagiarism asserted by a University of Pennsylvania sociologist against a colleague and her coauthor, indicating that initially, pursuant to university policies, the dispute was handled privately through in-house mediation within the Sociology Department at Penn. It was not until a letter appeared in *The Daily Pennsylvanian*, the student newspaper, that the matter received public attention in the press.

148. See, e.g., *infra* Part VII (discussing the American Historical Society’s procedures for hearing and determining the veracity of allegations of plagiarism, and its subsequent decision to abandon its role as an arbiter of plagiarism determinations).

149. See David D. Kirkpatrick, *Historian’s Fight for Her Reputation May Be Damaging It*, N.Y. TIMES, March 31, 2002, at 18 (indicating the publisher of Doris Kearns Goodwin, Simon & Schuster, in 1987 paid another author to resolve accusations of plagiarism leveled with regard to Goodwin’s work, *The Fitzgeralds and the Kennedys*).

150. See K. Lynn Taylor, *Plagiarism: Shared Responsibilities, Shared Solutions*, 13 FOCUS 1, 1 (Winter 2004).

151. See Robert Marquand, *Research Fraud Rampant in China*, CHRISTIAN SCI. MONITOR (May 16, 2006), available at <http://www.csmonitor.com/2006/0516/p01s03-woap.htm>.

152. Arthur Sterngold, *Confronting Plagiarism*, 36 CHANGE 16, 18 (May/June 2004).

153. See, e.g., Charlotte Allen, *Their Cheatin’ Hearts*, WALL ST. J., May 11, 2007, at W11; Julie Rawe, *A Question of Honor*, TIME, May 28, 2007, at 59; Emily Sachar, *Study: MBA Students Cheat Most Duke University Center Says Pressure-Cooker Atmosphere, Corporate Scandals May Be To Blame*, ST. LOUIS POST, Sept. 26, 2006, at C1; Valerie Strauss, *Book on Cheating: Paper Crib Notes Are So Old School*, CHI. TRIB., June 6, 2007, at 4. All of the foregoing authors cite as documentation for their

of the growth of plagiarism among students, both on the high-school and collegiate levels, is the work published by Professor Donald McCabe of Rutgers University, and of the Center for Academic Integrity (CAI).¹⁵⁴ For approximately eighteen years, McCabe has produced an annual report addressing the amount of cheating reported via surveys that students have completed. In 1999, for example, he pointed to the “relentless increase” in cheating, without specifying what amount could be attributed to plagiarism.¹⁵⁵ In 2003, his reports indicated that forty percent of students acknowledged plagiarizing and viewed “cut and paste” plagiarism as a trivial offense.¹⁵⁶ In 2005, a survey of 50,000 undergraduates, conducted by McCabe as part of the CAI’s Assessment Program, indicated forty percent of students cut and paste from the Internet; in contrast, ten percent had admitted to such conduct in 1999.¹⁵⁷ In 2008, McCabe, premised on analysis of 24,000 high-school students in grades nine to twelve, reported that plagiarism is practiced by fifty-eight percent of those surveyed, with the plagiarism encompassing downloading of complete papers and cutting and pasting online articles without the requisite attribution.¹⁵⁸

It is significant to note, however, that not all commentaries concur that plagiarism among students is on the rise. In a study conducted by

articles the research studies conducted by Professor McCabe; *see infra* note 154, describing the Center for Academic Integrity (CAI), of which Professor McCabe currently serves as a member of the Advisory Council.

154. Professor McCabe served as founding president of the CAI; it “provides a forum to identify, affirm and promote the values of academic integrity among students, faculty, teachers and administrators.” Clemson Univ., *Center for Acad. Integrity*, <http://www.academicintegrity.org/> (last visited Oct. 10, 2010). It provides several online resources intended to enhance the abilities of institutions of higher education to address the issue of academic integrity in an informed fashion. Currently the CAI is housed at the Robert J. Rutland Institute for Ethics at Clemson University in Clemson, South Carolina. Prior to this time, the CAI was partnered with the Kenan Institute for Ethics and Duke University. Clemson Univ., *CAI Has Moved to Clemson University*, http://www.academicintegrity.org/news_and_notes/clemson.php (last visited Oct. 10, 2010).

155. *See supra* note 22.

156. *See* Sara Rimer, *A Campus Fad That’s Being Copied: Internet Plagiarism Seems on the Rise*, N.Y. TIMES, Sept. 3, 2003, at 7 (describing McCabe’s findings of 18,000 surveyed students, 2,600 faculty members, and 650 teaching assistants at large public universities and small private colleges, and relaying that students regarded information on the Internet as within the bounds of public knowledge that required no attribution).

157. Further, seventy-seven percent believe doing so is not a serious issue. *See* Clemson Univ., *CAI Assessment Project*, (2005), http://www.academicintegrity.org/cai_research/index.php (last visited Oct. 10, 2010). The 2005 CAI study raises a significant issue in that it suggests students struggle to understand what constitutes acceptable use of the Internet, and, in the absence of faculty direction, believe they can, with impunity, cut and paste a sentence or two from various sources and weave them into a paper without citation. *Id.*

158. Reed Bus. Information, *Most Kids Cheat, Study Says*, SCH. LIBR. J. 16, Apr. 2008, at 6.

Professors Patrick M. Scanlon and David R. Neumann of the Rochester Institute of Technology (RIT) among 689 undergraduates, it became apparent that students' perceptions as to the amount of ongoing plagiarism were exaggerated and inaccurate. In this 2002 study, 16.5% of college students surveyed indicated they "sometimes" engage in plagiarism, while eight percent admit to "often" committing this academic offense.¹⁵⁹ Moreover, the researchers found that the amount of plagiarism conducted utilizing online resources was "comparable to the amount of conventional plagiarism . . . that had been reported for years."¹⁶⁰ Brian Hansen further cites studies that debunk the crisis mentality surrounding the unattributed borrowing of another's words.¹⁶¹ And interestingly, Hansen quotes Scanlon and Neumann of the RIT study as observing that the reason student survey participants thought their peers plagiarized far more than, in fact, they had, was because "[p]eople will overestimate behaviors in others that they themselves are not taking part in."¹⁶² Indeed, were a more uniform definition, with intent as a requisite, to be adopted by colleges and universities, in contrast to the present "conceptual elusiveness"¹⁶³ of the term, perhaps the touted number of cases would diminish in frequency.

IV. RATIONALE FOR PLAGIARISM'S PURPORTED PREVALENCE

Commentators attribute motivation for engaging in plagiarism to a wide variety of rationales, which encompass everything from the practical "pressed for time exigencies," the impact of the Internet, societal examples of unethical behavior, to one's perceived personal shortcomings. While the majority of such ruminations relate to student behavior, some of the reasons proffered are applicable to faculty and others as well. David

159. See Alex P. Kellogg, *Students Plagiarize Online Less Than Many Think, A New Study Finds*, CHRON. HIGHER EDUC., Feb. 15, 2002, at A44.

160. *Id.* So too, Wilfred Decoo's book, *Crisis in the Classroom*, does not, in fact, make the case, according to a critic, that student plagiarism is the "crisis." Roger Lindsay, in *Book Review, Crisis on Campus: Confronting Academic Misconduct*, 28 STUD. IN HIGHER EDUC. 110 (Feb. 2003) asserts that Decoo's analysis of plagiarism does not justify the title of the book, which implies an emphasis upon a "recent, sudden and threatening increase" in student wrongdoing. *Id.* at 111. He further argues that no evidence of a crisis is presented as the book barely discusses any incidences of student plagiarism, and even where the focus lies with faculty wrongdoing, Decoo only points to the "odd case." *Id.* at 111. While Lindsay applauds Decoo's efforts with respect to pointing to the difficulty in defining plagiarism, he asserts that "he gives little attention to the implications of this conceptual elusiveness for claims about frequency of occurrence." *Id.*

161. See Brian Hansen, *Combating Plagiarism*, 13 CQ RES. 773, 777-78 (2003). In a 1964 survey conducted by Professor W. J. Bowers, for example, and long before the advent of the Internet, Hansen reported that Bowers found "that 43 percent of the respondents acknowledged plagiarizing at least once." *Id.* at 778.

162. *Id.* (internal quotation marks omitted).

163. See Lindsay, *supra* note 160

Thomas sets forth several reasons why plagiarism occurs: academic pressures to excel, exacerbated by pressure imposed by ambitious parents; poor planning, as evidenced by procrastination and disorganization; poor prior foundation for current academic demands; an “excessive or mindless” workload that encourages injudicious time-saving behavior; cultural backgrounds that demonstrate “less compunction against plagiarism”; and revelations of plagiarism by public figures, where the tendered excuse of inadvertence is accepted.¹⁶⁴

The impact the Internet has had figures largely in the reasons for plagiarism offered by various commentators. Michael Hastings asserts that the available technology facilitates cheating, in contrast to the pre-wired days, which demanded greater effort by those intent on plagiarism.¹⁶⁵ Hastings notes, significantly, that many students are simply not taught the appropriate mechanisms for referencing.¹⁶⁶ Others make reference to the tempting abundance of hundreds of term-paper sites that lead to fee-based and non-fee-based standard and customized research-paper construction.¹⁶⁷ Exposure to the Internet has shaped a different perspective on academic integrity, Gail Wood and Paula Warnken contend, not because students are “dishonest or lack a moral center,”¹⁶⁸ but because their experiences have “led them to form different attitudes toward information, authorship and intellectual property.”¹⁶⁹

Some experts in ethics attribute cheating to a pervasive societal landscape that celebrates success, enshrining the “number one” status with

164. David A. Thomas, *How Educators Can More Effectively Understand and Combat the Plagiarism Epidemic*, 2004 BYU EDUC. & L.J. 421, 426–28 (2004). Thomas, in referring to the revelations of plagiarism, notes that they are often prompted by “reliance on the research and writing assistance of others without adequate scrutiny and supervision,” and that the problem occurs most frequently “when professors and executives use others to research and ‘ghost-write’ material for publication.” *Id.* at 428. See also Lisa G. Lerman, *Misattribution in Legal Scholarship: Plagiarism, Ghostwriting and Authorship*, 42 S. TEX. L. REV. 467, 467 (2001). The author, in the context of law school, advocates an acknowledgement of student work through either a footnote or designated co-authorship. *Id.* at 477–79, 487. She further suggests that guidelines be enacted at law schools to articulate the proper standards under which student research assistance should be acknowledged, urging that if such action is not taken it leaves “an indefensible double standard of authorship for students and for teachers.” *Id.* at 488.

165. Hastings, *supra* note 144.

166. *Id.* See also *Plagiarism Common Among Students*, *supra* note 141.

167. *Plagiarism Common Among Students*, *supra* note 141.

168. Gail Wood & Paula Warnken, *Managing Technology, Academic Original Sin: Plagiarism, the Internet, and Librarians*, 30 J. ACAD. LIBR. 237, 237 (2004).

169. *Id.* Michael Bugeja contends that the ability of students to select, copy and paste content from the Internet into a file labeled “My Documents” conveys a false sense of ownership, privacy, and immunity from scrutiny. See Michael Bugeja, *Don’t Let Students ‘Overlook’ Internet Plagiarism*, 70 Educ. Digest 37, 42 (2004).

a glory far removed from those who attain second or lower place.¹⁷⁰ Elliott J. Gorn, in discussing the high-profile plagiarism cases of historians Stephen Ambrose and Joseph Ellis, observes that “[w]inning is everything, and winning often means cutting corners to outsell the competition.”¹⁷¹ Some commentators offer a psychological profile of the plagiarist as possessing characteristics that cause him to purloin the words and ideas of another.¹⁷² Finally, David Mehegan suggests that writers sometimes continue to “steal” others’ works, even with the advent of detection devices, due to “ignorance of what plagiarism is.”¹⁷³

V. DEVICES FOR PURPOSES OF DETERRENCE AND DETECTION

Colleges and universities have employed a variety of techniques intended to deter students from the practice of plagiarism, to detect its presence, and to apply the appropriate penalties. Those devices include academic honesty or plagiarism policies articulated in college and university handbooks,¹⁷⁴ online workshops or tutorials intended to

170. Jeff Gammage, *Cheating As a Smart Choice*, PHILA. INQUIRER, May 22, 2006, at A1 (quoting Kirk Hanson of the Markkula Center for Applied Ethics at Santa Clara University in California, who contends that “cheating can be a rational choice” after two decades of economic Darwinism where the rewards for any position other than first are grossly disparate, thus prompting persons to take shortcuts to attain that status). *Id.* at A6.

171. Elliott J. Gorn, *The Historians’ Dilemma*, J. AM. HIST., 1327, 1328 (2004). Gorn notes that notwithstanding the scandals related to Ellis (false statements regarding his background tendered in the classroom) and Ambrose (plagiarism), they remained successful “at least as measured by sales, advances, and so forth,” although the charges sullied reputations. *Id.* at 1329.

172. Thomas Mallon contends the plagiarist exhibits “the lack of any real need to steal.” MALLON, *supra* note 35, at 33. This would contravene those assertions that claim the “publish or perish” environment of academia confronted by faculty and the pressure to succeed experienced by students in an increasingly competitive academic context serves as a motivating influence prompting one to engage in plagiarism. *See, e.g.*, Tara Parker-Pope, *College’s High Cost, Before You Even Apply*, N.Y. TIMES, Apr. 29, 2008, at F5 (wherein she documents the demographic bubble that “has produced the largest group of graduating seniors in history . . . facing rejection by colleges at record rates—more than 90 percent at Harvard and Yale . . .”). With regard to the plagiarism case of student Kaavya Viswanathan, Kurt Andersen states that “[s]he is a flagrant example of the hard-charging freaks that our culture grooms and prods so many of its best and brightest children to become . . .” Andersen, *supra* note 145, at 26.

173. David Mehegan, *The Purloined Letters: With Writers Under Increased Scrutiny, Why Do So Many Resort To Stealing Others’ Words?*, BOSTON GLOBE, June 11, 2003, at F1.

174. *See, e.g.*, Richard Stockton C. of N.J., *Academic Honesty*, <http://intraweb.stockton.edu/eyos/page.cfm?siteID=14&pageID=62> (last visited Oct. 10, 2010). Specifically, the policy states: “It is not always possible for a faculty member to distinguish a student’s conscious attempt at plagiarism from a clumsily documented, but well-intended paper. Therefore, the College requires every student to understand the rationale for, the application of, bibliographic methods and documentation. Each student has the responsibility to learn what constitutes

familiarize students with the forms of plagiarism and aid faculty in fostering academic integrity;¹⁷⁵ traditional honor codes that require a pledged promise both to refrain from acts of academic dishonesty and to inform authorities of students who violate the pledge;¹⁷⁶ modified honor codes that solely require a pledge of academic integrity and which are sometimes coupled with plagiarism-detection devices;¹⁷⁷ integrity codes which may or may not compel a signed pledge of adherence;¹⁷⁸ Internet

plagiarism; *unintentionally plagiarized work carries the same penalty as a blatant case.*" *Id.* (emphasis in original).

175. See, for example, the tutorial presented by Indiana University Bloomington, School of Education entitled "How to Recognize Plagiarism," which presents a definition, plagiarism cases, examples, practice examples, and a test to confirm one's knowledge, after which a student is awarded a confirmation certificate. Indiana Univ., *How to Recognize Plagiarism*, <http://www.indiana.edu/~istd/> (last visited Oct. 10, 2010). See also the workshops offered by the Center for Intellectual Property at the University of Maryland University College, which address in its Intellectual Property in Academia Workshop Series, among others, the topic of "Preventing Plagiarism Toolbox." Univ. of Maryland Univ. College, *Preventing Plagiarism Toolbox*, http://www.umuc.edu/distance/odell/cip/workshops_previous.shtml (last visited Oct. 11, 2010).

176. See, for example, the Honor System employed by the University of Virginia, wherein students pledge not to "lie, cheat or steal," and must agree to report anyone who does so to a court of their peers. Univ. of Virginia, *The Code of Honor*, <http://www.virginia.edu/uvatours/shorthisory/code.html> (last visited Oct. 11, 2010). What is distinctive about Virginia's Honor System, founded in 1842, is that all related proceedings are conducted entirely by students. This single sanction system offers a student formally accused of an Honors violation, subsequent to an investigation, two choices: leave the institution (which is construed as an admission of guilt) or seek an Honor trial. See Univ. of Virginia, *Honor Committee Constitution*, <http://www.virginia.edu/honor/bylaws/Constitution030110.html> (last visited Oct. 11, 2010).

177. See, for example, the University of Colorado at Boulder's Honor Code, which requires that "[e]ach member of the university community pledge to personally uphold the values of the honor code, though hearings are held for alleged student violations to determine responsibility." Univ. of Colorado, *Mission and Vision*, <http://www.colorado.edu/academics/honorcode/> (last visited Oct. 10, 2010). Paula Wasley, *Anti-plagiarism Software Takes On the Honor Code*, CHRON. HIGHER EDUC., Feb. 29, 2008, at A12 (noting that the University of Colorado at Boulder relies on both the honor code and on the Turnitin software technology).

178. See, for example, Carly Weinreb, *Freshman Integrity Pledge Sparks Discussion*, DAILY PENNSYLVANIAN, Sept. 2, 2004, <http://thedp.com/node/42825>, describing the process at the University of Pennsylvania begun in 2000, whereby incoming freshmen are forwarded a copy of the Code of Academic Integrity coupled with a pledge card agreeing to uphold the Code. Signing the card is optional. The integrity code does not require one to report cheating by others; further, the punishment for violating an integrity code, in contrast to the expulsion mandated by a traditional honor code, is typically suspension for a semester. *Id.* Research suggests that properly worded institutional statements regarding academic integrity and plagiarism, providing definition and penalties, serve as effective measures to reduce the incidence of plagiarism among undergraduates. Brown & Howell, *supra* note 24.

search engines;¹⁷⁹ techniques faculty can employ when scrutinizing student papers;¹⁸⁰ and plagiarism-detection software.¹⁸¹

The most ubiquitous of the foregoing mechanisms, which has engendered strong advocates, harsh criticism, analysis of the proper role of faculty vis-à-vis students, and litigation¹⁸² premised on copyright infringement under 17 U.S.C. § 501¹⁸³ and invasion of privacy pursuant to the Family Educational Rights and Privacy Act (FERPA),¹⁸⁴ is the

179. Kristen Gerdy, Note and Comment, *Law Student Plagiarism: Why It Happens, Where It's Found, and How to Find It*, BYU EDUC. & L.J. 431, 436 (2004) (noting that search engines that are free and easily accessed by faculty include Google, Altavista, and Metacrawler). As the coverage of each search engine differs, Gerdy advises faculty to “run the search in multiple engines or use a ‘meta’ engine like Copernic, which allows a search in multiple engines simultaneously.” *Id.* at 437.

180. Gerdy suggests “where students submit many written assignments or multiple drafts of a single assignment, unexplained and dramatic improvement in writing style and analysis can signal potential plagiarism. Inconsistent vocabulary, tone, sentence structure, depth of analysis, and other factors” that convey an impression the work does not emanate from a particular student often suggest potential plagiarism. *Id.* at 434. Further, Gerdy sets forth formatting inconsistencies that may indicate copy and paste plagiarism, including changes in font size, font style, font color, inconsistent margins or headings, and inconsistent citation format. *Id.* at 435.

181. A broad variety, or a “wave” of anti-plagiarism software exists with which to combat digital plagiarizing, notes Mary Pilon. Pilon, *supra* note 24. Citing software such as MyDropBox.com and Turnitin, Pilon observes that the reach of these programs has been enhanced by contractual arrangements entered with both universities and textbook companies. Pilon stated that from 2005 to 2006 Turnitin enlarged its base of student users from 6.84 million to 9 million and that MyDropBox.com expanded from 700,000 students in 2005 to 1.4 million in 2006. *Id.*; see also Trevor Davis, *Online Program Helps Eliminate Plagiarism*, OREGON DAILY EMERALD, UNIV. WIRE, Oct. 10, 2007, <http://www.dailyemerald.com/2.2358/online-program-helps-eliminate-plagiarism-1.197157> (noting widely-used anti-plagiarism software); David Eastment, *Plagiarism*, 59 ELT J. 183-84 (2005) (same); Alison Utley, *Cyber Sleuths Hunt For A Way To End Plagiarism*, TIMES HIGHER EDUC. SUPPLEMENT, August 8, 2003, at 7 (same).

182. See discussion *infra* notes 211–25 and accompanying text, of *A.V. v. iParadigms L.L.C.*, 544 F. Supp. 2d 473 (E.D. Va. 2008), *aff'd in part, rev'd in part*, 562 F.3d 630 (4th Cir. 2009), where high school students unsuccessfully brought suit against the company that produces the plagiarism software known as Turnitin.

183. Plaintiffs in the lawsuit commenced against iParadigms asserted that iParadigms’ conduct of archiving student authored unpublished manuscripts and providing copies of same to any iParadigms client upon such client’s request constituted copyright infringement under 17 U.S.C. § 501. See Amended Complaint for Copyright Infringement at 4, 8, *iParadigms*, 544 F. Supp. 2d 473 (No. 1:07 Civ. 293 CMH/LO), *available at* http://www.dontturnitin.com/images/iParadigms_Amended_Complaint.pdf.

184. FERPA, 20 U.S.C. § 1232g, protects the privacy of student records, according parents certain specific rights with regard to their children’s records, with such rights transferring to the student when he or she attains the age of eighteen or attends an institution of higher education. Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2006), *available at* <http://www.edu.gov/policy/gen/guid/fpco/ferpa/index/html>. Plaintiffs argued that Turnitin violated federal student privacy laws by permitting clients of Turnitin to

plagiarism-detection program known as Turnitin, which is produced by iParadigms. Highly touted as the program that is utilized in more than ninety countries,¹⁸⁵ by approximately seven thousand institutions of higher education and high schools,¹⁸⁶ that grossed more than eighty million dollars in 2006,¹⁸⁷ and as the repository of more than 100,000 daily submissions of students' written work,¹⁸⁸ Turnitin can be used as a teaching opportunity,¹⁸⁹ as the vehicle by which the academic death penalty is imposed,¹⁹⁰ and for a

request and receive copies of students' papers revealing their names and those of their instructors, among other personal information. See Jeffrey R. Young, *Judge Rules Plagiarism-Detection Tool Falls Under 'Fair Use,'* CHRON. HIGHER EDUC., Apr. 4, 2008, at A13. The New York Education Department, for example, ruled "that a professor would be putting an institution at risk for a Ferpa [sic] violation if he or she simply took term papers and shipped them off to a plagiarism-check site without having 'anonymized' the data." *The Law, Digitally Speaking*, CHRON. HIGHER EDUC., Apr. 4, 2008, at 14; see also Andrea Foster, *Plagiarism-Detection Tool Creates Legal Quandary*, CHRON. HIGHER EDUC., May 17, 2002, at 37. Foster cites Kenneth D. Crews, who served as both a professor of law at the Indiana University School of Law and director of the IUPUI Copyright Management Center, as stating that before entering contractual relations with Turnitin, faculty must notify students at the beginning of a course that their work may be submitted to Turnitin and that it will be retained by same. Further, Crews suggests that one should "give them a chance to opt out." *Id.* Foster observes that most other plagiarism detection services do not retain submissions of students, thus rendering the pool of manuscripts to which papers are compared smaller than that of Turnitin's. *Id.*

185. See Barbara Righton, *How Not To Catch a Thief*, MACLEAN'S, June 11, 2007, at 62.

186. John Timmer, *Plagiarism Screener Gets Passing Grade in Copyright Lawsuit*, ARS TECHNICA, Mar. 26, 2008, available at <http://arstechnica.com/news.ars/post/20080326-plagiarism-screener-gets-passing-grade-in-copyright-lawsuit.html>. Brock Read estimates that more than eight thousand high schools and colleges, including Harvard and Columbia, are utilizing the Turnitin service provided by iParadigms. Brock Read, *Anti-Cheating Crusader Vexes Some Professors*, CHRON. HIGHER EDUC., Feb. 29, 2008, at 1.

187. See Righton, *supra* note 185 (quoting Robert Vanderhye of McLean, Virginia, the lawyer representing the student plaintiffs in the lawsuit against iParadigms for copyright infringement).

188. *Id.*; see also Read, *supra* note 186; Scott Jaschik, *Finding Applicants Who Plagiarize*, INSIDE HIGHER EDUC., June 23, 2010, available at <http://www.insidehighered.com/layout/set/print/news/2010/06/23/essays> (indicating the Penn State University business program would utilize Turnitin to screen admission essays).

189. Elad Gefen & Kim Jaeger, *Web Site Helps Florida State U. Combat Plagiarism*, UNIV. WIRE, Sept. 18, 2003 (stating that Florida State University's decision to use Turnitin was not prompted by problems with plagiarism, but rather was sought as a tool to better educate students, particularly freshmen, with respect to plagiarism).

190. Bronwyn T. Williams, *Trust, Betrayal, and Authorship: Plagiarism and How We Perceive Students*, 51 J. ADOLESCENT & ADULT LITERACY 350, 353 (2007) (arguing that the advent of plagiarism detection software has shifted the emphasis from teaching to detection and punishment, and urges that displays of unintentional plagiarism should be employed as "a teaching moment and not a moment for academic death penalties."). It should be noted that the arena within which plagiarism detection software is utilized

host of other purposes.

In essence, the Turnitin program houses a massive database, comprised of all student submissions from licensed high schools and colleges and universities, online articles and journals, continuously updated Web materials, other publicly accessible databases, and any proprietary databases to which Turnitin may have access.¹⁹¹ After each student's submission is digitized and compared to other materials in the database,¹⁹² the program issues a "similarity index,"¹⁹³ which highlights in a color-coded fashion what segments of the work bear similarities to other work or works in the database. Every student paper is archived for future comparison purposes; upon request from a professor whose student's work was flagged pursuant to Turnitin scrutiny, the company will provide a copy of the paper from which the student purportedly copied. The similarity index does not definitively determine whether plagiarism has, in fact, occurred.¹⁹⁴ Rather, careful analysis on the part of the professor must conclude whether highlighted material represents a minor or major breach of attribution standards, common language typically employed in a discipline, or work that was properly cited.¹⁹⁵

This plagiarism-detection software has not received universal endorsement. Some believe that the program fundamentally alters the role of the faculty member, transforming it from one of mentorship to one that is adversarial and contributes to a "poisonous atmosphere."¹⁹⁶ On this account, faculty, employing what may be perceived as a "gotcha" device,¹⁹⁷

is expanding beyond that of student submissions to include the written works of academics, writers, and business persons in scholarly journals and books. In 2008, iParadigms joined Cross/Ref, a publishing industry association, to create an anti-plagiarism program akin to Turnitin for academic journals, whose purpose is both to avoid dual submissions of papers and plagiarism and to replace the current manual process of peer reviewers. See Catherine Rampell, *Journals May Soon Use Anti-Plagiarism Software on Their Authors*, CHRON. HIGHER EDUC., Apr. 25, 2008, at A17.

191. Gerdy, *supra* note 179, at 438 (stating that all of the varieties of plagiarism software have limited application to law schools, as the "universe of potential source material canvassed by these services does not include the proprietary databases on Lexis-Nexis and Westlaw.").

192. POSNER, *supra* note 28, at 82.

193. Read, *supra* note 186 (noting that the similarity index report specifies that percentage of the student's submission that potentially may have been copied from other sources).

194. *See id.*

195. *See, e.g.,* Jon Baggaley & Bob Spencer, *The Mind of a Plagiarist*, 30 LEARNING, MEDIA AND TECH. 55, 56 (March 2005). Baggaley and Spencer note that the highlighted unoriginal material "may or may not have [been] correctly attributed." *Id.*

196. Williams, *supra* note 190.

197. Rebecca Moore Howard, *Forget About Policing Plagiarism. Just Teach*, CHRON. HIGHER EDUC., Nov. 16, 2001, at 24. Howard observes that the hysteria engendered by the alleged plague of plagiarism, has prompted the academy to fail to

and fueled by their own emotional reaction of outrage and victimization,¹⁹⁸ adopt the role of police enforcer against the “criminal” student.¹⁹⁹ Students complain that the mere threatened usage of Turnitin, as set forth on syllabuses, denigrates the core of trust that supposedly exists between a faculty member and his or her students.²⁰⁰ Those in the approximately one hundred colleges and universities that adhere to the tenets of a traditional university honor code²⁰¹ urge that Turnitin represents the antithesis of such a code, which ideally is premised on mutual trust and respect.²⁰²

distinguish the broad array of behaviors encompassed by plagiarism standards. *Id.* But see *Letters to the Editor: The Wrong Way to Fight Plagiarism*, CHRON. HIGHER EDUC., Dec. 21, 2001, at B22, wherein Michael T. Nietzel, then Acting Provost of the University of Kentucky, criticizes Howard’s assumption that the “average faculty member is unable or disinclined” to distinguish among the shades of plagiarism; his experience with faculty suggests that they are reluctant to accuse students of plagiarism barring evidence of a “clear and flagrant” offense.

198. Brownwyn Williams observes that when confronted by instances of student dishonesty, faculty responses “reveal betrayal, anger and a visceral sense of disappointment.” Williams, *supra* note 190, at 350; *see also* Kolich, *supra* note 26, at 142 (describing his reaction “[l]ike an avenging god,” to student plagiarism).

199. Howard writes, “In our stampede to fight what The New York Times calls a ‘plague’ of plagiarism, we risk becoming the enemies rather than the mentors of our students; we are replacing the student-teacher relationship with the criminal-police relationship.” Howard, *supra* note 197.

200. Professor Donald McCabe, touted as “the leading expert on student cheating in North America,” has not supported a mandatory blanket use of Turnitin, asserting that checking all student papers “destroys that bond of trust” necessary to properly educate students as to their responsibilities for avoiding plagiarism. *See* Leo Charbonneau, *The Cheat Checker*, UNIV. AFFAIRS, March 15, 2004, available at <http://www.universityaffairs.ca/the-cheat-checker.aspx>. Apparently the widespread use of Turnitin and its plagiarism detection software competitors has also created a sense of distrust with regard to responding to Dr. McCabe’s annual surveys addressing student cheating. Julie Rawe reports that “[o]ne result of the high-tech cheating wars: paranoia. McCabe says fewer students are filling out his anonymous surveys.” Rawe, *supra* note 153, at 60.

201. *See* Lathrop & Foss, *supra* note 24, at 105–07, for samples of honor codes and academic integrity policies in universities and colleges. Davidson College, for example, states, in part: “Every student shall be bound to refrain from cheating (including plagiarism) Every student shall be honor bound to report immediately all violations of the Honor Code of which the student has first-hand knowledge; failure to do so shall be a violation of the Honor Code. Davidson, *Emphasizing the Honor Code*, <http://www3.davidson.edu/cms/x17371.xml> (last visited Oct. 11, 2010). Every student found guilty of a violation shall ordinarily be dismissed from the College. *Id.*

202. Professor Donald McCabe notes that institutions that have honor codes wherein “students pledge not to cheat and where they play a major role in the judicial process,” experience significantly fewer cases of cheating, including plagiarism. *See* McCabe & Drinan, *supra* note 142 (“The success of honor codes appears to be rooted in a campus tradition of mutual trust and respect among students and between faculty members and students.”). Timothy M. Dodd, an academic advising director at the University of Michigan at Ann Arbor, asserts that colleges and universities with honor codes “tend to ‘forefront trust,’” a position seemingly difficult to reconcile with Turnitin or its ilk. Wasley observes that Dodd formerly served as the executive

Turnitin has its champions as well in universities such as Tufts University and Florida State University. At Tufts, which mandates that all plagiarism cases be brought to the Dean of Student Affairs Office, irrespective of intent or degree, many faculty applaud the use of Turnitin as a vehicle that simplifies the search for plagiarism, while others suggest it be used as a teaching tool or only when a suspicion of plagiarism exists.²⁰³ Florida State, according to the associate vice president for academic affairs, was drawn to Turnitin as a successful way to educate students about plagiarism.²⁰⁴ Princeton University, in contrast, disavowed in 2006 any intention of using Turnitin on its campus, and was reportedly deemed “soft on cheating” for so doing by iParadigm’s founder and CEO, who likened plagiarists to the corporate criminals at Enron.²⁰⁵

It is the objections grounded in copyright law that form what many have deemed a viable challenge to Turnitin’s use and archival of student work in its database.²⁰⁶ The notion that an original expression as defined by the Copyright Act of 1976,²⁰⁷ and as represented by a student’s work, is

director of the Center for Academic Integrity, formerly housed at Duke University and now residing at Clemson University. Wasley, *supra* note 177. Wasley, quoting Dodd, does note that in an institution that has a modified honor code where responsibilities for detection and penalties are jointly shared by students and faculty, use of a plagiarism device may be deemed acceptable. Wasley, *supra* note 177. See also *supra* note 154 and accompanying text for further information regarding the Center.

203. Matt Skibinski, *Careless Citation Could Lead to Serious Consequences at Tufts U*, TUFTS DAILY *via* UNIV. WIRE, Mar. 13, 2007 (quoting Associate Professor of Philosophy Erin Kelly, who uses Turnitin premised on a suspicion that plagiarism has occurred, rather than mandating that all students submit their papers, stating, “I think [requiring students to use the site] puts people on edge and creates an atmosphere of suspicion.”).

204. Gefen & Jaeger, *supra* note 189. The use of Turnitin at Florida State is not mandatory; discretion lies with each professor as to his or her use of the plagiarism detection software. *Id.* See also Brock Read, *Turnitin Comes Back to Kansas*, CHRON. HIGHER EDUC., Oct. 4, 2006, available at <http://chronicle.com/wiredcampus/article/1614/turnitin-comes-back-to-kansas>, which notes that the University of Kansas had decided to terminate its arrangement with Turnitin due to cost and intellectual property concerns. Although some faculty shared those concerns, many vociferously complained and membership was reinstated. And, according to the article, Turnitin officials “assuaged Kansas officials’ concerns about intellectual property rights by agreeing to withhold some student papers” from its huge database. *Id.*

205. Read, *supra* note 186. Read states that the parallel that Turnitin CEO John Barrie drew between plagiarism and corporate crime “raised eyebrows—and ire—on the campus.” *Id.*

206. A student at McGill University, protesting the use of Turnitin, refused to submit his work in a course to the site, arguing the archiving of his work infringed his copyright. Charbonneau, *supra* note 200. Although his professor initially had stated that a refusal to submit a paper to Turnitin would merit a zero for the course, the university subsequently did agree to grade the student’s papers without such submission. *Id.*

207. See 17 U.S.C. §§ 101–801 (2006).

submitted to a for-profit plagiarism-detection site such as Turnitin to be archived, with no remuneration being afforded to the subject students, strikes a discordant note with some students and some professors. While the company's CEO dismisses such copyright concerns, noting, "[the student papers] aren't nuclear missile secrets,"²⁰⁸ copyright protection is indeed extended to those original ideas that are represented by "any tangible medium of expression."²⁰⁹ Stephen J. McDonald, general counsel at the Rhode Island School of Design, notes that "the threshold for what it takes to get a copyright is incredibly low. There's no requirement of quality or novelty; the tiniest 'spark' of creativity is enough."²¹⁰

In *A.V. v. iParadigms, L.L.C.*,²¹¹ students from McLean High School in Virginia and a high school in Arizona endeavored to challenge (ultimately unsuccessfully) the use of Turnitin, premised on FERPA privacy issues and on copyright infringement under 17 U.S.C. § 50.²¹² The plaintiffs, all minors, asserted that they had been compelled to submit their work to Turnitin; their option was to receive a zero for the assignment or seek an education at a different high school.²¹³ Prior to submission of their work, each had obtained formal copyright registration for their essays; some had placed a disclaimer at the bottom of each paper indicating the authors wished to be excluded from the archiving of their work.²¹⁴ Granting iParadigms' Motion for Summary Judgment,²¹⁵ District Court Judge

208. Rawe, *supra* note 153, at 60.

209. 17 U.S.C. § 102(a) (2006). Such protection is offered works without any necessity for accompanying registration or attachment thereto of any of the symbols formerly associated with copyright protection, as the law no longer mandates the latter requirements. Latourette, *supra* note 71, at 618.

210. *The Law, Digitally Speaking*, *supra* note 184.

211. 544 F. Supp. 2d 473 (E.D.Va. 2008), *aff'd in part, rev'd in part*, 562 F.3d 630 (4th Cir. 2009).

212. The background to the litigation, with copies of the "Relevant Court Documents," including the Amended Complaint, can be found at <http://www.dontturnitin.com/background.html> and <http://www.dontturnitin.com/followthecase.html>, a site established by the plaintiff students from McLean High School in Virginia. Dontturnitin.com, *What is turnitin.com?*, <http://www.dontturnitin.com/background.html> (last visited Oct. 11, 2010); Dontturnitin.com, *Follow the Case*, <http://www.dontturnitin.com/followthecase.html> (last visited Oct. 11, 2010).

213. Amended Complaint for Copyright Infringement, at 4, *iParadigms*, 544 F. Supp. 2d 473 (No. 1:07 Civ. 293 CMH/LO), *available at* http://www.dontturnitin.com/images/iParadigms_Amended_Complaint.pdf. The option afforded the plaintiffs from Desert Vista High School in Arizona was to receive a zero in the assignment, or be ineligible for literary contests. *Id.* at 6.

214. *Id.* at 6–8. The plaintiffs decried what they characterized as a contract of adhesion that they were required to sign in order to access the plagiarism detection website, and they requested enhanced statutory damages in the amount of \$150,000 for each registration. *Id.* at 9.

215. The court in essence concurred with all arguments proffered by the defendants as to the validity of the clickwrap contract. *iParadigms*, 544 F. Supp. 2d at 480–81.

Claude M. Hilton, citing the case of *Perfect 10, Inc. v. Amazon.com, Inc.*,²¹⁶ determined that iParadigms' use of the student papers was protected pursuant to the first of the four factors of fair use delineated by § 107 of the Copyright Act.²¹⁷ The court placed particular emphasis upon the "highly transformative" purpose and character of iParadigms' use of the plaintiffs' works, defined by the Supreme Court as a work that alters the original work "with new expression, meaning, or message."²¹⁸ Noting that the defendants made no use of the works' creative content beyond the limited use of comparison with other works, the court pointed to "a substantial public benefit through the network of educational institutions using Turnitin,"²¹⁹ notwithstanding its profit-making nature. Secondly, the court noted that iParadigms' use of the works does not diminish any incentive for creativity, but rather protects the creativity of the works from plagiarism by others.²²⁰ Citing *Perfect 10* again, the court noted the fact that the entire works were utilized does not necessarily negate fair use when a use is highly transformative.²²¹ Most importantly, the court held, the use is not violative of the fourth factor, the impact on the market value of the

See Young, *supra* note 183. While the court upheld the legality of the agreement, we can question the fairness of the purported assent that is conveyed pursuant to the contract, when no viable alternative is presented to a student. Given the options of a zero grade or a school transfer, the agreement may not constitute legal duress, but it does suggest an onerous, if not inequitable, means imposed by the school district in order to attain students' consent.

216. 487 F.3d 701 (9th Cir. 2007) (finding that Google's display of the thumbnail images of nude models sold by Perfect 10, which provided information and a url where one can view full size images at various sites, not all of which may have copyright permission to display those images, constituted fair use notwithstanding the fact that Perfect 10's market was impacted. The Court deemed Google's new use of thumbnails as highly transformative to the extent it did not view the other fair use factors as an obstacle to fair use).

217. *A.V. v. iParadigms, L.L.C.*, 544 F. Supp. 2d 473, 482 (E.D.Va 2008). The first factor to be considered in determining whether a particular use constitutes the affirmative defense of fair use is the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purpose. The Court found the plaintiffs "originally created and produced their works for the purpose of education and creative expression. iParadigms, through Turnitin, uses the papers for an entirely different purpose, namely to prevent plagiarism and protect the students' written works from plagiarism." *Id.* The remaining three criteria which establish the mandates of fair use under § 107 of the Copyright Act of 1976 for purposes such as commentary, education or research, include: the nature of the copyrighted work; the amount of the portion of the original work used in relation to the copyrighted work as a whole; and the effect of the use upon the market or value of the copyrighted work. For a discussion of all four fair use factors, see Latourette, *supra* note 71, at 620-23.

218. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

219. *iParadigms*, 544 F. Supp. 2d at 482.

220. *Id.* at 483.

221. *Id.* (citing *Perfect 10*, 487 F.3d at 721) ("The fact Google incorporates the entire Perfect 10 image into the search engine results does not diminish the transformative nature of Google's use").

plaintiffs' copyrighted works, as the works remain archived and are not publicly accessible.²²² Agreeing with the trial court, the Fourth Circuit Court of Appeals deemed iParadigms' use of the students' papers transformative, as it served a different function—ascertaining and deterring plagiarism—from the original work.²²³

These decisions reflect a recent trend in copyright cases that address the boundaries of the affirmative defense of fair use, affording significant emphasis to the transformative nature of the use in the context of the first of the four fair-use factors.²²⁴ Pursuant to the *iParadigms* case, fair use, “the notoriously murky legal doctrine that allows for ‘transformative’ uses of copyrighted material, whether for purposes of satire, criticism, or, in the

222. *Id.* at 483–84. In light of critiques applied to Turnitin in terms of its efficacy, one might urge, as did the plaintiffs on appeal, that Turnitin's software serves only as a transformative use if it, in fact, makes accurate assessments of existing plagiarism in a paper. Brief of Plaintiff-Appellant, *A.V. v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2008) (No. 08-1424). David Martin notes, for example, that some of the color-coded text Turnitin provides may not be “meaningfully valid.” Martin, *supra* note 139, at 150. Some of that text may constitute commonly used word groupings typically employed in a particular discipline; other color coded groupings may technically prove to be plagiarism, but can be “judged to be unintended or not meaningful, owing to the context of the student paper and the plagiarized source.” *Id.*; see also Baggaley & Spencer, *supra* note 195, at 56. The Court of Appeals said, however, the fact that Turnitin imperfectly achieves its goal did not render iParadigms' use of the students' papers as nontransformative. *A.V. v. iParadigms, LLC*, 562 F.3d 630, 639–40 (4th Cir. 2009).

223. *iParadigms*, 562 F.3d at 639.

224. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (addressing the affirmative defense of fair use with an emphasis upon the alleged infringer's transformative use and holding that a rap music group's use via parody of Roy Orbison's rock ballad, *Oh, Pretty Woman*, did not constitute infringement and that the commercial nature of the parody did not violate fair use). The U.S. Court of Appeals for the Sixth Circuit had concluded the commercial nature of the parody violated § 107's first factor in the fair use test, and had utilized too substantial a portion of the work under 107's third factor. *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1435, 1437–38 (6th Cir. 1992). In reversing, the Supreme Court stated that under the first of the four § 107 factors, “the purpose and character of the use, including whether such use is of a commercial nature,” the inquiry should focus on

whether the new work merely supersedes the objects of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning or message [T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.

Campbell, 510 U.S. at 578–79 (internal quotations omitted). See also *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701 (9th Cir. 2007); *Bill Graham Archives v. Dorling Kindersley*, 448 F.3d 605 (2d Cir. 2006); *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006). In all of the foregoing cases, the focus placed upon the extent of the transformative use appeared to give less weight to the other three fair use factors under consideration, including the amount used of the copyrighted work, the nature of the work, and the effect such subsequent use would have on the copyright holder's market.

company's [Paradigms'] view, plagiarism detection,"²²⁵ fully encompasses a profit-making venture such as Turnitin.

VI. PLAGIARISM AND COPYRIGHT

The terms "plagiarism" and "copyright" are frequently employed as substitutes for one another in a variety of contexts. Litigation that is premised on copyright statutes is frequently described by the media as constituting a lawsuit grounded in plagiarism.²²⁶ The coverage accompanying the widely noted lawsuit commenced by Michael Baigent and Richard Leigh, of *Holy Blood, Holy Grail* fame, against Random House,²²⁷ publisher of Dan Brown's *DaVinci Code*, for example, was touted as a plagiarism case, in which Brown was accused of "stealing [Baigent and Leigh's] ideas."²²⁸ It was, instead, a case of non-textual infringement in a literary work,²²⁹ in which Justice Peter Smith of the High Court of England and Wales, Justice Chancery Division held that the "architecture" of the plaintiffs' work, or the manner in which ideas are presented, was not substantially copied; hence, the assertion of copyright infringement could not be sustained.²³⁰ Even scholarly works occasionally regard plagiarism violations and copyright infringements as

225. Read, *supra* note 186, at 3.

226. See, e.g., Dalya Alberge, *Ridley Scott Denies Allegations of Plagiarism over Crusades Movie*, THE TIMES, March 31, 2005 (describing potential copyright infringement as alleged plagiarism accusations leveled against Sir Ridley Scott by James Reston, Jr., who claimed that "events, characters, scenes, descriptions and character tension" in the film *Kingdom of Heaven* were strikingly similar to Reston's narrative history entitled *Warriors of God: Richard the Lionheart and Saladin in the Third Crusade*). But see Sharon Waxman, *Historical Epic Is Focus of Copyright Dispute*, THE NEW YORK TIMES, March 28, 2005, at 1 (describing accurately the dispute between the aforementioned parties as one of potential copyright infringement).

227. *Baigent v. Random House Grp. Ltd.*, [2006] EWHC 719 (Ch).

228. Debra J. Saunders, *Da Vinci Code Trial Intrigue*, S.F. CHRON., March 16, 2006, at B9 (referring to Courtroom 61 in the Royal Court of Justice as the "home of the plagiarism trial of *Da Vinci Code* author Dan Brown"); Lynn Crosbie, *You Stole That Idea? Hardly Original*, GLOBE & MAIL, March 4, 2006, at R3 (describing the lawsuit against Dan Brown for "allegedly plagiarizing from . . . *Holy Blood, Holy Grail*" and likening such borrowing to the "acceptable impunity exhibited in Shakespeare's pilfering of Chaucer").

229. *Baigent*, [2006] EWHC 719 (Ch), [104]–[107].

230. *Id.* at [176]. Interestingly, Justice Smith alluded to the fact that a major figure in Brown's work, historian Sir Leigh Teabing, whose name represents an anagram of the names of the plaintiffs, accords *Holy Blood, Holy Grail* a "level of prominence." *Id.* at [102]. The Court further stated, however, "acknowledgement is an irrelevance from the point of view from infringement of copyright . . ." *Id.* at 28. One can speculate that an allegation of plagiarism mounted by the plaintiffs in a venue appropriate for making such a determination may have proved fruitless as well, as one might arguably contend that the noted acknowledgement Brown afforded Baigent's and Leigh's earlier work constitutes the attribution sufficient to defeat an allegation of plagiarism.

synonymous.²³¹ Courts, too, sometimes use the term “plagiarism” in a generic sense signifying copying in the context of copyright-infringement lawsuits.²³² And the phrase “music plagiarism” appears frequently with respect to copyright litigation arising out of the music industry.²³³

The reality, of course, is that plagiarism and copyright constitute two separate and distinct violations, each distinguished by its definition, its duration, its requisite intent or lack thereof, the focus of its protection, the applicability of criminal law, the relevance of fair use, and the significance of acknowledgement or attribution. An individual set of circumstances may indeed give rise to both plagiarism allegations and copyright-infringement claims,²³⁴ but the articulated standards for each ought not to be blurred.²³⁵ Plagiarism is an ethical violation, not a legal wrong; it serves to address a moral imperative of crediting one’s sources through proper citation. It involves the purposeful misrepresentation of the ideas or expression of another as one’s own, and a finding of plagiarism should demand the showing of intent, or minimally, the blatant disregard of the norms of attribution.²³⁶ Plagiarism can theoretically consist of but a few distinctive words—in contrast to copyright infringement, which requires the copying to comprise a substantial amount of the copyrighted work.

While neither constituting the basis for civil litigation nor a criminal offense, plagiarism is an ethical violation in which the academic institution serves as the primary venue for determining the merits of such

231. See, e.g., Betty Cruikshank, *Plagiarism, It’s Alive!*, 80 TEX. LIB. J. 132, 134 (asserting that plagiarism is illegal and that “anything plagiarized from those works [works protected by copyright subsequent to March 1, 1989] violates copyright laws”).

232. See, e.g., *Johnson v. Gordon, Jr.*, 409 F.3d 12, 14 (1st Cir. 2005); *Ellis v. Diffie*, 177 F.3d 503, 505 (6th Cir. 1999).

233. See Christine Lepera & Michael D. Manuelian, *Music Plagiarism: Notes on Preparing for Trial*, 17 ENT. & SPORTS L. 10 (Fall 1999); Maureen Baker, *A Note To Follow So: Have We Forgotten The Federal Rules Of Evidence In Music Plagiarism Cases?*, 65 S. CAL. L. REV. 1583 (1992); Stearns, *supra* note 78, at 521 (“The lone area in which the term [plagiarism] has developed some legal currency is in musical-copy-right-infringement.”).

234. See Thomas, *supra* note 164, at 424 (stating that the “intersection of restrictions related to plagiarism with restrictions related to copyright” frequently engenders definitional confusion: “[P]lagiarism presents a more rigorous standard, because it prohibits writers from failing to give attribution, which failure would mislead a reader into assuming that the ideas and expressions of another are actually the writer’s . . .”). “If the work of others is incorporated into and presented as one’s own work, without attribution, then both copyright and plagiarism restrictions have been violated.” *Id.* This assumes the author can demonstrate, *inter alia*, the defendant in a copyright lawsuit had access to the plaintiff’s work and that the wrongful copying bears a substantial similarity to the work of the plaintiff.

235. Howard, *supra* note 54, at 97 (“One way, in fact, that injunctions against plagiarism gain their power is by an apparent identity with copyright.”).

236. See *supra* Part II.B.

allegations.²³⁷ Plagiarism can be maintained as a legal complaint only if it can satisfy the requisites of a copyright-infringement matter.²³⁸ The ethical obligation to properly cite the ideas or expressions of another has no time constraints; hence, the need to attribute the words of Aristotle or Machiavelli remains as compelling as properly citing those of Isaac Asimov or Norman Mailer.²³⁹ Further, it matters not that ideas or expressions emerge from works in the public domain,²⁴⁰ nor that works may be afforded permission to be used pursuant to the fair-use exception to copyright law;²⁴¹ the obligation to correctly cite one's sources remains perpetual. Attribution is the ultimate defense to a charge of plagiarism, but offers no protection to a copyright-infringement claim, and while ethically pleasing, is irrelevant in that statutory context. For, despite acknowledgement of one's sources, a copyright infringement occurs if, *inter alia*, one has not obtained consent to reproduce or utilize the copyrighted matter.²⁴²

237. See *infra* Part VII.

238. Cf. Howard, *supra* note 54, at 97 (noting that while copyright is governed by legislation promulgated by the state, in contrast to plagiarism which "is a matter of local norms" governed by society, the manner in which universities and professional organizations codify regulations regarding plagiarism "gives them the appearance of law").

239. See LINDEY, *supra* note 1, at 2 ("[For] purposes of plagiarism, the material stolen need not be in copyright; for infringement, it must be.").

240. Materials that form the public domain include those whose copyright has expired, work created by the federal government, and public documents of state and local governments. See Latourette, *supra* note 71, at 633. The rationale for the public domain is to afford the public an unfettered access to the works, and to promote the further creation of original expression. See POSNER, *supra* note 28, at 12 (noting that work entered into the public domain "can be copied by anyone, without legal liability," but that same individual, free of any actionable copyright infringement claim pursuant to public domain rules, would still be deemed a plagiarist if he concealed the source of his copying).

241. See Copyright Act of 1976 § 107, 17 U.S.C. §§ 101–180 (2006) (setting forth the four criteria which establish the mandates of fair use for purposes such as commentary, education or research). See also, *infra* notes 249–50 and accompanying text (discussing the four factors delineated by the statute); Latourette, *supra* note 71, at 620. Laurie Stearns states that the fair use doctrine under which certain copying is acceptable under copyright law "is silent on the question of attribution. . . . Plagiarism would seem to be disqualified from being a fair use because its purpose is to mislead . . . ; [lack] of attribution does not automatically make plagiarism the ultimate unfair use, however." Stearns, *supra* note 78, at 530. Judge Posner asserts that the fair use defense to charges of copyright infringement should not afford the plagiarist, who does not "play fair," a sanctuary. POSNER, *supra* note 28, at 16–17. Disputing that fair use can exist when the copier is presenting a copied passage as his own work, Posner urges that the "fair user is assumed to use quotation marks and credit the source; he is not a plagiarist." *Id.*

242. Victoria Laurie describes an incident in which Dr. Felicity Haynes, an ethicist and educator at the University of Western Australia's School of Education, inadvertently committed copyright infringement for which she was fined \$4000. The

Copyright law, in contrast, which in the United States emanates from Article I, Section 8, Clause 8 of the U.S. Constitution, seeks to satisfy both the economic investment and market share of the copyright holder and the interest of the public with regard to the free exchange of ideas. It also endeavors to award “incentives to authors in order that they continue to produce intellectual and creative works.”²⁴³ Thus, for a limited time designated by Congress,²⁴⁴ the author may protect his economic interests in his intellectual property by pursuing infringement litigation against those who use his expression²⁴⁵ without permission, licensure, or payment.²⁴⁶ In exchange for this protection, upon the termination of the copyright period, the work enters the public domain in order to promote the distribution of knowledge and ideas and to stimulate further creative activity.²⁴⁷

Copyright infringement is regarded as a strict-liability offense “in that proving intent on the part of the infringing party is not a requisite to the finding of civil liability; demonstrating such intent is only deemed a prerequisite for the imposition of criminal liability.”²⁴⁸ Certain uses of copyrighted material are permitted under the fair-use exception of § 107 of the Copyright Act of 1976, such as parody, commentary, or educational purposes, if such uses satisfy the four factors delineated by the statute: namely (1) the purpose and character of the use, such as whether the use is

professor had established a website for one of her online learning classes. The website provided links to various sites, and further quoted from some of the sites, while providing acknowledgement of the utilized sources. She had overlooked the prohibition, however, contained in the copyright statement of one of the websites she used, against using the material on that website; thus her acknowledgement served to protect her against plagiarism accusations, but provided no shield to copyright infringement claims. Victoria Laurie, *Unoriginal Sins*, NATIONWIDE NEWS PTY LTD. AUSTRALIAN MAG., July 19, 2003, at 14.

243. See Latourette, *supra* note 71, at 616.

244. See Copyright Act of 1976 § 102(a), 17 U.S.C. §§ 101–180 (2006) (protecting creative works that are “fixed in any tangible medium of expression” for a period of the author’s life plus seventy years). Copyrights held by corporations endure for ninety-five years from the publication date or 120 years from the creation date, whichever is shorter. *Id.* § 302.

245. Eliminated completely from the scope of copyright protection are those ideas that have not been translated to a tangible form. *Id.* § 102(b).

246. This provides the copyright holder the ability to derive commercial benefit from the copyrighted material, reproduce and distribute copies of the work, create derivative works based on the copyrighted work, perform and display the work publicly, and determine what parties and under what circumstances others may lawfully make copies of the copyrighted work. See Latourette, *supra* note 71, at 616–17.

247. See John A. Shuler, *Distance Education, Copyrights Rights, and the New TEACH Act*, 29 J. ACAD. LIBR. 49 (2003).

248. Latourette, *supra* note 71, at 632. A requisite for criminal liability, since the first criminal provision under copyright laws was enacted in 1897, and continuing through all subsequent modifications of the relevant statutes, including the 1992 Copyright Felony Act, is that the defendant act “willfully and for purpose of commercial advantage.” *Id.* at 632 n.84.

of a commercial nature or is for nonprofit purposes, and whether such use, as determined by the courts, is deemed transformative;²⁴⁹ (2) the nature of the copyrighted work, including whether it is highly creative or more factual; (3) the substantiality of the portion of the work used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the market value of the copyrighted work.²⁵⁰ Plagiarism, on the contrary,

has no analogous exception; it can occur whenever a writer uses even a small excerpt of someone else's work. Accordingly, one who intentionally copied (and failed to attribute) a mere idea, a work that was not under copyright, or only a small excerpt of someone else's work would be guilty of plagiarism but not copyright infringement.²⁵¹

Further, to successfully mount a copyright-infringement lawsuit, the plaintiff must meet four criteria: ownership of a valid copyright,²⁵² whether the purportedly wrongful copying was, in fact, "copied from the allegedly infringed work and not independently created,"²⁵³ whether the defendant had access to the copyrighted material,²⁵⁴ and whether the copying bears substantial similarity (exact duplication is not a requirement) to the work of the plaintiff.²⁵⁵ Allegations of plagiarism, as noted by K. Matthew Dames, "do not require that the accuser prove the allegation. Plagiarism allegations do not even require that the injured party be the one who alleges wrongdoing."²⁵⁶ Indeed, in several high-profile instances, anonymous tipsters or plagiarism hunters are the parties that disclose revelations of alleged plagiarism.²⁵⁷ In short, the thrust of a plagiarism allegation is to

249. See *supra* notes 218–223 and accompanying text.

250. Latourette, *supra* note 71, at 619–23.

251. Green, *supra* note 28, at 201. See also, *supra* note 241 and accompanying text, discussing inapplicability of fair use exception to plagiarism.

252. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 548 (1985).

253. Stearns, *supra* note 78, at 524.

254. Access can be presumed, rather than proven, by virtue of a significant degree of similarity in the infringed and accused works. *Id.* (citing *Arnstein v. Porter*, 154 F.2d 464, 468–69 (2d Cir. 1946)). Access can be demonstrated in three ways: direct access, access through third parties, and the aforementioned striking similarity. See *Cottrill v. Spears*, No. 02-3646, 2003 U.S. Dist. LEXIS 8823, at *15–16 (E.D. Pa. May 22, 2003).

255. *Glover v. Austin*, 289 F. App'x 430, 431 (2d Cir. 2008) (stating that the similarities between the copyrighted work and the infringing work must be "probative of copying") (citing *Jorgensen v. Epic/Sony Records*, 351 F.3d 46, 51 (2d Cir. 2003)). See also *Well-Made Toy Mfg. Corp. v. Goffa Int'l Corp.*, 354 F.3d 112, 117 (2d Cir. 2003); *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 267 (5th Cir. 1988) and *Litchfield v. Spielberg*, 736 F.2d 1352, 1357 (9th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985).

256. Dames, *supra* note 5, at 26.

257. *Id.* ("In most cases, third parties identify potential acts of plagiarism, make public allegations, then let the public rumor mill consider the facts. The accuser is

penalize the ethical wrong encompassed in the deceptive representation of authorship²⁵⁸ as a moral affront to both the original author and to societal standards, and to castigate the accompanying lack of ethics exhibited by such conduct. In contrast, the thrust of the law related to copyright infringement is to protect property ownership and market values of the legitimate owner of the copyright. Hence, the intent or lack thereof of the infringer is irrelevant; the focus lies not on the lack of ethics of the wrongdoer, but on the economic impact infringing conduct exerts upon the copyright holder.²⁵⁹

VII. VENUES FOR PLAGIARISM DETERMINATIONS

Barring a case of plagiarism that rises to the level of copyright infringement, it is those structures comprising what one could broadly define as the academy, and not the courtroom, that provide the venues for complaints of plagiarism.²⁶⁰ The academic forums for plagiarism allegations are colleges and universities, professional journals, publishers and scholarly associations, or what one commentator has termed a “dense

never called upon to account for the veracity or falsity of his claim.”).

258. POSNER, *supra* note 28, at 17–18 (“Concealment is at the heart of plagiarism.”). Posner notes that even where one fails to acknowledge copying, no plagiarism exists if it is known that the intended readership will recognize the original source, such as evidenced in a parody or where the writer employs an allusion to an earlier work, to which the reader is expected to recognize. *Id.* at 18.

259. Green observes another distinction between copyright and plagiarism: “Copyright demands that one obtain formal permission from the copyright owner in order to copy the work. The rule against plagiarism assumes that the writer implicitly gives permission to copy the work provided that the copier make proper attribution.” Green, *supra* note 28, at 202.

260. See Gary Taubes, *Plagiarism Suit Wins; Experts Hope It Won't Set a Trend*, 268 SCI. MAY 26, 1995, at 1125, which describes a lawsuit brought by Pamela Berge, a former Cornell University epidemiologist against the University of Alabama, Birmingham (UAB) and four of its researchers, premised on the False Claims Act, 31 U.S.C. § 3729 *et seq.*, for using her dissertation work in grant proposals submitted to the National Institute of Health, without citation. Berge did attempt to resolve the issue under the UAB procedures, but two inquiries resulted in no finding of misconduct. Eschewing the other venues of the National Institute of Health and the Department of Health and Human Services' Office of Research Integrity, Berge filed a lawsuit, resulting in a very substantial settlement. The case represented the first time scientific misconduct had been addressed by a jury. Two commentators cited by Taubes expressed regret that the courtroom, rather than established mechanisms, was utilized to resolve accusations of misconduct. *Id.*; see also Roger Billings, *Plagiarism in Academia and Beyond: What Is the Role of the Courts?*, 38 U.S.F. L. REV. 391 (Spring 2004) (citing *Bajpayee v. Rothermich*, 372 N.E.2d 817 (Ohio Ct. App. 1977), as the only case found where the court recognized the tort of plagiarism as the basis for a cause of action). In *Bajpayee*, a biochemist alleged that the president and medical director of a foundation had presented the employee's ideas for arthritis treatment discoveries as his own without attribution. *Id.*

thicket of tangled jurisdictions.”²⁶¹ As noted by David Glenn, with respect to plagiarism allegations regarding faculty, each venue can impose, among others, the following sanctions: colleges and universities can deny tenure, terminate employment, or reduce salary; journals may remove articles from electronic databases, refuse to accept future articles from authors deemed plagiarists, or require the publication of a letter of apology from the plagiarist; and scholarly associations may publicize incidents of plagiarism, oust individuals from membership, or revoke licenses.²⁶² With regard to student-committed plagiarism, colleges and universities may impose a wide variety of punishments, which include: creating a new assignment, giving the student a failing grade for the plagiarized work or a failing grade for the course, placing a student on probation or suspension, ousting a student permanently or temporarily conditioned upon a showing of proper remorse and rehabilitation, deferring graduation, and rescinding formerly granted degrees.²⁶³ Glenn wryly observes that in an ideal world the various venues would work cooperatively, sharing expertise, ensuring that proceedings would remain confidential, and that the punishment for a given act of plagiarism would be applied equally to both faculty and students, but that such cooperation is rarely achieved.²⁶⁴

Peter Charles Hoffer notes that “educational institutions lead the way in investigating allegations of plagiarism,” but asserts that other societies have a duty to act in cases of plagiarism.²⁶⁵ Some suggest that it is the college or university that should play the primary role in plagiarism investigations, as it is best equipped to handle such issues, having superior resources to professional associations or journals, including counsel, and the power to obtain testimony and relevant documents.²⁶⁶ Others assert skepticism with regard to the college or university’s willingness to directly confront

261. David Glenn, *Judge or Judge Not?*, CHRON. OF HIGHER EDUC., Dec. 17, 2004, at A16. Glenn opines that the result of the “tangled jurisdictions, misunderstandings, rumors, and lawsuits” is that victims of plagiarism are uncertain as to “where—or whether—to bring their complaints.” *Id.* Another consequence is that the alleged plagiarizers may be uncertain as to when an investigation has attained closure. *See, e.g.*, Bartlett, *supra* note 23 (describing how the press that published Reverend William W. Meissner’s work, *THE ETHICAL DIMENSION OF PSYCHOANALYSIS: A DIALOGUE*, concluded that accusations of plagiarism were “without merit”; in contrast, the Boston Psychoanalytic Society found that Meissner’s book contained passages “that excessively paraphrased or borrowed ideas” from Ernest Wallwork’s book *PSYCHOANALYSIS AND ETHICS*).

262. David Glenn, *The Price of Plagiarism*, CHRON. OF HIGHER EDUC., Dec. 17, 2004, at A17.

263. *See infra* Part X for a discussion of student plagiarism and the penalties applied to such malfeasors.

264. Glenn, *supra* note 261, at A16.

265. Peter Charles Hoffer, *Reflections on Plagiarism—Part 2: ‘The Object of Trials,’* PERSPECTIVES, March 2004.

266. Glenn, *supra* note 261, at A16.

plagiarism issues.²⁶⁷ Thomas Mallon, whose book *Stolen Words* excoriates both plagiarists and those who find such conduct defensible, stated, “[A]cademics remain curiously willing to vaporize the whole phenomenon of plagiarism in a cloud of French theory.”²⁶⁸ Strongly contesting that the academy lacks the fortitude to vigorously pursue plagiarism claims is Roger Billings, who states: “If cases involving plagiarism are any guide as to the veracity of [Mallon’s] statement, Mallon is mistaken. Careers are ruined because plagiarism is fiercely policed in universities as if it is one of the seven deadly sins.”²⁶⁹

Carla Rahn Phillips, former head of the professional division of the American Historical Association, contends that professional associations must offer a viable avenue of recourse for those who are victims of plagiarism.²⁷⁰ Both Phillips and Marcel C. LaFollette, author of *Stealing Into Print: Fraud, Plagiarism and Misconduct in Scientific Publishing*, expressed disappointment that the American Historical Association in 2003 decided to “abando[n] its important duty”²⁷¹ and relinquish its role in adjudicating plagiarism, when it asserted that it lacked “the resources and the clout” to effectively police its membership and imposes sanctions.²⁷² Yet Ron Robin, author of *Scandals and Scoundrels: Seven Cases That Shook The Academy*, disputes the viability of academic venues for plagiarism determinations, attributing the surge of charges of academic deviancy to the “demise of conventional scholarly . . . mechanisms” to

267. *Id.* Glenn quotes Professor Nereu F. Kock, an associate professor of information systems at Texas A&M International University, as expressing skepticism regarding the willingness of some colleges and universities to address issues of plagiarism. When he discovered his own work had been plagiarized in a journal article, he found that neither the journal editors nor the plagiarizer’s university would conduct a formal investigation. *Id.*

268. THOMAS MALLON, *Afterword to the New Edition*, in *STOLEN WORDS* 242–43 (Mariner Books 2001) (1989).

269. Billings, *supra* note 260, at 391. Billings notes that “university administrators drum both student and teacher plagiarizers out of the academy.” *Id.*

270. Thomas Bartlett, *Historical Association Will No Longer Investigate Allegations of Wrongdoing*, *CHRON. OF HIGHER ED.*, May 23, 2003, at A12.

271. Glenn, *supra* note 261, at A18. See also JON WIENER, *HISTORIANS IN TROUBLE* 9 (2005) (observing that the abandonment by the American Historical Association of its procedures for addressing plagiarism and other issues of professional misconduct “gives the media, and the forces that shape them, even more power to define the issues and adjudicate scholarly controversies, to honor scholars who advance their partisan political agendas and punish those who challenge those agendas”).

272. Glenn, *supra* note 261, at A16. See also, HOFFER, *supra* note 29, at 135–39, (decrying AHA’s decision to end the Professional Division’s responsibility for adjudicating misconduct as a retreat from professional responsibility). It should be noted that other academic organizations, such as the American Psychological Association, American Sociological Association, and American Political Science Association, have not relinquished the mission of ruling on plagiarism complaints. Bartlett, *supra* note 270.

handle such matters.²⁷³

With respect to the role of journals serving as venues for plagiarism allegations, Michael Grossberg, editor of the *American Historical Review*, opines that editors have a “gate-keeping role” to seek evidence of plagiarism, to expose scholarly deception, and not to ignore the protestations of a victimized author.²⁷⁴ While some regard the consequences of a finding of plagiarism by a journal rather inconsequential—an article is withdrawn or is reprinted with an explanatory statement, or a written apology is accepted²⁷⁵—Grossberg believes that the attendant “publicity and open debate”²⁷⁶ best address ethical problems such as plagiarism.

All venues evince a concern with potential lawsuits that may arise from charges of plagiarism.²⁷⁷ One commentator notes that “[f]ear of libel suits hovers over the entire subject of plagiarism because of the calamitous consequences of calling someone a plagiarist.”²⁷⁸ Litigation emanating from plagiarism cases has been grounded in not only defamation,²⁷⁹ but in asserted violations of procedural due process,²⁸⁰ breach of contract,²⁸¹

273. ROBIN, *supra* note 146, at 228. Robin also contends that with the erasure of boundaries between academia and the public, outing has become “a cottage industry” and “adjudication of deviance is now part of the public domain.” *Id.* at 4, 36.

274. Michael Grossberg, *Plagiarism and Professional Ethics—A Journal Editor’s View*, 90 J. OF AM. HIST. 1333, 1339 (2004). The victimized author to whom Grossberg refers is Professor Stephen Nissenbaum of the University of Massachusetts at Amherst. The facts surrounding the purported plagiarism by Professor Jayme Sokolow of Texas Tech in his book *Eros and Modernization: Sylvester Graham, Health Reform, and the Origins of Victorian Sexuality in America*, of the dissertation of Nissenbaum (which subsequently appeared as the book *Sex, Diet, and Debility in Jacksonian America*) are addressed in depth by Thomas Mallon. MALLON, *supra* note 35, at 144–93. In Mallon’s opinion, notwithstanding the plagiarism, which he and others regarded as blatant, both the university venue and the American Historical Association failed to take deservedly strong measures against Sokolow. *Id.* at 151, 178.

275. Glenn, *supra* note 261. In the Sokolow case, the *American Historical Review* and the *Journal of American History* published a letter from Sokolow wherein he admitted to insufficient documentation, but not to plagiarism. See MALLON, *supra* note 35, at 183.

276. Grossberg, *supra* note 274, at 1339. Grossberg adds that charges of plagiarism “should be addressed in the court of professional opinion, not the court of law.” *Id.*

277. See Ralph D. Mawdsley and J. Joy Cumming, *Plagiarism Litigation Trends in the USA and Australia*, 20 EDUC. & THE LAW 209 (2008) (reviewing the areas of litigation that have arisen with respect to plagiarism).

278. Grossberg, *supra* note 274, at 1338.

279. See, e.g., *Tacka v. Georgetown Univ.*, 193 F. Supp. 2d 43 (D.D.C. 2001); *Haugh v. Bullis School, Inc.*, No. HAR 88-1172, 1989 U.S. Dist. LEXIS 4648 (D. Md. April 25, 1989); *Slack v. Stream*, 988 So.2d 516 (Ala. 2008); *Abdelsayed v. Narumanchi*, 668 A.2d 378 (Conn. 1995).

280. See, e.g., *Gunasekera v. Irwin*, 551 F.3d 461 (6th Cir. 2009); *In Re Kalinsky v. State Univ. of N.Y. at Binghamton*, 624 N.Y.S.2d 679 (1995).

281. *Tedeschi v. Wagner Coll.*, 417 N.Y.S.2d 521 (N.Y. App. Div. 1979).

negligence,²⁸² promissory estoppel and intentional infliction of emotional distress,²⁸³ and First Amendment protected speech.²⁸⁴ In an unusual recent case, a student expelled for plagiarism by Central Connecticut State University in 2006 achieved vindication in the courts by successfully bringing a civil suit against the other student involved in the incident, who had impliedly accused him of misappropriating her work.²⁸⁵ Citing evidence, which included computer-expert testimony regarding dates of submissions of the contested papers, the Superior Court judge exonerated the student of the charge and awarded damages permitting him to recoup monies spent pursuing his case.²⁸⁶ Journals and scholarly associations may lack financial resources to defend such lawsuits; colleges and universities certainly do not embrace the attendant inconveniences, costs incurred, and publicity.²⁸⁷

Barring an aspect of a student plagiarism case that renders it newsworthy, invoking media attention and public scrutiny (as where a university student's published work by a notable press is deemed a plagiarizing text;²⁸⁸ or a professor sets forth the names of students found culpable of plagiarism on a public blog;²⁸⁹ or a student's lawsuit arising from a plagiarism case attracts attention;²⁹⁰ or a university-wide plagiarism

282. Caroline Zaayer, *Caught 'Accidentally' Stealing, The Story of a Small-Town Reporter, Fired for Plagiarism, Who Got His Job Back*, 26 AM. JOURNALISM REV. 17 (2005) (employer neglected citation training).

283. *Matikas v. Univ. of Dayton*, 788 N.E.3d 1108 (Ohio Ct. App. 2003).

284. *Feldman v. Bahn*, 12 F.3d 730 (7th Cir. 1993).

285. Loretta Waldman, *Judge Vindicates Expelled CCSU 'Cheater,'* THE HARTFORD COURANT, Dec. 5, 2008, available at www.courant.com/news/education/hc-copykid1205.artdec05,0,1850173.story (last visited Oct. 12, 2010) [hereinafter Waldman, *Judge Vindicates*]. In this case, Professor Ronald Moss, discerning striking parallels in the papers submitted by the alleged plagiarist and another student, concluded that Matthew Coster, who was subsequently expelled, had plagiarized from the work of Cristina Duquette, whom he regarded as a superior student. He testified, according to news reports, that he "never inquired whether it was possible to accuse both . . . of plagiarizing each other's work." See Loretta Waldman, *Professor Testifies In Term Paper Trial*, THE HARTFORD COURANT, Nov. 20, 2008, at A1.

286. Waldman, *Judge Vindicates*, *supra* note 285. Notably, the student's family has not ruled out a suit against the university with respect to its handling of the matter. *Id.* For a fuller discussion of the facts of this case, see *infra* notes 404-06.

287. Glenn, *supra* note 261.

288. See Keever, *supra* note 17 and accompanying text describing the scandal that erupted, garnering wide media coverage, at Harvard University when then sophomore Kaavya Viswanathan's debut novel was pulled by publisher Little Brown and Company amidst allegations that the work plagiarized that of another author.

289. See Scott Jaschik, *Vigilante Justice on Plagiarism*, INSIDE HIGHER EDUC., Nov. 13, 2008, available at <http://www.insidehighered.com/news/2008/11/13/tamiu> (last visited Nov. 13, 2008) (describing the actions of a Texas A&M International University professor who publicly humiliated alleged student plagiarists).

290. See Loretta Waldman, *Lawsuit Is Latest Chapter In Accusation Of Cheating At CCSU*, THE HARTFORD COURANT, Nov. 19, 2008, available at <http://www.>

scandal erupts²⁹¹), the college and university venues generally address plagiarism cases in a decidedly private fashion. The primary concerns for the college or university venue are as follows: that it have in place an academic policy and procedures regarding all forms of academic dishonesty;²⁹² that it clearly define plagiarism²⁹³ and that the definition clarify whether intent is required;²⁹⁴ that it adhere to the standards enunciated in the policy;²⁹⁵ and that pursuant to the landmark decision of *Dixon v. Alabama State Board of Education*,²⁹⁶ the policy comport with the

courant.com/news/education/hc-copykid1119.artnov19,0,6233166.story (Jan. 7, 2009) (describing the lawsuit brought by an expelled student from Central Connecticut State University against the individual student whose paper he was charged with plagiarizing).

291. See Paula Wasley, *Ohio U. Revokes Degree for Plagiarism*, CHRON. OF HIGHER EDUC., Apr. 6, 2007, at 15 (referencing the university's continuing investigation reviewing twenty years of master's theses at its Russ College of Engineering and Technology for evidence of plagiarism). See Wasley, *supra* note 8, for a further discussion of the plagiarism scandal at the university.

292. See Ralph D. Mawdsley, *Plagiarism Problems in Higher Education*, 13 J.C. & U.L. 65, 66 (1986) (suggesting that while a simple description of the plagiarism definition might suffice, that "will do very little to inform students what kinds of acts are proscribed"). Mawdsley consequently advocates a more detailed statement of plagiarism accompanied by specific examples of student work deemed to be plagiarism. *Id.*

293. It is suggested that the adoption by colleges and universities of a common definition of plagiarism, including a requisite intent or gross indifference to the standards of attribution, would help to eliminate the disparities that exist in both procedures afforded and penalties applied to students and faculty charged with plagiarism. See *supra* Part II; see also Glenn, *supra* note 261 ("Every institution ought to adopt a common definition of plagiarism.") (quoting Steven Olswang, interim chancellor of the University of Washington at Tacoma).

294. See Mawdsley, *supra* note 292, at 69 (noting that if a college or university employs a "collage of confusing statements which can serve to contradict an institution's claim that intent should not be a factor in determining plagiarism," it may indeed find that a court will construe plagiarism as defined in the institutions' academic code as mandating the requisite of intent).

295. *Id.* at 82 (citing *Crook v. Baker*, 584 F. Supp. 1531 (E.D. Mich. 1984), as an example of an institution, in this case the University of Michigan, which failed to adhere to its articulated procedures in cases of academic dishonesty). Michigan committed the following errors prior to its decision to rescind a graduate degree: failed to provide a panel comprised of both faculty and students; produced unlisted witnesses at the hearing; declared that the burden of proof lies with the student to defend against the charges and not with the department to sustain a charge; and ex parte evidence was submitted subsequent to the hearing. *Crook*, 584 F. Supp. at 1544-47. The lower court, in nullifying the rescission, described the university's procedures thusly: "The inquisitorial, circus-like free-for-all which constituted plaintiff's 'hearing,' as a whole, resulted in a great risk of erroneous deprivation . . ." *Id.* at 1556. Upon appeal, however, the Court of Appeals for the Sixth Circuit vacated the trial court's order, finding that the assertion of a violation of due process had not been sustained. *Crook v. Baker*, 813 F.2d 88, 98-99 (6th Cir. 1987).

296. 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961). The court held that students who had engaged in disciplinary issues (conducting an off campus

due process requirements of the Fourteenth Amendment, it if is a public institution, or with fundamentally fair procedures, if it is a private university.²⁹⁷ At public institutions, where continued enrollment is deemed a protected property interest by federal courts,²⁹⁸ constitutional safeguards of due process protect students from arbitrary state action. At private universities, where constitutional protections do not apply, students have employed a variety of causes of action, including contract law and the law of association, to achieve some measure of non-arbitrary treatment.²⁹⁹

When the college or university serves as the forum for determinations of student plagiarism, the institution is rendered largely judgment-proof in that students will rarely emerge victorious in litigation arising from the

demonstration) were deprived of constitutional due process by not being afforded notice of the charges against them and an opportunity for a hearing. *Id.* at 158–59. In 1975 the U.S. Supreme Court sanctioned the notion that students had property and liberty interests which were entitled to due process protections in disciplinary actions undertaken by public institutions. *Goss v. Lopez*, 419 U.S. 565 (1975); *see also* Audrey Wolfson Latourette and Robert D. King, *Judicial Intervention in the Student University Relationship: Due Process and Contract Theories*, 65 U. DET. L. REV. 199, 206 (1988). It should be noted that the U.S. Supreme Court did not unequivocally expand due process constitutional protections to the purely academic arena. In *Board of Curators of the University of Missouri v. Horowitz*, while the Court did not specifically preclude the applicability of due process protections in the context of academic decisions, it stated that “far less procedural requirements in the case of an academic dismissal” are required. 435 U.S. 78, 86 (1978).

297. *See* Latourette & King, *supra* note 296, at 248 (“In the absence of state action, it is well recognized that a private institution is not obligated to comport with the constitutional mandates of *Dixon v. Alabama State Board of Education* and *Goss v. Lopez*, which require a hearing in disciplinary dismissal proceedings. Further, in the absence of a contractual right to a disciplinary hearing, the private institution’s decision will be upheld if it is not arbitrary or capricious and if it is premised on good faith and reasonable grounds.”). As public colleges and universities are regarded as agents of the state, their decisions in matters of disciplinary treatment of students are deemed “state action” so as to invoke the application of the Fourteenth Amendment’s Due Process Clause. *See Goss*, 419 U.S. at 574–75; *Dixon*, 294 F.2d. at 158; *see also* Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide To Fair Process For The University Student*, 99 COLUM. L. REV. 289, 291 (1999) (“Courts have refused to find ‘state action’ . . . in the case of private schools, even though most receive heavy financial aid and other forms of government support.”) (citing *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982)). Further, the U.S. Supreme Court stated thusly: “Embedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny under the Amendment’s Due Process Clause, and private conduct, against which the Amendment affords no shield, *no matter how unfair that conduct may be.*” *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988) (emphasis added).

298. In *Horowitz*, the U.S. Supreme Court assumed, without addressing the issue in specificity, that the student at the public college or university has a liberty or property interest in his or her education. 435 U.S. 78 (1978). Subsequent to the *Horowitz* decision, federal courts have followed the Court’s lead and assumed the existence of such interests. *See, e.g., Schuler v. Univ. of Minn.*, 788 F.2d 510, 513–14 (8th Cir. 1986); *Lewin v. Med. Coll. of Hampton Rds.*, 910 F. Supp. 1161, 1164 (E.D. Va. 1996).

299. *Berger & Berger, supra* note 297, at 291.

plagiarism charge. The view of the student-university relationship as one of *in loco parentis*,³⁰⁰ affording the college or university nearly unfettered discretion to educate, assess, and reprimand its charges, has long been discarded. Nevertheless, the long-held traditions of deference to academic expertise, judgment, and autonomy continue to dominate judicial thinking on the student-university relationship.³⁰¹ Academic decisions, such as deciding what grade a student's work warrants, will not be overridden absent evidence of bad faith or arbitrary action.³⁰² In contrast, disciplinary matters such as plagiarism or cheating, which potentially implicate serious and career-altering penalties, invite greater judicial scrutiny pursuant to courts' interpretation of the line of Supreme Court cases addressing fairness in the public-university academic and disciplinary contexts.³⁰³ In

300. *In loco parentis* enabled institutions of higher education to exercise the authority and discretion of a parent, concerning the physical and moral welfare of the students. See Latourette & King, *supra* note 296, at 201 n.5 (citing *Gott v. Berea Coll.*, 161 S.W. 204 (Ky. 1913)).

301. See Thomas A. Schweitzer, 'Academic Challenge' Cases: Should Judicial Review Extend to Academic Evaluations of Students?, 41 AM. U. L. REV. 267 (1992). Schweitzer states, "The purest example of the professor's academic role is the grading of student examinations, papers and class performances. Justice Rehnquist in *Horowitz* was on solid ground when he stated that a professor's decision as to 'the proper grade for a student in his course' requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial decision-making." *Id.* at 364, (citing *Horowitz*, 435 U.S. at 90).

302. See Latourette & King, *supra* note 296, at 224.

303. For a full discussion of the guidelines articulated by the U.S. Supreme Court in what Fernand N. Dutile references as "the big four," with respect to public institutional decision-making in both the academic and the disciplinary contexts, see Dutile, *Students and Due Process in Higher Education: Of Interests and Procedures*, 2 FLA. COASTAL L. J. 243, 264 (2001), (analyzing the disciplinary cases of *Goss v. Lopez*, 419 U.S. 565 (1975) and *Ingraham v. Wright*, 430 U.S. 651 (1977) and the academic cases of *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78 (1978) and *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985)). Commentators concur that disciplinary matters, which require due process protections that are not a requisite in the academic context, include acts such as cheating and plagiarism, as distinguished from poor grades. See Mawdsley, *supra* note 292, at 77 (noting that the federal district court in *Jaska v. Regents of University of Michigan*, 597 F. Supp. 1245, 1248 (E.D. Mich. 1984), interpreted the Court's ruling in *Horowitz* to "indicate that 'cheating should be treated as a disciplinary matter,' as opposed to academic"). The court in *Jaska* rationalized that "dismissal for cheating requires greater procedural protection than academic dismissals since the former are more stigmatizing than the latter, and may have a greater impact on a student's future." 597 F. Supp. at 1248 n.2. See also *Kalinsky v. State Univ. of N.Y. at Binghamton*, 557 N.Y.S.2d 577, 578 (N.Y. App. Div. 1990) (where the court regarded a student charged with plagiarism in a state university entitled to due process in accordance with *Dixon*, deeming the matter a disciplinary proceeding). Berger and Berger note that in numerous cases subsequent to *Dixon* and *Goss*, wherein students have challenged the due process afforded them, some courts, particularly where the penalty becomes "more burdensome," mandate due process procedures in public institutions which exceed that set forth in *Dixon*. *Supra* note 297, at 308-09. See, e.g., *Marin v. Univ. of Puerto Rico*, 377 F. Supp. 613 (P.R. Cir. 1974) (additionally mandating transcribed proceedings and the assistance of

accordance with those decisions,³⁰⁴ and as interpreted by the courts, the following procedural rights may be applicable to cases wherein public colleges and universities decide disciplinary matters such as the academic dishonesty representative of plagiarism: notice, right to a hearing, cross-examination of witnesses, availability of an appeal, and right to counsel.³⁰⁵ Contract law may serve as a vehicle to infuse the private college or university with concepts of common law due process.³⁰⁶ Curtis J. and

retained counsel). The commentators note that, pursuant to a survey they conducted of various educational institutions, "*Marin's* roster of required safeguards not only substantially exceeded *Dixon's*, but also . . . went well beyond what many public institutions currently afford the accused student," with more than 40% denying assistance by professional counsel and less than half providing for a transcript of the proceedings. Berger & Berger, *supra* note 297, at 309.

304. See Dutile, *supra* note 303, at 244–45. Dutile emphasizes the "simplicity of the hearing required" in disciplinary cases: as articulated by the Court, "*some* kind of notice" and "*some* kind of hearing" must be afforded the student. *Id.* at 245 (emphasis in original). He observes that while *Goss* does not require "the *production* of the evidence against the student; opportunity for cross-examination; legal or other representation for the student; transcript; or appeal," some of these elements "might become constitutionally requisite in cases threatening more serious consequences, for example suspensions for more than ten days or expulsions." *Id.* at 245 (citing *Goss*, 419 U.S. at 584) (emphasis in original).

305. See Mawdsley, *supra* note 292, at 78. Berger and Berger state that the results of their survey of more than two hundred colleges and universities (with a seventy-five percent return rate of response) indicated that while the "era of the wholly arbitrary dismissal has passed," with many public institutions affording the accused student "a hearing before an impartial body and cross-examination of adverse witnesses," "over 40% of public schools deny assistance by professional counsel, and fewer than half provide for a transcript of the proceedings." *Supra* note 297, at 294, 309 (referencing questions in their survey submitted to institutions of higher education). See also Dutile, *supra* note 303, at 265–82 for an in depth discussion of the requisite due process to be afforded students in public institutions with respect to disciplinary matters. Dutile notes that such demands of procedural protections are flexible, depending upon "1) the nature of the interest protected; 2) the danger of error and the benefit of additional or other procedures; and 3) the burden on the government such procedures would present." *Id.* at 265 (citing *Ingraham v. Wright*, 430 U.S. 651, 676–78, 682 (1977)). Dutile notes that while the due process requirements for disciplinary cases exceed those mandated for academic cases, they do not compel the procedural safeguards attendant to criminal trials. *Id.* at 267.

306. See Latourette & King, *supra* note 296, at 255 n.271 (citing *Abbariao v. Hamline Univ. Sch. of Law*, 258 N.W.2d 108, 113 (Minn. 1977) ("[T]he requirements imposed by the common law on private universities parallel those imposed by the due process clause on public universities.")). See also Hazel Glenn Beh, *Student Versus University: The University's Implied Obligations of Good Faith and Fair Dealing*, 59 MD. L. REV. 183, 197 (2000) (advocating that, given a heightened consumerism on the part of students, contract law might be employed in both the private and public college and university context to ensure students are accorded adequate protection in academic and disciplinary cases). See also Mawdsley, *supra* note 292, at 73 (noting that "*Corso* cannot be read to suggest that there is some minimal form of due process required in private schools before a student can be expelled for academic dishonesty") (citing *Corso v. Creighton Univ.*, 731 F.2d 529 (8th Cir. 1984) (court enforced the allegedly cheating student's right to a hearing before a university committee pursuant to the

Vivian Berger argue that private-college and -university students should receive protection equal to the constitutional due process afforded public-college and -university students in academic disciplinary cases, and that the implied covenant of good faith and fair dealing is the “contractual equivalent of due process.”³⁰⁷ Fairness, in their view, is achieved through a “calibrated approach” wherein required procedural safeguards would comport with the nature and gravity of the offense.³⁰⁸ The fact remains that findings of plagiarism can stigmatize the offender and trigger severe punishments such as suspension, expulsion, and permanent marks on one’s record that can reduce one’s mobility regarding future education, training, or career aspirations. Given the potential dire consequences to the offender, particularly in the case of an unknowing or careless culprit devoid of intent to defraud, the need for due process or its equivalent in the college and university venue is paramount.

VIII. CONSEQUENCES TO STUDENTS VERSUS FACULTY

Perceived disparities in treatment accorded faculty plagiarists as

terms of the university’s stated contractual policies)). *See also* *Napolitano v. Trs. of Princeton Univ.*, 453 A.2d 279 (N.J. Super. Ct. Ch. Div. 1982) (determining whether the penalty imposed by Princeton, a one year withholding of her degree, breached its contract with the student). The *Napolitano* court stated, “the legal standard against which the court must measure the university’s conduct is that of good faith and fair dealing.” *Id.* at 283. Further, the court specifically addressed the right to counsel in the private university context, stating “were the court to enforce a right to counsel in such a situation, the academic community’s control over its own affairs would be unjustifiably limited.” *Id.* at 282. Noteworthy factors contributing to this decision included: Princeton was not represented by counsel at the hearing; the university permitted the student to choose an advisor from the Princeton University community; the academic nature of the dispute; and the small likelihood that the punishment for plagiarism would entail any forfeiture such as expulsion. *Id.*

307. Berger & Berger, *supra* note 297, at 292. The authors proffer their primary thesis thusly:

A registered student has a legally protected interest in his college education, and the level of protection should not rise or fall because the student attends a private rather than a public school Contract law . . . becomes the bulwark for the private school student, and there is no reason why that protection should ordinarily be less than a public school student receives under the federal Constitution.

Id. at 291.

308. *Id.* at 292–93. The authors state that some due process rights, such as opportunity to be heard, are deemed so fundamental that they “inure to every charge”; as charges pose serious consequences that threaten to stain a student’s reputation, or compel expulsion or long term suspension, “greater procedural safeguards should apply.” *Id.* Further, Berger and Berger urge that academic wrongdoing such as “plagiarism, cheating, collusion with students to engage in academic dishonesty, and falsifying transcripts and resumes,” prompts serious punishment, a reality that gives urgency to the need for fair process. *Id.* at 293–94. The authors conclude that “in some critical ways, other students quite consistently receive fewer safeguards than fair process demands.” *Id.*

compared to that experienced by students is a theme strongly resounding in the literature. Charles McGrath, former editor of *The New York Times Book Review*, comments that a “moral component” is evident when a student plagiarizes a paper submission, but when a Doris Kearns Goodwin commits such a transgression, it “seems like an aesthetic offense, a crime against taste.”³⁰⁹ Judge Posner contends that a double standard for plagiarism exists, with faculty receiving fewer negative repercussions than do students.³¹⁰ Lisa G. Lerman, a Professor of Law at the Columbus School of Law at Catholic University, suggests that the “indefensible double standard” that exists in law schools with respect to disparate treatment of faculty and students is particularly egregious.³¹¹ She notes that plagiarism, a “capital offense” for law students, whether bred of intent or a “product of ineptitude or of an educational deficit,” can result in suspension and/or denial of admission to the bar.³¹² In contrast, she asserts that law professors rarely acknowledge, in more than a perfunctory manner, the student-authored research that forms the basis of an article or book published under the name of the professor.³¹³

309. McGrath, *supra* note 10, at A33. McGrath argues this absence of moral condemnation as applied to public figures is reminiscent of the manner in which the Romantics viewed the issue of plagiarism. *Id.* (citing MAZZEO, *supra* note 62).

310. POSNER, *supra* note 28, at 90. He argues that “[t]he resulting double standard outrages students and breeds warranted cynicism toward academics’ pretensions of adhering to a moral standard higher than that of the commercial marketplace.” *Id.* Concurring that professors are “typically let off too easily,” Professor Gary S. Becker of the University of Chicago argues that the punishment meted out for plagiarists should be “related to the magnitude of the gain . . . and the extent of knowledge about whether it is illicit,” deeming professors more culpable in both respects. Posting of Gary Becker to The Becker-Posner Blog, <http://www.becker-posner-blog.com/2005/04/comment-on-plagiarism-becker.html> (April 24, 2005, 19:43 EST).

311. Lerman, *supra* note 164, at 488. Lerman states “we apply the guillotine to a sampling of inexperienced writers for incorporating the work of another into a paper and not using quotation marks or footnotes . . . but we turn a blind eye to the very same conduct by law professors. . . . The fairer choice would be to try to educate the students and save the guillotine for dishonest or predatory professors.” *Id.*

312. *Id.* at 467–68. Lerman suggests the double standard be reduced by not charging students with plagiarism absent a showing of deliberate deception. *Id.* at 488.

313. *Id.* at 472, 469, 471. Lerman analogizes admission to the bar as “walking through a looking-glass. On the one side, plagiarism is considered to be the most egregious variety of dishonesty. On the other side, the use of the words and ideas of others without attribution is not regarded as raising any ethical concern.” *Id.* at 468. See also *Fed. Intermediate Credit Bank of Louisville v. Ky. Bar Assoc.*, 540 S.W.2d 14, 16, n.2 (Ky. 1976) (“Legal instruments are widely plagiarized, of course. We see no impropriety in one lawyer’s adopting another’s work, thus becoming the ‘drafter’ in the sense that he accepts responsibility for it”). See also K.K. DuVivier, *Nothing New Under The Sun—Plagiarism in Practice*, 32 COLO. LAW. 53 (2003) (urging that the legal profession is “built on borrowing” for purposes of consistency and efficiency, and absent fraudulent intent, such borrowing of ideas and language does not constitute unethical practice). See also *In re Hinden*, 654 A.2d 864 (D.C. 1995) (attorney was publicly censured for authoring a fifty-six page article that copied, without attribution,

The contemporary high-profile instances of professorial plagiarism emanating from Harvard University have served both to highlight perceived student/faculty disparities and to engender much critical commentary, particularly with regard to the viability of the tendered defenses of Doris Kearns Goodwin, a former member of Harvard's governing Board of Overseers and former Harvard history professor, and three law professors, Alan Dershowitz, Laurence Tribe, and Charles Ogletree, if such justifications for plagiarism had been offered by students.³¹⁴ Decoo asserts that "the higher the rank and the academic prestige, the less credible an accusation of misconduct. . . . Whether the allegations are true or not . . . an army of supporters will vouch for his or her integrity"³¹⁵ Sara Rimer notes that the defense to plagiarism raised

approximately twenty-three pages from another author's article); Iowa Supreme Court Bd. of Prof'l Ethics v. Lane, 642 N.W.2d 296 (Iowa 2002) (attorney William J. Lane was suspended for six months for plagiarizing verbatim eighteen pages of the legal part of his brief from a published treatise, and for his deception in requesting compensation premised on the eighty hours he purportedly spent in preparing the brief); In re Steinberg, 620 N.Y.S.2d 345 (N.Y. App. Div. 1994) (attorney received public censure for fraudulently submitting writing samples, necessary for a promotion, that were in fact authored by other attorneys).

314. See Editorial, *The Consequence of Plagiarism*, THE HARVARD CRIMSON, March 11, 2002, available at <http://www.thecrimson.com/article.aspx?ref=180483> (asserting that Goodwin's "gross negligence" in failing to attribute many sources warrants her withdrawal as a Harvard University Overseer, in light of the fact that pursuant to Harvard College policy, any letter of recommendation for students dismissed for plagiarism must report that the student had been required to withdraw for academic dishonesty). The author argued, "With this policy, it is clear that the College does not think that students who have committed plagiarism should be able to proceed, unaffected, with their career goals. Why then, should an adult who is more experienced, much less a professional historian, continue in her position in the University without consequence?" *Id.* For a discussion of the plagiarism allegations leveled against the cited Harvard scholar, see *supra* note 12.

315. DECOO, *supra* note 72, at 14; see also, Laurence H. Tribe, Op-Ed, *Misjudging Doris Kearns Goodwin*, THE HARVARD CRIMSON, March 18, 2002, available at <http://www.thecrimson.com/article.aspx?ref=180631> (noting that the author "was sad to see how eagerly these bright young people piled on to heap self-righteous condemnation on a scholar whose too-close-paraphrasing of a few passages even the Crimson editors had to acknowledge was 'unintentional'"). While recognizing that Goodwin erred in a fashion "no scholar should make," Tribe deemed the students' "lack of any real sense of proportion or, for that matter, much sense of decency" inappropriate for a scholar of Goodwin's achievement and integrity. *Id.* Kurt Andersen scoffs that the three "law-school superstar professors" have emerged unpunished and unscathed. Anderson, *supra* note 145, at 28. Joseph Bottum queries whether "it is something in the water" in Cambridge prompting revelations of professorial plagiarism, exhibiting disdain for the "nest of unpunished plagiarists" who "solemnly war[n] their students about the penalties for plagiarism." Bottum, *supra* note 82. Posner comments thusly with regard to the professorial incidents of plagiarism at Harvard:

Newspaper readers might think plagiarism a Harvard specialty. . . . One doubts that plagiarism is actually more common at Harvard than elsewhere. It is simply more conspicuous. Scandal at the nation's most famous university

by both Tribe and Ogletree—that of unintentionally misusing sources—would not be recognized as cognizable for students pursuant to Harvard University’s promulgations on plagiarism.³¹⁶ *The Harvard Crimson* noted the transgressions of Ogletree would likely have prompted expulsion for a Harvard undergraduate, and that his case revealed the “ludicrous double standard” and “glaring disparity” in the university’s application of plagiarism policies as applied to faculty and students.³¹⁷ One can argue that all scholars and academics, fully cognizant of plagiarism and the norms of attribution, should be held to strict standards of compliance if their plagiarism is deemed egregious. At minimum, it is advocated that students at every level should be given equal treatment to that extended to professors, and that if justifications related to time pressures, careless use of sources, and, particularly in this author’s view, lack of intent, are deemed credible defenses for the professoriate, so, too, should they serve as viable defenses securing comparable safe passages for college and university students.

Judy Anderson contends as well that faculty do not pay a high price for committing plagiarism, as “researchers caught plagiarizing are frequently given the option to leave the institution quietly.”³¹⁸ Yet she observes that Dr. Kenneth L. Melmon of Stanford University was compelled to step down as Chairman of the Department of Medicine upon the discovery that one-fourth of a textbook chapter he authored arose from another source.³¹⁹ Paula Wasley sets forth the serious repercussions incurred by both students and faculty who were embroiled in a plagiarism scandal at Ohio University, wherein recipients of graduate engineering degrees were given the options

gratifies the natural human delight at discovering that giants, including giant institutions, have feet of clay.

POSNER, *supra* note 28, at 6–7.

316. Rimer, *supra* note 14. Rimer notes that allegations of plagiarism regarding Tribe and Ogletree emerged from tips proffered by two anonymous law professors. Students found guilty of plagiarism could be required to withdraw from the university for minimally two semesters, losing credit for all coursework and monies expended. *Id.*

317. Editorial, *What Academia Is Hiding*, THE HARVARD CRIMSON, Sept. 13, 2004, available at <http://www.thecrimson.com/article.aspx?ref=503313>. The authors noted that the university’s “daunting, zero-tolerance discipline policy,” which applies to students charged with plagiarism, whether inadvertent or not, “does not extend to members of Harvard’s Faculty.” *Id.* The editorial concluded, “If Harvard is not willing to hold its Faculty to the same high scholarly standards as it does its students, then perhaps it should rethink its undergraduate plagiarism policy and do away with the charade of irreproachable academic integrity.” *Id.*

318. Anderson, *supra* note 73, at 32.

319. *Id.* (citing Colin Norman, *Stanford Investigates Plagiarism Charge*, 224 SCI. 35-36 (1984)); see also, *Stanford Medicine Chief Quits Post After Censure*, WALL ST. J., June 8, 1984, at 1 (reporting that while the chairman’s medical school colleagues concluded he had “no conscious intent to deceive,” they nonetheless found him guilty of “grossly negligent scholarship”).

of forfeiting degrees, rewriting the plagiarized portions of their masters theses (conditioned on an admission of guilt), or requesting a hearing.³²⁰ The involved faculty experienced loss of chairs, position, and threat of tenure removal.³²¹ Lerman, too, describes instances of grave consequences for scholars, such as the forced resignation of the Dean of Albany Law School who, in a memorandum to his Board of Directors, plagiarized part of an article authored by then-New York University School of Law Dean John Sexton and that had appeared in the *Montana Law Review*.³²² Further instances of sobering penalties applied to faculty plagiarism set forth below would suggest that notwithstanding the generally perceived faculty/student double standard,³²³ and despite Mallon's admonition that academia lacks the fortitude to address faculty plagiarism in a forthright manner,³²⁴ there exist many cases wherein faculty have suffered exposure, embarrassment, and serious penalties, including termination or marked alteration of

320. Wasley, *supra* note 8.

321. *Id.* Wasley notes that a committee established by the provost of Ohio University "placed responsibility for the plagiarism [engaged in by mechanical engineering graduate students] squarely on the shoulders of faculty advisers and called for the dismissal of the chairman of the mechanical-engineering department, Jay Gunasekera, and a second non-tenured professor, Bhavin V. Mehta, who, together, had supervised the greatest number of plagiarized theses." *Id.* According to Wasley, Mr. Gunasekera claimed the students engaged in "sloppy citation" but did not commit plagiarism, as "there was no intent to deceive, and therefore no plagiarism." *Id.*

322. Lerman, *supra* note 164, at 481 (citing Gary Spencer, *Albany Dean Takes Leave Under Fire: Faculty, Board Criticism of Performance Mounts*, N.Y. L.J. 1 (May 11, 1993)).

323. See, e.g., Roy Lawrence, Letter, *Why Does Plagiarism in Politics Appear to Get a Free Pass?* ATHENS NEWS, March 3, 2008, at 1, available at <http://www.athensnews.com/ohio/article-2362-letter-why-does-plagiarism-in-politics-appear-to-get-a-free-pass.html> (pointing to disparity in treatment evident in plagiarism cases in the political arena versus the student/university context). Lawrence, a former professor at Ohio University, compared the consequences of plagiarism to the graduate students at Ohio University, see *supra* notes 8 and 321, and the lack of consequences experienced by former Texas Governor Ann Richards, who used a phrase (referencing George H.W. Bush: "He was born with a silver foot in his mouth") that was actually authored by another (*U.S. News and World Report* Editor-in-Chief Mort Zuckerman) to significant political effect. *Id.* Of course, one can argue that there exist no expectations in the public perception that contemporary politicians devise their own speeches, and thus, the ethical breach of plagiarism does not apply. *But see* POSNER, *supra* note 28, at 36-37 (attributing the imploding of Vice President Joseph Biden's 1988 presidential aspirations to the revelation that he had lifted, without attribution, the opening paragraph of a campaign speech from a speech by the then leader of the British Labour Party).

324. MALLON, *supra* note 35, at xii. It should be noted that criticism has also been advanced regarding the faculty's "lack of responsibility" evidenced when confronted with instances of student plagiarism. See, e.g., ANDERSON, *supra* note 73, at 31-32 (contending that professors fail to enforce institutional policies regarding plagiarism in order to avoid the burden of documenting the plagiarism and wading through the requisite bureaucratic channels).

career.³²⁵

IX. CONSEQUENCES TO FACULTY

Except for high-profile instances of faculty plagiarism that engender media scrutiny, most cases of such academic misconduct are addressed pursuant to confidential, private, in-house college or university procedures.³²⁶ Consequences to faculty can be discerned, however, via the occasional articles published in *The Chronicle of Higher Education* addressing such issues, in the publicity attendant to a particularly scandalous incidence of plagiarism, or in the lawsuits grounded in procedural or substantive due process, defamation, or wrongful termination commenced by professors found culpable of plagiarism.³²⁷ While the consequences to faculty may vary, underscoring most such cases is the sentiment that “an accusation of plagiarism is academe’s version of a scarlet letter,”³²⁸ and that allegations, even when “unfounded or ultimately

325. See *infra* Part IX.

326. See, e.g., Mara Gordon, *Bushnell: Charges Resolved Internally*, DAILY PENNSYLVANIAN, Oct. 4, 2005, available at <http://thedp.com/node/46696> (describing the manner in which the internal mediation resolution of the University of Pennsylvania’s Sociology Department dispute, regarding whether Professor Kathryn Edin and her coauthor had sufficiently given attribution to the work of then fellow Sociology professor Elijah Anderson, became public due to the written protestations voiced by a Sociology professor emeritus). Timothy Dodd, executive director in 2005 for the Center for Academic Integrity at Duke University is cited as stating that “this type of informal mediation is the most common way universities deal with questions of academic integrity.” *Id.*

327. See, e.g., *Newman v. Massachusetts*, 884 F.2d 19 (1st Cir. 1989) (plaintiff claiming the university officials violated both her procedural and substantive due process rights in handling the plagiarism charge against her). See also *Yu v. Peterson*, 13 F.3d 1413 (10th Cir. 1993) (plaintiff arguing that his substantive and due process rights had been violated in the resolution of plagiarism charges against him); *Agarwal v. Regents of the Univ. of Minn.*, 788 F.2d 504 (8th Cir. 1986) (plaintiff claiming the university violated his due process in terminating his employment premised on charges of plagiarism, and alleged incompetence); Jim Phillips, *OU, Former Prof Mehta Await Verdict in Defamation Trial*, ATHENS NEWS, March 27, 2008, available at <http://athensnews.com/ohio/article-5251-ou-former-prof-mehta-awaits-verdict-in-defamation-trial.html>; Athens News Staff, *2nd Russ Prof Sues OU*, ATHENS NEWS, October 26, 2006 available at <http://athensnews.com/ohio/article-2961-2nd-ou-prof-sues-ou.html> (describing Bhavin V. Mehta’s lawsuit against Ohio University premised on defamation in response to the Russ College Dean declaring to reporters that “Mehta had contributed to a culture of plagiarism”).

328. *Leatherman*, *supra* note 23, at A18. The author details conflicting charges of plagiarism brought by members of the Sociology Department at Texas A&M University which have, according to the author, earned the department the appellation of ‘Peyton Place.’ *Id.* Amidst a flurry of mutual recriminations by faculty members which led to three lawsuits, and investigations conducted by the university, the American Sociological Association, and National Science Foundation, it appears clear that clarity regarding the definition of plagiarism, or when an idea is so ubiquitous that it is in the public domain and no longer warrants attribution, or whether a failure to use

disproved,” can damage one’s scholarly standing.³²⁹

Allegations of faculty and administrator plagiarism occur in the context of scholarly publications, but charges of purloining another’s words also are leveled with regard to speeches, class lectures, newspaper editorials or opinion letters, and teaching statements accompanying syllabuses that reflect a professor’s philosophy. One of the most public instances of faculty plagiarism occurred at Columbia University Teachers College, where Madonna Constantine, a professor of psychology and education, was initially privately suspended in June 2008, and ultimately terminated, for plagiarizing the work of a former colleague and that of two graduate students.³³⁰ The Manhattan law firm employed by the university to examine the charges concluded in February 2008 that Constantine had committed approximately two dozen instances of plagiarism in academic journals; these findings were affirmed by the Faculty Advisory Committee,

quotation marks is a “slip in scholarship” or plagiarism, or whether willful plagiarism is required, did not obtain in this situation. *Id.* Leatherman quotes the spouse of the accused academic as asserting that “a charge of plagiarism is ruinous in and of itself Whether or not you are innocent is not the issue.” *Id.*; see also Peter Monaghan, *Hot Type: The Worst Form of Flattery*, CHRON. OF HIGHER EDUC., Dec. 17, 2004, at 23 (quoting Jennifer Snodgrass, editor at Harvard University Press, as stating: “In the current climate, which tends to sensationalize such issues, an accusation of plagiarism, even when unfounded or ultimately disproved, can be enough to damage a scholarly reputation.”).

329. Monaghan, *supra* note 328. Yet some commentators argue that while passing off the words of another as one’s own is “the lowest of the low where scholarship is king,” when it is colleagues rather than students who engage in plagiarism, the criticism of lax ethical attitudes “falls strangely silent.” *Professor Copycat*, CHRON. OF HIGHER EDUC., Dec. 17, 2004, at 8. This is particularly true where the alleged perpetrator possesses a distinguished scholarly profile. See Marcella Bombardieri, *Tribe Admits Not Crediting Author*, THE BOSTON GLOBE, Sept. 28, 2004, available at http://www.boston.com/news/education/higher/articles/2004/09/28/tribe_admits_not_crediting_author?mode=PF (wherein Professor Henry J. Abraham of the University of Virginia, from whose 1974 book Professor Laurence H. Tribe of Harvard Law School “liberally” borrowed, stated, according to the *Weekly Standard*, with respect to the plagiarism: “I felt betrayed at the time I became aware of Professor Tribe’s plagiarism, and I still feel that way. . . . I’m sure his book sold better than mine . . . he’s a big mahatma and thinks he can get away with this sort of thing.”). Alfred George Gardiner alludes to the disparities in treatment afforded plagiarizers of notoriety:

You must be a big man to plagiarize with impunity. Shakespeare can take his ‘borrowed plumes’ from whatever humble bird he likes, and, in spite of poor Green’s carping, his splendour is undimmed, for we know that he can do without them. . . . But if you are a small man of exiguous talents and endeavour to eke out your poverty from the property of others you will discover that plagiarism is a capital offense, and that the punishment is for life.

ALFRED GEORGE GARDINER, *MANY FURROWS* 74 (E.P. Dutton & Co. 1925).

330. See Marc Santora, *Columbia Professor in Noose Case Is Fired on Plagiarism Charges*, N.Y. TIMES, June 24, 2008, at 1; Cathy Burke, *Columbia to Ax Plagiarist Noose Prof*, N.Y. POST, June 24, 2008, at 4; and Cyril Josh Baker, *Columbia Professor Fired*, N.Y. AMSTERDAM NEWS, June 26-July 3, 2008, at 28.

which deemed the professor's appeal baseless.³³¹ The case generated widespread publicity as the professor publicly claimed institutional racism fueled the allegations,³³² accused her victims of perpetrating plagiarism against her,³³³ and filed a lawsuit against the university for wrongful termination.³³⁴

A review of some of the reported instances of faculty and administrator plagiarism examined by *The Chronicle of Higher Education* during the late 1980s and 1990s suggests characteristics common to these cases. In some instances, a diversity of venues—the publisher, the college or university, and the professional association—will simultaneously address plagiarism charges, and will not always agree with respect to the appropriate penalty to be imposed. Further, defenders of the alleged plagiarists frequently raise the issue of the lack of intent exhibited as a defense to the charges. When a former Dean at Eastern New Mexico University was found to have inadequately acknowledged substantial portions of a dissertation in his book on the topic of Muzak, for example, his publisher urged that the acknowledgment of the thesis author's influence was sufficient documentation and reflected a lack of intent to plagiarize.³³⁵ The American Sociological Association demanded an additional written statement from the Dean acknowledging his wrongdoing, a recall of the first books published, and damages to the author of the plagiarized work.³³⁶ The Dean subsequently resigned.³³⁷ Similarly, a Drake University law professor, Stanley N. Ingber, when notified that unattributed passages were evident in

331. According to Marc Santora, the plagiarism investigation was conducted by Hughes, Hubbard & Reed, which reportedly found "numerous instances in which [Constantine] used others' work without attribution in papers she published in academic journals" during the prior five years. Santora, *supra* note 330, at 1.

332. Joy Resmovits & Lydia Wileden, *Constantine Will Appeal Sanction*, COLUM. SPECTATOR, Feb. 21, 2008, available at <http://www.columbiaspectator.com/2008/02/21/constantine-will-appeal-sanction>. Professor Constantine and Teachers College at Columbia University attracted widespread media attention when a noose was found in October of 2007 on Constantine's office door, an incident that remains unsolved. *Id.*

333. Burke, *supra* note 330; *Columbia U Keeps An Uppity Woman Prof*, 17 WOMEN IN HIGHER EDUC. 5 (2008). Constantine alleges that two former students attempted to plagiarize her work; they claimed she published their research under her name. *Id.*

334. See Dareh Gregorian, *Noose Prof Loses—Court KOs Suit Vs. Columbia*, N.Y. POST, Apr. 3, 2009, at 16. The lawsuit was dismissed, as administrative remedies at Columbia University had not yet been exhausted. *Id.*

335. Debra E. Blum, *A Dean Is Charged With Plagiarizing a Dissertation for His Book on Muzak*, CHRON. OF HIGHER EDUC., May 10, 1989, at A1. The publisher did issue a subsequent edition with full citation. *Id.*

336. *Id.*

337. Debra E. Blum, *Dean Accused of Plagiarism Leaves His Job at Eastern New Mexico U.*, CHRON. OF HIGHER EDUC., Nov. 15, 1989, at A23. According to the article, the dean's departure occurred subsequent to a faculty committee review of the plagiarism allegations tendered by the American Sociological Association. *Id.*

his law review article published in the fall 1994 issue of the *Rutgers Law Review*, apologized publicly for his error in the spring issue of the publication.³³⁸ When his university investigated the allegations concerning plagiarism in two of Mr. Ingber's articles, Martin H. Belsky, Dean of the University of Tulsa Law School, termed Ingber's work, at worst, negligent, and not reflective of intent to plagiarize.³³⁹ Mr. Ingber's resignation ended the prospects of a hearing before the university's Academic Freedom and Tenure Committee.³⁴⁰

Lack of intent was raised in two other faculty plagiarism cases, with a marked lack of success. A University of Chicago professor of history, Julius Kirshner, published a book review under his name that had, in fact, been written by his research assistant.³⁴¹ The standing committee on academic fraud found the professor guilty of plagiarism, rendering intent irrelevant as a defense.³⁴² Professor Kirshner retained his tenure, but was relieved of graduate-student courses for five years.³⁴³ Lastly, a Brigham Young University professor, Bruce A. Van Orden, who "inadequately cited material from eleven authors," attributed the failure to properly cite sources to lack of due care.³⁴⁴ The manner in which Dr. Van Orden was disciplined was not made public by the university. The associate academic vice president noted that the plagiarism, although unintentional, still constituted plagiarism pursuant to Brigham Young's definition of the term.³⁴⁵

In late 2004, *The Chronicle of Higher Education* mounted an

338. Denise K. Magner, *Law Professor at Drake U. Is Accused of Plagiarism*, CHRON. OF HIGHER EDUC., Nov. 24, 1995, at A16. Mr. Ingber's 217-page article, with more than seven hundred footnotes, had utilized several passages authored by Michael J. Perry, a law professor at Northwestern University, without attribution. Professor Ingber attributed his inadvertent error to, among other reasons, the lengthy period of research and writing, and the exchange of materials between him and his research assistants. According to Magner, Perry did accept Ingber's apology, but asserted his belief that if he were quoting other scholars, "even if my notes got messed up, I would know what I wrote and what I didn't." *Id.*

339. *Id.* Mr. Belsky argued that given the fact Professor Ingber, in a second disputed article, had properly cited the work of another author on several occasions, a failure to attribute another passage of that author did not reflect intent to plagiarize. "You don't cite someone 15 times in an article and not cite them the 16th time if you're trying to hide something." *Id.*

340. *Law Professor at Drake U. Resigns Amid Plagiarism Charges*, CHRON. OF HIGHER EDUC., Dec. 1, 1995, at A8.

341. Mary Crystal Cage, *U. of Chicago Panel Finds Professor Guilty of Plagiarism*, CHRON. OF HIGHER EDUC., Aug. 9, 1996, at A18. Yet Kirshner was found not guilty of intentional academic fraud, since he erroneously believed he owned the ideas set forth by the student assistant. *Id.*

342. *Id.*

343. *Id.*

344. Jeffrey Selingo, *Brigham Young Professor Admits He Plagiarized Significant Portions of a Book*, CHRON. OF HIGHER EDUC., Mar. 13, 1998, at A16.

345. *Id.* As an "unintentional variety" of plagiarism, however, Professor Van Orden's failure to attribute was not deemed an honor code violation. *Id.*

investigation to determine the incidence of academic plagiarists beyond high-profile instances of “borrowings.”³⁴⁶ It discovered examples of scholarly plagiarism that included: career-long blatant unattributed use of others’ work; citation to another author’s work that failed to disclose that nearly an entire chapter drew upon the dissertation of another; and purloined language that was not cited in the body of a work, but instead solely listed as a bibliographic source.³⁴⁷ More disturbing was the authors’ belief, premised on anecdotal evidence and a survey conducted by University of Alabama economists, that “academe often discourages victims from seeking justice, and when they do, tends to ignore their complaints.”³⁴⁸ And yet, *The Chronicle’s* investigative articles as well as other sources point to examples of a variety of punishments imposed upon faculty charged with plagiarism, including resignations,³⁴⁹ demotions,³⁵⁰ pay cuts,³⁵¹ dismissals,³⁵² the removal of a title,³⁵³ or a contract not being

346. Thomas Bartlett and Scott Smallwood, *Four Academic Plagiarists You’ve Never Heard Of: How Many More Are Out There?*, CHRON. OF HIGHER EDUC., Dec. 17, 2004, at 8.

347. *Id.*

348. *Id.* Bartlett and Smallwood stated that the economists in their 2004 survey queried 1,200 colleagues as to whether “they believed their work had ever been stolen,” with a “startling” forty percent responding affirmatively. *Id.*; see also, Thomas Bartlett and Scott Smallwood, *Mentor vs. Protégé*, CHRON. OF HIGHER EDUC., Dec. 17, 2004, at 14 (suggesting that when the victims of plagiarism are graduate assistants to mentor scholars, their path to seeking recognition for their work, which they regard as unethically appropriated by their mentor, is a formidable one).

349. See, e.g., Scott Smallwood, *The Fallout*, CHRON. OF HIGHER EDUC., Dec. 17, 2004, at 12 (describing the circumstances surrounding the resignation of Professor Jamil Hanifi from Northern Illinois University for plagiarizing words from other scholars for articles, his dissertation, and a book manuscript); Karen W. Arenson, *In a Charge of Plagiarism, An Echo of a Father’s Case*, N.Y. TIMES, Mar. 14, 2007, at 1 (describing the resignation of tenured Professor Jacqueline R. Griffith from Kean University in New Jersey upon the discovery that substantial portions of her dissertation had been plagiarized; the incident is notable in that the queries regarding Griffith’s dissertation were instigated by a fellow colleague, who after discerning similarities in Griffith’s dissertation and that of another scholar, hired a detective to find the other author in order to confirm his findings of plagiarism).

350. See Smallwood, *supra* note 349 (relating the manner in which the U.S. Naval Academy demoted Professor Brian VanDeMark to assistant professor, reduced his salary and deprived him of tenure, for including “dozens of passages” from other authors without proper attribution in his book *Pandora’s Keepers: Nine Men and the Atomic Bomb*).

351. JON WIENER, HISTORIANS IN TROUBLE 186 (New Press 2005) (stating that the U.S. Naval Academy reduced Brian VanDeMark’s salary by \$10,000 when it found him guilty of plagiarism in his book related to the development of the atomic bomb (citing Thomas Bartlett, *Naval Academy Demotes Professor Accused of Plagiarism in a Book on the A-bomb*, CHRON. OF HIGHER EDUC., Nov. 7, 2003, at 12)).

352. Smallwood, *supra* note 349 (describing the dismissal of Professor Roger Shepherd of the New School University’s Parsons School of Design for copying portions, some of which were taken “nearly verbatim” from another scholar’s work, in his 2002 book *Structures of Our Time: 31 Buildings That Changed Modern Life*).

extended.³⁵⁴ Even speeches that have plagiarized portions of others' writings have been condemned as an "ultimate sin," and have triggered penalties imposed upon presidents of institutions of higher education.³⁵⁵ The former president of Hamilton College resigned subsequent to the revelation and admission that he had plagiarized others' materials in speeches he had made over a period of several years.³⁵⁶ A Dean of the College of Arts and Sciences at the University of Missouri at Kansas City who used others' work in an unattributed manner in a commencement address was placed on administrative leave.³⁵⁷ In an extraordinary case of self-imposed penance, the former head of Boston University's mass-communications department resigned from that position because, in his guest lecture to several hundred freshmen, he inadvertently failed to cite the author of a concluding quote he had used.³⁵⁸ A Southern Illinois

353. Thomas Bartlett and Scott Smallwood, *Just Deserts?*, CHRON. OF HIGHER EDUC., Apr. 1, 2005, at A26 (relating the consequences to Professor George O. Carney of Oklahoma State University for plagiarizing significant portions of others' works, sometimes "nearly verbatim" without any citation or mention; the professor was barred from the classroom and was stripped of his regents title by the university); *see also* WIENER, *supra* note 351 (noting that Louis W. Roberts, chair of the SUNY-Albany classics department, was stripped of his title subsequent to the finding that he had plagiarized "large portions" of a book he had authored (citing Sharon Walsh, *SUNY-Albany Classicist Loses Chairmanship After Being Accused of Plagiarism*, CHRON. OF HIGHER EDUC., Mar. 8, 2002, at 12)).

354. Bartlett & Smallwood, *supra* note 353 (detailing how Mr. Donald Cuccioletta, a professor at the State University of New York at Plattsburgh, who was found to have plagiarized several pages in a chapter he wrote from the introduction of an earlier book by a Columbia University historian, was denied an extension of his contract at the university).

355. Debra E. Blum, *Plagiarism in Speeches by College Presidents Called 'Capital Offense' and 'Ultimate Sin'*, CHRON. OF HIGHER EDUC., Jul. 27, 1988, at A11 (citing as an example, the incident wherein Richard J. Sauer, the interim president of the University of Minnesota, delivered a speech at North Dakota State University which "borrowed a passage almost verbatim" from an article authored by Cornell University President Frank H. T. Rhodes, prompting Sauer to withdraw his candidacy for the presidency of North Dakota State from consideration).

356. Jonathan Margulies, *Hamilton President Apologizes for Failing to Cite Sources in Speech*, CHRON. OF HIGHER EDUC., Oct. 4, 2002, at A34 (detailing how Hamilton's president, Eugene M. Tobin, had heavily utilized descriptive material located on an Amazon.com site without sufficient attribution in presenting a speech which described books he had read during the summer); *see also*, Maurice Isserman, *Plagiarism: A Lie of the Mind*, CHRON. OF HIGHER EDUC., May 2, 2003, at 12 (reporting that Eugene Tobin resigned from his position as Hamilton College president, accompanied by an apology for utilizing plagiarized material in speeches he had delivered during his presidency).

357. Dan Carnevale, *Plagiarizing Dean Is Put on Leave*, CHRON. OF HIGHER EDUC., July 1, 2005, at 10.

358. *Communications-Department Head at Boston U. Resigns Over a Quote*, CHRON. OF HIGHER EDUC., Dec. 17, 1999, at A18 (describing how Professor John J. Schulz, who neglected to cite the author in his lecture, remarked that as "nothing in the definition of plagiarism . . . talks about intent" he would still be regarded as the

University at Edwardsville professor was fired for allegedly plagiarizing another professor's philosophy of teaching as articulated in the latter's teaching statement.³⁵⁹ A professor at the Johns Hopkins University School of Medicine who lifted approximately forty percent of a journal editorial he coauthored was permitted to retain his position conditioned upon his willingness to tender a public apology.³⁶⁰ And a University of New Hampshire professor was disciplined for plagiarizing part of a governor's speech in an opinion article that the professor wrote for a local newspaper.³⁶¹

Some might urge that faculty plagiarism under any circumstances is untenable; that an author should always recognize his or her voice and readily be able to distinguish it from that of another; that with due diligence, even in research extending over a period of years, no error of attribution should occur; and that such plagiarism, therefore, under any circumstances is an "academic crime" meriting the appropriate application of penalties. Academics, fully apprised of the need for proper citation and of the methods to achieve attribution, should at least be held to the same standards imposed upon students. Should not, however, those standards for both include a recognition of one's unintentional errors as a defense? Indeed, in certain situations, should not the apology for inadvertent plagiarism suffice? Is it the role of academia to excoriate faculty plagiarists regardless of intent? Surely the academy is capable of stripping the act of plagiarism of its erroneous associations with a criminal act, of the highly colored moralistic language that often accompanies accusations of

"perpetrator . . . of a momen[t] that can affect a whole lifetime").

359. Thomas Bartlett, *The Rumor*, CHRON. OF HIGHER EDUC., Feb. 10, 2006, at A8 (noting that the alleged plagiarism on the part of Professor Chris Dussold of Southern Illinois University involved copying the teaching statement of a professor at the College of Charleston comprising "two pages of boilerplate about the need to 'practice life-long learning'"). Peter Charles Hoffer, who has investigated plagiarism cases for the American Historical Association, stated for the Bartlett article, that "copying a brief teaching statement for inclusion in your teaching portfolio, with the understanding that you are expressing a philosophy of teaching, not making a contribution to education scholarship, is not a crime at all—not even a misdemeanor." *Id.* at A10; *see also* Steve Gonzalez, *SIUE Professor Files Defamation Suit*, MADISON ST. CLAIR REC., Mar. 15, 2005, available at <http://www.madisonrecord.com/news/149462-siue-professor-files-defamation-suit> (describing the lawsuit Dussold commenced against members of the university based upon defamation and wrongful termination); Kavita Kumar, *SIUE, Fired Professor Settle Case Tied to Plagiarism, Faculty Backlash*, MCCLATCHY-TRIB. BUS. NEWS, Apr. 12, 2008 (describing both the out-of-court settlement reached by the parties, and the emergence of a support group for Dussold named Alumni and Faculty Against Corruption at SIU, which utilized anti-plagiarism software to assert plagiarism allegations against the SIUE Chancellor, former SIU-Carbondale Chancellor, and the SIU President).

360. Constance Holden, *Kinder, Gentler Plagiarism Policy?*, 283 SCI. 483 (1999).

361. Scott Smallwood, *U. of New Hampshire Disciplines Professor Accused of Plagiarizing a Governor's Letter*, CHRON. OF HIGHER EDUC., Apr. 2, 2004, at A12.

it, and of discerning and distinguishing blatant disregard of the mandates of attribution from unintentional conduct. Certainly, repeated and pervasive plagiarism, or singular plagiarism of substantial proportion, conducted with intent to deceive, or with gross indifference to the standards of citation, merits opprobrium. Unintentional and isolated instances of plagiarism, even when conducted on the faculty or administrative level, should not generate the moralistic condemnation to which they are sometimes subjected. The notion that intent is irrelevant to a finding of plagiarism is contradicted by the historical record that suggests the essence of plagiarism is the fraudulent misrepresentation of ownership of ideas and expressions. Isolated instances of unintentional failure to attribute on the part of the professoriate ought not to serve as the basis for academic purgatory—or everlasting damnation.³⁶²

X. CONSEQUENCES TO STUDENTS

Consequences of plagiarism by students publicly emerge primarily through notorious incidents of plagiarism accompanied by media attention³⁶³ and through lawsuits filed by students found guilty of plagiarism, premised generally on due process or the private-institution equivalent.³⁶⁴ Research that has addressed this issue has pointed to disparities in the definitions for plagiarism employed by various colleges or universities and law schools, to the varying ranges of punishments available, and to the lack of consistency in application of sanctions.³⁶⁵

362. David Glenn, *How Long a Shadow Should Plagiarism Cast?*, CHRON. OF HIGHER EDUC., Dec. 17, 2004, at 19. Glenn addresses the issue raised by the common law tort of negligent referencing, wherein a former employer provides false or misleading information with respect to a former employee. He cites the case of Benson Tong who was hired by Gallaudet University as a history professor without being apprised that the American Historical Association in 2003 had formally concluded that Tong had plagiarized another scholar's work. Some argue that a "less than egregious" incident of plagiarism should not eternally haunt an individual; others urge that the doctrine of negligent referencing would mandate revealing any such incidents to a future employer. *Id.* One must query whether a finding of plagiarism, other than one reflecting a "persistent pattern of deception," poses the type of threat that must be revealed to a prospective employer. See WIENER, *supra* note 351 (citing *Statement on Plagiarism*, PERSPECTIVES: NEWSMAG. OF THE AM. HIST. ASS'N, Oct. 1986, at 7 ("A persistent pattern" of deception "justifies a termination of an academic career"))).

363. See, e.g., Wasley, *supra* note 8 (describing the plagiarism scandal at Ohio University); Keever, *supra* note 17 (detailing the plagiarism allegations surrounding a Harvard sophomore).

364. See *infra* Part X.E.

365. See, e.g., LeClercq, *supra* note 108. LeClercq contends that most law schools have not addressed the issue of whether plagiarism should be defined as an intentional act or "whether a student can be guilty of 'accidental' or 'good faith' plagiarism." *Id.* at 245. She observes that 91, or the majority of law schools she surveyed, do not mention intent as a factor in determining plagiarism; 42 include intent as a requisite for proving plagiarism; and 7 deem intent relevant in the sanctions stage. *Id.* at 245–46.

Definitions of plagiarism in the college or university and law-school contexts differ widely, to an extent deemed one of “disgraceful disparities.”³⁶⁶ In terms of punitive measures, penalties can consist solely of expulsion at institutions such as the University of Virginia or Washington and Lee University,³⁶⁷ or comprise a much broader array of sanctions, including grade reduction on a particular paper or for an entire course,³⁶⁸ expulsion, suspension, and a statement of censure in the student’s file, such as that utilized at New York University School of Law.³⁶⁹ In other instances of student plagiarism, colleges or universities may defer graduation for one year,³⁷⁰ dismiss permanently or with an opportunity to reapply,³⁷¹ permit a student to rewrite a thesis,³⁷² request a surrender of a degree,³⁷³ offer a one-semester expulsion,³⁷⁴ or rescind a degree.³⁷⁵ What is

She also asserts that a wider range of punishments should exist and that “an ideal policy would allow a spectrum of punishment to fit the extent and willfulness of the violation.” *Id.* at 252. LeClercq urges that the rather dramatic inconsistencies in punishments applied at law schools for the same act (one student’s record is permanently emblazoned with a first offense of plagiarism while another’s record is expunged when a professor’s “remediation requirement” has been satisfied) could prompt a potential lawsuit by a student affected by such disparate sanctions. *See also* Eric Hoover, *Honor for Honor’s Sake?*, CHRON. OF HIGHER EDUC., May 3, 2002, at 35 (reporting the characterization of the Honor Committee at the University of Virginia as representing a system that “has a built-in zeal for prosecution, [and] applies justice inconsistently”).

366. LeClercq, *supra* note 108, at 237. Some definitions exclude intent or simply fail to address it, while others consider intent a requisite to a finding of plagiarism, or regard it as an element relevant to the appropriate punishment. *See supra* Part II.B.

367. Allitt, *supra* note 26, at 89 (describing the Honor Council system at the University of Virginia and Washington and Lee University, “where honor is a central preoccupation, and where the *only* sanction for violating the honor code is expulsion”) (emphasis original); *see also* Hoover, *supra* note 365, at 35 (noting that studies suggest honor codes do deter students from cheating, but questions at what price, pointing out that the system “has created an atmosphere of distrust and fear, spawned numerous lawsuits, and brought UVa its share of bad press”). Hoover suggests that colleges and universities employ a “modified code” that “gives more authority to the administration than to students, and metes out milder punishments.” *Id.*

368. *See, e.g.*, Hill v. Trs. of Ind. Univ., 537 F.2d 248, 250 (7th Cir. 1976).

369. New York University School of Law, *Pledge of Academic Honesty*, http://www.law.nyu.edu/ecm_dlv3/groups/public/@nyu_law_website__llm_jsd/documents/documents/ecm_pro_062457.pdf (last visited Oct. 13, 2010).

370. Napolitano v. Trs. of Princeton Univ., 453 A.2d 263, 264 (N.J. Super. Ct. App. Div. 1982).

371. Waldman, *supra* note 285.

372. Kathy Lynn Gray, *OU Engineering School to Impose Honor Code Today; Some Plagiarism Investigations Continue*, COLUMBUS DISPATCH, Feb. 15, 2008, at 03B (indicating twenty-two former students at Ohio University’s engineering college, ensnared in a plagiarism investigation, had been ordered to rewrite their theses).

373. Joshua Sharp, *Laurie Returns Her USC Degree*, DAILY TROJAN, July 2, 2008, available at <http://www.dailytrojan.com/news/laurie-returns-her-usc-degree-1.212564>. Amidst an investigation at the University of Southern California as to whether Elizabeth Paige Laurie had paid her former roommate Elena Martinez a sum of

very striking in examining the cases, research, news articles, and informal reports of student plagiarism offered by faculty³⁷⁶ is the wide disparity in sanctions given student plagiarists in circumstances that would seem to call for more similarity in treatment. Roger Billings comments that it is “difficult to determine why similar instances of plagiarism have given rise to penalties that have varied so greatly in severity.”³⁷⁷ Harvard University, for example, rescinded the acceptance of Blair Hornstine, the co-valedictorian of her high-school class, because in her extracurricular writing for newspapers she had utilized language of former President Bill Clinton and Supreme Court Justices without giving proper attribution.³⁷⁸ Yet the furor surrounding then-Harvard sophomore Kaavye Viswanathan’s plagiarism of another author’s work in her widely publicized novel, which prompted her publisher to terminate existing contractual obligations, did not prompt Harvard to expel her. Instead, she graduated and now pursues a law degree at a prominent university.³⁷⁹ While the courts in their oft-expressed deference to college and university academic expertise³⁸⁰ may be indifferent to inconsistent application of penalties for student plagiarism,³⁸¹ the experts in academia should not be unresponsive to what may be lawful,

approximately \$20,000 over a three-year period to write assignments for her, Laurie voluntarily tendered her degree and returned her diploma. Sharp notes that the vice president of student affairs, Michael Jackson, “declined to state whether the investigation’s conclusion had caused Laurie to give back her degree, or if Laurie’s actions pre-empted the conclusion of the investigation.” *Id.*

374. Hoover, *supra* note 365, at 37 (describing the “more forgiving” modified honor code at Georgia Institute of Technology, wherein “occasionally, students found guilty of cheating receive one-semester suspensions”).

375. Mary Ann Connell & Donna Gurley, *The Right of Educational Institutions to Withhold or Revoke Academic Degrees*, 32 J.C. & U.L. 51, 55–56 (2005).

376. A professor from a top-ten law school, who wishes to remain anonymous, for example, relays that one student who had plagiarized a section of a paper, premised on lack of knowledge regarding rules of attribution, was permitted to rewrite the paper on an entirely different topic. Subsequently, under nearly identical circumstances, but under the aegis of a different administrator, a plagiarizing student was expelled from the law school with no promises of future readmittance extended.

377. Billings, *supra* note 260, at 398. Billings notes that although plagiarism is not a crime, its consequences can include a professor’s loss of an academic career or a student’s inability to become a lawyer. *Id.* at 398–400. He states, “Arguably, these consequences are worse than those for copyright infringement, which often ends quickly with a demand to cease and desist.” *Id.* at 396.

378. Green and Russell, *supra* note 16.

379. Kever, *supra* note 17. See also Tina Peng, *The Chick-Lit Culprit*, NEWSWEEK, Feb. 21, 2009, available at <http://www.newsweek.com/id/>.

380. See *supra* notes 301–03 and accompanying text.

381. See, e.g., *Napolitano v. Trs. of Princeton Univ.*, 453 A.2d 263, 278 (N.J. Super. Ct. App. Div. 1982) (“[W]e find little purpose in reviewing plaintiff’s argument which attempts to demonstrate that in 20 or more disciplinary cases arising out of the same or similar incidents the individuals there involved were not penalized as severely as she was. To us this is totally irrelevant.”).

but inequitable, treatment of students.

Institutions should endeavor to develop a plagiarism policy that defines plagiarism to include intent as an essential element, discards the erroneous criminal associations with which plagiarism is often framed, and provides a consistent application of a range of penalties in similar circumstances. While I am not advocating the adoption of a “universal policy”³⁸² for all colleges and universities, I am asserting that policies that incorporate these characteristics would accurately penalize those who plagiarize with intent or gross indifference to attribution standards, while avoiding the stigmatization of those whose imperfect or absent citations emerge from mistake or lack of knowledge. Faculty often assume that students enter colleges and universities armed with the requisite knowledge regarding citations and that a college or university policy set forth in a handbook or emblazoned on a syllabus will suffice. Thus forewarned, the argument goes, students must accept the consequences of their plagiarism, be it the product of intent, gross indifference, mistake, or lack of knowledge. But according to commentators, assumptions regarding student preparedness in the intricacies of citation are erroneous.³⁸³ Terri LeClercq, for example, asserts that while law schools punish students for plagiarism, presuming they know the rules of attribution, even there students “stumble into accidental plagiarism,” and it is incumbent upon the institution to actually teach the rules of attribution.³⁸⁴ College and university findings of “accidental plagiarism” should not prompt harsh punishments or haunt students’ future prospects. Nor should it be “irrelevant” to the academy that a similar instance of plagiarism can engender a withholding of a degree for one student while another is permitted to rewrite the offending paper.³⁸⁵ Such disparate penalties appear inequitable and arbitrary.

382. LeClercq, *supra* note 108, at 252 (observing that “no one would want to force a universal policy on all law schools. . . . But the range should be more consistent. Some future students may choose to sue if her sanction contradicts the sanction imposed for the same act in another law school”).

383. Alan V. Briceland, *Sometimes Ignorance Does Excuse Plagiarism*, RICHMOND TIMES DISPATCH, Aug. 24, 2008, at E-1. Briceland, emeritus associate professor of history at Virginia Commonwealth University, states that “‘ignorant plagiarism’ involves using the words, ideas, or work of others in an academically unacceptable way, but out of ignorance of what academia considers acceptable and unacceptable.” *Id.* Such ignorant plagiarism, for a conscientious instructor, forms the basis of a “teaching moment.” *Id.*

384. LeClercq, *supra* note 108, at 236. LeClercq states that most law schools simply offer up a blanket prohibition [on plagiarism] buried in an honor code They justify this perfunctory treatment on the basis of two assumptions: first, that students arrive at law school understanding the rules of scholarship and plagiarism, and second, that there is very little actual plagiarism by law students. Both these assumptions are fundamentally flawed.

Id.

385. *Napolitano*, 453 A.2d at 278.

A. Particular Impact on Law Students

The consequence of a single finding of plagiarism for the law student, whether occurring in college, law school, or in postgraduate legal study, is particularly illustrative of the impact such a resolution can have.³⁸⁶ The pivotal issue for such students, including whether they can remain in college or law school,³⁸⁷ is the impact the determination of plagiarism has with regard to the individual's moral character or fitness to engage in the practice of law necessary for admission to the bar or retaining one's status in the bar. Even where a law school student receives a punishment of a one-year suspension for plagiarism, as did a student at the University of Michigan Law School,³⁸⁸ cases reveal that the specter of a plagiarism finding can potentially thwart a law career at the admission-to-the-bar level. Interestingly, the posture of the courts is not one of complete deference to Board of Examiners' harsher determinations with respect to a plagiarist's fitness to practice law. *In re Zbiegien*,³⁸⁹ for example, reveals the dual challenges a law student found guilty of plagiarism confronts. In this instance, the Associate Dean permitted the student to remain in law school, but awarded an F for the course with an accompanying loss of credit and tuition.³⁹⁰ The State Board of Law Examiners recommended Zbiegien not be admitted to the bar, based upon the plagiarism in his law school paper and his "untruthful explanations" regarding same, thus marking him as lacking the "requisite character and fitness."³⁹¹ While concurring that plagiarism involves "an element of deceit" and is an "affront to honest scholars," the court did not conclude that "a single incident of plagiarism while in law school is necessarily sufficient evidence to prove lack of good character and fitness to practice law" and ordered the Board to recommend Zbiegien's admission to the bar.³⁹² Similarly, in *In re*

386. See Lerman, *supra* note 164.

387. See LeClercq, *supra* note 108, at 243. A third-year Vanderbilt Law School Student and Editor-in-Chief of the *Law Journal* felt compelled to withdraw when he admitted to intentional plagiarism in a note he had written for the *Journal*. *Id.* Prior to his admission, the Honor Council had cleared him of intentional plagiarism pursuant to a "reasonable doubt" standard. The faculty, had he not withdrawn, would have had discretion to overturn that decision and substitute a standard of "good moral character." *Id.*; see also David Berreby, *Student Withdraws in Plagiarism Uproar*, NAT'L L.J., May 9, 1983, at 4; LeClercq, *supra* note 108, at 243 (contending that the Vanderbilt law student was permitted to withdraw when the faculty expressed disagreement with the Honor Council's acquittal). LeClercq notes, "His earlier resignation from the law review and denial of academic credit for the course was not enough punishment for the faculty . . ." *Id.*

388. *Easley v. Univ. of Mich. Bd. of Regents*, 853 F.2d 1351 (6th Cir. 1988).

389. 433 N.W.2d 871 (Minn. 1988).

390. *Id.* at 872.

391. *Id.* at 874.

392. *Id.* at 875. The professor teaching the course in which Zbiegien had submitted a plagiarized paper had urged that he be expelled from the law school. *Id.* at 872.

Harper, the court chose the lesser punishment of censure for a lawyer who had not revealed in his application to the bar that he had plagiarized an entire article while pursuing a (now abandoned) LL.M. degree at Pace University.³⁹³ The court, in disagreeing with the Grievance Committee's decision to revoke Harper's admission, considered his "remorse, the isolated nature of his misconduct, and the uniformly high regard" in which he is held as key factors in ordering solely censure.³⁹⁴ In *In re Lamberis*, a practicing attorney confronted potential disbarment as a consequence of incorporating verbatim others' works in a thesis required for an LL.M. degree at Northwestern University School of Law, from which he was expelled.³⁹⁵ The Hearing Board had recommended censure, the Review Board suspension, and the Administrator disbarment.³⁹⁶ The court concurred that the extent of the intentional copying exhibited a disregard for "values that are most fundamental in the legal profession," but deemed the lesser penalty of censure appropriate in light of the attorney's "impeccable reputation in the community" and the fact that punishment had already been imposed by the law school.³⁹⁷

B. Public Humiliation

Given the in-house manner in which student plagiarism cases are handled in institutions of higher education, with the concomitant concern

Three character witnesses described the petitioner as diligent and honest. *Id.* at 874. The Dean regarded the failing grade for the course a sufficiently severe punishment and believed the student's candor in admission indicated that plagiarism would not be repeated. *Id.* at 872. The court was persuaded by the "remorse and candor" exhibited by the applicant as providing evidence of "reform and rehabilitation." *Id.* at 876.

393. 223 A.2d 200, 201 (N.Y. App. Div. 2d Dep't 1996). Harper had entered into a stipulation of disposition with the Investigating Committee at Pace University, wherein he admitted that he had violated the Honor Code at the law school through plagiarism of an article, and that such admission precluded him from reentry into the LL.M. program. *Id.*

394. *Id.* at 202.

395. 443 N.E.2d 549, 550 (Ill. 1982).

396. *Id.* at 552.

397. *Id.* While concurring that the respondent's plagiarism warranted discipline, in view of his "extreme cynicism toward the property rights of others," and his violation of the lawyer's standards prohibiting conduct involving "dishonesty, fraud, deceit, or misrepresentation," the court noted the plagiarism did not directly harm any person, diminish the value of the works of the plagiarized authors, nor expose any author to any risk of loss. *Id.* at 551-52. That, coupled with the attorney's unblemished record of law practice and the punishment already imposed by Northwestern University in expelling him, rendered a censure, in the court's view, the most appropriate discipline. *Id.* at 551-53. It is worthy of note that the widely publicized plagiarism scandal at Harvard University regarding Kaavya Viswanathan did not impede her graduation from that university, nor her admittance to Georgetown University School of Law. See Peng, *supra* note 379. The above-cited cases raise the question as to whether the undergraduate plagiarism finding will serve as an impediment with respect to admission to the bar.

for due process, fairness, and privacy, the recent use of public humiliation as a sanction for plagiarism at Texas A&M International University can be regarded as a notable exception. In 2008, Professor Loye Young included the following language on his syllabus for a management information systems course: “No form of dishonesty is acceptable. I will promptly and publicly fail and humiliate anyone caught lying, cheating, or stealing. That includes academic dishonesty”³⁹⁸ He named six students guilty of plagiarism on his course blog, and stated that each would receive an F and would be reported to university officials.³⁹⁹ The university fired Young based on his violation of FERPA.⁴⁰⁰ In comments accompanying the *Inside Higher Education* article regarding the incident, some faculty members expressed concerns that the academic integrity of the institution was being undercut by the firing of the professor.⁴⁰¹ An undercurrent in many of these remarks is the notion that plagiarism merits unilaterally imposed punishment without the need to comport with college or university procedures for addressing such issues. Yet as a public institution, Texas A&M must pursue enforcement in the context of constitutional rights of due process. Further, the comments proffered by some faculty reflected the erroneous and ubiquitous characterization regarding the criminal nature of plagiarism.⁴⁰² Finally, this “publicly fail and humiliate” approach suggests a “gotcha” perspective that exults in snaring the alleged perpetrator, with less interest exhibited in *teaching* the methods of attribution.⁴⁰³ A mere statement in a syllabus, adorned with examples of plagiarism, certainly functions as a warning, but provides little in the way of applied instruction in the proper norms of annotation or in assurances that students, in fact, are fully apprised of the rules for citation.

398. Scott Jaschik, *Vigilante Justice on Plagiarism*, INSIDE HIGHER ED, Nov. 13, 2008, available at <http://www.insidehighered.com/news/2008/11/13/tamiu>; see also Michelle Cormier, *Texas Professor Fired For Vigilante Justice on Plagiarism*, AACRAO TRANSCRIPT, Nov. 20, 2008, available at http://www.aacrao.org/transcript/index.cfm?fuseaction=show_view&doc_id=4097.

399. Jaschik, *supra* note 398.

400. *Id.*

401. *Id.*

402. See, e.g., Comments: John, *Comment to Vigilante Justice on Plagiarism*, INSIDE HIGHER ED, (Nov. 13, 2008, 9:40 EST), <http://www.insidehighered.com/news/2008/11/13/tamiu#Comments> (“Their names belong in the papers just like other criminals—who STEAL THE WORK OF OTHERS”); Comments: George McDonald Ross, *Comment to Vigilante Justice on Plagiarism*, INSIDE HIGHER ED, (Nov. 13, 2008, 5:55 EST) <http://www.insidehighered.com/news/2008/11/13/tamiu#Comments> (“The identity of criminals is not kept secret in the outside world, so why in academia?”).

403. Allitt describes the “righteous anger” many professors express regarding the plagiarizing student who may believe professors “aren’t clever enough to catch them.” ALLITT, *supra* note 26, at 95. Thus, Allitt notes that “That’s why, when you *do* catch one, it’s hard not to feel at least a little gleeful pleasure. You know: ‘Gotcha!’” *Id.* at 95 (emphasis in original).

C. Expulsion

The sanction of expulsion, the actual severance of a student from his or her college or university, is one of the most severe consequences to be faced by students found guilty of plagiarism. The lawsuit brought by Matthew Coster,⁴⁰⁴ who had wrongfully been found guilty of plagiarism and subsequently expelled from Central Connecticut State University, speaks to the devastating impact of expulsion. In his case, his losses included: more than \$25,000 to pursue the litigation, bouts of depression and sleeplessness, inability to transfer to another four-year institution of his choice, and the concern as to how the taint of expulsion would impact his career.⁴⁰⁵ Indeed, Superior Court Judge Jane Scholl, in finding that Coster was the victim of plagiarism rather than the perpetrator, addressed the “severe disadvantage and harm” sustained by Coster due to his ouster by his university.⁴⁰⁶ At multi-tier-sanction colleges and universities, such as Central Connecticut State and Emory University,⁴⁰⁷ expulsion is but one of many penalties available, and is usually, but not always, applied to only the most serious of cases. In marked contrast, institutions of higher learning such as the University of Virginia and Washington and Lee University, with traditional honor codes,⁴⁰⁸ employ a single-sanction system that offers but one penalty—that of permanent expulsion.⁴⁰⁹

404. See Waldman, *Judge Vindicates*, *supra* note 285 (describing Coster’s case in which he successfully sued another student for the plagiarism of which he had been charged).

405. *Id.*

406. *Id.*

407. Emory University, *Honor Code*, Art. 6, § e, available at http://college.emory.edu/current/standards/honor_code.html (last visited Aug. 3, 2009). Sanctions that may be imposed for academic misconduct, including plagiarism, include: verbal reprimand without an entry on the student’s Personal Performance Record; written reprimand with such an entry; F in the course notated both on his personal record and permanent transcript; suspension; dismissal (specifying when the student may apply for readmission); or a combination thereof. *Id.* As observed by Professor Patrick Allitt of Emory, “sanctions tend to be mild, sometimes merely requiring the student to actually do the work he or she was supposed to do in the first place, but could include an F for the course or even expulsion. Even then the sanction doesn’t always stick because the relevant associate dean is permitted to reduce sentences.” ALLITT, *supra* note 26, at 88.

408. See Jennifer Reese, *Reviving the Honor Code*, STANFORD MAGAZINE (1997) available at <http://www.stanfordalumni.org/news/magazine/1997/marapr/articles/honor.html> (stating that the tradition of the honor code commenced at “schools of the antebellum South,” with William and Mary College instituting the first honor code in 1779 and the University of Virginia adopting one in 1842). Reese notes that some of the approximately one hundred colleges and universities with honor codes have “jettisoned” or modified elements of the honor code. William and Mary, for example, discarded the “rat clause” mandating students to report transgressions of others; Georgetown University now proctors exams. Washington and Lee University and the University of Virginia “preserved the honor code in its most draconian form: Cheaters are simply expelled.” *Id.*

409. See Michelle Boorstein, *U.Va. Expels 48 Students After Plagiarism Probe*,

According to the philosophy espoused at the University of Virginia, the honor code creates a community of trust, wherein the Honor Committee conducts investigations, hears and tries cases, renders judgments, and imposes penalties.⁴¹⁰ Since the 1990s, students have been afforded the option of conscientious retraction, where a student voluntarily admits to dishonest conduct, and is not compelled to sever ties with the university if the admission is tendered before the student believes his or her conduct is being viewed suspiciously.⁴¹¹ At various times the students at the University, most recently in February 2009, have voted via referendum to consider expanding the range of punishments for plagiarism.⁴¹² Yet this measure to revisit the honor system was rejected by a two-to-one margin by students.⁴¹³ Notably, Professor McCabe⁴¹⁴ of Rutgers University was at

THE WASH. POST, Nov. 26, 2002, at B01 (describing the composition of the University of Virginia Honor Committee, and the procedures that govern from the point of accusation by a professor or a fellow student, through the investigations, confrontations, evidentiary hearings, and honor trials; when the entirely student-run honor code system at Virginia renders a judgment of guilt mandating expulsion, the student has forty-eight hours to depart from the campus).

410. See University of Virginia, Video: On My Honor, available at <http://www.virginia.edu/onmyhonor/> (last visited Aug. 3, 2009) (video narrated by University of Virginia graduate Katie Couric, describing the community of trust philosophy and the procedures utilized to achieve that goal).

411. University of Virginia, *Conscientious Retractions*, available at <http://www.virginia.edu/honor/proc/retract.html> (last visited Sept. 24, 2010). Reportedly, the Honor Committee initiated a campaign to make the conscientious retraction option, which has been available since the 1990s, more widely known among its students. See *City Council Urges Charlottesville to Vote 'No,'* WJTU NEWS, Nov. 7, 2006 available at <http://wtju.radio.virginia.edu/record/newsarch?d=2006-11-07> (last visited Oct. 13, 2010). The definition of plagiarism set forth by The Honor Committee is expressed, in part, as follows:

Plagiarism is using someone else's ideas or work without proper or complete acknowledgment. Plagiarism encompasses many things, and is by far the most common manifestation of academic fraud. For example, copying a passage straight from a book into a paper without quoting or explicitly citing the source is blatant plagiarism. In addition, completely rewording someone else's work or ideas and using it as one's own is also plagiarism. It is very important that students properly acknowledge all ideas, work and even distinctive wording that are not their own. However, certain information in any discipline is considered 'common knowledge' and may be used without acknowledgement.

University of Virginia, *What Is Academic Fraud?*, available at <http://www.virginia.edu/honor/fraud.html> (last visited Sept. 24, 2010).

412. Aaron Lee, *UVa Vote Reaffirms Honor Code*, CHARLOTTESVILLE DAILY PROGRESS, Feb. 24, 2009, available at http://www2.dailyprogress.com/news/cdp-news-local/2009/feb/24/uva_vote_reaffirms_honor_code-ar-68658/. The referendum had called for a multi-sanction policy to be implemented, in part to allow honor violations that are deemed trivial to confront sanctions other than expulsion. According to the article, all prior efforts to alter the single sanction policy have failed as well.

413. *Id.*

414. See *supra* notes 22, 153–58 and accompanying text.

one time an ardent advocate of the traditional honor system, contending that the “peer culture” that develops in honor-code campuses renders “most forms of serious cheating socially unacceptable among the majority of students.”⁴¹⁵ But the professor applauded the adoption of modified honor codes at colleges and universities, such as the Georgia Institute of Technology, where faculty participate in the process and an array of milder punishments can be employed.⁴¹⁶

A single-sanction system such as that utilized by the University of Virginia, in which the sole penalty is expulsion, while emblematic of a deeply held adherence to the highest standards of honor, trust and community, could potentially lead to harsh, even draconian results. A recent incident in which the university served as the academic sponsor of a Semester at Sea⁴¹⁷ program appears to confirm that the unyielding application of its sole penalty of expulsion to two relatively minor incidents of plagiarism can lead to an unduly punitive conclusion. At the commencement of the 2008 summer session of the program, the university advised all students, who came from a broad spectrum of colleges and universities, that its honor code and single-sanction system applied.⁴¹⁸ Pursuant to this declaration, two students, from colleges in Ohio and

415. Donald L. McCabe and Gary Pavela, *New Honor Codes for a New Generation*, INSIDE HIGHER ED, March 11, 2005, available at <http://www.insidehighered.com/views/2005/03/11/pavela1>. The authors assert that the efforts expended at colleges and universities that have honor codes “help students understand the value of academic integrity, and the responsibilities they have assumed as members of the campus community.” *Id.* They further state that this convinces many students, “most of whom have cheated in high school, to change their behavior.” *Id.*

416. Hoover, *supra* note 365. Hoover noted that the Georgia Institute of Technology experienced a similar incident to that witnessed at the University of Virginia, when 187 students in the computer science department were found, through the use of a “homemade computer program” to have cheated. The ramifications for students, however, were quite different in that the penalties imposed included receiving a zero on the assignment to an F for the class; none were suspended or expelled according to the author. *Id.* McCabe was quoted as stating that faculty membership on an honors committee, such as that used at Georgia Tech, helps “maintain an honor system’s institutional memory” and that “a code functioning only out of fear doesn’t help students internalize honor.” *Id.*

417. The Semester at Sea program, which has operated since 1963, offers students the opportunity to study abroad while “sailing the globe.” Semester at Sea, <http://www.semesteratsea.org/>.

418. Natalie LaConte, *OU Student Left in Greece After Alleged Plagiarism*, THE POST, Aug. 14, 2008, available at <http://thepost.ohiou.edu/main.asp?Search=1&ArticleID=25461&SectionID=17&SubSectionID=35&S=1>; see also Susan Kinzie, *An Education in the Pitfalls of Online Research; Expelled Students Ran Afoul of U-Va. Honor System by Inadequately Citing Sources in Their Papers*, THE WASH. POST, Aug. 20, 2008, at C01 (stating that during the 2007 trip, incoming students agree to adhere to the honor code, receive a handbook regarding same, and receive lectures related to citing sources from both a student from the Honor Committee and a librarian).

California, were expelled from the program and removed from the ship for engaging in plagiarism.⁴¹⁹ Both had drawn material from a Wikipedia site without the proper attribution to aid in analyses of an assigned film. Neither of these students accepted the opportunity to tender a conscientious retraction; each believed his or her paraphrasing or citations satisfied attribution requirements.⁴²⁰ As an insufficient number of trained University of Virginia students were on board to constitute an Honors Committee, a panel of faculty heard the cases.⁴²¹ The two students were deposited in Greece, given cab fare to the airport, and left to their own resources to return to their homes.⁴²² The incident engendered commentary both critical of, and supportive of, the conduct of the university. Alan V. Briceland, emeritus associate professor of history at Virginia Commonwealth University, argued that the only “immoral” form of plagiarism that would constitute an honor-code violation is the case of deliberate plagiarism, which exhibits a conscious and intentional effort to cheat and “gain an unfair advantage by submitting the work of others as one’s own.”⁴²³ In contrast, a professor at Northern Virginia Community College submitted an opinion in *The Washington Post* evocative of the hard-line view that all plagiarism is a moral offense, whether born of intent or not, that all students know the rules regarding plagiarism, and thus, the students merited their punishment.⁴²⁴

419. Kinzie, *supra* note 418.

420. *Id.* The professor, perceiving plagiarism among several of the students in class, offered all an opportunity to issue a conscientious retraction. *Id.*

421. LaConte, *supra* note 418; Kinzie, *supra* note 418 (noting that the two students separately faced a panel of faculty members during their hearings, and quotes one of the students as stating with respect to this confrontation, “I was scared out of my mind,” and the other, who requested a break in his hearing in order that he might calm down, “I just felt like I was being hammered. I had no hope.”). Reportedly, no student advisor aided either student in the hearings, although a student assisted with regard to one student’s unsuccessful appeal. LaConte, *supra* note 418.

422. LaConte, *supra* note 418; *see also* Kinzie, *supra* note 418.

423. Briceland, *supra* note 383. Professor Briceland contends, at least with respect to one of the offending students, that she should have been interviewed in order to determine her intent, and what she knew regarding “the intricate subjective judgments of restating others’ ideas.” *Id.* Agreeing that making such an assessment is admittedly a “high bar to get over,” he insists such efforts should be expended to avoid expelling someone simply for erring, given the tens of thousands of dollars students have invested in their education. *Id.* Briceland regarded one of the expelled student’s work as, at worst, “ignorant plagiarism” wherein one is ignorant of the proper rules of attribution. *Id.*; *see also* Carlos Santos and Reed Williams, *Critics Ask if U.Va. Was Too Harsh on Students; They Question Leaving Expelled Study-Abroad Participants in Greece*, RICHMOND TIMES DISPATCH, Aug. 13, 2008, at B-1 (quoting Stephen Satris, then head of the Center for Academic Integrity at Clemson University, as questioning whether the students “truly understood” the University of Virginia’s “complex honor code” and stating “it’s far from clear that dropping the students off in Greece was appropriate in this case”).

424. William Harrison, Editorial, *U-Va. Is Right. They Cheated*, THE WASH. POST,

Given the varied definitions of plagiarism employed on college and university campuses, by professional associations, and by publishers; given the disputes as to whether intent is a requisite or an irrelevant factor; and given the disparate results of determinations as to whether plagiarism has, in fact, occurred, it is erroneous to conclude that all students understand the definition and permutations of plagiarism and the rules of attribution necessary to avoid this ethical offense. Students not trained in the proper methods of citation and not familiar with the honor-code system at the University of Virginia cannot be deemed to have been imbued with the same understanding of, and commitment to, the honor system via an onboard lecture and accompanying handbook⁴²⁵ as have University of Virginia students. Lastly, the university's decision to deposit the two offenders in a foreign country and to leave them to secure their own means home because they erroneously (as reported) failed to attribute two or three lines from a source in a movie analysis, appears to have been unduly severe.

D. Revocation or Rescission of Degree

Colleges and universities are inherently empowered, in the courts' view, to revoke or rescind academic degrees "where (1) good cause such as fraud, deceit or error is shown, and (2) the degree holder is afforded a fair hearing at which he can present evidence and protect his interest."⁴²⁶ The rationale articulated by the court in *Faulkner v. University of Tennessee*⁴²⁷ is one

Aug. 24, 2008, at B08.

425. See Kinzie, *supra* note 418. It is interesting to note that while the university held all students participating in Semester at Sea to the standards articulated in its honor code, it did not afford the two students an Honor Committee comprised solely of students, in accordance with measures offered to students at the Virginia campus.

426. *Waliga v. Bd. of Trs. of Kent State Univ.*, 488 N.E.2d 850, 851 (Ohio 1986). See also *Connell & Gurley*, *supra* note 375 (stating that the authority of the academic institution to revoke a degree for a reasonable cause was addressed as early as 1334 in *The King v. University of Cambridge*, 8 Mod. Rep. 148 (citing *Waliga*, 488 N.E.2d at 852)).

427. 1994 Tenn. App. LEXIS 651 (Tenn. Ct. App. 1994). In this unusual case, wherein Faulkner concurred that his dissertation had contained extensive copying, he sought to reverse the revocation of his Ph.D. degree premised on two arguments: that his substantial copying of prior studies authored by others did not constitute plagiarism, and that the University of Tennessee was estopped from rescinding his doctorate because his major advisor, Dr. Walter Frost, had granted permission to fully utilize these studies, including verbatim copying. *Id.* at *7. The court, taking note of Dr. Frost's "peculiar" definition of plagiarism in which he emphasized the material was not "stolen," and hence, not plagiarized, concluded overwhelming evidence supported a finding of plagiarism, and that secondly, estoppel was not viable as Dr. Frost had no apparent authority to authorize Faulkner to plagiarize his dissertation. *Id.* at *11-12. Subsequently, both Dr. Frost and Mr. Faulkner were criminally prosecuted for mail fraud, among other offenses. See *United States v. Frost*, 125 F.3d 346 (6th Cir. 1997). The facts revealed a blatant plagiarism scheme wherein Professor Frost permitted the

which recognizes that

Academic degrees are a university's certification to the world-at-large of the recipient's educational achievement and fulfillment of the institution's standards. To hold that a university may never withdraw a degree . . . would undermine public confidence in the integrity of degrees, call academic standards into question, and harm those who rely on the certification which the degree represents.⁴²⁸

Revocation must occur within the constraints of the Fourteenth Amendment due-process protections if the college or university is a public institution,⁴²⁹ or with adherence to "principles of fundamental fairness" if it is a private institution.⁴³⁰ Courts will also ensure that the proper party or entity effectuates such revocation and that the institution does not significantly depart from articulated academic-dishonesty procedures.⁴³¹ Exercising its power of revocation, Ohio University in 2007, in a review of theses from the graduate engineering program dating back twenty years,

defendants to plagiarize their theses, in exchange for those students directing contracts, via their jobs, to the professor's science research business.

428. *Faulkner*, 1994 Tenn. App. LEXIS 651, at *15 (quoting *Waliga v. Bd. of Trs. of Kent St. Univ.*, 488 N.E.2d 850, 852 (Ohio 1986)). *See also* *Connell & Gurley*, *supra* note 375, at 52 (noting that "although relatively little judicial attention" is directed to the matter of revocation authority, both public and private institutions "generally have authority to withhold and revoke improperly awarded degrees").

429. *Connell & Gurley*, *supra* note 375 at 63–65 (giving as an example *Crook v. Baker*, 813 F.2d 88 (6th Cir. 1987), wherein the Court of Appeals for the Sixth Circuit upheld the state university's revocation of a degree, based upon evidence of fabrication of test results in a master's thesis, where notice and the basis of the charges and an opportunity to be heard were afforded the student). *See also supra* notes 296–99 and accompanying text for discussion of rights of students in the public and private college and university context.

430. *Connell & Gurley*, *supra* note 375, at 63–67 (providing as an example *Abalkhail v. Claremont University Center*, 2d Civ. No. B014012 (Cal. App. 1986), *cert denied*, 479 U.S. 853, wherein the private institution was upheld in revoking a Ph.D. degree premised on a partially plagiarized dissertation, where procedural fairness was provided, with the court indicating it would only set aside the revocation if an abuse of institutional discretion had occurred). *See also supra* notes 296–99, 303–08 and accompanying text for discussion of rights of students in the public and private college and university context.

431. In *Hand v. N.M. St. Univ.*, 957 F.2d 791 (10th Cir. 1992), the university revoked Hand's Ph.D. degree, awarded ten years earlier, subsequent to an investigation, prompted by an anonymous source, that revealed the dissertation plagiarized other sources. Hand challenged the validity of the revocation premised on the belief that pursuant to New Mexico law, only the Board of Regents, and not the Dean, was empowered to effectuate such a revocation. The court noted that it was "self evident" the university had the authority to revoke an improperly awarded degree where good cause and a fair hearing occur; it agreed, however, that the state statute confers exclusive power to the Board of Regents to confer degrees: "conversely . . . power to revoke degrees is vested exclusively in the Regents." *Id.* at 795.

revoked a student's master's degree for plagiarism.⁴³² In 1988, Western Michigan University revoked a master's degree of a Libyan citizen who plagiarized his thesis on Libyan foreign policy.⁴³³ St. John's University in 1998 revoked a B.A. degree that it had awarded a student the prior year, when the university discovered the student had plagiarized his award-winning senior essay.⁴³⁴ And the University of Virginia, in a widely reported "massive plagiarism investigation" in 2001 that occurred in the class of a physics professor who had utilized a plagiarism-detection program of his own design, dismissed forty-eight students and revoked the degrees of three who had already graduated.⁴³⁵

E. Litigation

The imposition of the sanctions employed by colleges and universities against students found guilty of plagiarism has prompted litigation brought by those individuals. Plaintiffs avail themselves of a wide variety of causes of action including negligence,⁴³⁶ estoppel,⁴³⁷ defamation,⁴³⁸ intentional infliction of emotional distress,⁴³⁹ and violations of state law,⁴⁴⁰ but primarily these cases are grounded in alleged violations of due process or the private-institution equivalent thereof. What these cases reveal, whether the student is objecting to the application of a stigmatizing penalty, a one-year withholding of a degree, or a revocation of a degree, is fourfold in

432. See Sean Gaffney, *Ohio U. Revokes Degrees for Plagiarism*, THE POST, Mar. 29, 2007 (stating that in the review of more than 1800 prior theses submitted by the graduate engineering students, the university's Plagiarism Hearing Committee had recommended five dismissals, twelve rewrites, and one revocation of a student's degree); see also Matt Leingang, *Ohio College Stung by Plagiarism Charges*, THE POST Aug. 21, 2006. Ramifications of the Ohio University plagiarism scandal also encompassed those faculty who had overseen the graduate students. See Wasley, *supra* notes 8 and 291; see also *supra* note 327. As a result of the plagiarism scandal, Ohio University's Russ College of Engineering and Technology adopted an honor code. See Gray, *supra* note 372.

433. *Master's Degree Revoked in Plagiarism Case*, CHRON. OF HIGHER EDUC., Aug. 3, 1988, at A2.

434. Theresa Winslow, *Degree Revoked at St. John's For Cheating*, THE CAPITAL, June 17, 1998, at D1. St. John's President Christopher Nelson was quoted as terming plagiarism "the highest crime in academia." *Id.*

435. Boorstein, *supra* note 409, at B01.

436. Phil Baty, *Plagiarist Student Set To Sue University*, TIMES HIGHER EDUC. SUPP., May 28, 2004, at 1 (where Michael Gunn was advised by the University of Kent at Canterbury, days before graduation, that his coursework revealed extensive plagiarism from internet sources, he argued that the university was negligent in that it "failed to give proper guidance on acceptable research techniques").

437. See *Faulkner v. Univ. of Tenn.*, 1994 Tenn. App. LEXIS 651, *11 (1994).

438. *Napolitano v. Trs. of Princeton Univ.*, 453 A.2d 279 (N.J. 1982); see also Billings, *supra* note 260, at 413-18.

439. Billings, *supra* note 260.

440. *Hand v. N.M. St. Univ.*, 957 F.2d 791 (10th Cir. 1992).

nature. First, courts do not require that state or private institutions provide procedures that comport with due process or fundamental fairness in a rigid or formulaic manner.⁴⁴¹ Secondly, courts will seek to determine if the procedures articulated by a college or university in its publications were followed, but not all departures from those procedures will render them devoid of due process or fairness.⁴⁴² Thirdly, courts generally evince little sympathy for the argument proffered by a sanctioned student that similarly culpable students receive disparate treatments.⁴⁴³ Lastly, consistent with *Dixon*⁴⁴⁴ and its progeny, the courts continue to exhibit great deference to college or university expertise in matters of academic wrongdoing.⁴⁴⁵

*Napolitano v. Trustees of Princeton University*⁴⁴⁶ is illustrative of the posture of the courts regarding the student-university relationship. While expressing deference for the university's disciplinary process, the trial court remanded the plagiarism matter to the university for a rehearing concerning the highly regarded senior student because Princeton had not adhered to its regulations in three ways: the Committee on Discipline had used an outdated definition of plagiarism, which regarded intent as irrelevant, rather than the applicable and current definition, which requires a deliberate use of an outside source without proper acknowledgement; it had not allowed Napolitano to call all of the character witnesses that she had selected; and it had not advised her that she had a right to cross-examine the witnesses against her.⁴⁴⁷ Nevertheless, when the Committee reached the same conclusion of withholding Napolitano's degree for a year, and advising all law schools to which she had applied of its plagiarism adjudication, the court upheld its decision as based on "sufficient reliable evidence."⁴⁴⁸ The court did so despite the fact that a review of Princeton's disciplinary files revealed that a wide range of sanctions for academic fraud appeared to be "imposed on an *ad hoc* basis, with suspension (or the withholding of degrees for seniors) being the exception rather than the rule."⁴⁴⁹ Indeed, the Appellate Division regarded the fact that many

441. See *supra* note 304.

442. *Hill v. Trs. of Ind. Univ.*, 537 F.2d 248, 252 (7th Cir. 1976). ("due process of law guarantees 'no particular form of procedure; it protects substantial rights'") (quoting *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 610 (1974)).

443. *Napolitano v. Trs. of Princeton Univ.*, 453 A.2d 279 (N.J. Super. Ct. App. Div. 1982).

444. *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 390 (1961); see *supra* notes 296–97, and accompanying text.

445. See *supra* notes 300–02 and accompanying text.

446. 453 A.2d 279 (1982).

447. *Id.* at 281.

448. *Id.* at 282.

449. *Id.* at 281. Notably, Princeton argued "there is no requirement that punishment be uniform in matters of discipline within a private institution." *Id.* at 284. The trial court, in assessing the issue of the penalty, defined its role as solely determinative of whether the penalty violated Princeton's contract with the student by

students in same or similar incidents were not as severely penalized as “totally irrelevant.”⁴⁵⁰

*Hill v. Trustees of Indiana University*⁴⁵¹ is suggestive of the broad latitude afforded the university in its academic disciplinary decisions. In *Hill*, the court found that the fact that a professor did not comply with university procedures in determining plagiarism had occurred and in giving Hill failing grades did not, “in itself, constitute a violation of the Fourteenth Amendment.”⁴⁵² In this instance, a professor concluded that Hill had committed plagiarism, awarded him an F in two courses, and advised that notice of the matter would be forwarded to the Dean of the Graduate School in accordance with the *Faculty Handbook*.⁴⁵³ When it was discovered that a different procedure was mandated by the *Student Code of Conduct*, the Dean informed Hill that both the plagiarism charge and the failing grades would “be held in abeyance” until the professor’s return in the fall semester when Hill would be provided with the notice and opportunity to present his defense.⁴⁵⁴ Hill did not avail himself of this option; he initiated the litigation premised on a deprivation of Fourteenth Amendment rights. In upholding the dismissal of the action, the court noted the receipt of the failing grades did not give rise to a deprivation of due process, given the university’s effort to stay the plagiarism charge and grades.⁴⁵⁵

*Sanderson v. University of Tennessee*⁴⁵⁶ is further reflective of the flexible standards with which due process can be satisfied by the university. In that case, Michael Sanderson asserted that the university’s decision to uphold a penalty, an F for a course and suspension for one year,

the severity of the sanction. The court noted that in “determining whether there has been a breach of contract, the legal standard against which the court must measure the university’s conduct is that of good faith and fair dealing.” *Id.* at 283 (citing *Onerdonk v. Presbyterian Homes of N.J.*, 85 N.J. 171, 182 (1981)). The court further noted that while disciplinary probation was the typical penalty in plagiarism cases, Princeton had the option of withholding Napolitano’s degree until September, allowing her to commence her graduate studies, rather than losing “a year of academic life.” *Id.* at 284 n.4.

450. *Id.* at 278. The Appellate Division asserted that Princeton was entitled to tailor the sanction to the offense, the offender and the community. *Id.*

451. 537 F.2d 248 (7th Cir. 1976).

452. *Id.* at 252.

453. *Id.* at 250.

454. *Id.* The Student Code of Conduct stated in part:

A faculty member who has evidence that a student is guilty of cheating or plagiarism shall initiate the process of determining the student’s guilt or innocence. No penalty shall be imposed by the instructor until the student has been informed of the charge and the evidence on which it is based and has been given an opportunity to present his defense to his instructor.

Id. at 250 n.1.

455. *Id.* at 252.

456. 1997 Tenn. App. LEXIS 825 (Tenn. Ct. App. 1997).

for plagiarism that he had committed on a term paper was in violation of the Tennessee Uniform Administrative Procedures Act,⁴⁵⁷ and thus ripe for a judicial reversal or modification if that decision was unsupported by “substantial and material evidence.”⁴⁵⁸ The Administrative Law Judge who initially heard the matter and noted that the university lacked an “established definition of plagiarism” applied the one in *Black’s Law Dictionary*⁴⁵⁹ and held that Sanderson lacked the requisite intent to commit plagiarism.⁴⁶⁰ The Chancellor, to whom the university appealed, in contrast employed the definition of plagiarism included in the course syllabus, which did not require a finding of intent. After comparing Sanderson’s work with the sources used, and after reviewing the record of witness testimony established at the administrative hearing, the Chancellor concluded that Sanderson was guilty of plagiarism.⁴⁶¹ In concurring with the Chancery Court that the finding of plagiarism was supported by substantial and material evidence, the Court of Appeals of Tennessee noted that due process did not require the Chancellor to personally observe witnesses; nor did it deprive him of broad discretion to accept, reject, or modify the Administrative Law Judge’s findings.⁴⁶²

In short, recourse to litigation by students found guilty of plagiarism generally does not afford them the relief they seek: an exoneration of the charge or a reduction in the sanction. Barring a college or university process that is rife with capricious behavior or that fails to provide the mandates of due process for the public-college or -university student or the “good faith and fair dealing” equivalent for the private-college or -university student, courts will uphold an institution’s decision regarding a determination of plagiarism in deference to the institution’s expertise and autonomy. The courts seek not to intrude into the student-university relationship and will not, and indeed should not, substitute their opinions for that of the institution. Further, the courts will generally not temper a penalty even if the penalty in question was harsh; nor will the courts condemn inequities of sanctions imposed upon the student plagiarist as compared to those penalties applied to students in similar circumstances. That role of ensuring equitable treatment for similarly circumstanced cases so that penalties are issued in an evenhanded and consistent manner, and of defining plagiarism in accordance with its historical roots, which would mandate intent and not mere error or lack of knowledge as the essential basis for a plagiarism finding, is a role that colleges and universities should seek to fulfill.

457. TENN. CODE ANN. § 4-5-322 (2010).

458. *Sanderson*, 1997 Tenn. App. LEXIS 825, at *7.

459. *See supra* note 70 and accompanying text.

460. *Sanderson*, 1997 Tenn. App. LEXIS 825, at *5.

461. *Id.*

462. *Id.* at *13–14.

XI. CONCLUSION AND RECOMMENDATIONS

Plagiarism, the deliberate misappropriation of another's words or ideas without appropriate attribution, is an offense that is clearly viewed as anathema by colleges and universities, meriting condemnation as a grievous violation of academic honesty codes and policies. With the advent of the Internet and its innumerable databases, the temptation for students to engage in such pursuits is markedly enhanced and vigorously documented as a growing scourge in academia. So too is the ability to discern and penalize perpetrators, heightened via the use of a score of detection services whose uses have "arguably increased the fervor to capture and punish."⁴⁶³ Many institutions decry the lack of attribution on the part of students and some faculty as so heinous an act that it requires no evidence probative of intent. At those institutions, it is treated as a strict-liability offense where instances of intentional, accidental, or unknowing plagiarism⁴⁶⁴ are equally castigated. But "the denial of authorial intention in adjudicating plagiarism contradicts . . . the origin and development of the concept."⁴⁶⁵

For many in the academy, plagiarism provokes a fervent indignation, in part because it is often inappropriately intertwined with, or viewed as synonymous with, the legal concepts of crime and copyright infringement. This amalgamation heightens the level of contempt with which it is viewed.⁴⁶⁶ If, indeed, being found guilty of plagiarism puts the offender in academic purgatory, often accompanied by permanent stigmatization that proves a hindrance to the pursuit of continued studies and careers, then it is imperative that it be defined consistently and correctly, devoid of its current assimilation to illegality and criminal behavior.⁴⁶⁷

Research suggests that the application by colleges and universities of their varying definitions of plagiarism to factual circumstances creates disparate results among similarly situated students, and between students and faculty. Faculty often assume that students, in fact, are fully apprised

463. Purdy, *supra* note 32, at 277 (noting that a plagiarism detection software program called EVE2, with a search function entitled "Call off the hounds when..." "positions the student as a wily and cunning trickster (the mythological image of the fox) and the instructor as a hunter out for the kill").

464. See Briceland, *supra* note 383, at E-1 (urging that morally reprehensible plagiarism requires proof of intent and that "mistakes and acts done out of ignorance are not moral lapses, they are simply mistakes").

465. HOWARD, *supra* note 53, at 162 (citing Giles Constable, *Forgery and Plagiarism in the Middle Ages*, ARCHIV FUR DIPLOMATIK, SCHRIFTGESCHICHTE, SIEGEL-UND WAPPENKUNDE, 1, at 3 (1983) ("[T]he intention to deceive is as central as the actual deception.")).

466. Richard A. Posner, *The Truth About Plagiarism*, NEWSDAY, May 18, 2003, at A34; see Part II.A; see also Part VI.

467. Plagiarism has never been deemed an illegality or a crime, except in colloquial conversation. See Green, *supra* note 28 and accompanying text.

of both the meaning of plagiarism and the appropriate rules of citation, either through pre-collegiate preparation or through statements and practices set forth on college and university syllabuses, pamphlets, or websites; research suggests such confidence is misplaced.

If, after a lengthy investigation in which noted academics stood at polar opposites as to whether the work of Stephen B. Oates represented plagiarism, the American Historical Association can conclude that Professor Oates failed to sufficiently acknowledge the work of Benjamin P. Thomas but then decline to deem that failure plagiarism,⁴⁶⁸ what does this portend for students' understanding of what constitutes plagiarism? When noted scholars signed a letter published in *The Daily Pennsylvanian* vehemently protesting the characterization of the work of University of Pennsylvania Professor Kathryn Edin as constituting conceptual plagiarism of the work of then-Penn Professor Elijah Anderson, in opposition to other scholars who opined that Anderson's groundbreaking work received insufficient attribution,⁴⁶⁹ what clarity of definition is conveyed to students? When noted Harvard scholars Laurence H. Tribe, Charles J. Ogletree, and Doris Kearns Goodwin can successfully proffer inadvertence and lack of intent in failing to attribute as a defense to accusations of plagiarism,⁴⁷⁰ how then can this not be similarly regarded as a reasonable defense for students who are advised that intent is irrelevant pursuant to academic policies which embrace a strict-liability definition of plagiarism? These incidents, wherein the experts cannot reach unanimity as to what, in practice, constitutes plagiarism, should serve to temper and inform the college and university response to alleged student and faculty plagiarists.

The underlying thrust of the ethical violation of plagiarism is the intent of an author to use the words or ideas of another, to conceal their provenance, and to deceive the readership as to the origin of the expressions. To define plagiarism as a no-fault offense is antithetical to both the record of history and that of law. Rather than engage in denunciations premised solely on textual comparisons such as those afforded by Turnitin and its ilk, institutions of higher education should engage in the time-consuming and difficult analyses as to authorial intent, degree of carelessness, or lack of knowledge that this problem requires. Such scrutiny is not mandated by the courts via judicial oversight or intervention—it is simply and inherently the ethical response that should be adopted by higher education. The courts will demand that a public college or university afford its students the due process required by the Fourteenth Amendment, and that a private college or university offer good faith and fair dealing with regard to its academic decision-making. The courts,

468. See *supra* note 96.

469. See *supra* note 79.

470. See *supra* notes 12 and 14.

however, exhibiting the traditional judicial deference to the expertise and autonomy of institutions of higher education, will not demand that uniform definitions of plagiarism be adopted, or that such policies mandate a consideration of authorial intent. Further, in accordance with *Dixon*⁴⁷¹ and its progeny, courts will impose no legal duty upon colleges and universities to provide a wide variety of sanctions proportionate to the egregiousness of the plagiarism offense; nor will they impose a legal duty to provide consistency of application of such penalties among students or between students and faculty. But it is the ethical obligation of the college or university to address these issues with a comprehensive plagiarism policy, particularly with respect to its students. The international academic community has, in fact, recently recognized the importance of establishing consistent plagiarism policies and penalties for student plagiarism.⁴⁷²

My recommendations with regard to establishing a plagiarism policy include the following: (1) colleges and universities should establish a more uniform definition of plagiarism that would adhere to the term's intellectual heritage as a form of fraud wherein one presents the words or ideas of another as one's own, and deem intent or deliberate indifference a requisite to a determination of plagiarism, as distinguished from that unattributed copying born of mistake or lack of knowledge of attribution requirements. Language that erroneously associates the act of plagiarism or the character of the perpetrator within a criminal context also should be eliminated, and distinctions should be drawn between the ethical failing of plagiarism and the legal and strict liability violation of copyright infringement; (2) sanctions, even at the traditional honor-code institutions that eschew any penalty other than expulsion, should be calibrated to match the egregiousness of the offense, and, at minimum, the intent or lack thereof evinced by the perpetrator should prove relevant in the determination of an appropriate penalty; (3) while not urging a rigid, inflexible approach, I suggest that clearly articulated policies, standards, and guidance with

471. *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961); *see supra* note 296.

472. *See* Rebecca Atwood, *The Plagiarism Tariff*, INSIDE HIGHER ED, June 17, 2010, [available at](http://www.insidehighered.com/layout/set/print/news/2010/06/17/plagiarism) <http://www.insidehighered.com/layout/set/print/news/2010/06/17/plagiarism> (last visited June 28, 2010). Academics in the United Kingdom have suggested a national tariff (a sliding scale of penalties for plagiarism premised on the student's history of plagiarism, the amount of plagiarized material and the level of study of the student, among others) which sets forth plagiarism penalties, intending to provide a "benchmark" to potentially be adopted worldwide as a method of addressing plagiarism, that would avoid the vast variation observed in institutions' plagiarism policies and the attendant penalties. *Id.* A former independent adjudicator for higher education in the UK warned that "universities were leaving themselves vulnerable to legal action as a result of their inconsistent handling of plagiarism cases." *Id.* The goal of the proposed tariff is to provide "a proportionate, consistent and fair-minded approach to sanctions." *Id.*

respect to determinations of plagiarism and appropriate sanctions, should be maintained, in order that wide disparities in treatment among students and between students and faculty do not undermine the lofty and worthwhile goals of advancing ethics in academia; and (4) lastly, I recommend that colleges and universities afford their students what the Chancery Court in *Napolitano v. Trustees of Princeton University*⁴⁷³ was constrained from mandating, due to its proper deference to the autonomy of college and university academic decisions: a decision infused with a measure of compassion, which, while upholding the tenets of academic integrity and applying sanctions for plagiarism that reflect that determination, avoids penalties that permanently stigmatize or condemn with moral castigation.

473. 453 A.2d 279 (N.J. Super. Ct. Ch. Div. 1982); *see also supra* note 130 and accompanying text.

