ARTICLES
Plagiarism: Legal and Ethical Implications for the University  Audrey Wolfson Latourette

New Scrutiny of College and University Executive Compensation and Unrelated Business Activity  Milton Cerny  Michele A. W. McKinnon  Jeffrey R. Capwell  Kelly L. Hellmuth


BOOK REVIEW
Justifying America's Universities: A Review of The Great American University: Its Rise to Preeminence, Its Indispensable National Role, Why It Must Be Protected  Judith Areen

NOTE
Transitioning from UMIFA to UPMIFA: How the Promulgation of the Uniform Prudent Management of Institutional Funds Act Will Affect Donor-Initiated Lawsuits Brought Against Colleges and Universities  Rachel M. Williams
PLAGIARISM: LEGAL AND ETHICAL IMPLICATIONS FOR THE UNIVERSITY

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AUDREY WOLFSON LATOURETTE*

I. HISTORICAL PERSPECTIVES ................................................. 9
II. CONTEMPORARY DEFINITION OF PLAGIARISM ....................... 15
   A. Plagiarism Regarded as a Potential Criminal Offense .......... 18
   B. Plagiarism and the Matter of Intent .............................. 22
   C. Defining Plagiarism with Regard to Intent: Determining Factors ....................................................... 24
III. INCIDENCE OF PLAGIARISM ............................................. 29
IV. RATIONALE FOR PLAGIARISM’S PURPORTED PREVALENCE ........... 33
V. DEVICES FOR PURPOSES OF DETERRENCE AND DETECTION ....... 35
VI. PLAGIARISM AND COPYRIGHT .......................................... 45
VII. VENUES FOR PLAGIARISM DETERMINATIONS ....................... 50
VIII. CONSEQUENCES TO STUDENTS VERSUS FACULTY ................. 59
IX. CONSEQUENCES TO FACULTY ........................................... 64
X. CONSEQUENCES TO STUDENTS ........................................... 71
   A. Particular Impact on Law Students ............................... 75
   B. Public Humiliation ................................................... 76
   C. Expulsion ............................................................. 78
   D. Revocation or Rescission of Degree .............................. 82
   E. Litigation ............................................................. 84
XI. CONCLUSION AND RECOMMENDATIONS ................................ 88

"[T]here is an upstart crow, beautified with our feathers . . . ." - Robert Greene, an English dramatist and contemporary of William Shakespeare, quoting on the Bard of Avon

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"West Side Story" is a thinly veiled copy... of 'Romeo and Juliet,' which in turn plagiarized Arthur Brooke's 'The Tragicall Historie of Romeo and Juliet,'... which in turn copied from several earlier Romeo and Julets, all of which were copies of Ovid's story of Pyramus and Thisbe." — Richard A. Posner, Judge, U.S. Court of Appeals, Seventh Circuit.

"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 biographer

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 malfeasant, 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" has been deemed the "hot, new crime du jour" that, according to commentators, has prompted an "escalating war against academic plagiarism." In an era in which scholars appear increasingly prepared to report alleged acts of plagiarism by their peers, the concept of the "plagiarist 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 LDNY, PLAGIARISM AND ORIGINALLITY 74-75 (1952) (arguing that Greene "violently resented Shakespeare's 'free-and-easy ways'). Lindsay further opines that with respect to the alleged charges of plagiarism directed to Shakespeare, "Time has rendered its verdict,... Greene himself is no more a name in the annals of letters, Shakespeare lives." Id.


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


7. Id.

8. Paula Walsey, 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 these 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 damage done to the area of research as "dissipated 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 McCrae acknowledges indebtedness to Andrew 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 have since 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 define 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 note 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 the plagiarizing of Platoon by Children 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/next/25363; see also Tina 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. Harvard University has witnessed a variety of allegations grounded in plagiarism, from challenges to faculty scholars on their failure to attribute sources or to indicate that they relied on another's use of secondary sources to revocation of an offer of acceptance to a high-school student whose published work in a local newspaper plagiarized sources, 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.15 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.16 And the pervasive embrace of plagiarism allegations has included Martin Luther King, Jr. with respect to his doctoral dissertation,17 then-Senator Joseph Biden with regard to both his law-school research and political speech making, and ironically, the writer for Katie Couric's blog, which he checked each original source to confirm the citation and that this does not constitute plagiarism. The revocation appears to have involved the issue of a draft, A.A.A.R.18 Dershowitz Accused of Plagiarism, HARV. CRIMSON, Sept. 29, 2003, available at http://www.thecrimson.com/article/2003/9/29/dershowitz-accused-of-plagiarism-a-depaut. 16. Elizabeth W. Green and J. Hale Russell, Harvard Takes Back Honorim Admission Offer, HARV. CRIMSON, July 11, 2003, available at http://www.thecrimson.com/article/2003/7/11/harvard-takes-back-honors-admision-offer. Blair Horstine, a senior at Moorestown High School in New Jersey,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 other court justices. Admitting to the plagiarism, Horstine acknowledged 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 12, 2003, available at http://www.guardian.co.uk/education/2003/jul/21/highereducation.uk. 17. Jeannie Keefe, When Words Aren't Yours—Plagiarism Goes Beyond Issue of Academic Honesty," HOUSTON CRIMSON, May 7, 2006, at 10. The article describes the manner in which Harvard sophomore Kayrin 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 Breeden, political cartoonist for The Harvard Crimson, bore similarities to the work collected on a Professional Cartoonists Index. Breeden was exonerated by the Yellow Kid and as “Kaavarsky,” among other terms of derision. Rachael Aspden, Ivy League Redemption, NEW STATESMAN, Nov. 13, 2006, at 19. 18. Alfred Labrado, Journalists Work to Stop Plagiarism, Keep Trust, PHILA. INQUIRER, April 21, 2004, at A10; David Meleahan, The Paperless 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 such attribution to the 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. Petros, Academic Dishonor: A Plague On Our
which purportedly is written by Couric. 21

In the college and university context, assertions of plagiarism, and statistics portraying an increasing incidence of plagiarism by students, abound. 22 Faculty and administrators nationwide are not immune from charges of plagiarism, and many have been tainted or terminated by these 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 academic communities have been embittered and disillusioned by the ritualistic and arbitrary nature of these processes, which are often conducted behind closed doors or in the dark, with no due process for the accused. 26

Profession, 123 EDUC 626, 626 (2003). 21. Suzanne Goldenberg, CBS Anchor Embarrassed by Plagiarism, THE GUARDIAN, April 12, 2007, at 19. A commentary written by Katie Couric, which was 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 Zaslav, 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 & Hefner, supra note 4, quoting Professor Donald McCabe of the Center for Academic Dishonesty at Duke University, whose studies of students conducted since 1990 indicate a growing percentage of students engage in forms of cheating including plagiarism. While in 1990 only half admitted to having plagiarized, they had plagiarized from the Internet, that figure increased to forty-one percent by the year 2001. Id.


25. Dumas defines stealing and passing off someone else's ideas or words as one's own without crediting the source . . . . Dumas, supra note 5, at 26 (quoting Merriam-Webster online definition); McGrath notes that "i[t]we talk to [students] about plagiarism in absolute terms, as if we were all agreed on what it was, and yet the literature suggests that we would wish to use the criminal law for purposes of deterrence."

26. Gill 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 labels . . . . Faculty have strong emotional responses to plagiarism. While in 1990 only half admitted to having plagiarized, they had plagiarized from the Internet, that figure increased to forty-one percent by the year 2001."


29. Scott McLean, 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, by publication, of the expression of the idea, . . . of another." Self-plagiarism is defined by Alexander Lindsey 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, dishonest 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. Faculty and administrators should avoid maintaining the vigilance of a "shark looking for violators," which harms the trust between professors and their students, or employing a "bring out the hounds" mentality, and constructing academic honesty policies rife with criminal connotations. Instead, they should engage in the lengthy and difficult process of distinguishing 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

now title," wronging the first publisher, cheating the second, and swindling the readers. LINDEY, supra note 1, at 218. But see Peter Charles Hoffer, Post Imperfect 181 (2004) (contending that "we 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, WASH. ST. J., November 29, 2003, at A1.

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.

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 declaraton, 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 Marcello 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 Wakefield 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. TIDAL MALLON, STOLEN WORDS, THE CLASSIC BOOK ON PLAGIARISM 4 (1999) (observing that "jokes about out-and-out literary theft go back all the way to Aristophanes and The Frogs, but what we call plagiarism was more for laughter than litigation.").


37. Id. at 3-4. Woodmansee and Jaszi observe that "William Wordworth . . . extensive reliance on the writing of his sister Dorothy is now also beginning to come to light." Id.
against the piracies of his contemporary as the “most famous in all literature,” because he framed the charge utilizing the word plagiarisim.

During the Middle Ages, reverence adherence to the philosophy of antiquity continued. While some medieval writers sought to protect their writings from unauthorized copying, in the absence of modern ideas of literary property, individualism, and originality, the contemporary notion of plagiarism did not exist. The invention by Johannes Gutenberg of the printing press in 1440, deemed a “crucial precondition of modern authorship,” supported a “growing artistic consciousness, albeit one not yet . . . protected by copyright laws.” Despite the foregoing, the classical style remained the primary model for authorship as Renaissance authors sought to imitate the classical texts. The quintessence of the imitative strategy employed by the classical 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.” Judge Posner, in comparing Sir Thomas North’s translation of Plutarch’s life of Marcus Antonius with Shakespeare’s brilliant transformative creation of the same lines, observes, “If this is plagiarism, we need more plagiarism.”

43. WHITE, supra note 42, at 16.

44. LISA EDE & ANDREA LUNSFORD, SINGULAR TEXTS/PLURAL AUTHORS: PERSPECTIVES ON COLLABORATIVE WRITING 78 (1990). The authors note that “[l]ots of medieval French court documents appear to be a form of contemporary plagiarism.” See PLUTARCH, trans. 2.119 (1952).Id. at 78-79; Howard, supra note 39, at 790 (asserting, however, that “the history of Western literature” 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 individually written ability. MALLON, supra note 35, at 4 (there existed a “dismally rising premium on uniqueness.”).

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


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 “plagiarism” and the first in English, when voiced by Ben Jonson, in the satire play “Poetaster.” Jonson notes, “Why! The dirt’s all borrowed: ‘tis Horace: hang him plagiarist.” 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."54 The British enactment of copyright law, as evidenced in the 1710 Statute of Anne,55 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.55 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.56

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, laid more claim to a new plagiarist than any other book of its size by an author of rank... ." LINDER, 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 redefinition of the notion of authorship, with its concomitant demand for attribution, included the application of the philosophy of Renaissance philosopher Rene Descartes. Ede & LUNSFOED, supra note 44, at 79 ("[t]his 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 societal 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/st_b_8s2.html. It vested authors with copyright protection for the period of twenty-one years for existing works, and for fourteen years thereafter. All works published subsequent to its enactment. Id. Ede and Lunsfoed recounted that the proposed adoption of the laws 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 & LUNSFOED, supra note 44, at 81–82.

53. WOODMANSEE & JASKL, 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 79 (1993) (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 "[a]sociating personal virtue with true authorship... [one] makes it possible to assert an absence of virtue for authorship’s opposite, plagiarism." Id. at 87.

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

56. Linder attributes 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." LINDER, 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 Tenaysyn’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 plagiaristic incentives. 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 Pound that commences, “I saw her on the bridal day in blushing beauty blast.” 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 Encyclopaedia 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, Mazzoe notes that today, "questions of improvement" are no longer operative; the focus now lies on the appropriation of specific language.65 Mazzoe'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 Mazzoe, 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 Mazzoe'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. LIT. 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 was no "monolithic phenomenon," but rather a "lively" and "interpenetrating" form of "borrowing." Id. at 219, 221.

63. MAZZOE, supra note 62, at 7. Two types of plagiarism prompted criticism by the Romantics: combinable plagiarism, which was considered "borrowing," and simultaneous plagiarism, which was considered "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 valence; such authors were deemed guilty of poor writing by failing to achieve aesthetic objectives that included "questions of voice, persona, and narrative or lyric mystery." Id.

64. Id. at 5–6. Mazzoe observes that "writers who did not acknowledge their borrowings, even implicitly (simply because they were not considered plagiarists), no matter how extensive the correspondences, if they had borrowed upon their borrowed materials. Where improvement existed, acknowledged 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 Benin 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. MAZZOE, supra note 62, at 6–7, 184.

66. MAZZOE, supra note 62, at 187.

67. Id.
Plagiarism as defined in some college and university or professional contexts is an intentional omission of one's sources;\textsuperscript{7} in other colleges and universities or associations, the act of appropriating another's ideas or expression, regardless of intent, prompts condemnation as plagiarism.\textsuperscript{14} 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.\textsuperscript{8} Some

7. ANDERSON, supra, at 27.

8. Lindey, supra note 1, at 218. However, putting forth a prior work or part of a prior work under a new title, Lindey contends, "orows [one's] first publisher, coasts the second, and swells [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 is taking an 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 intent of a quotation or citation of earlier publications." Standler, PLAGIARISM IN COLLEGES IN USA, SELF-PLAGIARIZATION, available at http://www-axis2.html.plag.htm (last visited Oct. 10, 2010). But see, NYU School of Law, Pledges of Academic Honor, available at http://www.nyu.nyu.edu/eclm_div/group/public/nyu_law_website_lin.jsd/docunents/lecim_pro_062457.pdf ("Although not within the definition of plagiarism, it is also forbidden, without permission of the instructor, to submit the same
plagiarism frequently refers to the "content of discovery or the interpretation of data," rather than the duplication of specific phraseology. Plagiarism, according to some commentators, includes the type of managed book wherein graduate students essentially construct the work that will ultimately bear the name of the faculty member who supervises as editor or overseer of the process. The plagiarism-definition landscape is further obscured by the colloquial practice of imprecisely garbing the term "plagiarism" in the mantle of criminal thief connotation.

A. Plagiarism Regarded as a Potential Criminal Offense

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


80. Stearns, supra note 78, at 525.

81. E.g., id.; Richard Posner, Plagiarism—Posner Post, THE BECKER-PO覆ER BLOG (Apr. 24, 2005, 7:51 PM), http://www.becker-posner-blog.com/archives/2005/04/plagiarismposner.html (likening the role of the nominal author of a managed book to that of a movie director who "supervises 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 Botum, Another Harvard Copycat, THE WILY STANDARD, Sept. 20, 2004 (opposing "pasted-production" of books and terming the reproduction of Balkin’s words as "double plagiarism"). Harward 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 Larry Kurland’s work entitled What Brown v. Board of Education Really Meant. How It’s Gone—and 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 a thief is a "recurrent metaphor," since it does not satisfy the legal definition of theft nor is it prosecuted as such. Id. at 170. See also N.Y. Unu. Sch. of Law, School of Law Policies and Procedures, at 6 (1970), available at http://www.law.nyu.edu/students/studentaffairs/publicationsandresources/studenthandb ook/nyu00703SchoolsLawsPoliciesProcedures/index.htm (follow "ECM_DLW_010208.pdf" hyperlink) (defining plagiarism as an "academic crime and a serious breach of Law School rules.")

84. Howdo, supra note 53, at 107 (counting the "judicialis form of documentary vocabulary

2010

PLAGIARISM

notwithstanding declarations to the contrary. Marilyn Randall terms plagiarism a crime against authors and copyright infringement a crime against owners. Abigail Lipson and Sheila M. Reindl label intentional plagiarism as "criminal plagiarism." Thomas Mallon decries the kidnapping writer who imprints the words of the original author, viewing him as an "audacious predator." Yet Lindey notes that while plagiarism is described as literary theft, literary larceny, and literary piracy, this has "no precise legal signification." 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; it is instead an ethical or moral offense whose proper hearing venue is that of the college or university or professional association. 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
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.69

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 literally emulated by others as long as the requirements of the intellectual property are satisfied. Likewise, of course, the amount used rises to the level requisite to a copyright infringement claim.70

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

91. Richard A. Posner, The Abuses—and Uses—of Plagiarism, THE RECOm, May 27, 2003, at 107. 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 a social disapproval. Posner, supra note 81.

92. Green, supra note 28, at 241.

93. Id.

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, it seems to follow that plagiarism should also require intent. At the same time, I would modify this requirement to say that the degree 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 delusional, or that he was merely negligent in his work, he should be viewed as having committed plagiarism.

95. Id. at 182. Applying these standards to the cases of alleged plagiarism attributable to the works of Doris Goodwin and the formula of Staggering Proportions, 90 J. AM. Hist. 1341, 1344 (2004) (wherein Fox asserts, 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. See also Richard Wightman Fox, A Breakthrough in Plagiarism? Staggering Proportions, 90 J. AM. Hist. 1341, 1344 (2004) (wherein Fox asserts, with 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 prose, there exists no need for footnoteing as one is then not engaging in original scholarship). Fox advocates “restricting plagiarism to cases in which one author does not credit another author at all.” Id. 96. See, e.g., Philip J. Hills, 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 case against historian Stephen B. Oates as allegedly found in his 1978 book 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 Thomas’ 1952 work entitled Abraham Lincoln: A Legs. An example, as quoted in The New York Times, included the following from Thomas: “Henderson 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 and a manner of deportment like a captain.” Id. From Oates: “Hendron stepped out in shining 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 the historical record. 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. See also Richard Wightman Fox, A Breakthrough in Plagiarism? Staggering Proportions, 90 J. AM. Hist. 1341, 1344 (2004) (wherein Fox asserts, with 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 prose, there exists no need for footnoteing as one is then not engaging in original scholarship). 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 Pursuance of American Protection of Moral Rights,” 29 CBE W. RES. L. REV. 735, 736–37, 745–67 (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 Lindsey, 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 inaccuracy, 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 failure 103 to attribute within the definition of plagiarism. The rationale 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 Hildegarde Bender rejects the notion that lack of knowledge, accompanied by lack of intent, affords the student an immunity from a plagiarism charge. Bender observes, "If I give you 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 LeClercq, for example, in providing a comparison of the practice of law

98. Green, supra note 28, at 173.
99. LINDSEY, supra note 1, at 222.
100. Stearns, supra note 78, at 516. Seton Hall Law School, in endeavoring to provide guidance to its students with respect to the above noted Stearns quote and adds that “[d]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.sbu.edu/Students/academics/Plagiarism-Memo.cfm. Seton Hall students, “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 Burnnea & Alice M. Roy eds., 1999). Accord Patrick J. Kelley, Another Meaning of Plagiarism, CH. THIB., 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 Lipsen and Reindl, supra note 25, at 8, the authors relate that

104. James Thomas Zebrowski states that plagiarism is serious regardless of intent. See Burnnea & 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 decent.” 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 note 84, at 214–15 (critiquing the manner in which a plagiarism 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 is in all likelihood “sent dozens of students home for crimes 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 Burnnea & Alice M. Roy eds., 1999) (reporting results of faculty survey of leading experts who sought the professors’ opinions regarding the role of intent in plagiarism findings).
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. 106 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 encounters 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 dishonesty. 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 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 overarching criteria 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

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.
110. 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 of the student’s explanation for the application of the norms of citation throughout the student’s career.
111. 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.
slightly paraphrased sentences appear without attribution. Decoo would conclude that "flagrant plagiarism" has occurred.

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. Indeed, employing his articulated standard, Green opines that in the case of Doris Kearns Goodwin, 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." Similarly, David Edelstein, addressing the plagiarism committed by Harvard student Kaavya Viswanathan of works of Megan Cafferty and other writers, 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."

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 constructed as an effort to avoid plagiarism or may be reflective of an intent to deceive), and whether the paraphrased 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.


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 not adequately 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 of misrepresentation. 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.

LINDLEY, *supra* note 1, at 253. Courts are/The fact that one's 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 (Law School for plagiarism, and who argued that his plagiarism was fueled by "academic laziness" rather than intent. In *re Lamberis*, 433 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 plagiarism (95 of a 99-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 505-51. In a similar
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..."

Many expose the view that plagiarism can be easily detected; 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. 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. 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, politicians, administrators, and faculty and students. 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, 533 (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 very similar words." Parrish notes that there exists no single governmentwide definition of scientific misconduct and plagiarism, leading to "virtually identical allegations of plagiarism" receiving "drasticate treatment" 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, 200 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.

paper, which "constitutes a mosaic of the [assigned] work... itself is the loudest argument" against her protestation that she did not intend to plagiarize. It is significant to note that while the trial court concurred that the weight of unattributed material justified a conclusion of intended plagiarism, 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 Chancellor's 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 as 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 Studio Committee on Discipline, which had 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 in Ms. Napolitano's own thoughts and words, when in fact, in virtually all instances, what follows is words borrowed from the one source without attribution; (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 Lahmier 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 doctrine of plagiarism, which was 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 Chancellor's Division, the definition of plagiarism required "deliberate" use of an outside source without proper acknowledgment. In response to the matter to Princeton's Committee on Discipline for a re hearing 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 280. The opinion here 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/psu/pul/integrity/08/academic_integrity_2008.pdf, at 10 (last visited Oct. 10, 2010) (emphasis in original).
misconduct that heretofore would have been handled quietly\cite{146} in house, either through university mediation\cite{147} or other mandated procedures, professional organization rules,\cite{148} or negotiations with publishing houses.\cite{149}

Quantitative figures regarding the incidence of plagiarism have been proffered by an array of sources. Dalhouse University, via a 2004 survey conducted among eleven Canadian universities, presented figures that indicated that thirty-two percent of undergraduates and twenty-six percent of graduate students had plagiarized at least once in the three prior academic years.\cite{150} Robert Marquand suggests that research fraud is "rampast" 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.\cite{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."\cite{152} The source most frequently cited by colleges and universities and by those who express concern with perceived plagiarism trends\cite{153} for statistical evidence

\cite{146} See Ron Robins, Scandals & Souredels: Seven Cases That Shock The Academy 6 (2004).

\cite{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 later point in the year that the Daily Pennsylvania, the student newspaper, that the matter received public attention in the press.

\cite{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 arbiter of plagiarism determinations).

\cite{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).

\cite{150} See K. Lynn Taylor, Plagiarism: Shared Responsibilities, Shared Solutions, 13 FOCUS 1 (Winter 2004).


\cite{152} Arthur Sterngold, Confronting Plagiarism, 36 Change 16, 18 (May/June 2004).

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).\textsuperscript{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.\textsuperscript{155} In 2005, his reports indicated that forty percent of students acknowledged plagiarizing and viewed "cut and paste" plagiarism as a trivial offense.\textsuperscript{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.\textsuperscript{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.\textsuperscript{158}

It is significant to note, however, that not all commentators 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 Academic 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 Kesan 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 CAI’s Survey 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 frequency directions, believe they can, with impunity, cut and paste a sentence or two from various sources and weave them into a paper without citation. Id.


2010] PLAGIARISM

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.\textsuperscript{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.”\textsuperscript{160} Brian Hansen further cites studies that debunk the crisis mentality surrounding the unattributed borrowing of another’s words.\textsuperscript{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.”\textsuperscript{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”\textsuperscript{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 professed 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, 777–778 (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 776.

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 injurious time-saving behavior; cultural backgrounds that demonstrate "less compunction against plagiarism"; and revelations of plagiarism by public figures, where the tendered excuse of inaccurate "excessive secrecy" 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, Gall 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 Con More Effectively Understand and Combat the Plagiarism Epidemic, 2004 BYU EDUC. & L.J. 421, 426-28 (2004). Thomas, in referring to the revelations of plagiarists, 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 Attribution, 42 S. Tex. L. REV. 467, 467 (2001). The author, in the context of law school, advocates an acknowledgement of student work throughout, 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, requiring that such action not be 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.


169. Id. Michael Bugeja concludes 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).

170. Jeff Gannage, 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 tended in the classroom) and Ambrose (plagiarism), they remained successful "at least as measured by sales, advances, and so forth," although the charges settled in 2000. 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 confronts 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-clawing freaks that our culture grooms and prods so many of its best and brightest children to become ..." ANDERSEN, supra note 145, at 2A. 35


174. See, e.g., Richard Stockton C. of N.J., Academic Honesty, http://intraweb.stockton.edu/eye Prefer.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 between a student's conscious attempt at plagiarism, which is usually 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
search engines, techniques faculty can employ when scrutinizing student papers, and plagiarism-detection software.

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 litigation premised on copyright infringement under 17 U.S.C. § 501 and invasion of privacy pursuant to the Family Educational Rights and Privacy Act (FERPA), is the

179. Kristen Gordy, Note and Comment, Low 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, Gordy advises faculty to use several search engines in multiple engines or use a 'meta' engine like Copsage, which allows a search in multiple engines simultaneously. Id. at 437.

180. Gordy suggests “where students submit many written assignments or multiple drafts of a single assignment, unexplained and dramatic improvements in ranging 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, Gordy sets forth formulating 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 and analog plagiarism, notes Mary Pilone. Pilone, supra note 24. Using software such as MyDropBox.com and Turnitin, Pilone observes that the reach of these programs has been enhanced by contractual arrangements entered with both universities and trade organizations. (Pilone stated that from 2005 to 2006 Turnitin enhanced its agreement for student uses from 6.8 million to 9 million and that MyDropBox.com expanded 700,000 students to 2005 to 1.4 million in 2006.) Id.; see also Trevor Davis, Online Program Helps Eliminate Plagiarism, OREGON DAILY EMAIL, UNIV. WIRE, Oct. 10, 2006, at 1, available at http://www.dailywire.com/2/21358/online-program-helps-eliminate-plagiarism-1.197157 (noting widely-used anti-plagiarism software); David Eastment, Plagiarism, 59 ELM T. 183-84 (2005) (same); Alison Ulley, Cyber Stenches Hunt For A Way To End Plagiarism, TIMES HIGHER EDUC. SUPPLEMENT, August 8, 2003, at 7 (same).


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.ed.gov/policy/gen/uid/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, by approximately seven thousand institutions of higher education and high schools that grossed more than eighty million dollars in 2006, and as the repository of more than 100,000 daily submissions of students’ written work, Turnitin can be used as a teaching opportunity, as the vehicle by which the academic death penalty is imposed, 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 Fera [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. Frank 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.


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


189. Elad Gonen & 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. ADOLESCENCE & 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. After each student’s submission is digitized and compared to other materials in the database, the program issues a “similarity index,” 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. 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. This plagiarism-detection software has not received universal endorsement. Some believe that the program fundamentally alters the role of the faculty, transforming it from one of mentorship to one that is adversarial and contributes to a “poisonous atmosphere.” On this account, faculty, employing what may be perceived as a “gotcha” device, 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 with colleges, including GrocTech, a publishing industry association, to create an antiplagiarism 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 plagiarism reviews. See Catherine Rampley, Journals May Soon Use Anti-Plagiarism Software on Their Authors, CHRON. HIGHER EDUC., Apr. 25, 2008, at A17. GrocTech, 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.”).

191. POSNER, supra note 28, at 82.

192. 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).

193. See, e.g., Jon Baggsley & Bob Spencer, The Mind of a Plagiarist, 50 LEARNING MEDIA & TECH. 55, 56 (March 2005). Baggsley and Spencer note that the highlighted unoriginal material “may or may not have been correctly attributed.” Id.

194. Williams, supra note 190.
and fueled by their own emotional reaction of outrage and victimization,\textsuperscript{96} adopt the role of police enforcer against the "criminal" student.\textsuperscript{190} 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.\textsuperscript{200} Those in the approximately one hundred colleges and universities that adhere to the tenets of a traditional university honor code\textsuperscript{201} urge that Turnitin represents the antithesis of such a code, which ideally is premised on mutual trust and respect.\textsuperscript{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 EDX., Dec. 21, 2001, at B22, wherein Michael T. Nietzel, then Acting Provost of the University of Kentucky, criticizes the notion that the "average Howard 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.\textsuperscript{199}

Brownwyn Williams observes that when confronted by instances of student dishonesty, faculty responses "revel betray, anger and a visceral sense of disappointment." Williams, supra note 190, at 350; see also Kolish, supra note 26, at 142 (describing his reaction "[like an avenging god," to student plagiarism).\textsuperscript{199}

Howard writes, "In our society, the war on plagiarism by 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 173.\textsuperscript{199}

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 Cherneho, 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 competition has also created a sense of distrust and antipathy toward responding to Dr. McCabe's annual surveys addressing student cheating. Julie Rawe reports that "one result of the high-tech cheating wars: paranoia. McCabe says fewer students are filling out his anonymous surveys." Rawe, supra note 4, at 4.

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 will be vigorously complained and membership will be based upon adherence to 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://eac.davidson.edu/cmt/17121.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. Wailey observes that Dodd formerly served as the executive director of the Center for Academic Integrity, formerly housed at Duke University and now residing at Texas A&M University. Wailey, supra note 177. Wailey, quoting Dr. McCabe, 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 detection device may be deemed acceptable. Wailey, 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, Mar. 13, 2007 (quoting Associate Professor of Philosophy Ethan Kelly, who uses Turnitin promised 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. Gerten & 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 EDX., Oct. 60, 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 about the costs and membership with Turnitin, 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.

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 would be a violation of 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.

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, "[t]he 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. § 501.212 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. Prior to submission of their work, each had obtained formal copyright registration for their essays; some had placed a disclaiming notice at the bottom of each page indicating the authors wished to be excluded from the archiving of their work.213 Granting iParadigms' Motion for Summary Judgment,214 District Court Judge

208. Raue, supra note 153, at 60.
209. 17 U.S.C. § 102(a) (2006). Such protection is offered 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. Lassourette, supra note 71, at 618.
210. The Law, Digitally Speaking, supra note 184.
213. Amended Complaint for damages, 4, iParadigms, 544 F. Supp. 2d 473 (No. 1:07 Civ. 293 CM/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 480-81.
plaintiffs' copyrighted works, as the works remain archived and are not publicly accessible.\textsuperscript{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.\textsuperscript{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-factors test.\textsuperscript{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

\textsuperscript{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 assessment 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 may constitute commonly used word groupings typically employed in a particular discipline; other color coded groupings may technically prove to be plagiaristic, 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 Baggeley & Spencer, supra note 195, at 56. The Court of Appeals said, however, that 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).

\textsuperscript{223} iParadigms, 562 F.3d at 639.

\textsuperscript{224} See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (addressing the affirmative defense of fair use with an emphasis on the alleged infringer's transformative use) and holding that a defendant has "transformed" the use of the copyrighted work under 107's first factor in the fair use test, because it "superseded the objects of the copyright".

\textsuperscript{225} Read, supra note 186, at 3.

\textsuperscript{226} See, e.g., Dalby 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 Wartners of God: Richard the Lionheart and 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).

\textsuperscript{227} Baigent v. Random House Grp. Ltd., 129 F.3d 660 (2d Cir. 1997), which held that the plaintiffs' use of the third factor was "transformative use" because the "purposess 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 characteristic, 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.

\textsuperscript{228} Debra 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? Handing Original, O Globo & Max, March 4, 2006, at 83 (discussing 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").

\textsuperscript{229} Baigent, supra note 227, at 669-70.

\textsuperscript{230} Id. at [176]. Interestingly, Justice Smith alluded to the fact that a major figure in Brown's work, historian Sir Leigh Tebshing, whose name appears under the names of the plaintiffs, affords 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.
agreements.\textsuperscript{237} Plagiarism can be maintained as a legal complaint only if it can satisfy the requisites of a copyright-infringement matter.\textsuperscript{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.\textsuperscript{239} Further, it matters not that ideas or expressions emerge from works in the public domain,\textsuperscript{240} nor that works may be afforded permission to be used pursuant to the fair-use exception to copyright law;\textsuperscript{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.\textsuperscript{242}

\textsuperscript{237} See infra Part VII.

\textsuperscript{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 laws determined by society, the manner in which universities and professional organizations codify regulations regarding plagiarism "gives them the appearance of law").

\textsuperscript{239} See LINTHEY, supra note 1, at 2 ("[F]or purposes of plagiarism, the material stolen need not be in copyright; for infringement, it must be").

\textsuperscript{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 that it allows the public an unfettered access to the works, and thereby ensures the further creation of original expression. See PONSER, 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").

\textsuperscript{241} See Copyright Act of 1976 \S 107, 17 U.S.C. \S\S 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 . . .; [ack] 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 doctrine also gives "little choice of copyright infringement should not afford the plagiarist, who does not "play fair," a sanctuary." PONSER, 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.

\textsuperscript{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." Thus, for a limited time designated by Congress, the author may protect his economic interests in his intellectual property by pursuing infringement litigation against those who use his expression without permission, license, or payment. 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.

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." 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 for a commercial nature or is for nonprofit purposes, and whether such use, as determined by the courts, is deemed transformative; (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 such use upon the market value of the copyrighted work. 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.

Further, to successfully mount a copyright-infringement lawsuit, the plaintiff must meet four criteria: ownership of a valid copyright, whether the purportedly wrongful copying was, in fact, "copied from the allegedly infringed work and not independently created", whether the defendant had access to the copyrighted material, and whether the copying bears substantial similarity (exact duplication is not a requirement) to the work of the plaintiff. 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." Indeed, in several high-profile instances, anonymous tipsters or plagiarism hunters are the parties to disclose revelations of alleged plagiarism. In short, the thrust of a plagiarism allegation is to

249. See supra notes 218–223 and accompanying text.
250. Latoretta, 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.
253. Stearns, supra note 78, at 524.
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 authorship 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 Borge, a former Cornell University epidemiologist against the University of Alabama, Birmingham (UAB) and four of its researchers, premised on the Federal 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. Borge did attempt to resolve the issue under the UAB procedures, but two inquiries resulted in no finding of misconduct. Eschewing the latter venues of the National Institute of Health and the Department of Health and Human Services’ Office of Research Integrity, Borge filed a lawsuit, resulting in a very substantial settlement. The case represented the first time scientific misconduct has 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 Bajajpayee v. Rothermich, 572 N.E.2d 817 (Ohio Ct. App. 1997), as the only case found where the court recognized the tort of plagiarism as the basis for a cause of action). In Bajajpayee, a biochemist alleged that the president and medical director of foundation had presented the employee’s ideas for arthritis treatment discoveries as his own without attribution. Id.

thicket of tangled jurisdictions. 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 from a professional field, or requiring executive 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.

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. 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. Others assert skepticism with regard to the college or university’s willingness to directly confront
plagiarism issues. Thomas Mallon, whose book *Stolen Words* eulogizes 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.” 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.”

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. 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 “abandon its important duty” 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.

Yet Ron Robin, author of *Scandals and Scoundrels: Seven Cases That Shocked the Academy*, disputes the viability of academic venues for plagiarism determinations, attributing the surge of charges of academic deiviae to the “denise of conventional scholarly . . . mechanisms” to handle such matters.

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. While some regard the consequences of a finding of plagiarism by a journal rather inconsequential—an article is withdrawn or is reprinted with an erratum statement, or a written apology is accepted—Grossberg believes that the attendant “publicity and open debate” best address ethical problems such as plagiarism.

All venues evince a concern with potential lawsuits that may arise from charges of plagiarism. One commentator notes that “[t]he fear of libel suits hovers over the entire subject of plagiarism because of the calamitous consequences of calling someone a plagiarist.” Litigation emanating from plagiarism cases has been grounded in not only defamation, but in asserted violations of procedural due process, breach of contract, and other legal claims.

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

274. *Michael Grossberg, Plagiarism and Professional Ethics—A Journal Editor’s View, 50 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’s (which subsequently appeared as the book *Sex, Diet, and Deblity 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. *Glenna, 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 34, 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 also Ralph D. Mawdley and J. Joy Cuming, 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).


scandal erupts\(^2\), 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;\(^2\) that it clearly define plagiarism and that the definition clarify whether intent is required;\(^6\) that it adhere to the standards enunciated in the policy;\(^7\) and that pursuant to the landmark decision of Dixon v. Alabama State Board of Education,\(^8\) the policy comport with the
court.com/news/education/be-copykid1119.artenv910.6233166.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).


292. See Ralph D. Mawdsley, Plagiarism Problems in Higher Education, 13 J.C. & U. 155, 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 plagiarized.

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 for 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 codes 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 permitted the university to submit subsequent to the hearing. Crook, 584 F. Supp. at 1544–47. The lower court, in invalidate the rescission, described the university’s procedures falsely: “The institution’s procedures were free-for-all which constituted plaintiff’s ‘hearsay,’ by definition, a whole, which resulted in grossly 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, 89–99 (6th Cir. 1987).

296. 24 F.2d 150 (5th Cir. 1936), 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. At public institutions, where continued enrollment is deemed a protected property interest by federal courts, 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 oldest to achieve something not otherwise attainable.

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, as 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 extend due process constitutional protections to the purely academic arena. In Board of Trustees of the University of Missouri ex rel. Horowitz, while the Court did not specifically preclude the applicability of due process protections in the context of academic decisions, it stated that "for 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 otherwise reasonable."). 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" 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 138; see also Curtis J. Berger & Vivian Berger, Academic Committee: A Guide To Fair Process For The University Student, 99 COLUM. L. REV. 289, 291 (1999) ("Courts have refused to find "state action," id. in the case of private schools, even though most private schools provide 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 and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be." N.C.A.A. 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., Schauer v. Univ. of Minn., 510 U.S. 1, 14 (1994); Board of Trustees of the University of Missouri ex rel. Horowitz, 435 U.S. 78 (1978); Levin v. Med. Coll. of Hampton Rds., 910 F. Supp. 1161, 1164 (E.D. Va. 1996).

accordance with those decisions,” 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 hearing, cross-examination of witnesses, availability of an appeal, and right to counsel. Contract law may serve as a vehicle to inflate the private college or university with concepts of common law due process. 

Curts 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 Duttle, supra note 303, at 244–45. Duttle 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; right; 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 384) (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 was 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 304, 309 (referring to survey submitted to publication). See also 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. Duttle notes that “each of these requirements 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)). Duttle 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 Abbavio v. Hartline Univ. Sch. of Law, 258 N.W.2d 108, 113 (Minn. 1977) (“The 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 Obligations of Good Faith and Fair Dealing, 59 Mo. 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 71 (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 argues 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.” Fairness, in their view, is achieved through a “calibrated approach” wherein required procedural safeguards would comport with the nature and gravity of the offense. The fact remains that findings of plagiarism can stigmatize the offender and trigger negative private or public reactions 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 policy of the university, as promulgated by Princeton, a one year withholding of her degree by the university, was given in good faith to 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. Note worthy 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 profess their primary thesis that 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 basis 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 “minre to every charge”; as charges pose serious consequences that threaten to stain a student’s reputation, or cause 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 "information and resumes," prompts serious punishment, a requirement of "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 academic offense, a crime against taste." Judge Posner contends that a defendant charged for plagiarism exists, with faculty receiving fewer negative repercussions than do students. Lisa G. Lerman, a Professor of Law at the Columbus School of Law at Catholic University, suggests that the "indescribable double standard" that exists in law schools with respect to disparate treatment of faculty and students is particularly egregious. 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. In contrast, she asserts that law professors rarely acknowledge, 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.

309. McGrath, supra note 10, at A33. McGrath argues this absence of moral condemnation applied to public figures is reminiscent of the manner in which the Romans viewed the issue of plagiarism. Id. (citing MAZZOCCO, supra note 633).

310. Posner, supra note 28, at 90. He argues that "[t]he resulting double standard outrates students and breeds warrantied 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 was illicit," deeming professors more culpable in both "the desire to publish and the respect for intellectual property." Becker to The Becker-Posner Blog, http://www.becker-posnerblog.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 in a sanctimonious manner to the uninitiated, writing for the world as if it were an ancient Roman template 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 lettuce jungle. On the one side, plagiarism is considered to be the most egregious variety of dishonesty. On the other side, the use of the work 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 COLOR. L. W. 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 Hinde, 654 A.2d 864 (D.C. 1995) (attorney was publicly censured for authoring a sixty-five page article that copied, without attribution, 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 last thirty-nine pages 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 Stevenberg, 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 13, 2002, available at http://www.thecrimson.com/article.aspx?ref=180651 (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 committed plagiarism should be able to proceed, with their careers and goals. Why then, should an adult who is more experienced, much less a professional historian, continue in her capacity as an Overseer for the University without consequences?" Id. For a discussion of the plagiarism allegations leveled against the cited Harvard scholar, see supra note 12.

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=180653 (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' "failure to clearly sense of proportion of their duty, or, for that matter, much sense of decency" inappropriate for a scholar of Goodwin’s achievement and integrative intellect. Id. But Anderson scoffs that the three "law-school superstars professors" have emerged unscathed and unscathed. Anderson, supra note 145, at 28. Joseph Bottum queries whether "it is one thing in the water" in Cambridge proper and similar relations of profess oral plagiarism, exhibiting disdain for the "nest of unpunished plagiarists" who "solomnly war[r] their students about the penalties for plagiarism." Bottum, supra note 82.1 Proper comments trenchly 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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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 of forfeiting degrees, rewriting the plagiarized portions of their masters theses (conditioned on an admittance of guilt), or requesting a hearing.\textsuperscript{320} The involved faculty experienced loss of chair, position, and threat of tenure removal.\textsuperscript{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.\textsuperscript{322} Further instances of sobering penalties applied to faculty plagiarism set forth below would suggest that notwithstanding the generally perceived faculty/student double standard,\textsuperscript{323} and despite Mallon’s admonition that academia lacks the fortitude to address faculty plagiarism in a forthright manner,\textsuperscript{324} there exist many cases wherein faculty have suffered exposure, embarrassment, and serious penalties, including termination or marked alteration of

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


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 “disingenuous discipline policy” was used to defend 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”).
9. 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.\textsuperscript{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.\textsuperscript{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,"\textsuperscript{328} and that allegations, even when "unfounded or ultimately disproved," can damage one's scholarly standing.\textsuperscript{29}

Alllegations 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.\textsuperscript{320} 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.

\textsuperscript{326} See infra Part IX.

\textsuperscript{327} See e.g., Mara Gordon, Bushnell: Charges Resolved Internally, DAILY PENNSYLVANIAN, Oct. 4, 2005, available at http://nepdcp.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 their colleague 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.

\textsuperscript{328} 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); See also Petersen, 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); Auguraw verdikt in Deinametion Trial, ATHENS NEWS, March 27, 2008, available at http://athensnews.com/ohio/article-2521-2nd-prof-meha-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-prof-sues-ou.html (describing Bhatnvr V. Mehia's lawsuit against Ohio University prompted on defamation in response to the Russ College Dean declaring to reporters that "Meha had contributed to a culture of plagiarism.").

\textsuperscript{329} See infra 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 Foundation, it is unclear whether or not 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

2010

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

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, defenses 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. 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. The Dean subsequently resigned. Similarly, a Drake University law professor, Stanley N. Inger, when notified that unattributed passages were evident in 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. When his university investigated the allegations concerning plagiarism in two of Mr. Inger’s articles, Martin H. Belsky, Dean of the University of Tulsa Law School, termed Inger’s work, at worst, negligent, and not reflective of intent to plagiarize. Mr. Inger’s resignation ended the prospects of a hearing before the university’s Academic Freedom and Tenure Committee.

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. The standing committee on academic fraud found the professor guilty of plagiarism, rendering intent irrelevant as a defense. Professor Kirshner retained his tenure, but was relieved of graduate-student courses for five years. 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. 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.

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

331. According to Marc Santora, the plagiarism investigation was conducted by Hughes, Hubbard & Reed, which reportedly found “numerous instances in which [Constantine] used, but did not attribute, in papers she published in academic journals” during the prior five years. Santora, supra note 330, at 1.


333. Burke, supra note 330; Columbia U Keeps An Upity Woman Prof, 17 WOMEN RIGHTS E. 8 (2006). Constantine alleges that two former students attempted to plagiarize her work; they claimed she published their research under her name.

334. See Dari Grigorian, Noose Prof Lover—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.


336. Id.

337. Id.

338. Debra E. Blum, Dean Accused of Plagiarism Leaves His Job at Eastern New Mexico U, CIR O N. O F H I G H E R E D U C , Nov. 15, 1989, at A25. 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.

339. Id. Mr. Belsky argued that given the fact Professor Inger, 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.”


341. Mary Crystal Cage, U. of Chicago Panel Finds Professor Guilty of Plagiarism, CIR O N. O F H I G H E R E D U C., 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 students assistant.

342. Id.

343. Id.


345. Id. As an "unintentional variety" of plagiarism, however, Professor Van Orden’s failure to attribute was not deemed an honor code violation.
investigation to determine the incidence of academic plagiarists beyond high-profile instances of "borrowings." 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. More disturbing was the authors' belief, premised on anecdotal evidence and a survey conducted by University of Alabama economists, that "academic often discourages victims from seeking justice, and when they do, tends to ignore their complaints." 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, demotions, pay cuts, dismissals, the removal of a title, or a contract not being extended. 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.

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. 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. 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. A Southern Illinois

353. Thomas Bartlett and Scott Smallwood, Just Desert?, CRONUH OF HIGHER EDUC., Apr. 1, 2005, at A26 (relating the consequences to Professor George O. Carey 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 "a large portion" of a book he had authored (citing Sharon Walsh, SUNY-Albany Classicist Loses Chairmanship After Being Accused of Plagiarism, CRONUH OF HIGHER EDUC., Mar. 8, 2002, at 12)).

354. Bartlett & Smallwood, supra note 353 (detailing how Mr. Donald Cucciolotta, 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 introductory section of a 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,' CRONUH OF HIGHER EDUC., Jul. 27, 1988, at A11 (citing as an example, the incident wherein Richard J. Sauder, the interim president of the University of Minnesota, delivered a speech at North Dakota State University which "seemingly was a word-for-word almost verbatim" from an article authored by North Dakota State University President Frank H. T. Rhodes, prompting Sauder to withdraw his candidacy for the presidency of North Dakota State from consideration).

356. Joan M. Mangelsdorff, Hamilton President Apologizes for Failing to Cite Sources in Speech, CRONUH 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 he had written weeks before he had read during the summer; see also WIENER, supra note 351 (noting that Thomas Bartlett, Naval Academy Donates Professor Accused of Plagiarism in a Book on the Atomic Bomb, CRONUH OF HIGHER EDUC., Nov. 7, 2003, at 12)).


358. Communications-Department Head at Boston U. Resigns Over A Quote, CRONUH OF HIGHER EDUC., Dec. 17, 1999, at A18 (describing how Professor John W. 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. A professor at the Johns Hopkins University School of Medicine who lifted approximately forty percent of a journal editorial he co-authored was permitted to retain his position conditioned upon his willingness to tender a public apology. 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.

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 exacerbate faculty plagiarism 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 moment[that] can affect a whole lifetime”).

339. Thomas Bartlett, The Rumor, CHRON. OF HIGHER EDUC., Feb. 10, 2006, at A8 (noting that the alleged plagiarism was the part of Professor Chris Dusold 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, SJU Professor Files Defamation Suit, MADISON.COM, Mar. 15, 2005, available at http://www.madisonrecord.com/news/149462-sjue-professor-files-defamation-suit (describing the lawsuit Dusold commenced against members of the university based upon defamation and wrongful termination); and SJU Fired Professor Settle Case Tied to Plagiarism, Faculty Backlash, MCCALCITY-THIB. BUS. NEWS, Apr. 12, 2008 (describing both the out-of-court settlement reached by the parties, and the emergence of a support group for Dusold named Alumni and Faculty Against Campus Interference, or SACI, which utilized anti-plagiarism software to assert plagiarism allegations against the SJU Chancellor, former SJU-Carbonate Chancellor, and the SJU President).


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 v. Locke, who was hired by Gallaudet University as a history professor, but subsequently was apprised that the American Historical Association in 2003 had formally concluded that Tung had plagiarized another scholar’s work. Some argue that a “less than egregious” instance of academic 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 289, 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”).

364. See infra Part X.F.
Definitions of plagiarism in the college or university and law-school contexts differ widely, to an extent deemed one of "disgraceful disparities." In terms of punitive measures, penalties can consist solely of expulsion at institutions such as the University of Virginia or Washington and Lee University, or comprise a much broader array of sanctions, including grade reduction on a particular paper or for an entire course, expulsion, suspension, and a statement of censure in the student's file, such as that utilized at New York University School of Law. In other instances of student plagiarism, colleges or universities may defer graduation for one year, dismiss permanently or with an opportunity to reapply, permit a student to rewrite a thesis, request a surrender of a degree, offer a one-semester expulsion, or rescind a degree. What is She also asserts that a wider range of punishments should exist and that "an ideal policy would allow a spectrum of punishments to fit the extent of the violation." Id. at 252. LeClercq urges that the rather drastic incentives in punishments applied 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 "rightful concern" 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, 2003, 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 for 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, for violating the honor code is considered an act of theft" (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 created an environment of threat UVA's share of bad human resources, 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).


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 College of Law, ensnared in a plagiarism investigation, had been ordered to rewrite their theses).


374. However, 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").


376. A professor from a top-tier law school, whose wish remains anonymous, for example, relays that one student who had plagiarized a section of a paper, premised on (back). The pledge 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 reinstatement extended.

377. Billings notes in supra note 266, at 398. Billings notes that although plagiarism is not a crime, its consequences can include a professor's loss of 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.


380. See supra notes 301-13 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 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 association of a range of penalties in meaningful instances. While I am not advocating the adoption of a "universal policy," I believe that 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. 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. 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. Such disparate penalties appear inequitable and arbitrary.

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.").

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.

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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) L.L.M. degree at Pace University.390 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.391 In In re Lamberti, a practicing attorney confronted potential disbarment as a consequence of incorporating verbatim others’ works in a thesis required for an L.L.M. degree at Northwestern University School of Law, from which he was expelled.392 The Hearing Board had recommended censure, the Review Board suspension, and the Administrator disbarment.393 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.394

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.D.2d 200, 201 (N.Y. App. Div. 2d Dept’ 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 program, and that such admission precluded him from reentry into the L.L.M. program. 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 expelling him, rendered a censure, in the court’s view, the most appropriate discipline. Id. at University regarding Kaevee Vyawaharan 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 Mary 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...”395 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.396 The university fired Young based on his violation of FERPA.397 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.398 An undercurrent in many of these remarks is the notion that plagiarism merits unilateral 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 nature of plagiarism.402 Finally, this “publicly fail and humiliate” approach suggests a “gothika” perspective that exists in snaring the alleged perpetrator, with less interest exhibited in teaching the methods of attribution. 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.


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 a bit of 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 Cover,34 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 helplessness, 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.35 Indeed, Superior Court Judge Jane Scholl, in finding that Cover was the victim of plagiarism rather than the perpetrator, addressed the "severe disadvantage and harm" sustained by Cover due to his ouster by his university.36 At multi-tier-sanction colleges and universities, such as Central Connecticut State and Emory University,47 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,48 employ a single-sanction system that offers but one penalty—that of permanent expulsion.49

404. See Waldman, Judge Vindicates, supra note 285 (describing Cover'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, § 3, 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 noted 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 Alritt 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 association is cheaters are simply expelled." Id.

408. See Jennifer Reese, Reviving the Honor Code, STANFORD MAGAZINE (1997) available at http://www.stanfordalumni.org/news/magazine/1997/narator/articles/honor.html (stating that the tradition of the honor code commenced at "schools of the antebellum South," with William and Mary, where "the "hit 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,

2010) PLAGIARISM

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.409 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, evidentiary hearings, and honor trials; when the entire 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://wv.washington.edu/honor/proc/retract1.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," THE DRUDGE REPORT, Nov. 7, 2006 available at http://web.nola.com/channels/news/article.php?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 acknowledgement. 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 infractions in any discipline is considered 'common knowledge' and may be used without acknowledgement.


411. Aaron Lee, U.Va Vote Reaffirms Honor Code, CHARLOTTESVILLE DAILY PROGRESS, Feb. 24, 2009, available at http://www2.dailyprogress.com/news/cdp-news-local/2009/feb/24/ua_vote_reaffirms_honor_code-ar-68658.html. The referendum had called for a modification of the single-sanction policy to be implemented, in part to allow for more 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.

412. Id.

413. 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." 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. 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 Sea program appears to confirm that the unyielding application of the 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. Pursuant to this declaration, two students, from colleges in Ohio and California, were expelled from the program and removed from the ship for engaging in plagiarism. 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. 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. The two students were expelled from the ship to Greece, given cab fare to the airport, and left to their own resources to return to their homes. 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." 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.

415. Donald L. McCabe and Gary Pavek, 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." They further state that this convives many students, "most of whom have cheated in high school, to change their behavior."

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 plagiarized on a programming assignment. The ramifications for students, however, were quite different in that the penalties imposed included receiving a zero on the assignment and 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 "prevent 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. 10, 2008, available at http://thepost.obhre.com/main.asp?Search=1&ArticleID=254561&SectionID=1&SubSectionID=35581; see also Susan Kinzie, An Education in the Pitfalls of Online Research: Expelled Students Run Afioul of U-Va Honor System by Inadequately Citing Sources in Their Papers, THE WASH. POST, Aug. 20, 2008, at C01 (stating that during the 2007-08 academic year 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).

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 the student should have been interviewed in order to determine her intent, and what she knew regarding "the intricate subjective judgments of resisting others' ideas." Id. Agreeing that making such an assessment is admittedly "a tall hat to get on," 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 of U-Va's 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 Satri, 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 investigations 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 handbook 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." The rationale articulated by the court in Foulkner v. University of Tennessee is one


425. See Kinzie, supra note 418. It is interesting to note that while the university held all students participating in Semester at Sea to its 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. Walga v. Bd. of Trs. of Kent State Univ., 488 N.E.2d 850, 852 (Ohio 1986). See also Connell & Garley, 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").

427. Connell & Garley, supra note 375, at 63-65 (giving as an example Creo v. Balk, 815 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 decision was provided (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.

428. Connell & Garley, supra note 375, at 63-67 (providing as an example Abshakb v. Claremont University Center, 2d Civ. No. B010412 (Cal. App. 1986), court 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.

429. 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 he had not plagiarized, in an effort to associate 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 were afforded; 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. In 1988, Western Michigan University revoked a master's degree of a Libyan citizen who plagiarized his thesis on Libyan foreign policy. 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. 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.

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, estoppel, defamation, intentional infliction of emotional distress, and violations of state law, 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 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. 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. Thirdly, courts generally evince little sympathy for the argument proffered by a sanctioned student that similarly culpable students receive disparate treatments. Lastly, consistent with Dixon and its progeny, the courts continue to exhibit great deference to college or university expertise in matters of academic wrongdoing.

Napolitano v. Trustees of Princeton University is illustrative of the posture of the courts regarding the student-university relationship. While expressing deference for the university's disciplinary procedures, 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. 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 her plagiarism adjudication, the court upheld its decision as based on "sufficient reliable evidence." 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." Indeed, the Appellate Division regarded the fact that many

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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 dissimilarities, 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 Waxley, 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.


434. Thereon 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 greatest crime in academia." Id.

435. Boortstein, supra note 409, at 301.

436. Phil Baty, Plagiarist Student Set To Sue University, TIMES HIGHER EDUC. SUPP., May 28, 2004, at 1 (where Michael Guzi 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").


441. 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)).


444. See supra notes 200-02 and accompanying text.


446. Id. at 281.

448. Id. at 282.

449. Id. at 281. Notably, Princeton argued "there is no requirement that penalties 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."430

Hill v. Trustees of Indiana University431 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."432 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.433 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.434 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.435 Sanderson v. University of Tennessee436 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 Onderdonk 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 N.J. 248 (72d 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.


2010] PLAGIARISM

for plagiarism that he had committed on a term paper was in violation of the Tennessee Uniform Administrative Procedures Act,437 and thus ripe for a judicial reversal or modification if that decision was unsupported by "substantial and material evidence."438 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 Dictionary439 and held that Sanderson lacked the requisite intent to commit plagiarism.440 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.441 In concurrence 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.442 In short, recourse to litigation by students found guilty of plagiarism generally does not afford them the relief they seek: an exequation 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).


459. See supra note 70 and accompanying text.


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." Many institutions decry the lack of attribution on the part of students and some faculty as a soils 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 plagiarism are equally castigated. But "the denial of authorial intention in adjudicating plagiarism contradicts...the origin and development of the concept." 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. 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.

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 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 syllabus, 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, 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, what clarity of definition is it afforded 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, 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,

463. Purdy, supra note 32, at 277 (noting that a plagiarism detection software program called ETE2, with a search function entitled "Call off the hounds when..." positions the student as a willy and cunning trickster (the mythological image of the fox) and the instructor as a hunter out for the kill").

464. See Bickland, supra note 383, at 8-1 (arguing 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, SCHREIBGESCHICHTE, SIEGEL-UND WAPENKUNDE, 1, at 3 (1983) ("[T]he intention to deceive is as central as the actual deception.")


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

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 Dixon471 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


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 (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.

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