

THE JOURNAL OF COLLEGE AND UNIVERSITY LAW

Volume 37

2010

Number 1

ARTICLES

Plagiarism: Legal and Ethical Implications for the University

Audrey Wolfson Latourette 1

Plagiarism, the “scourge” of academia, has garnered increasing attention due to the purported evidence of mounting student purloining of others’ words and ideas prompted by the advent of the Internet, and due to the notoriety attending several infamous cases of plagiarism on the part of students, faculty, and public figures. Regarded as the academic death knell, plagiarism is frequently perceived by those in the public arena and the academy as consistent with criminality and copyright infringement, and these erroneous perceptions have heightened the resistance to, and condemnation of, this ethical wrongdoing. Public colleges and universities must afford students charged with plagiarism Fourteenth Amendment due process consistent with *Dixon* and its progeny; private institutions of higher education are compelled, by virtue of their contractual relationship with students, to provide such students good faith and fair dealing. Yet within these broad constraints, it is evident that significant disparities exist regarding the definition of plagiarism employed, particularly as to whether authorial intent must be considered, and regarding the range and consistency, or lack thereof, of sanctions to be applied. Recommendations are proffered concerning the establishment of college and university plagiarism policies that both afford a calibrated and equitable approach to plagiarism and uphold the tenets of academic integrity.

New Scrutiny of College and University Executive Compensation and Unrelated Business Activity

Milton Cerny 93
Michele A. W. McKinnon
Jeffrey R. Capwell
Kelly L. Hellmuth

The executive compensation and unrelated business activity of colleges and universities are under close review by Congress and government agencies and could become potential issues for educational institutions as Congress seeks funds to close budget deficits. This article discusses

congressional concerns related to these areas and reviews the current Internal Revenue Service examination program auditing the operations of colleges and universities and reporting to Congress its findings. It analyzes the current tax law regarding the excess benefit transaction rules of Internal Revenue Code § 4958 and the unrelated business income tax of Internal Revenue Code § 511, as applied to colleges and universities. This article also suggests areas for needed institutional compliance audits and risk management.

Penumbral Academic Freedom: Interpreting the Tenure Contract in a Time of Constitutional Impotence

Richard J. Peltz

159

This article recounts the deficiencies of constitutional law and common tenure-contract language—the latter based on the 1940 Statement of Principles of the American Association of University Professors—in protecting the academic freedom of faculty on the modern university campus. The article proposes an Interpretation of that common language, accompanied by Illustrations, aiming to describe the penumbras of academic freedom—faculty rights and responsibilities that surround and emanate from the three traditional pillars of teaching, research, and service—that are within the scope of the tenure contract but not explicitly described by it, and therefore too readily subject to neglectful interpretation. This proposal means thus to provide more comprehensive protection for academic freedom at a time when the constitutional concept is near defunct, and thus more broadly to realize, through proper understanding of the written tenure contract, the ideal of the university as the quintessential marketplace of ideas.

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 195

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 201

Since its recommendation in 2006, forty-six states have adopted the Uniform Prudent Management of Institutional Funds Act (UPMIFA). UPMIFA, like its predecessor the Uniform Management of Institutional Funds Act (UMIFA), governs the investment and management of donations to non-profit organizations. UPMIFA updates and modernizes the approach taken by UMIFA, in the process making significant changes to the way in which donations are managed and invested. In theory, the changes made in updating UMIFA could have a substantial impact on the ability of donors to enforce restrictions or conditions placed upon the gifts that they make to colleges and universities. This Note argues, however, that very few changes will in fact take place on that front in states that adopt UPMIFA. An examination of cases employing UMIFA will demonstrate the minimal use of UMIFA in donor-initiated lawsuits and reluctance on the part of courts to rely upon UMIFA in their rulings. Furthermore, this Note will show that donor-initiated lawsuits tend to turn on matters of donor standing and interpretation of donative documents, two areas unchanged by UPMIFA. Ultimately, this Note concludes that the adoption of UPMIFA is likely to have a minimal impact on colleges and universities when they are involved in litigation with dissatisfied donors.

PLAGIARISM: LEGAL AND ETHICAL IMPLICATIONS FOR THE UNIVERSITY

AUDREY WOLFSON LATOURETTE*

I. HISTORICAL PERSPECTIVES	9
II. CONTEMPORARY DEFINITION OF PLAGIARISM	14
A. Plagiarism Regarded as a Potential Criminal Offense.....	18
B. Plagiarism and the Matter of Intent	21
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.....	34
VI. PLAGIARISM AND COPYRIGHT	44
VII. VENUES FOR PLAGIARISM DETERMINATIONS	49
VIII. CONSEQUENCES TO STUDENTS VERSUS FACULTY	58
IX. CONSEQUENCES TO FACULTY.....	62
X. CONSEQUENCES TO STUDENTS	69
A. Particular Impact on Law Students.....	73
B. Public Humiliation.....	75
C. Expulsion.....	76
D. Revocation or Rescission of Degree.....	80
E. Litigation	82
XI. CONCLUSION AND RECOMMENDATIONS	86

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

* Audrey Wolfson Latourette is a Professor of Business Law at Richard Stockton College of New Jersey. She earned her J.D. *cum laude* from Temple University School of Law. The research for this article was conducted as a Scholar in Residence appointed by the Faculty Resource Network at New York University. An earlier version of this article received the Pacific Southwest Academy of Legal Studies in Business 2010 Double-Blind-Peer-Reviewed Best Paper Award. The author notes that addressing the subject of plagiarism engenders concerns that parties will appear on the failure-to-attribute horizon, thus casting a rather chilling effect upon one’s scholarship. Therefore, the ubiquitous footnote that generously adorns this article may be viewed as both an effort to comport with the standards of legal scholarship and to

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

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

INTRODUCTION

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

serve as a bona fide attempt to duly credit all utilized sources.

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

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

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

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

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

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

7. *Id.*

plagiarists, has emerged.⁸ So intense on occasion is the search conducted by the media for unattributed passages that one commentator deemed the goal of exposing a particular author “a participation sport.”⁹

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

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

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

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

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

12. In response, both denied the charge of plagiarism, asserting that due recognition had been afforded prior authors via footnotes, and that any failure to place copied passages in quotation marks was inadvertent. *Id.* Ambrose was charged with utilizing in his work entitled *The Wild Blue: The Men and Boys Who Flew the B-24s over Germany*, without proper attribution, lines from the *Wings of Morning: The Story of the Last American Bomber Shot Down over Germany in World War II*, authored by University of Pennsylvania Professor Thomas Childers. It is interesting to note that some students at the University of Pennsylvania, held to a strict standard of academic honesty, viewed any tolerance by Childers of Ambrose’s plagiarism as a clear case of the application of double standards to student and faculty transgressions. See Jonathan Margulies, *When Plagiarism and Dishonesty Pay Off*, DAILY PENNSYLVANIAN, Opinion, Jan. 9, 2002, available at <http://thedp.com/node/25363>; see also Dina Ackerman, *Ambrose Faces More Charges of Plagiarism*, DAILY PENNSYLVANIAN, Jan. 8, 2002, available at <http://thedp.com/node/25338> (where Rutgers University Professor Donald McCabe observed that a professor would not regard a student’s offer to

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

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

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

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

15. Harvard Professor Alan M. Dershowitz was accused by a DePaul University professor, Norman G. Finkelstein, of excessive reliance on the source material of another author. Finkelstein charged that Dershowitz in his book *The Case for Israel* lifted substantial amounts of source material from the work of Joan Peters entitled *From Time Immemorial*. In essence, Finkelstein alleges that Dershowitz cites more than twenty quotes and references to primary and secondary sources that directly mirror Peters' quotes and footnotes. Dershowitz asserts that while he did utilize Peters' book, he checked each original source to confirm the citation and that this does not constitute plagiarism. That denial appears to have resolved the issue. Lauren A.E. Schuker, *Dershowitz Accused of Plagiarism*, HARV. CRIMSON, Sept. 29, 2003, available at

revocation of an offer of acceptance to a high-school student whose published work in a local newspaper plagiarized sources,¹⁶ to the downfall of a Harvard sophomore whose first novel, *How Opal Mehta Got Kissed, Got Wild, and Got a Life*, was deemed to have plagiarized books by Megan McCafferty, Sophie Kinsella, and Meg Cabot.¹⁷ Journalists Jack Kelley of *USA Today* and Jayson Blair of *The New York Times* seemingly excelled in obtaining extraordinary interviews; scandalous revelations indicated that many of their published works were either fabrications or plagiarized from other authors.¹⁸ And the pervasive embrace of plagiarism allegations has included Martin Luther King, Jr. with respect to his doctoral dissertation,¹⁹ then-Senator Joseph Biden with regard to both his law-school research and political speech making,²⁰ and ironically, the writer for Katie Couric's blog, which purportedly is written by Couric.²¹

<http://www.thecrimson.com/article/2003/9/29/dershowitz-accused-of-plagiarism-a-depaul>.

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

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

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

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

20. Jonathan D. Salant, *Biden's Quitting Clouds '88 Race For Presidency: Democratic Candidate Vows To Try National Campaign Again*, THE POST-STANDARD, Sept. 24, 1987, at A1; Kenneth C. Petress, *Academic Dishonesty: A Plague On Our Profession*, 123 EDUC. 624, 626 (2003).

21. Suzanne Goldenberg, *CBS Anchor Embarrassed by Plagiarism*, THE GUARDIAN, April 12, 2007, at 19. A commentary called Katie's Notebook, purportedly

In the college and university context, assertions of plagiarism, and statistics demonstrating an increasing incidence of plagiarism by students, abound.²² Faculty and administrators nationwide are not immune from charges of plagiarism, and many careers have been tainted or terminated by such revelations.²³ Honor codes, academic honesty boards, and plagiarism-detection devices, created to address, define, and punish offenders, permeate the landscape in an effort to stem the perceived tide of unethical behavior.²⁴ Cries of theft, criminal wrongdoing, and moral turpitude on the part of wrongdoers are asserted by academic authorities when referencing incidents of student and faculty plagiarism.²⁵ Some in the college and university context aggressively pursue alleged plagiarists, exulting in the detection and capture of the miscreants.²⁶ Findings of plagiarism have

written by Katie Couric, which was posted on her blog, was, in fact, written by a producer at CBS. The producer fashioned “Couric’s” statement by heavily relying on work of another unattributed author, Jeffrey Zaslow, whose commentary appeared in the *Wall Street Journal*. See Bill Carter, *After Couric Incident, CBS News To Scrutinize Its Web Content*, N.Y. TIMES, Apr. 12, 2007, at E6.

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

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

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

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

26. Gail Wood, *Academic Original Sin: Plagiarism, the Internet and Librarians*, 30 J. ACAD. LEADERSHIP 237, 239 (2004) (urging that discussions of plagiarism should “abandon the highly colored, emotional language that labels all plagiarists, intentional and unintentional alike, with criminal language Faculty have strong emotional

fomented litigation arising from the college and university context with both students and faculty asserting due-process violations challenging the findings, hearings, and corrective action taken by colleges and universities.²⁷ Clearly, some academics regard plagiarism as a capital offense potentially meriting the academic death knell for students and for faculty.

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

responses to plagiarism. These range from a gleeful 'gotcha!' to feelings of anger, betrayal and dismay."); PATRICK ALLITT, I'M THE TEACHER, YOU'RE THE STUDENT 95 (2004) (noting that "they think the professors aren't clever enough to catch them. That's why, when you *do* catch one, it's hard not to feel at least a little gleeful pleasure. You know: 'Gotcha!!'"); *see also* Augustus M. Kolich, *Plagiarism: The Worm of Reason*, 45 C. ENG. 141, 142 (1983) (noting that earlier in his academic career, "Like an avenging god I have tracked plagiarists with eagerness and intensity, faced them with dry indignation when I could prove their deception, and failed them with contempt.").

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

28. RICHARD A. POSNER, *THE LITTLE BOOK OF PLAGIARISM* 33–34 (2007). Judge Posner observes that "[f]raud is a tort—a civil wrong for which damages or other legal relief can be obtained in a lawsuit—and often a crime. Plagiarism as such is neither" *Id.* Posner does note that plagiarism can serve as the basis of a lawsuit if it rises to the level of copyright infringement or breach of contract. *Id.*; *see also* Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 HASTINGS L.J. 167, 234 (2002) (concluding that plagiarism should not be treated as a form of theft and it is not so harmful that we would wish to use the criminal law for purposes of deterrence).

29. Scott McLemee, *What Is Plagiarism?*, CHRON. HIGHER EDUC., Dec. 14, 2004, at A9 (reviewing several definitions, including that from the Oxford English Dictionary: "the wrongful appropriation or purloining, and publication as one's own, of the ideas, or the expression of the ideas . . . of another."). Self-plagiarism is defined by Alexander Lindey as altering a published work and "put[ting] it forward under a new title," wronging the first publisher, cheating the second, and swindling the readers. LINDEY, *supra* note 1, at 218. *But see* PETER CHARLES HOFFER, PAST IMPERFECT 181 (2004) (contending that "[w]e cannot plagiarize our own work."). Conceptual plagiarism is alleged when one appropriates the concepts and ideas that emanated from the research of another. *See* Jeff Gammage, *Who Owns an Idea? Researchers at Prestigious Universities Are Choosing Up Sides in a Dispute Between a Sociologist and a Colleague*, WIS. ST. J., November 29, 2005, at A1.

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

In the end, I suggest that armed with a thorough knowledge of the history, complexities, and repercussions of plagiarism, colleges and universities can fashion policies that both uphold the tenets of academic honesty and equitably serve their institutional population. At its heart, I contend, the ethical violation of plagiarism is premised on a knowing, dishonorable form of misappropriation of another's words or ideas. We should, of course, oppose blatant attempts to pass off the words or ideas of others as one's own, but we should also recognize that not all so-called plagiarism is worthy of equal condemnation. Indeed, it does not constitute a crime and may or may not represent a copyright violation; hence, the language we employ in castigating malfeasors should be tempered.³⁰ Faculty and administrators should avoid maintaining the vigilance of a "shark looking for violators," which harms the trust between professors and their students,³¹ or employing a "bring out the hounds"³² mentality, and constructing academic honesty policies rife with criminal connotation. Instead, they should engage in the lengthy and difficult process of distinguishing on a case-by-case basis whether a potential act of plagiarism was executed intentionally or in a manner grossly indifferent to academic standards of scholarship, or conducted in a negligent fashion or without command of the fundamental standards of citation, and deem only the former acts plagiaristic. If a tendered apology of mistake or inadvertence can serve to exonerate an esteemed legal scholar,³³ then surely the academy

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

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

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

33. Harvard Professor and constitutional scholar Laurence Tribe acknowledged, after the report of an anonymous tipster to the magazine *The Weekly Standard*, that his book *God Save This Honorable Court* borrowed from the work of another scholar, and lifted one nineteen-word passage from Henry Abraham's book, *Justices and Presidents*. See *supra* note 14. Subsequent to this declaration, Tribe purportedly received a "mild" reprimand from his Dean. See POSNER, *supra* note 28, at 7. The offended scholar, a professor at the University of Virginia, asserted that he had known

can conduct its plagiarism inquiries with respect to students and faculty with equal rigor, discernment, and compassion.

I. HISTORICAL PERSPECTIVES

Examining plagiarism from a historical perspective reveals that this present scourge of academia has not “gone on forever,”³⁴ and has, in fact, at points in history engendered laughter rather than lambasting;³⁵ that the rise in plagiarism allegations is inextricably intertwined with the advent of the printing press and its concomitant revolutionizing view of one’s authorship as one’s sole property rather than one’s knowledge to be shared with, and improved upon, by others;³⁶ that the Romantic period, which some contemporary scholars regard as representing the quintessence of the solitary genius disdaining reliance on the work of the past, exhibited significant unattributed absorption of others’ work;³⁷ and that finally, even where plagiarism was decried as wrongful, the opposition to plagiarism was not marked by the fervor and moral castigation it currently engenders.³⁸

of the plagiarism for twenty years and deemed Tribe’s conduct “inexcusable”; he did, however, accept the apology tendered by Tribe. *See* Marcella Bombardieri, *Tribe Admits Not Crediting Author, Harvard Scholar Publicly Apologizes*, BOSTON GLOBE, Sept. 28 2004, at B1.

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

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

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

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

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

In the ancient world, the prevailing view was that art was imitative and thus, mimesis or copying from, and improving upon, the work of others was recommended as the vehicle whereby “Western writers established their authority.”³⁹ The Roman poet Horace characterized the servile imitator in the image of a crow who has donned the stolen colors of another.⁴⁰ There is a general consensus among commentators that the first written use of the word plagiarism was offered by the first-century-A.D. Roman poet Martial, who utilized the term *plagiarius*⁴¹ to mock a competitor, Fidentinus.⁴² Harold Ogden White considers Martial’s protests against the piracies of his contemporary as the “most famous in all literature,” because he framed the charge utilizing the word *plagiarius*.⁴³

During the Middle Ages, reverent adherence to the philosophy of antiquity continued. While some medieval writers sought to protect their writings from unauthorized copying,⁴⁴ in the absence of modern ideas of literary property, individualism, and originality, the contemporary notion of

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

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

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

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

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

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

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

The period that is inextricably intertwined with the modern view of the author as the solitary genius is the Romantic period, encompassing a period commencing in the latter part of the eighteenth century and concluding in the late nineteenth to early twentieth centuries. It is this era in which “‘authorship’ and ‘originality’ emerged as significant cultural values” and in which “the norm of attribution and the taboo of plagiarism came to the fore.”⁵¹ The British enactment of copyright law, as evidenced in the 1710

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

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

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

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

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

50. POSNER, *supra* note 28, at 53. Posner also notes that Shakespeare, who utilized borrowed ideas, plot lines, and “verbatim copies” of thousands of lines in his plays, would be deemed a plagiarist by modern standards. *Id.* at 53. It should be noted that this period evidenced the second recorded use of the term “plagiary” and the first in English, when voiced by Ben Jonson, in the satiric play “Poetaster.” Jonson wrote, “‘Why? The ditti’s all borrowed; ‘tis Horaces: hang him plagiary.’” MALLON, *supra* note 35, at 6 (quoting Jonson, “Poetaster,” IV, iii). Lindey ironically observes that this self-made classical scholar’s “*Timber*, which contains his memorable tribute to Shakespeare . . . comprises more plagiarized material than any other book of its size by an author of rank” LINDEY, *supra* note 1, at 78. One could argue that Jonson expected his readers to recognize his sources, thus mitigating any such charge of plagiarism.

51. Green, *supra* note 28, at 176. External factors that helped to engender this

Statute of Anne,⁵² extended protection and rights of reproduction to the author, thus fortifying the notion of literary production being construed as property from which the creator could profit.⁵³ As authorship defined by Romantic literary theory merged with personal virtue, the divine gifts of the original genius were extolled; the slavish adherence to revising the classics was denigrated, and plagiarism commenced to be viewed as a moral offense.⁵⁴

Yet an examination of the authorial vision of the Romantics against their actual writing strategies presents a far more ambiguous portrait. Perhaps most illustrative of the seeming dichotomy that existed in this era between the purported idealization of the figure of the original author and the writing practices engaged in by such authors is the assault leveled by Edgar Allan Poe against Henry Wadsworth Longfellow. Lindey terms this “Little Longfellow War” as the pivotal event that brought the issue of plagiarism to the fore in the American context.⁵⁵ Poe in 1845 launched a series of vituperative attacks against the popular Longfellow⁵⁶ for engaging

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

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

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

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

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

56. Lindey describes the attacks thusly: “No writer of consequence in this country was ever more savagely set upon or more persistently pounded for his borrowings than

in plagiarism of Tennyson⁵⁷ “too palpable to be mistaken, and which belongs to the most barbarous class of literary robbery.”⁵⁸ Ironically, Silverman sets forth examples of Poe’s “flagrant plagiarism” where he borrowed from the poems of others,⁵⁹ engaged in “wholesale pilfering of long stretches of material from other books,”⁶⁰ and practiced self-plagiarism.⁶¹

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

was Longfellow by Poe.” LINDEY, *supra* note 1, at 93.

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

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

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

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

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

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

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

borrowing.⁶⁴ In contrast, Mazzeo notes that today, “questions of improvement” are no longer operative; the focus now lies on the appropriation of specific language.⁶⁵

Mazzeo’s conclusions in questioning assumptions regarding Romanticism are striking: the glamour of the Romantic ideology of the solitary, original genius does not, in fact, comport with the historical reality of the authors of that era, which reflects a pattern of collaboration and competitive textual interpenetration.⁶⁶ The term Romanticism, urges Mazzeo, is an “aesthetic fantasy,” a set of cultural and ideological formations that came into prominence after that period but have been ascribed to that period.⁶⁷ Most significantly for purposes of this article is Mazzeo’s contention that contemporary professors “hold our undergraduates to higher standards of *ex nihilo* originality than those to which the Romantics ever held each other,”⁶⁸ and do so under the erroneously perceived mandates of the legacy of the Romantic solitary genius.

II. CONTEMPORARY DEFINITION OF PLAGIARISM

A review of the literature suggests that no universal understanding exists with respect to plagiarism; rather, it is a term that encompasses a variety of permutations that extend beyond the mere appropriation of another’s specific language.⁶⁹ Indeed, the definitions set forth in *Black’s Law*

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

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

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

67. *Id.*

68. *Id.*

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

Dictionary—“The deliberate and knowing presentation of another person’s original ideas or creative expression as one’s own”⁷⁰—and in case law—“it is not necessary to exactly duplicate another’s literary work in order to be liable for plagiarism, it being sufficient if an unfair use of such work is made by the lifting of a substantial portion of it”⁷¹—do not fully reflect the multifaceted aspects of plagiarism as evidenced in college and university plagiarism policies, guidelines of professional organizations, opinions of media commentators, and analyses by scholars.⁷²

Plagiarism as defined in some college and university or professional contexts is an intentional omission of one’s sources;⁷³ in other colleges and universities or associations, the act of appropriating another’s ideas or expression, regardless of intent, prompts condemnation as plagiarism.⁷⁴

scholars in the field have proffered a variety of definitions of plagiarism).

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

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

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

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

74. Kevin J. Worthen, Associate Dean for Academic Affairs at Brigham Young

Moreover, faculty, students, and authors have on occasion been deemed culpable of self-plagiarism, although Lindey observes that such self-plagiarism lacks the requisite of false assumption of ownership.⁷⁵ Some commentators and professional organizations state that “plagiarism is a species of intellectual fraud,”⁷⁶ while others contend that the repetition of even commonplace words, use of another's apt term, paraphrasing, or incorporating another's line of thinking are correctly deemed acts of plagiarism.⁷⁷ Laurie Stearns describes plagiarism as imitative of another's structure, research, and organization.⁷⁸ Allegations of architectural or

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

75. LINDEY, *supra* note 1, at 218. However, putting forth a prior work or part of a prior work under a new title, Lindey contends, “wrongs [one's] first publisher, cheats the second, and swindles [one's] readers.” *Id.* Self-plagiarism occurs when an author reuses prior writings, presents them in an allegedly new format, and deceives the reader into believing that the publication is, in fact, new. Ronald Standler delineates two forms of self plagiarism: “(1) for students self-plagiarization is taking a term paper or essay that was written for one class and submitting substantial parts of that work for credit in a second class, without informing the instructor; and (2) for professionals self-plagiarization is using part of one publication in a subsequent publication, without the indicia of a quotation or citation to a paraphrase of an earlier publication.” RONALD B. STANDLER, *PLAGIARISM IN COLLEGES IN USA, SELF-PLAGIARIZATION*, available at <http://www.rbs2.com/plag.htm> (last visited Oct. 10, 2010). *But see*, NYU School of Law, *Pledge of Academic Honesty*, Part II. A. 4., available at http://www.law.nyu.edu/ecm_dlv3/groups/public/@nyu_law_website__llm_jsd/documents/documents/ecm_pro_062457.pdf (“Although not within the definition of plagiarism, it is also forbidden, without permission of the instructor, to submit the same work or a portion of the same work for academic credit in more than one setting, whether the work was previously submitted at the school or elsewhere.”) (last visited Sept. 27, 2010).

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

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

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

conceptual plagiarism, wherein one adopts the analytic or creative scheme of another, have been raised, for example, by authors Michael Baigent and Richard Leigh against author Dan Brown with respect to his use in *The DaVinci Code* of their ideas regarding the relationship of Jesus and Mary Magdalene and their resulting bloodline, ideas that were first articulated in their 1982 work entitled *Holy Blood, Holy Grail*.⁷⁹ In the sciences, plagiarism frequently refers to the “content of discovery or the interpretation of data,”⁸⁰ rather than the duplication of specific phraseology. Plagiarism, according to some commentators, includes the type of managed book⁸¹ wherein graduate students essentially construct the

79. See *infra*, notes 227–30 and accompanying text; see also Jeff Gammage, *An Academic Shoot-out on the Ethical Frontier*, PHILA. INQUIRER, Nov. 13, 2005, at A1 (describing the charges of conceptual plagiarism, wherein one appropriates the concepts and ideas of another, leveled against a University of Pennsylvania sociology scholar by her colleague, Professor Elijah Anderson). Professor Anderson asserted that fellow Penn Professor Kathryn Edin and her coauthor, Maria Kefalas, a St. Joseph’s University professor, had inadequately credited his groundbreaking work, *Code of the Street: Decency, Violence, and the Moral Life of the Inner City*, in their book, *Promises I Can Keep: Why Poor Women Choose Motherhood Before Marriage*. *Id.* While *Promises* cited Anderson’s work in its Bibliography and in three footnotes, Anderson claimed that it employed his analytic scheme, concepts, and ideas and did not afford sufficient credit to its author. Elijah Anderson, *Professor Anderson Responds*, ALMANAC, Oct. 11, 2005, at 2, available at http://www.upenn.edu/almanac/volumes/v52/n07/pdf_n07/101105.pdf. See also Mara Gordon, *Prof Declares Himself Victim of Plagiarism*, DAILY PENNSYLVANIAN, Oct. 11, 2005, available at <http://thedp.com/node/46814>. Initially the matter was resolved via confidential internal mediation within the Sociology Department at Penn, a mechanism employed throughout academia. Mara Gordon, *Department Chair Defends Accused Prof*, DAILY PENNSYLVANIAN, Oct. 6, 2005, available at <http://thedp.com/node/46739>. Subsequently, a Penn professor emeritus forwarded a memo to the Penn Sociology Department, which was allegedly leaked to *The Daily Pennsylvanian*, the student newspaper, asserting that the coauthors had engaged in conceptual plagiarism. *Id.* Scholars representing a variety of prestigious colleges and universities, such as Princeton and Harvard Universities, stated in a letter to *The Daily Pennsylvanian* that “[t]he idea that [Edin and Kefalas’] new book, . . . is ‘conceptual plagiarism’ of Elijah Anderson’s work is absurd” Sara McLanahan, *Letter to the Editor: Not Plagiarism*, DAILY PENNSYLVANIAN, Oct. 6, 2005, available at <http://thedp.com/node/46749>. Anderson responded by setting forth twenty-two instances where similarities in idea and language were evident in the two works in the *Penn Almanac*. Elijah Anderson, *Professor Anderson Responds*, ALMANAC, Oct. 11, 2005, at 2, available at http://www.upenn.edu/almanac/volumes/v52/n07/pdf_n07/101105.pdf.

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

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

work that will ultimately bear the name of the faculty member who serves as editor or overseer of the process.⁸² The plagiarism-definition landscape is further obfuscated by the colloquial practice of imprecisely garbing the term “plagiarism” in the mantle of criminal theft connotation.⁸³

A. Plagiarism Regarded as a Potential Criminal Offense

While the commentary regarding plagiarism often links it to criminality,⁸⁴ it does not satisfy the basic requisites of criminality, notwithstanding declarations to the contrary. Marilyn Randall terms plagiarism a crime against authors and copyright infringement a crime against owners.⁸⁵ Abigail Lipson and Sheila M. Reindl label intentional plagiarism as “criminal plagiarism.”⁸⁶ Thomas Mallon decries the

students, in order to avoid a charge of plagiarism.” *Id.*

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

83. *E.g.*, Green, *supra* note 28, at 169–70 (noting that plagiarists are repeatedly referred to as thieves and criminals culpable of stealing, robbery, piracy, or larceny). Green queries whether the idea of plagiarism as a theft crime is “anything more than a recurring metaphor,” since it does not satisfy the legal definition of theft nor is it prosecuted as such. *Id.* at 170. *See also* N.Y. Univ. Sch. of Law, *School of Law Policies and Procedures*, at 6 (1970), available at <http://www.law.nyu.edu/students/studentaffairs/publicationsandresources/studenthandbook/nyu0073chooloflawpoliciesprocedures/index.htm> (follow “ECM_DLX_010208.pdf” hyperlink) (defining plagiarism as “an academic crime and a serious breach of Law School rules.”).

84. HOWARD, *supra* note 53, at 107 (recounting the “judiciomoral vocabulary” that commentators employ with respect to plagiarism, citing among others, “crime and honor” (Frank J. McCormick in the *Journal of Teaching Writing*, 1989); and “crime, theft, and the plagiarist as ‘less of a person’ ” (Edith Skom in the *AAHE Bulletin* 1986)). Such commentary may be traced in part to Martial’s metaphorical use of the term “plagiaries” as kidnapper, *see supra* notes 41–43, or the sense of violation experienced by victims of the plagiarist. *See, e.g.*, William W. Savage, Jr., *My Favourite Plagiarist: Some Reflections of an Offended Party*, 34 J. SCHOLARLY PUBLISHING 214–21 (2003).

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

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

kidnapping writer who imprisons the words of the original author, viewing him as an “audacious predator.”⁸⁷ Yet Lindey notes that while plagiarism is described as literary theft, literary larceny, and literary piracy, this has “no precise legal signification.”⁸⁸ Indeed, plagiarism, although often described as violative of the law, is not a legal term that would constitute a cause of action in a court of law;⁸⁹ it is instead an ethical or moral offense whose proper hearing venue is that of the college or university or professional association.⁹⁰ Judge Posner contends that although plagiarism is neither theft nor always synonymous with copyright infringement, it is confused with both, which has raised the level of contempt with which this ethical offense is viewed.⁹¹ Stuart P. Green concludes that this ethical offense has never been prosecuted as a crime of theft, nor should it be regarded as such.⁹² Likening the characterization of plagiarism as larceny to metaphorical language such as “a lawyer’s fees constituted ‘highway robbery,’”⁹³ Green argues that if plagiarism is to be treated as a form of theft, then the intent requisite to the commission of a theft crime should be a mandated element of the definition of plagiarism.⁹⁴ And yet there exists

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

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

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

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

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

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

93. *Id.* at 170.

94. *Id.* at 181–86. Green states:

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

no uniformity with respect to this aspect of the definition of plagiarism, with some university codes mandating a finding of intentional plagiarism, with others prohibiting plagiarism prompted by unintentional or inadvertent conduct, and others failing to indicate what, if any, mental element is requisite to the commission of the act.⁹⁵ Inasmuch as so many legal terms are deemed words of art, it is incongruous that criminal terminology—such as theft and robbery—would be so broadly applied to the ethical violation of plagiarism, a term that bears no uniformly accepted definition.⁹⁶

failing to attribute is that he was deliberately indifferent to the requirements of attribution, he should be viewed as having committed plagiarism.

Id. at 182.

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

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

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

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

B. Plagiarism and the Matter of Intent

As observed by Stuart P. Green, “there is a good deal of confusion over whether copying or failure to attribute must be ‘intentional’ or ‘knowing,’ or whether plagiarism is committed even when such acts are inadvertent.”⁹⁸ Authorities in the field have reached disparate conclusions. Alexander Lindey, author of the cornerstone work *Plagiarism and Originality*, asserts that while copyright law merely queries whether the alleged wrongdoer has copied an essential or substantial portion of copyrighted material, ethics “is primarily concerned with intent It condemns him only if he steals knowingly and willfully.”⁹⁹ Laurie Stearns asserts that “[p]lagiarism means intentionally taking the literary property of another without attribution and passing it off as one's own”¹⁰⁰ Henry L. Wilson, in

one author does not credit another author at all.” *Id.*

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

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

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

100. Stearns, *supra* note 78, at 516. Seton Hall Law School, in endeavoring to provide guidance to its students with respect to plagiarism, cites the above noted Stearns quote and adds that “[t]o plagiarize, the copier must not only copy another's work but also attempt to pass off the copied work as his or her own.” Memorandum from Charles A. Sullivan, Associate Dean of Seton Hall Law School (July 4, 1994), <http://law.shu.edu/Students/academics/Plagiarism-Memo.cfm>. Seton Hall warns,

urging that intent is crucial to a finding of plagiarism, observes that the *Oxford Dictionary* defines plagiarism as knowingly presenting the work as one's own.¹⁰¹ Finally, Green, in urging that plagiarism should require intent, states that "there is a legitimate distinction to be made between mere influence, unconscious imitation, and inadvertent failure to attribute (on the one hand), and extensive copying that is intended to convey the impression that the copier is the original author (on the other)."¹⁰²

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

"Observers and critics are sometimes reluctant to accept the plagiarist's claim of lack of intent, but their reluctance is more likely due to an inability to believe the excuse than to a conviction that accidental copying is equivalent to plagiarism." *Id.* But see *infra* notes 103–07 (noting that commentators express the conviction that accidental and unintentional failure to attribute do fall within the rubric of plagiarism).

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

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

103. For example, in Lipson and Reindl, *supra* note 25, at 8, the authors relate that colleges and universities rely on three explanations for academic misconduct, which include criminal plagiarism, sloppy scholarship, and ignorance of the rules. The latter excuse is, according to Lipson and Reindl, "considered a weak explanation given the pains to ensure students' awareness of the importance and mechanisms of proper citation." *Id.* Even when it becomes clear that "a student really is at a loss regarding the basic conventions of source use, perhaps because of poor precollege preparation or widely divergent cultural assumptions about the nature of knowledge or the role of a student . . . students are generally still held accountable for their inappropriate use of sources . . ." *Id.*

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

105. See Savage, *supra* note 84, at 214–15 (critiquing the manner in which a

doubts regarding the proffered excuses of inadvertence, with one stating, “there is no possibility of unintentional plagiarism.”¹⁰⁶ Hildegard Bender rejects the notion that lack of knowledge, accompanied by lack of intent, affords the student an immunity from a plagiarism charge. Bender states, “If you give me plagiarism, I will give you an ‘F.’ I am not concerned with the idea of ‘intent to deceive’ since my experience tells me two things: the world doesn’t care about intent; and since I give very thorough instruction regarding plagiarism prior to expository writing, if it occurs, there *is* intent to deceive.”¹⁰⁷ Interestingly, some authorities adopt the position that intent is irrelevant with respect to a finding of the act of plagiarism, but can play a role in terms of assessing appropriate punishments for such conduct. Terri LeClercq, for example, in providing a comparison of the practice of law schools, which seeks to avoid plagiarism, and the practice of law, which routinely employs the use of others’ work product in the form of model briefs and form books, asserts that plagiarism should be a no-fault offense with intent affecting punishment.¹⁰⁸ Concurring that intent to deceive should play a role in the sanction stage of the wrongdoing, Kevin J. Worthen, Associate Dean for Academic Affairs at Brigham Young University Law School, advocates that plagiarism, whether prompted by laziness, sloppiness, ignorance, or dishonesty, merits consequences.¹⁰⁹

One can appreciate that those who espouse a strict-liability approach to defining plagiarism seek to establish the highest standards of academic

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

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

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

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

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

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

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

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

C. Defining Plagiarism with Regard to Intent: Determining Factors

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

Reasonably included within the scope of the definition of plagiarism would be conduct exhibiting the reckless or “deliberate” indifference to the norms of citation advocated by Green.¹¹⁴ What then are some of the factors

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

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

112. See *infra* note 258.

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

114. Green, *supra* note 28, at 174. If, for example, a student were to employ footnotes in close proximity to borrowed material, but failed to place specific borrowed words in quotation marks, such conduct would not satisfy the requirements of reckless indifference to the norms of citation. Further, if a student were to generously cite sources throughout his or her paper, but neglected to cite those same sources on occasion within the confines of the same paper, such conduct would not exhibit the type of deliberate disregard of the norms of attribution. The foregoing represents a text-only approach to determining plagiarism. Cf. Decoo, *supra* note 72, at 117 (advocating that the entire context of the situation be appraised, including, among others, the credibility of the student's explanation for the appearance of the borrowed

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

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

language or ideas, an assessment of the student's prior record, and recommendations from professors with regard to the student's character, integrity and likelihood of having intentionally committed the ethical offense of plagiarism); Howard, *supra* note 53, at 164 (same).

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

116. Decoo suggests that one determine, for example, if professional antagonisms preceded an accusation mounted by a colleague. *Id.* See, for example, *Abdelsayed v. Narumanchi*, 668 A.2d 378 (Conn. App. Ct. 1995), where, in an action to recover damages for defamation, the defamatory statement asserted by the defendant professor regarding his faculty colleague was proven demonstrably untrue; the fact that the defendant refused to retract the statement, coupled with evidence of ill will between the parties, establishes proof of "convincing clarity" that the defamatory falsehood regarding plaintiff's alleged plagiarism issued by the defendant was published with actual malice. *Id.* at 381.

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

118. *Id.* at 131.

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

120. See *supra* note 12.

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

122. See *supra* note 17.

the time a novelist does it 29 times, the effort is transparently intentional and conscious.”¹²³

Rebecca Moore Howard, in urging that authorial intent and context be considered in making a plagiarism finding,¹²⁴ contends that where the student is writing from assigned sources, “it is highly unlikely that she intended to deceive.”¹²⁵ Yet this precise factual scenario formed the foundation of a plagiarism case at Princeton University, where a senior honors student was deemed guilty of plagiarizing from a text assigned for a final project. In Gabrielle Napolitano’s lawsuit premised, in part, on breach of contract as to whether the finding of plagiarism and the penalty imposed by Princeton violated the university’s rules and regulations,¹²⁶ the

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

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

LINDEY, *supra* note 1, at 253. Courts have weighed in on the issue of whether intent to plagiarize, as evidenced in the amount of copying, had been demonstrated on the part of two lawyers, whose bar membership was imperiled by their acts of plagiarism during law school. *In re Lamberis* involved a practicing attorney who had been expelled from the LL.M. program at Northwestern Law School for plagiarism, and who argued that his plagiarism was fueled by “academic laziness” rather than intent. *In re Lamberis*, 443 N.E.2d 549, 550 (Ill. 1982). The court premised its concurrence with the Hearing Board that intent had been demonstrated by the extent of the copying (pages 13 through 59 of a 93 page thesis were substantially verbatim and devoid of citation) and by Lamberis’ academic background, which the court presumably thought should have rendered him more informed about citation procedures. *Id.* at 550–51. In a similar fashion, *In re Petition of Zbiegien* involved a law graduate who appealed from the denial of admission to the bar for lacking the requisite character. The denial had been based upon an act of plagiarism in law school where most of the first twelve pages of a paper were taken verbatim from law review articles without attribution. *In Re Petition of Zbiegien*, 433 N.W.2d 871, 872 (Minn. 1988). The court concurred with the Associate Dean of William Mitchell College of Law that the unattributed reproduction of published passages and footnotes equaled “unstated intent.” *Id.* at 874–76. *See also infra*, Part X.

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

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

126. *See* Napolitano v. Trs. of Princeton Univ., 453 A.2d 263, 268 (N.J. 1982). The student’s complaint employed a variety of legal theories in addition to those premised on contract in her attempt to attack both the plagiarism finding and the resultant penalty

ultimate findings of the Chancery Court and the Appellate Division of the Superior Court of New Jersey were that, despite the fact that the material in question was taken from the assigned text, the extensive use of unattributed material warranted a conclusion that the student had intentionally presented the quoted material as her own.¹²⁷ As noted by the Appellate Division, her paper, which “constitutes a mosaic of the [assigned] work . . . itself is the loudest argument” against her protestation that she did not intend to plagiarize.¹²⁸ It is significant to note that while the trial court concurred that the weight of unattributed material justified a conclusion of intended plagiarism,¹²⁹ it reflected its distaste for the harshness of the penalty

imposed, including causes of action arising under the N.J. CONST. art. I, § I (1947) (declares all persons have “certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property”), the law of associations, the Fifth and Fourteenth Amendments to the U.S. Constitution, defamation, intentional infliction of emotional harm, invasion of privacy, malicious interference with her prospective economic advantage, and malicious interference with plaintiff’s contractual relationship. *Id.*

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

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

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

Id.

129. See *supra* note 127. The issue of whether intent was a required component of Princeton’s definition of plagiarism was raised in the context of Napolitano’s challenge to the manner in which Princeton’s rules had been applied to her case. Princeton had

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

Many espouse the view that plagiarism can be easily detected;¹³¹ incidents suggest plagiarism cannot be so readily discerned. Walter Stewart and Ned Feder of the National Institute of Health, for example, applied a plagiarism-detection program they devised to the writings of historian Stephen B. Oates, and concluded that he had, by virtue of the number of passages similar to other works, plagiarized in several of his books.¹³² The American Historical Association, in marked contrast, and after extensive review of these allegations with experts divided on the issue, found that plagiarism was not so readily discernible in Oates’ work and concluded, in fact, while Oates was short on attribution, he had not

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

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

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

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

engaged in plagiarism.¹³³ Finally, if one moves beyond a textual analysis that solely compares words, ideas, and rules of citation, and considers, as suggested here, the author's intent, then clearly discerning plagiarism becomes a challenging task.

III. INCIDENCE OF PLAGIARISM

Much of the concern voiced regarding plagiarism emanates from the perceived marked increase in the incidence of plagiarism, evidenced in, among other indicators, highly publicized cases involving journalists,¹³⁴ politicians,¹³⁵ administrators,¹³⁶ and faculty and students.¹³⁷ Deemed a serious problem¹³⁸ that has "increased over the past decades,"¹³⁹ "a worrisome trend"¹⁴⁰ suggesting "epidemic proportions,"¹⁴¹ and exhibiting a "relentless increase,"¹⁴² plagiarism has been attributed by many commentators to the ease with which individuals can access the seemingly limitless resources of the Internet,¹⁴³ as it both facilitates and tempts¹⁴⁴ the

133. See *supra* notes 8 and 96.

134. See *supra* note 18.

135. See *supra* notes 20–23.

136. See *supra* note 23.

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

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

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

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

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

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

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

commission of the act of plagiarism. Contributing to the perception of plagiarism intensifying is the exposure afforded such cases (and the glee, or “schadenfreude,”¹⁴⁵ that often seems to accompany such exposés), which gives the public eye the opportunity to examine instances of academic misconduct that heretofore would have been handled quietly¹⁴⁶ in house, either through university mediation¹⁴⁷ or other mandated procedures, professional organization rules,¹⁴⁸ or negotiations with publishing houses.¹⁴⁹

Quantitative figures regarding the incidence of plagiarism have been proffered by an array of sources. Dalhousie University, via a 2004 survey conducted among eleven Canadian universities, presented figures that indicated that thirty-two percent of undergraduates and twenty-one percent of graduate students had plagiarized at least once in the three prior academic years.¹⁵⁰ Robert Marquand suggests that research fraud is “rampant” in China, reflecting a “deeply ingrained habit of plagiarism, falsification and corruption,” specifically pointing to a study of 180 Ph.D. candidates who admitted plagiarizing and paying bribes in order to ensure their work was published.¹⁵¹ And Arthur Sterngold reports that the 2003 National Survey of Student Engagement results indicate “87 percent of

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

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

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

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

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

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

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

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

college students who took the survey online said their peers copied data from the Internet without citing sources at least some of the time.”¹⁵² The source most frequently cited by colleges and universities and by those who express concern with perceived plagiarism trends¹⁵³ for statistical evidence of the growth of plagiarism among students, both on the high-school and collegiate levels, is the work published by Professor Donald McCabe of Rutgers University, and of the Center for Academic Integrity (CAI).¹⁵⁴ For approximately eighteen years, McCabe has produced an annual report addressing the amount of cheating reported via surveys that students have completed. In 1999, for example, he pointed to the “relentless increase” in cheating, without specifying what amount could be attributed to plagiarism.¹⁵⁵ In 2003, his reports indicated that forty percent of students acknowledged plagiarizing and viewed “cut and paste” plagiarism as a trivial offense.¹⁵⁶ In 2005, a survey of 50,000 undergraduates, conducted by McCabe as part of the CAI’s Assessment Program, indicated forty percent of students cut and paste from the Internet; in contrast, ten percent had admitted to such conduct in 1999.¹⁵⁷ In 2008, McCabe, premised on

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

153. See, e.g., Charlotte Allen, *Their Cheatin’ Hearts*, WALL ST. J., May 11, 2007, at W11; Julie Rawe, *A Question of Honor*, TIME, May 28, 2007, at 59; Emily Sachar, *Study: MBA Students Cheat Most Duke University Center Says Pressure-Cooker Atmosphere, Corporate Scandals May Be To Blame*, ST. LOUIS POST, Sept. 26, 2006, at C1; Valerie Strauss, *Book on Cheating: Paper Crib Notes Are So Old School*, CHI. TRIB., June 6, 2007, at 4. All of the foregoing authors cite as documentation for their articles the research studies conducted by Professor McCabe; see *infra* note 154, describing the Center for Academic Integrity (CAI), of which Professor McCabe currently serves as a member of the Advisory Council.

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

155. See *supra* note 22.

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

157. Further, seventy-seven percent believe doing so is not a serious issue. See Clemson Univ., *CAI Assessment Project*, (2005), http://www.academicintegrity.org/cai_research/index.php (last visited Oct. 10, 2010). The 2005 CAI study raises a significant issue in that it suggests students struggle to

analysis of 24,000 high-school students in grades nine to twelve, reported that plagiarism is practiced by fifty-eight percent of those surveyed, with the plagiarism encompassing downloading of complete papers and cutting and pasting online articles without the requisite attribution.¹⁵⁸

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

understand what constitutes acceptable use of the Internet, and, in the absence of faculty direction, believe they can, with impunity, cut and paste a sentence or two from various sources and weave them into a paper without citation. *Id.*

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

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

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

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

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

163. See Lindsay, *supra* note 160

term, perhaps the touted number of cases would diminish in frequency.

IV. RATIONALE FOR PLAGIARISM'S PURPORTED PREVALENCE

Commentators attribute motivation for engaging in plagiarism to a wide variety of rationales, which encompass everything from the practical “pressed for time exigencies,” the impact of the Internet, societal examples of unethical behavior, to one’s perceived personal shortcomings. While the majority of such ruminations relate to student behavior, some of the reasons proffered are applicable to faculty and others as well. David Thomas sets forth several reasons why plagiarism occurs: academic pressures to excel, exacerbated by pressure imposed by ambitious parents; poor planning, as evidenced by procrastination and disorganization; poor prior foundation for current academic demands; an “excessive or mindless” workload that encourages injudicious time-saving behavior; cultural backgrounds that demonstrate “less compunction against plagiarism”; and revelations of plagiarism by public figures, where the tendered excuse of inadvertence is accepted.¹⁶⁴

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

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

165. Hastings, *supra* note 144.

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

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

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

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

V. DEVICES FOR PURPOSES OF DETERRENCE AND DETECTION

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

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

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

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

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

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

university handbooks;¹⁷⁴ online workshops or tutorials intended to familiarize students with the forms of plagiarism and aid faculty in fostering academic integrity;¹⁷⁵ traditional honor codes that require a pledged promise both to refrain from acts of academic dishonesty and to inform authorities of students who violate the pledge;¹⁷⁶ modified honor codes that solely require a pledge of academic integrity and which are sometimes coupled with plagiarism-detection devices;¹⁷⁷ integrity codes which may or may not compel a signed pledge of adherence;¹⁷⁸ Internet

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

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

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

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

178. See, for example, Carly Weinreb, *Freshman Integrity Pledge Sparks Discussion*, DAILY PENNSYLVANIAN, Sept. 2, 2004, <http://thedp.com/node/42825>, describing the process at the University of Pennsylvania begun in 2000, whereby incoming freshmen are forwarded a copy of the Code of Academic Integrity coupled with a pledge card agreeing to uphold the Code. Signing the card is optional. The integrity code does not require one to report cheating by others; further, the punishment

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

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

for violating an integrity code, in contrast to the expulsion mandated by a traditional honor code, is typically suspension for a semester. *Id.* Research suggests that properly worded institutional statements regarding academic integrity and plagiarism, providing definition and penalties, serve as effective measures to reduce the incidence of plagiarism among undergraduates. Brown & Howell, *supra* note 24.

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

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

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

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

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

184. FERPA, 20 U.S.C. § 1232g, protects the privacy of student records, according parents certain specific rights with regard to their children’s records, with such rights transferring to the student when he or she attains the age of eighteen or attends an

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

institution of higher education. Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2006), available at <http://www.edu.gov/policy/gen/guid/fpco/ferpa/index/html>. Plaintiffs argued that Turnitin violated federal student privacy laws by permitting clients of Turnitin to request and receive copies of students' papers revealing their names and those of their instructors, among other personal information. See Jeffrey R. Young, *Judge Rules Plagiarism-Detection Tool Falls Under 'Fair Use,'* CHRON. HIGHER EDUC., Apr. 4, 2008, at A13. The New York Education Department, for example, ruled "that a professor would be putting an institution at risk for a Ferpa [sic] violation if he or she simply took term papers and shipped them off to a plagiarism-check site without having 'anonymized' the data." *The Law, Digitally Speaking*, CHRON. HIGHER EDUC., Apr. 4, 2008, at 14; see also Andrea Foster, *Plagiarism-Detection Tool Creates Legal Quandary*, CHRON. HIGHER EDUC., May 17, 2002, at 37. Foster cites Kenneth D. Crews, who served as both a professor of law at the Indiana University School of Law and director of the IUPUI Copyright Management Center, as stating that before entering contractual relations with Turnitin, faculty must notify students at the beginning of a course that their work may be submitted to Turnitin and that it will be retained by same. Further, Crews suggests that one should "give them a chance to opt out." *Id.* Foster observes that most other plagiarism detection services do not retain submissions of students, thus rendering the pool of manuscripts to which papers are compared smaller than that of Turnitin's. *Id.*

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

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

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

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

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

190. Bronwyn T. Williams, *Trust, Betrayal, and Authorship: Plagiarism and How We Perceive Students*, 51 J. ADOLESCENT & ADULT LITERACY 350, 353 (2007) (arguing that the advent of plagiarism detection software has shifted the emphasis from teaching

host of other purposes.

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

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

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

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

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

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

194. *See id.*

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

196. Williams, *supra* note 190.

197. Rebecca Moore Howard, *Forget About Policing Plagiarism. Just Teach*, CHRON. HIGHER EDUC., Nov. 16, 2001, at 24. Howard observes that the hysteria

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

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

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

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

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

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

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

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

It is the objections grounded in copyright law that form what many have deemed a viable challenge to Turnitin’s use and archival of student work in its database.²⁰⁶ The notion that an original expression as defined by the Copyright Act of 1976,²⁰⁷ and as represented by a student’s work, is submitted to a for-profit plagiarism-detection site such as Turnitin to be archived, with no remuneration being afforded to the subject students,

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

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

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

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

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

207. See 17 U.S.C. §§ 101–801 (2006).

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

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

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

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

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

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

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

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

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

215. The court in essence concurred with all arguments proffered by the defendants as to the validity of the clickwrap contract. *iParadigms*, 544 F. Supp. 2d at 480–81. *See* Young, *supra* note 183. While the court upheld the legality of the agreement, we can question the fairness of the purported assent that is conveyed pursuant to the contract, when no viable alternative is presented to a student. Given the options of a zero grade or a school transfer, the agreement may not constitute legal duress, but it

Claude M. Hilton, citing the case of *Perfect 10, Inc. v. Amazon.com, Inc.*,²¹⁶ determined that iParadigms' use of the student papers was protected pursuant to the first of the four factors of fair use delineated by § 107 of the Copyright Act.²¹⁷ The court placed particular emphasis upon the "highly transformative" purpose and character of iParadigms' use of the plaintiffs' works, defined by the Supreme Court as a work that alters the original work "with new expression, meaning, or message."²¹⁸ Noting that the defendants made no use of the works' creative content beyond the limited use of comparison with other works, the court pointed to "a substantial public benefit through the network of educational institutions using Turnitin,"²¹⁹ notwithstanding its profit-making nature. Secondly, the court noted that iParadigms' use of the works does not diminish any incentive for creativity, but rather protects the creativity of the works from plagiarism by others.²²⁰ Citing *Perfect 10* again, the court noted the fact that the entire works were utilized does not necessarily negate fair use when a use is highly transformative.²²¹ Most importantly, the court held, the use is not violative of the fourth factor, the impact on the market value of the plaintiffs' copyrighted works, as the works remain archived and are not publicly accessible.²²² Agreeing with the trial court, the Fourth Circuit

does suggest an onerous, if not inequitable, means imposed by the school district in order to attain students' consent.

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

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

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

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

220. *Id.* at 483.

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

222. *Id.* at 483–84. In light of critiques applied to Turnitin in terms of its efficacy, one might urge, as did the plaintiffs on appeal, that Turnitin's software serves only as a transformative use if it, in fact, makes accurate assessments of existing plagiarism in a

Court of Appeals deemed iParadigms' use of the students' papers transformative, as it served a different function—ascertaining and deterring plagiarism—from the original work.²²³

These decisions reflect a recent trend in copyright cases that address the boundaries of the affirmative defense of fair use, affording significant emphasis to the transformative nature of the use in the context of the first of the four fair-use factors.²²⁴ Pursuant to the *iParadigms* case, fair use, “the notoriously murky legal doctrine that allows for ‘transformative’ uses of copyrighted material, whether for purposes of satire, criticism, or, in the company’s [Paradigms’] view, plagiarism detection,”²²⁵ fully encompasses a profit-making venture such as Turnitin.

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

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

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

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

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

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

VI. PLAGIARISM AND COPYRIGHT

The terms “plagiarism” and “copyright” are frequently employed as substitutes for one another in a variety of contexts. Litigation that is premised on copyright statutes is frequently described by the media as constituting a lawsuit grounded in plagiarism.²²⁶ The coverage accompanying the widely noted lawsuit commenced by Michael Baigent and Richard Leigh, of *Holy Blood, Holy Grail* fame, against Random House,²²⁷ publisher of Dan Brown’s *DaVinci Code*, for example, was touted as a plagiarism case, in which Brown was accused of “stealing [Baigent and Leigh’s] ideas.”²²⁸ It was, instead, a case of non-textual infringement in a literary work,²²⁹ in which Justice Peter Smith of the High Court of England and Wales, Justice Chancery Division held that the “architecture” of the plaintiffs’ work, or the manner in which ideas are presented, was not substantially copied; hence, the assertion of copyright infringement could not be sustained.²³⁰ Even scholarly works occasionally regard plagiarism violations and copyright infringements as synonymous.²³¹ Courts, too, sometimes use the term “plagiarism” in a generic sense signifying copying in the context of copyright-infringement

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

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

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

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

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

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

lawsuits.²³² And the phrase “music plagiarism” appears frequently with respect to copyright litigation arising out of the music industry.²³³

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

While neither constituting the basis for civil litigation nor a criminal offense, plagiarism is an ethical violation in which the academic institution serves as the primary venue for determining the merits of such allegations.²³⁷ Plagiarism can be maintained as a legal complaint only if it can satisfy the requisites of a copyright-infringement matter.²³⁸ The ethical

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

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

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

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

236. See *supra* Part II.B.

237. See *infra* Part VII.

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

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

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

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

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

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

242. Victoria Laurie describes an incident in which Dr. Felicity Haynes, an ethicist and educator at the University of Western Australia’s School of Education, inadvertently committed copyright infringement for which she was fined \$4000. The professor had established a website for one of her online learning classes. The website provided links to various sites, and further quoted from some of the sites, while providing acknowledgement of the utilized sources. She had overlooked the prohibition, however, contained in the copyright statement of one of the websites she used, against using the material on that website; thus her acknowledgement served to protect her against plagiarism accusations, but provided no shield to copyright infringement claims. Victoria Laurie, *Unoriginal Sins*, NATIONWIDE NEWS PTY LTD. AUSTL’N MAG., July 19, 2003, at 14.

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

Copyright infringement is regarded as a strict-liability offense “in that proving intent on the part of the infringing party is not a requisite to the finding of civil liability; demonstrating such intent is only deemed a prerequisite for the imposition of criminal liability.”²⁴⁸ Certain uses of copyrighted material are permitted under the fair-use exception of § 107 of the Copyright Act of 1976, such as parody, commentary, or educational purposes, if such uses satisfy the four factors delineated by the statute: namely (1) the purpose and character of the use, such as whether the use is of a commercial nature or is for nonprofit purposes, and whether such use, as determined by the courts, is deemed transformative;²⁴⁹ (2) the nature of the copyrighted work, including whether it is highly creative or more factual; (3) the substantiality of the portion of the work used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the market value of the copyrighted work.²⁵⁰ Plagiarism, on the contrary,

has no analogous exception; it can occur whenever a writer uses even a small excerpt of someone else’s work. Accordingly, one

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

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

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

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

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

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

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

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

who intentionally copied (and failed to attribute) a mere idea, a work that was not under copyright, or only a small excerpt of someone else's work would be guilty of plagiarism but not copyright infringement.²⁵¹

Further, to successfully mount a copyright-infringement lawsuit, the plaintiff must meet four criteria: ownership of a valid copyright,²⁵² whether the purportedly wrongful copying was, in fact, "copied from the allegedly infringed work and not independently created,"²⁵³ whether the defendant had access to the copyrighted material,²⁵⁴ and whether the copying bears substantial similarity (exact duplication is not a requirement) to the work of the plaintiff.²⁵⁵ Allegations of plagiarism, as noted by K. Matthew Dames, "do not require that the accuser prove the allegation. Plagiarism allegations do not even require that the injured party be the one who alleges wrongdoing."²⁵⁶ Indeed, in several high-profile instances, anonymous tipsters or plagiarism hunters are the parties that disclose revelations of alleged plagiarism.²⁵⁷ In short, the thrust of a plagiarism allegation is to penalize the ethical wrong encompassed in the deceptive representation of authorship²⁵⁸ as a moral affront to both the original author and to societal standards, and to castigate the accompanying lack of ethics exhibited by such conduct. In contrast, the thrust of the law related to copyright infringement is to protect property ownership and market values of the legitimate owner of the copyright. Hence, the intent or lack thereof of the

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

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

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

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

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

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

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

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 thicket of tangled jurisdictions.”²⁶¹ As noted by David Glenn, with respect to plagiarism allegations regarding faculty, each venue can impose, among others, the following sanctions: colleges and universities can deny tenure, terminate employment, or reduce salary; journals may remove articles from

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

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

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

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

Peter Charles Hoffer notes that “educational institutions lead the way in investigating allegations of plagiarism,” but asserts that other societies have a duty to act in cases of plagiarism.²⁶⁵ Some suggest that it is the college or university that should play the primary role in plagiarism investigations, as it is best equipped to handle such issues, having superior resources to professional associations or journals, including counsel, and the power to obtain testimony and relevant documents.²⁶⁶ Others assert skepticism with regard to the college or university’s willingness to directly confront plagiarism issues.²⁶⁷ Thomas Mallon, whose book *Stolen Words* excoriates both plagiarists and those who find such conduct defensible, stated, “[A]cademics remain curiously willing to vaporize the whole phenomenon of plagiarism in a cloud of French theory.”²⁶⁸ Strongly contesting that the academy lacks the fortitude to vigorously pursue plagiarism claims is Roger Billings, who states: “If cases involving plagiarism are any guide as to the veracity of [Mallon’s] statement, Mallon is mistaken. Careers are ruined because plagiarism is fiercely policed in universities as if it is one of

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

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

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

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

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

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

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

the seven deadly sins.”²⁶⁹

Carla Rahn Phillips, former head of the professional division of the American Historical Association, contends that professional associations must offer a viable avenue of recourse for those who are victims of plagiarism.²⁷⁰ Both Phillips and Marcel C. LaFollette, author of *Stealing Into Print: Fraud, Plagiarism and Misconduct in Scientific Publishing*, expressed disappointment that the American Historical Association in 2003 decided to “abando[n] its important duty”²⁷¹ and relinquish its role in adjudicating plagiarism, when it asserted that it lacked “the resources and the clout” to effectively police its membership and imposes sanctions.²⁷² Yet Ron Robin, author of *Scandals and Scoundrels: Seven Cases That Shook The Academy*, disputes the viability of academic venues for plagiarism determinations, attributing the surge of charges of academic deviancy to the “demise of conventional scholarly . . . mechanisms” to handle such matters.²⁷³

With respect to the role of journals serving as venues for plagiarism allegations, Michael Grossberg, editor of the *American Historical Review*, opines that editors have a “gate-keeping role” to seek evidence of plagiarism, to expose scholarly deception, and not to ignore the protestations of a victimized author.²⁷⁴ While some regard the

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

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

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

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

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

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

consequences of a finding of plagiarism by a journal rather inconsequential—an article is withdrawn or is reprinted with an explanatory statement, or a written apology is accepted²⁷⁵—Grossberg believes that the attendant “publicity and open debate”²⁷⁶ best address ethical problems such as plagiarism.

All venues evince a concern with potential lawsuits that may arise from charges of plagiarism.²⁷⁷ One commentator notes that “[f]ear of libel suits hovers over the entire subject of plagiarism because of the calamitous consequences of calling someone a plagiarist.”²⁷⁸ Litigation emanating from plagiarism cases has been grounded in not only defamation,²⁷⁹ but in asserted violations of procedural due process,²⁸⁰ breach of contract,²⁸¹ negligence,²⁸² promissory estoppel and intentional infliction of emotional distress,²⁸³ and First Amendment protected speech.²⁸⁴ In an unusual recent case, a student expelled for plagiarism by Central Connecticut State University in 2006 achieved vindication in the courts by successfully bringing a civil suit against the other student involved in the incident, who had impliedly accused him of misappropriating her work.²⁸⁵ Citing

blatant, both the university venue and the American Historical Association failed to take deservedly strong measures against Sokolow. *Id.* at 151, 178.

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

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

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

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

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

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

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

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

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

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

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

evidence, which included computer-expert testimony regarding dates of submissions of the contested papers, the Superior Court judge exonerated the student of the charge and awarded damages permitting him to recoup monies spent pursuing his case.²⁸⁶ Journals and scholarly associations may lack financial resources to defend such lawsuits; colleges and universities certainly do not embrace the attendant inconveniences, costs incurred, and publicity.²⁸⁷

Barring an aspect of a student plagiarism case that renders it newsworthy, invoking media attention and public scrutiny (as where a university student's published work by a notable press is deemed a plagiarizing text;²⁸⁸ or a professor sets forth the names of students found culpable of plagiarism on a public blog;²⁸⁹ or a student's lawsuit arising from a plagiarism case attracts attention;²⁹⁰ or a university-wide plagiarism scandal erupts²⁹¹), the college and university venues generally address plagiarism cases in a decidedly private fashion. The primary concerns for the college or university venue are as follows: that it have in place an academic policy and procedures regarding all forms of academic dishonesty;²⁹² that it clearly define plagiarism²⁹³ and that the definition

In Term Paper Trial, THE HARTFORD COURANT, Nov. 20, 2008, at A1.

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

287. Glenn, *supra* note 261.

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

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

290. *See* Loretta Waldman, *Lawsuit Is Latest Chapter In Accusation Of Cheating At CCSU*, THE HARTFORD COURANT, Nov. 19, 2008, *available at* <http://www.courant.com/news/education/hc-copykid1119.artnov19,0,6233166.story> (Jan. 7, 2009) (describing the lawsuit brought by an expelled student from Central Connecticut State University against the individual student whose paper he was charged with plagiarizing).

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

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

293. It is suggested that the adoption by colleges and universities of a common definition of plagiarism, including a requisite intent or gross indifference to the

clarify whether intent is required;²⁹⁴ that it adhere to the standards enunciated in the policy;²⁹⁵ and that pursuant to the landmark decision of *Dixon v. Alabama State Board of Education*,²⁹⁶ the policy comport with the due process requirements of the Fourteenth Amendment, if it is a public institution, or with fundamentally fair procedures, if it is a private university.²⁹⁷ At public institutions, where continued enrollment is deemed

standards of attribution, would help to eliminate the disparities that exist in both procedures afforded and penalties applied to students and faculty charged with plagiarism. *See supra* Part II; *see also* Glenn, *supra* note 261 (“Every institution ought to adopt a common definition of plagiarism.”) (quoting Steven Olswang, interim chancellor of the University of Washington at Tacoma).

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

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

296. 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961). The court held that students who had engaged in disciplinary issues (conducting an off campus demonstration) were deprived of constitutional due process by not being afforded notice of the charges against them and an opportunity for a hearing. *Id.* at 158–59. In 1975 the U.S. Supreme Court sanctioned the notion that students had property and liberty interests which were entitled to due process protections in disciplinary actions undertaken by public institutions. *Goss v. Lopez*, 419 U.S. 565 (1975); *see also* Audrey Wolfson Latourette and Robert D. King, *Judicial Intervention in the Student University Relationship: Due Process and Contract Theories*, 65 U. DET. L. REV. 199, 206 (1988). It should be noted that the U.S. Supreme Court did not unequivocally expand due process constitutional protections to the purely academic arena. In *Board of Curators of the University of Missouri v. Horowitz*, while the Court did not specifically preclude the applicability of due process protections in the context of academic decisions, it stated that “far less procedural requirements in the case of an academic dismissal” are required. 435 U.S. 78, 86 (1978).

297. *See* Latourette & King, *supra* note 296, at 248 (“In the absence of state action, it is well recognized that a private institution is not obligated to comport with the constitutional mandates of *Dixon v. Alabama State Board of Education* and *Goss v. Lopez*, which require a hearing in disciplinary dismissal proceedings. Further, in the absence of a contractual right to a disciplinary hearing, the private institution’s decision will be upheld if it is not arbitrary or capricious and if it is premised on good faith and reasonable grounds.”). As public colleges and universities are regarded as agents of the state, their decisions in matters of disciplinary treatment of students are deemed “state

a protected property interest by federal courts,²⁹⁸ constitutional safeguards of due process protect students from arbitrary state action. At private universities, where constitutional protections do not apply, students have employed a variety of causes of action, including contract law and the law of association, to achieve some measure of non-arbitrary treatment.²⁹⁹

When the college or university serves as the forum for determinations of student plagiarism, the institution is rendered largely judgment-proof in that students will rarely emerge victorious in litigation arising from the plagiarism charge. The view of the student-university relationship as one of *in loco parentis*,³⁰⁰ affording the college or university nearly unfettered discretion to educate, assess, and reprimand its charges, has long been discarded. Nevertheless, the long-held traditions of deference to academic expertise, judgment, and autonomy continue to dominate judicial thinking on the student-university relationship.³⁰¹ Academic decisions, such as deciding what grade a student's work warrants, will not be overridden absent evidence of bad faith or arbitrary action.³⁰² In contrast, disciplinary matters such as plagiarism or cheating, which potentially implicate serious and career-altering penalties, invite greater judicial scrutiny pursuant to

action" so as to invoke the application of the Fourteenth Amendment's Due Process Clause. *See Goss*, 419 U.S. at 574-75; *Dixon*, 294 F.2d. at 158; *see also* Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide To Fair Process For The University Student*, 99 COLUM. L. REV. 289, 291 (1999) ("Courts have refused to find 'state action' . . . in the case of private schools, even though most receive heavy financial aid and other forms of government support.") (citing *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982)). Further, the U.S. Supreme Court stated thusly: "Embedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny under the Amendment's Due Process Clause, and private conduct, against which the Amendment affords no shield, *no matter how unfair that conduct may be.*" *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988) (emphasis added).

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

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

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

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

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

courts' interpretation of the line of Supreme Court cases addressing fairness in the public-university academic and disciplinary contexts.³⁰³ In accordance with those decisions,³⁰⁴ and as interpreted by the courts, the following procedural rights may be applicable to cases wherein public colleges and universities decide disciplinary matters such as the academic dishonesty representative of plagiarism: notice, right to a hearing, cross-examination of witnesses, availability of an appeal, and right to counsel.³⁰⁵

303. For a full discussion of the guidelines articulated by the U.S. Supreme Court in what Fernand N. Dutile references as "the big four," with respect to public institutional decision-making in both the academic and the disciplinary contexts, see Dutile, *Students and Due Process in Higher Education: Of Interests and Procedures*, 2 FLA. COASTAL L. J. 243, 264 (2001), (analyzing the disciplinary cases of *Goss v. Lopez*, 419 U.S. 565 (1975) and *Ingraham v. Wright*, 430 U.S. 651 (1977) and the academic cases of *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78 (1978) and *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985)). Commentators concur that disciplinary matters, which require due process protections that are not a requisite in the academic context, include acts such as cheating and plagiarism, as distinguished from poor grades. See Mawdsley, *supra* note 292, at 77 (noting that the federal district court in *Jaska v. Regents of University of Michigan*, 597 F. Supp. 1245, 1248 (E.D. Mich. 1984), interpreted the Court's ruling in *Horowitz* to "indicate that 'cheating should be treated as a disciplinary matter,' as opposed to academic"). The court in *Jaska* rationalized that "dismissal for cheating requires greater procedural protection than academic dismissals since the former are more stigmatizing than the latter, and may have a greater impact on a student's future." 597 F. Supp at 1248 n.2. See also *Kalinsky v. State Univ. of N.Y. at Binghamton*, 557 N.Y.S.2d 577, 578 (N.Y. App. Div. 1990) (where the court regarded a student charged with plagiarism in a state university entitled to due process in accordance with *Dixon*, deeming the matter a disciplinary proceeding). Berger and Berger note that in numerous cases subsequent to *Dixon* and *Goss*, wherein students have challenged the due process afforded them, some courts, particularly where the penalty becomes "more burdensome," mandate due process procedures in public institutions which exceed that set forth in *Dixon*. *Supra* note 297, at 308–09. See, e.g., *Marin v. Univ. of Puerto Rico*, 377 F. Supp 613 (P.R. Cir. 1974) (additionally mandating transcribed proceedings and the assistance of retained counsel). The commentators note that, pursuant to a survey they conducted of various educational institutions, "*Marin's* roster of required safeguards not only substantially exceeded *Dixon's*, but also . . . went well beyond what many public institutions currently afford the accused student," with more than 40% denying assistance by professional counsel and less than half providing for a transcript of the proceedings. Berger & Berger, *supra* note 297, at 309.

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

305. See Mawdsley, *supra* note 292, at 78. Berger and Berger state that the results of their survey of more than two hundred colleges and universities (with a seventy-five percent return rate of response) indicated that while the "era of the wholly arbitrary dismissal has passed," with many public institutions affording the accused student "a hearing before an impartial body and cross-examination of adverse witnesses," "over

Contract law may serve as a vehicle to infuse the private college or university with concepts of common law due process.³⁰⁶ Curtis J. and Vivian Berger argue that private-college and -university students should receive protection equal to the constitutional due process afforded public-college and -university students in academic disciplinary cases, and that the implied covenant of good faith and fair dealing is the “contractual equivalent of due process.”³⁰⁷ Fairness, in their view, is achieved through a

40% of public schools deny assistance by professional counsel, and fewer than half provide for a transcript of the proceedings.” *Supra* note 297, at 294, 309 (referencing questions in their survey submitted to institutions of higher education). *See also* Dutile, *supra* note 303, at 265–82 for an in depth discussion of the requisite due process to be afforded students in public institutions with respect to disciplinary matters. Dutile notes that such demands of procedural protections are flexible, depending upon “1) the nature of the interest protected; 2) the danger of error and the benefit of additional or other procedures; and 3) the burden on the government such procedures would present.” *Id.* at 265 (citing *Ingraham v. Wright*, 430 U.S. 651, 676–78, 682 (1977)). Dutile notes that while the due process requirements for disciplinary cases exceed those mandated for academic cases, they do not compel the procedural safeguards attendant to criminal trials. *Id.* at 267.

306. *See Latourette & King, supra* note 296, at 255 n.271 (citing *Abbariao v. Hamline Univ. Sch. of Law*, 258 N.W.2d 108, 113 (Minn. 1977) (“[T]he requirements imposed by the common law on private universities parallel those imposed by the due process clause on public universities.”). *See also* Hazel Glenn Beh, *Student Versus University: The University’s Implied Obligations of Good Faith and Fair Dealing*, 59 MD. L. REV. 183, 197 (2000) (advocating that, given a heightened consumerism on the part of students, contract law might be employed in both the private and public college and university context to ensure students are accorded adequate protection in academic and disciplinary cases). *See also* Mawdsley, *supra* note 292, at 73 (noting that “*Corso* cannot be read to suggest that there is some minimal form of due process required in private schools before a student can be expelled for academic dishonesty”) (citing *Corso v. Creighton Univ.*, 731 F.2d 529 (8th Cir. 1984) (court enforced the allegedly cheating student’s right to a hearing before a university committee pursuant to the terms of the university’s stated contractual policies)). *See also* *Napolitano v. Trs. of Princeton Univ.*, 453 A.2d 279 (N.J. Super. Ct. Ch. Div. 1982) (determining whether the penalty imposed by Princeton, a one year withholding of her degree, breached its contract with the student). The *Napolitano* court stated, “the legal standard against which the court must measure the university’s conduct is that of good faith and fair dealing.” *Id.* at 283. Further, the court specifically addressed the right to counsel in the private university context, stating “were the court to enforce a right to counsel in such a situation, the academic community’s control over its own affairs would be unjustifiably limited.” *Id.* at 282. Noteworthy factors contributing to this decision included: Princeton was not represented by counsel at the hearing; the university permitted the student to choose an advisor from the Princeton University community; the academic nature of the dispute; and the small likelihood that the punishment for plagiarism would entail any forfeiture such as expulsion. *Id.*

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

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

“calibrated approach” wherein required procedural safeguards would comport with the nature and gravity of the offense.³⁰⁸ The fact remains that findings of plagiarism can stigmatize the offender and trigger severe punishments such as suspension, expulsion, and permanent marks on one’s record that can reduce one’s mobility regarding future education, training, or career aspirations. Given the potential dire consequences to the offender, particularly in the case of an unknowing or careless culprit devoid of intent to defraud, the need for due process or its equivalent in the college and university venue is paramount.

VIII. CONSEQUENCES TO STUDENTS VERSUS FACULTY

Perceived disparities in treatment accorded faculty plagiarists as compared to that experienced by students is a theme strongly resounding in the literature. Charles McGrath, former editor of *The New York Times Book Review*, comments that a “moral component” is evident when a student plagiarizes a paper submission, but when a Doris Kearns Goodwin commits such a transgression, it “seems like an aesthetic offense, a crime against taste.”³⁰⁹ Judge Posner contends that a double standard for plagiarism exists, with faculty receiving fewer negative repercussions than do students.³¹⁰ Lisa G. Lerman, a Professor of Law at the Columbus School of Law at Catholic University, suggests that the “indefensible double standard” that exists in law schools with respect to disparate treatment of faculty and students is particularly egregious.³¹¹ She notes

Id. at 291.

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

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

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

311. Lerman, *supra* note 164, at 488. Lerman states “we apply the guillotine to a sampling of inexperienced writers for incorporating the work of another into a paper

that plagiarism, a “capital offense” for law students, whether bred of intent or a “product of ineptitude or of an educational deficit,” can result in suspension and/or denial of admission to the bar.³¹² In contrast, she asserts that law professors rarely acknowledge, in more than a perfunctory manner, the student-authored research that forms the basis of an article or book published under the name of the professor.³¹³

The contemporary high-profile instances of professorial plagiarism emanating from Harvard University have served both to highlight perceived student/faculty disparities and to engender much critical commentary, particularly with regard to the viability of the tendered defenses of Doris Kearns Goodwin, a former member of Harvard’s governing Board of Overseers and former Harvard history professor, and three law professors, Alan Dershowitz, Laurence Tribe, and Charles Ogletree, if such justifications for plagiarism had been offered by students.³¹⁴ Decoo asserts that “the higher the rank and the academic

and not using quotation marks or footnotes . . . but we turn a blind eye to the very same conduct by law professors. . . . The fairer choice would be to try to educate the students and save the guillotine for dishonest or predatory professors.” *Id.*

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

313. *Id.* at 472, 469, 471. Lerman analogizes admission to the bar as “walking through a looking-glass. On the one side, plagiarism is considered to be the most egregious variety of dishonesty. On the other side, the use of the words and ideas of others without attribution is not regarded as raising any ethical concern.” *Id.* at 468. *See also* Fed. Intermediate Credit Bank of Louisville v. Ky. Bar Assoc., 540 S.W.2d 14, 16, n.2 (Ky. 1976) (“Legal instruments are widely plagiarized, of course. We see no impropriety in one lawyer’s adopting another’s work, thus becoming the ‘drafter’ in the sense that he accepts responsibility for it”). *See also* K.K. DuVivier, *Nothing New Under The Sun—Plagiarism in Practice*, 32 COLO. LAW. 53 (2003) (urging that the legal profession is “built on borrowing” for purposes of consistency and efficiency, and absent fraudulent intent, such borrowing of ideas and language does not constitute unethical practice). *See also* In re Hinden, 654 A.2d 864 (D.C. 1995) (attorney was publicly censured for authoring a fifty-six page article that copied, without attribution, approximately twenty-three pages from another author’s article); Iowa Supreme Court Bd. of Prof’l Ethics v. Lane, 642 N.W.2d 296 (Iowa 2002) (attorney William J. Lane was suspended for six months for plagiarizing verbatim eighteen pages of the legal part of his brief from a published treatise, and for his deception in requesting compensation premised on the eighty hours he purportedly spent in preparing the brief); In re Steinberg, 620 N.Y.S.2d 345 (N.Y. App. Div. 1994) (attorney received public censure for fraudulently submitting writing samples, necessary for a promotion, that were in fact authored by other attorneys).

314. *See* Editorial, *The Consequence of Plagiarism*, THE HARVARD CRIMSON, March 11, 2002, available at <http://www.thecrimson.com/article.aspx?ref=180483> (asserting that Goodwin’s “gross negligence” in failing to attribute many sources warrants her withdrawal as a Harvard University Overseer, in light of the fact that pursuant to Harvard College policy, any letter of recommendation for students dismissed for plagiarism must report that the student had been required to withdraw for academic dishonesty). The author argued, “With this policy, it is clear that the College does not think that students who have committed plagiarism should be able to proceed, unaffected, with their career goals. Why then, should an adult who is more experienced, much less a professional historian, continue in her position in the

prestige, the less credible an accusation of misconduct. . . . Whether the allegations are true or not . . . an army of supporters will vouch for his or her integrity”³¹⁵ Sara Rimer notes that the defense to plagiarism raised by both Tribe and Ogletree—that of unintentionally misusing sources—would not be recognized as cognizable for students pursuant to Harvard University’s promulgations on plagiarism.³¹⁶ *The Harvard Crimson* noted the transgressions of Ogletree would likely have prompted expulsion for a Harvard undergraduate, and that his case revealed the “ludicrous double standard” and “glaring disparity” in the university’s application of plagiarism policies as applied to faculty and students.³¹⁷ One can argue that all scholars and academics, fully cognizant of plagiarism and the norms of attribution, should be held to strict standards of compliance if their plagiarism is deemed egregious. At minimum, it is advocated that students at every level should be given equal treatment to that extended to

University without consequence?” *Id.* For a discussion of the plagiarism allegations leveled against the cited Harvard scholar, see *supra* note 12.

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

Newspaper readers might think plagiarism a Harvard specialty. . . . One doubts that plagiarism is actually more common at Harvard than elsewhere. It is simply more conspicuous. Scandal at the nation’s most famous university gratifies the natural human delight at discovering that giants, including giant institutions, have feet of clay.

POSNER, *supra* note 28, at 6–7.

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

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

professors, and that if justifications related to time pressures, careless use of sources, and, particularly in this author's view, lack of intent, are deemed credible defenses for the professoriate, so, too, should they serve as viable defenses securing comparable safe passages for college and university students.

Judy Anderson contends as well that faculty do not pay a high price for committing plagiarism, as "researchers caught plagiarizing are frequently given the option to leave the institution quietly."³¹⁸ Yet she observes that Dr. Kenneth L. Melmon of Stanford University was compelled to step down as Chairman of the Department of Medicine upon the discovery that one-fourth of a textbook chapter he authored arose from another source.³¹⁹ Paula Wasley sets forth the serious repercussions incurred by both students and faculty who were embroiled in a plagiarism scandal at Ohio University, wherein recipients of graduate engineering degrees were given the options of forfeiting degrees, rewriting the plagiarized portions of their masters theses (conditioned on an admission of guilt), or requesting a hearing.³²⁰ The involved faculty experienced loss of chairs, position, and threat of tenure removal.³²¹ Lerman, too, describes instances of grave consequences for scholars, such as the forced resignation of the Dean of Albany Law School who, in a memorandum to his Board of Directors, plagiarized part of an article authored by then-New York University School of Law Dean John Sexton and that had appeared in the *Montana Law Review*.³²² Further instances of sobering penalties applied to faculty plagiarism set forth below would suggest that notwithstanding the generally perceived faculty/student double standard,³²³ and despite Mallon's admonition that academia lacks

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").

320. Wasley, *supra* note 8.

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

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

323. *See, e.g.*, Roy Lawrence, Letter, *Why Does Plagiarism in Politics Appear to Get a Free Pass?* ATHENS NEWS, March 3, 2008, at 1, available at <http://www.athensnews.com/ohio/article-2362-letter-why-does-plagiarism-in-politics-appear-to-get-a-free-pass.html> (pointing to disparity in treatment evident in plagiarism cases in the political arena versus the student/university context). Lawrence, a former

the fortitude to address faculty plagiarism in a forthright manner,³²⁴ there exist many cases wherein faculty have suffered exposure, embarrassment, and serious penalties, including termination or marked alteration of career.³²⁵

IX. CONSEQUENCES TO FACULTY

Except for high-profile instances of faculty plagiarism that engender media scrutiny, most cases of such academic misconduct are addressed pursuant to confidential, private, in-house college or university procedures.³²⁶ Consequences to faculty can be discerned, however, via the occasional articles published in *The Chronicle of Higher Education* addressing such issues, in the publicity attendant to a particularly scandalous incidence of plagiarism, or in the lawsuits grounded in procedural or substantive due process, defamation, or wrongful termination commenced by professors found culpable of plagiarism.³²⁷ While the

professor at Ohio University, compared the consequences of plagiarism to the graduate students at Ohio University, *see supra* notes 8 and 321, and the lack of consequences experienced by former Texas Governor Ann Richards, who used a phrase (referencing George H.W. Bush: “He was born with a silver foot in his mouth”) that was actually authored by another (*U.S. News and World Report* Editor-in-Chief Mort Zuckerman) to significant political effect. *Id.* Of course, one can argue that there exist no expectations in the public perception that contemporary politicians devise their own speeches, and thus, the ethical breach of plagiarism does not apply. *But see* POSNER, *supra* note 28, at 36–37 (attributing the imploding of Vice President Joseph Biden’s 1988 presidential aspirations to the revelation that he had lifted, without attribution, the opening paragraph of a campaign speech from a speech by the then leader of the British Labour Party).

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

325. *See infra* Part IX.

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

327. *See, e.g.*, *Newman v. Massachusetts*, 884 F.2d 19 (1st Cir. 1989) (plaintiff claiming the university officials violated both her procedural and substantive due process rights in handling the plagiarism charge against her). *See also* *Yu v. Peterson*, 13 F.3d 1413 (10th Cir. 1993) (plaintiff arguing that his substantive and due process rights had been violated in the resolution of plagiarism charges against him); *Agarwal v. Regents of the Univ. of Minn.*, 788 F.2d 504 (8th Cir. 1986) (plaintiff claiming the

consequences to faculty may vary, underscoring most such cases is the sentiment that “an accusation of plagiarism is academe’s version of a scarlet letter,”³²⁸ and that allegations, even when “unfounded or ultimately disproved,” can damage one’s scholarly standing.³²⁹

university violated his due process in terminating his employment premised on charges of plagiarism, and alleged incompetence); Jim Phillips, *OU, Former Prof Mehta Await Verdict in Defamation Trial*, ATHENS NEWS, March 27, 2008, available at <http://athensnews.com/ohio/article-5251-ou-former-prof-mehta-awaits-verdit-in-defamation-trial.html>; Athens News Staff, *2nd Russ Prof Sues OU*, ATHENS NEWS, October 26, 2006 available at <http://athensnews.com/ohio/article-2961-2nd-ou-prof-sues-ou.html> (describing Bhavin V. Mehta’s lawsuit against Ohio University premised on defamation in response to the Russ College Dean declaring to reporters that “Mehta had contributed to a culture of plagiarism”).

328. Leatherman, *supra* note 23, at A18. The author details conflicting charges of plagiarism brought by members of the Sociology Department at Texas A&M University which have, according to the author, earned the department the appellation of ‘Peyton Place.’ *Id.* Amidst a flurry of mutual recriminations by faculty members which led to three lawsuits, and investigations conducted by the university, the American Sociological Association, and National Science Foundation, it appears clear that clarity regarding the definition of plagiarism, or when an idea is so ubiquitous that it is in the public domain and no longer warrants attribution, or whether a failure to use quotation marks is a “slip in scholarship” or plagiarism, or whether willful plagiarism is required, did not obtain in this situation. *Id.* Leatherman quotes the spouse of the accused academic as asserting that “a charge of plagiarism is ruinous in and of itself Whether or not you are innocent is not the issue.” *Id.*; see also Peter Monaghan, *Hot Type: The Worst Form of Flattery*, CHRON. OF HIGHER EDUC., Dec. 17, 2004, at 23 (quoting Jennifer Snodgrass, editor at Harvard University Press, as stating: “In the current climate, which tends to sensationalize such issues, an accusation of plagiarism, even when unfounded or ultimately disproved, can be enough to damage a scholarly reputation.”).

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

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

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

Allegations of faculty and administrator plagiarism occur in the context of scholarly publications, but charges of purloining another's words also are leveled with regard to speeches, class lectures, newspaper editorials or opinion letters, and teaching statements accompanying syllabuses that reflect a professor's philosophy. One of the most public instances of faculty plagiarism occurred at Columbia University Teachers College, where Madonna Constantine, a professor of psychology and education, was initially privately suspended in June 2008, and ultimately terminated, for plagiarizing the work of a former colleague and that of two graduate students.³³⁰ The Manhattan law firm employed by the university to examine the charges concluded in February 2008 that Constantine had committed approximately two dozen instances of plagiarism in academic journals; these findings were affirmed by the Faculty Advisory Committee, which deemed the professor's appeal baseless.³³¹ The case generated widespread publicity as the professor publicly claimed institutional racism fueled the allegations,³³² accused her victims of perpetrating plagiarism against her,³³³ and filed a lawsuit against the university for wrongful termination.³³⁴

A review of some of the reported instances of faculty and administrator plagiarism examined by *The Chronicle of Higher Education* during the late 1980s and 1990s suggests characteristics common to these cases. In some instances, a diversity of venues—the publisher, the college or university, and the professional association—will simultaneously address plagiarism charges, and will not always agree with respect to the appropriate penalty to be imposed. Further, defenders of the alleged plagiarists frequently raise the issue of the lack of intent exhibited as a defense to the charges. When a former Dean at Eastern New Mexico University was found to have

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

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

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

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

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

inadequately acknowledged substantial portions of a dissertation in his book on the topic of Muzak, for example, his publisher urged that the acknowledgment of the thesis author's influence was sufficient documentation and reflected a lack of intent to plagiarize.³³⁵ The American Sociological Association demanded an additional written statement from the Dean acknowledging his wrongdoing, a recall of the first books published, and damages to the author of the plagiarized work.³³⁶ The Dean subsequently resigned.³³⁷ Similarly, a Drake University law professor, Stanley N. Ingber, when notified that unattributed passages were evident in his law review article published in the fall 1994 issue of the *Rutgers Law Review*, apologized publicly for his error in the spring issue of the publication.³³⁸ When his university investigated the allegations concerning plagiarism in two of Mr. Ingber's articles, Martin H. Belsky, Dean of the University of Tulsa Law School, termed Ingber's work, at worst, negligent, and not reflective of intent to plagiarize.³³⁹ Mr. Ingber's resignation ended the prospects of a hearing before the university's Academic Freedom and Tenure Committee.³⁴⁰

Lack of intent was raised in two other faculty plagiarism cases, with a marked lack of success. A University of Chicago professor of history, Julius Kirshner, published a book review under his name that had, in fact, been written by his research assistant.³⁴¹ The standing committee on

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

336. *Id.*

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

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

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

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

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

academic fraud found the professor guilty of plagiarism, rendering intent irrelevant as a defense.³⁴² Professor Kirshner retained his tenure, but was relieved of graduate-student courses for five years.³⁴³ Lastly, a Brigham Young University professor, Bruce A. Van Orden, who “inadequately cited material from eleven authors,” attributed the failure to properly cite sources to lack of due care.³⁴⁴ The manner in which Dr. Van Orden was disciplined was not made public by the university. The associate academic vice president noted that the plagiarism, although unintentional, still constituted plagiarism pursuant to Brigham Young’s definition of the term.³⁴⁵

In late 2004, *The Chronicle of Higher Education* mounted an investigation to determine the incidence of academic plagiarists beyond high-profile instances of “borrowings.”³⁴⁶ It discovered examples of scholarly plagiarism that included: career-long blatant unattributed use of others’ work; citation to another author’s work that failed to disclose that nearly an entire chapter drew upon the dissertation of another; and purloined language that was not cited in the body of a work, but instead solely listed as a bibliographic source.³⁴⁷ More disturbing was the authors’ belief, premised on anecdotal evidence and a survey conducted by University of Alabama economists, that “academe often discourages victims from seeking justice, and when they do, tends to ignore their complaints.”³⁴⁸ And yet, *The Chronicle’s* investigative articles as well as other sources point to examples of a variety of punishments imposed upon faculty charged with plagiarism, including resignations,³⁴⁹ demotions,³⁵⁰

342. *Id.*

343. *Id.*

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

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

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

347. *Id.*

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

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

pay cuts,³⁵¹ dismissals,³⁵² the removal of a title,³⁵³ or a contract not being extended.³⁵⁴ Even speeches that have plagiarized portions of others' writings have been condemned as an "ultimate sin," and have triggered penalties imposed upon presidents of institutions of higher education.³⁵⁵ The former president of Hamilton College resigned subsequent to the revelation and admission that he had plagiarized others' materials in speeches he had made over a period of several years.³⁵⁶ A Dean of the

similarities in Griffith's dissertation and that of another scholar, hired a detective to find the other author in order to confirm his findings of plagiarism).

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

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

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

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

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

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

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

College of Arts and Sciences at the University of Missouri at Kansas City who used others' work in an unattributed manner in a commencement address was placed on administrative leave.³⁵⁷ In an extraordinary case of self-imposed penance, the former head of Boston University's mass-communications department resigned from that position because, in his guest lecture to several hundred freshmen, he inadvertently failed to cite the author of a concluding quote he had used.³⁵⁸ A Southern Illinois University at Edwardsville professor was fired for allegedly plagiarizing another professor's philosophy of teaching as articulated in the latter's teaching statement.³⁵⁹ A professor at the Johns Hopkins University School of Medicine who lifted approximately forty percent of a journal editorial he coauthored was permitted to retain his position conditioned upon his willingness to tender a public apology.³⁶⁰ And a University of New Hampshire professor was disciplined for plagiarizing part of a governor's speech in an opinion article that the professor wrote for a local newspaper.³⁶¹

Some might urge that faculty plagiarism under any circumstances is untenable; that an author should always recognize his or her voice and readily be able to distinguish it from that of another; that with due diligence, even in research extending over a period of years, no error of

delivered during his presidency).

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

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

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

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

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

attribution should occur; and that such plagiarism, therefore, under any circumstances is an “academic crime” meriting the appropriate application of penalties. Academics, fully apprised of the need for proper citation and of the methods to achieve attribution, should at least be held to the same standards imposed upon students. Should not, however, those standards for both include a recognition of one’s unintentional errors as a defense? Indeed, in certain situations, should not the apology for inadvertent plagiarism suffice? Is it the role of academia to excoriate faculty plagiarists regardless of intent? Surely the academy is capable of stripping the act of plagiarism of its erroneous associations with a criminal act, of the highly colored moralistic language that often accompanies accusations of it, and of discerning and distinguishing blatant disregard of the mandates of attribution from unintentional conduct. Certainly, repeated and pervasive plagiarism, or singular plagiarism of substantial proportion, conducted with intent to deceive, or with gross indifference to the standards of citation, merits opprobrium. Unintentional and isolated instances of plagiarism, even when conducted on the faculty or administrative level, should not generate the moralistic condemnation to which they are sometimes subjected. The notion that intent is irrelevant to a finding of plagiarism is contradicted by the historical record that suggests the essence of plagiarism is the fraudulent misrepresentation of ownership of ideas and expressions. Isolated instances of unintentional failure to attribute on the part of the professoriate ought not to serve as the basis for academic purgatory—or everlasting damnation.³⁶²

X. CONSEQUENCES TO STUDENTS

Consequences of plagiarism by students publicly emerge primarily through notorious incidents of plagiarism accompanied by media attention³⁶³ and through lawsuits filed by students found guilty of plagiarism, premised generally on due process or the private-institution

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

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

equivalent.³⁶⁴ Research that has addressed this issue has pointed to disparities in the definitions for plagiarism employed by various colleges or universities and law schools, to the varying ranges of punishments available, and to the lack of consistency in application of sanctions.³⁶⁵ Definitions of plagiarism in the college or university and law-school contexts differ widely, to an extent deemed one of “disgraceful disparities.”³⁶⁶ In terms of punitive measures, penalties can consist solely of expulsion at institutions such as the University of Virginia or Washington and Lee University,³⁶⁷ or comprise a much broader array of sanctions, including grade reduction on a particular paper or for an entire course,³⁶⁸ expulsion, suspension, and a statement of censure in the student’s file, such as that utilized at New York University School of Law.³⁶⁹ In other instances of student plagiarism, colleges or universities may defer graduation for one year,³⁷⁰ dismiss permanently or with an opportunity to

364. See *infra* Part X.E.

365. See, e.g., LeClercq, *supra* note 108. LeClercq contends that most law schools have not addressed the issue of whether plagiarism should be defined as an intentional act or “whether a student can be guilty of ‘accidental’ or ‘good faith’ plagiarism.” *Id.* at 245. She observes that 91, or the majority of law schools she surveyed, do not mention intent as a factor in determining plagiarism; 42 include intent as a requisite for proving plagiarism; and 7 deem intent relevant in the sanctions stage. *Id.* at 245–46. She also asserts that a wider range of punishments should exist and that “an ideal policy would allow a spectrum of punishment to fit the extent and willfulness of the violation.” *Id.* at 252. LeClercq urges that the rather dramatic inconsistencies in punishments applied at law schools for the same act (one student’s record is permanently emblazoned with a first offense of plagiarism while another’s record is expunged when a professor’s “remediation requirement” has been satisfied) could prompt a potential lawsuit by a student affected by such disparate sanctions. See also Eric Hoover, *Honor for Honor’s Sake?*, CHRON. OF HIGHER EDUC., May 3, 2002, at 35 (reporting the characterization of the Honor Committee at the University of Virginia as representing a system that “has a built-in zeal for prosecution, [and] applies justice inconsistently”).

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

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

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

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

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

reapply,³⁷¹ permit a student to rewrite a thesis,³⁷² request a surrender of a degree,³⁷³ offer a one-semester expulsion,³⁷⁴ or rescind a degree.³⁷⁵ What is very striking in examining the cases, research, news articles, and informal reports of student plagiarism offered by faculty³⁷⁶ is the wide disparity in sanctions given student plagiarists in circumstances that would seem to call for more similarity in treatment. Roger Billings comments that it is “difficult to determine why similar instances of plagiarism have given rise to penalties that have varied so greatly in severity.”³⁷⁷ Harvard University, for example, rescinded the acceptance of Blair Hornstine, the co-valedictorian of her high-school class, because in her extracurricular writing for newspapers she had utilized language of former President Bill Clinton and Supreme Court Justices without giving proper attribution.³⁷⁸ Yet the furor surrounding then-Harvard sophomore Kaavye Viswanathan’s plagiarism of another author’s work in her widely publicized novel, which prompted her publisher to terminate existing contractual obligations, did not prompt Harvard to expel her. Instead, she graduated and now pursues a law degree at a prominent university.³⁷⁹ While the courts in their oft-

371. Waldman, *supra* note 285.

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

373. Joshua Sharp, *Laurie Returns Her USC Degree*, DAILY TROJAN, July 2, 2008, available at <http://www.dailytrojan.com/news/laurie-returns-her-usc-degree-1.212564>. Amidst an investigation at the University of Southern California as to whether Elizabeth Paige Laurie had paid her former roommate Elena Martinez a sum of approximately \$20,000 over a three-year period to write assignments for her, Laurie voluntarily tendered her degree and returned her diploma. Sharp notes that the vice president of student affairs, Michael Jackson, “declined to state whether the investigation’s conclusion had caused Laurie to give back her degree, or if Laurie’s actions pre-empted the conclusion of the investigation.” *Id.*

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

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

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

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

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

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

expressed deference to college and university academic expertise³⁸⁰ may be indifferent to inconsistent application of penalties for student plagiarism,³⁸¹ the experts in academia should not be unresponsive to what may be lawful, but inequitable, treatment of students.

Institutions should endeavor to develop a plagiarism policy that defines plagiarism to include intent as an essential element, discards the erroneous criminal associations with which plagiarism is often framed, and provides a consistent application of a range of penalties in similar circumstances. While I am not advocating the adoption of a “universal policy”³⁸² for all colleges and universities, I am asserting that policies that incorporate these characteristics would accurately penalize those who plagiarize with intent or gross indifference to attribution standards, while avoiding the stigmatization of those whose imperfect or absent citations emerge from mistake or lack of knowledge. Faculty often assume that students enter colleges and universities armed with the requisite knowledge regarding citations and that a college or university policy set forth in a handbook or emblazoned on a syllabus will suffice. Thus forewarned, the argument goes, students must accept the consequences of their plagiarism, be it the product of intent, gross indifference, mistake, or lack of knowledge. But according to commentators, assumptions regarding student preparedness in the intricacies of citation are erroneous.³⁸³ Terri LeClercq, for example, asserts that while law schools punish students for plagiarism, presuming they know the rules of attribution, even there students “stumble into accidental plagiarism,” and it is incumbent upon the institution to actually teach the rules of attribution.³⁸⁴ College and university findings of

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

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

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

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

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

“accidental plagiarism” should not prompt harsh punishments or haunt students’ future prospects. Nor should it be “irrelevant” to the academy that a similar instance of plagiarism can engender a withholding of a degree for one student while another is permitted to rewrite the offending paper.³⁸⁵ Such disparate penalties appear inequitable and arbitrary.

A. Particular Impact on Law Students

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

Id.

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

386. *See* Lerman, *supra* note 164.

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

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

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

390. *Id.* at 872.

391. *Id.* at 874.

concurring that plagiarism involves “an element of deceit” and is an “affront to honest scholars,” the court did not conclude that “a single incident of plagiarism while in law school is necessarily sufficient evidence to prove lack of good character and fitness to practice law” and ordered the Board to recommend Zbiegien’s admission to the bar.³⁹² Similarly, in *In re Harper*, the court chose the lesser punishment of censure for a lawyer who had not revealed in his application to the bar that he had plagiarized an entire article while pursuing a (now abandoned) LL.M. degree at Pace University.³⁹³ The court, in disagreeing with the Grievance Committee’s decision to revoke Harper’s admission, considered his “remorse, the isolated nature of his misconduct, and the uniformly high regard” in which he is held as key factors in ordering solely censure.³⁹⁴ In *In re Lamberis*, a practicing attorney confronted potential disbarment as a consequence of incorporating verbatim others’ works in a thesis required for an LL.M. degree at Northwestern University School of Law, from which he was expelled.³⁹⁵ The Hearing Board had recommended censure, the Review Board suspension, and the Administrator disbarment.³⁹⁶ The court concurred that the extent of the intentional copying exhibited a disregard for “values that are most fundamental in the legal profession,” but deemed the lesser penalty of censure appropriate in light of the attorney’s “impeccable reputation in the community” and the fact that punishment had already been imposed by the law school.³⁹⁷

392. *Id.* at 875. The professor teaching the course in which Zbiegien had submitted a plagiarized paper had urged that he be expelled from the law school. *Id.* at 872. Three character witnesses described the petitioner as diligent and honest. *Id.* at 874. The Dean regarded the failing grade for the course a sufficiently severe punishment and believed the student’s candor in admission indicated that plagiarism would not be repeated. *Id.* at 872. The court was persuaded by the “remorse and candor” exhibited by the applicant as providing evidence of “reform and rehabilitation.” *Id.* at 876.

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

394. *Id.* at 202.

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

396. *Id.* at 552.

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

B. Public Humiliation

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

undergraduate plagiarism finding will serve as an impediment with respect to admission to the bar.

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

399. Jaschik, *supra* note 398.

400. *Id.*

401. *Id.*

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

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

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.

C. Expulsion

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

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

405. *Id.*

406. *Id.*

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

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

but one penalty—that of permanent expulsion.⁴⁰⁹

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

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

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

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

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

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

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

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

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

413. *Id.*

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

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

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

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

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

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

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

students merited their punishment.⁴²⁴

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

D. Revocation or Rescission of Degree

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

424. William Harrison, Editorial, *U-Va. Is Right. They Cheated*, THE WASH. POST, Aug. 24, 2008, at B08.

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

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

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

which recognizes that

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

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

The facts revealed a blatant plagiarism scheme wherein Professor Frost permitted the defendants to plagiarize their theses, in exchange for those students directing contracts, via their jobs, to the professor's science research business.

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

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

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

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

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

E. Litigation

The imposition of the sanctions employed by colleges and universities against students found guilty of plagiarism has prompted litigation brought by those individuals. Plaintiffs avail themselves of a wide variety of causes of action including negligence,⁴³⁶ estoppel,⁴³⁷ defamation,⁴³⁸ intentional infliction of emotional distress,⁴³⁹ and violations of state law,⁴⁴⁰ but primarily these cases are grounded in alleged violations of due process or the private-institution equivalent thereof. What these cases reveal, whether the student is objecting to the application of a stigmatizing penalty, a one-year withholding of a degree, or a revocation of a degree, is fourfold in nature. First, courts do not require that state or private institutions provide

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

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

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

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

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

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

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

439. Billings, *supra* note 260.

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

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

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

441. See *supra* note 304.

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

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

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

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

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

447. *Id.* at 281.

448. *Id.* at 282.

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

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

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

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

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

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

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

452. *Id.* at 252.

453. *Id.* at 250.

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

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

Id. at 250 n.1.

455. *Id.* at 252.

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

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

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

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

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

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

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

461. *Id.*

462. *Id.* at *13–14.

XI. CONCLUSION AND RECOMMENDATIONS

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

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

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

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

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

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

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

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

either through pre-collegiate preparation or through statements and practices set forth on college and university syllabuses, pamphlets, or websites; research suggests such confidence is misplaced.

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

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

468. See *supra* note 96.

469. See *supra* note 79.

470. See *supra* notes 12 and 14.

definitions of plagiarism be adopted, or that such policies mandate a consideration of authorial intent. Further, in accordance with *Dixon*⁴⁷¹ and its progeny, courts will impose no legal duty upon colleges and universities to provide a wide variety of sanctions proportionate to the egregiousness of the plagiarism offense; nor will they impose a legal duty to provide consistency of application of such penalties among students or between students and faculty. But it is the ethical obligation of the college or university to address these issues with a comprehensive plagiarism policy, particularly with respect to its students. The international academic community has, in fact, recently recognized the importance of establishing consistent plagiarism policies and penalties for student plagiarism.⁴⁷²

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

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

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

worthwhile goals of advancing ethics in academia; and (4) lastly, I recommend that colleges and universities afford their students what the Chancery Court in *Napolitano v. Trustees of Princeton University*⁴⁷³ was constrained from mandating, due to its proper deference to the autonomy of college and university academic decisions: a decision infused with a measure of compassion, which, while upholding the tenets of academic integrity and applying sanctions for plagiarism that reflect that determination, avoids penalties that permanently stigmatize or condemn with moral castigation.

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

NEW SCRUTINY OF COLLEGE AND UNIVERSITY EXECUTIVE COMPENSATION AND UNRELATED BUSINESS ACTIVITY

MILTON CERNY, MICHELE A. W. MCKINNON, JEFFREY R. CAPWELL, AND
KELLY L. HELLMUTH*

I. INCREASING CONGRESSIONAL AND IRS FOCUS ON COLLEGES AND UNIVERSITIES.....	95
A. Climate of Heightened Scrutiny and Greater Enforcement.....	95
B. IRS Compliance Questionnaire and Interim Report for Colleges and Universities.....	98
1. Executive Compensation Findings	98
2. Unrelated Business Taxable Income and Debt-Financed Property Findings.....	100
3. Anticipated Final Report.....	101
4. Resulting College and University Audits	101
II. EXECUTIVE COMPENSATION AND I. R. C. § 4958.....	102
A. History of “Intermediate Sanctions”.....	102
B. Overview of Excess Benefit Transaction Rules Under § 4958	104
C. Applicable Tax-Exempt Organizations and Application of Excess Benefit Transaction Rules to Colleges and Universities.....	106
D. Disqualified Persons	106
1. Definite Categories of Disqualified Persons.....	107
2. Facts and Circumstances Test.....	108
3. Disqualified Persons at a College or University	109
E. Organization Managers.....	111
F. Excess Benefit Transactions	112
1. General Principles.....	112
2. Reasonableness Test	114

* Milton Cerny is counsel at McGuireWoods LLP, in Washington, D.C. Michele A. W. McKinnon is a partner at McGuire Woods, LLP, in Richmond, Virginia. Jeffrey R. Capwell is a partner at McGuire Woods, LLP, in Charlotte, North Carolina. Kelly L. Hellmuth is an associate at McGuire Woods, LLP, in Richmond, Virginia.

3.	Included Compensation	116
4.	Compensatory Intent Requirement	117
5.	Initial Contract Exception	119
6.	Special Considerations.....	121
G.	Rebuttable Presumption of Reasonableness	122
1.	Advantages and Limitations	122
2.	Fixed vs. Non-Fixed Payments.....	123
3.	Requirements to Establish the Presumption	123
H.	Correction of an Excess Benefit Transaction	126
I.	Planning to Avoid an Excess Benefit Transaction	127
J.	Advisory Committee’s Online Executive Compensation Tutorial	128
III.	UNRELATED BUSINESS TAXABLE INCOME AND DEBT-FINANCED PROPERTY	129
A.	Overview of the UBIT	130
1.	Purpose of the UBIT	130
2.	Application of the Unrelated Trade or Business Rules to Colleges and Universities	130
B.	Definition of “Unrelated Trade or Business”	132
1.	“Trade or Business”	132
2.	“Regularly Carried On”	133
3.	“Substantially Related”	134
C.	Volunteer, Thrift Store, and Convenience Exceptions.	135
D.	Special Rules Relating to Unrelated Trade or Business	136
E.	Modifications to UBTI	136
F.	Debt-Financed Income	140
G.	Internet and Catalogue Sales	141
H.	Partnerships, Limited Liability Companies, and S Corporations	143
I.	Controlled Organizations.....	144
J.	Allocation of Expenses.....	145
K.	Advertising	147
L.	Substantiation	148
M.	Controlled Foreign Organizations, Partnerships, and Operations.....	148
1.	Overview.....	148
2.	Doing Business Abroad	149
N.	Investment Structures to Avoid Unrelated-Business- Income Tax	150
O.	Conclusion.....	153
IV.	CONCLUSION: COSTS AND BENEFITS	155

I. INCREASING CONGRESSIONAL AND IRS FOCUS ON COLLEGES AND UNIVERSITIES

A. Climate of Heightened Scrutiny and Greater Enforcement

Today colleges and universities are subject to close scrutiny by the United States Congress and the Internal Revenue Service (the “IRS”). Investigations of excessive executive compensation and private benefits have led to the dismissal and resignation of college and university officers.¹ The downturn in the U.S. economy has prompted Congress and the public to question why seemingly large endowment funds are not being used to provide assistance to needy students, particularly in the face of escalating tuition costs. Press reports regarding businesses operated by educational institutions have raised concerns in the for-profit sector. Suggested reforms in the tax treatment of charitable organizations, originally issued in 2004 by the United States Senate Finance Committee, have resulted in certain legislative changes as well as an increased focus on compliance and enforcement initiatives. Senator Charles E. Grassley (R-Iowa) continues to address the need for additional charitable reforms and has focused on hospitals, colleges and universities, and other large charities, questioning whether these organizations should be subject to the same rules as local soup kitchens and homeless shelters. His principal concern is that funds raised by § 501(c)(3) organizations should be used for “charitable” purposes, particularly in the education sector.²

Senator Grassley more recently has turned his attention to colleges and universities. He has questioned why wealthy colleges and universities are not spending more endowment money on student aid, and he has sought more information on how colleges and universities “are maximizing their tax-exempt status to fulfill their charitable mission of educating students.”³ Senator Grassley has also indicated the possibility of legislation that would require an annual payout equal to five percent of an educational institution’s endowment. In November 2009, following the release of a survey in the *Chronicle of Higher Education* on annual executive compensation, Senator Grassley continued to express concerns by stating that “[t]he executive suite shouldn’t be insulated from belt-tightening.”⁴

1. For example, see *NCSU Fires Mary Easley, Chancellor Quits Amid Turmoil*, NEWS 14 CAROLINA (June 9, 2009), http://charlotte.news14.com/content/top_stories/610366/ncsu-fires-mary-easley--chancellor-quits-amid-turmoil/; Statement from the American University Board of Trustees, Thomas Gottschalk (Oct. 24, 2005), <http://www.american.edu/trustees/statements/10242005.html>.

2. Charles E. Grassley, *Salaries for College Presidents Go Up*, <http://grassley.senate.gov/about/Salaries-for-college-presidents-go-up.cfm> (last visited Nov. 18, 2010).

3. Charles E. Grassley, *Wealthy Colleges Must Make Themselves More Affordable*, CHRON. HIGHER EDUC., May 30, 2008, at A36.

4. Press Release, U.S. Senate Committee on Finance, Private College Salaries

At an American Bar Association Section of Taxation meeting in September 2009, Emily Lam, an attorney-advisor in the Office of Tax Policy, indicated that exempt organizations are in a climate of enforcement and disclosure rather than leniency, and that the trend is toward disclosure and transparency (noting “the price to get to exemption is sunshine”).⁵ She also noted that within the IRS there has been an increased focus on compliance and enforcement “with a lot more looking at what charities are doing.”⁶

The IRS’s increased focus on compliance and enforcement is evidenced by a number of new initiatives (many of which are directed towards colleges and universities), including the following:

- The IRS 2008 fiscal-year work plan for the Exempt Organization Division announced a renewed focus on IRS examinations of tax-exempt colleges and universities, especially college and university endowments and their use (or lack thereof) in the context of the rising cost of higher education.⁷
- The release of a dramatically revised Form 990 that not only serves as a roadmap for areas of IRS concern, but also gathers significant amounts of information to assist the IRS in its compliance and enforcement efforts.
- The IRS issuance in late 2008 of a compliance questionnaire to over 400 colleges and universities, focusing on endowments and investments, unrelated business taxable income, governance, and executive compensation.⁸
- Continued focus on executive compensation and the application of the excess benefit transaction rules in a number of exempt organization sectors, including colleges and universities.⁹
- Continued focus on governance practices of exempt organizations, including questions on the revised Form 990 and the issuance of a governance checksheet and guidesheet for use by IRS agents in examinations.¹⁰

Soar as Tuition Goes Up (Nov. 2, 2009), <http://finance.senate.gov/newsroom/ranking/release/index.cfm?id=8e69a8a4-7e4a-422f-9739-29e80a2be490>.

5. Alison Bennett, *Treasury Official Lam Stresses Charities Face Climate of Enforcement, Transparency*, Daily Tax Rep. (BNA), Sept. 25, 2009, at G-8.

6. *Id.*

7. See FY 2008 EO Implementing Guidelines, Section III.A.2, available at http://www.irs.gov/pub/irs-tege/fy08_implementing_guidelines.pdf.

8. A copy of the questionnaire is available at http://www.irs.gov/pub/irs-tege/sample_cucp_questionnaire.pdf.

9. See INTERNAL REVENUE SERVICE, EXEMPT ORGANIZATIONS: FY 2009 WORK PLAN 17 (2008), available at http://www.irs.gov/pub/irs-tege/finalannualrptworkplan11_25_08.pdf.

10. See Internal Revenue Service, Governance and Tax-Exempt Organizations—

- An announcement that more than 30 colleges and universities are currently under audit as a result of responses to the college and university compliance questionnaire.¹¹
- The issuance of a Congressional Budget Office report on April 30, 2010 on indirect tax arbitrage achieved by colleges and universities through the use of tax-exempt bond financing, which may indicate an additional area of future IRS inquiry.¹²

These initiatives reflect the growing significance of the nonprofit sector in the U.S. economy. And with increasing pressure on national, state, and local governments to raise revenues, nonprofits are likely to continue to find themselves in the crosshairs. In 2005, assets held by § 501(c)(3) organizations exceeded \$2.2 trillion, and these organizations generated over \$1.25 trillion in revenue. Colleges and universities held more than \$400 billion in endowment assets in 2008, the most recent year for which national data is available.¹³ In addition, compensation for private college presidents continues to rise. A recent survey found that the presidents of 30 private colleges had annual compensation in 2008 of over \$1 million, and that the average annual compensation for the top three most-highly paid presidents exceeded \$3 million.¹⁴

There is also heightened scrutiny by the public of the manner in which exempt organizations compensate their managers. For example, a self-professed public watchdog group recently petitioned the IRS, the Senate Finance Committee, and the Pennsylvania Department of Banking to review alleged excessive compensation paid by the Milton Hershey School and the Milton Hershey School Trust.¹⁵ The petition challenges the

Examination Materials (2009), available at <http://www.irs.gov/charities/article/0,,id=216068,00.html>.

11. See INTERNAL REVENUE SERVICE, IRS EXEMPT ORGANIZATIONS: COLLEGES AND UNIVERSITIES COMPLIANCE PROJECT: INTERIM REPORT at 5 (2010), available at http://www.irs.gov/pub/irs-tege/cucp_interimrpt_052010.pdf [hereinafter *Interim Report*].

12. See CONG. BUDGET OFF., TAX ARBITRAGE BY COLLEGES AND UNIVERSITIES (2010), available at <http://www.cbo.gov/ftpdocs/112xx/doc11226/04-30-TaxArbitrage.pdf>. The Joint Committee on Taxation estimated the cost of this tax advantage, measured in terms of lost revenues had the institutions used taxable debt, at \$5.5 billion in 2010. The CBO study focuses on approaches to measuring the amount of tax arbitrage practiced by colleges and universities and the effect of expanding the definition of tax arbitrage and thereby eliminating some of the benefits of tax-exempt financing. This report may lead the IRS to raise questions relating to such indirect tax arbitrage of any colleges and universities under audit.

13. U.S. GOV'T ACCOUNTABILITY OFF., POSTSECONDARY EDUCATION: COLLEGE AND UNIVERSITY ENDOWMENTS HAVE SHOWN LONG-TERM GROWTH, WHILE SIZE, RESTRICTIONS, AND DISTRIBUTIONS VARY (2010), available at <http://www.gao.gov/new.items/d10393.pdf>.

14. Andrea Fuller, *Compensation of 30 Private-College Presidents Topped \$1-Million in 2008*, CHRON. HIGHER EDUC., Nov. 19, 2010, at A1.

15. A copy of the letter requesting review is available at

reasonableness of compensation paid to certain board members and also alleges certain conflicts of interest.

B. IRS Compliance Questionnaire and Interim Report for Colleges and Universities

In October 2008, the IRS began a coordinated effort to learn more about the operations and activities of colleges and universities. Of the 2,402 public and private colleges and universities identified as offering four-year degrees or higher in the United States, the IRS selected 400, stratified by size and population, to receive a detailed compliance questionnaire. An entire portion of the questionnaire focused on activities of colleges and universities and the potential unrelated business taxable income from such activities, including expense allocation, losses, and debt-financed property issues. Substantial sections of other portions of the questionnaire related to executive compensation and supplemental benefits. On May 7, 2010, the IRS issued an Interim Report based on the responses to this questionnaire.¹⁶ Meanwhile, more than 30 institutions are currently under IRS examination as a result of their responses to the questionnaire.

The Interim Report summarizes responses from the questionnaire based upon the responding institutions' 2006 tax years.¹⁷ The Interim Report reports the data received from 344 responding colleges and universities—177 of them private and 167 of them public.¹⁸ For the purposes of the Interim Report, the IRS divided the institutions into three groups based on population (small: fewer than 5,000 students; medium: 5,000-14,999 students; large: 15,000 or more students).¹⁹ Of particular relevance to the future landscape for colleges and universities are the findings summarized in the Interim Report regarding executive compensation and unrelated business taxable income and debt-financed property.

1. Executive Compensation Findings

The Interim Report includes information provided by the responding institutions regarding compensation of their executives, as well as their general practices in setting compensation, including amounts and types of compensation, compensation provided by related organizations, executive loans and other extensions of credit, and use of the rebuttable presumption of reasonableness and initial contract exception under the excess benefit transaction rules of I.R.C. § 4958.

In most cases, the institution's highest-paid executive was its chancellor

http://www.witf.org/images/stories/Article_Images/news/PDF/Hershey_Trust_Excessive_Compensation.pdf

16. *Interim Report*, *supra* note 11, at 5.

17. *Interim Report*, *supra* note 11, at 1.

18. *Interim Report*, *supra* note 11, at 1.

19. *Interim Report*, *supra* note 11, at 2.

or president.²⁰ For executives (meaning officers, directors, trustees, and key employees), the compensation paid by large institutions averaged \$420,000 with a median of \$357,000, while small institutions paid an average of \$200,000 with a median of \$174,000.²¹ A smaller number of institutions (seven large, five medium, and three or fewer small institutions) also paid compensation to executives through related organizations.²² In small and medium institutions, the highest paid employee (other than executives) was most often a faculty member, but for large institutions, most often (in forty-three percent of organizations) it was an athletic coach.²³ The average compensation of the highest-paid employee (other than an executive) ranged from \$727,000 for large institutions to \$142,000 for small institutions, while the median compensation was \$285,000 for large institutions and \$98,000 for small institutions.²⁴ Again, a small number of institutions also reported providing compensation (approximately one-half of the total compensation paid) from related organizations (thirteen large, three medium, and five small institutions).²⁵

Nearly all institutions reported compensating their executives by base salary and contributions to employee benefit plans, as well as contributions to life, disability, and long-term-care insurance.²⁶ Approximately one-third of all institutions offered bonuses, and over one-half of medium and large institutions provided housing or utilities as part of their compensation package.²⁷ Institutions also reported on the provision of institutional vehicles for personal use, personal travel for the employee or the employee's family members, expense reimbursements, personal services provided at the employee's home, health- or social-club dues, and other fringe benefits not covered by I.R.C. § 132.²⁸

For the questions relating to the process used to set compensation of the highest paid executives, the IRS instructed public colleges and universities not to complete this section of the questionnaire because, as discussed below, they are not subject to the excess benefit transaction rules of I.R.C. § 4958.²⁹ For the private institutions, while more than half of all sizes of such institutions reported taking steps to raise the rebuttable presumption of reasonableness when setting compensation, these institutions relied on compensation comparability data less frequently than the other rebuttable

20. *Interim Report, supra* note 11, at 54, Fig. 63.

21. *Interim Report, supra* note 11, at 55, Fig. 64.

22. *Interim Report, supra* note 11, at 55, Fig. 64.

23. *Interim Report, supra* note 11, at 51, Fig. 58.

24. *Interim Report, supra* note 11, at 52, Fig. 59.

25. *Interim Report, supra* note 11, at 52, Fig. 59.

26. *Interim Report, supra* note 11, at 57, Fig. 67.

27. *Interim Report, supra* note 11, at 57, Fig. 67.

28. *Interim Report, supra* note 11, at 57, Fig. 67.

29. *Interim Report, supra* note 11, at 60.

presumption requirements (i.e., approval by an independent governing body and contemporaneous documentation).³⁰ A small number of private institutions reported using the initial contract exception for their six highest paid executives, even though a majority of institutions reported that none of those executives were previously disqualified persons and therefore any fixed payments for such executives would not be subject to the excess benefit transaction rules.³¹ The IRS recently announced that it will begin to more closely review the information in the Interim Report to determine whether the comparability data relied upon by reporting institutions is defensible. The IRS will apparently assess whether comparisons were based on individuals within similarly-sized organizations, in similar geographic areas, and with responsibilities similar to those of the senior executives of the reporting institutions.³²

The Interim Report also indicates that many of the responding institutions (forty-five percent of small, eighty-two percent of medium, and ninety-six percent of large organizations) have related entities, the most common type being related tax-exempt organizations. Many of these institutions also reported that they controlled one or more other organizations. As previously noted, some institutions used such related organizations to provide compensation to their highest paid executives and other employees.

2. Unrelated Business Taxable Income and Debt-Financed Property Findings

The questionnaire asked the institutions to report on the extent of their activities in forty-seven different areas and then queried whether the institutions treated the revenue derived from these activities as tax-exempt or as subject to unrelated business income tax.³³ Questions focused primarily on (1) advertising, including printed publications, internet advertising, billboards, and television or radio broadcasting; (2) corporate sponsorship, including printed materials, events, internet sponsorship, billboards, and television or radio broadcasting; (3) rental of property, including facilities, arenas, recreation centers, athletic facilities, personal property, and telecommunications; and (4) a wide range of miscellaneous activities, including internet and catalog sales, royalties, mailing lists, affinity cards, scientific research and intellectual property, hotels and conference centers, catering and food services, parking lots, bookstores, golf courses, investments in partnerships and S corporations, and controlled

30. *Interim Report*, *supra* note 11, at 63–64, Fig. 79, 81–83.

31. *Interim Report*, *supra* note 11, at 63, Fig. 80.

32. Diane Freda, *University Compensation – Setting Procedures Will Get Further Review by IRS*, *Lerner Says*, Daily Tax Rep. (BNA), Nov. 26, 2010, at G-3.

33. *Interim Report*, *supra* note 11, at 22.

entities.³⁴

The questionnaire also asked the institutions to indicate whether they filed a Form 990-T and reported the activities and the revenue generated on the Form 990-T. The IRS notes in the Interim Report that it intends to explore further the differences between the number of institutions responding that they engaged in certain activities and the lower number of institutions responding that they reported such activities on Form 990-T.³⁵ The IRS acknowledges that this difference may be attributable to the fact that some business activities are substantially related to the institution's exempt purposes. It is also possible that an exception or exemption, such as the "convenience" exception, is available to shelter the income generated by business activities from the unrelated business income tax. But the IRS states that this will be an area of further study.³⁶

Additional questions on the questionnaire required the institutions to report on their expense allocations and whether they relied on advice from independent accountants or counsel when determining whether an activity generated unrelated business income. More than half of the institutions in all size categories indicated that they had indirect expenses, and at least sixty percent of all responding colleges and universities responded that they did not rely on outside advice for determining the tax treatment of revenue from these activities.³⁷

3. Anticipated Final Report

The IRS anticipates that it will issue a final report on the information gathered by the compliance questionnaire. The final report will also likely include information from the college and university examinations that are now underway and will allow for extrapolation of its findings to colleges and universities as a sector.³⁸ The IRS expects that this study will identify areas that warrant additional guidance or further scrutiny, including executive compensation.³⁹ It is possible that the final report will generate additional examinations of colleges and universities focused on compensation-related or other issues.

4. Resulting College and University Audits

As a result of responses to the college and university questionnaire, the IRS now has more than thirty colleges and universities under audit. It is unknown what responses triggered these examinations, although it is likely that the use of tax-exempt financing, unreasonable executive compensation,

34. *Interim Report*, *supra* note 11, at 23–26.

35. *Interim Report*, *supra* note 11, at 29.

36. *Interim Report*, *supra* note 11, at 31.

37. *Interim Report*, *supra* note 11, at 31–33.

38. *Interim Report*, *supra* note 11, at 5.

39. *Interim Report*, *supra* note 11, at 1.

and unrelated business activities are the primary areas of focus overall. The IRS has not commented on the reasons for the audits, but it previously indicated that it intends to be “exceptionally active” in reviewing the executive compensation paid in tax-exempt organizations.⁴⁰ One concern expressed has been that the use of comparables from third-party organizations that set their executive salaries using the initial contract exception under the excess benefit transaction rules may result in inappropriate skewing of the comparables relied upon when determining the reasonableness of executive compensation.⁴¹ The IRS will also have at its disposal additional information about compensation levels and practices based upon filings on the redesigned Form 990 beginning with the 2008 tax year. Other areas of focus may also include employer-provided housing, below-market or interest-free loans, deferred compensation, and miscellaneous items of income such as tax gross-ups, spousal travel expenses, and similar benefits.⁴²

The selection of more than thirty colleges and universities for further examination following receipt of the responses to the questionnaire clearly indicates that the IRS is serious about pursuing compliance issues arising from the data and information gathered. Colleges and universities need to be prepared not only to deal with an examination and to explain their positions in the event the IRS implements an examination, but they also should take steps to avoid further scrutiny or adverse findings should an examination occur. This will require colleges and universities to review their executive-compensation practices as well as their reporting positions with respect to business activities.

II. EXECUTIVE COMPENSATION AND I. R. C. § 4958

A. History of “Intermediate Sanctions”

Until the excess benefit transaction rules of I.R.C. § 4958 were enacted in July 1996, the IRS had only one enforcement tool it could use when a person had abused his position within a charitable or educational organization by using his position or influence within the organization to

40. Tom Gilroy, *IRS Plans to Stay Focused on EO Executive Compensation, Miller Says*, Daily Tax Rep. (BNA), Nov. 21, 2008, at G-6.

41. Diane Freda, *IRS Exploring Initial Contract Exception’s Impact on Exempts’ Executive Compensation*, Daily Tax Rep. (BNA), July 2, 2009, at G-2.

42. The IRS appears to have a particular interest in exempt organization deferred compensation. This is likely influenced by the requirements of I.R.C. § 409A that were enacted in 2004. The IRS has announced its intent to coordinate the deferred-compensation rules for tax-exempt organization plans in I.R.C. § 457 with the § 409A requirements. See I.R.S. Notice 2007-62, 2007-32 I.R.B. 331 (announcing the intent to issue new guidance regarding (1) the exemption under § 457(e)(11) for bona fide severance-pay plans and (2) the definition of “substantial risk of forfeiture” in § 457(f)(3)(B)).

obtain unwarranted benefits for himself or related parties.⁴³ The only sanction available to the IRS was revocation of the organization's tax-exempt status, which could have a devastating effect on a charity, especially if it relied on either deductible charitable contributions or tax-exempt financing for funding. Revocation is often a disproportionate and misdirected sanction that inappropriately punishes the charity, its employees, and, most importantly, the community that it serves, while allowing the insiders who benefited from the abusive transaction to retain the benefit of their misconduct. These shortcomings highlighted the need for an enforcement tool that could directly penalize those who engaged in the improper behavior without affecting innocent parties.

In 1976, and again in 1987, Congress enacted a form of intermediate sanctions for public charities that engage in lobbying or political activities in violation of I.R.C. § 501(c)(3).⁴⁴ But Congress did not develop intermediate sanctions for violations of the prohibition on private inurement until the early 1990s, after a few highly publicized cases of such wrongdoing. The IRS's inability to address these potentially abusive transactions without revoking the charitable organization's tax-exempt status led to a renewed call for a form of intermediate sanction for improper transactions involving public charities.

The Clinton Administration shared Congress's concern that existing tax law did not adequately curtail abusive transactions. The administration's views were first expressed by IRS Commissioner Margaret Richardson testifying at a hearing of the House Ways and Means Oversight Committee investigating specific cases of perceived abuses.⁴⁵ Commissioner Richardson stressed that the absence of any sanctions, short of revocation of exempt status, for a public charity's violations of the private inurement and private benefit rules was creating serious enforcement problems for the IRS. Commissioner Richardson noted that the consequences of revocation are often highly disproportionate to the violation, and often punish the wrong parties by threatening the continued existence of the public charity and its ability to perform needed services for its community while allowing those abusing the charity to retain the benefits of their misconduct.

Not long after the Commissioner's testimony, the administration proposed the enactment of intermediate sanctions for public charities in

43. Treas. Reg. §§ 53.4958-1 to 53.4958-7 (as amended in 2002).

44. In 1976, Congress incorporated a form of intermediate sanctions in the I.R.C. § 501(h) rules governing lobbying by public charities, I.R.C. § 501(h) (West 2010), and in 1987, adopted a two-tier, foundation-type penalty-tax scheme in I.R.C. § 4955 for public charity violations of the prohibition on intervention in political campaigns. I.R.C. § 4955 (West 2010).

45. *Federal Tax Laws Applicable to the Activities of Tax-Exempt Charitable Organizations: Hearing Before the Subcomm. on Oversight of the House Comm. on Ways & Means*, 103d Cong. 8 (1993) (statement of Margaret M. Richardson, Comm'r, IRS).

violation of the inurement prohibition. The Department of Treasury, in consultation with the IRS, forwarded to Congress a detailed proposal for legislation intended to provide the government with effective targeted sanctions. The general approach was to adopt a series of graduated levels of penalty taxes on “disqualified persons” and “organization managers” that engage in “excess benefit transactions” for their own private benefit with “applicable tax-exempt organizations.”

Congress agreed that it needed to cure this serious weakness in the tax law and, with broad support from the charitable sector, enacted I.R.C. § 4958 on July 30, 1996. Section 4958 was enacted as a “narrowly tailored” intermediate sanction scheme based on the Treasury proposal, taxing excess benefit transactions and unreasonable compensation agreements between public charities (and § 501(c)(4) civic leagues and social welfare organizations) and certain “disqualified persons.”⁴⁶

Colleges and universities must be keenly aware of the potential application of the excess benefit transaction rules to compensation arrangements and other transactions common to colleges and universities. For example, excessive or unreasonable compensation, not only for the chief administrative officers of a school, but also for influential academic officers, athletic coaches, and board members, can potentially subject these persons to excise taxes under § 4958. These transactions can be complicated by the detailed requirements of the regulations under the law.

B. Overview of Excess Benefit Transaction Rules Under § 4958

The excess benefit transaction rules of § 4958 impose an excise tax on certain “disqualified persons” (basically traditional corporate insiders, their families, and related organizations) that engage in an “excess benefit transaction” with an “applicable tax-exempt organization.”⁴⁷ This tax is paid by the disqualified person and initially is equal to twenty-five percent of the amount of the excess benefit.⁴⁸ The public charity is never subject to any tax under § 4958. If more than one disqualified person benefitted from a single transaction, all such disqualified persons are jointly and severally liable for the excise tax.⁴⁹

Section 4958(b) imposes a second-tier tax on the disqualified person of 200% of the amount of the excess benefit if the violation is not corrected within the applicable taxable period, as discussed below.⁵⁰ If part of the transaction is corrected, the second-tier tax is imposed only on that part

46. For a detailed discussion of the history of I.R.C. § 4958 and an analysis of its provisions, see Milton Cerny & Catherine Livingston, *IRS Intermediate Sanctions: How They Will Impact Colleges and Universities*, 25 J.C. & U.L. 865 (1999).

47. I.R.C. § 4958(a)(1) (2006); Treas. Reg. § 53.4958-1(a).

48. I.R.C. § 4958(a)(1) (2006).

49. Treas. Reg. § 53.4958-1(c)(1).

50. See *infra* Part II.H.

which is not corrected.⁵¹ An excise tax may also be imposed on “organization managers” who participate in an excess benefit transaction. Any organization manager (i.e., a director, trustee, or officer) who participates in the transaction knowing that it is an excess benefit transaction is also liable for an excise tax of ten percent of the amount of the excess benefit unless such participation is not willful and is due to reasonable cause.⁵² The maximum aggregate tax that can be imposed on all of the organization managers for any single excess benefit transaction is \$20,000.⁵³ The organization managers are jointly and severally liable for such tax.⁵⁴

An organization manager “participates” in an excess benefit transaction not only where he takes affirmative action with respect to the transaction (such as voting to approve an unreasonable compensation arrangement), but also when he is silent or fails to take action when under a duty to speak or act.⁵⁵ Where an organization manager opposes a proposed transaction in a manner consistent with his obligation to the organization, he is not considered to have “participated” in the transaction.

The organization manager must have actual knowledge of facts that would support treating the transaction as an excess benefit transaction.⁵⁶ In addition, the manager must be aware that there are limits on excess benefit transactions.⁵⁷ Finally, the manager must negligently fail to make reasonable attempts to ascertain whether the transaction was an excess benefit transaction.⁵⁸

An organization manager’s participation will be due to reasonable cause, and therefore will not give rise to excise tax exposure, if the manager exercised ordinary business care and prudence in relation to the transaction. The regulations under § 4958 offer a safe harbor for organization managers who rely on professional advice. An organization manager will not be subject to tax if the manager fully discloses the factual situation to an appropriate professional and then relies on the reasoned written opinion of the professional with respect to elements of the transaction within the professional’s expertise.⁵⁹ Appropriate professionals include legal counsel, certified public accountants or accounting firms with expertise regarding

51. Treas. Reg. § 53.4958-1(c)(2).

52. I.R.C. § 4958(a)(2).

53. As amended by the Pension Protection Act of 2006, the maximum limit of \$20,000 per excess benefit transaction applies to taxable years beginning after August 17, 2006. For prior years, the maximum limit was \$10,000. Pension Protection Act of 2006, Pub. L. No. 109-280, § 1212, 120 Stat. 780, 1074 (codified as amended at I.R.C. § 4958(d)(2)).

54. Treas. Reg. § 53.4958-1(d)(8).

55. *Id.* § 53.4958-1(d)(3).

56. *Id.* § 53.4958-1(d)(4)(i)(A).

57. *Id.* § 53.4958-1(d)(4)(i)(B).

58. *Id.* § 53.4958-1(d)(4)(i)(C).

59. *Id.* § 53.4958-1(d)(4)(iii).

the relevant tax laws, and independent valuation experts who hold themselves out to the public as appraisers or compensation consultants, perform the relevant valuations on a regular basis, are qualified to make valuations of the property or services involved, and include in the written opinion a certification that they meet these requirements.⁶⁰ Also, a manager's participation will not ordinarily be considered "knowing" if the requirements for raising the rebuttable presumption of reasonableness (discussed below) are met.⁶¹

C. Applicable Tax-Exempt Organizations and Application of Excess Benefit Transaction Rules to Colleges and Universities

Section 4958 only applies to "applicable tax-exempt organizations," which are defined to be those organizations that would be exempt from federal income tax pursuant to I.R.C. §§ 501(c)(3) or 501(c)(4). A special "lookback" rule deems an organization an applicable tax-exempt organization for the five-year period ending on the date of an excess benefit transaction.⁶² In addition, although private foundations are § 501(c)(3) organizations, they are excluded from the definition of "applicable tax-exempt organizations" because they are otherwise subject to the self-dealing rules under I.R.C. § 4941.⁶³

Most nonprofit private colleges and universities draw their federal income tax exemption from § 501(c)(3). They are classified as public charities under I.R.C. § 509(a)(1) because they are educational institutions within the meaning of I.R.C. § 170(b)(1)(A)(ii). On the other hand, public colleges and universities generally rely on exemption from federal income tax as an arm of a state or a political subdivision under I.R.C. § 115, and are therefore not subject to the excess benefit transaction rules.⁶⁴ Those public institutions that otherwise would qualify for exemption under § 501(c)(3) and that may have obtained their own determination letter recognizing them as exempt under § 501(c)(3) (typically as a convenience for their donors) are specifically excepted from the excess benefit transaction rules if they are governmental units.⁶⁵

D. Disqualified Persons

The definition of "disqualified person" is a key part of § 4958. Only transactions with disqualified persons come within the scope of § 4958. In general, a disqualified person is any person who, at any time during the five-year period ending on the date of the transaction, was in a position to

60. Treas. Reg. § 53.4958-1(d)(4)(iii).

61. *Id.* § 53.4958-1(d)(4)(iv). *See infra* Part II.G.

62. I.R.C. § 4958(e) (2006); Treas. Reg. § 53.4958-2(a) (as amended in 2008).

63. Treas. Reg. § 53.4958-2(a)(2)(i).

64. *Id.* § 53.4958-2(a)(2)(ii).

65. *Id.*; Rev. Proc. 95-48, 1995-2 C.B. 418.

exercise substantial influence over the affairs of the organization.⁶⁶ Certain persons are presumed to be disqualified persons under § 4958, while others may be disqualified persons depending upon the facts and circumstances.⁶⁷

1. Definite Categories of Disqualified Persons

The following persons are presumed, by virtue of their positions, to exercise substantial influence over the affairs of the charitable organization and thus to be disqualified persons:

Voting Members of Governing Body. Any individual serving on the governing body who is entitled to vote on any matter over which the governing body has responsibility.⁶⁸

President, Chief Executive Officer, or Chief Operating Officer. Any person who, regardless of title, has ultimate responsibility for implementing the decisions of the governing body or for supervising the administration, management, or operation of the organization. A person who serves as president, chief executive officer, or chief operating officer has this ultimate responsibility unless the person demonstrates otherwise.⁶⁹

Treasurer or Chief Financial Officer. Any person who has ultimate responsibility for managing the finances of the organization. A person who serves as treasurer or chief financial officer has this ultimate responsibility unless the person demonstrates otherwise.⁷⁰

In addition, family members of the persons described above are disqualified persons.⁷¹ Family members include the person's spouse, siblings (whether by whole or half blood), ancestors, children, grandchildren, great-grandchildren, and the spouses of siblings, children, grandchildren, and great-grandchildren.⁷² Also, entities that are thirty-five percent or more controlled by the persons described above and their family members are disqualified persons. In the case of a corporation, control is based on owning thirty-five percent or more of the total combined voting

66. Treas. Reg. § 53.4958-3(c).

67. *Id.* § 53.4958-3(a)(1).

68. *Id.* § 53.4958-3(c)(1).

69. *Id.* § 53.4958-3(c)(2).

70. *Id.* § 53.4958-3(c)(3).

71. *Id.* § 53.4958-3(b)(1).

72. Treas. Reg. § 53.4958-3(b)(1).

power of the corporation.⁷³

2. Facts and Circumstances Test

If a person does not fall into one of the definite categories of disqualified persons, the person may still be a disqualified person. The determination of whether a person has substantial influence over the affairs of the organization such that he is a disqualified person is based on all relevant facts and circumstances.⁷⁴ The Treasury Regulations indicate that the following facts and circumstances “tend to show” that a person has substantial influence over the affairs of an organization such that the person is a disqualified person:

- The person founded the organization;
- The person is a substantial contributor to the organization during the current year and has been for the four preceding years;
- The person’s compensation is based primarily on revenues derived from activities of the organization that the person controls;
- The person has authority to control or determine a substantial portion of the organization’s capital expenditures, operating budget, or compensation for employees;
- The person manages a discrete segment or activity of the organization that represents a substantial portion of the activities, assets, income, or expenses of the organization as compared to the organization as a whole; or
- The person owns a controlling interest in a corporation, partnership, or trust that is a disqualified person.⁷⁵

The IRS takes the position that it is not necessary for a person to actually exercise substantial authority over the affairs of the organization to be a disqualified person under the “facts and circumstances” test. A person who is merely in a position to do so apparently can be a disqualified person.⁷⁶

Conversely, the following facts and circumstances tend to show the

73. *Id.* § 53.4958-3(b)(2)(i), (ii).

74. *Id.* § 53.4958-3(e)(1).

75. *Id.* § 53.4958-3(e)(2).

76. See Lawrence M. Brauer & Leonard J. Henzke, Jr., *Intermediate Sanctions (IRC 4958) Update*, EXEMPT ORGS. CONTINUING PROF. EDUC. TECHNICAL INSTRUCTION PROGRAM 9, available at <http://www.irs.gov/pub/irs-tege/eotopice03.pdf>. (“In considering all the relevant facts and circumstances to determine whether a person is a disqualified person as to an applicable tax-exempt organization, it is *not* required that a person *actually exercised* substantial influence over the affairs of an organization, only that the person was in a *position* to exercise substantial influence. . . . Thus, although a person may not have actually exercised substantial influence over the affairs of the organization, if the person was in a *position* to do so at any time during the Lookback Period, this person is a disqualified person as to the organization.”).

person does not have substantial influence over the affairs of an organization:

- The person has taken a bona fide vow of poverty as an employee, agent, or on behalf of, a religious organization;
- The person is an independent contractor, such as an attorney, accountant, or investment manager, whose sole relationship with the organization is providing professional advice (without having decision-making authority) with respect to transactions from which the independent contractor will not economically benefit either directly or indirectly (aside from customary fees received for the professional advice rendered);
- The direct supervisor of the person is not a disqualified person; or
- The person does not participate in any management decisions affecting the organization as a whole or a discrete segment or activity of the organization.⁷⁷

In addition, employees (either full-time or part-time) who receive total economic benefits below the dollar threshold for determining “highly compensated employee” status under I.R.C. § 414(q) are not disqualified persons, provided that they are not otherwise a disqualified person by virtue of their position and are not a substantial contributor. In applying this exception, all economic benefits directly or indirectly received by the employee from the organization must be taken into account, not just compensation.⁷⁸

3. Disqualified Persons at a College or University

Persons holding certain positions at a college or university fall within the definite categories of disqualified persons. These include presidents, chancellors, and rectors because of their ultimate authority for management and supervision of the institution, as well as chief financial officers, treasurers, and vice presidents of finance because of their ultimate responsibility for managing the institution’s finances. Similarly, voting members of the institution’s board of trustees or board of directors are disqualified persons. And individuals who held any of these positions during the five-year “lookback” period continue to be disqualified persons with respect to the college or university.

Provosts, chief academic officers, and others with significant managerial authority may be disqualified persons under the “facts and circumstances” test. Deans of professional schools and chairs of academic departments that represent a substantial portion of the institution’s overall activities,

77. Treas. Reg. § 53.4958-3(e)(3).

78. *See id.* § 53.4958-3(d)(3). The dollar threshold for 2010 is \$110,000.

assets, income, or expenses may also be disqualified persons depending on the underlying facts and circumstances.⁷⁹

In addition, there are certain other positions that, because of their increasing stature in recent years, require close examination under the facts and circumstances test to determine whether persons holding those positions are disqualified.

Athletic Coaches. Concerns about the status of athletic coaches have existed for some time. During hearings on the proposed regulations under § 4958, commentators expressed concerns that the facts and circumstances test could include a broader group of persons than the statute was intended to cover. One commentator specifically asked the IRS to modify the regulations to clarify that college or university athletic coaches were not disqualified persons because they do not have sufficient influence over the affairs of the school as a whole.⁸⁰ The final regulations do not contain any specific guidance regarding athletic coaches but the following was added to the list of factors tending to show an absence of substantial influence over the affairs of the organization:

The person does not participate in any management decisions affecting the organization as a whole or a discrete segment or activity of the organization that represents a substantial portion of the activities, assets, income, or expenses of the organization, as compared to the organization as a whole.⁸¹

This factor can provide a basis for not treating many athletic coaches as disqualified persons, absent other factors that would indicate substantial influence over the organization or falling within one of the definite categories. For example, a coach of an athletic program that does not represent a substantial portion of the activities, assets, income, or expenses of the college or university, as compared to the college or university as a whole, generally would not be a disqualified person absent some other factor.⁸² However, the head coach of a sport that generates a substantial

79. *Id.* § 53.4958-3(g), Ex. 8. This example addresses the status of a law-school dean at a large university. The example concludes that she is a disqualified person because of her role in hiring faculty, her control over the capital expenditures and budget of the law school, and the fact that the law school represents a substantial portion of the income of the university.

80. *Regulations to Implement New Intermediate Sanctions Statute: Public Hearings on Proposed Regulations Under Section 4958 Before the IRS Oversight Board* (testimony of Dorothy Robinson, Vice President and Gen. Counsel, Yale Univ., on behalf of the Am. Council on Ed.), <http://www.aau.edu/WorkArea/showcontent.aspx?id=2728>.

81. Treas. Reg. § 53.4958-3(e)(3)(iv).

82. The Treasury Regulations include a helpful example concerning the chairman of a small academic department within the college of arts and sciences of a large

portion of the college's or university's income could be a disqualified person as a result of the management authority over that program, even if such management authority is shared with another, such as an athletic director. In addition, substantial increases in compensation levels for head coaches of large college and university athletic programs make the status of such persons under the excess benefit transaction rules highly important. For example, from 2007 to 2009, the average pay for a head coach in the NCAA's 120-school Football Bowl Subdivision rose forty-six percent to \$1.4 million.⁸³ Similarly, the average pay for a head coach of the sixty-five schools that competed in the 2009 NCAA men's basketball tournament was nearly \$1.3 million.⁸⁴

Endowment Managers. The explosive growth of college and university endowments in recent years has been well documented. Even after the financial crisis of 2008–2009, the endowments of a number of colleges and universities are staggeringly large.⁸⁵ In light of the size of endowments, careful consideration should be given to the potential status of endowment managers as disqualified persons. If it is determined that an endowment manager is a disqualified person under § 4958, particular care should be exercised in setting the manager's compensation, particularly in light of the high compensation often paid to these managers in order to attract them from the for-profit sector. If the endowments represent a substantial portion of a college or university's assets, the endowment manager's authority over the investment (and disposition) of those assets may be sufficient to establish substantial influence under the "facts and circumstances" test.

E. Organization Managers

Organization managers who participate in an excess benefit transaction may also be subject to the excise tax under § 4958. The term "organization manager" includes, with respect to any applicable tax-exempt organization, any officer, director, or trustee of such organization, or any individual having powers or responsibilities similar to those of officers, directors, or

university. The example concludes that the dean is not a disqualified person even though he exercises various management responsibilities with respect to the department, because his department does not represent a substantial portion of the university's activities, assets, income, expenses, or operating budget. *Id.* § 53.4958-3(g), Ex. 9.

83. Steve Berkowitz, *IRS Audits of Schools Might Delve into Salaries of Coaches; Corporate Sponsorships Could be Scrutinized*, USA TODAY, May 24, 2010, at 7C.

84. *Id.*

85. See Goldie Blumenstyk, *Why the Endowment-Spending Debate Matters Now More Than Ever*, CHRON. HIGHER EDUC., Mar. 7, 2010, available at <http://chronicle.com/article/Why-the-Endowment-Debate/64527/> (over fifty colleges and universities have endowments worth more than \$1 billion).

trustees of the organization.⁸⁶ In general, the definition is limited to those officers, directors, or trustees of the organization with final authority or responsibility for decisions.⁸⁷ Independent contractors such as attorneys, accountants, and investment managers, or advisers acting in those capacities, are not considered organization managers.⁸⁸ Also, the term “organization manager” does not include any person who was an organization manager during the five-year “lookback” period (unlike the term “disqualified person”). The excise tax cannot be imposed on such individuals for transactions occurring after they ceased to act as organization managers.

F. Excess Benefit Transactions

Section 4958 applies to a broad array of transactions. The term “excess benefit transaction” means any transaction where an applicable tax-exempt organization provides an economic benefit (either directly or indirectly) to a disqualified person and the value of that economic benefit exceeds the consideration received by the applicable tax-exempt organization.⁸⁹

Excess benefit transactions include payments of unreasonable compensation and non-fair market value transactions with the organization, such as the purchase from the organization of assets for less than fair market value or the sale of assets to the organization for greater than fair market value.⁹⁰ The following discussion focuses on compensatory transactions with disqualified persons at colleges or universities subject to § 4958 or related entities.

1. General Principles

To determine whether there has been an excess benefit transaction, generally all consideration and economic benefits exchanged either directly or indirectly between the parties will be taken into account. In a compensatory context, this means all forms of payment such as salary, fees, bonuses, severance pay, deferred compensation, and retirement benefits, as

86. I.R.C. § 4958(f)(2) (1996).

87. Treas. Reg. § 53.4958-1(d)(2).

88. *Id.* § 53.4958-1(d)(2)(B).

89. *Id.* § 53.4958-4(a)(1).

90. While compensation arrangements commonly present potential excess benefit transaction issues, there are a number of other types of transactions that can present concerns under § 4958. For examples of other types of transactions that the IRS has asserted were excess benefit transactions, compare *Caracci v. Comm’r*, 118 T.C. 379 (2002) (transfers of a tax-exempt organization’s assets to a for-profit organization for inadequate consideration) with *Dzina v. United States*, 345 F. Supp. 2d 818 (N.D. Ohio 2004) (repossession of commercial property following a tax-exempt organization’s default on an installment sale contract for that property) and I.R.S. Priv. Ltr. Rul. 2002-43-057 (Oct. 25, 2002) (loans to parties related to a tax-exempt organization).

well as non-cash compensation.⁹¹ Certain limited types of compensation are disregarded when evaluating the reasonableness of compensation paid to a disqualified person, as discussed below.⁹² In addition, there must be written evidence that the parties intended to treat that compensation as consideration for the performance of services at the time compensation is paid.

Section 4958 contains certain general principles for evaluating whether a compensation payment may constitute an excess benefit transaction. The first general principle is that both current and prior services provided by a disqualified person may be considered when evaluating the reasonableness of compensation.⁹³ For example, if a college or university president is promised at age fifty-eight that she will receive a supplemental retirement payment at age sixty-two if she remains in continuous employment to that age, her total years of service up to and including the year she turns sixty-two could be taken into account when evaluating the reasonableness of that payment, not merely the services she performs the year she turns sixty-two.

Second, compensation paid both directly and indirectly by a college or university must be evaluated when determining its reasonableness. Indirect payment of compensation can arise in two circumstances. The first is when compensation is paid by an entity controlled by the college or university. The other situation is when compensation is paid through an intermediary.⁹⁴

For purposes of these rules, a college or university is considered to control another entity when:

- In the case of a corporation, the institution owns fifty percent or more of the stock;
- In the case of a partnership, the institution owns fifty percent or more of the capital or profits interests;
- In the case of a non-stock corporation, the institution's directors, trustees, employees, or agents constitute fifty percent or more of the directors or trustees, or the institution appoints or elects fifty percent or more of the directors or trustees; or
- In the case of other entities, such as trusts, the institution owns fifty percent or more of the beneficial interests.⁹⁵

Ownership for these purposes is determined using the constructive ownership rules of I.R.C. § 318, even for non-corporate entities, similar to the manner in which control is determined for controlled organization

91. Treas. Reg. § 53.4958-4(b)(1)(ii)(B)(I).

92. See *infra*, notes 105–06 and accompanying text.

93. Treas. Reg. § 53.4958-4(a)(1).

94. *Id.* § 53.4958-4(a)(2).

95. *Id.* § 53.4958-4(a)(2)(ii).

purposes under the unrelated business income tax rules.⁹⁶

The intermediary rule applies where the college or university does not have sufficient ownership or representation on the board of a third-party payor of compensation to cause that third-party payor to be a controlled entity, or when the payment is through a person rather than an entity. For purposes of this rule, an intermediary is any individual or entity (whether tax-exempt or taxable) that indirectly participates in an excess benefit transaction on behalf of the college or university. To establish an intermediary relationship, the college or university must provide an economic benefit to the intermediary, and either (1) there is an oral or written agreement or understanding that the intermediary will provide an economic benefit to or for the use of the disqualified person, or (2) the intermediary provides an economic benefit to or for the use of the disqualified person without a business purpose or an exempt purpose of its own for providing the economic benefit.⁹⁷

The breadth of the indirect payment rules for controlled entities and intermediaries requires that many types of third-party payment arrangements be treated as payments by the college or university. For example, payments by an affiliated foundation or supporting organization to supplement compensation that the college or university pays directly to its president or other key administrators will in many circumstances be treated as payment directly by the college or university, thereby requiring that the supplemental compensation be aggregated with compensation actually paid by the college or university when evaluating the reasonableness of compensation paid to such persons. Therefore, colleges and universities must be aware of any related-party compensation arrangements with their disqualified persons to properly evaluate whether compensation is excessive. In addition, affiliated foundations may be subject to the excess benefit transaction rules even where the institution as a public college or university may not be. In these circumstances, it is common for foundations to supplement the compensation of the president and for the president to be a trustee or director of the foundation and therefore a disqualified person with respect to the foundation. In such a case, the foundation must determine the reasonableness of the total compensation paid to the president, even when the college or university is not required to do so. The foundation should also take steps to raise the rebuttable presumption of reasonableness, discussed below, in this circumstance.

2. Reasonableness Test

The regulations under § 4958 impose a reasonableness test for evaluating whether compensation is excessive relative to the services

96. See I.R.C. § 318(a) (1996).

97. Treas. Reg. § 53.4958-4(a)(2)(iii).

performed by the disqualified person. This test measures the value of the services based on what would ordinarily be paid for like services by like enterprises under like circumstances.⁹⁸ The types of like enterprises that can be considered are not limited to tax-exempt organizations. Taxable enterprises may be considered to the extent they are sufficiently similar to the applicable tax-exempt organization paying the compensation.⁹⁹

IRS challenges as to the reasonableness of compensation are generally based on factors similar to those that the IRS considers in challenging compensation deductions under I.R.C. § 162. In fact, the regulations under § 4958 incorporate the standards of § 162 for determining reasonableness of compensation for purposes of § 4958.¹⁰⁰ The factors under § 162 include whether the compensation was the subject of true arm's-length bargaining, the size and complexity of the organization, the nature of the duties and responsibilities of the disqualified person, the disqualified person's qualifications and prior compensation, the disqualified person's performance, how the disqualified person's compensation compares with that of other similarly situated employees of the organization, and whether an outside investor would be likely to approve the compensation.¹⁰¹

The time at which the reasonableness of compensation is measured depends upon whether the compensation is a "fixed payment." A fixed payment is either a specific amount or an amount that is determined under a fixed non-discretionary formula.¹⁰² That amount or formula must be specified in a binding written contract (such as an employment agreement).¹⁰³ The reasonableness of a fixed payment is generally evaluated based on facts and circumstances at the time the contract was entered into by the parties, not when the compensation is paid.¹⁰⁴ Therefore, the IRS generally cannot challenge the reasonableness of a fixed payment that occurs several years after the date of the contract. Instead, the reasonableness of the payment may only be challenged based on circumstances existing at the time the parties entered into the contract. Consequently, fixed-payment arrangements allow colleges and universities to establish reasonableness at the outset of entering into a written compensation arrangement, such as through reliance on then-current compensation comparability data, and can eliminate the need for the

98. *Id.* § 53.4958-4(b)(1)(ii)(A).

99. *Id.*

100. *Id.*

101. These factors are described in the notice of deficiency that the IRS issued in the first intermediate sanctions case that it brought concerning unreasonable compensation. See Bruce Hopkins, *First Intermediate Sanction Excess Compensation Case Arrives in U.S. Tax Court; Penalties Total \$6.4 Million*, THE NONPROFIT COUNSEL, Vol. XVII, No. 12 (Dec. 2000).

102. Treas. Reg. § 53.4958-4(a)(3)(ii).

103. *Id.* § 53.4958-4(a)(3)(iii).

104. *Id.* § 53.4958-4(b)(2)(i).

frequent compensation surveys and studies associated with non-fixed or discretionary payments under a contract.

A different timing rule applies for payments that are not fixed payments or that are fixed payments but are paid despite substantial non-performance under the contract (such as a payment made despite the disqualified person's failure to complete the full term of an employment agreement). In these circumstances, the reasonableness of the payment is evaluated at the time the payment is actually made. Changes in compensation comparability data from the time the compensation arrangement was entered into to the time when the compensation is actually paid are potentially relevant to the reasonableness determination. This typically should not pose a problem in an environment of escalating or stable pay levels. However, changes in economic circumstances that reduce comparable pay or changes in pay practices may cause a non-fixed payment (or a fixed payment without substantial performance by the disqualified person) to fail to meet the reasonableness test when actually paid.¹⁰⁵

3. Included Compensation

The reasonableness standards described above must be applied to the total compensation received by the disqualified person. Compensation includes all forms of cash and non-cash payments, and includes such items as salary, fees, bonuses, severance pay, deferred compensation, qualified retirement plan benefits (such as contributions to a § 403(b) plan), non-qualified deferred compensation, and compensatory transfers of property.¹⁰⁶

Other types of compensation and benefits must be similarly included in the evaluation, even if they are not included in the disqualified person's taxable income. Examples include payments to welfare-benefit plans (e.g., medical, dental, life insurance), severance pay, disability benefits, fringe benefits (other than fringe benefits described in I.R.C. § 132), expense allowances or reimbursements (unless paid under an accountable plan), and the economic benefit of below-market loans. In addition, premiums paid

105. In addition to these timing rules, the regulations also have special timing standards for determining when an excess benefit transaction occurs. As a general matter, an excess benefit transaction occurs when unreasonable compensation is paid (or on the last day of the taxable year for multiple compensation payments paid in one year under a single contractual arrangement, such as an employment agreement). Excess benefit transactions involving qualified retirement-plan benefits or compensatory transfers of property under I.R.C. § 83 are treated as occurring when the benefits or property become vested. Treas. Reg. § 53.4958-1(e). In the case of a compensatory transfer of property, the transaction occurs when the property is no longer subject to a substantial risk of forfeiture unless the disqualified person has made an election under I.R.C. § 83(b), in which case the general timing rule applies. *Id.* § 53.4958-1(e)(2).

106. *Id.* § 53.4958-4(b)(1)(ii)(B)(I).

for liability insurance covering liability under § 4958 and certain fiduciary liabilities are also included, as are reimbursements for such expenses if they are not covered by insurance, unless such amounts are excluded from the disqualified person's income under § 132(a)(4) as de minimis fringe benefits.¹⁰⁷

There are a limited number of pay items that can be excluded from the reasonableness determination. Excluded items include fringe benefits that are not included in income under I.R.C. § 132 (other than certain liability insurance premiums, payments, or reimbursements), and expense reimbursements received under an accountable plan.¹⁰⁸ There are some other categories of excluded benefits, but they generally are not relevant to standard compensation arrangements.¹⁰⁹

4. Compensatory Intent Requirement

One of the more problematic aspects of the excess benefit transaction rules, and a proverbial “trap for the unwary,” is the requirement that the payments to a disqualified person be specifically intended as compensation for services provided by the disqualified person. The organization must clearly indicate its intent to treat the benefit as compensation when the benefit is paid.¹¹⁰ Failure to establish contemporaneous compensatory intent generally will result in an “automatic” excess benefit transaction (i.e., the compensation is automatically an excess benefit because it is treated as having been paid without any exchange of consideration from the disqualified person).

To establish compensatory intent, contemporaneous substantiation of such intent is required. There are two primary means of establishing contemporaneous substantiation.

Contemporaneous Tax Reporting. The primary method for establishing contemporaneous compensatory intent is to show that the compensation was properly reported for federal tax purposes. This can be accomplished by showing that the compensation was reported by the college or university (or other payor when the compensation was paid indirectly) on Form W-2 or Form 1099, as appropriate. Even if the college or university did not properly report the compensation, contemporaneous substantiation is shown if the disqualified person reported the compensation on his or her

107. *Id.* § 53.4958-4(b)(1)(ii)(B)(3).

108. *Id.* § 53.4958-4(a)(4)(i)–(ii) (accountable plan is an expense reimbursement arrangement that meets the requirements of Treas. Reg. § 1.62-2(c)).

109. These other exclusions include (1) economic benefits provided to volunteers (so long as the benefit is provided to the general public in return for a membership fee or an annual contribution of \$75 or less) and (2) economic benefits provided to members or donors solely on account of the payment of membership fees or charitable contributions (provided that certain conditions are met). *Id.* § 53.4958-4(c)(1).

110. Treas. Reg. § 53.4958-4(c)(1).

individual income tax return. If compensation is not reported on the originally filed report or return, reporting it on an amended report or return is sufficient to establish contemporaneous substantiation of compensatory intent provided that the amended return or report is filed before the initiation of an IRS examination of the college or university or of the disqualified person who received the compensation. In addition, an institution's failure to report compensation will not prevent the establishment of compensatory intent if the reporting failure was due to reasonable cause. The conditions to establish reasonable cause in this context, however, are relatively narrow.¹¹¹

Contemporaneous Written Documentation. A college or university may also establish compensatory intent through other written evidence. This may include, but is not limited to, an approved employment contract that was executed by the parties before the compensation or benefit was paid or provided.¹¹² Similarly, documents which indicate that the college or university followed the required steps for establishing a rebuttable presumption of reasonableness can be relied upon to establish compensatory intent.¹¹³

The requirement to show compensatory intent does not apply to compensation that is excludable from the disqualified person's income.¹¹⁴ This exception covers employer-provided health plans, contributions to and benefits under tax-advantaged retirement plans (such as § 401(a) and § 403(b) plans) and certain fringe benefits. However, even though establishment of compensatory intent is not required for such compensation, the compensation generally must be taken into account in evaluating the reasonableness of the total compensation payable to the disqualified person (except for the limited exclusions discussed above).¹¹⁵

IRS National Office training materials provide useful insight into how the IRS applies this requirement.¹¹⁶ The training materials identify specific

111. *See id.* § 53.4958-4(c)(3)(i). Reasonable cause is only available if the college or university can show "significant mitigating factors" for the reporting failure or that the event arose from events beyond its control. In either case, the college or university must also show that it acted in a reasonable manner both before and after the reporting failure occurred. *See also id.* § 301.6724-1(b)-(d) (as amended in 2004).

112. *Id.* § 53.4958-4(c)(3)(ii)(A).

113. The procedures for establishing a rebuttable presumption of reasonableness are discussed below. *See infra* Part II.G. It is important to note that those procedures require approval of the compensation before it may be paid. Therefore, similar to the rule for approved employment contracts, other written evidence of compensatory intent must be in place before the compensation is paid.

114. Treas. Reg. § 53.4958-4(c)(2).

115. *See supra* Part II.F.3.

116. *See* Lawrence Brauer & Leonard Henzke, Jr., "Automatic" Excess Benefit Transactions Under IRC 4958 (2004), available at <http://www.irs.ustreas.gov/pub/irs->

types of compensation arrangements that examining agents should review in evaluating whether the requirement is met. The materials indicate that failure to meet the requirement will typically result in an automatic excess benefit transaction, even where the compensation would otherwise be reasonable, either on its own or when aggregated with other compensation for which contemporaneous substantiation is established.¹¹⁷

5. Initial Contract Exception

An important exception from the excess benefit transaction rules is available for some forms of compensation paid under an employment agreement or other binding written contract between a college or university and a person who was not a disqualified person immediately before entering into the contract.¹¹⁸ This initial contract exception is most commonly available when a college or university plans to hire a new employee who will be a disqualified person once he begins employment. It is also available for employment agreements and compensation arrangements that are put in place with existing employees before they experience a change in position or responsibility (or other circumstances) that cause them to become a disqualified person.

The practical usefulness of this exception is limited by the fact that it only applies to fixed payments. As discussed earlier, a fixed payment is any payment of cash or property that is either of a specific amount or which is determined under a fixed formula. The amount or the formula must be described in the written contract. The contract must also specify the services for which the compensation will be paid.¹¹⁹

A formula does not fail to be a fixed payment merely because payment is conditioned on future specified events or contingencies.¹²⁰ But the formula cannot allow any person to exercise discretion when calculating either the amount payable under the formula or whether a payment will be made.¹²¹ For example, a fixed payment could include an annual base salary described in an employment agreement, subject to automatic adjustment in future years by reference to changes in an objective cost-of-living standard. A contract provision that allows for periodic salary adjustment at the discretion of the organization, however, would not generally qualify as a fixed payment. Similarly, a purely discretionary bonus program, or even a bonus program with objective metrics that allowed for discretionary adjustments upward or downward in the amount payable, would not qualify as a fixed payment. Nevertheless, payments to

tege/eotopice04.pdf.

117. *See id.* at 14–28.

118. Treas. Reg. § 53.4958-4(a)(3).

119. *Id.* § 53.4958-4(a)(3)(ii)(A).

120. *Id.*

121. *Id.*

tax-qualified retirement plans or other tax-favored benefit plans (such as education and adoption-assistance programs) are treated as fixed payments for purposes of this exception despite an organization's discretion to vary the amount of benefits under those plans.¹²²

The initial contract exception also has certain other requirements that are worthy of note. First, the exception only applies if the person substantially performs his or her obligations under the contract.¹²³ As a result, the person's actual services (and performance of other obligations) generally must be consistent with those required in the contract for the exemption to be available.¹²⁴ Second, if a contract provides that it is terminable or subject to cancellation by the organization (other than as a result of a lack of substantial performance by the person) without the person's consent and without substantial penalty to the organization, the contract is treated as a new contract as of the earliest date that any such termination or cancellation, if made, would be effective.¹²⁵ As a result, the exception will generally be lost as soon as termination or cancellation without penalty is permitted because the individual will likely be a disqualified person prior to that time and therefore not eligible for the exception.¹²⁶

If the contract also provides for both fixed and non-fixed payments, the exception still applies to the fixed payments. The non-fixed payments, however, are subject to the general reasonableness test described above.¹²⁷ In determining the reasonableness of the non-fixed compensation, all compensation is taken into account (even compensation that qualifies as a fixed payment).¹²⁸ For example, if an initial contract with a newly hired athletic director provides for a fixed base salary and a right to an annual bonus determined at the discretion of the president of the university, the base salary will be eligible for exemption under the initial contract rule but the discretionary bonus will not. Consequently, the reasonableness of each

122. *Id.* § 53.4958-4(a)(3)(ii)(B). The exception would appear to apply even if participation in such plans or programs is not specifically provided for in the contract. However, best practices would dictate inclusion in the contract of a reference to participation in such programs, as applicable.

123. *Id.* § 53.4958-4(a)(3)(iv).

124. Treas. Reg. § 53.4958-4(a)(3)(vii), Ex. 11. Some practitioners have questioned the availability of the exception if severance is payable upon the person's involuntary termination of employment before substantial completion of the term of the contract. This potential concern may be addressed by requiring the individual to comply with post-termination restrictive covenants as a condition to receiving the severance pay, such as restrictions on competition or solicitation of employees. In addition, severance pay is generally a means of insuring that a "substantial penalty" is present, as required to avoid the contract being treated as a new contract.

125. *Id.* § 53.4958-4(a)(3)(v).

126. For a thoughtful discussion of the practical implications of this requirement on structuring employment agreements and offer letters, see Celia Roady, *Intermediate Sanctions*, 884 Tax Mgmt. (BNA) Estates, Gifts, and Trusts (July 20, 2009).

127. See *supra* Part II.F.2.

128. Treas. Reg. § 53.4958-4(a)(3)(vi).

annual bonus payment must be evaluated based on the total value of the annual salary and the bonus payment, as well as any other compensation paid outside of the contract.

As a general matter, material changes to a contract, including renewals or extensions, are treated as the creation of a new contract.¹²⁹ The new contract must then be analyzed to determine whether it qualifies under the initial contract exception. If the person is a disqualified person at the time of the material change creating the new contract, the initial contract exception will no longer be available. Conversely, the new contract may still qualify for the exemption if the person is not a disqualified person when the new contract is deemed to be established.

6. Special Considerations

Revenue Sharing. Section 4958 authorizes the Treasury Department to develop regulations that would make economic benefits received by a disqualified person that are “determined, in whole or in part, by the revenues of one or more activities of the organization[.]” excess benefit transactions.¹³⁰ To date, the IRS has not issued final regulations on such revenue-sharing arrangements.¹³¹

Absent final regulations, such arrangements should be subject to the § 4958 general reasonableness standard. However, § 4958 does include the condition that the revenue sharing arrangement not result in private inurement, echoing the prohibition in I.R.C. §§ 501(c)(3) and 501(c)(4). Consequently, such arrangements should be structured in a manner that is consistent with the general standards that the IRS has considered relevant in favorable rulings on incentive compensation arrangements for employees of those tax-exempt organizations. For instance, there should be mechanisms in the arrangement to assure that actual incentive compensation payments, when combined with salary and other compensation, are reasonable in the aggregate.¹³²

Enhanced Form 990 Reporting. The revisions made to Form 990 in 2008 substantially expanded the required disclosures regarding compensation of officers and other key employees. Significant changes in the new reporting regime include required disclosure of compensation paid by related organizations, expanded scope of employees for which

129. *Id.* § 53.4958-4(a)(3)(v).

130. *Id.* § 53.4958-4(a)(1).

131. *See id.* § 53.4958-5. Proposed regulations under § 4958 included provisions treating certain types of revenue-sharing arrangements as excess benefit transactions. Those provisions were dropped in the final regulations. The final regulations reserve this as an area for guidance at a future date.

132. *See, e.g.,* I.R.S. Priv. Ltr. Rul. 2006-01-030 (Jan. 6, 2006); I.R.S. Information Ltr. 2002-0021 (Jan. 9, 2002), *available at* <http://www.irs.gov/pub/irs-wd/02-0021.pdf>.

disclosure is required, break-out of compensation by category of pay-type, and representations as to whether the organization used comparability data in determining compensation for top management officials.

The compensation information now required to be reported on an institution's annual Form 990 will provide the IRS with additional data for purposes of evaluating potential excess benefit transactions. As a result, colleges and universities should carefully consider their responses to each of the compensation-related questions on the Form 990. This will likely require more time and resources than have traditionally been dedicated to completing the form, not only for purposes of collecting all required data, but also for purposes of evaluating its presentation on the form.

Another impact of the new reporting requirements is that an expanded and more detailed array of comparability data will now be available. These data will enhance the ability of colleges and universities to periodically evaluate the reasonableness of the compensation arrangements with their disqualified persons and to undertake the comparability analysis that is necessary if the college or university wishes to establish the rebuttable presumption of reasonableness discussed below.

G. Rebuttable Presumption of Reasonableness

1. Advantages and Limitations

The House Committee Report provided an important planning tool for protecting against the application of the excess benefit transaction excise tax, which has been incorporated into the regulations under § 4958. The charitable organization may establish a rebuttable presumption that the compensation paid to the disqualified person is reasonable.¹³³

There are two primary benefits of establishing the rebuttable presumption. First, as a general rule, if the requirements for establishing the rebuttable presumption have been met, a director's participation in a transaction will not be considered "knowing."¹³⁴ Thus, the participating directors cannot be subjected to the ten-percent excise tax imposed on organization managers under § 4958.¹³⁵ Second, meeting the requirements for the rebuttable presumption shifts the burden of proof to the IRS.¹³⁶ The IRS will then have the burden of rebutting the presumption by challenging the validity or independence of comparables or by proving that the comparables do not reflect functionally similar positions.

The rebuttable presumption, however, has recently been questioned by Senator Grassley of the Senate Finance Committee. In September 2009, Senator Grassley proposed an amendment to the provisions of the Senate

133. Treas. Reg. § 53.4958-6.

134. *Id.* § 53.4958-1(d)(4)(iv).

135. *See supra* Part II.B.

136. Treas. Reg. § 53.4958-6(b).

Finance Committee's markup of America's Healthy Future Act of 2009 that would have eliminated the rebuttable presumption of reasonableness for determining the compensation of officers and directors under the excess benefit transaction rules and would have required organizations to disclose a summary of the comparability data used to determine reasonableness.¹³⁷ Senator Grassley ultimately pulled the amendment before it was voted upon by the Committee.¹³⁸

2. Fixed vs. Non-Fixed Payments

In the case of a contract providing for a fixed payment, the rebuttable presumption arises, if the required elements are met, at the time the parties enter into the contract.¹³⁹ The same rule applies for retirement benefits. If the contract involves a non-fixed payment (except in the case of certain payments subject to a cap), the rebuttable presumption can arise only after discretion is exercised, the exact amount of the payment is determined or the formula is fixed, and the three requirements for the rebuttable presumption are met.¹⁴⁰

3. Requirements to Establish the Presumption

The rebuttable presumption of reasonableness may be established only if three separate conditions are met: (1) the compensation arrangement must be approved in advance by the organization's governing body or by a committee; (2) the approval must be made in reliance upon appropriate compensation comparability data; and (3) the basis for the determination must be adequately and concurrently documented.¹⁴¹

Advance Approval by Authorized Body. The authorized body or committee of the charitable organization that approves the compensation must be composed entirely of individuals who do not have a conflict of interest with respect to the compensation arrangement.¹⁴² An authorized body is the board of directors, a committee of the board of directors composed of individuals permitted under state law to serve on such committee and act on behalf of the board of directors, or, to the extent permitted under state law, other parties authorized by the board of directors

137. America's Healthy Future Act of 2009, S. 1796, Grassley Amendment #4-8 (2009) (unenacted).

138. *See Results of Executive Session America's Healthy Future Act of 2009*, available at <http://finance.senate.gov/imo/media/doc/102009%20America%27s%20Healthy%20Future%20Act%20Markup%20Results.pdf>.

139. Treas. Reg. §§ 53.4958-4(b)(2)(i), 53.4958-6(a)(1).

140. *Id.* § 53.4958-6(d)(1).

141. *Id.* § 53.4958-6(a).

142. *Id.* § 53.4958-6(a)(1).

to act on its behalf by following procedures specified by the board of directors in approving compensation arrangements.¹⁴³ For purposes of determining whether an individual has a conflict of interest, a member of the authorized body does not have a conflict of interest with respect to a compensation arrangement only if the member:

- Is not a disqualified person participating in or economically benefiting from the compensation arrangement and is not a member of the family of any such disqualified person;
- Is not in an employment relationship subject to the direction or control of any disqualified person participating in or economically benefiting from the compensation arrangement;
- Does not receive compensation or other payments subject to approval by any disqualified person participating in or economically benefiting from the compensation arrangement;
- Has no material financial interest affected by the compensation arrangement; and
- Does not approve a transaction providing economic benefits to any disqualified person participating in the compensation arrangement, who in turn has approved or will approve a transaction providing economic benefits to the member.¹⁴⁴

Many colleges and universities will establish a small independent compensation committee consisting of non-employee members of the board of directors or trustees to serve as the authorized body in all compensation matters associated with disqualified persons.

Appropriate Comparability Data. The authorized body must obtain and rely upon appropriate data as to comparability before making its determination.¹⁴⁵ An authorized body has appropriate data as to comparability if, given the knowledge and expertise of its members, it has information sufficient to determine if the compensation is reasonable.¹⁴⁶ In the case of a compensation arrangement, relevant information includes:

- Compensation levels paid by similarly situated organizations, both taxable and tax-exempt, for functionally comparable positions.
- The availability of similar services in the geographic area.
- Current compensation surveys compiled by independent firms.
- Actual written offers from similar institutions competing for the

143. *Id.* § 53.4958-6(c)(1)(i).

144. *Id.* § 53.4958-6(c)(1)(iii).

145. Treas. Reg. § 53.4958-6(a)(2).

146. *Id.* § 53.4958-6(c)(2)(i).

services of the disqualified person.¹⁴⁷

For certain small organizations reviewing compensation arrangements, the authorized body is considered to have appropriate data for comparability if it has data showing the compensation paid by three comparable organizations in the same or similar communities. A small organization is one having gross receipts of less than \$1 million per year.¹⁴⁸

A frequently asked question is whether the organization should retain a third-party compensation consultant to assist in collecting and evaluating comparability data. The regulations do not require that the comparability data relied on be provided by an independent compensation consultant or other third-party adviser. However, reliance on data provided by such a person may insulate the board or committee members from potential penalties under the excess benefit transaction rules if the requirements for the presumption are not met and the compensation is found to be unreasonable.¹⁴⁹ In addition, a compensation consultant generally will have ready, available access to a broader and more detailed set of compensation data than the organization can compile on its own. Finally, a compensation consultant may also be helpful in advising the board or committee on related issues, such as identification of appropriate peer organizations for compensation comparability, compensation arrangement design and delivery, and new trends in exempt-organization compensation practices.

Required Documentation. The authorized body must adequately document the basis for its determination concurrently with making that determination. For a decision to be documented adequately, the written or electronic records of the authorized body must note the following:

- The terms of the compensation arrangement that was approved and the date of the approval;
- The members of the authorized body who were present during the debate on the compensation arrangement that was approved and those who voted on it;
- The comparability data obtained and relied upon by the authorized body and how the data were obtained; and
- Any actions taken, with respect to the compensation arrangement, by anyone who is otherwise a member of the authorized body but who had a conflict of interest with respect to the compensation arrangement.¹⁵⁰

147. *Id.*

148. *Id.* § 53.4958-6(c)(2)(ii).

149. *See* discussion *supra* Part II.B.

150. Treas. Reg. § 53.4958-6(c)(3)(i).

For a decision to be documented concurrently, records must be prepared before the later of the next meeting of the authorized body or sixty days after the final action or actions of the authorized body. Records must be reviewed and approved by the authorized body as reasonable, accurate, and complete within a reasonable time period thereafter.¹⁵¹

H. Correction of an Excess Benefit Transaction

An excess benefit transaction occurs when the disqualified person receives the excess benefit for federal income tax purposes.¹⁵² To avoid the second-tier tax, a disqualified person must correct an excess benefit transaction in the time between when the transaction occurs and the earlier of the date on which the twenty-five percent initial tax is assessed and the date of mailing of a notice of deficiency under I.R.C. § 6212 with respect to the twenty-five percent initial tax.¹⁵³

To correct an excess benefit transaction, the disqualified person must undo the excess benefit to the extent possible and take any additional steps necessary to place the organization in a financial position not worse than it would be in if the disqualified person were dealing under the highest fiduciary standards. Correction requires payment of the correction amount, which is the excess benefit plus interest at the applicable federal rate, compounded annually.¹⁵⁴

Generally, correction may only be made by making a cash payment.¹⁵⁵ But, with the agreement of the organization, correction may be made by returning specific property.¹⁵⁶ If payment is made with property, the amount of the payment is the lesser of the fair market value of the property on the date of return and the fair market value at the time the excess benefit transaction occurred.¹⁵⁷ If the fair market value of the property is less than the correction amount, the disqualified person must make a cash payment also. If the fair market value of the property is greater than the correction amount, the organization may make a cash payment to the disqualified person.¹⁵⁸ The decision to accept property must be made by the organization without the participation of the disqualified person.¹⁵⁹ The organization may always refuse the return of property and require a cash

151. *Id.* § 53.4958-6(c)(3)(ii).

152. *Id.* § 53.4958-1(e)(1).

153. *Id.* § 53.4958-1(c)(2)(ii)(A), (B).

154. *Id.* § 53.4958-7(c).

155. *Id.* § 53.4958-7(b)(1).

156. Treas. Reg. § 53.4958-7(b)(4)(i).

157. *Id.*

158. *Id.* § 53.4958-7(b)(4)(ii).

159. *Id.* § 53.4958-7(b)(4)(iii).

payment.¹⁶⁰ In the case of an ongoing contract, the contract may be modified so that the excess benefit transaction is corrected going forward.¹⁶¹ If correction is of less than the full correction amount, the 200% second-tier tax is imposed only on the unpaid portion.¹⁶²

I. Planning to Avoid an Excess Benefit Transaction

In light of increased scrutiny of executive compensation, as well as the adverse publicity that can be associated with high compensation (the details of which will now be fully available to the public with the revised Form 990), colleges and universities must adopt procedures designed to avoid an excess benefit transaction as well as adverse publicity. All colleges and universities should take steps to identify persons subject to the rules and compensation arrangements that could potentially constitute excess benefit transactions. In addition, colleges and universities should evaluate the availability and appropriateness of the initial contract exception and the rebuttable presumption of reasonableness for compensation arrangements involving persons who will become disqualified persons or for proposed new compensation arrangements for persons who are currently disqualified persons.

At a minimum, the following practices should be implemented and performed on a regular basis as part of the institution's overall compensation program:

Identify Disqualified Persons. Colleges and universities should regularly identify disqualified persons in their organizations. As discussed above,¹⁶³ the process for identifying disqualified persons requires not only identification of the persons who hold certain positions in the organization, but also those persons whose specific responsibilities and authorities provide them with the ability to substantially influence the affairs of the organization (without regard to whether they actually exercise those authorities and responsibilities). In addition, transactions with a disqualified person's family members and thirty-five percent controlled corporations should be identified.

Periodically Review Compensation Arrangements for Disqualified Persons. Colleges and universities should have a process for regularly reviewing the compensation of their disqualified persons to confirm that the compensation, if not otherwise exempt from the excess benefit transaction rules, is reasonable. This review requires consideration of a number of factors. First, all compensation of any kind paid to the

160. *Id.* § 53.4958-7(b)(4)(ii).

161. Treas. Reg. § 53.4958-7(d).

162. *Id.* § 53.4958-1(c)(2)(ii).

163. *See supra* Part II.D.

disqualified persons should be identified, including compensation paid by related parties. Second, each item of compensation should be evaluated to determine whether it may be excluded from the reasonableness test. Third, the reasonableness of the non-excludible compensation should be evaluated based on the general standards applicable under I.R.C. § 162, including comparison of appropriate compensation data.

Establish Standards for Independent Review and Approval. Where compensation for a disqualified person is set annually or on some other periodic basis, consideration should be given to implementing compensation-setting procedures designed to comply with the rebuttable presumption of reasonableness. The college or university should make certain that the independent board or committee establishing the rebuttable presumption is truly independent and that any conflict of interest is avoided. This standard may necessitate establishing a standing compensation committee.¹⁶⁴

Establish Procedures for New Compensation Arrangements. Colleges and universities should adopt procedures for evaluating whether new compensation arrangements can be structured to fall under the initial contract exception or whether a rebuttable presumption of reasonableness can be established for the arrangement. Because of the various limitations associated with the initial contract exception, reliance on the rebuttable presumption of reasonableness may be the more appropriate alternative for addressing potential excess benefit transaction issues. It is important to remember that the three requirements for the rebuttable presumption must be satisfied before any proposed compensation is paid.

Establish Procedures for Emergency Situations. Colleges and universities should consider procedures for handling unexpected benefits that become payable to disqualified persons during the year. The procedures should follow the steps necessary to obtain the rebuttable presumption of reasonableness. For example, in the case of reimbursement of expenses not otherwise covered under an accountable plan, the organization should consider requiring the disqualified person to pay the expense initially, with later reimbursement from the organization once the proper steps are taken to establish the rebuttable presumption of reasonableness.

J. Advisory Committee's Online Executive Compensation Tutorial

Colleges and universities may have another tool in the future to assist

164. For an in-depth discussion of compensation committees, see Steven D. Kittrell et al., *Compensation Committees*, 73-2nd Corp. Prac., Ser. (BNA 2009).

with compensation arrangements and avoidance of excess benefit transactions. In a recent response to the ongoing discussion over appropriate levels of compensation in the tax-exempt sector, the Advisory Committee on Tax Exempt and Government Entities (“ACT”) developed an online instructional guide regarding executive compensation for charities.¹⁶⁵ The tutorial offers step-by-step, plain-language advice designed for managers and board members of charities on topics such as developing internal procedures and compensation comparables, reporting salary information on Form 990, determining the proper tax treatment of fringe benefits, and maintaining appropriate records necessary to meet the rebuttable presumption of reasonableness and comply with the excess benefit transaction rules.

ACT suggested in its report that the IRS coordinate its efforts to provide the tutorial with other nonprofit organizations whose purposes are to promote good governance and best practices among nonprofits. ACT provided a prototype of the tutorial to the IRS’s Tax-Exempt and Government Entities Division on a DVD and recommended that the IRS adopt a version of the tutorial as part of its public education program. The IRS will likely subject the tutorial to extensive review before considering posting a final product on the IRS website, but such a product could provide valuable information for colleges and universities attempting to develop procedures to avoid a § 4958 excess benefit transaction.

III. UNRELATED BUSINESS TAXABLE INCOME AND DEBT-FINANCED PROPERTY

Although compensation, community benefit, and college and university endowments have received the most attention from the Senate Finance Committee and the tax-exempt community recently, the IRS has looked towards another issue as a major revenue raiser: the proliferation of unreported, and untaxed, unrelated business taxable income (“UBTI”). Indicative of the increased IRS focus on unrelated business income were the thirty-two questions on the college and university questionnaire regarding receipts, cost of goods sold, deductions, operating-loss deductions, and the expense allocation method used to arrive at the taxable net income of forty-seven activities ranging from advertising to golf course operations. The IRS was also interested in which of these activities resulted in debt-financed income and what percentage came from partnerships, S corporations, and controlled organizations.¹⁶⁶

Generally, the institutions responding to the questionnaire reported

165. Jack Siegel et al., *Exempt Organizations: Getting It Right – An Online Guide to Setting Executive Compensation for Charities*, ADVISORY COMM. ON TAX EXEMPT AND GOV’T ENTITIES (June 9, 2010), http://www.irs.gov/pub/irs-tege/tege_act_rpt9.pdf.

166. See IRS Form 14018 Part II (2008), available at http://www.irs.gov/pub/irs-tege/sample_cucp_questionnaire.pdf.

engaging in trade or business activities, but not reporting the activity on a Form 990-T (Unrelated Business Income Tax).¹⁶⁷ The obvious reason was that the institutions believed either that the activities were related to their tax-exempt functions or the activities fell under one of the modifications and exceptions contained in the unrelated business income tax (“UBIT”) rules.

A. Overview of the UBIT

1. Purpose of the UBIT

The main objective of the UBIT rules is to eliminate unfair competition between tax-exempt and taxable entities. This objective is accomplished by taxing trade or business revenue generated by an exempt organization that, aside from making funds available, is not related to the organization’s tax-exempt function.

2. Application of the Unrelated Trade or Business Rules to Colleges and Universities

Generally, private colleges and universities that are described in I.R.C. § 501(c)(3) are exempt from federal income tax, and public colleges and universities that are state instrumentalities are exempt from federal income tax under I.R.C. § 115. I.R.C. § 511, however, imposes a tax on the UBTI of colleges and universities that are exempt under § 501(c)(3) as well as public colleges and universities exempt under § 115. Broadly defined, UBTI is income an otherwise tax-exempt organization receives from engaging in a trade or business that is unrelated to the tax-exempt organization’s exempt purpose.

Unfortunately, many tax-exempt organizations do not fully understand the rules for determining whether income is UBTI requiring the filing of a Form 990-T and the payment of UBIT. As a result, many organizations likely underreport their UBTI and underpay their UBIT. Not only does this increase the organization’s audit risk, but it also may require the payment of back taxes with interest, as well as penalties for failure to file and failure to pay.

The UBIT rules are not complex. They are, however, very detailed. Tax administrative officials and outside tax advisors serving colleges and universities must know and understand these rules in order to report the institution’s revenues properly and avoid underpaying UBIT and the interest and penalties that can follow. Business activities typically conducted by colleges and universities that have piqued the IRS’s interest include (but are by no means limited to) college book stores,¹⁶⁸ travel

167. *Interim Report*, *supra* note 11, at 29.

168. Related (and therefore not subject to UBIT) items include sales of course

programs,¹⁶⁹ athletic programs,¹⁷⁰ alumni use of university facilities (e.g., golf courses),¹⁷¹ rental of university facilities,¹⁷² corporate sponsorships,¹⁷³ bartering,¹⁷⁴ and telecommunication rentals.¹⁷⁵

books, supplies, tapes, compact discs, athletic wear necessary for participation in athletic and physical education programs, computer hardware and software, and items to induce school spirit. There is also an exception for convenience items used by students such as sundry articles, cards, film, etc. The IRS will tax sales to the general public. *See* *Squire v. Students Book Corp.*, 191 F.2d 1018 (9th Cir. 1951); Rev. Rul. 58-194, 1958-1 C.B. 240.

169. Regulations on travel and tour activities were issued by the IRS on February 4, 2000. Treas. Reg. § 1.513-7. The regulation contains only a brief statement of the UBIT general rule and two examples pertaining to colleges and universities. Example 1 states that income from an alumni association tour open to its members and their guests and arranged by a travel agency that pays a per-person fee to the association is UBTI; although a faculty member is present, none of the tours include any scheduled instruction or curriculum related to the destinations being visited. Example 2 states that there is no UBIT where there is a “substantial amount of required study, lectures, report preparation, examinations, and [the tour] qualif[ies] for academic credit[.]” *Id.* For instance, a program, sponsored by an organization whose purpose is education about the geography and culture of the U.S., consisting of tours of parks and other locations in the U.S. and conducted by education professionals and where participants agree to participate in the required study program, including five or six hours per day devoted to study, would not be subject to UBIT. *Id.* *See also* BERTRAND M. HARDING, JR., *THE TAX LAW OF COLLEGES AND UNIVERSITIES*, § 3.6 (3d ed. 2008) (discussing other examples of travel tours).

170. Revenue generated from entrance fees at college and university athletic events is considered income from a related trade or business and therefore not subject to UBIT. Similarly related is income generated by the telecasting and radio broadcasting of athletic events, including the sale of exclusive television and radio rights. *See* Rev. Rul. 80-295, 1980-2 C.B. 194; Rev. Rul. 80-296, 1980-2 C.B. 195.

171. In Tech. Adv. Mem. 96-45-004 (July 17, 1996), the IRS concluded that the alumni use of a university’s golf course or ski facility does not contribute importantly to the accomplishment of the university’s exempt purposes. The IRS rejected the argument that by making a golf course available the university is providing an “inducement” for alumni to make financial contributions or otherwise be involved in the university. *See* I.R.S. Priv. Ltr. Rul. 80-20-010 (1980). *See also* *Oakland Univ. v. Comm’r*, No. 2570-97 (T.C. stipulated decision entered May 27, 1998). *But see* I.R.S. Priv. Ltr. Rul. 83-40-101 (July 11, 1983).

172. Generally, the income from the rental of college or university athletic facilities, dormitories, and facilities to non-students would be considered passive rental income and not taxable as long as collateral services such as meals or services beyond ordinary maintenance are not provided. I.R.C. § 512(b)(3); *see also* I.R.S. Gen. Couns. Mem. 38060 (Aug. 22, 1979) (concluding that revenue from the operation of a hotel and restaurant for the general public adjacent to a college campus was UBTI).

173. A qualified sponsorship payment is not UBTI even when the payment is based on a contingent level of attendance or broadcast rating indicating a degree of public exposure. I.R.C. § 513(i)(2)(A). Congress added I.R.C. § 513(i) in order to reduce uncertainty regarding any payments to nonprofit organizations, including colleges and universities. A “qualified” payment received by either a private or public state college or university is not subject to UBIT even if there is a complimentary receipt of tickets or receptions for the donor corporate sponsor.

174. Bartering activities are considered income for services rendered. Treas. Reg. § 1.61-2(d)(1) (as amended in 2003).

175. Telecommunication rentals can take several forms, from the passive rental of

B. Definition of “Unrelated Trade or Business”

In order for an activity to constitute an unrelated trade or business, three requirements must be met. First, the activity must constitute a trade or business. Second, the trade or business must be regularly carried on. And third, the activity must not be substantially related to the exempt purposes of the college or university.¹⁷⁶

1. “Trade or Business”

A “trade or business” includes any activity carried on for the production of income from the sale of goods or the performance of services.¹⁷⁷ The regulations under I.R.C. § 513 provide some guidance as to what activities constitute a trade or business for purpose of the UBIT rules. Factors indicative of UBTI include: whether the activities are carried on for the production of income and have the characteristics of a trade or business under I.R.C. § 162; whether the trade or business is carried on to produce income from the sale of goods or performance of services; and whether the activities do not contribute importantly to accomplishment of the organization’s tax exempt purposes.

Although a primary purpose for adoption of the UBIT rules in 1950 was to eliminate “unfair” competition from nonprofits engaged in commercial endeavors, the case law does not require an actual showing of competitive effect.¹⁷⁸ Competition with for-profit businesses is, nonetheless, a consideration under the Treasury Regulations in determining whether there is a “trade or business.”¹⁷⁹ It is not necessary, however, to establish actual competition for there to be a finding of unrelated trade or business income.¹⁸⁰ Rather, the IRS and the courts have used this factor to test an organization’s argument that the business is substantially related.

It is difficult to distinguish the test used for UBTI and the test used for the requirement that an exempt organization must “operate” for its exempt purposes. According to the Tax Court, determining the existence or absence of a commercial purpose in exemption cases is a “facts and circumstances” determination.¹⁸¹ Although the I.R.C. and the Treasury Regulations do not make the presence or absence of profits a factor in determining the existence of a trade or business, several federal courts have held that a trade or business exists if the activity was entered into to

telephone poles to carrying other utility lines. *See* I.R.S. Priv. Ltr. Rul. 78-28-001 (Mar. 13, 1978).

176. I.R.C. § 513.

177. I.R.C. § 513; Treas. Reg. § 1.513-1(b) (as amended in 1983).

178. *See, e.g.,* United States v. Am. Bar Endowment, 477 U.S. 105 (1986).

179. Rev. Rul. 68-505, 1968-2 C.B. 248.

180. *La. Credit Union League v. United States*, 693 F.2d 525 (5th Cir. 1982).

181. *Redlands Surgical Serv. v. Comm’r*, 113 T.C. 47, 72 (1999); *B.S.W. Group, Inc. v. Comm’r*, 70 T.C. 352, 357-58 (1978).

“realize a profit.”¹⁸² The accumulation of profits has been considered by various courts, but the ultimate decision of exemption rests on the purpose for the accumulation.¹⁸³ The appearance of “commercialism” is also an important factor.¹⁸⁴ The courts recognize, however, that passive activities do not constitute a “trade or business.” Thus, investing is not normally a trade or business, nor is a covenant not to compete.¹⁸⁵

2. “Regularly Carried On”

Whether a trade or business is “regularly carried on” is determined by reference to the “frequency and continuity with which the activities productive of the income are conducted and the manner in which they are pursued . . . in light of the purpose . . . to place exempt-organization business activities upon the same tax basis as the non-exempt business endeavors with which they compete.”¹⁸⁶ A relevant factor is the typical time span of the activities—for instance, whether the activities are engaged in only discontinuously or periodically without the competitive and promotional efforts typical of commercial endeavors.¹⁸⁷

The IRS generally views preparatory activity as part of the business activity for purposes of determining whether a trade or business is regularly carried on.¹⁸⁸ The courts, however, have held that preparation time should not be taken into account to determine “regularity.” For instance, advertising in programs for the three-week NCAA basketball tournament was held not to produce income from a “regularly carried on” activity despite the fact that the year-round sale of advertising was characterized by the court as “preparation time.”¹⁸⁹ The IRS disagrees with this position and

182. *Am. Bar Endowment*, 477 U.S. at 110, n.1; *Am. Postal Workers Union v. United States*, 925 F.2d 480 (D.C. Cir. 1991); *Prof'l Ins. Agents of Mich. v. Comm'r*, 726 F.2d 1097, 1102 (6th Cir. 1984); *Carolinas Farm & Power Equip. Dealers v. United States*, 699 F.2d 167, 169 (4th Cir. 1983); *La. Credit Union League*, 693 F.2d at 532; *Fraternal Order of Police v. Comm'r*, 87 T.C. 747, 756 (1986), *aff'd*, 833 F.2d 717 (7th Cir. 1987).

183. *See Presbyterian & Reformed Pub'g Co. v. Comm'r*, 743 F.2d 148 (3d Cir. 1984); *Scripture Press Found. v. United States*, 285 F.2d 800 (Ct. Cl. 1961).

184. *See Estate of Haw. v. Comm'r*, 71 T.C. 1067 (1979), *aff'd*, 647 F.2d 170 (9th Cir. 1981).

185. *San Antonio Dist. Dental Soc'y v. United States*, 340 F. Supp. 11 (W.D. Tex. 1972); *Ohio Farm Bureau Fed'n, Inc. v. Comm'r*, 106 T.C. 222, 235 (1996).

186. *Treas. Reg.* § 1.513-1(c)(1) (as amended in 2003).

187. *Id.* § 1.513-1(c)(2)(i), (ii) (as amended in 2003). *See, e.g., Nat'l Collegiate Athl. Ass'n v. Comm'r*, 914 F.2d 1417 (10th Cir. 1990), *action on dec.*, 1991-15 (July 3, 1991); *see also Rev. Rul.* 68-505, 1968-2 C.B. 248 (holding that the conduct of an activity for all or a significant portion of the season satisfied the “regularly carried on” requirement).

188. *Rev. Rul.* 73-424, 1973-2 C.B. 190; *but see Suffolk Cnty. Patrolmen's Benevolent Ass'n v. Comm'r*, 77 T.C. 1314, 1323 (1981) (rejecting the notion that preparatory time is a business activity).

189. *Nat'l Collegiate Athletic Ass'n v. Comm'r*, 914 F.2d 1417, *action on dec.*,

continues to litigate the issue.

Also, activities of those acting on the organization's behalf can be attributed to the organization on an "agency" theory.¹⁹⁰

3. "Substantially Related"

An "unrelated" trade or business is not substantially related (aside from the need of such organization for income or funds or the use it makes of the profits derived) to the exercise or performance of the purpose or function constituting the basis for the organization's exemption.¹⁹¹ A trade or business activity is "related" to the tax-exempt purpose of the organization if the activity is causally related to the achievement of the organization's exempt purpose, and if the causal relationship, in a substantial way, "contribute[s] importantly" to that exempt purpose.¹⁹² If the activity is carried on more extensively than necessary, income from the excess activity is treated as unrelated.¹⁹³ Thus, where income is realized from activities that are related but are conducted on a scale that is not reasonably necessary to accomplish the tax-exempt purpose, the excess income will be UBTI.

Because the determination of whether a trade or business is substantially related to an organization's exempt purposes depends upon the facts and circumstances of each case, the numerous IRS pronouncements and judicial decisions offer limited comfort to a particular organization carrying on a particular activity. But there are some indicia that the IRS and the courts have looked to when concluding that an activity is not substantially related. These indicia include:

- Fees charged to the general public are comparable to commercial facilities;
- Only those that purchase the goods or services are benefited and the benefits are in direct proportion to the fees charged;
- The organization furnishes and operates the facilities through its own employees who perform substantial services in providing the activity; and
- Revenue maximization is a predominant element in the exempt organization's conduct of the activity.¹⁹⁴

1991-15 (July 3, 1991).

190. *State Police Ass'n of Mass. v. Comm'r*, 72 T.C.M. (CCH) 582 (1996), *aff'd* 125 F.3d 1 (1st Cir. 1997).

191. I.R.C. § 513(a). In the case of state colleges and universities, the educational purpose or function described in I.R.C. § 501(c)(3) is controlling.

192. Treas. Reg. § 1.513-1(d)(2) (as amended in 1983).

193. *Id.* § 1.513-1(d)(3); *see also* Rev. Rul. 76-94, 1976-1 C.B. 171.

194. I.R.S. Gen. Couns. Mem. 39863 (Nov. 26, 1991); I.R.S. Tech. Adv. Mem. 91-47-008 (Nov. 22, 1991).

C. Volunteer, Thrift Store, and Convenience Exceptions.

UBTI does not include income from any trade or business in which substantially all the work is performed without compensation;¹⁹⁵ income from the selling of merchandise substantially all of which has been received as gifts or contributions; or, in the case of a college or university, income derived from businesses carried on primarily for the convenience of its students, officers, or employees.¹⁹⁶

The convenience exception can be applied to certain goods sold by colleges and universities, such as articles that are of a recurrent demand and do not have a useful life of more than one year. Such articles would include athletic clothing with the college or university insignia, other low-cost apparel, novelty items such as jewelry, cups, and pillows imprinted with the school's logo or name, and items such as film, cards, candy, newspapers, and magazines.¹⁹⁷

As a general rule, items do not fall into the above categories if they have a useful life of more than one year. Sales of items such as cameras, tape recorders, radios, record players, television sets, and small appliances would be subject to UBIT.¹⁹⁸ Exceptions have been made if a school demonstrates that its campus is located a considerable distance from commercial retail facilities.¹⁹⁹ The IRS has held, however, that revenue from the sale of multiple computers to students, faculty, and non-students is UBTI.

Dormitory rentals to students during the school year, as well as the provision of food, laundry, and similar services, come within the convenience exception. Questions have been raised, however, regarding

195. "Substantially all" has not been defined by the IRS except in limited situations. See I.R.S. Priv. Ltr. Rul. 95-44-029 (Nov. 3, 1995) (concluding that the "substantially all" test was met where a religious organization used volunteers supervised by paid staff in a ratio of ten-to-one to sell clothing, crosses, buttons, key chains, flags, and bumper stickers containing inscriptions or artwork with a Biblical message or theme). See also *St. Joseph Farms of Ind. Bros. of the Congr. of the Holy Cross v. Comm'r*, 95 T.C. 9 (1985) ("substantially all" test was met where uncompensated workers constituted ninety-one percent of the farm labor force and ninety-four percent of the total hours worked on the farm); *Waco Lodge No. 166, Benevolent & Protective Order of Elks v. Comm'r*, 42 T.C.M. (CCH) 1202 (1981), *aff'd in part and rev'd in part*, 696 F.2d 372 (9th Cir. 1982) (holding that regular bingo nights where a compensated bartender and caller constituted 23.1% of the total man-hours failed the "substantially all" test); *Greene Cty. Med. Soc'y Found. v. United States*, 345 F. Supp. 900 (W.D. Mo. 1972) (concluding that the reimbursement of volunteer expenses is not considered compensation).

196. See *Treas. Reg. § 1.513-1(e)*; *Rev. Rul. 55-676*, 1955-2 C.B. 266 (convenience rule applies to on-campus laundry and dry-cleaning services for college and university students).

197. *Squire v. Students Book Corp.*, 191 F.2d 1018 (9th Cir. 1951); I.R.S. Gen. Couns. Mem. 33323 (Aug. 29, 1966).

198. I.R.S. Gen. Couns. Mem. 35811 (May 7, 1974).

199. *Id.*

the provision of similar services to students during the summer months and to for-profit companies conducting educational programs using the school's facilities.²⁰⁰ But the IRS ruled that such rental activities were related to the school's tax-exempt purpose.²⁰¹ In another ruling, a theological school had rented out dormitory quarters to family members of students and faculty, potential students and their parents, guest speakers, guests of other nonprofit organizations, and members of the general public.²⁰² There, the IRS expanded the convenience exception to include the first four cited categories but held that the rental income from the general public was UBTI.²⁰³

D. Special Rules Relating to Unrelated Trade or Business

Special rules apply under I.R.C. § 513 for qualified convention and trade-show activities, certain hospital services, certain bingo games, certain distributions of low-cost articles, certain exchanges and rentals of member lists, certain travel and tour activities, and certain sponsorship payments.²⁰⁴

E. Modifications to UBTI

Certain Investment Income. Dividends, interest, payments from securities, loans, annuities, and other substantially similar income from routine and ordinary investments, and all deductions directly connected with any such investment income, are excluded from UBTI (except in the case of debt-financed income).²⁰⁵

Royalties. Royalties and all deductions connected with royalties are excluded from UBTI except in the case of debt-financed income and receipts from controlled organizations. Royalties (including overriding royalties), whether measured by production or by gross, are excluded from UBTI.²⁰⁶ Generally, a royalty is a payment for the use of a valuable right such as a trademark, trade name, service mark, or copyright, regardless of whether the property represented by the right is used.²⁰⁷ If, however, the

200. See I.R.S. Priv. Ltr. Rul. 90-14-069 (Apr. 6, 1990).

201. *Id.*

202. I.R.S. Priv. Ltr. Rul. 2006-25-035 (June 23, 2006).

203. *Id.*

204. I.R.C. § 513; Treas. Reg. § 1.513-3.

205. I.R.C. § 512(b)(1); Treas. Reg. § 1.512(b)-1(a)(1).

206. I.R.C. § 512(b)(2); Treas. Reg. § 1.512(b)-1(b). Working interests in oil and gas leases are not considered a royalty, and the income is taxable where the organization is liable for the operating expenses associated with the interest. See Rev. Rul. 69-179, 1969-1 C.B. 158.

207. See *Comm'r v. Wodenhoe*, 337 U.S. 369, 377 (1949); *Rohmer v. Comm'r*, 153 F.2d 61, 62 (2d Cir. 1946); *Comm'r v. Affiliated Enters., Inc.*, 123 F.2d 665, 667 (10th Cir. 1941); *Sabatini v. Comm'r*, 98 F.2d 753, 755 (2d Cir. 1938); *Nat'l Well Water Ass'n, Inc. v. Comm'r*, 92 T.C. 75, 100 (1989).

payment for such rights is coupled with a duty to perform services by the licensor, it is not treated as a royalty for tax purposes. But, if a licensor retains quality-control rights with respect to the licensed product, it does not cause payments to the licensor to lose their character as royalties.²⁰⁸

The IRS has held that payments received for personal endorsements of products and services made by an athletic organization's members are payments for personal services and not royalties.²⁰⁹ Royalties may be received from books, plays, copyrights, trade names, patents, and the exploitation of natural resources.

Mailing Lists and Affinity Cards. Mailing-list rentals, affinity cards, and the like are often used by colleges and universities and their affiliates to generate revenue. The IRS previously took the position that income from the rental of mailing lists to organizations marketing their affinity cards to members was subject to UBIT. However, after several contrary court decisions including the *Oregon State University Alumni Association* case, where the court said that the organization's activity in the program was insubstantial,²¹⁰ the IRS has conceded the issue. In Private Letter Rulings 1999-38-041 and 2001-49-043, the IRS held that, under certain circumstances, a subsidiary organization's marketing and licensing for its exempt parent will not be attributed to the parent for purposes of determining the parent's continued qualification for exempt status or liability for tax on UBTI. There, the IRS allowed the tax-exempt organization to bifurcate payments under a licensing agreement; one part was a royalty to the parent for use of the intellectual property and the other was a payment to the taxable subsidiary for services.

Rents. Except in the case of debt-financed income and receipts from controlled organizations, rents from real property and incidental rents from personal property leased with real property are excluded in the computation of UBTI. Rents from personal property are "incidental" only if they do not exceed ten percent of the total rents from all the property leased. However, if rents from personal property exceed fifty percent of the total rents, all rents (including the rent from real property) are UBTI. Also, rents are UBTI if it is dependent in whole or in part on the income or profits derived

208. *Lemp Brewing Co. v. Comm'r*, 18 T.C. 586 (1952), *acq.* 1952-2 C.B. 2; Rev. Rul. 81-78, 1981-2 C.B. 135, situation 1; I.R.S. Tech. Adv. Mem. 94-36-001 (Sept. 9, 1994); I.R.S. Priv. Ltr. Rul. 2006-01-033 (Oct. 14, 2005).

209. Rev. Rul. 81-178, 1981-2 C.B. 135, situation 2.

210. *Or. State Univ. Alumni Ass'n v. Comm'r*, 193 F.3d 1098 (9th Cir. 1999); *Common Cause v. Comm'r*, 112 T.C. 332 (1999); *Planned Parenthood Fed. of America, Inc. v. Comm'r*, 77 T.C.M. (CCH) 2227 (1999); *Miss. State Univ. Alumni, Inc. v. Comm'r* 74 T.C.M. (CCH) 458 (1997); *Sierra Club v. Comm'r*, 65 T.C.M. (CCH) 2582 (1993), *aff'd*, 86 F.3d 1526 (9th Cir. 1996); see Lloyd Hitoshi Mayer, *Tax Court Rules (Again) on Sierra Club Affinity Card Income*, 24 EXEMPT ORG. TAX REV. 311 (May 1999). See also Rev. Rul. 69-179, 1969-1 C.B.158.

from the property leased (other than an amount based on a fixed percentage of receipts or sales).²¹¹

The IRS has ruled that payments to a college or university for the use of excess radio frequencies are non-taxable royalties.²¹² Payments for the use of the university broadcast tower, however, are taxable. The IRS has held that such income is not rent under I.R.C. § 512(b)(3) because, under I.R.C. § 1.48-4(a), broadcasting towers are treated as tangible personal property rather than real property.²¹³

Rent loses its characterization as passive, and thus its status as excluded income, if the organization provides substantial services to occupants. Furnishing heat and light, cleaning public entrances, providing parking lots, and collecting trash are not considered services rendered to the occupant.²¹⁴ Income from valet or maid services to particular occupants would be considered income from services. Similarly, the rental of a college or university facility to corporate business patrons for special events where the university provides food service would be subject to UBIT.²¹⁵ The IRS has ruled that the income from the lease of a university football stadium to a professional football team for several weeks during the summer months was subject to UBIT because maintenance, security, and linen services were provided to the team.²¹⁶ Parking lot revenues at a college or university stadium are generally regarded by the IRS as exempt rental income because of the lack of services. But if the space is dedicated to a particular payor who is responsible for the property, it may not be exempt, even without the provision of services.

Sales or Other Dispositions of Property; Options; Forfeiture of Deposits; Short Sales; etc. Except in the case of debt-financed property, gains or losses from the sale, exchange, or other disposition of property are excluded from the computation of UBTI, except for inventory-type property or property held primarily for sale to customers in the ordinary course of business.²¹⁷ There is no UBTI from gains or losses on the lapse

211. I.R.C. § 512(b)(3); Treas. Reg. § 1.512(b)-1(c) (as amended in 1992); I.R.S. Priv. Ltr. Rul. 95-51-019 (Dec. 22, 1995).

212. I.R.S. Priv. Ltr. Rul. 98-16-027 (Apr. 17, 1998).

213. I.R.S. Priv. Ltr. Rul. 2001-04-031 (Jan. 26, 2001).

214. Treas. Reg. § 1.512(b)-1(c)(5).

215. In I.R.S. Tech. Adv. Mem. 97-02-003, the IRS determined that a museum's rental of its facilities to corporate and business patrons for special events was not sufficiently related to the museum's educational purposes. The rent exclusion did not apply because the museum provided substantial services, including food and liquor, primarily for the convenience of the patrons. The same rationale would be applied to the rental of college and university facilities, including hotels. See I.R.S. Tech. Adv. Mem. 97-02-003 (Jan. 10, 1997).

216. See Rev. Rul. 80-298, 1980-2 CB.197.

217. See, e.g., I.R.S. Priv. Ltr. Rul. 96-19-069 (May 10, 1996) (no UBTI where a tax-exempt organization, whose purpose was to support the endowment of a school,

or termination of options to buy or sell securities in connection with the organization's investment activities, from gains or losses from options on real property, or from the forfeiture of good-faith deposits (consistent with established business practices) for the purchase, sale, or lease of real property.²¹⁸ There is no UBTI from the short sale of stock through a broker.²¹⁹

Income from Scientific Research. Income (and all related deductions) from research is excluded in the calculation of UBTI in the following situations: (1) income derived from research for the United States, or any of its agencies or instrumentalities, or any state or political subdivision thereof;²²⁰ (2) in the case of a college, university, or hospital, income derived from research performed for any person;²²¹ and (3) in the case of an organization operated primarily for purposes of carrying on fundamental research, the results of which are freely available to the general public, all income derived from research for any person.²²²

Technology transfer is an area that has caught the attention of the IRS. In 1982, the IRS held that a university foundation formed to transfer technology from nonprofit research institutions to private industry by obtaining patents, copyrights, and rights from researchers and licensing them to third parties was not a tax-exempt activity.²²³ Since then, the IRS has not provided much guidance on the taxation of technology transfer and its commercialization. The IRS has held in several private letter rulings that the transfer of technology from laboratory to public use was a tax-exempt activity and thus would not be subject to UBIT.²²⁴ Colleges and

subdivided and sold unimproved farm land to unrelated third parties at fair market value); I.R.S. Priv. Ltr. Rul. 97-04-010 (Jan. 24, 1997) (no UBTI where school participated directly or indirectly in partnerships created to finance infrastructure improvements and subdivide large land parcels with the hope of selling such parcels to real-estate developers); I.R.S. Priv. Ltr. Rul. 97-45-025 (Nov. 7, 1997) (sale of an apartment building). *See generally* I.R.C. § 512(b)(5).

218. I.R.C. §§ 512(b)(1), (5). However, the Senate Finance Committee and the IRS are looking into alternative investments including offshore hedge funds and private equity funds. In a recent inquiry, the Senate Finance Committee questioned the \$100 million of investments by the Boys and Girls Clubs of America in offshore funds registered in foreign countries investing in U.S. stocks and bonds for tax advantages.

219. *See* I.R.C. § 512(b).

220. *Id.* § 512(b)(7).

221. *Id.* § 512(b)(8).

222. *Id.* § 512(b)(9).

223. *See* Wash. Research Found. v. Comm'r, 50 T.C.M. (CCH) 1457 (1985). For a broad discussion of the tax issues regarding technology transfers by colleges and universities and their tax-exempt foundations, see Milton Cerny & Kelly Hellmuth, *Economic Crisis: Technology Transfer to the Rescue*, TAX'N OF EXEMPTS (May/June 2010).

224. I.R.S. Priv. Ltr. Rul. 85-12-084 (Dec. 31, 1984) (holding that a university assignment of a copyright to specialized research software for a percentage of gross income was not taxable); I.R.S. Priv. Ltr. Rul. 92-43-008 (Oct. 23, 1992) (holding that

universities also have used taxable subsidiaries to transfer research conducted at the institution that may have applied uses in the marketplace.²²⁵

F. Debt-Financed Income

Until the introduction of the UBIT, tax-exempt organizations enjoyed a full exemption from the payment of federal income tax. The Revenue Act of 1950 subjected charities to tax on their unrelated trade or business income but excluded from the tax certain forms of passive income. Charities could acquire property on credit with all financing provided by the seller and then lease the property back to the seller under a long-term lease and service the loan with tax-free rental income from the lease.²²⁶ Over the years, the IRS found that many tax-exempt organizations were making debt-financed acquisitions of going businesses. The IRS attempted to revoke the tax-exempt status of these organizations and require sellers to report their gains as ordinary income, but the courts ruled against the IRS on these issues.²²⁷

Fearing an erosion of the tax base, Congress expanded I.R.C. § 514 in 1969 to include UBTI from any passive investment income to the extent that the property generating income was acquired directly or indirectly with borrowed funds. Today, income from investments subject to acquisition indebtedness purchased by the exempt organization, in addition to investments subject to acquisition indebtedness contributed to the organization, are subject to UBIT under I.R.C. § 514(b).

The general rules excluding dividends, interest, royalties, rent, and proceeds from dispositions of certain property do not apply if the income is from “debt-financed” property—property subject to “acquisition indebtedness.”²²⁸ “Acquisition indebtedness” is debt incurred by an

an organization’s transfer of communication technology among public and private sectors lessened the burdens of government under § 501(c)(3) and such commercialization was not taxable); I.R.S. Priv. Ltr. Rul. 93-16-052 (Apr. 23, 1993) (holding that a governmental instrumentality conducting research in the public interest creating marketable technologies to develop industries to aid the economies of surrounding states was a charitable activity).

225. See I.R.S. Priv. Ltr. Rul. 96-04-019 (Jan. 26, 1996) (examining a § 501(c)(3) organization that exchanged all of its intellectual property rights in software technology for stock in a for-profit subsidiary); I.R.S. Priv. Ltr. Rul. 97-05-028 (Jan. 31, 1997); I.R.S. Priv. Ltr. Rul. 97-20-031 (May 15, 1997); I.R.S. Priv. Ltr. Rul. 2006-02-039 (Jan. 13, 2006).

226. In a famous case involving the New York University School of Law, a corporation that purchased and operated a macaroni company was held to be a tax-exempt organization. *Mueller Co. v. Comm’r*, 190 F.2d 120 (3d Cir. 1951). Congress enacted the feeder rules to deny exemption to such transactions. I.R.C. § 502. (2006).

227. See, e.g., *Comm’r v. Brown*, 380 U.S. 563 (1965); but see *Univ. Hill Found., etc. v. Comm’r*, 446 F.2d 701 (9th Cir. 1971).

228. I.R.C. §§ 512(b)-(c), 514. See *Henry E. and Nancy Horton Bartels Trust v. United States*, 209 F.3d 147 (2d Cir. 2000) (holding that the purchase of securities on

exempt organization to acquire or improve property that was either incurred before the purchase of the property or incurred after the property is acquired if the debt would not have been incurred but for the acquisition of the property.²²⁹ The amount of income reported as UBTI is generally determined by a ratio of the average amount of acquisition indebtedness during the taxable year to the property's average adjusted basis (including straight-line depreciation) during such taxable year.²³⁰ An important exemption from the debt-financed income rules is provided for certain indebtedness incurred in connection with the acquisition or improvement of real property by colleges and universities and their affiliated support foundations, pension plans, title-holding companies described in I.R.C. § 501(c)(25), or partnerships, all of whose partners are one of the foregoing or which meet rigid profit and loss allocation rules.²³¹ Property "substantially related" to the organization's exempt purpose is not subject to the debt-financed-property rules. Debt-financed-property rules do not apply to real property used by colleges and universities to carry out their tax-exempt functions.²³² If an exempt organization uses eighty-five percent or more of the debt-financed property for exemption-related purposes, the property will not be treated as debt-financed.²³³

G. Internet and Catalogue Sales

The extensive use of the internet by colleges and universities and other tax-exempt organizations has raised a number of issues, but to date there has been a paucity of guidance from the IRS. It was anticipated that the final sponsorship regulations under Treas. Reg. § 1.513-4 would include guidance on internet and catalogue sales. Those issues were, however, reserved for further consideration.²³⁴ The regulations, as discussed previously, did provide useful guidance on other issues of advertising and incidental benefit. But guidance on internet and catalogue sales has not been forthcoming since the IRS raised a series of questions that were to be incorporated into Treas. Reg. § 1.513-4 regarding sponsorships and

margin gave rise to UBTI).

229. I.R.C. § 514(c).

230. *Id.* § 514(a)(1); Treas. Reg. §§ 1.514(a)-1(a)(1), 1.514(a)-1(b)(2)(ii). As an example, a building with an adjusted basis of \$100,000 and acquisition indebtedness of \$50,000 generates \$10,000 in rent. The debt/basis ratio is fifty percent (\$50,000/\$100,000); \$5,000 of the \$10,000 income is taxable.

231. I.R.C. § 514(c)(9); Treas. Reg. § 1.514(c)-2. *See* Priv. Ltr. Rul. 95-10-040 (Dec. 9, 1994).

232. Rev. Rul. 55-676, 1955-2 C.B. 266; Rev. Rul. 81-19, 1981 C.B. 533; *see also* I.R.C. § 514(c)(9) (special exception for debt-financed real estate of schools).

233. This exception also applies to certain activities that are exempt from the UBIT such as research under I.R.C. §§ 512(b)(7) and (9) and under the voluntary-work and thrift-store exceptions under I.R.C. § 514(b)(1)(D).

234. *See* T.D. 8991, 2002-1 C.B. 972.

unrelated trades or businesses.²³⁵ The FY 2000 Exempt Organizations Technical Training Program article, "Tax Exempt Organizations and World Wide Web Fund Raising and Advertising on The Internet," raised a number of red flags in this area.²³⁶ The IRS, in Private Letter Ruling 1997-23-046, caused further confusion regarding the parameters allowed to a sponsor's page, converting what would be an acknowledgement of a sponsor into potentially taxable advertising.

If a website is being used to create a periodical, then there is a question of whether the exception for an acknowledgement of a sponsor that is not subject to UBIT in "printed material" that is distributed in connection with a specific event under I.R.C. § 513(i) would also apply to an acknowledgement on a website. It would appear that this restriction should not apply to a website acknowledgement of a sponsor. Thus, the determination of UBIT derived from the sale of advertising in exempt organization periodicals under Treas. Reg. § 1.512(a)-1(f) would also seemingly not apply.²³⁷ Therefore, while the IRS has not ruled on this matter, websites should not be seen as periodicals coming under the restrictions imposed on acknowledgements by I.R.C. § 513(i).²³⁸ A hyperlink, with no advertising, posting the name and address of a for-profit business on an I.R.C. § 501(c)(3) organization's website was a "qualified sponsorship" and not subject to UBIT.²³⁹ Where, instead, a tax-exempt organization "endorses" the business sponsor's product, such endorsement is advertising and not a qualified acknowledgement of the sponsorship.²⁴⁰

Providing a link to a business vendor on the educational organization's website for a fee may be UBTI depending on whether or not the sale of goods or services is related to the organization's tax-exempt purposes. If the services or products are not related, then the question might be whether the fee comes under the exception for the exploitation of an intangible such as the royalty exclusion from UBTI under I.R.C. § 512(b)(2). The IRS has not ruled on whether the sale of educational courses on the internet is a related activity. However, there should not be a reason to treat fees from these sales any differently from those fees derived from providing educational programs under Treas. Reg. § 1.501(c)(3)-1(d)(3). Similarly, e-mail list rentals would be treated in the same way as mailing lists under I.R.C. § 513(1)(b) and thus should not be subject to UBIT.

Finally, there is some uncertainty on the question of when an institution serves as an internet service provider and what tax effect it will have. This

235. *Id.*

236. See Cheryl Chasin et al., *Technical Instruction Program*, 2000 WL 34402221.

237. See I.R.S. Priv. Ltr. Rul. 2003-03-062 (Jan. 17, 2003) (Treas. Reg. § 1.512(a)-1(f) did not apply where an agricultural organization sold banner advertisements on its website).

238. See Treas. Reg. § 1.513-4(e).

239. *Id.* § 1.513-4(f), Ex. 11.

240. *Id.* § 1.513-4(f), Ex. 12.

issue appears to be a factual issue that depends on the group of end users being served and the context in which the services are offered. This issue arises when “electronic strips” or “charity malls” serve as a third-party website, hosting a collection of hyperlinks to online vendors. The charity mall encourages shoppers to purchase goods and services from featured vendors and agrees to pay a portion of the sales income to the exempt organization selected by the purchaser. In some instances, the payment over the fair market value of the articles is considered a contribution to the tax-exempt organization.²⁴¹ The IRS has issued private letter rulings that permit an income tax charitable deduction for the donation where the entity acts as the agent for the charity.²⁴² In either case, the income received by the exempt organization should be treated as an exploitation of the organization’s tax-exempt function resulting in a royalty payment, and as such, exempt from UBIT.

The IRS included several questions on the compliance questionnaire for colleges and universities regarding internet activities. Possibly, the information that is gathered through the questionnaire or the pending audits will lead to some additional guidance that will shed some light on these issues.

H. Partnerships, Limited Liability Companies, and S Corporations

Exempt organizations are permitted to be either general or limited partners in partnerships or members in limited liability companies (“LLCs”).²⁴³ If an exempt organization is a member of a partnership that regularly carries on a trade or business that is unrelated to the organization’s exempt purpose, it must include the unrelated taxable income of its partnership share and the deductions directly connected with that income.²⁴⁴ The IRS has required an exempt organization that participates in a general partnership to show that the tax-exempt purposes of the organization are served and that its interests are properly protected through guarantees, indemnities, and penalties that would prevent potential benefits to the limited partners. Additionally, the IRS considers “control” of the substantive functions of the partnership to be an important factor when the exempt organization or its affiliate is a general partner.²⁴⁵

241. *See, e.g.*, Rev. Rul. 85-184, 1985-2 C.B. 8.

242. *See* I.R.S. Priv. Ltr. Rul. 2002-28-001 (July 12, 2002); I.R.S. Priv. Ltr. Rul. 2001-42-019 (Oct. 19, 2001).

243. I.R.C. § 512(c)(1). *See also* Treas. Reg. § 1.512(c)-1 (regarding income and expenses includible in UBTI).

244. Internal Revenue Amendments, Pub. L. No. 103-66, § 13145(a)(1)-(3) (codified at I.R.C. § 512(c)(1)).

245. Rev. Rul. 98-15, 1998-1 C.B. 718; *Redlands Surgical Servs. v. Comm’r*, 113 T.C. 3 (1999) (judgment of exempt status for subsidiary in typically reorganized hospital system in California). *See* *St. David’s Health System v. United States*, 349 F.3d 232 (5th Cir. 2003); I.R.S. Priv. Ltr. Rul. 2005-48-026 (Dec. 2, 2005); Priv. Ltr.

S corporation stock owned by a charity is treated as an interest in an unrelated trade or business, regardless of whether it is related or unrelated to the organization's tax-exempt purpose.²⁴⁶ All pass-through income, including dividends, interest, and other passive income attributable to the exempt organization's shareholdings in the S corporation, is subject to UBIT as well as any gains from the organization's sale of the S corporation stock.²⁴⁷

I. Controlled Organizations

A tax-exempt college or university foundation may own a for-profit subsidiary with an independent business purpose.²⁴⁸ The exclusion from UBTI of interest, annuities, royalties, and rents (in the absence of acquisition indebtedness) does not extend to such income received from a "controlled organization."²⁴⁹

Control of a corporation means ownership by vote or value of more than fifty percent of the corporation's stock. For partnerships or other entities, control means ownership of more than fifty percent of the profits, capital, or beneficial interests. Control of non-stock corporations presumably will mean that more than fifty percent of the directors or trustees of the organization are representatives of, or directly or indirectly controlled by, the exempt organization. Under Treas. Reg. § 1.512(b)-1(1)(4)(i)(b), a trustee, director, agent, or employee of an exempt organization is a "representative" of that organization. The same regulations provide that an exempt organization controls any trustee or director that it has the power to remove or replace. The UBIT rules also apply to second-tier subsidiaries. Under I.R.C. § 512(b)(13), the constructive ownership rules of I.R.C. § 318 apply to determine control and ownership of interests. Thus, a parent college or university is deemed to control any subsidiary in which it holds

Rul. 2004-48-048 (Nov. 26, 2004) (control of partnership that owns and operates an MRI facility). *Plumstead Theatre Soc'y, Inc. v. Comm'r*, 74 T.C. 1324 (1980), *aff'd*, 675 F.2d 244 (9th Cir. 1982) (limited partners had no control over charitable general partner); *cf. Housing Pioneers v. Comm'r*, 65 T.C.M. (CCH) 2191 (1993), *aff'd*, 49 F.3d 1395 (9th Cir. 1995) (activities of co-general partner were so narrowly framed that for-profit partner was in a position of control with inappropriate private benefit).

246. I.R.C. § 512(e)(1)(A) (2006).

247. *Id.* § 512(3)(1)(B).

248. *See, e.g., I.R.S. Priv. Ltr. Rul. 97-20-036* (May 16, 1997) (§ 509(a)(2) charity established two for-profit subsidiaries); *I.R.S. Priv. Ltr. Rul. 97-22-032* (May 30, 1997) (spin-off of a for-profit affiliate and transfer of technology and employees to commercialize pharmaceutical products).

249. I.R.C. § 512(b)(13) (2006). Colleges and universities have lobbied to eliminate this tax on income from subsidiaries operated on their behalf. The purpose of the legislation is to prevent a tax-exempt organization from housing an unrelated business activity in a separate but controlled organization and receiving non-taxable income by reason of the passive income rules. Instead of granting relief, Congress reduced the percentage of control used to determine what a "controlled" organization is.

more than fifty percent of the voting power or value directly (as in the case of a first-tier subsidiary) or indirectly (as in the case of a second-tier subsidiary).

I.R.C. § 512(b)(13) also provides the method for determining how much of an annuity, interest, rent, or royalty payment made by a controlled subsidiary to a college or university parent is includible in the parent's UBTI. The payments are subject to UBIT to the extent the payment reduces the net unrelated income or increases the net loss of the subsidiary. This control test is based on the vote or value and the constructive ownership rules of § 318.

Congress further modified I.R.C. § 512(b)(13) in 2006 to add an exception for payments from controlled organizations that meet the requirements of I.R.C. § 482. This exception, made at the urging of the college and university community, applies only to payments made pursuant to a binding written contract in effect on the date of enactment (which was August 17, 2006). This special provision expired on December 31, 2009, and a one-year extension is currently pending as part of the package of "extenders" being considered by Congress.

J. Allocation of Expenses

The I.R.C. allows deduction of expenses from UBTI for all ordinary and necessary expenses incurred in carrying out the unrelated trade or business if the expense is directly connected with carrying out the business.²⁵⁰ The expense must be an allowable deduction under one of the business deductions allowed to businesses, and the expense must be directly connected to carrying on the unrelated trade or business.²⁵¹ If the expense item satisfies both tests and is attributable solely to the conduct of a trade or business, then it is fully deductible in calculating UBTI.

Dual-Use Expenses. Dual-use expenses are expenses incurred for both related and unrelated activities. An exempt organization must make a "reasonable" allocation of the expenses between those activities.²⁵² This is

250. *Id.* § 512(a)(1); Treas. Reg. § 1.512(a)(1); *see also* I.R.C. § 162; Treas. Reg. § 1.162-1.

251. For example, I.R.C. § 162 defines ordinary and necessary business expenses. I.R.C. § 165 allows deductions for losses and I.R.C. §§ 167 and 168 allows deductions for depreciation. *See also* Amer. Med. Ass'n v. U.S., 887 F.2d 760 (7th Cir. 1989) (holding that the directly connected test is met if the dominant reason for incurring the expense was to engage in an unrelated trade or business).

252. Treas. Reg. § 1.512(a)-1(c). *Rensselaer Polytechnic Inst. v. Comm'r*, 732 F.2d 1058 (2d Cir. 1983), is the leading case in the area. The college operated a field house for both educational and commercial uses. In determining the expenses allocable to the commercial use, the college used a three-part methodology of (a) direct expense, (b) variable expense dependent on the percentage of commercial use, and (c) fixed expenses that did not depend on use. The IRS argued that fixed expense percentage should be based on the ratio of commercial use time to total time available. The court

an important issue for colleges and universities that rent out their facilities to the public.

Treas. Reg. § 1.512(a)-1(c) provides that if assets or personnel of an exempt organization are employed both in an unrelated trade or business and in an exempt activity, there must be a reasonable allocation with regard to the deduction attributable to such assets or personnel between the two uses. The basis for a reasonable allocation depends on the facts of the individual case. In *Disabled American Veterans v. U.S.*, the court directed that allocations should be based on gross receipts.²⁵³ In *Rensselaer Polytechnic Institute v. Commissioner*, the court held that the allocation should be based on actual time of use.²⁵⁴

Direct or Indirect Expenses. “Direct” and “indirect” cost allocations have been at issue in several court cases, including *Rensselaer*, where the IRS attempted to assert its position that (1) indirect expenses for dual-use facilities must be directly connected to the unrelated activity to which they are allocated, and (2) the dual-use expense would not have been incurred but for that activity.²⁵⁵ The IRS announced in 2006 that it was developing a project to review the treatment and allocation of income and expenses for colleges and universities.²⁵⁶ While the project was to commence in 2008, to date the IRS has not published any further guidance. The IRS may be awaiting the results of the college and university compliance programs before announcing its position.

Aggregation of Deductions from Multiple Trades or Businesses. UBTI is calculated by aggregating the income and deductions attributable to all unrelated trades or businesses of an exempt organization.²⁵⁷ Thus, a loss resulting from a deduction from one unrelated trade or business can be used to offset income from another trade or business. However, if a particular business continually operates at a loss, the IRS in most cases will challenge the deduction of the losses under I.R.C. § 165 because the activity is not engaged in to make a profit.²⁵⁸ Net operating loss deductions are available in computing UBIT. These losses can be carried back two years

agreed with the college’s methodology and held that the time the facility was idle was part of the college’s tax-exempt use. While the IRS has never acquiesced in this decision, it is generally followed by the college and university community in allocating expenses for dual-use facilities.

253. *Disabled Am. Veterans v. United States*, 704 F.2d 1570 (Fed. Cir. 1983).

254. *Rensselaer*, 732 F.2d at 1058.

255. The government’s reasoning did not prevail in *Rensselaer. Id.*

256. IRS 2007 Exempt Organizations Workplan (2007), available at http://www.irs.gov/pub/irs-tege/fy07_teb_workplan.pdf.

257. Treas. Reg. § 1.512(a)-1(a).

258. See *W. Va. State Med. Ass’n v. Comm’r*, 882 F.2d 123 (4th Cir. 1989); I.R.S. Tech. Adv. Mem. 97-19-002 (May 9, 1997).

immediately preceding the loss year and, if not used up, can be carried forward twenty years.²⁵⁹ Under a special rule, net operating losses for any year, including carry-back or carry-forward, are determined regardless of whether or not they were taken into account in determining income or deduction for UBTI purposes.

K. Advertising

Advertising income is taxable as UBTI if it is in a publication that promotes an advertiser's services or products, and if it is "regularly carried on."²⁶⁰ Such advertising in a publication circulated to members "exploits" the exempt function of the organization even if the organization's exempt function is furthered by the circulation and distribution of the "readership content" of the publication.²⁶¹ If expenses of the exempt and non-exempt activities exceed the income of the exempt activity, some exempt expenses may be allocated to the non-exempt (advertising) activity, but a loss may not be created for carry-forward or carry-back purposes.²⁶²

If the advertising is profitable, after taking into account the direct costs of the advertising, the taxable profit may be further reduced (but to no more than zero) by the amount by which "readership costs" (the cost of producing and distributing the exempt activity readership content) exceed "circulation income" (the subscription income and/or the portion of dues attributable to receipt of the periodical).

Colleges and universities may sell commercial advertising (as described in I.R.C. § 513 rather than sponsorship acknowledgements under § 513(i)) in a variety of formats including student newspapers, professional journals, athletic programs, and the sponsorship or exclusive use of a business' products. Because the advertising is included in an otherwise related activity, the IRS will "fragment" a particular business activity, like a school newspaper or journal, into its component parts, some of which are related, like the editorial content, and others, like product advertising, that may be taxed as UBTI.²⁶³ An example from a student-operated campus newspaper is presented in Treas. Reg. § 1.513-1(d)(4)(iv), example 5. There, the

259. I.R.C. § 172 (2006).

260. See I.R.C. § 512; Nat'l Collegiate Athl. Ass'n v. Comm'r, 914 F.2d 1417, 1421-26 (10th Cir. 1990) (holding that the activity was not regularly carried on and therefore not taxable); see also Rev. Rul. 68-505, 1968-2 C.B. 248 (where the conduct of an activity for all or a significant portion of the typical commercial season satisfied the "regularly carried on" requirement).

261. United States v. Am. Coll. of Physicians, 475 U.S. 834 (1986) (holding that revenues from advertising in a scholarly journal were unrelated trade or business income because such advertising was not substantially related to the organization's exempt purposes).

262. Treas. Reg. § 1.512(a)-1(f)(3)(iii).

263. *Id.* § 1.513-1(b). An activity does not lose its identity as a trade or business merely because it is carried on within a larger aggregate of activities or endeavors that may or may not be related to the organization's tax-exempt purpose.

students solicited, sold, and published paid advertising in the campus newspapers under the instruction of the university.²⁶⁴ While the services provided to the advertisers normally would have constituted commercial advertising, the preparation and publication of the advertising contributed importantly to the university's educational program. Thus, the income was not UBTI.²⁶⁵

L. Substantiation

Both the IRS and the courts require substantiation rather than estimates of expenses. In Private Letter Ruling 1993-24-002, the IRS denied an allocated overhead deduction because the organization failed to justify its fifty-percent allocation rate. Colleges and universities should take note that, in connection with a compliance audit of the University of Michigan, the IRS disallowed virtually all of the direct expenses claimed by the University against its UBTI because the University could not prove that the amounts were expended for designated purposes. The indirect cost deductions were disallowed because they were not based on a reasonable method.²⁶⁶

Colleges and universities are also allowed to take charitable contributions as deductions, but they cannot exceed ten percent of the institution's UBIT as computed without the charitable contribution deduction.²⁶⁷ A specific deduction of \$1,000 is also allowed in computing UBTI.²⁶⁸

M. Controlled Foreign Organizations, Partnerships, and Operations

1. Overview

Many colleges and universities are involved in a complex web of international operations, partnerships, and investments. Educational institutions have established foreign campuses, international collaborative research, student activities, and strategic partnerships for various development activities. Providing these services requires the allocation of start-up funds and the support, management, and involvement of the institution's governing board. The planning and management aspects of

264. *Id.* § 1.513-1(d)(4)(iv), Ex. 5.

265. *Id.* In an interesting, related ruling, the IRS held in I.R.S. Tech. Adv. Mem. 1999-14-035 (Apr. 9, 1999) that even a separately incorporated organization publishing a daily university newspaper that had student journalists and faculty and solicited and published advertising was not subject to UBTI.

266. *Regents of Univ. of Mich. v. Comm'r*, No. 4625-95 (T.C. filed Mar. 21, 1995) (this case was settled prior to trial, and all of the expenses in question were allowed); for further discussion of this case, see BERTRAND M. HARDING, JR., *THE TAX LAW OF COLLEGES AND UNIVERSITIES* 64 (3d ed. 2008).

267. I.R.C. § 512(b)(10).

268. *Id.* § 512(b)(12).

the ventures are critical to the success or failure of any such projects.²⁶⁹

While it may seem obvious that the establishment of overseas branches is important to the U.S. economy, Congress has been skeptical about the sizable international operations of major colleges and universities that are in part subsidized by U.S. taxpayers, for fear that they may be undermining America's economic competitiveness. The concern is that these activities help other countries create and develop their own scientific and technological work force.²⁷⁰

Educators who testified before the House Committee on Science and Technology pointed out that the overseas programs expanded opportunities for talented students in other countries in the sciences, technology, engineering, and mathematics fields that might draw them to the United States because of the lack of interest by U.S. students in working for U.S. companies. These research programs also enable colleges and universities to attract resources from overseas governments and companies.

2. Doing Business Abroad

When a college or university chooses to directly engage in work abroad rather than to distribute grants or engage in other passive financial assistance, there is a whole host of issues that must be considered, such as the appropriate legal form for its presence in that country, either as an independent organization under the host country's laws, a subsidiary branch of the U.S. educational institution, or a branch with no separate status in the foreign country. Each option has its own set of issues.

For example, what are the reporting, labor, tax, and other implications of each? In the case of a parent college or university, what responsibilities must be exercised by the parent institution's board of trustees over the activities of the subsidiary organization overseas? Taxes and accounting procedures may be different for the foreign entity, for instance, the treatment of exempt status from value added tax ("VAT"), custom taxes, personal and corporate income taxes, profit, and business taxes. It is important to realize that most foreign countries have limitations regarding tax-exempt activities and do not recognize a related trade or business as does the United States. There are also certain practical issues, including whether the foreign country imposes taxes on in-kind contributions, donated labor, or donated equipment.

In some jurisdictions, grants to or from local donors, or to local individuals or non-governmental organizations ("NGOs"), may not be exempt from income tax by that country. If fees are charged to the host

269. See John Fielden, *Leading International Partnerships: 7 Roles for Presidents*, CHRON. HIGHER EDUC., July 18, 2010.

270. See Goldie Blumenstyk, *Overseas Branches are Vital to American Academe and the U.S. Economy, University Officials tell House Panel*, CHRON. HIGHER EDUC., (Wash., D.C.), July 27, 2007, at 26.

country or to other NGOs, they may be subject to the country's VAT. On the administrative side, there may be specific procedures and requirements for establishing employee residence or obtaining work permits for employees outside the country.

While operating overseas may be an appropriate way to carry out a university's tax-exempt purposes, there are a number of issues that must be considered. There are also United States rules and regulations that need to be observed. U.S. nonprofit organizations must be careful in granting funds to foreign charitable organizations. Tax-exempt educational institutions are subject to the Foreign Corrupt Practices Act.²⁷¹ Moreover, Executive Order 13224 prohibits transactions between a domestic charity and foreign organizations deemed by the federal government to be terrorist groups or individuals associated with such groups. Embargoed countries are listed by the Treasury Department of Foreign Asset Control.

The establishment of offshore activities serves a tax-exempt purpose for colleges and universities as well as our economy. However, care must be taken to understand the laws of the country where the operation takes place in order to weigh both the benefits and detriments of establishing an independent organization. There are many other options open to the college or university to provide assistance to foreign organizations, including "friends of" groups, donor-advised funds, program-related investments (PRIs), and direct grants to international organizations and foreign governments.²⁷²

N. Investment Structures to Avoid Unrelated-Business-Income Tax

There are two primary ways in which certain investments, typically those in some type of investment partnership such as a hedge fund, a fund of funds, or private equity fund, can generate UBTI. First, UBTI includes debt-financed income. If the charitable organization invests in a fund that is a partnership for federal tax purposes, and the fund borrows to make investments and generates income (i.e., is leveraged), the charitable organization will have to pay tax on its share of the income attributable to the debt-financed property. Second, if the fund is a pass-through entity and invests directly in a business that is operated as a pass-through entity, the income received by the fund from this operating business will be UBTI which will pass through to the charitable organization for federal income

271. See Mark Brzezinski, *Obama's Foreign Bribery Crackdown*, WASH. POST, May 28, 2010, at A23.

272. Lois Lerner, the IRS Director of Exempt Organizations, said that the IRS is looking at foreign entities that receive IRS recognition of exemption, and the IRS will publish a new publication describing special rules for domestic charities conducting overseas activities. See Diana Freda, *New Publication on International Compliance*, Daily Tax Rep. (BNA), Nov. 26, 2010, at G-3.

tax purposes.²⁷³

When considering these investments, a college or university must consider the effect of these possible taxes on the projected returns from the investment and must also determine what protections or options, if any, may be available to avoid or minimize any adverse tax consequences from UBTI. For instance, investment partnership agreements can prohibit the fund manager from making investments that generate UBTI or require the manager to use his or her “best efforts” to avoid or minimize UBTI.

Many funds are structured in a manner specifically designed to address the UBTI concerns of tax-exempt organizations. These are generally funds whose investments likely generate significant UBTI. Typically these funds use a “blocker corporation,” often created offshore in a jurisdiction that does not impose income taxes on corporations, so that a corporate-level tax is avoided for its tax-exempt investors. The tax-exempt investors invest in the blocker corporation, instead of the partnership vehicle, and the blocker corporation then invests in the investment partnership. This blocker corporation will distribute dividends, and the sale of the interest will generate gains, neither of which are UBTI to a tax-exempt organization (assuming no borrowing by the charitable organization to acquire the investment).²⁷⁴ The IRS has ruled favorably on the use of such an arrangement.²⁷⁵

The tax consequences of these types of investments, however, must be carefully considered as these structures can also cause the organization to incur taxes on income that would otherwise be exempt. While the blocker corporation is an effective method of eliminating UBTI for tax-exempt investors, other taxes could potentially be greater for a tax-exempt entity investing through a blocker corporation. Foreign corporations are generally subject to U.S. federal income tax on income that is “effectively connected” with the conduct of a trade or business in the U.S.²⁷⁶ Foreign corporations that are partners in a partnership are considered as being engaged in a trade or business within the U.S. if the partnership is so engaged.²⁷⁷ A foreign corporation is subject to U.S. federal income tax on its effectively connected income at the regular graduated rates applicable to U.S. corporations. In addition, a foreign corporation may be subject to the branch-profits tax at a rate of thirty percent.²⁷⁸ The branch-profits tax is basically a tax on the amount of the foreign corporation’s effectively connected income that is not reinvested in the U.S. If the foreign corporation is subject to the branch-profits tax, the effective tax rate on the

273. I.R.C. § 512(c)(1) (2006).

274. *Id.* § 512(b)(1), (5).

275. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 2003-15-028 (Jan. 13, 2003); I.R.S. Priv. Ltr. Rul. 2003-15-035 (Jan. 14, 2003).

276. I.R.C. § 882 (2006).

277. *Id.* § 875.

278. *Id.* § 884.

effectively connected income can be as high as 54.5%. Additionally, a U.S. private investment fund is required to withhold tax at the highest applicable marginal rate on the effectively connected income, including U.S. source interest and dividends, allocable to each foreign partner.²⁷⁹

A tax-exempt investor that invests directly in a U.S. partnership would only be taxed on the portion of effectively connected income that constitutes UBTI, and that tax is substantially lower than the 54.5% that a blocker corporation may have to pay. Furthermore, the tax-exempt investor would not be subject to any tax on non-debt-financed U.S. source interest and dividends.²⁸⁰

The United States' four-year, post-secondary educational institutions collectively held more than \$400 billion in endowment assets in 2008.²⁸¹ The United States Senate Finance Committee has expressed concern about investments of college and university endowments in overseas hedge funds, offshore tax shelters, and potentially risky investments. Before the market crash in 2008–2009, endowment managers were putting a larger percentage of their endowment funds into hedge funds and other alternative investments. The National Association of College and University Business Officers estimated that, in 2000, three unidentified colleges had invested forty to sixty percent of their endowments in hedge funds. The hedge fund craze continued to build when stock prices declined.²⁸²

That trend continued into 2008–2009 when we saw the collapse of the stock market, which resulted in the fall of major investment houses and banks that had invested in risky products composed of credit default swaps and other exotic products. Congress, the IRS, and the public have been concerned about the growth of college and university endowments and whether colleges and universities are engaged in charitable activities commensurate with their resources.

The Senate Finance Committee and the IRS began taking a closer look at college and university endowments and offshore investments that avoid federal taxes. Senator Grassley continues to express concern about these investments, and the college and university questionnaire specifically focused on these types of investments.²⁸³ Investments by college and

279. *Id.* § 1446.

280. In a letter dated August 16, 2010 to the House Ways and Means Committee, Senate Finance Committee, Treasury, and the IRS, the New York State Bar Association Tax Section recommended that Congress and the Treasury undertake a review of I.R.C. § 514 in order to determine whether the tax policy rationale for subjecting income from leveraged investments in securities and commodities to UBIT is appropriate today. The letter is on file with the author.

281. For a current discussion of the growth of college and university endowment, see U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 13.

282. See John L. Pulley, *Betting the Endowment on Risky Investments*, CHRON. HIGHER EDUC., Jan. 18, 2002, at A28.

283. Charles E. Grassley, *Wealthy Universities Must Make Themselves More Affordable*, CHRON. HIGHER EDUC., May 30, 2008, at A36 (directing comments at

university endowments through offshore hedge funds and private equity funds can be quite profitable, but they should only be engaged in with full knowledge that Congress is reviewing these relatively tax-free investments in their continuing search for funds to finance the U.S. Treasury. What Congress grants, it can also take away.

O. Conclusion

The primary objective of the UBIT was to eliminate unfair competition by placing unrelated business activities conducted by exempt organizations on the same tax basis as that of for-profit businesses. Since 1950, when the UBIT rules were originally introduced, it has not really accomplished its statutory purpose. Over the years, the small business community, led by a consortium of trade associations, has urged Congress to expand the scope of the UBIT rules and improve its enforcement at the IRS. However, Congress has not, up to this point, been willing to take on the challenge to restructure the UBIT. This may be due to lack of political will, or, more importantly, lack of empirical data.

As the IRS completes its study of college and university business activities, some of the analysis and information will provide useful substance for future legislation. But Congress will still have the same tax policy issues to deal with. That is, should taxpayers with equal income pay the same amount of tax? Is it unfair for the tax system to favor one competitor over another?

There has been a plethora of court cases and congressional modifications to the UBIT rules. However, there has not been a comprehensive analysis of the formulation of the UBIT since the House Ways and Means Draft Report in 1988.²⁸⁴ The following recommendations in the Draft Report could affect colleges and universities:

- Income from mail-order and catalog sales of bookstores would be treated as UBIT subject to certain exceptions that included sales of mementoes, T-shirts, and other items with the exempt organization's logo and costing less than \$15.00.
- Special exemptions for sales of goods to students with a retail price of \$15.00 or less, and for items with higher prices if the sales furthered educational programs and the articles were not common consumer goods. Books and computer software would be

colleges and universities with large endowments).

284. See SUBCOMM. ON OVERSIGHT OF THE HOUSE COMM. ON WAYS AND MEANS, 100TH CONG., DRAFT REPORT DESCRIBING RECOMMENDATION ON THE UNRELATED BUSINESS INCOME TAX (Comm. Print 1988). See also JAMES J. FISHMAN AND STEPHEN SCHWARZ, TAXATION OF NONPROFIT ORGANIZATIONS: CASES AND MATERIALS (3d ed. 2010); Thomas Troyer, *Changing UBIT: Congress in the Workshop*, 41 Tax Notes 1221 (Dec. 12, 1988).

exempted, but not appliances, cameras, television sets, VCRs, and recreational sports equipment. Exemptions for computer sales would be granted on the condition that the faculty member approved the purchase. (With the widespread use of computers, such sales with or without faculty approval would appear to be related).

- Health, fitness, exercise, and similar health-promotion activities costing a special fee would be subjected to UBIT.
- UBIT would not apply to income derived by a college or university from travel or tours conducted by the students and faculty, but only if the travel is related to a degree program curriculum.
- UBIT would not apply to income derived from food sales by a college or university for students, faculty, or employees, but only if it is provided on the institution's premises.
- Lodging-facilities income would be treated as UBTI when the facilities are used by the public, but not when they are used by students, faculty, or staff as dormitories or fraternity or sorority houses.
- Affinity credit card income or catalog and endorsement activities would be treated as UBTI. A number of these items were included in the college and university questionnaire issued by the IRS.
- Advertising income subject to UBIT could only be reduced by deductions associated with direct advertising costs.

The Draft Report also recommended that the UBIT convenience exception under I.R.C. § 513(a)(2) be repealed except for limited exceptions applicable to college and university dining halls and dormitories. The Draft Report went on to indicate that royalty income would be subject to UBIT whether measured by net or taxable income. There would be an exception for the licensing of a trademark or logo fostering name recognition, for certain non-property working interests, and for products directly related to the organization's tax-exempt function.

Two more significant recommendations that would apply to colleges and universities and on which the IRS is seeking more data in the current compliance review apply to controlled subsidiaries. The oversight subcommittee would have taxed the income of a non-exempt controlled taxable subsidiary as UBTI if the tax on such income would have been less than if the activity was carried on directly by the tax-exempt parent. This recommendation would have required the charity's taxable subsidiaries to pay tax at the level of the greater of (1) the amount computed under the normal corporate rates, or (2) the amount of UBIT that would have been paid if the activity were conducted in the parent charity.

Finally, the Report focused on the allocation of expenses and recommended, in the case of dual-use facilities, that the marginal costs

attributable to the taxable activity would only be deductible if the taxable use of the facility was twenty-five percent or less of the facility's total use time. If the taxable activity use percentage was between twenty-five and seventy-five percent of the total use time, costs (including depreciation and general administrative costs) would be allowable to the taxable activity based on a percentage of actual use. Over seventy-five percent use in a taxable activity would result in all costs being deductible except for marginal costs.

It is evident from the above recommendations and discussions that the IRS and Congress are focusing more on the exceptions and modifications under the UBIT rules as the reviews of the business activities of colleges and universities proceed. Congress has certain recommendations on "the shelf" and may be awaiting the final IRS review before finding potential avenues of revenue to reduce budget shortfalls. The UBIT area may become a real target for congressional action in the next session.

IV. CONCLUSION: COSTS AND BENEFITS

In this article we have discussed the technical tax rules and the historical reasons for the law as it applies to colleges and universities in two important areas—executive compensation and business activities. We have seen that both Congress and the IRS are anxious to determine whether tax-exempt educational institutions' activities serve a broad public purpose justifying the loss of revenues to the government from granting tax exemption.

There is no doubt that the public benefits from the activities conducted by colleges and universities that produce educated individuals, innovations for our economy, and improvement in the quality of our lives are all beneficial to the general public. The question is not whether we should periodically review these activities to determine whether the activities continue to serve the public good, but rather whether the cost, time, and funding expended by the government in obtaining information and by the institutions in preparing the necessary responses to the government requests are justified in today's climate of economic distress. Could those funds be better put toward tax-exempt purposes, and is the information gathered worth the cost?

It would appear from the experience of other IRS audit programs of colleges and universities that such costs may not be justified by the results that are produced. For example, the audits of colleges and universities conducted over a decade ago resulted in meager returns in enforcement by the IRS and costly expenditures by colleges and universities. In that large case audit program, the IRS focused on a broad range of issues that covered compensation and benefits, fundraising and contributions, qualification of activity bonds, contracts, research, scholarships, related entities, investment activities, and corporate sponsorships. These areas are similar in many respects to those being examined today. In the earlier examinations, a wide

variety of documents and financial information was requested.²⁸⁵ Teams of IRS agents converged on college and university campuses for several years. It was reported that at least fifty or more colleges and universities were under a coordinated examination program,²⁸⁶ but the IRS never issued a published report on the results of those examinations and its findings.

What was the result of these audits? What new regulations came into being as a result? How much tax was collected? While there have been reports issued by associations of institutions and practitioners representing specific colleges and universities, it would appear that most examinations resulted in minimal tax revenue, and that much of that tax was from non-compliance involving failure to report or pay employment taxes. If clarification of the rules on executive compensation and a rational approach to the unrelated trade or business income tax is the result, then, and only then, can it be said that this program is worth the time, money, and effort.

285. For a detailed discussion of that program, see Milton Cerny and E. Mallon, *Extensive New IRS Audit Guidelines Intensify Scrutiny of Colleges and Universities*, 78 J. OF TAX'N, No. 5, at 299 (May 1993). See also R. Switzer, *New IRS Guidelines Target College and University UBIT*, 21 J.C. & U.L. 489 (1995).

286. See Marlis L. Carson, *IRS Officials Discuss Proposed University Audit Guidelines*, 7 EXEMPT ORG. TAX REV. 177 (1993); see also HARDING, JR., *supra* note 262, at ch. 10 (discussing audits of colleges and universities).

PENUMBRAL ACADEMIC FREEDOM: INTERPRETING THE TENURE CONTRACT IN A TIME OF CONSTITUTIONAL IMPOTENCE

RICHARD J. PELTZ*

INTRODUCTION	159
A. The False Promise of Tenure?	160
B. The Problem with Academic Freedom, and a Proposal	162
I. THE THREAT TO ACADEMIC FREEDOM	163
II. INTERPRETING THE TENURE CONTRACT TO DESCRIBE PENUMBRAL ACADEMIC FREEDOM.....	174
A. Academic Freedom and the 1940 AAUP Statement of Principles	174
B. The “Proposed Interpretation Concerning Closely Related Activities”	177
III. CONCLUSION	184

INTRODUCTION

This article recounts the deficiencies of constitutional law and common tenure-contract language—the latter based on the 1940 Statement of Principles of the American Association of University Professors¹—in protecting the academic freedom of faculty on the modern university campus. The article proposes an Interpretation of that common language, accompanied by Illustrations, aiming to describe the penumbras of academic freedom—faculty rights and responsibilities that surround and emanate from the three traditional pillars of teaching, research, and service—that are within the scope of the tenure contract but not explicitly described by it, and therefore too readily subject to neglectful interpretation. This proposal means thus to provide more comprehensive protection for academic freedom at a time when the constitutional concept is near defunct, and thus more broadly to realize, through proper

* Richard J. Peltz, J.D., is a professor of law. This work was completed with the assistance of a grant from the University of Arkansas at Little Rock, William H. Bowen Law School.

1. 1940 Statement of Principles on Academic Freedom and Tenure, *in* AAUP POLICY DOCUMENTS & REPORTS 3 (10th ed. 2006).

understanding of the written tenure contract, the ideal of the university as the quintessential marketplace of ideas.

A. The False Promise of Tenure?

For what could you, the tenured professor, be fired? What line are you not permitted to cross?

In the spring of 2007, I was told by my law school² that I would be fired if I did not drop my private civil action for defamation against local attorneys and recent alumnae.³ The lawsuit grew out of accusations of racism (and underlying false factual assertions) against me after I took the “anti” position in a campus debate on affirmative action, at the invitation of the Black Law Students Association.⁴ It would be fine, the dean explained, for a professor to sue a former student in a case of physical injury. But the university would not abide a tort suit predicated on reputational harm.⁵

I suspect the university’s demand had more to do with public relations than the merits of my cause. Such is our society’s view of litigation⁶ that rarely does anyone, party or not, look good in connection with a lawsuit, and neither I nor the university looked good.⁷ I had sued only as a last resort, after the university rebuffed my repeated entreaties for internal redress.⁸ I deliberately had declined to pursue a cause of action against the

2. Personal meeting with Charles W. Goldner, Jr., Dean, William H. Bowen School of Law, University of Arkansas at Little Rock, Little Rock, Ark., June 17, 2008.

3. Second Am. Compl., *Peltz v. Nation*, No. CV 2008-2530 (Pulaski County Cir. Ct. filed June 10, 2008).

4. *Id.* ¶¶ 14–15, 19, 21–27, 35–36 & ex. 3. In the social-science parlance, which borrows a term from ornithology, I was “mobbed.” Also called workplace bullying, this phenomenon has been studied extensively, particularly in the academic context, by Professor Kenneth Westheus, who maintains an unparalleled web site rounding up the research. See Kenneth Westheus, *Workplace Mobbing in Academe*, <http://kwesthues.com/mobbing.htm> (last visited Oct. 14, 2009). See generally, e.g., KENNETH WESTHEUS, *THE ENVY OF EXCELLENCE: ADMINISTRATIVE MOBING OF HIGH-ACHIEVING PROFESSORS* (2006); John Gravois, *Mob Rule*, *CHRON. OF HIGHER EDUC.*, Apr. 14, 2006, at A10. My lawsuit was an instance of the “boomerang” effect, which in the vocabulary of mobbing describes the mob target who fights back. See Brian Martin, *The Richardson Dismissal as an Academic Boomerang*, in KENNETH WESTHEUS, ED., *WORKPLACE MOBING IN ACADEME: REPORTS FROM TWENTY UNIVERSITIES* 317 (2004).

5. Personal meeting with Goldner, *supra* note 2.

6. See generally, e.g., WILLIAM HALTOM & MICHAEL McCANN, *DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS* (2004).

7. See, e.g., Editorial, *End this Farce: The Law School Follies of '08*, *ARK. DEMOCRAT-GAZETTE*, Mar. 19, 2008, at A18 (criticizing both parties in case). Perhaps as one ought to expect, news coverage tended to play up the conflict as “professor sues students,” à la “man bites dog,” with sparse explanation of the facts. See, e.g., Lynnley Browning, *Law Professor Accuses 2 Students of Defamation*, *N.Y. TIMES*, May 1, 2008, at A21. *The New York Times* furthermore never reported the resolution of the matter.

8. In retrospect, the university’s refusal to negotiate before I instituted a lawsuit was likely the product of precisely the calculation posited in the mobbing literature, see

university so as to minimize the impact of the case on the school, on my students (many of whom were defiantly loyal, as it turned out), and on my colleagues (who were not, with a few commendable exceptions). But for all my caution, the university to which I had been loyal for a decade leapt into the fray anyway, apparently without regard for my freedom of petition, or for my legal interest in tenure.

The non-party university, almost all of the defendants, and I reached a settlement shortly after the threat to my employment.⁹ I am grateful to the cooler heads within the bureaucracy who facilitated that outcome. The university at last provided me with a letter stating that despite charges leveled inside and outside the school, I had done nothing wrong.¹⁰ I dismissed the lawsuit,¹¹ and I continue to be a productive member of a largely chilly faculty.

But now I am left to wonder what freedom I have. I doubt every action, every word. I have steered clear of overtly political issues in my extensive work on behalf of state legislators. I have resigned my memberships in both the ACLU and the Federalist Society. I skipped a lecture by Charles Murray when he visited a nearby historically black college. Murray is co-author of the controversial *Bell Curve*,¹² and more recently author of *Real Education*,¹³ which challenges the conventional wisdom of four-year college for everyone, among other sacred cows. I was afraid that my presence at his talk would have been perceived as an endorsement of his positions on affirmative action, or on education, or on anything that might precipitate another round of attacks on my reputation and career.

The chilling effect is worse in my capacity as an educator. Though having served in the past as adviser of the student Federalist Society and ACLU chapters, I have more recently refused to be a faculty sponsor. I

supra note 4, by which administrators have more to lose siding with a mob target than by siding with the mob. See Presentation, Joan E. Friedenberg, Mark A. Schneider, & Kenneth Westheus, *Mobbing as a Factor in Faculty Work Life*, American Association of University Professors International Conference, Washington, D.C., June 13, 2009, overview available at <http://kwesthues.com/mobbing.htm> (last visited Oct. 14, 2009). See generally Joan Friedenberg, *The Anatomy of an Academic Mobbing*, in KENNETH WESTHEUS, ED., *THE ANATOMY OF AN ACADEMIC MOBBIING: TWO CASES* (2008).

9. See Scott Jaschik, *What You Can't Win in Court*, INSIDER HIGHER ED, Nov. 17, 2008, <http://www.insidehighered.com/news/2008/11/17/ualr> (last accessed Apr. 28, 2009); Debra Cassens Weiss, *Law Prof Drops Defamation Suit against Students over Racism Claims*, ABA J., http://www.abajournal.com/news/-law_prof_drops_defamation_suit_against_students_over_racism_claims/ (last accessed Apr. 28, 2009).

10. Letter from John M.A. DiPippa, Interim Dean, William H. Bowen School of Law, University of Arkansas at Little Rock, to author, Oct. 2, 2008, at 1–2 (copy on file with author).

11. Orders, *Peltz*, No. CV 2008-2530 (signed Oct. 22, 2008).

12. RICHARD J. HERNSTEIN & CHARLES MURRAY, *BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1996).

13. CHARLES MURRAY, *REAL EDUCATION: FOUR SIMPLE TRUTHS FOR BRINGING AMERICA'S SCHOOLS BACK TO REALITY* (2008).

have declined to participate on panels organized by students on current issues and events in politics. I worry about class discussions on issues such as hate speech and race discrimination, for fear that someone will perceive a slight and claim a civil-rights violation. I close doors and speak to students in hushed tones when they seek advice on matters that might displease the university, such as *U.S. News* rankings, or transfer to another law school that might better suit their needs. I refuse to intervene when they are wronged by the same sort of allegations that were wrongfully leveled against me. I write *this text* only with trepidation.

And I am not alone. The lesson of my experience was not lost on untenured, junior faculty at my school, who turned my name into a verb. Behind closed doors, to be “Peltzed” is to have complaints of political incorrectness made against you, and then to have school administrators and colleagues gang up with your accusers and join in the pummeling.¹⁴ If Peltz—a tenured, productive full professor, and winner of excellence awards in teaching, research, and service—could be *fired* for First Amendment-protected activity outside the law school, what hope is there for the tenure prospect? At least one of the political-issue panels that I refused to join never materialized because none of the junior faculty was willing to risk it.

It’s not easy to be an effective educator when your employer does not have your back.

I was taught, some time ago, that the university is the quintessential marketplace of ideas.¹⁵ I am no longer certain that that was ever true. What I do know now is that if that maxim is desirable even as an ideal, the current legal framework for academic freedom is insufficient to get us there. The purpose of this article is to start changing that.

B. The Problem with Academic Freedom, and a Proposal

If the university is the quintessential marketplace of ideas, then academic freedom is the legal and theoretical guarantee that keeps the marketplace open for business.¹⁶ Accordingly, “[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.”¹⁷

Nevertheless, recent legal developments have cast serious doubt on whether academic freedom has a constitutional dimension. The (so-called) judicial activism of the civil-rights era having abated, the courts have been busy about the business of mapping and marking the boundaries of an

14. Transcript of Meeting of Faculty, William H. Bowen School of Law, University of Arkansas at Little Rock, Little Rock, Ark., Feb. 5, 2009 (copy on file with author).

15. *See, e.g., Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

16. *See, e.g., id.*

17. *Id.*

expanded, but finite, First Amendment freedom of expression. Amid this impotence, or omission of constitutional potential (pressed substantially from the right), coincident with a vigorous effort to enforce an official orthodoxy in U.S. higher education (inversely and ironically, pressed substantially from the left), the limits and inadequacies of the academic tenure contract are being exposed. Thus bereft of constitutional, contractual, and philosophical underpinning, academic freedom is unraveling.

This article posits one approach, a start, to rescue and restore the protection afforded academic freedom in the tenure contract by positing a free-expression-friendly interpretation of its terms. Using the 1940 AAUP Statement of Principles,¹⁸ which provides the language from which university tenure contracts are overwhelmingly drawn, this article proposes an Interpretation, and accompanying Illustrations, to encourage, if not require, administrative and judicial construction of the contractual language in a manner that modernizes the tenure contract to afford adequate protection for academic freedom. Where the tenure contract drawn on AAUP principles focuses on the core professorial functions of teaching, research, and service, the Interpretation aims to describe the penumbras—disconcertingly wide spaces that lie between these three core pillars—in which can be found myriad responsibilities that faculty actually fulfill. Notable among these penumbral responsibilities is the function of faculty governance, to which freedom of expression and inquiry is essential.

I. THE THREAT TO ACADEMIC FREEDOM

Academic freedom traces its roots in Supreme Court case law to the McCarthyist investigation and loyalty-oath cases involving academics—namely, *Sweezy v. New Hampshire* and *Keyishian v. Board of Regents*.¹⁹ Both generated generous dicta on the essentiality of academic freedom to the First Amendment ideals of freedom of expression, thought, and conscience, but neither case was decided on grounds of academic freedom specifically. The concept subsequently escaped articulation in the civil-rights era as any sort of rule. The eloquent dicta of those cases has been quoted many times in Court decisions in the decades since—notably in *University of Pennsylvania v. EEOC* and *Grutter v. Bollinger*²⁰—but academic freedom has continued to haunt opinions as dicta only, never taking the more corporeal form of doctrine.

18. 1940 Statement of Principles on Academic Freedom and Tenure, *supra* note 1, at 3.

19. *Keyishian*, 385 U.S. 589; *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

20. *Grutter v. Bollinger*, 539 U.S. 306, 324, 329 (2003) (relying in part upon academic freedom to support compelling university interest in diverse student body achieved through affirmative action); *University of Pa. v. EEOC*, 493 U.S. 182, 195–202 (1990) (declining to articulate First Amendment right upon “so-called academic-freedom cases” vis-à-vis imposition on university of EEOC subpoena).

Despite the apparently continuing confidence of a Court majority that the First Amendment animates some sort of academic-freedom right, courts and scholars have lately doubted whether academic freedom in fact carves out any discrete zone of liberty protected in constitutional law.²¹ At a 2007 panel of the annual conference of the Association of American Law Schools,²² Professor Van Alstyne, a renowned constitutional scholar, described three threads of High Court First Amendment case law that cast serious doubt on the future viability of academic freedom as a constitutional concept.²³ First, the U.S. Supreme Court's jurisprudence on employee speech suggests that a public employee acting within the scope of employment enjoys no First Amendment protection vis-à-vis the government employer.²⁴ Second, the Court's jurisprudence in government funding suggests that a recipient of government funds may be constrained to speak only in accordance with the terms of the funding.²⁵ Third, the Court's jurisprudence in government speech suggests that public institutions themselves enjoy a prerogative to speak their own institutional viewpoints,²⁶ and some courts have elevated First Amendment protection for institutions over the liberty of individuals within institutions.²⁷

Leading the charge in these veins of doubt is the Court doctrine in public-employee speech.²⁸ No First Amendment case has kindled more

21. See generally, e.g., R. George Wright, *The Emergence of First Amendment Academic Freedom*, 85 NEB. L. REV. 793 (2007).

22. Academic Freedom, Plenary Program, AALS, Washington, D.C., Jan. 4, 2007; see Elia Powers, *A Freewheeling Academic Freedom Debate*, INSIDE HIGHER ED, Jan. 5, 2007.

23. William W. Van Alstyne, Academic Freedom, Plenary Program, AALS, Washington, D.C., Jan. 4, 2007.

24. *Id.* (discussing *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006)). The *Garcetti* Court expressly reserved the question of employee-speech doctrine in the academic context. *Garcetti*, 126 S. Ct. at 1962; see also *id.* at 1963, 1969–70 (Souter, J., dissenting).

25. Van Alstyne, *supra* note 23 (discussing *Rust v. Sullivan*, 500 U.S. 173 (1991)).

26. *Id.* (discussing *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005)).

27. E.g., *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000). See generally Richard Fossey & Joseph C. Beckham, Commentary, *University Authority Over Teaching Activities: Institutional Regulation May Override a Faculty Member's Academic Freedom*, 228 ED. L. REV. 1, 21–22 (2008) (finding academic freedom an institutional and not individual faculty prerogative in context of classroom instruction); Richard H. Hiers, *Institutional Academic Freedom or Autonomy Grounded Upon the First Amendment: A Jurisprudential Mirage*, 30 HAMLINE L. REV. 1 (2007).

28. As the most important doctrine of the three, only the employee-speech doctrine is discussed here in greater depth. All of these doctrines present essentially the same problem, viewed through different prisms: when does the role of Government transform from that of regulator, subject to the full strictures of the First Amendment, to that of competing actor in the private marketplace of ideas—as employer, benefactor, or speaker—precluding full-throttle application of the First Amendment? The threshold test of the employee-speech doctrine, discussed *infra*, is but one way to ask the question. It is no wonder that these are difficult cases, resulting in five-to-four

debate over academic freedom in recent memory than a case in this area, *Garcetti v. Ceballos*.²⁹ *Garcetti* joined the classic trio of cases used to teach employee-speech doctrine for now more than twenty years: *Pickering v. Board of Education*, *Connick v. Myers*, and *Rankin v. McPherson*.³⁰ The *Pickering* test asks as a threshold matter “whether the employee spoke as a citizen on a matter of public concern.”³¹ If the answer is no, then the First Amendment is generally not implicated.³² The Government acts much as a private employer, and not in its capacity as regulator; procedural due process may apply, but not its substantive counterpart.³³ If the answer is yes, then the First Amendment is implicated, and the test of the merits is the *Pickering* balancing test.³⁴ This test balances “the interests of the [employee], as a citizen, in commenting upon matters of public concern[, against] the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”³⁵

The role of the speaker as citizen or employee, and the matter as one of public or private concern, is as often as not in the eye of the beholder.³⁶ A fundamental problem that has always lurked behind application of *Pickering* arises in the threshold test. The tension was evident in *Garcetti*,

decisions in cases such as *Rankin v. McPherson*, 483 U.S. 378 (1987), and *Connick v. Myers*, 461 U.S. 138 (1983) (reaching opposite conclusions in government-as-employer cases); *Legal Services Corp. v. Velasquez*, 531 U.S. 533, and *Rust v. Sullivan*, 500 U.S. 173 (1991) (reaching opposite conclusions in government-as-benefactor cases); and six-to-three and five-to-four decisions respectively in *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457 (1997), and *United States v. United Foods*, 533 U.S. 405 (2001) (reaching opposite conclusions in government-as-speaker cases).

29. 547 U.S. 410 (2006); see, e.g., Susan P. Stuart, *Citizen Teacher: Damned if You Do, Damned if You Don't*, 76 U. CIN. L. REV. 1281, 1281–82 (2008) (observing that “*Garcetti v. Ceballos* is becoming one of the most-used cases in its mere two-year history,” and that “bad management practices now seem to trump the First Amendment. Such practices have school boards discharging teachers and administrators for speaking out—truthfully—on matters of fiscal mismanagement, student discipline, and similar school district problems,” and describing *Garcetti* as “perhaps one of the most extraordinarily ill-considered—and short-sighted—opinions penned by the United States Supreme Court in recent years”).

30. *Rankin v. McPherson*, 483 U.S. 378 (1987); *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

31. *Garcetti*, 547 U.S. at 418 (citing *Pickering*, 391 U.S. at 568).

32. E.g., *id.* (citing *Connick*, 461 U.S. at 147). Whether there is any modest role remaining for the First Amendment when the government acts as employer is disputed. Dissenting in *Garcetti*, Justice Stevens wrote that the answer is “[s]ometimes,” not “never,” and suggested that the Government’s position should not be justified when the speech is “unwelcome [merely] because it reveals facts that the supervisor would rather not have anyone else discover[.]” *Id.* at 426 (Stevens, J., dissenting) (citing whistleblower cases in the circuits).

33. E.g., *id.*

34. E.g., *id.* (citing *Pickering*, 391 U.S. at 568).

35. *Connick v. Myers*, 461 U.S. 138, 140 (1983) and *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968), quoted in *Rankin v. McPherson*, 483 U.S. 378, 384 (1987).

36. Cf. *supra* note 26 and accompanying text.

Rankin, and *Connick*, all five-to-four decisions, with the “public concern” question at issue every time.³⁷ *Connick*, for example, was a case about an assistant district attorney’s controversial questionnaire about office politics and politics in the office. ADA Myers prevailed on the “public concern” inquiry as to some, but not many, of the items on her questionnaire; she would have had to win all of her points to invalidate the employment action, a transfer, to which she objected. Justice Brennan complained in dissent that as a matter of “hornbook law,” “speech about ‘the manner in which government is operated’ is an essential part of the communications necessary for self-governance the protection of which was a central purpose of the First Amendment.”³⁸ The Court, in contrast, seemed persuaded by the Government’s case because ADA Myers’ “questionnaire emerged after a persistent dispute between [her and her boss] over office transfer policy.”³⁹ The threshold test thus formulated does not seem to admit of employee expression that might simultaneously further the public interest *and* the speaker’s own employment interests.

The classic conundrum arises in the case of a whistleblower. Even Justice Brennan in *Connick* reasoned that the questionnaire “did not adversely affect the operations of the District Attorney’s Office or interfere with Myers’ working relationship with her fellow employees[.]”⁴⁰ In the case of the whistleblower—giving the speaker the benefit of the doubt—the expression is a matter of public concern, but might well interfere with working relationships. Indeed, the termination of a malfeasant co-worker may be a whistleblower’s very purpose. Thus Justice Stevens, dissenting in *Garcetti*, contended that government-as-employer is sometimes, but not always, dispositive of First Amendment application, and he cited a number of circuit-court whistleblower cases.⁴¹ In *Garcetti*, deputy district attorney Ceballos suffered adverse employment action after he alleged government misconduct in a case. Because he spoke out on a matter within his purview as a public official, the Court classified him as employee-speaker rather than citizen-speaker, and therefore the Government as employer rather than regulator. The position of the *Garcetti* majority was plain: whistleblowers should seek protection in the legislatures.⁴²

The problem of *Pickering*—especially after *Garcetti* restated the

37. *E.g.*, *Garcetti v. Ceballos*, 547 U.S. 410, 427 (Stevens, J., dissenting) (rejecting a “categorical difference between speaking as a citizen and speaking in the course of one’s employment”); *Rankin*, 483 U.S. at 394 (Scalia, J., dissenting) (accusing majority of “irrationally expand[ing] the definition of ‘public concern’”); *Connick*, 461 U.S. at 156 (Brennan, J., dissenting).

38. *Connick*, 461 U.S. at 156 (Brennan, J., dissenting).

39. *Id.* at 154.

40. *Id.* at 156 (Brennan, J., dissenting).

41. *Garcetti*, 547 U.S. at 426 & n.*.

42. *Id.* at 425–26.

threshold test as one of “official duties” in a whistleblower context⁴³—is especially problematic for academics. What sets the academic at a public college or university apart from other public officials is that the academic’s job *is* free expression: expression in teaching, in research, and in the course of public service. The ideal of academic freedom, whether or not a legal concept, means to afford the academic independence from the employer in the conduct of this expression. In teaching, the independence of the classroom instructor from any “pall of orthodoxy” has been a recurring theme in Supreme Court dicta.⁴⁴ In research, credibility and reliability depend on independence—for example, favorably distinguishing the drug research of an academic institution from that of a profit-driven pharmaceutical maker. And in service, the independence of the academic is what makes him or her the impassive source to whom legislative committees, news media, and research organizations turn for expert opinions.⁴⁵

In all of these tasks, the academic is performing “official duties.” The *Pickering-Garcetti* line of cases seems thus to strip academics of any constitutional protection, unless academic freedom is—as the Supreme Court has never held that it is or is not—an independent constitutional concept. Justice Kennedy, writing for the Court in *Garcetti*, and responding to the dissent of Justice Souter,⁴⁶ cautioned:

There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case

43. What I characterize here as a restatement is often, and arguably better, rendered as the creation of a second threshold test, such that the original *Pickering* threshold tests for “public concern,” and the *Garcetti* threshold tests for “official duties.” The employee may invoke the First Amendment only upon a matter of public concern that also is not within the scope of official duties. *E.g.*, *Davis v McKinney*, 518 F.3d 304, 311–12 (5th Cir. 2008) (“*Garcetti* added a threshold layer to our previous analysis.”), *quoted in* Paul M. Secunda, *Garcetti’s Impact on the First Amendment Speech Rights of Federal Employees*, 7 *FIRST AMEND. L. REV.* 117, 125 n.35 (2008).

44. *Keyishian*, 385 U.S. at 603, *quoted in, e.g.*, *Garcetti v. Ceballos*, 547 U.S. 410, 438 (Stevens, J., dissenting).

45. *E.g.*, Kevin L. Cope, *Defending the Ivory Tower: A Twenty-First Century Approach to the Pickering-Connick Doctrine and Public Higher Education Faculty After Garcetti*, 33 *J.C. & U.L.* 313, 314 (2007) (explaining how higher education faculty “are unique”: “Unlike primary and secondary teachers, whose principal duty is intra-institutional knowledge dissemination, major public college and university faculty members’ primary duty is the creation and *public*, i.e., *extra*-institutional, dissemination of knowledge.” (emphasis in original)).

46. *Id.* at 439 (Souter, J., dissenting).

involving speech related to scholarship or teaching.⁴⁷

Meanwhile, absent a ruling on point, academics are left to look elsewhere to build a foundation for academic freedom. Like whistleblowers, they must turn to protections of statute—largely non-existent in the academic-freedom area—or of the employment contract.

A recent *First Amendment Law Review* symposium⁴⁸ focused on *Garcetti*, and two authors wrote specifically on the implications for academic freedom.⁴⁹ Robert M. O’Neil, founding director of the Thomas Jefferson Center for Freedom of Expression and president emeritus of the University of Virginia, described the case of Juan Hong, a tenured University of California-Irvine professor who claimed in a lawsuit that he

47. *Id.* at 425.

48. Symposium: Public Citizens, Public Servants: Free Speech in the Post-*Garcetti* Workplace, 7 *FIRST AMEND. L. REV.* 1 (2008); *see also* Symposium on Academic Freedom, 33 *J.C. & U.L.* 245 (2007); Symposium: Horowitz, Churchill, Columbia—What Next for Academic Freedom?, 77 *U. Colo. L. Rev.* 841 (2006); Robert C. Cloud, *Public Employee Speech on Matters Pursuant to their Official Duties: Whistle While You Work?*, 210 *ED. L. REP.* 855, 866 (2006) (cautioning courts against application of *Garcetti* in the academic sphere); Martha McCarthy, Commentary, *Garcetti v. Ceballos: Another Hurdle for Public Employees*, 210 *ED. L. REP.* 867, 877–83 (2006) (analyzing *Garcetti* and concluding that case, perhaps unwisely, weights *Pickering* threshold inquiry against whistleblowers); Leonard M. Niehoff, *Peculiar Marketplace: Applying Garcetti v. Ceballos in the Public Higher Education Context*, 35 *J.C. & U.L.* 75, 76, 97 (2008) (analyzing public higher education cases since *Garcetti* to conclude that decision has limited First Amendment employee speech and “perhaps” faculty academic freedom). A thorough overview of academic freedom and the employee-speech doctrine, ultimately conceiving of academic freedom as a qualified immunity rather than a constitutional right, can be found in Larry D. Spurgeon, *A Transcendent Value: The Quest to Safeguard Academic Freedom*, 34 *J.C. & U.L.* 111 (2007). *See also* Alan K. Chen, *Bureaucracy and Distrust: Germaneness and the Paradoxes of the Academic Freedom Doctrine*, 77 *U. COLO. L. REV.* 955, 957, 968–83 (2006) (calling for development of academic freedom doctrine relative to “germaneness to the university’s central academic mission”); Kevin L. Cope, *Defending the Ivory Tower: A Twenty-First Century Approach to the Pickering-Connick Doctrine and Public Higher Education Faculty After Garcetti*, 33 *J.C. & U.L.* 313, 315, 359–60 (2007) (reviewing history of academic freedom and concluding that lack of coherent academic freedom doctrine in constitutional law threatens “society’s economic and cultural vitality”); R. George Wright, *The Emergence of First Amendment Academic Freedom*, 85 *NEB. L. REV.* 793, 826–27 (2007) (exploring origin of academic freedom and finding current free speech tests inadequate to protect it). *See generally* Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 *U. COLO. L. REV.* 907 (2006). Some writers have proposed associational rights as a foundation upon which to articulate First Amendment academic freedom. *E.g.*, Barbara K. Bucholtz, *What Goes Around, Comes Around: Legal Ironies in an Emergent Doctrine for Preserving Academic Freedom and the University Mission*, 13 *TEX. WESLEYAN L. REV.* 311, 326–31 (2007); Emily Calhoun, *Academic Freedom: Disciplinary Lessons from Hogwarts*, 77 *U. COLO. L. REV.* 843, 871–80 (2006).

49. Sheldon Nahmod, *Academic Freedom and the Post-Garcetti Blues*, 7 *FIRST AMEND. L. REV.* 54 (2008); Robert M. O’Neil, *Academic Speech in the Post-Garcetti Environment*, 7 *FIRST AMEND. L. REV.* 1 (2008).

was denied a routine merit pay increase because of “his outspoken criticism of the way in which several recent hiring and promotion decisions in his department had been handled, and his publicly expressed objection to excessive reliance on lecturers (rather than full-time faculty) to teach undergraduates in his discipline.”⁵⁰ The district court concluded that Hong spoke “pursuant to his official duties,” and therefore not on “matters of public concern,” so the First Amendment did not apply.⁵¹

According to O’Neil, courts in six circuits before *Garcetti* had consistently rejected the either-or dichotomy of employee-speaker and citizen-speaker.⁵² O’Neil discussed the Fourth Circuit case of a police officer who criticized official policy;⁵³ the court of appeals opined, “[M]atters relating to your employment clearly can encompass matters of public concern.”⁵⁴ But the courts of appeals in five circuits since *Garcetti* have turned around dramatically, O’Neil documented, broadening the scope of “official duties”—in the Tenth Circuit, for example, to “activities [a public employee is] paid to do.”⁵⁵ Insofar as this “extension of *Garcetti*” applies to university professors, as in Hong’s case, O’Neil lamented:

If the only conditions under which complete candor may be expected of scholarly witnesses are those about which a professor is largely ignorant, we will have come to a sorry state indeed. Thus an extension of *Garcetti* to university professors would not only disserve the core values of academic freedom, but would also dramatically disserve the public interest.⁵⁶

Professor Sheldon Nahmod contributed the second article focused on academic freedom to the *First Amendment Law Review* symposium on *Garcetti*.⁵⁷ Taking a self-described “normative approach,” Nahmod demonstrated that academic freedom is consistent “with the democracy-promoting purposes of higher education: the ability to engage in moral reasoning or, more broadly, the development of critical intellectual faculties and the advancement of knowledge.”⁵⁸ Therefore, he concluded,

50. O’Neil, *supra* note 50, at 2.

51. *Hong v. Grant*, 516 F. Supp. 2d 1158, 1168–69 (C.D. Cal. 2007), *aff’d*, No. 07-56705, 2010 WL 4591419 (9th Cir. Nov. 12, 2010), *quoted in* O’Neil, *supra* note 50, at 2.

⁵² O’Neil, *supra* note 50, at 9–10.

53. O’Neil, *supra* note 50, at 10.

54. *Mansoor v. Trank*, 319 F.3d 133, 138 (4th Cir. 2003) (holding for officer), *quoted in* O’Neil, *supra* note 50, at 10.

55. *Green v. Board of County Comm’rs*, 472 F.3d 794, 800–01 (10th Cir. 2007), *quoted in* O’Neil, *supra* note 50, at 13 (alteration O’Neil’s).

56. O’Neil, *supra* note 50, at 20.

57. Nahmod, *supra* note 50.

58. *Id.* at 67–68. Nahmod further notes that this consistency accords with the 1940 AAUP Statement of Principles. *Id.* at 68 n.61.

However, in contrast to my normative approach which is grounded on self-government, the AAUP’s primary rationale appears to be the marketplace of ideas. Thus, the preamble to the AAUP Statement declares in relevant part:

Garcetti should not be construed to permit government intrusion in the academic sphere.⁵⁹ Nahmod furthermore analogized the academic role within employee-speech doctrine to the student-organization funding mechanism in the government-as-benefactor case, *Rosenberger v. Rector and Visitors of the University of Virginia*.⁶⁰ In both situations, Nahmod reasoned, the government is constrained by the First Amendment in the manner of a regulator, despite its appearance as employer or benefactor, because its very intention was to facilitate free speech by independent parties (in one situation by professors, and in the *Rosenberger* scenario by students).⁶¹

Incidentally, Nahmod also examined the potential impact of *Garcetti* on elementary and secondary education (“K–12”), which he concluded would be negligible, because the government-as-educator line of cases⁶² has already established the primacy of governmental interests over individual liberties in that context.⁶³ The comparison is apt, and I restate it to ground

Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition. Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth.

Id. (quoting 1940 Statement of Principles on Academic Freedom and Tenure).

59. *Id.* at 73–74.

60. 515 U.S. 819 (1995).

61. Nahmod, *supra* note 50, at 69 (citing *Rosenberger*, 515 U.S. at 835).

62. *Morse v. Frederick*, 551 U.S. 393, 127 S. Ct. 2618 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

63. Nahmod, *supra* note 50, at 61–67; see also Kevin L. Cope, *Defending the Ivory Tower: A Twenty-First Century Approach to the Pickering-Connick Doctrine and Public Higher Education Faculty After Garcetti*, 33 J.C. & U.L. 313, 314 (2007) (distinguishing higher education and K–12 faculty). See generally Kim Fries, Vincent J. Connelly, & Todd A. DeMitchell, Commentary, *Academic Freedom in the Public K–12 Classroom: Professional Responsibility or Constitutional Right? A Conversation with Teachers*, 227 ED. L. REP. 505, 522–24 (2008) (surveying K–12 teachers and finding in general that they perceive academic freedom as grounded in professionalism and not necessarily in constitutional law); Anne Gardner, Note, *Preparing Students for Democratic Participation: Why Teacher Curricular Speech Should Sometimes Be Protected by the First Amendment*, 73 MO. L. REV. 213, 236–41 (2008) (urging pedagogical foundation for academic freedom of public K–12 teachers); Ann Hassenpflug, Commentary, *Job Duties and Teacher Freedom of Speech*, 220 ED. L. REP. 471, 480–81 (2007) (analyzing *Garcetti* and concluding that public K–12 teachers should not have to choose between job security and responsible challenge to superiors, especially when speaking out is required by law); Neal H. Hutchens, *Silence at the Schoolhouse Gate: The Diminishing First Amendment Rights of Public School Employees*, 97 KY. L.J. 37, 75–77 (2008–2009) (concluding that *Garcetti* should not preclude public K–12 teacher from reporting, e.g., “financial fraud” or condition contrary to “well-being of students”); Alison Lima, Casenote and Comment, *Shedding First Amendment Rights at the Classroom Door?: The Effects of Garcetti and Mayer on Education in Public Schools*, 16 GEO. MASON L. REV. 173, 198–201 (2008) (proposing that *Pickering-Connick* control teacher speech outside the classroom and student-speech analysis be adapted to control teacher speech within the classroom); Ralph D.

the observation that the contract-based solution proposed by this article is analogous to previous proposals to shore up student academic freedom in K–12 and higher education. Student advocates have long pressed for statutory and regulatory solutions to move K–12 student publications from the context of government-as-educator to a *Rosenberger* scenario, promoting free student speech for a number of desirable pedagogical and policy reasons.⁶⁴ Student advocates further feared that the government-as-educator doctrine would escape the K–12 box and infect the student university press,⁶⁵ contrary to the norms of higher education that Nahmod discussed.⁶⁶ This escape occurred in one hard-fought Seventh Circuit case.⁶⁷ I previously proposed that advocates for media freedom in higher education learn from the K–12 experience and deploy preemptively the same statutory and regulatory solutions.⁶⁸ Similarly here, academics in higher education have something to learn from the experience of students, who for many years already have had to defend their free speech in academic environments against encroachment by the government forum owner.⁶⁹

With the *Garcetti* wolf prowling around the ivory tower, it is critically important that academics and academic institutions well assess and define their mutual understanding of academic freedom as expressed through their

Mawdsley & Allan Osborne, *The Supreme Court Provides New Direction for Employee Free Speech in Garcetti v. Ceballos*, 220 ED. L. REP. 457, 465 (2007) (analyzing *Garcetti* and urging error in application on side of free speech of public K–12 teacher); Martha M. McCarthy & Suzanne E. Eckes, *Silence in the Hallways: The Impact of Garcetti v. Ceballos on Public School Educators*, 17 B.U. PUB. INT. L.J. 209, 234–35 (2008) (arguing that *Garcetti* contravenes public interest by silencing worthy whistleblowing in absence of sufficient federal or state statutory protection); Alison E. Price, Comment, *Understanding the Free Speech Rights of Public School Coaches*, 18 SETON HALL J. SPORTS & ENT. L. 209, 244–54 (2008) (urging *Hazelwood* rather than *Garcetti* as desirable framework); Susan P. Stuart, *Citizen Teacher: Damned if You Do, Damned if You Don't*, 76 U. CIN. L. REV. 1281, 1281, 1341–42 (2008) (lamenting that school district “seduc[ti]on by the weapon of *Garcetti*’s absolute power will create unanticipated and legal consequences to both school boards and the educational institution itself”); Ronald D. Wenkart, Commentary, *Public School Curriculum and the Free Speech Rights of Teachers*, 214 ED. L. REP. 1 (2006) (analyzing *Garcetti* and concluding that work-related speech by public K–12 teachers is now clearly unprotected by First Amendment).

64. Richard J. Peltz, *Censorship Tsunami Spares College Media: To Protect Free Expression on Public Campuses, Lessons from the “College Hazelwood” Case*, 68 TENN. L. REV. 481, 501–08 (2001).

65. *Id.* at 508–12.

66. Nahmod, *supra* note 50, at 67–73.

67. *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005) (en banc).

68. Peltz, *Censorship Tsunami Spares College Media*, *supra* note 65, at 537–53 (urging college student media to clarify contractual protection for intellectual freedom in anticipation of loss of constitutional safeguards).

69. See Susan P. Stuart, *Citizen Teacher: Damned if You Do, Damned if You Don't*, 76 U. CIN. L. REV. 1281, 1281, 1340 (2008) (offering contractual solution in academic freedom language of model school district collective bargaining agreement).

contractual relationships, apart from the external system of constitutional law.⁷⁰ Fortunately, in this vein, the American Association of University Professors has done considerable work in articulating the commonly understood scope of academic freedom, and the norms of the AAUP have been widely adopted by institutions of higher education. The academic-freedom policy articulated in the landmark AAUP 1940 Statement of Principles on Academic Freedom and Tenure has become the boilerplate starting point for the tenure policies of institutions across the United States.⁷¹

Still, the AAUP articulation of academic freedom focuses on the core functions of research, teaching, and service, and is sparse on detail. Due process is the touchstone of academic-freedom protection in the AAUP framework. As a matter of substantive due process, “cause” is a *sine qua non* of adverse job action against a protected individual, and ample procedural due process also is required. There is no doubt in the AAUP vision that faculty autonomy as against a “for cause” determination embraces a wide range of activities, exceeding the strict, core constructs of teaching, research, and service.⁷² For example, an AAUP statement, *On the Relationship of Faculty Governance to Academic Freedom*—recall the plight of Professor Hong, recounted by O’Neil—maintains that “[t]he academic freedom of faculty members includes the freedom to express their views . . . on matters having to do with their institutions and its policies, and . . . on issues of public interest generally, and to do so even if their views are in conflict with one or another received wisdom,” even if the expression does not fall squarely within the traditional cores of published research, classroom teaching, and public-service activities.⁷³ But AAUP policies collected in its renowned “*Redbook*”⁷⁴ offer little more specific articulation of protected faculty activity outside the three pillars.

At the same time, academic freedom, like other civil liberties, faces vigorous perils in our present era of grave concern for public security. This state of affairs has been studied and expounded by the AAUP Special

70. E.g., Michael K. Feaga & Perry A. Zirkel, Commentary, *Academic Freedom of Faculty Members: A Follow-Up Outcomes Analysis*, 209 ED. L. REP. 597, 597–607 (conducting quantitative analysis of academic freedom claims to conclude that claimants ought depend on ethical professional, statutory, and contractual bases for academic freedom rather than constitutional law).

71. 1940 Statement of Principles on Academic Freedom and Tenure, *supra* note 1, at 3.

72. See generally NEIL W. HAMILTON, *ACADEMIC ETHICS: PROBLEMS AND MATERIALS ON PROFESSIONAL CONDUCT AND SHARED GOVERNANCE* (2002).

73. On the Relationship of Faculty Governance to Academic Freedom, in AAUP POLICY DOCUMENTS & REPORTS 141, 142 (10th ed. 2006). Shared institutional governance is an established aspect of academic freedom even though it is not squarely within any of the core functions of research, teaching, or service. See, e.g., Paula Wasley, *AAUP Criticizes Rennsalaer Polytechnic Institute Over Faculty Governance*, CHRON. OF HIGHER EDUC. NEWS BLOG, Sept. 24, 2007.

74. AAUP POLICY DOCUMENTS & REPORTS (10th ed. 2006).

Committee on Academic Freedom and National Security in a Time of Crisis, which documented a number of alarming incidents.⁷⁵ For example, in the weeks after September 11, 2001, an Orange Coast College professor was suspended for remarks deemed insensitive to Muslim students, and board members of the City University of New York called for the censure of faculty who criticized U.S. foreign policy.⁷⁶ At Irvine Valley College in California in 2003, the academic vice president issued a memo admonishing faculty not to discuss the war in Iraq “unless it [could] be demonstrated, to the satisfaction of [his] office, that such discussions [were] directly related to the approved instructional requirements and materials associated with those classes.”⁷⁷ Officials of the State University of New York at New Paltz, citing “the best interests of the university,” denied funds to a women’s-studies-program conference on Islam after off-campus groups alleged unbalanced criticism of Israel.⁷⁸ Rutgers University in 2003 denied use of university facilities for a student-organized conference on Palestinian solidarity after pro-Israeli politicians objected, though the university pointed to defective paperwork to support its decision and disclaimed any content or viewpoint bias.⁷⁹

In all of these instances cited by the AAUP Special Committee, faculty involvement in the activities deemed objectionable could have been restricted were academic freedom misconstrued as strictly limited to the core functions of teaching, research, and service. But academic freedom is a broader concept, protecting faculty autonomy in commenting on public affairs⁸⁰ and in organizing conferences on matters of public interest, even when those activities are not tightly bound to a classroom lecture or published research. That broader concept may be made more explicit than it is at present.

75. *Report of an AAUP Special Committee: Academic Freedom and National Security in a Time of Crisis*, ACADEME, Nov.–Dec. 2003, at 34.

76. *Id.* at 52; *see also* Robert M. O’Neil, For the Record: Academic Freedom and National Security, <http://www.aaup.org/AAUP/issues/AF/oneilFTR.htm> (2004) (last visited Dec. 21, 2007) (speech delivered June 12, 2004, in Washington, D.C., to AAUP annual meeting), *available at* <http://www.aaup.org/NR/rdonlyres/5D2D9A5A-1935-4DF4-B402-57525CAF8CDD/0/Post911.pdf> (last visited June 29, 2009).

77. *Report of an AAUP Special Committee*, *supra* note 75, at 54.

78. *Id.* at 55.

79. *Id.*

80. Post-9/11 fear is a highly visible threat to academic freedom, but certainly the traditional threat of partisan sniping is ever-present. *See, e.g.*, Robin Wilson, *AAUP Goes to Bat for “Freedom in the Classroom,”* CHRON. OF HIGHER EDUC., Sept. 12, 2007 (citing AAUP, *Freedom in the Classroom* (2007)).

II. INTERPRETING THE TENURE CONTRACT TO DESCRIBE PENUMBRAL ACADEMIC FREEDOM

A. Academic Freedom and the 1940 AAUP Statement of Principles

To protect academic freedom, and to preserve the intellectual freedom that is essential to a flourishing culture and economy, it is timely, appropriate, and essential to further elaborate a common understanding, or interpretation—not necessarily a new articulation—of the scope of protected academic freedom guaranteed by the language of the 1940 AAUP Statement of Principles, from which tenure contracts are commonly derived. The Statement states in relevant parts:

The purpose of this statement is to promote public understanding and support of academic freedom and tenure and agreement upon procedures to ensure them in colleges and universities. Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition.

Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights.

Tenure is a means to certain ends; specifically: (1) freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.

Academic Freedom

(1) Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

(2) Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. Limitations of academic freedom because of religious or other aims of the institution should be

clearly stated in writing at the time of the appointment.

(3) College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.⁸¹

The Statement well describes the core academic functions. It only modestly alludes to more: “extramural activities” as an end of tenure, and the references in numbered paragraph (3) to speech by professors as citizens rather than as institutional representatives. An additional 1964 AAUP Statement on Extramural Utterances bolsters the freedom of the professor speaking as citizen—*e.g.*, “[e]xtramural utterances rarely bear upon the faculty member’s fitness for continuing service”⁸²—but does little to clarify when the professor speaks in an extramural rather than institutional role. The universe of academic activities within the scope of academic freedom is broader than the core academic functions, as depicted in Figure 1.

81. 1940 Statement of Principles on Academic Freedom and Tenure, *supra* note 1, at 3–4.

82. Committee A Statement on Extramural Utterances, *in* AAUP POLICY DOCUMENTS & REPORTS 32, 32 (10th ed. 2006).

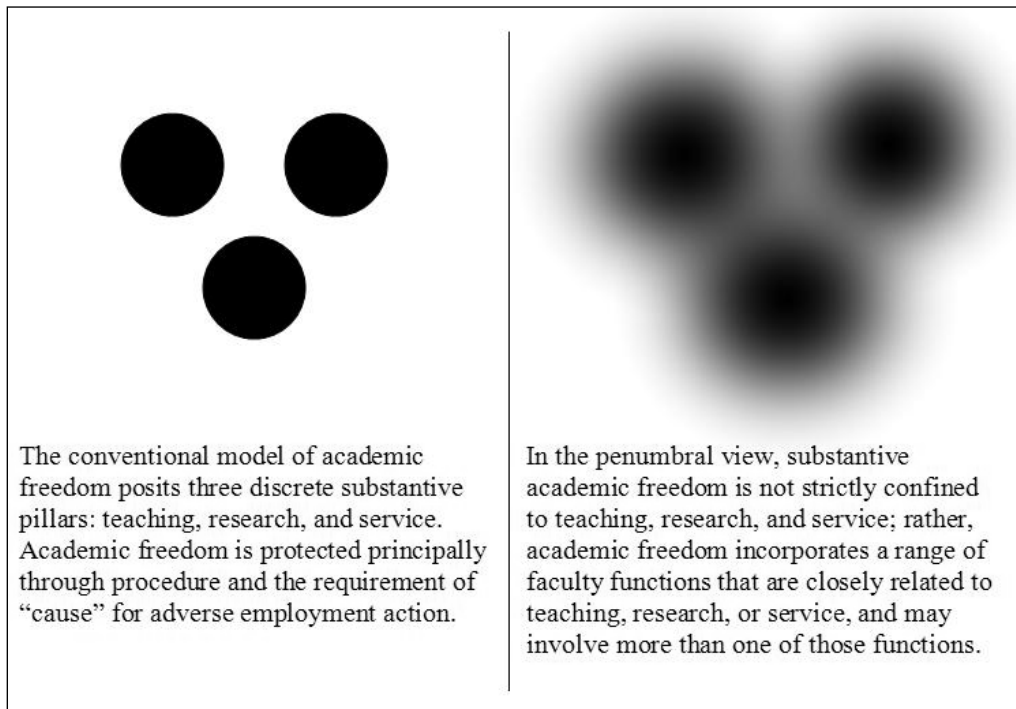


Fig. 1: Academic Freedom

The reference in the Standard to speech as performed by citizens causes more confusion than it alleviates, especially under the *Pickering-Garcetti* doctrine. The dichotomy drawn by the Statement—between professor as institutional spokesperson and professor as commentator on matters within a discipline—is not the same dichotomy drawn by the case law—between professor as employee-speaker, which may include either of the paragraph (3) roles, and professor as citizen-speaker, outside the administrative reach of the institution. In other words, there are really three possibilities: (1) professor as institutional spokesperson, within institutional administrative control per *Pickering-Garcetti*, or per government-as-speaker or doctrine; (2) professor purely as private citizen, such as a biology professor who takes part in a weekend anti-war demonstration, wholly beyond institutional administrative control per *Pickering-Garcetti*; or (3) professor in official but individual capacity, a role that should implicate academic freedom but may not amid extension of *Garcetti* to academics.

The preoccupation of this article is in defining this third role, and redressing the deficiency of the 1940 (and 1964) Statement in describing much of what professors do from day to day. Much of the professor’s job outside the classroom and the research journal involves functions critical to the academy and integral to the public interest, such as faculty governance and peer-performance review. Effective performance of these functions,

which in the Statement are not explicit (and at best are only alluded to), requires freedom of expression and inquiry.

B. The “Proposed Interpretation Concerning Closely Related Activities”

Thus to the end of adding clarity while remaining true to the spirit of the Statement, this article proposes the following Interpretation. This text, and the Illustrations that are appended to this article, were developed by an *ad hoc* committee of the Faculty Senate at the University of Arkansas at Little Rock.⁸³ In the wake of *Garcetti*, the Faculty Senate charged the committee with “study[ing] the adequacy of the University tenure contract to protect academic freedom,” and “mak[ing] recommendations accordingly to protect academic freedom.”⁸⁴ The committee described faculty activities “closely related” to the three pillars of the Statement, a class of functions described in this article as “penumbral.”

Proposed Interpretation Concerning Closely Related Activities

(1) As faculty responsibilities evolve, a need arises to elaborate a common understanding of the academic freedom that is guaranteed by [University Policy based on the 1940 AAUP Statement of Principles]. [University Policy] is clear in that the core functions described in subsections (1), (2), and (3) are exemplary and neither limit nor exhaust the scope of academic freedom. In addition to the core functions of research, teaching, and service, faculty conduct activities that are closely related to those core functions. Accordingly, the broad conception of academic freedom expressed in [University Policy] protects faculty engaged in those closely related activities. The following statements therefore further exemplify, while still neither limiting nor exhausting, the scope of academic freedom that is protected by [University Policy].

(a) Faculty members are entitled to freedom in the selection of classroom instructional materials, regardless of medium or source.

(b) Faculty members are entitled to freedom in advising students.

83. The committee was ably served by Carlton M. “Sonny” Rhodes, assistant professor in the School of Mass Communication; Roby D. Robertson, professor and director of the Institute of Government; Olga Tarasenko, assistant professor in the Department of Biology; and C.F. Williams, professor in the Department of History. I chaired.

84. Memorandum from Ad Hoc Faculty Senate Committee to Study Academic Freedom and Tenure, to Faculty Senate, University of Arkansas at Little Rock 1 (Feb. 25, 2008) (copy on file with author).

(c) Faculty members are entitled to freedom in their involvement with campus organizations.

(d) Faculty members are entitled to freedom in the course of faculty governance.

(e) Faculty members are entitled to freedom of expression both within and outside the institution.

(f) Faculty members are entitled to freedom of participation in scientific, research, or educational meetings, and in the organization of conferences.

(2) As has always been the case under [University Policy], acts which interfere with the freedom of faculty to pursue these activities, as well as acts which, in effect, deny the freedom to speak, to be heard, to study, and to administer, are the antithesis of academic freedom. Moreover, for purposes of legal analysis under the First Amendment, faculty engaged in research, teaching, service, and closely related activities are presumed to be speaking on matters of public concern, regardless of whether the matter affects the interests of the speaker.

(3) As has always been the case under [University Policy], academic freedom does not mean absolute discretion to pursue any agenda without regard for the pedagogical mission of the university. Individual academic choices may be limited by policies that are reasonable and viewpoint neutral, and adopted by duly authorized bodies of the faculty for pedagogical reasons. In matters of alleged interference with academic freedom, due process remains the analytical touchstone such that interference may never be sanctioned when not “for cause” or when lacking the provision of ample procedural safeguards.⁸⁵

This Interpretation may be adopted by faculties as the governing bodies of their institutions. Like the 1940 AAUP Statement of Principles, the Interpretation is suitable for public and private institutions. Faculty understanding of tenure policy that is plainly consistent with the broader, purposive policy goal of academic freedom, especially if uncontradicted by administrative response, should be influential if not controlling in later construction, whether by administrative entities or courts, on the question of what constitutes “cause” for permissible discipline or dismissal. Better, the Interpretation may be adopted jointly by faculties, administrators, and governing boards, as a reflection of an institution’s commitment to academic freedom as a bedrock value in twenty-first-century higher education. The legal effect of such adoption would then be incontrovertible.

The Interpretation operates by supplementing the Statement’s

85. *Id.* at 7.

explication of the core academic functions. Added as exemplary activities are those that are commonplace in the performance of faculty duties, and that are closely related to, but not solidly within, the core academic functions of teaching, research, and service—in other words, penumbral. Some of these activities have been the subject of prior disputes, reported in lawsuits and in AAUP investigations. Others are born of experience and will be familiar to faculty.

The penumbral rights and responsibilities described in the Interpretation are to be bolstered by broad construction. To that end, paragraph (2) restates the laudable purpose of academic freedom. Moreover, paragraph (2) resists extension of *Garcetti*'s "official duties" analysis to academics, setting "public concern" in the *Pickering* threshold test as the presumptive state of affairs. The latter sentence of paragraph (3) means to preserve the key procedural safeguards and substantive requirement of "cause," which lie at the heart of the AAUP-designed defense of academic freedom.

Like the academic-freedom interests asserted by the Statement, the penumbral rights and responsibilities of the Interpretation are not absolute, but subject to limiting principles. Paragraph (3) recognizes countervailing institutional interests in sound pedagogy. Limits on the penumbral rights and responsibilities of individual faculty must be (1) reasonable, (2) viewpoint neutral, (3) adopted by authorized bodies of the faculty, and (4) pedagogically justified. The elements of reasonableness and pedagogical soundness derive from the *Hazelwood v. Kuhlmeier* approach to student free speech in curricular contexts,⁸⁶ a number of scholars having expressed a fondness for application of *Hazelwood* rather than *Garcetti* to the academic-speech problem.⁸⁷ Viewpoint neutrality is derived from general First Amendment principles forbidding government from imposing an official orthodoxy on free thought and expression.⁸⁸ Viewpoint neutrality is thus consistent with the Supreme Court's no-"pall of orthodoxy" principle in academic freedom,⁸⁹ and with scholarly criticism

86. 484 U.S. 260 (1988); see, e.g., Peltz, *Censorship Tsunami Spares College Media*, *supra* note 65, at 491–501.

87. E.g., Alison E. Price, Comment, *Understanding the Free Speech Rights of Public School Coaches*, 18 SETON HALL J. SPORTS & ENT. L. 209, 244–54 (2008). It is some comment on the sad state of academic freedom that the *Hazelwood* approach, designed for K12 children, would be a more protective framework than the employee-speech doctrine. Cf. Kelly Sarabyn, *The Twenty-Sixth Amendment: Resolving the Federal Circuit Split Over College Students' First Amendment Rights*, 14 TEX. J. CIV. LIBERTIES & CIV. RTS. 27 (2008) (arguing for inapplicability of *Hazelwood* framework to college students, because as adults they are vested with full constitutional liberties).

88. See, e.g., Richard J. Peltz, *Pieces of Pico: Saving Intellectual Freedom in the Public School Library*, 2005 B.Y.U. EDUC. & L.J. 103, 135–36 (discussing Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982)).

89. *Keyishian*, 385 U.S. 589, 603 (1967).

of *Hazelwood* for its failure to prohibit viewpoint-based censorship.⁹⁰ Finally, the faculty element ensures that pedagogical decision-making is not utterly ceded to administrative officials to run roughshod over individual liberty, but remains at some level in the hands of faculty, who bear primary responsibility for executing the pedagogical mission of the educational institution.

Faculty members are entitled to freedom in the selection of classroom instructional materials. The selection of classroom instructional materials is obviously closely related to, and follows logically from, the freedom of classroom discussion. Instructors and teachers often clash over classroom instructional materials—a term drafted broadly enough to include traditional paper handouts, as well as electronic media and visual aids. But school authorities sometimes wish to designate materials for uniformity, for pedagogically sound reasons; for example, a single textbook might be chosen to ensure that all first-year statistics students cover the same basic skills. Accordingly, for example, in a junior-college English class, a professor circulated a poem “liberally sprinkled with Anglo-Saxon obscenities, slang references to male and female sexual organs and to sexual activity, and profane references to Jehovah and Christ,” and a pamphlet “contain[ing] nine photographs of an entwined nude couple,” suggestive of sexual intercourse.⁹¹ The materials supported a discussion of indecency and censorship.⁹² With reference to a statute governing teacher dismissal, the Supreme Court of California affirmed a ruling for the professor, pointing *inter alia* to “the absence of regulations defining the content and suitability of supplemental teaching materials.”⁹³ The Interpretation would not preclude the development of such regulations in keeping with the requirements of paragraph (3).

Faculty members are entitled to freedom in advising students. Student advising, a form of service closely related to teaching, is an important faculty function in which independence is essential. Students depend on faculty for full and frank advice, and what is in a student’s best interests is not necessarily in the institution’s best interests, at least in the short term. For example, my university, like many, prizes student retention. But a student’s career goals or family demands might dictate advising a student to transfer to another institution, or to postpone studies for a time.⁹⁴ In the

90. E.g., Peltz, *Censorship Tsunami Spares College Media*, *supra* note 65, at 501–08.

91. Board of Trustees v. Metzger, 8 Cal.3d 206, 208, 104 Cal. Rptr. 452 (Cal. 1972).

92. *Id.*

93. *Id.* at 211.

94. For the record, I have never been impeded by my university in student advising. But *Garcetti* and the threat of firing discussed in part I.A, *supra*, have made

recent *Gorum v. Sessoms*, a professor advised a student to sue the university after the student was suspended for possessing a firearm on campus under a no-tolerance policy.⁹⁵ Professor Gorum was in hot water on a number of other university charges,⁹⁶ and the Third Circuit ultimately upheld a judgment against him on various grounds.⁹⁷ Significantly, the Third Circuit nevertheless upheld application of *Garcetti* to support the adverse outcome on the student-advising claim.⁹⁸ Whatever the particulars of the *Gorum* case, a professor who rationally believes that a student has a cause of action against the university—imagine a claim of disability non-accommodation—should be free to direct the student to a lawyer, even if to the university’s dismay. The Interpretation makes room for such full and frank advice.

*Faculty members are entitled to freedom in their involvement with campus organizations.*⁹⁹ Many years ago, I interviewed for the position of student-publications adviser at a small public university in Louisiana. A university vice president ultimately posed a question: what would I do if the university told me to keep a story out of the student newspaper, and the students wanted to run it? I gave an ambivalent answer about discussing the university concerns with the students, in the context of journalistic values and ethics. The vice president said (more than asked), “You understand, don’t you, that the university signs your paycheck.” I did not get the job, and I was spared a choice that too many college media advisers have faced, between professional responsibility and the employer’s short-term expectations.¹⁰⁰ Academic freedom should provide the responsible professor the security to choose the former. Similarly, one of the asserted offenses of the aforementioned Professor Gorum arose in the context of his advisership of the campus chapter of the Alpha Phi Alpha fraternity.¹⁰¹ The Third Circuit invoked *Garcetti*’s “official duties” analysis upon observing a university rule that charged faculties with a responsibility for “involvement with student organizations and clubs as mentors and advisors.”¹⁰² But again, *Garcetti* was not the proper mode of analysis. The Interpretation encompasses this faculty right and responsibility, a form of

me reticent to provide full and frank advice in all circumstances.

95. 561 F.3d 179, 185 (3d Cir. 2009).

96. *Id.* at 182–84.

97. *Id.* at 188.

98. *Id.* at 185–86.

99. *Cf.* Joint Statement on Rights and Freedoms of Students, in AAUP POLICY DOCUMENTS & REPORTS 273, 274–75 (10th ed. 2006) (guaranteeing student freedom of association in organizational affairs, including freedom to choose faculty adviser).

100. *See, e.g.*, Vincent F. Filak & Scott Reinardy, *College Journalism Advisers Able to Ward Off Stress, Burnout*, C. MEDIA REV., Spring 2009, at 15, 15–16 (discussing clashes between university administrators and college media advisers).

101. *Gorum v. Sessoms*, 561 F.3d 179, at 184.

102. *Id.* at 184–85.

service closely related to teaching and student advising.

*Faculty members are entitled to freedom in the course of faculty governance.*¹⁰³ As stated several times already, the faculty right and responsibility of governance, a form of service, requires independence from university overseers. Were there no such independence, there would be no point in having structures of faculty governance apart from the university administration. The overwhelming number of disputes between faculty and administrators over matters not within the teaching, research, and service cores, documented by the courts and by the AAUP, concern faculty governance, specifically manifested in criticism of institutional policies and calls for reforms. Thus *Hong v. Grant*¹⁰⁴ was the prototype case that animated O'Neil's introduction to the *First Amendment Law Review* symposium.¹⁰⁵ Professor Hong was denied a merit pay increase after he was critical of the appointment and promotion process, and of the use of lecturers rather than tenured faculty to teach key courses in his discipline.¹⁰⁶ Hong lost after the district court applied *Garcetti*.¹⁰⁷ The Interpretation would fix faculty governance within the academic-freedom constellation, and would rate *Garcetti* as presumptively inapplicable.

*Faculty members are entitled to freedom of expression both within and outside the institution.*¹⁰⁸ A guarantee of free expression for faculty, both internally and externally, in part overlaps with protections for other activities, such as faculty governance. But the guarantee leaves no room for doubt as to the presumptively protected status of extramural utterances, whether on or off campus. In Wisconsin, Professor Kevin Renken complained to officials at the University of Wisconsin-Milwaukee about what he believed was improper use of federal grant funds.¹⁰⁹ Because Renken's official duties included the administration of grant funds, the Seventh Circuit had no trouble applying *Garcetti* to rule in favor of the university on the professor's retaliation claim.¹¹⁰ In Florida, Professor Sami Al-Arian became entangled in an academic-freedom battle with the University of South Florida after federal law-enforcement officials

103. See generally On the Relationship of Faculty Governance to Academic Freedom, *supra* note 73.

104. 516 F. Supp. 2d 1158 (C.D. Cal. 2007), *aff'd*, No. 07-56705, 2010 WL 4591419 (9th Cir. Nov. 12, 2010).

105. O'Neil, *supra* note 50, at 2.

106. *Hong*, 516 F. Supp. 2d at 1162-65.

107. *Id.* at 1165-70.

108. See generally Committee A Statement on Extramural Utterances, *supra* note 82; Statement on Professors and Political Activity, in AAUP POLICY DOCUMENTS & REPORTS 33 (10th ed. 2006).

109. *Renken v. Gregory*, 541 F.3d 769, 773 (7th Cir. 2008).

110. *Id.* at 773-75.

mistakenly implicated him in a terrorism investigation.¹¹¹ The professor's notoriety catapulted him to a September 26, 2001 television appearance on *The O'Reilly Factor*, which in turn prompted "intens[e] . . . public reaction," "perceived threats to the safety of Professor Al-Arian and others," and on one occasion the evacuation of the university computer-science building. The university asserted that Al-Arian had violated a collective bargaining agreement "to indicate when appropriate that one is not an institutional representative."¹¹² Ruling against the university, an AAUP investigative committee concluded that Al-Arian's academic freedom had been violated by a consequent threat of dismissal.¹¹³ The committee, chaired by Professor Van Alstyne, explained that Al-Arian clearly had not been speaking as a representative of the institution, even though he was identified as a USF professor:

Professor Al-Arian obviously did not preface each of his off-campus interviews or appearances with a disclaimer—for example, "None of my remarks should be misunderstood to represent the views of the University of South Florida, or any division, department, or group associated with the university, its alumni, its administration, or its board of trustees"—but the investigating committee can find no reasonable warrant for such an extraordinary and gratuitous disclaimer, nor was the committee advised of *any* other instance in which this kind of disclaimer was expected of others at the university The circumstance in which the norms of sound academic practice might require such a statement would ordinarily be the exceptional one in which confusion of roles might otherwise occur, that is, in which some audience might assume one was a "spokesperson" or a "representative" of some sort.¹¹⁴

The Interpretation would effect freedom of speech for faculty on and off campus and presumptively preclude the "official duties" analysis of *Garcetti*. Renken would have been afforded latitude, at least presumptively, to lodge his internal complaints, and USF would be precluded presumptively from invoking *Garcetti*'s "official duties" approach simply by virtue of Al-Arian's media identification by professional association.

Faculty members are entitled to freedom of participation in scientific, research, or educational meetings, and in the organization of conferences. Colloquia and conferences are critical media for the dissemination of

111. *Academic Freedom and Tenure: University of South Florida*, ACADEME, May–June 2003, at 59, 60.

112. *Id.* at 65–66.

113. *Id.* at 69.

114. *Id.* at 66.

academic knowledge and expression, and for the back-and-forth of academic inquiry and challenge. The colloquium *is* a marketplace of ideas, so official interference in that marketplace directly implicates the dreaded “pall of orthodoxy.” Few cases explore this problem, but it is not difficult to imagine a dispute arising. For example, U.S. federal regulations disallow U.S.-headquartered organizations from sponsoring professional meetings or conferences in Cuba.¹¹⁵ The Interpretation would afford a faculty member latitude for lawful attendance at an educational conference in Cuba, organized by a foreign sponsor, free of threatened retaliation by a university administration that favored absolute terms for the U.S. embargo.

The committee that developed the Interpretation furthermore developed a series of Illustrations, which demonstrate the operation of the penumbral rights and responsibilities, as well as the limiting principles.¹¹⁶ Like the penumbral rights and responsibilities of the Interpretation, the Illustrations are exemplary and non-exhaustive. The committee developed the Illustrations by drawing upon hypotheticals and anecdotal experiences collected in the course of research. These Illustrations are appended to this Article.¹¹⁷

III. CONCLUSION

The Interpretation means to ensure a zone of academic freedom on which faculty can rely when exercising and fulfilling their many rights and responsibilities, without fear that academic freedom may be eroded upon the vagaries of judicial interpretation over time, or will fail entirely for the omission of constitutional doctrine. In this vein, the Interpretation eschews the impact of the triple threat to academic freedom as a constitutional concept, as described by Professor Van Alstyne and others, especially since *Garcetti*. The Interpretation and Illustrations mean to bolster academic freedom through contract language, manifesting the evident intention of the 1940 AAUP Statement of Principles, to facilitate a thriving marketplace of ideas in the university, and thereby to ensure that the leaders of our communities, states, and nation are “trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritarian selection.”¹¹⁸

While the Interpretation and Illustrations map strides toward the preservation of academic freedom, the committee that developed these

115. See 31 C.F.R. § 515.564(a)(2)(i). A challenge, based in part on academic freedom, to federal restrictions on educational travel to Cuba under 31 C.F.R. § 515.565 was rejected in *Emergency Coalition to Defend Educational Travel v. U.S. Dep’t of the Treasury*, 545 F.3d 4 (D.C. Cir. 2008).

116. See Appendix.

117. *Id.*

118. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (internal quotation marks, marks of prior alteration, and citations omitted).

texts was fully cognizant of threats that the proposal will not abate, and which also merit attention, but which are beyond the scope of this article. First, it is not clear that contractual protection by itself, without complementary constitutional safeguards, will be adequate to protect academic freedom.¹¹⁹ The law of contracts is more vulnerable than constitutional law to goal-oriented methods such as strategic drafting and political manipulation, and is more readily subject to being overwhelmed by fleeting public passions. Vigilance is required, and the cause of academic freedom as a constitutional construct should not be abandoned. Second, the proliferation of non-tenure-track positions, often superseding tenure-track positions, threatens to moot the very question of what tenure means.¹²⁰ Investigation and vigilance are warranted as to systems of tenure, within and across institutions, inquiring into the range of personnel who are eligible for tenure, and the process by which tenure is awarded. Academic freedom should not be reserved as a privilege for an elite slice of the academic community,¹²¹ but should animate the entire university as part of a consistent philosophy of free expression and inquiry.

119. Memorandum, *supra* note 85, at 6.

120. *Id.*

121. See generally, e.g., John Gravois, *Labor Union Plants a Flag for Academic Freedom in an Era of Fewer Tenured Positions*, CHRON. OF HIGHER EDUC., Oct. 29, 2007 (citing American Federation of Teachers, *Academic Freedom in the 21st-Century College and University*); John Gravois, *Tracking the Invisible Faculty*, CHRON. OF HIGHER EDUC., Dec. 15, 2006 (citing AAUP, *Contingent Faculty Index*); Donna Euben, *Legal Contingencies for Contingent Professors*, CHRON. OF HIGHER EDUC., June 15, 2006; Donna R. Euben, AAUP, *Tenure: Perspectives and Challenges*, <http://www.-aaup.org/AAUP/protect/legal/topics/tenure-perspectives.htm> (2002) (last visited Dec. 21, 2007).

APPENDIX

*Illustrations in Support of the Proposed Interpretation Concerning Closely Related Activities*¹²²

The following Illustrations mean to demonstrate principles embodied in [University Policy], as articulated specifically through the Interpretation Concerning Closely Related Activities. The Illustrations are in no way limiting or exhaustive of the scope of academic freedom described by [University Policy] and the Interpretation Concerning Closely Related Activities.

(1) Selection of Classroom Instructional Materials. Professor A in the English Department chooses a controversial novel for an introductory literature course. She believes as a pedagogical matter that the novel is appropriate to the course. The head of the department objects to the choice, deeming the book unsuitable as insufficiently challenging. Professor A's adoption decision is protected by academic freedom, because the selection of classroom instructional materials is an activity closely related to teaching.

Subsequently, for viewpoint-neutral and pedagogical reasons, the faculty of the English Department duly adopts a uniform reading list for all introductory literature courses. Professor A's previous selection is not on the list. Professor A subsequently must abide by the decision of the faculty and may suffer adverse employment action for failure to do so.

(2) Student Academic Advising. Professor B in the Political Science Department advises a student who wishes to study historical Soviet politics to consider transfer to another institution, because the university offers limited resources in that area. In the interest of student retention, university administrators direct faculty to advise students against transfer. Professor B's advising of the student is protected by academic freedom, because even informal student advising is an activity closely related to teaching and service. The student advising directive may not be enforced against Professor B, because it unreasonably burdens his discretion in conducting pedagogically sound student advising.

Subsequently, Professor B's department head directs faculty when advising students ensure that they take the department's course in ethics, which is a graduation requirement. The course requirement exists for viewpoint-neutral and pedagogically sound reasons, and was duly adopted

122. These Illustrations are derived from, and quote extensively from (without marks) Memorandum, *supra* note 85, at 8–10. The committee chose to describe scenarios in which the professor prevailed; the Illustrations here further develop the committee scenarios to demonstrate in each instance where a professor would go too far.

by the departmental faculty. Professor B tells an advisee not to take the ethics course, and instead to apply to the faculty for a waiver, because Professor B believes that the ethics course wastes students' time. Professor B is bound by the advising directive and may suffer adverse employment action for failure to abide by the directive. The advising directive is a reasonable burden on Professor B's discretion in student advising.

(3) Student Conduct Advising. Upon a student's request and with the permission of the head of the Business Department, Professor C sits in a meeting between the student and the department head to discuss allegations of plagiarism against the student. The student is not taking any classes from Professor C, but the student trusts Professor C as a neutral observer who is not involved in the matter under consideration. Subsequently, the student is disciplined upon the authority of the head of the Department. Believing that the student has grounds for appeal, Professor C advises the student as to established university procedures for the appeal of disciplinary matters, as well as the student's right, consistent with university procedures, to seek professional outside counsel. Professor C's advising of the student is protected by academic freedom, because student advising is a function closely related to teaching and service. Whether Professor C and the head of the Department differ on the appropriate outcome of the matter has no bearing on the scope of protected activity.

In an unrelated matter, Professor C is assigned to serve on a neutral adjudication panel in a campus disciplinary matter. The disciplinary process follows an established procedure, duly adopted by an authorized faculty body and soundly respecting the due process rights of persons accused of misconduct. Professor C is contacted in confidence by a student witness in the matter who confesses that he fabricated the accusation that initiated the matter. Professor C advises the witness to maintain his story and not to reveal the fabrication, lest the witness himself face charges of misconduct. The witness maintains his story, and Professor C informs no one. Thus upon false testimony, the adjudication panel finds the accused responsible for misconduct. Upon a later administrative appeal, the deception and communication with Professor C are revealed. Professor C's advice to the witness is not protected by academic freedom, and Professor C may suffer adverse employment action for having failed to fulfill the role of neutral adjudicator in accordance with the disciplinary process. Even if Professor C might have been bound to maintain the confidence of the witness, Professor C improperly advised the witness to disrupt the disciplinary process with perjury, and Professor C thereafter countenanced a violation of the rights of the accused.

(4) Campus Organization Participation. Upon invitation, Professor D in the Religion Department participates in a debate sponsored by the Lesbian, Gay, Bisexual and Transgender Student Association. Professor D vehemently asserts the position that homosexuality is a sin. Professor D's participation in the debate is protected by academic freedom, both because

participation in a campus organization is closely related to teaching and service, and because the expression, however vehemently, of an opinion, however controversial, may not constitute cause for adverse employment action.

Subsequently, Professor D is assigned the responsibility of adviser to the student newspaper. By university policy, duly adopted by an authorized faculty body, the student newspaper enjoys editorial independence, free of viewpoint-based regulation by any university actor. Professor D disagrees with the position of a planned student editorial opposing a referendum ban on gay adoption, so Professor D pulls the editorial from production. Professor D's censorship is not protected by academic freedom, and Professor D may suffer adverse employment action for violating the viewpoint-neutrality policy that governs the university-newspaper relationship.

(5) Internal Policy Statement, Distinterested Speaker. Professor E in the French Department writes a memo to her departmental colleagues asserting that the placement testing of incoming students is inaccurate. Professor E's position is at odds with the conclusion of the French Department Assessment Committee, which just concluded a study of the incoming placement testing. Professor E is accused of being "non-collegial." Professor E's expression is protected by academic freedom, both because her expression is closely related to service through faculty governance and to teaching, and because the expression of an opinion, however controversial, may not constitute cause for adverse employment action. Whether Professor E is perceived as "collegial" has no bearing on the scope of protected activity.

Subsequently, an authorized faculty body, for viewpoint-neutral and pedagogical reasons, duly adopts a departmental policy requiring that incoming students with common, qualifying placement scores are to be started at the same point of study in the second-level course, French 161, which is taught in three sections. Lacking confidence in the efficacy of the placement test, Professor E on the first morning of classes distributes a memo to the other two teachers of French 161, indicating Professor E's intention to use an attached supplementary placement test and to sub-divide her French 161 students into groups according to the results, with different plans of study in defiance of the departmental policy. In the memo, Professor E entreats the other teachers to defy the policy similarly. Had Professor E circulated the memo a week earlier as a proposal for amendment to existing policy, rather than as a call for imminent defiance, the circulation would have been protected by academic freedom. But Professor E's expression is not protected by academic freedom, because the memo means to facilitate the imminent defiance of a binding policy. Accordingly, Professor E may be subject to adverse employment action.

(6) Internal Policy Statement, Interested Speaker. Professor F in the Biology Department writes a memo to the departmental faculty stating that

the head of the department has shown poor judgment by placing resources in student placement, rather than in faculty research, and that the head should be removed. Because of the department's fiscal priorities, Professor F suffers a reduction in funding. Professor F is accused of acting in self-interest and in not being a "team player." Professor F's expression is protected by academic freedom, because Professor F's expression is closely related to service through faculty governance, and to teaching and research, and Professor F is presumptively commenting on a matter of public concern, even though the matter affects him. Professor F's expression is also protected because the expression of an opinion, however controversial, may not constitute cause for adverse employment action. Whether Professor F is perceived as a "team player" has no bearing on the scope of protected activity.

Subsequently, Professor F writes another memo to the departmental faculty. In the second memo, Professor F accuses the head of the Biology Department of receiving a financial kickback from a pharmaceutical company for having cut funding to Professor F's research, because Professor F's research might have resulted in the development of a product that would diminish the company's profit margin on an existing product. The charge is false and reckless; the head of the department has had no such interaction with the pharmaceutical company. Professor F's expression is not protected by academic freedom, because Professor F's expression is false, reckless, and injurious to the reputation of a colleague. Professor F's expression is not protected as a statement of opinion, because the expression constitutes a false assertion of fact. Professor F is presumed to have commented on a matter of public concern, but made with recklessness, such expression still may subject Professor F to adverse employment action.

(7) External Policy Statement, Public Affairs. Professor G in the Sociology Department is quoted in the newspaper as an expert stating that government entitlement programs hurt the poor more than help the poor. Professor G did not tell the reporter that she was not speaking on behalf of the university, but she did not affirmatively purport to speak on behalf of the university. Professor G's expression is protected by academic freedom, both because her expression as an expert is closely related to service and research, and because the expression of an opinion may not constitute cause for adverse employment action. Because Professor G was consulted in her capacity as an expert, it was not necessary to disclaim her affiliation with the university. It was evident under the circumstances that Professor G was not purporting to espouse an official position of the university.

Subsequently, Professor G is quoted in the newspaper asserting opposition to a referendum bond issue that would support state educational institutions, including the university. Professor G opposes the bond issue because she opposes government debt to support public works as a matter of social policy. However, Professor G is correctly quoted in the

newspaper having said, "Everyone at the university, outside the athletic department, opposes the bond, because the money is going to be wasted on building a new athletic stadium." Professor G expressly neither asserted nor disclaimed representation of the university on the issue; in fact, the official university position supports the bond issue because of the indirect academic benefits of a vibrant athletic program. Professor G's expression is not protected by academic freedom because she purported, without authority or disclaimer, to express an opinion on public affairs on behalf of other university officials. That Professor G expressed a mere opinion does not save her, because the opinion was not propounded as merely her own, and the attribution of that opinion to all academic officials was a false assertion of fact. Professor G may suffer adverse employment action for having purported to speak on behalf of the institution with neither authority nor disclaimer.

(8) External Policy Statement, Institutional Affairs. Professor H in the Law Department is quoted in the newspaper stating that the university places too much emphasis on recruitment and insufficient emphasis on placement. Professor H told the reporter that he was not speaking on behalf of the university, but that disclaimer does not appear in the story. Professor H's expression is protected by academic freedom, both because his assessment of university policy is closely related to service through faculty governance and to teaching, and because the expression of an opinion, however controversial, may not constitute cause for adverse employment action. Professor H properly disclaimed representation of the institution, and he is not responsible for the subsequent failure of a third party to perpetuate the disclaimer.

Subsequently, Professor H is quoted in the newspaper stating that fewer than half of law graduates have jobs upon graduation, and using this statistic as evidence to support his argument that the university expends insufficient resources on placement. In fact, the law placement rate upon graduation is ninety percent, and has never been lower than fifty percent. There is no foundation for Professor H's misstatement. Professor H's expression is not protected by academic freedom because he recklessly misstated a fact to the detriment of the institution. His expression is not protected as opinion, because he made a false factual assertion. Professor H may be held responsible for his expression regardless of whether he disclaimed representation of the institution, though a disclaimer may mitigate his offense.

(9) External Policy Statement, Whistleblower to Private Entity. Professor J in the Journalism Department urges a regional accrediting authority of journalism departments to determine whether the department awards more credits than permitted in certain subjects, according to accreditation standards, for students pursuing degrees in the department. Professor J does not know whether the department is at fault, because she does not have access to records that would demonstrate the department's

culpability. She does hope that the ensuing scandal will prompt a disliked department head to step down. But Professor J is not reckless in urging the authority to make the inquiry. The department's accreditation is consequently jeopardized. Professor J's communication is protected by academic freedom, because the communication is closely related to service through faculty governance, and to teaching, and because Professor J has not asserted a fact she knows to be false, nor asserted a fact with reckless disregard of its truth or falsity. The department may prefer that Professor J first have worked internally to correct any misunderstanding, but Professor J's failure to do so is not cause for adverse employment action. Whether Professor J bore ill will to the department head, and whether the accrediting authority ultimately determines that wrongdoing occurred are circumstances that have no bearing on the scope of protected activity.

Subsequently, Professor J urges the regional accrediting authority to investigate whether the Journalism Department has been falsifying grades for student-athletes to prevent them from failing. In fact, Professor J has no reason to believe that such falsification has occurred, but Professor J wishes to spark a scandal that might prompt a disliked department head to step down. The department's accreditation is consequently jeopardized. Ultimately, no wrongdoing is uncovered, and the department is reaccredited. Professor J's communication is not protected by academic freedom, because Professor J asserted a fact that she knew to be false, or posited a damaging accusation in reckless disregard of its truth or falsity. Whether Professor J bore ill will to the department head has no bearing on this conclusion; Professor J's recklessness is the dispositive circumstance.

(10) External Policy Statement, Whistleblower to Public Entity. Professor K in the Political Science Department reports to the Department of Education that the Political Science Department has disclosed student information in a manner contrary to the Family Educational Rights and Privacy Act. Professor K believes that such a wrong occurred and also hopes that the ensuing scandal will prompt a disliked department head to step down. Professor K's communication is protected by academic freedom, both because the communication is closely related to service through faculty governance, and because the communication is protected by the First Amendment right to petition, regardless of whether the matter concerns Professor K personally. The Department may prefer that Professor K first have worked internally to correct any misunderstanding, but Professor K's failure to do so is not cause for adverse employment action. Whether Professor K bore ill will to a department head is immaterial; the sincerity of Professor K's petition is dispositive.

Subsequently, Professor K reports to the Department of Education that the Political Science Department has disregarded institutional review standards for survey research involving human subjects. Professor K has no reason to believe that such a wrong occurred but made the complaint in the hope that an ensuing scandal will prompt a disliked department head to

step down. Professor K's communication is not protected by academic freedom, because the communication was made for no legitimate purpose. The communication is not protected as a First Amendment petition because the complaint was false and a mere sham. Professor K may not be condemned for his personal animosity for the department head, but his groundless complaint to public authorities may support the imposition of adverse employment action.

(11) Exercise of Public Right. Professor L in the German Department of a public university files a request under the state freedom of information act (FOIA) to obtain public records revealing the expenditures of the department. The department previously denied access to these records to Professor L on grounds that she had no authority over or responsibility for the financial disposition of the department. The FOIA does not condition access on the purpose of the request or identity of the requester. Professor L's FOIA request is protected by academic freedom, because Professor L's supervision of departmental expenditures is closely related to service through faculty governance. Moreover, Professor L's request is protected because the exercise of a statutory or constitutional right cannot be cause for adverse employment action.

In an unrelated matter, Professor L, serving on the university's readmissions committee, lawfully comes into possession of a former student's private medical history, which includes records of medical treatment for depression and related violent expressions. Over Professor L's vote, the readmissions committee readmits the applicant as a freshman. Believing that the readmissions committee jeopardizes the safety of the community, Professor L releases an unredacted copy of the applicant's record to the news media. Professor L's release to the media is not protected by academic freedom, and Professor L may suffer adverse employment action for the disclosure. Though ordinarily the First Amendment prohibits prior restraint of the subsequent dissemination of truthful information lawfully obtained, Professor L may be, as a university employee, constitutionally restrained by the Family Educational Rights and Privacy Act.

(12) Organization of Conference. Professor M in the History Department organizes a conference of academic professionals on the subject of teaching evolutionary biology. The History Department asks Professor M, an avowed atheist, to cancel the conference for fear that protests organized by a student organization espousing creationist theology will be disruptive to the campus. Professor M refuses to cancel the conference. Professor M's decision to go forward with the conference is protected by academic freedom, because Professor M's conference activity is closely related to teaching, research, and service. The History Department may not upon mere fear of disruption override Professor M's decision, and the History Department must endeavor to thwart unlawful disruptive conduct before resorting to censorship of academic activity.

The conference proceeds amid vigorous protests. As a controversial keynote speaker, invited by Professor M, is about to take the lectern, university security receives a credible threat that a bomb has been planted inside the auditorium where the conference is being held. With the approval of university and departmental administrations, security evacuates the facility. The speaker, who must depart on a tight schedule, cannot appear. No violation of Professor M's academic freedom has occurred. The university acted neutrally with regard to viewpoint and only upon circumstances demonstrating an imminent threat of substantial campus disruption that could not be averted by less restrictive action.

JUSTIFYING AMERICA'S UNIVERSITIES: A
REVIEW OF *THE GREAT AMERICAN UNIVERSITY:
ITS RISE TO PREMINENCE, ITS INDISPENSABLE
NATIONAL ROLE, WHY IT MUST BE PROTECTED*

JUDITH AREEN*

American higher education is one of the nation's most successful sectors. A recent survey found that seventeen of the top twenty universities in the world are in the United States (and forty of the top fifty); roughly sixty percent of all Nobel Prizes awarded since the 1930s have gone to Americans; and as many as eighty percent of the leading new industries in the United States derive from discoveries made at American colleges and universities. Yet during his fourteen years as provost of Columbia University, Jonathan Cole found that alumni questions dealt almost exclusively with teaching or undergraduate life. The experience prompted him to write *The Great American University* to address the evident lack of knowledge about the research mission of America's colleges and universities. In this important book, he warns that colleges and universities are more fragile institutions than most believe, and that we are at risk of losing our top ranking in the world to other nations if "we do not recognize their importance, find out what makes them tick, and continue to nourish and guard them."¹

Cole begins the book by recounting how America's colleges and universities became the envy of the world. Several favorable circumstances made college and university growth possible, including the right values and social structure, academic talent, a commitment to free inquiry and to competition among colleges and universities, and "vast resources."² In addition to these blessings, America was able to draw heavily on the most successful aspects of European higher education, although few European scholars were recruited to come until the 1930s.³

* Judith Areen is the Paul Regis Dean Professor of Law at Georgetown University Law Center.

1. JONATHAN R. COLE, *THE GREAT AMERICAN UNIVERSITY* xii (2009) [hereinafter COLE].

2. *Id.* at 5.

3. Thomas Jefferson persuaded Francis Walker Gilmer, a fellow graduate of William and Mary, to recruit professors for the University of Virginia. Gilmer wrote several letters explaining that it was difficult to persuade faculty at Oxford or

The idea of a college or university committed to research as well as teaching did not emerge until the nineteenth century. Historians generally date this dual-mission approach to the founding of the University of Berlin in 1810 by Wilhelm von Humboldt. The new approach spread rapidly to nearby regions whose universities and morale had been decimated by Napoleon. In a relatively brief time, the new-style German universities were recognized as the best in the world.

The German approach of linking scholarship and teaching had a major impact on the development of higher education in the nineteenth century in the United States. The transmission was facilitated by the many academic leaders who were educated in German universities, including Andrew Dickson White, the founding president of Cornell (1865), and Charles Eliot, the influential president of Harvard. Johns Hopkins (1876) was the first American university to commit itself to the German emphasis on research as well as teaching. Daniel Coit Gilman, its first president, was deeply impressed by the German universities he visited early in his career. Under his leadership, Hopkins became the major producer of Ph.D.s, who spread the research model to the faculties of colleges and universities around the nation.

The German model was not imported whole cloth, however. Instead, American colleges and universities embraced the attention to undergraduate student life emphasized at Oxford and Cambridge—but not in Germany. American colleges and universities also committed themselves to public service by providing ideas and expertise to the state and federal governments. Clark Kerr best summed up this American hybrid:

a university anywhere can aim no higher than to be as British as possible for the sake of the undergraduates, as German as possible for the sake of the graduates and the research personnel, as American as possible for the sake of the public at large—and as confused as possible for the sake of the preservation of the whole uneasy balance.⁴

Cole expands his discussion of the emergence of the American research university with a revealing account of the intellectual migration set off by the rise of Hitler. The migration ensured that the indigenous talent in the United States was significantly enhanced in the early twentieth century by the arrival of such important thinkers as Albert Einstein (1933), Hans Bethe and more than 100 other German physicists (1933-1941), and Max Delbruck (1937), whose fresh perspective on genetics helped to pave the

Cambridge to accept a professorship in “an unknown country,” particularly given their apartments and generous salaries. Letter from Francis Walker Gilmer to Thomas Jefferson, July 20, 1824, in *Correspondence of Thomas Jefferson and Francis Walker Gilmer, 1814-1826*, at 92-94 (Richard Beale Davis ed., 1946).

4. CLARK KERR, *THE USES OF THE UNIVERSITY* 14 (5th ed. 2001), quoted in COLE, *supra* note 1, at 38.

way for James Watson and Francis Crick.

American higher education also benefited from the fact that the United States was the first nation to commit significant national resources to higher education. Cole mentions the Morrill Act of 1862, which provided crucial financial incentives for expansion and research in public universities.⁵ He devotes more attention to the huge federal investment after World War II in research for military and health needs. Appropriately, he highlights the role played by Vannevar Bush, whose influential treatise *Science—The Endless Frontier* did so much to encourage post-war funding. Equally important was Bush's view that there needed to be a mechanism for financing science that would be independent of government laboratories and the direct influence of the state. Had his view not prevailed with its reliance on peer review by scientists in colleges and universities, the United States might not have become the scientific powerhouse it did in the second half of the twentieth century. It certainly would have been more vulnerable to the abuse of scientific freedom infamously exemplified by Trofim Lysenko, who persuaded Stalin and his advisers to purge alternative views from the Soviet scientific community.

Our national commitment to competition also contributed to excellence in higher education, although as always it produced losers as well as winners. William Rainey Harper might not have launched the University of Chicago as quickly as he did, for example, despite having access to the deep pockets of John D. Rockefeller, if he had not recruited leading faculty from more established universities. When the University of Chicago opened with 120 faculty in 1892, there were five faculty from Yale and fifteen from Clark, "virtually decimating that young and aspiring university."⁶ Cole notes that the lists of top universities compiled in the early twentieth century had changed little by the end of the century because they had the "first-mover advantage." One exception was Clark University.⁷

In addition to outstanding faculty, great universities need leaders in academic and public administration. Cole uses the crucial role played by Frederick Terman, another provost, in the ascendance of Stanford to make his point. Terman, who was Stanford's provost from 1955 to 1965, wanted to compete with the best private colleges and universities on the east coast

5. The national commitment is much older. In 1785, the Continental Congress authorized the sale of public lands in the Northwest (which later became the states of Ohio, Indiana, Illinois, Michigan, Wisconsin, and the part of Minnesota east of the Mississippi). The land was first divided into townships of thirty-six sections (a section was 640 acres). One section of every township was reserved for public education, including higher education. The townships reserved for education in Ohio, for example, became the principal source of income for Ohio University in 1804. JUDITH AREEN, *HIGHER EDUCATION AND THE LAW* 38 (2009).

6. COLE, *supra* note 1, at 31.

7. COLE, *supra* note 1, at 34.

despite the fact that Stanford's endowment at the end of the 1950s was not equal on a per student basis to that of any of the Ivy League schools, and was only about a quarter of the size of the endowments of Harvard, Yale and Princeton.⁸ Today, by contrast, Stanford clearly ranks in the top five in the nation.⁹ Indeed, the Chinese rank it second in the world.¹⁰

Terman's strategy was to focus on the recruitment of outstanding scholars to the faculty. He sought the opinions of the best scholars in the country to decide whom to recruit. He used other measures as well to build Stanford's "steeple of excellence," such as reviewing young scholars who were nominated for membership in the National Academy of Sciences but just missed the cut. As provost, he reviewed every faculty appointment and scrutinized them for research excellence and potential. He also directed significant funds to faculty recruitment from multiple sources: government funding, private contributions, and alumni support. He was omnivorous in his commitment to innovation. In contrast to MIT, which concentrated on specific areas of research, Terman encouraged any research that built on the curiosity and interest of individual faculty members. He also encouraged interdisciplinary research, particularly in the physical and biological sciences. He even established independent institutions, such as the Center for Advanced Study in the Behavioral Sciences, which were located on campus but only loosely affiliated with the university. The Center brought outstanding social scientists to the area which in turn gave departments an opportunity to identify the most talented and to recruit many of them.

After a section explicating several of the major scientific advances made at American universities, Cole concludes with a discussion of threats to free inquiry and academic freedom that have arisen in the post-9/11 years. He criticizes those provisions of the Patriot Act, for example, which expanded the government's power to collect information from college and university libraries and bookstores, and authorized federal agents to obtain student academic records without their consent.¹¹

Although Cole is certainly right to emphasize that academic freedom is crucial to the functioning of great colleges and universities, one wishes that he had devoted more attention to understanding and strengthening the freedom. America is unique in the world in granting control over private and public colleges and universities to boards of lay (meaning non-faculty) trustees. This governance structure undergirds the great colleges and universities of today, but only because it was modified in the twentieth century when most governing boards embraced shared governance, a system in which governing boards delegate primary responsibility for

8. COLE, *supra* note 1, at 536 n.8.

9. COLE, *supra* note 1, at 515.

10. COLE, *supra* note 1, at 515.

11. COLE, *supra* note 1, at 391.

academic matters (such as the curriculum and faculty hiring) to faculties. The goal was to ensure that American colleges and universities would be “intellectual experiment station[s]” where new ideas could germinate even when they challenged conventional wisdom, rather than mere “instruments of propaganda” subject to the whim of board members or hostile outside forces.¹² Part of what makes American colleges and universities tick is that shared governance has enabled them to develop an internal culture of innovation that both produces new knowledge and educates new thinkers.

Cole at the end expresses concern that trustees “rarely try to increase their knowledge of the educational and research programs . . . [and so] remain blissfully or unhappily ignorant of what the university is actually trying to do.”¹³ This book is a great step toward increasing their knowledge and understanding of the colleges and universities they lead.

12. AM. ASS'N OF UNIV. PROFESSORS, GENERAL DECLARATION OF PRINCIPLES (1915), *reprinted in* 2 AMERICAN HIGHER EDUCATION: A DOCUMENTARY HISTORY 870 (Richard Hofstadter & Wilson Smith eds., 1961).

13. COLE, *supra* note 1, at 493.

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*

I. THE UNIFORM LAWS: REGULATING CHARITABLE DONATIONS.....	204
A. The General Purpose of UMIFA	204
1. The State of Charitable Institutions Pre-UMIFA.....	205
2. The State of Donors Before UMIFA	207
3. Meeting These Needs with the Uniform Laws	208
B. How UPMIFA Differs from its Predecessor	208
1. The Maintenance of Endowment Funds	209
a. Elimination of Historic Dollar Value.....	209
b. The Optional Rebuttable Presumption of Imprudence ..	210
2. Updating the Prudence Standard.....	211
a. Articulation of the Standard.....	211
b. Factors to be Considered.....	212
3. Liberalization of the Conditions Under Which Restrictions can be Modified	214
a. Cy Pres and Equitable Deviation	216
b. Modification of Restrictions on Small Funds	218
II. LITIGATING WITH THE UNIFORM LAWS: LAWSUITS INVOLVING COLLEGES AND UNIVERSITIES.....	219
A. <i>Yale University v. Blumenthal</i>	219
B. <i>Carl J. Herzog Foundation, Inc. v. University of Bridgeport</i>	221
C. <i>Robertson v. Princeton</i>	221
1. History of <i>Robertson v. Princeton</i>	221
a. The Robertson Foundation and the Robertsons’ Intent	222
b. “Princeton’s Betrayal”	223
c. The Summary Judgment Stage	223
d. The Outcome of the <i>Robertson v. Princeton</i>	

Litigation.....	224
2. The Role of UMIFA in the Litigation.....	225
a. Sole Beneficiary Issue.....	225
b. Article 11(c) Interpretation.....	226
3. The Role of UPMIFA in the Litigation	227
III. UPMIFA IN ACTION: EFFECT OF UPMIFA ON DONOR-INITIATED LAWSUITS BROUGHT AGAINST COLLEGES AND UNIVERSITIES	227
A. Minimal Use of UMIFA.....	228
B. Court Reluctance	230
C. Lack of Changes Affecting the Main Litigation Issues under UMIFA	232
1. The Lack of Donor Standing	232
2. The Continued Importance of Donative Documents	235
IV. CONCLUSION.....	237

INTRODUCTION

Since the establishment of America's first university in 1636 thanks to the donation of John Harvard's library and estate upon his death,¹ American colleges and universities have relied upon the generosity of donors to fund the education they provide. In the 2008 fiscal year, yearly charitable contributions to colleges and universities reached an all-time high of over \$31 billion.²

In forty-eight states plus the District of Columbia, donations to those colleges and universities that are eleemosynary³ in character are governed by state statutes based upon uniform laws promulgated by the Uniform Law Commission.⁴ The first of the Uniform Laws governing the

* Richard M. Williams is a member of the Virginia Bar presently working as an attorney in Arlington, Virginia. She is a 2007 graduate of Harvard University and received her J.D. from Notre Dame Law School in 2010.

1. President and Fellows of Harvard College, *The Harvard Guide: History, Lore, and More*, <http://www.hno.harvard.edu/guide/intro/index.html> (last visited Feb. 1, 2009).

2. Press Release, Council for Aid to Education, Contributions to Colleges and Universities up 6.2 percent to \$31.60 Billion (Feb. 25, 2009), *available at* http://www.cae.org/content/pdf/VSE_2008_Survey_Press_Release_with_Tables.pdf. From 1998 to 2008, charitable contributions increased 4.1% each year on average. *Id.* After reaching the all-time high of \$31.60 billion during the 2008 fiscal year, contributions decreased by 11.9% in the 2009 fiscal year, the steepest decline in charitable contributions ever recorded by the Council for Aid to Education. Press Release, Council for Aid to Education, Contributions to Colleges and Universities Down 11.9 percent to \$27.85 Billion: Greatest Decline Ever Recorded (Feb. 3, 2010), *available at* http://www.cae.org/content/pdf/VSE_2009_Press_Release.pdf.

3. Eleemosynary is defined as "[o]f, relating to, or assisted by charity; not-for-profit." BLACK'S LAW DICTIONARY (8th ed. 2004).

4. The Uniform Law Commission, also called the National Conference of

investment and management of donations to non-profit organizations, the Uniform Management of Institutional Funds Act (“UMIFA”), was promulgated in 1972.⁵ Its successor, the Uniform Prudent Management of Institutional Funds Act⁶ (“UPMIFA”), was recommended to the states in 2006 in order to update the management and investment rules first created by UMIFA.⁷

Commissioners on Uniform State Laws, “provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of the law.” Uniform Law Commission, <http://www.nccusl.org/Update/> (Feb. 3, 2010).

5. UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT (Nat’l Conference of Comm’rs on Unif. State Laws 1972).

6. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT (Nat’l Conference of Comm’rs on Unif. State Laws 2006).

7. The following forty-six states have adopted the UPMIFA as a state statute: Alabama (ALA. CODE § 19-3C-1 *et seq.* (2009)); Alaska (ALASKA STAT. § 13.70.010 (2009)); Arizona (ARIZ. REV. STAT. ANN. § 10-11801 *et seq.* (2009)); Arkansas (ARK. CODE ANN. § 28-69-801 *et seq.* (West 2009)); California (CAL. PROB. CODE § 18501 *et seq.* (West 2009)); Colorado (COLO. REV. STAT. § 15-1-1101 *et seq.* (2009)); Connecticut (CONN. GEN. STAT. § 45a-535 *et seq.* (2009)); Delaware (DEL. CODE ANN. tit. 12, § 4701 *et seq.* (2009)); Georgia (GA. CODE ANN. § 44-15-1 *et seq.* (2009)); Hawaii (HAW. REV. STAT. § 518E-1 *et seq.* (2009)); Idaho (IDAHO CODE ANN. § 33-5001 *et seq.* (2009)); Illinois (760 ILL. COMP. STAT. ANN. 51/1 *et seq.* (West 2009)); Indiana (IND. CODE ANN. § 30-2-12-1 *et seq.* (West 2009)); Iowa (IOWA CODE § 540A.101 *et seq.* (2009)); Kansas (KAN. STAT. ANN. § 58-3611 *et seq.* (2009)); Kentucky (KY. REV. STAT. ANN. § 273.600 *et seq.* (West 2010)); Louisiana (LA. REV. STAT. ANN. § 2337:1 (2009)); Maine (ME. REV. STAT. ANN. tit. 13, § 5101 *et seq.* (2009)); Maryland (MD. CODE ANN., EST. & TRUSTS § 15-401 *et seq.* (West 2009)); Massachusetts (MASS. GEN. LAWS ch. 180A § 1 *et seq.* (2009)); Michigan (MICH. COMP. LAWS § 451.921 *et seq.* (2009)); Minnesota (MINN. STAT. § 309.73 *et seq.* (2009)); Missouri (MO. REV. STAT. § 402.130 *et seq.* (2009)); Montana (MON. CODE ANN. § 72-30-101 *et seq.* (2009)); Nebraska (NEB. REV. STAT. § 58-610 *et seq.* (2009)); Nevada (NEV. REV. STAT. § 164-640 *et seq.* (2009)); New Hampshire (N.H. REV. STAT. ANN. § 292-B:1 *et seq.* (2009)); New Jersey (N.J. STAT. ANN. § 15:18-25 *et seq.* (West 2009)); New Mexico (N.M. STAT. § 46-9A-1 *et seq.* (2009)); North Carolina (N.C. GEN. STAT. ANN. § 36E-1 *et seq.* (West 2009)); North Dakota (N.D. CENT. CODE 59-21-01 *et seq.* (2009)); Ohio (OHIO REV. CODE ANN. § 1715.51 *et seq.* (West 2009)); Oklahoma (OKLA. STAT. tit. 60, § 300.11 *et seq.* (2009)); Oregon (OR. REV. STAT. § 128.305 *et seq.* (2009)); Rhode Island (R.I. GEN. LAWS § 18-12.1-1 *et seq.* (2009)); South Carolina (S.C. CODE ANN. § 34-6-10 *et seq.* (2009)); South Dakota (S.D. CODIFIED LAWS § 55-14A-1 *et seq.* (2009)); Tennessee (TENN. CODE ANN. § 35-10-201 *et seq.* (2009)); Texas (TEX. PROP. CODE ANN. § 163.001 *et seq.* (Vernon 2009)); Utah (UTAH CODE ANN. § 51-8-101 *et seq.* (2009)); Vermont (VT. STAT. ANN. tit. 14, § 3411 *et seq.* (2009)); Virginia (VA. CODE ANN. § 55-268.11 *et seq.* (2009)); Washington (WASH. REV. CODE § 24.55.005 *et seq.* (2009)); West Virginia (W. VA. CODE § 44-6A-1 *et seq.* (2009)); Wisconsin (WIS. STAT. ANN. § 112.11 *et seq.* (West 2009)); Wyoming (WYO. STAT. ANN. § 17-7-301 *et seq.* (2009)). The District of Columbia has also adopted UPMIFA as statute. D.C. CODE § 44-1631 *et seq.* (2009). *See also* Uniform Law Commission, Enactment Status Map (Dec. 31, 2009), available at <http://upmifa.org/DesktopDefault.aspx?tabindex=5&tabid=68>. The UMIFA is still in effect in five of the forty-seven states that originally enacted it as statute: Florida (FLA. STAT. § 1010.10 *et seq.* (2009)); Kentucky (KY. REV. STAT. ANN. § 273.510 *et seq.* (West 2009)); Louisiana (LA. REV. STAT. ANN. § 9:2337.1 *et seq.* (2009)); Mississippi (MISS. CODE ANN. § 79-11-601 *et seq.* (2009)); and New York (N.Y. NOT-FOR-PROFIT

In theory, the changes made in updating UMIFA could have a substantial impact on the ability of donors to enforce restrictions or conditions placed upon the gifts that they make to colleges and universities.⁸ This Note argues, however, that very few changes will in fact take place on that front in states that adopt UPMIFA. Part I, below, will lay out the main goals of both of the Uniform Laws⁹ and highlight the major changes made by UPMIFA. Part II will provide an overview of the most important lawsuits brought under UMIFA, especially focusing on the most recent lawsuit, brought by donors against Princeton University in 2002. Finally, Part III will explain why the adoption of UPMIFA is likely to have a minimal impact on colleges and universities when they are involved in litigation with dissatisfied donors.

I. THE UNIFORM LAWS: REGULATING CHARITABLE DONATIONS

Prior to the enactment of the first Uniform Law by the Uniform Law Commission in 1972, there was no clearly defined body of law to govern the use, management, and investment of funds given to charitable organizations.¹⁰ UMIFA established, for the first time ever, “uniform and fundamental rules for the investment of funds held by charitable institutions and the expenditure of funds donated as ‘endowments’ to those institutions.”¹¹ Its rules governed the management of all funds held by a charitable institution “for its exclusive use, benefit, or purposes,”¹² but placed special emphasis on endowment funds and other funds accompanied by donor intent.

A. The General Purpose of UMIFA

The overarching aim of UMIFA was to meet the needs of charitable institutions by creating for them a distinct set of uniform laws well-tailored to the unique problems generated by charitable donations. Courts hearing cases involving charitable organizations and attorneys offering advice to charities often turned to trust law, corporate law, and contract law, but no one type of law was applied consistently, and none was a good fit for

CORP. §§ 102, 512, 514, 522 (McKinney 2009)). As of June 14, 2010, UPMIFA had been introduced but not yet passed in Mississippi and New York.

8. Approximately half of all charitable contributions to colleges and universities are explicitly given for a “capital purpose” and cannot be used simply to support the current operations of the institution. Council for Aid to Education, *supra* note 2.

9. I will use the phrase Uniform Laws to refer to the UMIFA and UPMIFA together.

10. UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT prefatory note at 1 (Nat’l Conference of Comm’rs on Unif. State Laws 1972).

11. Uniform Law Commission, History of UPMIFA and UMIFA, <http://upmifa.org/DesktopDefault.aspx?tabindex=2&tabid=69> (Feb. 1, 2009).

12. UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 1(2) (Nat’l Conference of Comm’rs on Unif. State Laws 1972).

charitable organizations. The lack of a pertinent body of uniform law governing charitable donations had proven to be disadvantageous for both the donors and the charitable institutions receiving their gifts.

1. The State of Charitable Institutions Pre-UMIFA

Only a few years before the Uniform Law Commission would promulgate UMIFA, Professors William Cary and Craig Bright published their landmark study on endowment funds.¹³ Through a review of cases involving nonprofit corporations, they found that “[t]rust principles or corporate principles are applied if they happen to be of assistance in reaching the desired conclusion”¹⁴ Even more disconcerting to charitable institutions than this mix of trust law and corporate law was the fact that the courts showed “no undue concern . . . for the niceties of logic and consistency in choosing between the two.”¹⁵

In addition to this general uncertainty surrounding charities, they also faced specific legal problems because there was no uniform body of law governing charitable institutions. In 1972, the Uniform Law Commission noted that there was “substantial concern about the potential liability of the managers of the institutional funds” among eleemosynary institutions.¹⁶ Despite the increasing number of charitable organizations, “virtually no statutory law regarding trustees or governing boards of eleemosynary institutions” existed.¹⁷ When disputes did arise about the liability of management, courts were forced to turn either to trust law or corporate law. The problem was that trustees and governing boards were held to different standards under trust law than in corporate law.¹⁸ They enjoyed greater freedom under the corporate standard, but were held to a very strict standard in trust law.¹⁹ For all practical purposes, uncertainty as to which standard applied meant that a case brought against a charity’s trustees or its

13. *Id.* prefatory note at 1.

14. WILLIAM L. CARY AND CRAIG B. BRIGHT, *THE LAW AND THE LORE OF ENDOWMENT FUNDS* 18 (1969).

15. *Id.*

16. UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT prefatory note at 1 (Nat’l Conference of Comm’rs on Unif. State Laws 1972).

17. *Id.*

18. In trust law as it existed in 1972, those with fiduciary duties were held to a strict duty of care, under which simple negligence was the threshold for liability. This duty of care was often expressed as the “prudent man rule”—the duty “to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property.” Douglas M. Salaway, *UMIFA and a Model For Endowment Investing*, 22 J.C. & U.L. 1045, 1064 (1996). On the other hand, in corporate law, the duty of care was more lenient, requiring only “the care an ordinarily prudent person in a like position would exercise under similar circumstances.” More than simple negligence was required to impose liability under this standard. *Id.* at 1064-65. *See also* Iris J. Goodwin, *Donor Standing to Enforce Charitable Gifts: Civil Society vs. Donor Empowerment*, 58 VAND. L. REV. 1093, 1129 (2005) [hereinafter Goodwin 1].

19. Salaway, *supra* note 18, at 1064.

governing board could be won or lost solely based on the determination of the applicable law. Considering that courts did not agree on which standard to apply, case law on the matter was nothing more than “a series of seemingly disjointed cases that made it difficult for governing boards and their attorneys to predict judicial judgment.”²⁰

When it came to the investment of charitable funds, many charities assumed that they were bound by trust law,²¹ and their legal counsel often gave advice based on analogy to trust law.²² However, trust law was not a perfect fit for charitable institutions. The investment standards and accounting principles of trust law placed strict restrictions on the ability of charities to invest, hindering the production of adequate income.²³ This often resulted in an erosion of principal that “left the charity in worse shape overall than if the charity could have taken a more balanced approach to its investments.”²⁴

Additionally, without uniform laws specifically tailored to the problems of charitable institutions, the legally binding nature of donor-imposed restrictions²⁵ had the potential to “imper[i] the effective management of the fund,” especially as these restrictions became old and obsolete.²⁶ There was always the danger that charitable institutions would end up with no way to escape burdensome restrictions imposed upon them by long-dead donors. Take for example the case of *In re Weaver’s Trust*,²⁷ involving a donation given to Gettysburg College to provide scholarships to white, Protestant males. Despite the College’s objection to the racial restriction at the time of the donation, and despite the existence of college and church policy²⁸ against racial discrimination, the court refused to release the

20. *Id.* at 1065.

21. See Susan N. Gary, *Charities, Endowments, and Donor Intent: The Uniform Prudent Management of Institutional Funds Act*, 41 GA. L. REV. 1277, 1283 (2007) [hereinafter Gary 1]; Salaway, *supra* note 18, at 1050-51.

22. UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT prefatory note at 1 (Nat’l Conference of Comm’rs on Unif. State Laws 1972).

23. See Gary 1, *supra* note 21, at 1283, 1296; Susan Gary, *UMIFA Becomes UPMIFA*, p. 4, [http://www.nccusl.org/Update/Docs/UMIFA Becomes UPMIFA.pdf](http://www.nccusl.org/Update/Docs/UMIFA%20Becomes%20UPMIFA.pdf) [hereinafter Gary 2].

24. Gary 1, *supra* note 21, at 1283.

25. In one way or another, all donations to charitable organizations are governed by restrictions. Some donations are restricted only to the extent that they are given to and are to be spent by a specific institution. A donor may, however, make his donation conditional upon certain restrictions being accepted by the charity. If an organization accepts a conditional gift, it becomes legally bound to abide by any restrictions attached to it. See, e.g., Evelyn Brody, *From the Dead Hand to the Living Dead: The Conundrum of Charitable-Donor Standing*, 41 GA. L. REV. 1183, 1187 (2007); Goodwin 1, *supra* note 18, at 1107.

26. UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT prefatory note at 5 (Nat’l Conference of Comm’rs on Unif. State Laws 1972).

27. *In re Weaver’s Trust*, 43 Pa. D. & C.2d 245 (Pa. Orph. Ct. 1967).

28. At the time, Gettysburg College was under the influence of the Lutheran Church. *Id.* at 248-49.

College from the racial restriction.²⁹ The court's reasoning for continuing to hold Gettysburg College to the donor-imposed restriction to accept only white males was that "the eligibility criterion 'white', is clearly and unmistakably declared and can be literally and lawfully carried out."³⁰ The fact that the College could not comply with the racial criterion was dismissed as a problem of the trustee—here, Gettysburg College—and not the gift.³¹

2. The State of Donors Before UMIFA

Donors also faced potential problems if institutions chose not to follow donor-imposed restrictions. Donors who made conditional gifts to charitable organizations often found themselves in difficult legal situations because the charities were legally bound by the restrictions and conditions placed on gifts, but the donors were unable to enforce these restrictions.³² Because restricted gifts are not traditionally seen as contracts, donors could not turn to contract law for enforcement.³³ Additionally, donors did not have, and still do not have, standing to sue a charity for non-compliance with donor-imposed restrictions.³⁴ Consequently, donors could do very little to ensure that their donations were spent in accordance with their intent. Nevertheless, donors still occasionally turned to the courts in an attempt to have restrictions on charitable donations enforced. Most courts dismissed these cases due to a lack of standing.³⁵ On the rare occasion that a donor's case was heard on the merits, donors were not recognized as having much power vis-à-vis the charitable organizations. For example, in a 1970 case brought against Dartmouth College, the court refused to enforce donor-imposed restrictions that were clearly intended to be mandatory by the donor.³⁶ Another court, also in 1970, went so far as to hold that a college's violation of the terms of the charitable trust "[did] not entitle the settlor or his successor to enforce" the terms of the gift instrument.³⁷

29. *Id.* at 254.

30. *Id.*

31. *Id.*

32. *See* Brody, *supra* note 25, at 1187; Gary 2, *supra* note 23, at 4, 6.

33. Brody, *supra* note 25, at 1225.

34. *Id.* at 1187.

35. *See, e.g.,* Amundson v. Kletzing-McLaughlin Mem'l Found. Coll., 73 N.W.2d 114 (Iowa 1955) (dismissing the action because the donor's widow and children had no "reservation or condition which amounts of a property interest" in the property donated to the college); Penn v. Keller, 16 S.E.2d 331 (Va. Ct. App. 1941) (holding that the donor had no standing to have the trust enforced once there was "a complete dedication" to the recipient college).

36. *Trs. of Dartmouth Coll. v. Quincy*, 258 N.E.2d 745, 753 (Mass. 1970).

37. *Wilbur v. Univ. of Vt.*, 270 A.2d 889 (Vt. 1970).

3. Meeting These Needs with the Uniform Laws

In drafting UMIFA and later UPMIFA, the Uniform Law Commission attempted to balance the interests of the institutions with those of the donors when dealing with donor-imposed restrictions. To specifically address one of the problems raised by donor-imposed restrictions for charities—namely, the perpetuity of even the most ridiculous restrictions—both UMIFA and UPMIFA allow for the release of restrictions.³⁸ On the other hand, to protect donors and donor intent, many provisions of both UMIFA and UPMIFA are restricted by, or can be overridden by, a written agreement between the donors and the charity.³⁹ On a more general level, both UMIFA and UPMIFA establish the goal of ensuring that funds held by charitable institutions are managed and used prudently and according to the donor's intentions without deterring the operation of the charity or unduly restricting its ability to respond to changes in the world.

B. How UPMIFA Differs from its Predecessor

While both Uniform Laws serve the same general purposes, UPMIFA approaches these goals by a path distinct from that of UMIFA. UPMIFA was written in 2006 with the goal of “balancing protection of donor intent with the flexibility that will enable charities to cope with economic upturns and downturns.”⁴⁰ To achieve this goal, UPMIFA modernizes and updates the rules governing endowment funds and donor-imposed restrictions.⁴¹

To accomplish this modernization of the Uniform Laws, the Uniform Law Commission made many changes to UMIFA. Three of these changes are especially noteworthy: the deletion of “historic dollar value,” the updating of the prudence standard, and the liberalization of conditions under which donor-imposed restrictions can be modified. It is these modifications that seem most likely to impact the nature of lawsuits brought against colleges and universities under the Uniform Laws. These changes also are likely to have a significant impact on the manner in which

38. UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 7 (Nat'l Conference of Comm'rs on Unif. State Laws 1972); UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6 (Nat'l Conference of Comm'rs on Unif. State Laws 2006).

39. *See, e.g.*, UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT §§ 3, 4, 5 (Nat'l Conference of Comm'rs on Unif. State Laws 1972); UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT §§ 3(a), 3(e), 4(a), 4(b) (Nat'l Conference of Comm'rs on Unif. State Laws 2006). The UMIFA considered any writing that “establishes the terms of the gift” to be an authoritative “gift instrument.” UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 1 cmt. (Nat'l Conference of Comm'rs on Unif. State Laws 1972). Under the UPMIFA, any “writing” that expresses the intent of both the donor and the charity at the time of the donation serves as a “gift instrument.” UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 2 cmt. (Nat'l Conference of Comm'rs on Unif. State Laws 2006).

40. Gary 1, *supra* note 21, at 1332-33.

41. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT prefatory note at 1-2 (Nat'l Conference of Comm'rs on Unif. State Laws 2006).

endowment funds are invested and maintained by colleges and universities.

1. The Maintenance of Endowment Funds

Both UMIFA and UPMIFA focus a great deal on the maintenance of endowment funds. An endowment fund is a specific kind of conditional gift, one in which the most basic restriction is on how much of the fund can be spent.⁴² The two Uniform Laws define an endowment fund in slightly different ways, but the concept is the same: an endowment fund, by its very nature, cannot be spent in its entirety; a portion of the fund's value must be preserved and maintained for continued and future use.⁴³

While UPMIFA does not change the way in which an endowment fund is defined, it does change the way in which these funds are maintained. It does so mainly by eliminating UMIFA's limitation of historic dollar value, but it also includes an optional rebuttable presumption of imprudence.⁴⁴

a. Elimination of Historic Dollar Value

UMIFA used the historic-dollar-value calculation in order to achieve the goal of making sure that endowment funds were properly maintained.⁴⁵ This provision was meant to provide a monetary limit to institutions for the spending of funds held in endowment. The historic-dollar-value calculation consisted of the "value of the fund expressed in dollars at the time of the original contribution to the fund plus the dollar value of any subsequent gifts to the fund."⁴⁶ By way of example, if a donor gave a principle donation of \$50,000 to his college alma mater in 1975 and gave an additional \$10,000 fifteen years later, the historic dollar value of the fund would be \$50,000 until 1990 and \$60,000 thereafter. Historic dollar value remained constant as the initial donation generated income. Therefore, if the college to which our donor made his contribution was able to triple the value of the donation by 2000 through investing, the historic dollar value of the fund would still be \$60,000. Charitable institutions

42. The basic intent of any donor placing a gift in endowment is that a portion of the gift will be preserved and maintained for continual and future use. Endowment funds can be and often are subject to further restrictions on purpose and use.

43. UMIFA defined an endowment fund as one requiring "the continued maintenance of all or a specific portion of the original gift." UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 1 cmt. (Nat'l Conference of Comm'rs on Unif. State Laws 1972). UPMIFA focused on the expendability of the fund when defining an endowment fund, identifying an endowment fund as one "not wholly expendable by the institution on a current basis." UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 2(2) (Nat'l Conference of Comm'rs on Unif. State Laws 2006).

44. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 4(d) (Nat'l Conference of Comm'rs on Unif. State Laws 2006).

45. UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 1(5) (Nat'l Conference of Comm'rs on Unif. State Laws 1972).

46. *Id.* § 1 cmt.

under the jurisdiction of UMIFA were forbidden from making any expenditure that took the value of the endowment fund below its historic dollar value.⁴⁷ Only funds above the historic dollar value could be spent,⁴⁸ and even then only if the proposed expenditure met the prudence standard set forth in UMIFA.⁴⁹ In our example above, any expenditure from this specific donor's contribution would have been capped at \$120,000—the maximum amount that could be spent while still leaving \$60,000 in the fund.

In order to provide greater ability for institutions to cope with fluctuations in the value of endowment funds, UPMIFA eliminates the historic-dollar-value calculation.⁵⁰ The Uniform Law Commission believed that endowment funds could be protected and maintained even without the existence of the historic-dollar-value limitation due to the better-defined prudence standard of UPMIFA,⁵¹ discussed below.

b. The Optional Rebuttable Presumption of Imprudence

To further provide protection to endowment funds, the Uniform Law Commission added an optional rebuttable presumption of imprudence to UPMIFA.⁵² No such rebuttable presumption existed in UMIFA. Under the presumption of imprudence, any expenditure of greater than seven percent of the value of an endowment fund is considered imprudent.⁵³ It is meant to provide institutions with a spending guideline that will prevent charities from spending endowments too quickly.⁵⁴ The drafters of UPMIFA believed that the rebuttable presumption of imprudence was not necessary to provide sufficient protection for endowment funds because of the updated prudence standard.⁵⁵ They also had doubts about the effectiveness of defining imprudence with a flat percentage rate instead of basing it upon the value of the original gift. They feared the standard might not fit the range of charities covered by the Act, allowing some to spend in a manner that is actually imprudent, and preventing others from efficiently using appreciated funds.⁵⁶ Given these reservations, the Uniform Law Commission chose to make the rebuttable presumption of imprudence an

47. *Id.* § 2.

48. *Id.*

49. *Id.* § 6.

50. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT prefatory note at 3-4 (Nat'l Conference of Comm'rs on Unif. State Laws 2006). For a list of specific problems with the UMIFA's historic dollar value, see *id.*

51. *Id.* prefatory note at 4.

52. *Id.* § 4(d).

53. *Id.*

54. *Id.* § 4 cmt.

55. *Id.* prefatory note at 4

56. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 4 cmt. (Nat'l Conference of Comm'rs on Unif. State Laws 2006).

optional provision of UPMIFA as a way to indicate that some states might find it necessary while others would not.

2. Updating the Prudence Standard

For colleges and universities governed by the Uniform Laws, the most imposing and perhaps bothersome provision of UMIFA and UPMIFA is the spending restriction placed on charitable donations held as endowments.⁵⁷ Under this restriction, funds from an endowment fund can be expended only when the expenditure is “prudent.”⁵⁸ UPMIFA does not change the underlying standard of prudence that existed in UMIFA, but “simply updates the statutory language to provide good direction about the role of prudence in investment and management.”⁵⁹ This updated standard is the result of changes to both the articulation of the standard and the factors to be considered in making decisions regarding the investment and expenditure of charitable donations.

a. Articulation of the Standard

When drafting UPMIFA, the Uniform Law Commission first updated the articulation of the standard to comport with the modern notion of prudence.⁶⁰ The prudence standard as articulated in UMIFA was “ordinary business care and prudence,”⁶¹ with the added requirement that the

57. A donation is governed by the spending restriction only when the fund qualifies as an endowment fund under the applicable Uniform Law. Not all charitable donations are considered endowment funds. For a discussion of the definitions of “endowment fund” under UMIFA and UPMIFA, see *supra* Part I.B.1. More generally, gifts with no restriction beyond the designation for expenditure by a specific institution do not fall within the purview of the UPMIFA. See UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT §§ 2(5) (Nat’l Conference of Comm’rs on Unif. State Laws 2006) (requiring funds to be held “exclusively for charitable purposes” in order to be considered an institutional fund under the UPMIFA). See also *id.* § 2(7); § 2 cmt. (excluding from coverage funds that are considered program-related assets used to conduct general “charitable activities”). This was a distinction not made in the UMIFA. See UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 1(2) (Nat’l Conference of Comm’rs on Unif. State Laws 1972) (failing to exclude program-related assets or to require that funds are held only for charitable purposes, but instead bringing any funds “held by an institution for its exclusive use, benefit, or purposes” under the purview of the UMIFA). However, even if a donor does not attach to the donation specific conditions or restrictions, preventing the Uniform Laws from applying, the gift must still be used according to the purposes of the charity. Goodwin 1, *supra* note 18, at 1106.

58. See UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 6 (Nat’l Conference of Comm’rs on Unif. State Laws 1972); UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 3 (Nat’l Conference of Comm’rs on Unif. State Laws 2006).

59. Gary 2, *supra* note 23, at 2.

60. Susan Gary describes the concept of prudence as “the ‘industry’ standard for similarly situated investors.” It continues to evolve. Gary 1, *supra* note 21, at 1299.

61. UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 6 (Nat’l Conference of Comm’rs on Unif. State Laws 1972).

governing board also consider the charitable purposes of the organization.⁶² UPMIFA built upon this business standard, drawing language from the updated version of the standard as articulated in the Revised Model Nonprofit Corporation Act:⁶³ charitable donations are to be managed and invested “in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.”⁶⁴

In addition, the UPMIFA standard of conduct incorporates some of the “common standards of prudent investing” from trust law, as found in the Uniform Prudent Investor Act.⁶⁵ The trusts standards incorporated into the UPMIFA standard can be found in Sections 3(c), 3(d), and 3(e) of the Act.⁶⁶ These provisions include the duty to minimize costs, the duty to investigate facts relevant to management and investment of the fund, and the factors to consider when making investment decisions.⁶⁷

Thus, the language of UPMIFA “reflects the merging of the trust and corporate standards,”⁶⁸ combining the overall duty to act as a prudent person would in a similar situation with the stricter, more specific rules and guidelines of trust law. Due to this restatement and merging of standards, UPMIFA’s articulation of the prudence standard alone provides greater guidance to the charities under the jurisdiction of the Uniform Laws than UMIFA did.⁶⁹

b. Factors to be Considered

In addition to the general statement of the prudence standard, the Uniform Laws give charitable institutions a list of factors to be considered when making decisions about what is prudent. UMIFA provided only a short list of factors focused on the characteristics and needs of the charity: the “long and short term needs of the institution . . . , “its present and anticipated financial requirements, expected total return on its investments, price level trends, and general economic conditions.”⁷⁰ UPMIFA, however, provides a much longer list of factors to be considered, including “the role that each investment or course of action plays within the overall investment portfolio of the fund,” “the duration and preservation of the

62. Gary 1, *supra* note 21, at 1299.

63. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 3 cmt. (Nat’l Conference of Comm’rs on Unif. State Laws 2006).

64. *Id.* § 3(b).

65. *Id.* §3 cmt.

66. *Id.*

67. *Id.* §§ 3(c)(1)-(2), (e).

68. Gary 2, *supra* note 23, at 2.

69. Susan Gary described the prudence standard under the UPMIFA as being “more carefully articulated” than the UMIFA. *Id.* at 3.

70. UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 6 (Nat’l Conference of Comm’rs on Unif. State Laws 1972).

endowment fund,” and “the investment policy of the institution.”⁷¹ These factors come from the Uniform Prudent Investor Act and represent the incorporation of trust law into UPMIFA.⁷² Due to this incorporation of various elements of trust law, UPMIFA lists factors that focus on the purpose of the fund in question instead of the charity as a whole, as was the case in UMIFA.⁷³

These factors play a greater role in UPMIFA than they did in UMIFA. In addition to more clearly listing a greater number of factors to be considered, UPMIFA also places greater emphasis on the prudence standard by eliminating the historic-dollar-value limitation. Whereas only spending above the historic dollar value was subject to the prudence standard under UMIFA, all spending must pass the prudence standard of UPMIFA.⁷⁴ Additionally, consideration of the factors listed is mandatory under UPMIFA’s duty of care.⁷⁵

By listing more factors and making them mandatory, UPMIFA provides better guidance to institutions in making the determination of what is prudent. It is important to remember, however, that even the prudence standard and the factors are applicable only if the donor did not set forth different rules in the gift instrument.⁷⁶ It is the donor intent in the gift instrument that controls decision-making by charities under UPMIFA.

71. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT §§ 3, 4 (Nat’l Conference of Comm’rs on Unif. State Laws 2006). The complete list of factors includes those in § 3(e)(1):

(A) general economic conditions; (B) the possible effect of inflation or deflation; (C) the expected tax consequences, if any, of investment decisions or strategies; (D) the role that each investment or course of action plays within the overall investment portfolio of the fund; (E) the expected total return from income and the appreciation of investments; (F) other resources of the institution; (G) the needs of the institution and the fund to make distributions and to preserve capital; and (H) an asset’s special relationship or special value, if any, to the charitable purposes of the institution

and those in § 4(a):

(1) the duration and preservation of the endowment fund; (2) the purposes of the institution and the endowment fund; (3) general economic conditions; (4) the possible effect of inflation or deflation; (5) the expected total return from income and the appreciation of investments; (6) other resources of the institution; and (7) the investment policy of the institution.

Id.

72. *Id.* §3 cmt.

73. *See* Gary 2, *supra* note 23, at 3; Gary 1, *supra* note 21, at 1310. Since UPMIFA deals mostly with endowment funds, many of the factors in § 3(e) focus on the permanent nature of charitable fund. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT prefatory note at 4 (Nat’l Conference of Comm’rs on Unif. State Laws 2006).

74. *Id.* §§ 3(b), 4(a).

75. *Id.* § 3(e)(1).

76. *See, e.g., id.* § 4(a) (stating that the rules of construction are “[s]ubject to the intent of a donor expressed in the gift instrument”); *id.* § 3 cmt.; *id.* § 4 cmt.; Gary 1, *supra* note 21, at 1311.

Indeed, all default rules set forth by UPMIFA, save the generally prescribed duty of care, can be overridden by specific donor intent.⁷⁷ It is only when this intent is not clear that the default rules of UPMIFA take effect in order to approximate what the donor intent would have been. The revisions of UPMIFA are meant to “remind[] charities that donor intent remains paramount”⁷⁸ and to better enable them to determine donor intent when it is not clear.

3. Liberalization of the Conditions Under Which Restrictions can be Modified

As noted above, donor-imposed restrictions play a huge role in the area of charitable gifts and become binding once a charity accepts the gift to which the restrictions are attached.⁷⁹ It is unsurprising, then, that the Uniform Laws address these donor-imposed restrictions. Under both Uniform Laws, modifying or releasing a restriction can be as simple as obtaining donor consent.⁸⁰ The reality is, however, that obtaining donor consent can be impossible, at worst, or extremely burdensome, at least.⁸¹ The Uniform Laws focus on these situations when consent cannot be obtained.

Even though the drafters of UMIFA intended to provide “an expeditious way to make necessary adjustments when the restrictions no longer serve the original purpose,”⁸² UMIFA allowed for only a limited release of restrictions. Charities could apply to courts for the release of a restriction if written consent of the donor could not be obtained,⁸³ but such relief was available only if written consent from the donor could not be obtained due to “death, disability, unavailability, or impossibility of identification” of the donor.⁸⁴ Even when application to court was allowed, the only option for relief was release. UMIFA did not allow charitable organizations to apply to courts for the modification of donor-imposed restrictions.⁸⁵

For example, imagine that a donor had endowed \$500,000 to his alma mater in 1971, the yearly interest from which was to be distributed among thirty students at the college to cover their tuition payments. At the time of

77. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 3 cmt. (Nat'l Conference of Comm'rs on Unif. State Laws 2006).

78. Gary 1, *supra* note 21, at 1331.

79. See, e.g., Brody, *supra* note 25, at 1187; Goodwin 1, *supra* note 18, at 1107.

80. UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 7(a). (Nat'l Conference of Comm'rs on Unif. State Laws 1972); UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6(a) (Nat'l Conference of Comm'rs on Unif. State Laws 2006).

81. See, e.g., *id.* §6 cmt.; Gary 1, *supra* note 21, at 1328.

82. UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 7 cmt. (Nat'l Conference of Comm'rs on Unif. State Laws 1972).

83. *Id.* § 7(b).

84. *Id.*

85. Gary 1, *supra* note 21, at 1326.

the donor's initial gift, when tuition was only \$376 per student per year,⁸⁶ providing tuition for thirty students with the interest from the fund would be an extremely feasible and manageable task.⁸⁷ However, as the cost of tuition dramatically increased over the years, paying for the tuition of thirty students out of the interest would become increasingly difficult and ultimately impossible.⁸⁸ Under UMIFA, the college in this hypothetical could apply to a court to be completely released from this restriction, assuming donor consent could not be obtained. If the release was granted, the college no longer would be required to use the interest to cover the tuition payments of thirty students. The college would have been free to use the principal gift and the yearly interest in any way it wished. This college would not, however, have been able to ask the court to be allowed to pay the tuition for only as many students as was feasible. Such modifications were not allowed, leaving courts with "an all-or-nothing choice"⁸⁹ when faced with a donor-imposed restriction: restriction or no restriction.

In revising the Uniform Laws, the Uniform Law Commission wanted to liberalize the conditions under which donor-imposed restrictions could be modified. This liberalization manifests itself in UPMIFA in the incorporation of the trust doctrines of cy pres and equitable deviation⁹⁰ and the ability to modify small funds without going to court.⁹¹ UMIFA explicitly stated that it "[did] not limit the application of the doctrine of cy pres."⁹² It was never clear, however, what exactly this statement meant.⁹³ By incorporating the doctrines of cy pres and equitable deviation, UPMIFA not only makes clear the interplay between these trust doctrines and the Uniform Laws, but also expands the scope of judicial relief from donor-imposed restrictions to allow for modification as well as release from the entire restriction.

86. THE COLLEGE BOARD, TRENDS IN COLLEGE PRICING Table 5: Average Tuition & Fees, 1971-21 to 1998-99 (1998), *available at* http://www.trends-collegeboard.com/college_pricing/archive/CP_1998.pdf.

87. Assuming a five-percent interest rate, the fund would generate \$25,000 in interest in 1971. Tuition for all thirty students would only be \$11,280.

88. Assuming a five-percent average interest rate, after only ten years the interest on our donor's contribution would be insufficient to pay for the cost of tuition for thirty students. In 1981, the average tuition was \$909, COLLEGE BOARD, *supra* note 86, Table 5, making the cost of tuition for the requisite thirty students a little over \$27,000.

89. Gary I, *supra* note 21, at 1326.

90. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT §§ 6(b), 6(c) (Nat'l Conference of Comm'rs on Unif. State Laws 2006).

91. *Id.* § 6(d).

92. UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 7(d) (Nat'l Conference of Comm'rs on Unif. State Laws 1972).

93. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6 cmt. (Nat'l Conference of Comm'rs on Unif. State Laws 2006).

a. Cy Pres and Equitable Deviation

The doctrines of cy pres and equitable deviation are taken from trust law and, as adopted in UPMIFA, “tak[e] an approach that favors modification over release to protect donor intent.”⁹⁴ Under the doctrine of cy pres, a court can modify the purpose of a fund or a restriction on the use of the fund when it has become “unlawful, impracticable, impossible to achieve, or wasteful.”⁹⁵ In the example of our \$500,000 endowment fund above, cy pres could be used to change in some way the donor’s instruction that the fund be used to pay for the tuition of thirty students each year. A court is limited in making modifications using cy pres, however, because any modification made must be consistent with the charitable purpose as expressed in the gift instrument.⁹⁶ Due to this restriction, cy pres has been described as “a narrow doctrine providing only a modest remedy.”⁹⁷

In trust law, the decision whether or not to apply cy pres depends upon the ability of the charity to prove three things:⁹⁸ (1) that the gift was given “to a charitable organization for a charitable purpose”;⁹⁹ (2) that it is “impossible, impractical or illegal to carry out the donor’s stated charitable purpose”;¹⁰⁰ and (3) “that the donor had general charitable intent.”¹⁰¹ UPMIFA requires that the same three elements be proven, although it updates the second requirement. Cy pres can be used only if the restriction “becomes unlawful, impracticable, impossible to achieve, *or wasteful*,”¹⁰² a standard which should be easier to satisfy due to the addition of the “wasteful” component.

94. Gary 1, *supra* note 21, at 1328.

95. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6(c) (Nat’l Conference of Comm’rs on Unif. State Laws 2006).

96. *Id.*

97. Goodwin 1, *supra* note 18, at 1108.

98. JOEL C. DOBRIS ET AL., *ESTATES AND TRUSTS: CASES AND MATERIALS* 701 (3d ed., Foundation Press 2007) (1998).

99. *Id.* For an example of a case in which failure to prove charitable purpose prevented the application of cy pres, see *Shenandoah Valley Nat’l Bank of Winchester v. Taylor*, 63 S.E.2d 786 (Ct. App. Va. 1951) (denying the application of cy pres because the trust involved was a private trust).

100. DOBRIS, *supra* note 98, at 701. For an example of a case in which the impossibility of the restriction was the determining factor, see *Conn. Coll. v. United States*, 276 F.2d 491 (D.C. Ct. App. 1959) (denying modification of the restriction because “the performance of [the testatrix’s] plan for a separate building has not become impossible or impracticable merely because the bequest may not be large enough to cover the cost of the sort of building the Government would be willing to construct”).

101. DOBRIS, *supra* note 98, at 701. For an example of a case in which the existence of general charitable intent was in issue, see *Estate of Crawshaw*, 819 P.2d 613 (Kan. 1991) (allowing for the appointment of a new trustee because the original trustee was “an agent to effect his general charitable intent of furthering higher education”).

102. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6(c) (Nat’l Conference of Comm’rs on Unif. State Laws 2006) (emphasis added).

Equitable deviation applies under virtually the same circumstances as cy pres, except that it applies not to the purpose of a fund but to the means used to carry out that purpose¹⁰³ and other aspects of administration.¹⁰⁴ As Susan Gary of the Uniform Law Commission described it: “[U]sing deviation, a court makes changes to the way a charity manages a fund, rather than changes to the purpose for which the donor created the fund.”¹⁰⁵ For this reason, equitable deviation can be used not only when a restriction becomes impracticable or wasteful, but also “if it impairs the management or investment of the fund, or if, because of circumstances not anticipated by the donor, a modification of a restriction will further the purposes of the fund.”¹⁰⁶ When used,¹⁰⁷ it allows for modifications that actually “enable a charity to carry out the purposes of the fund more efficiently.”¹⁰⁸ Returning to our hypothetical \$500,000 endowment fund, if the college were to merge with a larger university that had a well staffed donor-relations office, the college could apply to a court for permission to transfer management of the fund to the larger university’s donor-relations office. In doing so, the college would have to request a change under the doctrine of equitable deviation, not cy pres, because a change in the administration of the fund relates to the management of the fund and does not alter its overall charitable purpose.

103. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6 cmt. (Nat’l Conference of Comm’rs on Unif. State Laws 2006).

104. Goodwin 1, *supra* note 18, at 1135.

105. Gary 1, *supra* note 21, at 1328.

106. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6(b) (Nat’l Conference of Comm’rs on Unif. State Laws 2006).

107. For cases in which the doctrine of equitable deviation has been applied at the request of a college or university, see *Sendak v. Trs. of Purdue Univ.*, 279 N.E.2d 840 (Ind. Ct. App. 1972) (holding that the trustees of the gift can “deviate from the mechanical means of administration of the trust where circumstances not known or foreseen by the testator have come about, and where such change in circumstances in combination with the administrative means provided in the trust would defeat or substantially impair the accomplishment of the intended trust purpose.”); and *Furman Univ. v. McLeod*, 120 S.E.2d 865 (S.C. 1961) (holding that the University had “produced ample proof of the need to deviate from the strict terms of the trust . . . in order to accomplish and fulfill the intent and purposes of the conveyance by [the donor] to The Greenville Academies and from The Greenville Academies to Furman University.”). For cases in which the doctrine of equitable deviation has been denied, see *Moore v. City and County of Denver*, 292 P.2d 986 (Colo. 1956) (en banc) (refusing to allow modification of a restriction imposed on a college for orphans because “[p]etitioners have not shown the impracticability of executing the express provisions of the trust.”); *Nat’l City Bank of Mich./Ill. v. N. Ill. Univ.*, 818 N.E. 2d 453 (Ill. App. Ct. 2004) (denying the application of equitable deviation or cy pres because “no impediment hinders the administration of the Scholarship Trust or the accomplishment of its charitable objective.”).

108. Gary 1, *supra* note 21, at 1328.

b. Modification of Restrictions on Small Funds

In order to take advantage of the doctrines of both cy pres and equitable deviation, an institution must apply to a court for the modification to be made.¹⁰⁹ As the cost of going to court to ask for the release of a restriction can be high, UPMIFA adds a provision that allows for the modification of restrictions on old, small funds without going to court.¹¹⁰ One caveat to this option is that the fund must be used “in a manner consistent with the charitable purposes expressed in the gift instrument” even after the modification of the restriction.¹¹¹ As society’s representative of funds held in charity,¹¹² it is up to the Attorney General to take action if this requirement is not met, although as a practical matter it is unlikely that Attorneys General will take note of or act upon such violations.¹¹³

The remaining requirements for application of this provision are up to the specific state adopting UPMIFA. Even so, the Uniform Law Commission suggests that this provision apply only to funds over twenty years old and with a value of less than \$25,000.¹¹⁴ The length of twenty years was chosen as a safeguard to donor intent and the amount of \$25,000 to reflect the cost/benefit calculation of a judicial proceeding to obtain a modification of a restriction. In this way, the provision was meant to cover funds for which “the cost of a judicial proceeding will be out of proportion to its protective purpose.”¹¹⁵

Some of the changes made when updating UMIFA are considerable enough that they have the potential to change significantly the nature of legal fights over restricted donations. Before we can determine if such a change will in fact take place, however, it is important to understand the lawsuits that have been brought under UMIFA. Part II provides an overview of some of the lawsuits brought under UMIFA so that we can make this determination in Part III, below.

109. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT §§ 7(b), 7(c) (Nat’l Conference of Comm’rs on Unif. State Laws 2006).

110. *Id.* § 6(d).

111. *Id.* § 6(d)(3).

112. The state Attorney General has limited power and standing to enforce donor-imposed restrictions and is generally responsible for “protect[ing] the public’s interest in funds held by charities and protect[ing] the intent of donors who contribute to those charities.” Gary 1, *supra* note 21, at 1332-33. If a charitable institution wishes to modify the restrictions placed on a gift without donor consent, it is required under the Uniform Laws to notify the Attorney General, who “must be given an opportunity to be heard.” UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 7(b) (Nat’l Conference of Comm’rs on Unif. State Laws 1972); UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT §§ 6(b), (c), (d) (Nat’l Conference of Comm’rs on Unif. State Laws 2006).

113. *See* UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6(d), § 6 cmt. (Nat’l Conference of Comm’rs on Unif. State Laws 2006).

114. *Id.* §6 cmt.

115. *Id.*

II. LITIGATING WITH THE UNIFORM LAWS: LAWSUITS INVOLVING COLLEGES AND UNIVERSITIES

While there have been many lawsuits brought against colleges and universities for the alleged misuse of donor funds or the violation of donor-imposed restrictions, the parties in these cases rarely used the Uniform Laws to make their claims or raise a defense. Of the five cases in which UMIFA has been invoked,¹¹⁶ three are particularly instructive of how UMIFA has been interpreted and applied by colleges and universities, donors, and judges. *Yale University v. Blumenthal* illustrates how a college or university goes about bringing suit under UMIFA to request release from donor-imposed restrictions. Rice University has brought two similar lawsuits, but the opinions issued do not provide any insight into the judge's attitudes or reasoning. *Carl J. Herzog Foundation, Inc. v. University of Bridgeport* established that donors do not have standing under UMIFA to enforce donor-imposed restrictions. Lastly, *Robertson v. Princeton* gives us a more thorough understanding of how courts respond to the use of UMIFA by either party to the litigation.

A. *Yale University v. Blumenthal*¹¹⁷

Yale University v. Blumenthal was the earliest case to deal with UMIFA. In this case, Yale employed UMIFA-based arguments in an attempt to change one of the donor-imposed restrictions by which it was bound. Yale had been named the beneficiary of a testamentary trust created by the will of alumnus Thomas Smallman many years ago. His will indicated that the donation was "to be used for the building of a wing for the Yale Medical School to be known as the Jane Smallman Wing, for the treatment of sick poor."¹¹⁸ When Yale gained access to the trust in 1987, the amount donated proved to be insufficient for the construction of the wing mentioned in the donor's will,¹¹⁹ so Yale approached the Attorney General of Connecticut, who was and still is considered the protector of donors,¹²⁰

116. My search revealed only five cases involving colleges and universities that include UMIFA- or UPMIFA-based arguments: *Yale University v. Blumenthal*, 621 A.2d 1304 (Conn. 1993); *Carl J. Herzog Foundation, Inc. v. University of Bridgeport*, 699 A.2d 995 (Conn. 1997); Princeton University, Excerpts from the University's Motions Seeking Summary Judgment, <http://www.princeton.edu/robertson/statements/viewstory.xml?storypath=/main/news/archive/S13/68/44111/index.xml> (last visited Feb. 1, 2010), *In re Garbrecht*, 2000 WL 35501605, No. 2000-15658 (Dist. Ct. Tex. 2000), and *In re Harry Carothers*, 2000 WL 34584345, No. 2000-35712 (Dist. Ct. Tex. 2000).

117. 621 A.2d 1304 (Conn. 1993).

118. *Id.* at 1305 (quoting the will of donor Thomas F. Smallman).

119. *Id.* Yale received \$312,086 from the trust in 1987. *Id.*

120. See, e.g., Brody, *supra* note 25, at 1187 ("[D]espite the fact that the organization is legally bound by specific terms of the gift, legally it is not the donor's concern. It is society's concern, to be pursued (or not) by society's representative, the attorney general."); UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT prefatory

“in an attempt to achieve an agreement concerning an acceptable alternative use of Smallman’s bequest.”¹²¹ When no acceptable alternative could be agreed upon, Yale brought this suit against Connecticut’s Attorney General.¹²²

Yale relied upon the UMIFA provision allowing a court to release an institution from any restriction that is “obsolete, inappropriate or impracticable.”¹²³ Ultimately, the Connecticut courts did not consider any of the issues governed by this provision. The courts focused instead solely upon whether UMIFA was even applicable to the fund in question by asking whether it was an “institutional fund” as defined in UMIFA.¹²⁴ The Superior Court of Connecticut heard the case initially, and held that Smallman’s donation was not an institutional fund because it “was not held for Yale’s ‘exclusive use, benefit or purposes,’ and also that the bequest was one ‘in which a beneficiary that is not an institution has an interest.’”¹²⁵

On appeal, the Supreme Court of Connecticut reversed the decision of the lower court, holding that Yale could apply for relief under UMIFA.¹²⁶ Relying upon the Uniform Law Commission’s comments to UMIFA, the court decided that “a fund to provide scholarships for students or medical care for indigent patients is held by the school or hospital for the institution’s purposes.”¹²⁷ Additionally, the fact that a fund benefits various patients through the hospital does not make those patients non-institutional beneficiaries of the fund or “take the bequest outside the definition of an institutional fund.”¹²⁸ Indeed, the court believed that these types of situations were “explicitly anticipated” by the drafters of UMIFA and the Connecticut legislature.¹²⁹ Therefore, the Smallman bequest was

note at 4 (Nat’l Conference of Comm’rs on Unif. State Laws 2006) (stating that the “attorney general continues to be the protector both of the donor’s intent and of the public’s interest in charitable funds.”).

121. *Yale*, 621 A.2d at 1305.

122. *Id.*

123. Connecticut Uniform Management of Institutional Funds Act, CONN. GEN. STAT. § 45a-533 (repealed 2008).

124. *Yale Univ. v. Blumenthal*, 621 A.2d 1304, 1306 (Conn. 1993). The applicable definition is found in the Connecticut Uniform Management of Institutional Funds Act, General Statutes § 45a-527(2)(b):

(2) ‘Institutional fund’ means a fund held by an institution for its exclusive use, benefit or purposes, but does not include [...] (B) a fund in which a beneficiary that is not an institution has an interest, other than possible rights that could arise upon violation or failure of the purposes of the fund.

Connecticut adopted the definition of an “institutional fund” exactly as it appeared in UMIFA § 1(2). *Yale*, 621 A.2d at 1307.

125. *Id.* at 1306 (discussing the decision of the trial court).

126. *Id.* at 1308.

127. *Id.* at 1307 (quoting the comments to UMIFA).

128. *Id.* at 1308.

129. *Id.*

an “institutional fund” under UMIFA. Although the ruling opened the door for Yale to continue with its claim under UMIFA, the parties settled without further litigation.¹³⁰

B. *Carl J. Herzog Foundation, Inc. v. University of Bridgeport*¹³¹

The issue of donor standing under UMIFA was decided by *Carl J. Herzog Foundation, Inc. v. University of Bridgeport*. In 1997, a donor brought suit against the University of Bridgeport for commingling the donated funds with the general funds of the university and for using the money for purposes other than that described in the gift instrument.¹³² Although the suit was brought under UMIFA, it was not considered past the issue of “whether the Connecticut Uniform Management of Institutional Funds Act . . . establishes statutory standing for a donor to bring an action to enforce the terms of a completed charitable gift.”¹³³ The Supreme Court of Connecticut ultimately decided that “the drafters of UMIFA did not intend to confer donor standing in the matter of the release of gift restrictions”¹³⁴ Due to the plaintiff’s lack of standing, this case went no further in the courts than did *Yale University v. Blumenthal*.

C. *Robertson v. Princeton*

The most extensive treatment of UMIFA by a court was in *Robertson v. Princeton*. In this case, the donors relied upon UMIFA in making their claims, but Princeton University also employed UMIFA as a key part of its defense.¹³⁵ The *Robertson v. Princeton* litigation remains, to date, the only true example we have of how UMIFA plays out when used in litigation against a college or university.

1. History of *Robertson v. Princeton*

The litigation against Princeton was initiated in 2002 by several descendants of Charles and Marie Robertson,¹³⁶ who had donated

130. Ultimately, the parties were able to agree upon a new use for the fund that was acceptable to Yale yet also in line with the purpose of the original donation. The Connecticut Superior Court to which the case had been remanded approved the parties’ settlement, thereby giving Yale permission to use the fund to support a lead paint removal program at the university. E-mail from David Ormstedt, former Assistant Attorney General of Connecticut, to author (Jan. 20, 2010) (on file with author).

131. 699 A.2d 995 (Conn. 1997).

132. *Id.* at 996.

133. *Id.*

134. *Id.* at 1000.

135. See Princeton University, Excerpts from the University’s Motions Seeking Summary Judgment, <http://www.princeton.edu/robertson/statements/viewstory.xml?storypath=/main/news/archive/S13/68/44I11/index.xml> (last visited Feb. 1, 2010).

136. Princeton University, Key Issues,

approximately \$35 million worth of Great Atlantic & Pacific Tea Company shares to the University in 1960.¹³⁷ By 2002, the value of the gift was \$600 million.¹³⁸ The Robertson Foundation was created at the time of the donation to handle its management and investment.¹³⁹ This lawsuit was brought against both Princeton University and the Robertson Foundation for betraying the family's trust and confidence in the then recent investment and expenditure of parts of the donation.¹⁴⁰

a. The Robertson Foundation and the Robertsons' Intent

The Robertson Foundation was incorporated in Delaware in 1961, at which time the purposes and objectives of the gift to Princeton were laid out in writing.¹⁴¹ The objective of the Robertson Foundation and of the money placed in its care was "to strengthen the Government of the United States and increase its ability and determination to defend and extend freedom throughout the world by improving the facilities for the training and education of men and women for government service"¹⁴² To accomplish this broad objective, the Foundation was allowed to utilize the donation for several specific uses.

The first of these uses was the establishment and support of the Woodrow Wilson Graduate School at Princeton University. This school was to educate and prepare individuals "for careers in government service, with particular emphasis on the education of such persons for careers in those areas of the Federal Government that are concerned with international relations and affairs."¹⁴³ Secondly, the Robertson Foundation was allowed to use the donation "to establish and maintain scholarships or fellowships" for students attending this graduate school.¹⁴⁴ Finally, the Robertson Foundation was "to provide collateral and auxiliary services, plans and programs in furtherance of the object and purpose above set

<http://www.princeton.edu/robertson/about/issues/> (last visited Nov. 28, 2010).

137. Princeton University, Background, <http://www.princeton.edu/robertson/about/background/> (last visited Nov. 28, 2010).

138. Verified First Amended Complaint of Plaintiffs at ¶ 3, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02).

139. The Robertson Foundation is classified as a Type 1 supporting organization under the U.S. Tax Code. Princeton University, Foundation Tax Structure, http://www.princeton.edu/robertson/about/tax_status/ (last visited Apr. 23, 2009). This means that the Robertson Foundation is "organized, and at all times thereafter is operated, exclusively for the benefit of" Princeton University, the recipient of the Robertsons' donation. 26 U.S.C.A. § 509(a)(3)(A) (West 2009).

140. Verified First Amended Complaint of Plaintiffs at ¶ 4, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02).

141. See generally *id.* at Ex. A: Composite Certificate of Incorporation of The Robertson Foundation.

142. *Id.* at Ex. A, ¶ 3.

143. *Id.* at Ex. A, ¶ 3(a).

144. *Id.* at Ex. A, ¶ 3(b).

forth.”¹⁴⁵

*b. “Princeton’s Betrayal”*¹⁴⁶

The Robertson family brought this suit against Princeton University and the Robertson Foundation because it believed that the funds originally donated by the Robertsons were not being used in accordance with their intent or with the restrictions set forth at the time of the donation in the Certificate of Incorporation.¹⁴⁷ Generally speaking, the plaintiffs believed that the funds were being used “as if they belong[ed] to the University and [we]re available for uses that are not part of the Robertson Foundation’s mission.”¹⁴⁸ They also claimed that the university misused more than \$200 million of Robertson Foundation funds.¹⁴⁹

In fleshing out this general complaint of non-compliance with donor intent, the plaintiffs also pointed to more specific instances in which the University violated the intent of the Robertsons. For purposes of this note, the most important specific violation alleged was the spending of realized gains in contravention of paragraph 11(c) of the Certificate of Incorporation,¹⁵⁰ which contained a spending restriction that limited expenditures to income or accumulated income.¹⁵¹ The plaintiffs believed the capital gains from certain of the University’s activities to be outside the definition of “income” under paragraph 11(c).

c. The Summary Judgment Stage

Before the *Robertson v. Princeton* case settled in 2008, several issues

145. *Id.* at Ex. A, ¶ 3(c).

146. *Id.* at ¶ 40.

147. Verified First Amended Complaint of Plaintiffs at ¶ 5, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02).

148. *Id.* at ¶ 4.

149. Erin Strout, *Princeton Returns \$782,000 Donation*, CHRON. OF HIGHER EDUC., Mar. 23, 2007, at A27.

150. Verified First Amended Complaint of Plaintiffs at ¶ 116(b), *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2008) (No. C-99-02).

151. The Certificate of Incorporation for the Robertson Foundation was attached to the Plaintiffs’ Verified First Amended Complaint as Exhibit A. Paragraph 11(c) reads as follows:

Funds or property of the corporation which do not constitute income or accumulated income as defined in Treasury Department Regulations 1.504-1(c), or its then equivalent, shall not be disbursed or paid out unless (1) income of the corporation sufficient to cover the proposed expenditure is not available, and (2) at the time such funds or property is disbursed or paid out, provision is made for repayment out of future income. Payments of principal or capital shall not exceed 5% of the total market value of the corporation’s principal or capital assets in any fiscal year computed at the time of such payment.

Verified First Amended Complaint of Plaintiffs at Ex. A, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2008) (No. C-99-02).

of the case were considered by a New Jersey Superior Court in six different motions for partial summary judgment.¹⁵² In 2006, Judge Neil Shuster issued opinions as he ruled on all six motions. Summary judgment was denied in the majority of the motions because Judge Shuster determined that issues of material fact remained.¹⁵³ A trial date was set for January 2009.¹⁵⁴ However, because the case was settled, no trial was held. The summary-judgment opinions were the only decisions issued in the case.

d. The Outcome of the Robertson v. Princeton Litigation

The parties to *Robertson v. Princeton* settled on December 9, 2008.¹⁵⁵ While the details of the settlement have not been circulated widely, it appears that the main import of the settlement is that the Robertson Foundation has been or soon will be dissolved.¹⁵⁶ Following the dissolution of the Robertson Foundation, any assets remaining will be given to Princeton University.¹⁵⁷ Over the next seven years, \$50 million of these funds are to be transferred into a new foundation “for the restricted use of preparing students for careers in government service.”¹⁵⁸ It thus seems that the basic intent of the Robertsons will be continued.

The remaining aspects of the settlement involve attorneys’ fees and litigation costs. The Robertson Foundation had used funds from another

152. Princeton University, Litigation Status, www.princeton.edu/Robertson/about/status/ (last visited Jan. 31, 2009).

153. Summary judgment was denied in regard to fiduciary duties, the PRINCO, and the sole beneficiary issue. Partial Summary Judgment Decision Regarding “Fiduciary Duties” and “Business Judgment Rule,” *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02); Partial Summary Judgment Decision on the “Sole Beneficiary” Issue, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02); Partial Summary Judgment Decision on the “PRINCO” Issue, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02). Summary judgment was granted in regards to the Article 11(c) issue. Partial Summary Judgment Decision on Article 11(c), *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02). Summary judgment was denied in part and granted in part with regard to the laches and limitations, and overcharges and offset summary issues. Partial Summary Judgment Decision on Claims Falling Outside the Applicable Statute of Limitations or Laches Period, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02); Partial Summary Judgment Decision Regarding Defendants’ Admitted Overcharges and Offset Defense, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02). PDFs of all the partial-summary-judgment decisions are available at www.princeton.edu/robertson/documents/summaryjudgment/ (last accessed Jan. 31, 2009).

154. Princeton University, Jury Demand, http://www.princeton.edu/robertson/about/summary_judgments/jury_demand/ (last visited Feb. 2, 2010).

155. Final Judgment and Order of Dismissal, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2008) (No. C-99-02).

156. Princeton University, Understanding the Robertson v. Princeton settlement, <http://www.princeton.edu/robertson/about/> (last visited Jan. 31, 2009).

157. *Id.*

158. *Id.*

charitable foundation held by the Robertson family—the Banbury Fund—to pay for its expenses throughout the litigation. All amounts taken from the Banbury Fund must be reimbursed under the terms of the settlement agreement.¹⁵⁹ Additionally, the Robertson Foundation must reimburse Princeton University for its defense costs in the litigation.¹⁶⁰

2. The Role of UMIFA in the Litigation

UMIFA made a significant appearance in the arguments of the parties in two of the summary-judgment proceedings: the sole beneficiary issue and Article 11(c) interpretation.¹⁶¹ Judge Shuster ultimately found UMIFA to be inapplicable to the sole-beneficiary issue, but the law did play an important part in his decision on the interpretation of Article 11(c).

a. Sole Beneficiary Issue

The defendants filed a motion for summary judgment that argued that Princeton was intended to be the only beneficiary of the Robertsons' gift. This motion was filed in response to one of the remedies requested by the plaintiffs. In its complaint, the Robertson family asked the court to substitute “another school of public administration at another University in the place of the Woodrow Wilson School and Princeton University, which other school will conscientiously and unselfishly dedicate itself to the purposes of the Robertson Foundation.”¹⁶² During the summary-judgment proceedings, the defendants argued that this substitution could not be accomplished because “the plain language of the Foundation’s Certificate of Incorporation requires that the University remain the sole tax-exempt charity supported by the Foundation.”¹⁶³

In defense of its position, the Robertson Foundation argued that this substitution could be accomplished using the doctrine of *cy pres*.¹⁶⁴ In making this argument, the plaintiffs relied upon UMIFA as adopted in Delaware, the state whose version of UMIFA was applicable to the litigation.¹⁶⁵ The court did not, however, agree with the plaintiffs' use of UMIFA, holding instead that their “reliance on UMIFA [was] misplaced” because it did not allow for the modification of the purpose or management

159. *Id.*

160. *Id.*

161. See generally Partial Summary Judgment Decision on Article 11(c), *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02); Partial Summary Judgment Decision on the “Sole Beneficiary” Issue, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02).

162. Verified First Amended Complaint of Plaintiffs at ¶ 8, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2008) (No. C-99-02).

163. Partial Summary Judgment Decision on the “Sole Beneficiary” Issue at 2, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02).

164. *Id.* at 36.

165. *Id.* at 36-37.

of a fund,¹⁶⁶ which was the type of modification for which the plaintiffs had asked.

b. Article 11(c) Interpretation

Another motion for summary judgment brought by the defendants involved the interpretation of Article 11(c) of the Certificate of Incorporation.¹⁶⁷ This section of the Certificate of Incorporation governs the spending of funds held by the Robertson Foundation. It states that “funds or property of the corporation which do not constitute income or accumulated income as defined in Treasury Department Regulations 1.504-1(c), or its then equivalent, shall not be disbursed or paid out” unless certain exceptions are met.¹⁶⁸ At issue in the litigation between the Robertson family and Princeton University was whether the spending of realized or capital gains was consistent with the restrictions laid out in this article.

The defendants believed that “the plain language of the Foundation’s Certificate of Incorporation permitted the spending of capital gains and appreciation as ‘income’ of the Foundation.”¹⁶⁹ In order to buttress this contention, they relied upon the Delaware version of UMIFA.¹⁷⁰ UMIFA was adopted in Delaware to alter the “widely held view that the realized gains of endowment funds of education institutions must be treated as principal.”¹⁷¹ In place of this view, the Delaware UMIFA established a rule stating that realized and unrealized net appreciation can be spent unless there is clear indication of contrary donor intent.¹⁷² Believing that the Certificate of Incorporation did not *clearly* prohibit the spending of appreciation, the defendants argued that this rule of UMIFA should apply in interpreting Article 11(c).

Judge Shuster agreed with the defendants, holding that “absent express language evidencing a donor’s intent that net appreciation not be expended, UMIFA applies.”¹⁷³ Although he found, after analyzing the language of Article 11(c), that “[t]he ability to spend realized gains under Article 11(c) is clear and unambiguous,” thereby making the applicability of UMIFA moot, Judge Shuster nevertheless addressed the applicability of UMIFA in

166. *Id.* at 37.

167. See Partial Summary Judgment Decision on Article 11(c), *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02).

168. Verified First Amended Complaint of Plaintiffs at Ex. A, ¶ 11(c), *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2008) (No. C-99-02).

169. Partial Summary Judgment Decision on Article 11(c) at 2, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02).

170. *Id.*

171. *Id.* at 36.

172. *Id.* at 37.

173. Partial Summary Judgment Decision on Article 11(c) at 37, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02).

interpreting the Certificate of Incorporation.¹⁷⁴ Again adopting the argument put forward by the defendants, he held that “UMIFA would apply to permit the spending of realized gains because the language of Article 11(c) does not contain express language indicating that net appreciation not be expended.”¹⁷⁵

3. The Role of UPMIFA in the Litigation

In his decision on the sole beneficiary issue, Judge Shuster pointed out that Delaware had enacted UPMIFA to replace UMIFA during the litigation of this case.¹⁷⁶ He provided a few “general observations,”¹⁷⁷ but in the end gave no useful insight into the way in which UPMIFA would apply to the *Robertson v. Princeton* litigation.

No other courts have dealt with the application of UPMIFA to the issue of restricted donations to colleges and universities. Only one case involving a college or university has been brought under UPMIFA,¹⁷⁸ but it settled before the case was heard by a court.¹⁷⁹ Despite the lack of cases upon which to draw, in Part III, I will argue that even when these lawsuits begin to make arguments based upon UPMIFA, the outcomes in the courts will not significantly change from those seen with UMIFA.

III. UPMIFA IN ACTION: EFFECT OF UPMIFA ON DONOR-INITIATED LAWSUITS BROUGHT AGAINST COLLEGES AND UNIVERSITIES

Until UPMIFA has been tried out by various lawsuits involving colleges and universities and their donors, there is no sure way of knowing what its impact on the parties to and outcomes of such lawsuits will be. Considering that UMIFA only produced a limited number of cases

174. *Id.* at 44.

175. *Id.*

176. Partial Summary Judgment Decision on the “Sole Beneficiary” Issue at 37, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02).

177. *Id.*

178. I searched the ALLCASES, BRIEF-ALL, MOTIONS, and PLEADINGS databases on Westlaw using the following search: upmifa “uniform prudent management of institutional funds act.” The search returned five results. The only result involving a college or university was the complaint in *Northwestern Univ. v. Madigan*. See *infra*, note 178. I searched the Federal & State Cases, Combined; All Federal and State Pleadings, Combined; and All Federal and State Briefs and Motions, Combined databases on Lexis using the following search: upmifa or “uniform prudent management of institutional funds act.” The search returned three results, none of which involved a college or university.

179. Last year, Northwestern University filed a complaint in state court seeking changes to an endowment fund given to Northwestern by the National Engineering Company in 1944. Verified Complaint for Relief Under the Doctrine of Cy Pres at ¶ 1, *Northwestern Univ. v. Madigan* (Ill. Cir. Ct. Cook Co. Ch. Div. 2009) (No. 09CH37676). The case was settled soon after the initiation of the suit. Docket Proceedings, *Northwestern Univ. v. Madigan* (Ill. Cir. Ct. Cook Co. Ch. Div. 2009) (No. 09CH37676).

involving colleges and universities over the past thirty-eight years, it would be imprudent to wait until lawsuits are filed under UPMIFA before assessing its effects on colleges and universities. This Part argues that the adoption of UPMIFA in forty-six states and the District of Columbia will have a very small impact on the lawsuits brought against colleges and universities by unsatisfied donors because the use of UMIFA has been minimal and because judges are reluctant to reach these issues. Furthermore, the changes made in UPMIFA do not affect the two main issues that often limited the use of UMIFA in litigation: standing and donative documents.

A. Minimal Use of UMIFA

UMIFA never has been heavily used by donors bringing suit against colleges and universities or by the institutions themselves in defending such suits. In general, disgruntled donors who actually make it to the point of bringing a lawsuit argue a variety of other matters. The most highly litigated issue seems to be whether there is donor standing to bring a lawsuit to object to the use of funds or enforce a restriction.¹⁸⁰ Some suits also are brought under a breach-of-contract cause of action,¹⁸¹ which leads to the application of a specific set of rules governing contract interpretation. This is a different set of rules from those that are applied if the parties choose to argue under a trust-law or corporate-law framework, which has also been the case.¹⁸² Bringing a suit on any of these grounds—contract, trust, or corporate law—precludes the use of UMIFA’s principles of interpretation in any way because contract, trust, or corporate law will be applied in a manner corresponding to the parties’ characterization of the case.

UMIFA’s provisions regarding the release of restrictions, albeit very limited, have similarly been virtually unused by universities when litigating these suits. Yale and Rice Universities are the only colleges or universities

180. Standing was the deciding factor in the following cases: *Carl J. Herzog Found., Inc. v. Univ. of Bridgeport*, 699 A.2d 995 (Conn. 1997); *L.B. Research and Educ. Found. v. UCLA Found.*, 29 Cal. Rptr. 3d 710 (Ct. App. 2005); *Howard v. Adm’rs of Tulane Educ. Fund.*, 986 So.2d 47 (La. 2008) [hereinafter *Tulane 1*]; *Russell v. Yale Univ.*, 737 A.2d 941, 946 (Conn. App. Ct. 1999); *Dodge v. Trs. of Randolph-Macon Woman’s Coll.*, 661 S.E.2d 805, 807 (Va. 2008) (referring to the decision of the circuit court).

181. See *Glenn v. Univ. of S. Cal.*, No. B151776, 2002 WL 31022068 (Cal. Ct. App. Sept. 10, 2002); *UCLA*, 29 Cal. Rptr. 3d 710.

182. The *Dodge v. Randolph-Macon* case was argued under the Uniform Trust Code. *Dodge*, 661 S.E.2d at 807. Corporate-law principles were argued in the fiduciary duties and PRINCO motions for summary judgment in *Robertson v. Princeton*. Partial Summary Judgment Decision Regarding “Fiduciary Duties” and “Business Judgment Rule,” *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02); Partial Summary Judgment Decision on the “PRINCO” Issue, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02).

to have made use of these provisions offensively.¹⁸³ Even the use of UMIFA to defend a college or university has been tried only once, in the case of *Robertson v. Princeton*.¹⁸⁴

The fact of the matter is that very few cases regarding donor intent reach the stage in which the issues governed by the Uniform Laws can be employed. If the parties do not resolve the dispute before it reaches court, it is common for them to settle or dismiss the lawsuit early in the litigation process.¹⁸⁵ The actual donations and restrictions involved in the disputes are only rarely directly addressed by the courts.¹⁸⁶ If this current trend

183. See *Yale Univ. v. Blumenthal*, 621 A.2d 1304 (Conn. 1993); *In re Garbrecht*, No. 2000-15658, 2000 WL 35501605 (Dist. Ct. Tex. 2000); *In re Harry Carothers*, No. 2000-35712, 2000 WL 34584345 (Dist. Ct. Tex. 2000).

184. See Partial Summary Judgment Decision on the “Sole Beneficiary” Issue, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02).

185. Disputes in which the parties resolved the issues without judicial proceedings include those between Boston University and donor David Mugar, Boston University, Joint Statement Re: David Mugar and Boston University, <http://www.bu.edu/phpbin/news/releases/display.php?id=455> (Feb. 1, 2010); Harvard and donor Jane Fonda, Sara Rimer, *Harvard Is Returning Donation From Jane Fonda for New Center*, N.Y. TIMES, Feb. 4, 2003, at A14; the University of Iowa and donor Peggy Guggenheim, Scott Jaschik & Doug Lederman, *Quick Takes: Pollock Painting May Be Safe*, INSIDE HIGHER ED, Oct. 6, 2008, <http://www.insidehighered.com/news/2008/10/06/qt>; and Notre Dame and the family of donor Robert Hayes Gore, Sr., Charles Storch, *Family Tells Notre Dame: ‘Don’t diss the donors’*, THE CHICAGO TRIBUNE, Jan. 17, 2008, available at <http://www.cehe.org/resources/ChicagoTribune.pdf>.

Disputes that were resolved at some point during litigation include those involving the University of South Dakota and donor Lucy Buhler, Kathryn Masterson, *U. of South Dakota Settles Donor Lawsuit Over Naming Rights*, THE CHRONICLE OF HIGHER EDUCATION, Sept. 19, 2008, <http://chronicle.com/news/article/5184/u-of-south-dakota-settles-donor-lawsuit-over-naming-rights>; Dartmouth College and the Association of Alumni, Notice of Decision, *Assoc. of Alumni v. Trs. of Dartmouth Col.*, (N.H. Super. Ct. 2008) (No. 07-E-0289); the University of Southern California and donor Paul Glenn, Center for Excellence in Higher Education, Resources on Donor Intent, <http://www.cehe.org/resources/> (last visited Feb. 1, 2010); Tulane University and two heirs of donor Josephine Newcomb, Tulane University, Plaintiffs Dismiss Original Newcomb Lawsuit, <http://women.tulane.edu/news093008.html> (last visited Feb. 1, 2010); Princeton University, Understanding the Robertson v. Princeton settlement, <http://www.princeton.edu/robertson/about/> (last visited Feb. 1, 2010); UCLA and the L.B. Research Foundation, UCLA Newsroom, Statement regarding lawsuit filed by California Attorney General, <http://newsroom.ucla.edu/portal/ucla/statement-regarding-lawsuit-filed-101846.aspx> (last visited Feb. 1, 2010); DePauw University and donor Henry Crimmel, Zach Koch, *Faculty focus on science*, THE DEPAUW, Nov. 10, 2006, <http://media.www.thedepauw.com/media/storage/paper912/news/2006/11/10/News/Faculty.Focus.On.Science-2453318.shtml>; Brandeis University and donor Julius Kalman, John Hechinger, *Brandeis Settles Donor Lawsuit Over Science Building*, WALL ST. JOURNAL, Aug. 19, 2009, <http://online.wsj.com/article/SB125071093826043923.html>; Yale University and donor Lee Bass, *supra*, note 124; and Northwestern University and the Illinois Attorney General, *supra*, note 180.

186. My research uncovered only four cases in which the courts made a decision after examining the actual donation, any donor-imposed restrictions, and the use by the college or university. Rice University’s application to a Texas State District Court for

continues with UPMIFA, the changes made in updating UMIFA will make little difference to colleges and universities as far as litigation is concerned.

B. Court Reluctance

The minimal use of UMIFA by either party in lawsuits against colleges and universities may be explained by the lack of success of UMIFA-based arguments in the few cases that have presented such issues to the court. In the cases in which UMIFA has been raised, the courts have seemed reluctant to apply UMIFA in making their decisions.

The court in *Yale University v. Blumenthal* did not even reach UMIFA issues raised by the University, arguing that “[t]he particular question posed by this appeal is extremely narrow.”¹⁸⁷ Consequently, the court heard and decided only one issue: whether the donation in question was of such a classification that the Connecticut Uniform Management of Institutional Funds Act (“CUMIFA”) would apply.¹⁸⁸ In understanding the issue so narrowly, the court dismissed arguments based on UMIFA made by both parties to the case. On one side, the court held that “[t]he issue of whether Yale may ultimately be entitled to a release or a modification of the restrictions in Smallman’s will is not before us.”¹⁸⁹ On the other, the Attorney General’s questions regarding the constitutionality of CUMIFA were dismissed as “premature.”¹⁹⁰ While the court’s decision did not preclude Yale from continuing with its suit to “seek relief pursuant to [CUMIFA],”¹⁹¹ such reluctance on the part of the court to give any consideration to both parties’ UMIFA-based arguments does not provide much of an impetus for other colleges and universities to bring such claims in the hope of obtaining quick and easy relief from donor-imposed restrictions that the institution finds to be onerous. The six summary-

the release of a restriction on the donation of donor Charles O. Garbrecht was approved. In re Garbrecht, 2000 WL 35501605, No. 2000-15658 (Tex. Dist. June 3, 2000). The New York Supreme Court considered the dispute between St. Bonaventure University and donors Paul and Irene Bogoni, and awarded the university a judgment equal to the amount promised by the donors. Steve Mayer, *University Wins Lawsuit*, THE BONA VENTURE, Oct. 23, 2009, <http://media.www.thebv.org/media/storage/paper1111/news/2009/10/23/News/University.Wins.Lawsuit-3811860.shtml> (Oct. 23, 2009). Most recently, a Federal District Court in Florida heard the case between Okaloosa-Walton College and the grandson of donor Mattie Kelly, and dismissed the suit, leaving the college free to sell the donated land. NWF State College, *Federal Judge Dismisses Kelly Lawsuit Against OWC*, <http://www.owcfoundation.org/news/newsitem.cfm?NewsID=560> (last visited Feb. 1, 2010). Finally, as noted in Part II of this Note, the New Jersey Superior Court considered many different aspects of the *Robertson v. Princeton* lawsuit in issuing opinions on the various motions for partial summary judgment filed by both sides.

187. *Yale*, 621 A.2d at 1306.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 1308.

judgment opinions in *Robertson v. Princeton* reveal a slightly greater acceptance of UMIFA-based arguments when made by the parties. However, there remains a reluctance to address UMIFA-based arguments, even when the court notes that the law obviously applies.

In the summary-judgment proceeding addressing the sole-beneficiary issue, the court briefly addressed the applicability of UMIFA because the Robertsons used UMIFA as a defense to Princeton's arguments.¹⁹² After a brief analysis of the case, however, the court decided that "Plaintiffs' reliance on UMIFA is misplaced, as it only provided for modification 'on use or investment' and not the 'purpose' or management of the institutional fund."¹⁹³ This is similar to the dismissal identified in the *Yale* case. In both cases, the decision as to the applicability or inapplicability of UMIFA was based upon a technicality: in the *Princeton* case, whether the change requested was a change to "use" or "purpose"; in the *Yale* case, whether the fund was truly an "institutional" fund. However, the *Princeton* court, unlike the *Yale* court, which made no comments on UMIFA after finding it to be inapplicable, devoted several pages to introducing the parties to UPMIFA, adopted in Delaware during the course of the litigation.¹⁹⁴ While Judge Shuster gave no advice to the parties and, quite appropriately, provided no indication on how he would rule if an UPMIFA-based issue were brought before him,¹⁹⁵ he did at least acknowledge its existence and the potential of its applicability.

The *Princeton* court was again faced with UMIFA in the Article 11(c) summary judgment opinion.¹⁹⁶ When deciding the scope of Article 11(c) in the incorporating document, the court noted that "a determination of whether Defendants failed to exercise 'ordinary business care and prudence' under UMIFA is best suited for, and encompassed in, Plaintiff's allegations of breaches of fiduciary duties and committing ultra vires acts."¹⁹⁷ When directly confronted with these allegations of the plaintiffs, however, the court did not mention UMIFA and certainly did not decide the case on UMIFA-based grounds. The parties themselves had not brought up the applicability of UMIFA in the summary-judgment proceedings regarding fiduciary duties. Therefore, even though this court was more willing to address UMIFA-based arguments when made by the parties, the court was precluded from addressing UMIFA because the parties did not use UMIFA-based arguments themselves.

Unless courts start to hear and respect UMIFA-based claims, neither

192. Partial Summary Judgment Decision on the "Sole Beneficiary" Issue at 36-37, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02).

193. *Id.* at 37.

194. *Id.* at 40.

195. *Id.*

196. Partial Summary Judgment Decision on Article 11(c) at 43-44, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02).

197. *Id.* at 43.

donors nor colleges and universities will find it advantageous to raise such claims under either UMIFA or UPMIFA, especially when arguments based in trust, corporate, or contract law have found success over the years.¹⁹⁸ Given that one of the problems that led to UMIFA was the diversity of laws governing charitable donations,¹⁹⁹ the fact that parties continue to argue donor-initiated lawsuits on other grounds should be a sign of a weakness in both UMIFA and UPMIFA.

C. Lack of Changes Affecting the Main Litigation Issues under UMIFA

Although UMIFA has been rarely used by the parties either in bringing or defending these donor-intent suits, UPMIFA could have made certain changes in order to make it more useful to one or both of the parties involved. When drafting UPMIFA, the Uniform Law Commission in fact considered, but did not adopt, a provision establishing donor standing. Without this change, many potential lawsuits will continue to be decided long before courts reach the merits because of a lack of standing. Those cases that reach the lawsuit stage will likely be decided on the issue of standing alone, before UPMIFA can be considered. Additionally, because of the importance placed on the donative documents in cases involving donor intent, UPMIFA remains a secondary consideration in these lawsuits, coming into play as an interpretive tool only if the documents are considered unclear or ambiguous.

1. The Lack of Donor Standing

At least since 1997,²⁰⁰ it has been apparent that the issue of donor standing would be as glaring a barrier to the legal enforcement of donor-imposed restrictions for potential litigants under UMIFA as under the common law.²⁰¹ Under the common law, a donor does not have standing to bring a lawsuit for the enforcement of a donor-imposed restriction unless the donor “expressly reserved the right to do so”²⁰² when making the original donation or had “expressly reserved a property interest in the gift.”²⁰³ *Carl J. Herzog Foundation v. University of Bridgeport*, the first major case to address standing under UMIFA, was brought in 1997 to determine whether Connecticut’s version of UMIFA “establishes statutory standing for a donor to bring an action to enforce the terms of a completed

198. See *supra* note 183.

199. See UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT prefatory note at 1 (Nat’l Conference of Comm’rs on Unif. State Laws 1972).

200. *Carl J. Herzog Found., Inc. v. Univ. of Bridgeport*, 699 A.2d 995 (Conn. 1997).

201. *Id.* at 996.

202. *Id.* at 997.

203. *Id.* at 999; see also Brody, *supra* note 25, at 1229.

charitable gift.”²⁰⁴ The Connecticut Supreme Court held that the law did not create donor standing.²⁰⁵

The issue of donor standing has continued to appear in UMIFA-based cases. The Louisiana Supreme Court agreed to hear a recent case against Tulane because it wished to determine “whether *our law* recognizes a right of action of a non-legatee, would-be heir to institute suit for injunctive relief on behalf of a donor/testator to enforce a conditional donation. . . .”²⁰⁶ The case was remanded for further briefing by the plaintiffs on the issue of standing.²⁰⁷ The threshold issue in *L.B. Research and Education Foundation v. UCLA Foundation* was also standing.²⁰⁸ The plaintiffs in that case were found to have standing, and their case was allowed to continue to trial, but many other donors wishing to challenge the use of a donation are not so lucky and their cases are dismissed early in the proceedings.²⁰⁹

A great debate continues to surround the issue of donor standing.²¹⁰ While “nearly all modern American authorities—decisions, model acts, statutes, and commentaries—deny a donor standing to enforce a restricted gift to public charity absent express retention of a reversion in the donative instrument,”²¹¹ at one time donors possessed a “power of ‘visitation’ to supervise their gifts” after they had been given to charity.²¹² Based in the rights of a property owner to decide how his property is used and disposed of, the power of visitation was considered “inherent in the endowing of a corporate charity.”²¹³ Ever since Chief Justice Marshall dismissed the idea that a donor retained interest in his donation after it has been given,²¹⁴ the power of visitation has mostly disappeared²¹⁵ and donor standing has generally been denied.²¹⁶

The reasons cited for denying standing include the protection of

204. *Herzog*, 699 A.2d at 996.

205. *Id.* at 1000.

206. *Howard v. Adm’rs of Tulane Educ. Fund.*, 986 So.2d 47, 54 (La. 2008) (emphasis in original).

207. *Id.* at 61.

208. *L.B. Research and Educ. Found. v. UCLA Found.*, 29 Cal. Rptr. 3d 710, 712 (Ct. App. 2005).

209. *See, e.g.*, *Tulane 1*, 986 So. 2d 47; *Dodge v. Trs. of Randolph-Macon Woman’s Coll.*, 661 S.E.2d 805 (Va. 2008).

210. For a thorough discussion of donor standing, see *Goodwin 1*, *supra* note 18; *Gary 2*, *supra* note 23; and *Brody*, *supra* note 25.

211. *Goodwin 1*, *supra* note 18, at 1145.

212. *Id.* at 1148.

213. *Id.*

214. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 682 (1819).

215. *Goodwin 1*, *supra* note 18, at 1148.

216. Iris J. Goodwin, *Ask Not What Your Charity Can Do For You: Robertson v. Princeton Provides Liberal-Democratic Insights into the Dilemma of Cy Pres Reform*, 51 ARIZ. L.R. 75, 106 (2009) [hereinafter *Goodwin 2*].

charitable institutions from “unreasonable and vexatious litigation” by people with no real interest in the donation,²¹⁷ a fear first associated with broad donor standing by Chief Justice Marshall in 1819.²¹⁸ On the other hand, proponents of donor standing argue that protection of donor rights through the Attorney General “is more theoretical than real”²¹⁹ and that the current arrangement is nothing more than an inducement for charities to disregard donor-imposed restrictions with no consequences.²²⁰ These proponents not only argue that donors generally would be in a better position to keep charities in check, but also that granting them standing would serve as “an inducement to a particular type of donor engagement within the charitable sector.”²²¹ Indeed, some believe that “a liberalization of the standing rules is an important incentive to continued participation by donors.”²²²

The Uniform Law Commission seriously considered a provision for donor standing during the recent drafting of UPMIFA.²²³ The provision was not, however, adopted for the final version.²²⁴ The reasons for deciding against donor standing were not clearly articulated by the Uniform Law Commission.²²⁵ The reporter for the Drafting Committee of the

217. Goodwin 1, *supra* note 18, at 1140.

218. *Dartmouth*, 17 U.S. at 587-88 (arguing that “[i]f the entire [charter granted by the legislature to create a college] cannot be taken away, neither can it be essentially impaired” by acts of the donor, in this case the legislature).

219. Goodwin 2, *supra* note 216, at 104.

220. Goodwin 2, *supra* note 216, at 79.

221. Goodwin 1, *supra* note 18, at 1158–60.

222. *Id.* at 1098.

223. Brody, *supra* note 25, at 1217–19. Section on donor standing proposed but not adopted by UPMIFA:

§8 Enforcement of Restricted Gifts

(a) If a gift instrument restricts the use of assets transferred to an institution, then the donor may maintain a proceeding to enforce the restriction on the gift.

(b) Any right held by the donor under subsection (a) may be exercised on the donor’s behalf by his [or her] conservator or guardian or by the personal representative of the donor’s estate.

(c) A donor’s right to maintain a proceeding under subsection (a) is limited to enforcing the restriction on the donor’s gift and does not give a donor standing to challenge other actions by the governing board.

(d) A donor may maintain a proceeding under subsection (a) only if the gift to be enforced had a value that was either (i) greater than [\$500,000] at the time the donor made the gift or (ii) greater than [five percent] of the value of the assets of the institution at the time the donor begins the proceeding.

(e) A donor’s right to maintain a proceeding under subsection (a) ceases [30 years] after the date of the last donation that was subject to the restriction.

224. Brody, *supra* note 25, at 1219.

225. Gary 2, *supra* note 23, at 6. “UPMIFA does not change the general rule that donors do not have standing to bring a court challenge to a charity’s actions. UPMIFA maintains the Attorney General’s traditional role in protecting donor intent and the public’s interest in charitable institutions.” *Id.*

UPMIFA, Susan Gary, states in an article published outside of her role as reporter that “[t]he Committee concluded that the issue of standing . . . was an issue better left to other statutes or to the courts.”²²⁶ Although this provision, if adopted, would have created only “limited donor standing,”²²⁷ it would have alleviated some of the uncertainty that surrounds the area of donor-initiated lawsuits under the Uniform Laws. With UPMIFA as it was adopted, standing (or rather, the lack of standing) continues to be a barrier for any donor wishing to bring a lawsuit against a college or university in order to enforce restrictions placed on a donation.

Whatever the benefits of and drawbacks to donor standing may be, until donors are able to more easily jump the hurdle of standing, UPMIFA will continue to be an avenue of argument rarely reached in these types of lawsuits as a lack of standing will prevent most donor-initiated lawsuits from advancing beyond the early stages of argument, as has been the case in the past.

2. The Continued Importance of Donative Documents

Although it is true that UPMIFA includes many improvements, including a more advanced principle of interpretation for donor intent,²²⁸ these improvements in UPMIFA are marginalized by the fact that in UPMIFA, as in UMIFA, the language of the documents establishing the original donation must always be the first consideration.²²⁹ Even if the gift instrument includes provisions that directly conflict with UPMIFA, so long as the gift instrument is clear, UPMIFA cannot be used to rewrite that document or even make small changes to it. On the most basic level, UPMIFA is a set of default rules that can be overridden by the gift instrument.²³⁰ The intent of the donor, as expressed in the gift instrument, must control decision-making both at the institutional level and in any court cases that arise from disputes over donor intent.²³¹ Therefore, UPMIFA can be employed only if the donor’s intent as expressed in the donative documents is unclear or ambiguous, or if the doctrines of *cy pres* or equitable deviation are applicable, in which case donor intent as expressed in the gift instrument is still a consideration.

226. Gary 1, *supra* note 21, at 1331.

227. Brody, *supra* note 25, at 1219 (quoting Susan Gary in the cover memorandum for the October 2002 draft).

228. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 4(c) (Nat’l Conference of Comm’rs on Unif. State Laws 2006).

229. *See, e.g.* UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT §§ 3(a), 4(a) (Nat’l Conference of Comm’rs on Unif. State Laws 2006) (stating that these sections of the statute are “[s]ubject to the intent of a donor expressed in a gift instrument”); *id.* § 4 cmt.

230. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 3 cmt. (Nat’l Conference of Comm’rs on Unif. State Laws 2006).

231. *Id.* § 3.

Courts have paid heed to the rule that they can rely upon the Uniform Laws only after full consideration of the donative documents. This principle served as the basis for the court's decision in the early stages of the recent case against Tulane.²³² At both the district and appellate court levels, the donor's intent was found to be clearly articulated in the relevant documents.²³³ Once it was determined that the language expressing the donor's intent was "clear and unambiguous,"²³⁴ both courts were able to decide the main issues of the case.²³⁵ While neither party argued for the application of UMIFA or UPMIFA in the *Tulane* case, the courts' treatment of the relevant documents was similar to that engaged in by other courts when considering UMIFA-based arguments. There is a similar analysis in the Article 11(c) summary judgment ruling in the *Princeton* case, where it was ultimately held that "absent express language evidencing a donor's intent . . . , UMIFA applies."²³⁶ In the *Princeton* case, the donor's intent was found to be unclearly expressed in the documents, so UMIFA was applied. Had the court found, however, that the donor's intent was clearly and unambiguously expressed, the court in *Princeton*, like the lower *Tulane* courts, probably would not have reached any issues raised under UMIFA.

Given this emphasis on donative documents, it is no wonder that many parties have based their entire cases on principles of contract analysis.²³⁷ An analysis of the donative documents is required under UMIFA *before* its principles of interpretation can be applied. This prerequisite has not been changed under UPMIFA. Therefore, as long as donative documents are to be considered first, there will be no need for the court to move beyond the application of the donor's intent in many cases, and UPMIFA will continue to be rarely argued and even less often applied by courts in these cases.

232. *Howard v. Adm'rs of Tulane Educ. Fund*, 970 So.2d 21 (La. Ct. App. 2007) [hereinafter *Tulane 2*]

233. *Tulane 2*, 970 So.2d at 26; *Tulane 1*, 986 So.2d 47, 53 (La. 2008) (referencing the district court opinion).

234. *Tulane 2*, 970 So.2d at 26.

235. *Tulane 1*, 986 So.2d at 53 (quoting the district court opinion as saying that "a clear reading of Ms. Newcomb's will shows that she intended for Tulane [...] to use the balance of her estate to maintain a women's higher education college"); *id.* (holding that "given the plain meaning of these words, we find that these terms bar the Nieces from interfering in Tulane's administration of Mrs. Newcomb's donations *inter vivos*").

236. Partial Summary Judgment Decision on Article 11(c) at 37, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02).

237. See *Glenn v. Univ. of S. Cal.*, No. B151776, 2002 WL 31022068 (Cal. Ct. App. Sept. 10, 2002); *L.B. Research and Educ. Found. v. UCLA Found.*, 29 Cal. Rptr. 3d 710 (Ct. App. 2005); Partial Summary Judgment Decision on the "Sole Beneficiary" Issue at 36-37, *Robertson v. Princeton Univ.* (N.J. Super. Ct. Ch. Div. 2007) (No. C-99-02).

IV. CONCLUSION

While it remains to be seen what the impact of the changes that UPMIFA made to UMIFA will be, the use of either statute in lawsuits brought by donors against colleges and universities has been so minimal that the changes are unlikely to be noticed, let alone taken advantage of by parties in these types of lawsuits. In addition, UPMIFA fails to change the two things that would have the biggest effect: it neither establishes donor standing nor lessens the emphasis placed on donative documents. Therefore, the adoption of UPMIFA in forty-six states and the District of Columbia will most likely have minimal impact on colleges and universities as they face lawsuits by unsatisfied donors.

Because UMIFA and UPMIFA cover more issues than just those arising from disputes with donors, the changes made by UPMIFA have already had a significant impact on colleges and universities in other ways. A 2010 survey of colleges and universities was conducted by the Association of Governing Boards, and looked at the “ways higher education boards are managing spending under the new law”²³⁸ This study revealed that “UPMIFA has encouraged governing boards of colleges, universities, and affiliated foundations to devote increased attention to endowment spending and develop increasingly sophisticated and supple decision making practices.”²³⁹ By eliminating the historic dollar value and updating the prudence standard, UPMIFA has given colleges and universities greater liberty in choosing investment strategies for endowment funds “but has also forced them to develop new processes for making decisions regarding spending and accumulation.”²⁴⁰ On the other hand, colleges and universities are considering a greater number of specific factors when making investment and management decisions under UPMIFA. The 2010 study reported that “[n]early one-third (28.5%) of institutions have changed their approach to portfolio construction to focus on factors such as risk reduction, inflation protection, and liquidity”²⁴¹ While the former changes might lead to a decrease in donor-initiated litigation by making a greater number of investment strategies acceptable, the latter change has the potential to highlight problems in the decision-making processes of colleges and universities by providing a more clearly defined rubric against which investment decisions can be judged.

Ultimately, we have no way of knowing exactly what effect UPMIFA will have on colleges and universities inside the courtroom until we see how courts accept the changes made by UPMIFA and how eleemosynary

238. ASS'N OF GOVERNING BDS., SPENDING AND MANAGEMENT OF ENDOWMENTS UNDER UPMIFA 2 (Aug. 30, 2010), *available at* http://www.nacua.org/documents/UPMIFASurvey_2010.pdf.

239. *Id.*

240. *Id.*

241. *Id.* at 3.

institutions continue to adapt to the new rules.



UNIVERSITY OF NOTRE DAME

The Law School

Notre Dame Law School, the oldest Roman Catholic law school in the United States, was founded in 1869 as the nation's third law school. The Notre Dame program educates men and women to become lawyers of extraordinary professional competence who possess a passion for justice, an ability to respond to human need, and a compassion for their clients and colleagues. Notre Dame Law School equips its students to practice law in every state and in several foreign nations. The school raises and explores the moral and religious questions presented by the law. The learning program is geared to skill and service. Thus, the school is committed to small classes, especially in the second and third years, and emphasizes student participation.

In order to further its goal of creating lawyers who are both competent and compassionate, Notre Dame Law School is relatively small. The Admissions Committee makes its decisions based on a concept of the "whole person." The Law School offers several joint degree programs, including M.B.A./J.D. and M.Div./J.D. Notre Dame Law School is the only law school in the United States that offers study abroad for credit on both a summer and year-round basis. Instruction is given in Notre Dame's own London Law Centre under both American and English professors. The Center for Civil and Human Rights, which is located on the home campus, adds an international dimension to the educational program that is offered there. Notre Dame Law School serves as the headquarters for the *Journal of College and University Law*.

University of Notre Dame Officers of Administration

President

John I. Jenkins, C.S.C.

Provost

Thomas G. Burish

Executive Vice President

John Affleck-Graves

Notre Dame Law School Officers of Administration

Dean

Nell Jessup Newton

Associate Dean for Library and Information Technology

Edmund P. Edmonds

Associate Dean for Faculty Research

Margaret Brinig

Associate Dean

Richard W. Garnett

Associate Dean

Michael Kirsch

THE JOURNAL OF COLLEGE AND UNIVERSITY LAW

Editorial Board 2010–2011

Marc P. Cardinali, <i>Chair</i> Shawnee State University	Gail Dyer Providence College	Jennifer Mone Hofstra University
Mary Ann Connell, <i>Vice Chair</i> Mayo Mallette	Janet Elie Faulkner Northeastern University	Christopher T. Murray Dow Lohnes, PLLC
Rebecca Abelson Dow Lohnes, PLLC	John Gaal Bond, Schoeneck, & King, PLLC	Jan A. Neiger The Ohio State University
Jonathan Alger <i>Ex Officio</i> Rutgers, The State University of New Jersey	Laverne Lewis Gaskins Valdosta State University	Robert M. O'Neil University of Virginia
Judith Areen Georgetown University Law Center	Gary Goldman Pennsylvania Institute of Technology	Michael A. Olivas University of Houston Law Center
David Aronofsky University of Montana	John Graff Ciampa Fray-Witzer, LLP	S. Whitney Rahman Roland & Schlegel
Jonathan Band Jonathan Band, PLLC	Peter J. Harrington Bowditch & Dewey	Jon A. Reed Mountain State University
Michele Bradford Gadsden State Community College	Claudia E. Haywood The J. Craig Venter Institute	John H. Robinson, <i>Faculty Editor</i> University of Notre Dame
James Bryant United Theological Seminary	Julia R. Hoke North Carolina State Educational Assistance Authority	Kathleen Curry Santora, <i>Ex Officio</i> Chief Executive Officer National Association of College and University Attorneys
James Castagnera Rider University	William P. Hoye, <i>Faculty Editor</i> Institute for International Education of Students	Marianne Schimelfenig, <i>Ex Officio</i> St. Joseph's University
Robert Clothier Fox Rothschild, LLP	William A. Kaplin The Catholic University of America	Scott Schneider Tulane University
Diane Corley Texas State University System	Jamie Lewis Keith University of Florida	Meredith Schultz Mercyhurst College
Guilherme Costa University of Idaho	Derek Langhauser Maine Community College System	James F. Shekleton South Dakota Board of Regents
Jane E. Davis The City University of New York	Rachel Levinson Waldman American Association of University Professors	William E. Thro Christopher Newport University
Mary Devona DePaul University	Nicholas Trott Long Rhode Island College	Virginia Underwood Eastern Kentucky University
Darby Dickerson Stetson University College of Law	Roopali Malhotra University of Illinois	Jack Witt Macomb Community College
	Martin Michaelson Hogan Lovells, US LLP	Karl F. Brevitz, <i>Staff Liaison</i> National Association of College and University Attorneys

THE JOURNAL OF COLLEGE AND UNIVERSITY LAW

Editorial Staff
2010-2011

Faculty Editors

WILLIAM HOYE
PROFESSOR JOHN ROBINSON

Assistant Editors

JILL BODENSTEINER
CATHERINE PIERONEK

Editor in Chief

MICHAEL A.B. WOOFER, WISCONSIN

Executive Managing Editor

ALEXANDER HERMANNY, ILLINOIS

Executive Articles Editors

STEVEN ANDERSON, OHIO
CHRISTOPHER AVILA, FLORIDA
NINO GURULI, MASSACHUSETTS
DYLAN JOHNSON, CALIFORNIA
DEWEY DUY NGUYEN, SOUTH CAROLINA
RYAN OUYANG, ILLINOIS
ERIN ROGOZINSKI, INDIANA
JOSEPH SCHUESSLER, WISCONSIN
ANTHONY SEGNA, NEW JERSEY
AMY WILLIAMS, INDIANA
JASON ZWARA, NEW YORK

Executive Editors

URI ABT, MICHIGAN
MEGAN IRVING, MICHIGAN
KATIE SCHUMAN, ILLINOIS
MATTHEW SHEEHAN, IOWA

Notes Editor

DANIEL NORA, ILLINOIS

Executive Solicitation Editors

JEAN BAK, NEW YORK
KEVIN MUSHENO, PENNSYLVANIA
DANIELLE PALKERT, MINNESOTA

London Liaison

ANNIE HUANG, CALIFORNIA

Journal Staff

JESSICA ACKERMANN, OHIO
JIM AUDETTE, MICHIGAN
STEVEN M. BAUGH, KANSAS
LAURA BIRD, INDIANA
JOSEPH CALLAGHAN, ILLINOIS
LISA R. CRABTREE, RHODE ISLAND
AMANDA B. DWORAK, NEBRASKA
LAURA EWAN, FLORIDA
CHRISTINE GARTHWAITE, PENNSYLVANIA
FABIÁN GAUNA, ILLINOIS
DANIEL HERBSTER, ILLINOIS
T. ISADORA HUNTLEY, GEORGIA

DANIELLE K. LIGENZA, CALIFORNIA
SHARON LIM, CALIFORNIA
KATE MATERNOWSKI, WISCONSIN
CHRISTOPHER A. NICHOLS, MONTANA
STEVEN OYLER, UTAH
ANDREW ROMAN, OHIO
FRITZ SHADLEY, OHIO
JONATHAN M. THORNTON, ILLINOIS
KEVIN TRACY, NEBRASKA
NATALIE M. WARRICK, MICHIGAN
MICHAEL S. WILDE, UTAH

Senior Staff Assistant

DEBBIE SUMPTION

The Journal of College and University Law

Published three times per year in cooperation with the Notre Dame Law School (University of Notre Dame), the *Journal of College and University Law* is the only national law review devoted exclusively to higher education legal concerns. Issues generally include articles of current interest to college and university counsel, commentaries on recent cases, legislative and administrative developments, book reviews, student comments, and occasional papers from the Association's Annual Conference. All NACUA members receive the *Journal* as a benefit of membership.

Publications, Subscriptions, and Orders for Back Copies

To inquire about subscriptions to the *Journal of College and University Law* or to obtain a single issue of the current volume, contact the *Journal* directly at Notre Dame Law School, P.O. Box 780, Notre Dame, IN 46556, or by email at JCUL@nd.edu.

Orders for back issues of the *Journal* can be obtained from William S. Hein and Company Inc., 1285 Main Street, Buffalo, NY 14209-1987, (800) 828-7571. Back issues of the *College Law Digest* are available from the NACUA National Office, Suite 620, One Dupont Circle, N.W., Washington, DC 20036.

Correspondence relating to editorial and membership matters should be addressed directly to the Association's national office in Washington, DC.

The Journal of College and University Law, 1973–2010

Volume 37 (2010–11) Subscription: \$75.00 Per Issue: \$29.50	Volume 36 (2009–10) Subscription: \$67.00 Per Issue: \$27.00	Volume 35 (2008–09) Subscription: \$67.00 Per Issue: \$27.00
Volume 34 (2007–08) Subscription: \$67.00 Per Issue: \$27.00	Volume 33 (2006–07) Subscription: \$64.00 Per issue: \$23.00	Volume 32 (2005–06) Subscription: \$64.00 Per issue: \$23.00
Volume 31 (2004–05) Subscription: \$64.00 Per issue: \$23.00	Volume 30 (2003–04) Subscription: \$64.00 Per issue: \$23.00	Volume 27–29 (2000–03) Subscription: \$61.00 Per issue: \$17.00
Volume 26 (1999–2000) Subscription: \$57.00 Per issue: \$16.00	Volume 25 (1998–99) Subscription: \$55.00 Per issue: \$15.00	Volume 24 (1997–98) Subscription: \$52.50 Per issue: \$14.00
Volume 23 (1996–97) Subscription: \$50.00 Per issue: \$13.50	Volumes 21–22 (1994–95) Per volume bound: \$47.50 Per issue: \$11.50	Volumes 17–20 (1990–94) Per volume bound: \$47.50 Per issue: \$11.50
Volumes 14–16 (1987–90) Per volume bound: \$47.50 Per issue: \$11.50	Volumes 12–13 (1985–87) Per volume bound: \$47.50 Per issue: \$11.50	Volumes 5–11 (1977–85) Per volume bound: \$35.00 Per issue: \$8.50
Volumes 1–4 (1973–77) Per volume bound: \$30.00 Per issue: \$8.50		

College Law Digest, 1971–1982

Volumes 10–12 (1980–82) Per volume bound: \$35.00	Volumes 1–2 (1971–72) The set, bound: \$25.00
Volumes 3–9 (1973–79) Per volume bound: \$25.00	Volumes 1–12 (1971–82) The set, bound: \$290.00

THE JOURNAL OF COLLEGE AND UNIVERSITY LAW

This country has witnessed great changes and challenges in education law during the past decade: judicial decisions have changed student and faculty rights and their relations with institutions; colleges and universities have entered an era of severe financial constraints with many legal ramifications; and Congress has dictated new procedures and requirements for serving members of protected classes. The professionals who deal with education law need a resource to keep current on this burgeoning body of law.

The *Journal of College and University Law* is such a resource and, in fact, is the only law review devoted totally to the concerns of higher education. If you do not subscribe at present, or if you receive your subscription online and want to receive a hard copy of each issue, send in the application below—and please pass the subscription information on to someone you know who may benefit from the *Journal*.

.....

Mail subscription to:

The Journal of College and University Law
Notre Dame Law School
Box 780
Notre Dame, IN 46556

Volume 37 One year subscription (3 issues) for non-NACUA members: \$75.00 for NACUA members: \$37.50 International: \$85.00 Single issue costs Domestic: \$29.50 International: \$29.50 <input type="checkbox"/> Payment enclosed Make checks payable to the Journal of College and University Law
--

Name: _____

Institution/Business: _____

Street: _____

City: _____ State: _____ Zip: _____

Membership in the National Association of College and University Attorneys (NACUA) includes an online subscription to the *Journal*. NACUA members are eligible to subscribe to print editions of the *Journal* at a 50% discount from the regular subscription fee. For information on joining NACUA, write: NACUA, Suite 620, One Dupont Circle, N.W., Washington, DC 20036.

INSTRUCTIONS FOR AUTHORS

The *Journal of College and University Law* is a publication of the National Association of College and University Attorneys (NACUA) and the Notre Dame Law School. It is a refereed, professional journal specializing in contemporary legal issues and developments important to postsecondary education.

The *Journal* publishes articles, commentaries (scholarly editorials), book reviews, student notes, and student case comments. Experts in the law of higher education review all manuscripts.

Manuscripts should be double spaced and submitted electronically via a Microsoft Word document, or typewritten on 8½" × 11" paper. Set-off quotations should be double-spaced. Footnotes should reflect the format specified in the nineteenth edition of *A Uniform System of Citation* (the "Bluebook"). A paragraph on the title page should provide the position, the educational background, the address and telephone number of the author. Each author is expected to disclose in an endnote any affiliation or position—past, present, or prospective—that could be perceived to influence the author's views on matters discussed in the manuscript. Authors who submit a hard copy of their article should be prepared to submit an electronic version once editing commences.

Decisions on publication usually are made within four weeks of a manuscript's receipt. Student editors, an outside reviewer, and a Faculty Editor edit articles accepted for publication. The *Journal* submits editorial changes to the author for approval before publication. The Faculty Editor reserves the right of final decision concerning all manuscript changes. When an article is approved for publication, the *Journal* requires a signed License Agreement from its author(s), pursuant to which NACUA must be granted the first right to publish the manuscript in any form, format or medium. The copyright to the article remains with the author, while NACUA retains all rights in each issue of the *Journal* as a compilation.

The *Journal* welcomes electronic and hard copy submissions. To submit electronically, authors should send a version of their article in Microsoft Word, a cover letter, and a current curriculum vitae to the *Journal* staff at JCUL@nd.edu. Submissions in hard copy should be addressed to: *Journal of College and University Law*, Notre Dame Law School, P.O. Box 780, Notre Dame, IN 46556.

The Journal of College and University Law
(ISSN 0093-8688)

The *Journal of College and University Law* is the official publication of the National Association of College and University Attorneys (NACUA). It is published three times per year by the National Association of College and University Attorneys, Suite 620, One Dupont Circle, N.W., Washington, DC 20036 and indexed to *Callaghan's Law Review Digest*, *Contents of Current Legal Periodicals*, *Contents Pages in Education*, *Current Index to Journals in Education*, *Current Index to Legal Periodicals*, *Current Law Index*, *Index to Current Periodicals Related to Law*, *Index to Legal Periodicals*, *LegalTrac*, *National Law Review Reporters*, *Shepard's Citators*, and *Legal Resource Index* on Westlaw.

POSTMASTER: Send changes of address requests to the *Journal of College and University Law*, P.O. Box 780, Law School, Notre Dame, IN 46556.

Postage paid at Washington, D.C., and at additional mailing offices.

**Copyright © 2010 by National Association
of College and University Attorneys**

Cite as — J.C. & U.L. —

Library of Congress Catalog No. 74-642623

Except as otherwise provided, the *Journal of College and University Law* grants permission for material in this publication to be copied for use by non-profit educational institutions for scholarly or instructional purposes only, provided that 1) copies are distributed at or below cost, 2) the author and the *Journal* are identified, and 3) proper notice of the copyright appears on each copy.

ABOUT THE JOURNAL AND ITS EDITORS

The *Journal of College and University Law* is the only law review entirely devoted to the concerns of higher education in the United States. Contributors include active college and university counsel, attorneys who represent those institutions, and education law specialists in the academic community. The *Journal* has been published annually since 1973 and now boasts a national circulation of more than 3,800. In addition to scholarly articles on current topics, the *Journal of College and University Law* regularly publishes case comments, scholarly commentary, book reviews, recent developments, and other features.

In 1986, the Notre Dame Law School assumed publication of the *Journal*, which had been published at the West Virginia University College of Law from 1980–1986.

Correspondence regarding publication should be sent to the *Journal of College and University Law*, Notre Dame Law School, P.O. Box 780, Notre Dame, IN 46556, or by email to JCUL@nd.edu. The *Journal* is a refereed publication.

The views expressed herein are attributed to their authors and not to this publication, the National Association of College and University Attorneys or the Notre Dame Law School. The materials appearing in this publication are for information purposes only and should not be considered legal advice or be used as such. For a special legal opinion, readers must confer with their own legal counsel.