

# The University of New Hampshire Law Review

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Volume 5  
Number 3 *Pierce Law Review*

Article 3

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June 2009

## Parsing the Plagiarism Scandals in History and Law

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### Repository Citation

Arthur Austin, *Parsing the Plagiarism Scandals in History and Law*, 5 *Pierce L. Rev.* 367 (2007), available at [http://scholars.unh.edu/unh\\_lr/vol5/iss3/3](http://scholars.unh.edu/unh_lr/vol5/iss3/3)

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# Parsing the Plagiary Scandals in History and Law

ARTHUR AUSTIN \*

## I. INTRODUCTION

In 2002 the history of History was scandal. The narrative started when a Pulitzer Prize winning professor was caught foisting bogus Vietnam War exploits as background for classroom discussion.<sup>1</sup> His fantasy lapse prefaced a more serious irregularity—the author of the Bancroft Prize book award was accused of falsifying key research documents.<sup>2</sup> The award was rescinded. The year reached a crescendo with two plagiarism cases “that shook the history profession to its core.”<sup>3</sup>

Stephen Ambrose and Doris Kearns Goodwin were “crossover” celebrities: esteemed academics—Pulitzer winners—with careers embellished by a public intellectual reputation. The media nurtured a Greek Tragedy—two superstars entangled in the labyrinth of the worst case academic curse—accusations that they copied without attribution. Their careers dangled on the idiosyncratic slope of paraphrasing with its reefs of echoes, mirroring, recycling, borrowing, etc.

As the Ambrose-Kearns Goodwin imbroglio ignited critique from the History community,<sup>4</sup> a sequel engulfed Harvard Law School. Alan Der-showitz, Charles Ogletree, and Laurence Tribe were implicated in plagiarism allegations; the latter two ensnared on the paraphrase slope. The *New York Times* headline anticipated a new media frenzy: *When Plagiarism’s Shadow Falls on Admired Scholars*.<sup>5</sup> Questioned after the first two incidents, the President of Harvard said: “If you had a third one then I would have said, okay, you get to say this is a special thing, a focused problem at

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1. Norah Vincent, *Publishing, Pressure, Profits and Plagiarism*, L.A. TIMES, Feb. 28, 2002, at 15.

2. JON WIENER, HISTORIANS IN TROUBLE 73-93 (2005).

3. PETER CHARLES HOFFER, PAST IMPERFECT 198 (2005).

4. See JENNIE ERDAL, GHOSTING (2004); HOFFER, *supra* note 3; RON ROBIN, SCANDALS-SCOUNDRELS (2004); WIENER, *supra* note 2; see also THOMAS MALLON, STOLEN WORDS (1989); RICHARD A. POSNER, THE LITTLE BOOK OF PLAGIARISM (2007); K. R. ST. ONGE, THE MELANCHOLY ANATOMY OF PLAGIARISM (1988).

5. Sara Rimer, *When Plagiarism’s Shadow Falls on Admired Scholars*, N.Y. TIMES, Nov. 24, 2004, at B9.

the Law School.”<sup>6</sup> There was no follow up comment after the Tribe accusation.<sup>7</sup>

The occurrence of similar plagiarism packages in two disciplines within an overlapping time frame justifies an inquiry. The following case studies of six accusation narratives identify a congeries of shared issues, subsuming a crossfire of contention over definition, culpability, and sanction. While the survey connects core History-Law commonalities, each case is defined by its own distinctive cluster of signifiers. The primary source for the explication of each signifier cluster is the media of newspaper, trade journal, television, and internet. The media presence is the Article’s motif—each case study summarizes a media construct of a slice of the plagiarism debate. By author’s decree the debate is restricted to “pure” plagiarism: the appropriation of another’s text without attribution. The survey is conducted according to chronological order, beginning with History.

Ward Churchill’s *sui generis* smutch from plagiarism continues to agitate media coverage. His argument that a dismissal by the University of Colorado for academic misconduct would constitute a cover for a First Amendment protected essay on 9/11 adds more challenge to the plagiary abyss. This Article concludes with up-to-date coverage of the Churchill narrative.<sup>8</sup>

## II. HISTORY SCANDALS

### A. *The Ambrose-Kearns Goodwin Duet*

Like shadows from a Greek tragedy Ambrose and Kearns Goodwin were bracketed together in a media duet where negative bytes ricocheted back-and-forth. They were outed by the *Weekly Standard*, a conservative publication, within the same month. Supported by references to comparison excerpts, Ambrose was accused of appropriating “nearly identical” sentences, “barely distinguishable” key phrases and “passages” with only

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6. Daniel J. Hemel & Lauren A.E. Schuker, *Prof Admits to Misusing Source*, HARVARD CRIMSON, Sept. 27, 2004, available at <http://www.thecrimson.com/article.aspx?ref=503493>.

7. A fourth Harvard plagiarism drama broke in April 2006 when Kaavya Viswanathan, a second year undergraduate, admitted using “borrowed” excerpts from previous novels in her best selling “chick lit” book. The *Harvard Crimson* noted, “Controversy over alleged plagiarism is not new at Harvard,” citing Ogletree, Tribe, and Dershowitz. David Zhou, *College Looking into Plagiarism Accusations*, HARVARD CRIMSON, Apr. 27, 2006, available at <http://www.thecrimson.com/article.aspx?ref=513104>. For a caustic view of a “riveting” downfall, see Kurt Andersen, *Generation Xerox*, N.Y. MAG., May 15, 2006, at 26, available at <http://nymag.com/news/imperialcity/16935/index.html>.

8. See *infra* Part V.C.

fleeting attribution.<sup>9</sup> Two days later he announced that he “made a mistake for which I am sorry.”<sup>10</sup> On January 18, the *Standard* confirmed an anonymous letter identifying numerous instances of “striking borrowing” by Kearns Goodwin in her 1987 biography of the Kennedys and Fitzgeralds.<sup>11</sup> In response she conceded “close paraphrasing” lapses from Lynne McTaggart’s book, noting however, that after complaints from McTaggart the “mistakes” were corrected. She added: “And learning from this, I have made it a constant practice to use quotations in the text itself and to have the original source directly in front of me when I am writing.”<sup>12</sup>

Within four days after the *Standard*’s disclosure, Kearns Goodwin revealed that the McTaggart “complaint” was, in fact, a copyright infringement lawsuit and a monetary settlement with a confidentially provision.<sup>13</sup> “Sad and contrite,” she denied—“absolutely not”<sup>14</sup>—charges of plagiarism, adding that the lapse resulted in a switch to the use of computer to better organize data. “By the time I did *No Ordinary Time* I was very careful to understand what happened in that [McTaggart] situation.”<sup>15</sup> Goodwin Kearns piqued more attention by contradicting this assertion when she admitted that she was using the old longhand method in completing the *No Ordinary Time* composition.<sup>16</sup>

Contributing more aftershock, she announced that because the “borrowings” of the 1987 *The Fitzgeralds and the Kennedys* were more extensive than originally reported, her publishers were taking the extraordinary step of replacing the old paperback inventory with corrected copies.<sup>17</sup>

Ambrose proved the writer’s legend that paraphrasers inevitably return to the scene of the crime to invite disclosure by the footnote police. Six days after the *Standard*’s revelation, the *Los Angeles Times* reported more allegations of appropriation without citation by Ambrose.<sup>18</sup> He proffered

9. Fred Barnes, *Stephen Ambrose, Copycat; The Latest Work of a Bestselling Historian Isn’t All His*, WKLY. STANDARD, Jan. 4, 2002, at 27.

10. Fred Barnes, *Ambrose Apologizes*, WKLY. STANDARD, Jan. 7, 2002.

11. Bo Crader, *A Historian and Her Choices*, WKLY. STANDARD, Jan. 18, 2002, at 12. “I’ve long been concerned by several instances of plagiarism I noted long ago in Doris Kearns Goodwin’s *The Fitzgeralds and the Kennedys*. I believe she ought to be called to account, just as Professor Ambrose has.” Peter H. King, *As History Repeats Itself, the Scholar Becomes the Story*, L.A. TIMES, Aug. 4, 2002, at 1 (quotations omitted).

12. Crader, *supra* note 11.

13. Thomas C. Palmer, Jr., *Goodwin Discloses Settlement Over Credits*, BOSTON GLOBE, Jan. 22, 2002, at A1.

14. *Id.* (quoting Kearns Goodwin).

15. *Id.* (quoting Kearns Goodwin). “You learn how to do this right . . . I love footnotes. It’s hard because I take so much pride in my footnotes and my sources.” *Id.* (quoting Kearns Goodwin).

16. David D. Kirkpatrick, *Historian Says Borrowing Was Wider Than Known*, N.Y. TIMES, Feb. 23, 2002, at A10.

17. *Id.*

18. *More Questions Raised Over Ambrose’s Books*, L.A. TIMES, Jan. 10, 2002, at 13; *see also Stephen Ambrose, Copycat (continued)*, WKLY. STANDARD, Jan. 21, 2002.

the usual apology, denial, and “mistake” rationalizations. Counting the Kearns Goodwin issue, throw in Joe Ellis, “who was caught last year lying to his Mount Holyoke students about serving in Vietnam, you have what amounts to a startling rash of mendacity in popular history and a serious betrayal of public trust, not to mention an egregious breach of intellectual copyright.”<sup>19</sup>

The operative term is “popular history,” a genre that under Ambrose’s influence became a rationalization for paraphrasing. He disdained the conventional history style that exulted a rush to uncover languished documents, overlooked events, or lost letters, supported by phalanxes of footnotes counting plowshares. “I tell stories,” Ambrose explained. “I don’t discuss my documents. I discuss the story . . . . I am not writing a Ph.D. dissertation.”<sup>20</sup>

He compared himself to Homer and Thucydides,<sup>21</sup> aspiring to emulate these mentors by becoming the Ernie Pyle of World War II history with books like *Band of Brothers*, *Citizen Soldiers*, and *D-Day*. He and Kearns Goodwin were contributors to a “new generation of vigorous narrative historians,”<sup>22</sup> producing best sellers as “celebrity authors.”

For Ambrose, it was celebrity television appearances, a steady gig on the lecture circuit, Hollywood connections as a consultant, access to presidents, and honors such as the National Humanities Medal.<sup>23</sup> While name recognition sustained his self-proclaimed Homer legacy, it also imposed a troublesome implication—the necessity of satisfying the public and publisher with a constant stream of books. An obligation that invites criticism from the establishment for churning out an assembly line history infected with sloppiness. It also breeds plagiarism. Professor Foner: “Nobody can write as many books as he has—many of them were well-written books—without the sloppiness that comes with speed and the constant pressure to produce. It is the unfortunate downside of doing too much too fast.”<sup>24</sup>

Ambrose deflected censure by expressing disdain for envious colleagues who chastised him for success in promoting an unfashionable style and perspective.<sup>25</sup> Self-exiled from the real world they applied postmod-

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19. Vincent, *supra* note 1.

20. David D. Kirkpatrick, *As Historian’s Fame Grows, So Do Questions on Methods*, N.Y. TIMES, Jan. 11, 2002, at A1.

21. Megan K. Stack, *For Historian Ambrose, It’s Time for a ‘Love Song,’* L.A. TIMES, May 11, 2002, at 1.

22. Tim Rutten, *Regarding Media*, L.A. TIMES, Oct. 16, 2002, at 1.

23. Myrna Oliver, *Stephen E. Ambrose, 66; Author’s Work Brought WWII Vets Back to Americans’ Homes, Hearts*, L.A. TIMES, Oct. 14, 2002, at 9.

24. Kirkpatrick, *supra* note 20; see also *More Questions Raised Over Ambrose’s Books*, *supra* note 18.

25. Stack observes,

ern interpretation to colonial trivia while he fashioned a Homer simile to make history a part of the Nation's wisdom.<sup>26</sup> He was a storyteller with an advantage. "The reason why historians tend to get envious . . . is that we don't tell good stories."<sup>27</sup>

We will never know how the Ambrose narrative would have played out—he died of cancer within ten months of the accusation. To the end, he was defiant: "After I got through the shock, the outrage, the how-can-this-be-happening, I got to thinking: Screw it."<sup>28</sup> At this point one conclusion is evident: as a "popular" historian dedicated to uplifting narratives he forced a discussion of the implications of the intersections of "popular" history and plagiarism. Kearns Goodwin, the other member of the duet, is still providing new insights on the issue.

### B. *Risk, Process, Parsing*

The duet performed for different constituencies. Ambrose carried on a personal dialogue with readers who empathized with his shared narratives of ordinary citizens whose collective sacrifice shaped the events of war. He appropriated the blue collar class. Kearns Goodwin described the ethos—politics, intrigue, and vulnerability—of major players in the presidential venue. She speaks from the vortex of the power class in narratives about L.B.J., the Kennedys, Franklin and Eleanor Roosevelt, and Lincoln. Hence, a difference in their reaction to the accusations. Ambrose was defiant; Kearns Goodwin's strategy borrows from the tactics of the subjects of her books, including consulting a political consultant.<sup>29</sup>

Her defense started with an op-ed piece in *Time Magazine* that resembled a State Department press release critiquing a national disaster. The accusation was deflated from disaster to an error—a media induced aberration entrapping her in a "swirl" about crediting sources.<sup>30</sup> It was a fluke of

Ambrose believes his interests were unfashionable. He's long been an outspoken critic of teachers who favor obscure glimpses of the past over the epic stories of looming leaders and drastic clashes. "I always had a hard time because I did military history. They want you to teach about gays and lesbians in the Colonial period."

Stack, *supra* note 21.

26. Arthur Schlesinger said: "[Ambrose] combined high standards of scholarship with the capacity to make history come alive for a lay audience." Mark Feeney, *Stephen Ambrose Dies; His Books Recounted Epics*, BOSTON GLOBE, Oct. 14, 2002, at A1.

27. Diana Jean Schemo, *Many on Campus Disdain Historian's Practice*, N.Y. TIMES, Jan. 15, 2002, at A14.

28. Oliver, *supra* note 23.

29. Identified as Bob Shrum. "[S]he had also gotten Senator Ted Kennedy, a friend, to intervene on her behalf. The *Times* then quoted Princeton historian and former AHA president Robert Darnton: 'If she is organizing a P.R. campaign to exculpate herself, that strikes me as unprofessional conduct.'" WIENER, *supra* note 2, at 185.

30. Doris Kearns Goodwin, *How I Caused That Story*, TIME, Feb. 4, 2002, at 69.

irony, a no winner for the perfectionist: the greater the commitment to research, the greater “the possibility of error.”<sup>31</sup> The McTaggart incident was marginalized as a “matter . . . completely laid to rest.”<sup>32</sup>

This became her talking point: the “swirl” could be rationalized according to the basic dynamics of risk. Research methodology was the context; Kearns Goodwin presented her work as classic history process. She composed a 900 page book with 350 footnotes, in longhand, diligently scouring sources from “a multitude of primary materials,”<sup>33</sup> including 150 boxes of Joe Kennedy’s “treasure trove” of diaries, movie stubs, etc.; over five years of dedication to her book. Accidental self entrapment was inevitable. “Somehow in this process, a few of the books were not fully rechecked. I relied instead on my notes, which combined direct quotes and paraphrased sentences.”<sup>34</sup>

By focusing on methodology, Kearns Goodwin asserted control of the dialogue. While her plea got a standing ovation at a college lecture in Minnesota, the reporter covering the event anticipated the negative reaction with an impeaching quote: “[Ambrose and Kearns Goodwin] are trying to write good pop history. That’s supposed to excuse them? No! You can do it honestly.”<sup>35</sup>

As noted,<sup>36</sup> she had to admit that she had fudged on the extent of “borrowing.” Even more damning, the *Time* article did not explain the settlement that had allowed her to avoid public scrutiny.<sup>37</sup> No longer bound to confidentially, McTaggart used a *New York Times* op-ed piece to accuse her of benefiting from the “literary equivalent of the *droit du seigneur*” where celebrity writers can appropriate whatever satisfies their “fancy.”<sup>38</sup>

Just when the tempo of the media swirl mellowed, it was invigorated when the *Los Angeles Times* discovered new paraphrasing in *No Ordinary Time*.<sup>39</sup> After six months of media chatter, Peter King summarized the

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31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. Geeta Sharma Jensen, *Word Problems; How Bad Is It When Historians Plagiarize?*, MILWAUKEE J. SENTINEL, Mar. 17, 2002, at 1.

36. See *supra* note 16 and accompanying text.

37. Mark Lewis, *Doris Kearns Goodwin and the Credibility Gap*, FORBES, Feb. 27 2002, <http://www.forbes.com/people/2002/02/27/0227goodwin.html>.

38. Lynne McTaggart, *Fame Can't Excuse a Plagiarist*, N.Y. TIMES, Mar. 16, 2002, at A15.

In my case, whether Ms. Goodwin had used footnotes or even quotation marks around the passages taken from my book would not have mattered. (Some passages were credited to me in footnotes.) It was the sheer volume of the appropriation—thousands of my exact or nearly exact words—that supported my copyright infringement claim.

*Id.*

39. See Peter H. King, *As History Repeats Itself, the Scholar Becomes the Story*, L.A. TIMES, Aug. 4, 2002, at 1.

Kearns Goodwin strategy: a “dogged defense” based on inadvertent error implicit in methodology.<sup>40</sup> In the face-off, she took some hits beyond the verbal assaults—she was suspended from regular appearances on Jim Lehrer’s PBS NewsHour program, she opted out of participating in the Pulitzer Prize judging and several universities withdrew speaking invitations.<sup>41</sup> She also received strong criticism from the *Harvard Crimson*, demanding that she resign from the Harvard Board of Overseers.<sup>42</sup>

Drawing on the lessons from the historical subjects of her books, Kearns Goodwin took the offensive on two levels. First, she exploited an engaging television persona to connect with Ambrose’s Greatest Generation demographic. She became a storyteller as a television commentator “hair parted unevenly down the middle, makeup minimal . . . warm, wise, accessible,”<sup>43</sup> appearing on middle America talk shows like David Letterman<sup>44</sup> and Don Imus.<sup>45</sup> She connected with the Greatest Generation by doing commentary for Ken Burns’ baseball documentary. “[A]s close to a media darling as a historian can be,”<sup>46</sup> she proved the point by producing a best selling memoir on growing up, known in her neighborhood as “Ragmop.”<sup>47</sup> The “Ragmop” narrative did not, however, shield her from a non-academic and more intransigent form of criticism. As a “star” Liberal she was pulled into the Conservative–Liberal crossfire.

The anonymous plagiarism accusation served as a red flag to the conservative *Weekly Standard*, a golden opportunity for some political muckraking of a prominent Democratic insider. The Kearns Goodwin pedigree traces back to the Johnson White House, culminating in his biography.<sup>48</sup> Her husband’s close ties to John Kennedy as his speechwriter provided

40. *Id.*

41. Fred Bruning, *As the Plagiarism Debate Swirls Around Her; Doris Kearns Goodwin Takes Comfort from Her Latest Project—A Book About Lincoln’s Presidency*, NEWSDAY, Apr. 8, 2002, at B6.

42. “Goodwin has a long road ahead of her before she restores her credibility as an [sic] historian or journalist . . . . The first step should be resigning from the University’s oldest governing board, thereby respecting the reputation that it and each of its 29 other members have worked hard to establish.” *The Consequence of Plagiarism*, HARVARD CRIMSON, Mar. 11, 2002, available at <http://www.thecrimson.com/article.aspx?ref=180483>.

43. King, *supra* note 39. “She exhibited a knack for remembering stories and telling them well.” *Id.*

44. Bruning, *supra* note 41. Letterman: “I know your work a little bit, and you’re no skunk.” *Id.*

45. Who, off the air said: “Just what we need, another Lincoln book.” Buzz Bissinger, *Don Imus’s Last Stand?*, VANITY FAIR, Feb. 2006, at 150.

46. Phil Kloer, *Pla.gi/a.rize (pla’ je riz’) vt. To Take Ideas, Writings, Etc. from Another and Pass Them off as One’s Own; Doris Kearns Goodwin Says She’ll Confront Controversy in Atlanta Lecture Monday*, ATLANTA J. & CONST., Mar. 24, 2002, at 1F.

47. King, *supra* note 39.

48. Her contact with Johnson was initiated at a dance while she was a White House fellow. Interview by Acad. of Achievement with Doris Kearns Goodwin, Pulitzer Prize for History, in Sun Valley, Idaho (June 28, 1996), <http://www.achievement.org/autodoc/printmember/goo0int-1>.



access to valuable source material—an insider’s cachet of contacts and documents. She was tagged in the Congressional Record as colorizing “her history with a very strong liberal bias.”<sup>49</sup> Moreover, as a one time professor and overseer at Harvard, Kearns Goodwin was part of the Liberal academic elite. Her Liberal connections were manifest when the *Harvard Crimson* sharply criticized her for not resigning from the Board of Overseers,<sup>50</sup> igniting a letter of support from Laurence Tribe.<sup>51</sup>

With an advocate’s instinct, Tribe laid out what emerged as Kearns Goodwin’s template. He narrowed the issue to the paraphraser’s abyss—the lack of attribution via an absence of quotation signals or footnotes, thereby excluding the more serious issues of falsifying data or creating nonexistent facts.<sup>52</sup> A critical distinction—the latter is a “cardinal sin for any scholar” while the former can be characterized as a “sloppy” mistake.<sup>53</sup> Descending from felony to misdemeanor eliminates reference to intention enabling Tribe to explain away Kearns Goodwin’s culpability on the basis of a “minuscule” lapse in a 900 page opus with 350 footnotes. The Tribe brief also served notice that the Harvard community held Kearns Goodwin in high esteem as a serious historian, distancing her from the “popular” market driven category.<sup>54</sup>

As “one of the truly outstanding historians of our time”<sup>55</sup> she is entitled to a favorable presumption.<sup>56</sup> Support from academic historians emerged when a *New York Times* article, *Are More People Cheating*, included Kearns Goodwin in the group “of some of the most notorious scoundrels in America.”<sup>57</sup> A rebuttal letter, signed by Liberal heavyweights, including Arthur Schlesinger, Jr., Douglas Brinkley, and David Halberstam followed Tribe’s talking points to exonerate Kearns Goodwin: “[h]er errors resulted from inadvertence, not intent.”<sup>58</sup> Her Liberal aca-

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49. *Liberal Bias in America’s Colleges and Universities*, 107 CONG. REC. H718 (2002) (statement of Rep. Duncan).

50. See *supra* note 42 and accompanying text.

51. Laurence H. Tribe, *Misjudging Doris Kearns Goodwin*, HARVARD CRIMSON, Mar. 18, 2002, available at <http://www.thecrimson.com/article.aspx?ref=180631>.

52. This could be construed as a swipe at Joseph Ellis and Michael Bellesiles.

53. Tribe, *supra* note 51.

54. Meaning Ambrose?

55. Tribe, *supra* note 51.

56. A Crimson staff writer anticipated Tribe’s “presumption” with a different twist: “If you’re famous enough, it might not matter.” Andrew J. Miller, *Overseer’s Admission of Plagiarism Comes with Few Repercussions*, HARVARD CRIMSON, Jan. 31, 2002, available at <http://www.thecrimson.com/article.aspx?ref=161414> (quoting a Harvard professor).

57. Letter to the Editor, *A Historian’s Integrity*, N.Y. TIMES, Oct. 25, 2003, at A18; see Felicia R. Lee, *Are More People Cheating?; Despite Ample Accounts of Dishonest, A Moral Decline Is Hard to Calculate*, N.Y. TIMES, Oct. 4, 2003, at B7.

58. “In fact, her character and work symbolize the highest standard of moral integrity.” Lee, *supra* note 57.

demic flank secure, she continued to pursue the “Ragmop” persona to reach the middle class television market. She thus placated both markets; the Lincoln book for the academics, and the baseball memoir for the red state demographic.

Kearns Goodwin’s post-2002 career resembles Pareto’s description of Karl Marx’s statements—they “are like bats; from one angle they resemble birds, while from another view they look like mice.”<sup>59</sup> The Gilder Lehrman Institute for American History sees birds: it awarded Kearns Goodwin the 2006 Lincoln Prize of \$50,000 for her biography of Abraham Lincoln. The *New York Times* announcement of the award included a mice reference: “The book is Ms. Goodwin’s first since she acknowledged copying passages from other works in her 1987 book, *The Fitzgeralds and the Kennedys*.”<sup>60</sup>

Less than a month later she received another award minus the mice echo tag.<sup>61</sup>

### C. *The Puzzles of Definition and Penalty*

The dialogue over Ambrose and Kearns Goodwin depicts the affinity of the Pareto bird-mice metaphor to the black hole of defining plagiarism, a deconstructionist’s aphrodisiac: “it’s rather like Jell-O.”<sup>62</sup> For Yale literary critic Harold Bloom, why bother? There is no such thing as originality, thus there is no issue over plagiarism—which he calls the “most normal activity of literary production.”<sup>63</sup> Maybe Shakespeare could get away with it but history suggests otherwise,<sup>64</sup> especially in the academy, where ego driven members are constantly on the lookout for rivals appropriating their genius. Charles Hoffer is Stephen Ambrose and Kearns Goodwin’s worst case scenario—he sees every echo as plagiarism mice.

Hoffer is in a unique position to lay out a précis of a formal peer evaluation of plagiarism accusations. A practicing historian, he served two years on the Professional Division, the arm of the American Historical Association (AHA) responsible for adjudicating plagiarism complaints. In

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59. EDWARD S. MASON, *ECONOMIC CONCENTRATION AND THE MONOPOLY PROBLEM* 391 (1959).

60. *Lincoln Prize to Doris Kearns Goodwin*, N.Y. TIMES, Feb. 10, 2006, at E5 (quotations omitted).

61. *See Doris Kearns Goodwin Wins \$50,000 Prize*, N.Y. TIMES, Mar. 29, 2006, at E2.

62. Kloer, *supra* note 46 (quoting Richard Shenkman).

63. Jenny Attiyeh, *For Yale Critic, Plagiarism Is Literature*, BOSTON GLOBE, Apr. 21, 2002, at B7.

Q. Your defense of plagiarism makes me think perhaps that we have no original thoughts.

A. Well, there are figures who come along and so subsume our available stock of reality and of language, Shakespeare above all, so that after Shakespeare, no one can be original! And so Shakespeare himself was not original.

*Id.*

64. *See, e.g.*, ALEXANDER LINDEY, *PLAGIARISM AND ORIGINALITY* (1952).

fact, that is what he does in *Past Imperfect*—he conducts a “one man show” as complainant, defender, trier of fact, and judge of law,<sup>65</sup> to conclude that Ambrose and Kearns Goodwin “were plagiarists on a large scale.”<sup>66</sup>

Hoffer interprets the AHA as decreeing that disclosure of external contribution to the author’s work is an ethical imperative.<sup>67</sup> Whatever the context, failure to comply constitutes “strict liability” for violators, “like going through a stoplight.”<sup>68</sup> Hoffer and the AHA assume that intent to deceive is irrelevant, thereby adopting an antitrust version of the *per se* offense. Proof of the offense ends inquiry, cutting off exculpatory defenses admissible under an expansive “rule of reason” standard.<sup>69</sup>

Hoffer identified the *per se* fact of Ambrose’s plagiary violation: the use of primary material as cited authority, adorned by quotation marks, commingled with unreferenced secondary material. Strict liability was inherent in the close paraphrasing of the secondary material, thereby conveying the fraudulent impression that it was Ambrose’s interpretation of the quoted source. “Ambrose reduced the other scholars from whom he appropriated exact language virtually to the status of research assistants, incorporating into his own documents and passing off as his own their findings and their unique way of looking at those findings.”<sup>70</sup> Like price-fixing that inevitably produces injurious effects, the harm justifies a *per se* sanction.<sup>71</sup>

65. HOFFER, *supra* note 3, at xi.

66. *Id.* at 176.

67. The AHA’s standards provide:

Plagiarism, then, takes many forms. The clearest abuse is the use of another’s language without quotation marks and citation. More subtle abuses include the appropriation of concepts, data, or notes all disguised in newly crafted sentences, or reference to a borrowed work in an early note and then extensive further use without subsequent attribution. Borrowing unexamined primary source references from a secondary work without citing that work is likewise inappropriate. All such tactics reflect an unworthy disregard for the contributions of others.

AM. HISTORICAL ASS’N, STATEMENT ON STANDARDS OF PROFESSIONAL CONDUCT (Jan. 6, 2005), available at <http://www.historians.org/pubs/free/professionalstandards.cfm>.

68. HOFFER, *supra* note 3, at 174.

69. See *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993).

The rule of reason requires the finder to “weigh all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.” The plaintiff bears an initial burden under the rule of reason of showing that the alleged combination or agreement produced adverse, anti-competitive effects within the relevant product and geographic markets.

*Id.* (footnote and citation omitted).

70. HOFFER, *supra* note 3, at 188-89.

71. Hoffer explains:

In particular, in a historical work that is presented as one one’s own contribution to knowledge, not only must one acknowledge its sources, the *writer must reveal the full ex-*

After hammering Ambrose with a “*per se*” judgment, Hoffer waffled on Kearns Goodwin. She plagiarized, “but only because the definition of plagiarism in the AHA’s Statement of Standards of Professional Conduct makes no allowance for [proof of] motive or intent.”<sup>72</sup> It was a waffle that left the backdoor open for what antitrust recognizes as a “quick look” truncated judgment—a modification of the *per se* rule that allows the fact finder to evaluate evidence beyond proof of the fact of violation to make a finding that the conduct produced the presumed effects.<sup>73</sup> Hoffer’s fact finding system provides a road map for a “quick look” evaluation: the fact of uncited paraphrasing is undisputed, sufficient for *per se*, then a quick look at the McTaggart cover-up and the *Los Angeles Times* exposure of fudging on secondary sources would justify shifting the burden of proof to Kearns Goodwin. Hoffer was sympathetic to her sloppy work defense. She made mistakes, “inadvertently and infrequently . . . though she was not as forthcoming as she might have been.”<sup>74</sup> The latter point is persuasive; Hoffer leaves the impression that his quick look would favor the prosecution; he concludes his decision with a reference to an exposé of *The Fitzgeralds and the Kennedys* where Kearns Goodwin replicated the Ambrose strict liability standard—“footnotes but no quotation marks around the borrowed passages.”<sup>75</sup> Under Hoffer’s parsing, echo at your risk: “As for the definition Hoffer applies to today’s scholars, . . . it sweeps up some instances of legitimate paraphrase and is sometimes so hard and fast that we’d all be guilty of it.”<sup>76</sup>

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*tent of the work’s indebtedness.* No historical author may paraphrase so closely to the original that the change of a few words would result in a direct or exact quotation.

*Id.* at 174-75 (emphasis added). The AHA admonishes:

All historians share responsibility for defending high standards of intellectual integrity. When appraising manuscripts for publication, reviewing books, or evaluating peers for placement, promotion, and tenure, scholars must evaluate the honesty and reliability with which the historian uses primary and secondary source materials. Scholarship flourishes in an atmosphere of openness and candor, which should include the scrutiny and public discussion of academic deception.

AM. HISTORICAL ASS’N, *supra* note 67.

72. HOFFER, *supra* note 3, at 203.

73. See ANDREW I. GAVIL ET AL., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 197 (2002).

**Quick Look to Condemn.** In 1981, Professor Phillip Areeda authored a paper, later cited with approval in *NCAA*, by the Supreme Court, in which he offered the suggestion that sometimes the rule of reason can be applied “in the twinkling of an eye.” His essential point was this: sometimes the anticompetitive impact of a restraint can be readily demonstrated—even if the restraint falls outside of the established *per se* categories.

*Id.* (citations omitted) (bold in original).

74. HOFFER, *supra* note 3, at 203.

75. *Id.* (citing Mark Lewis).

76. Matthew Price, *Hollow History: A Former Plagiarism Advisor for the American Historical Association Says His Professor Is in Deep Trouble. But Some Colleagues Say His Case Doesn’t Add up*, BOSTON GLOBE, Oct. 24, 2004, at E1 (quotations omitted).

In the public arena, Kearns Goodwin benefited from a rule of reason analysis that allowed her supporters to control the context, an edge that generally favors the accused.<sup>77</sup> The AHA implicitly favors an expansive debate by eliminating intent as a condition of guilt followed by an announcement that they would no longer investigate plagiarism accusations.<sup>78</sup> The best case for a bird interpretation favoring the accused under the Pareto metaphor comes from St. Onge's classic survey which provides benchmarks for sanction according to "syndrome criteria": quality, quantity, intent, illicit gain, no worthy claim, printed matter, and competency.<sup>79</sup> His definition: "Plagiarism is an intentional verbal fraud committed by the psychologically competent that consists of copying significant and substantial uncredited written materials for unearned advantages with no significant enhancement of the materials copied."<sup>80</sup>

St. Onge, like Richard Posner, exults the benefits of copying, to be repudiated only when it reaches copyright infringement levels, and requiring proof of intent and economic benefit.<sup>81</sup> Failure to recognize these nuances leads to quick judgments and media frenzy and, according to St. Onge, in the Ambrose and Kearns Goodwin situations, a rush to the judgment of guilt.<sup>82</sup> Under his definition the fact finder must (1) follow the copyright model by distinguishing between marginal echoing and substantial—both

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77. At least under the antitrust system. "Business practices tested under a full rule of reason, with no presumptions based on any set of facts and with the burden of showing anticompetitive effect on the plaintiff, will usually turn out to be legal." Robert Pitofsky, *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 COLUM. L. REV. 1, 2 (1978).

78. See Thomas Bartlett, *Historical Association Will No Longer Investigate Allegations of Wrongdoing*, CHRON. HIGHER EDUC., May 23, 2003, at A12.

79. ST. ONGE, *supra* note 4, at 60.

80. *Id.* at 101 (emphasis omitted). St. Onge adds:

This is plagiarism pure. It happens all to [sic] often. It is also all too often confused with plagiarism impure, mitigated, extenuated, marginal, hapless, ignorant, careless, etc. There are too many salients to plagiarism for a comprehensive definition. The underlined above is sufficiently rigorous to alert all readers with suspicions, warranted and otherwise, to essential discriminations that should and usually must precede judgments. In the light of these basics, the concerned reader is then ready to address the context for the kind and degree of copying and proper courses of remediation if needed.

*Id.* at 101-02.

81. *Id.*

82. On his blog, Posner posted:

Recent "scandals" involving charges of plagiarism by professors and other writers *treat plagiarism as (1) a well-defined concept that (2) is unequivocally deserving of condemnation*. It is neither. Take the second point first. The idea that copying another person's ideas or expression (the form of words in which the idea is encapsulated), without the person's authorization and without explicit acknowledgment of the copying, is reprehensible is, in general, clearly false.

Posting of Richard Posner to The Becker-Posner Blog, <http://www.becker-posner-blog.com>, (Apr. 24, 2005, 19:52 CST) (emphasis added); see also Keith R. St. Onge, *Plagiarism: You Know It When You See It (Really?)*, HISTORY NEWS NETWORK, Mar. 18, 2002, <http://hnn.us/articles/628.html>.

in terms of quantity and quality—and (2) adhere to the ultimate principle: “Anything less than original complex sentences cannot command our intellectual respect.”<sup>83</sup> In his “judicious court, the charges against Stephen Ambrose and Doris Kearns Goodwin are dismissed.”<sup>84</sup>

### III. THE MEDIA VENUE CONFRONTS CULTURAL BAGGAGE

#### A. *Paradigms*

A quick autopsy of the media coverage confronts vacuity—pontification by Pulitzer winners, shadowed by envious petty recrimination from tenured radicals and testy conservatives, with everyone seeking to add points on Posner’s Top 100 media mention list.<sup>85</sup> There was the vigorous ripple effect over lack of agreement on key issues—from definition to sanction. Succumbing to the convenience of postmodernism, the AHA jettisoned its responsibility to monitor plagiarism<sup>86</sup> leaving an abyss: “[T]here is no about for any thinking to be about . . . .”<sup>87</sup>—triggering a siren for scholarly review. Hoffer, Robin, and Wiener responded with books proffering their constructs of Pareto’s bat-mice/bird metaphor. They were trumped by Jim Lehrer’s mystery novel delving into the psychology of plagiarism; producing speculation over Kearns Goodwin’s termination from NewsHour.<sup>88</sup>

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83. *Id.*

84. *Id.* Noting Kearns Goodwin’s express rejection of quotation marks for McTaggart’s text, Posner concludes that while possibly a “confession of copyright infringement . . . . I would hesitate to call it plagiarism . . . .” POSNER, *supra* note 4, at 88.

85. Kearns Goodwin ranked thirty-sixth, one spot below Bill Moyers and two places above Jonathan Turley. RICHARD A. POSNER, *PUBLIC INTELLECTUALS: A STUDY OF DECLINE* 209 (2001); *see also* Arthur Austin, *The Law Academy and the Public Intellectual*, 8 ROGER WILLIAMS U. L. REV. 243 (2003).

86. Bartlett, *supra* note 78.

87. MALCOM BRADBURY, *MY STRANGE QUEST FOR MENSONGE* 63 (1987) (quoting Mensonge).

88. JIM LEHRER, *THE FRANKLIN AFFAIR* (2005). In addition to the theme involving a ghost writing historian, the book is a virtual treatise on the Kearns Goodwin defense. Rebecca, a Reagan historian and television commentator, is accused of lifting verbatim material in her book on Reagan. Her explanation:

Rebecca, defeated, took her seat again. “Yes, Dr. Hooper, I am guilty, not of direct pre-meditated plagiarism but of something equally awful. My only defense is that I did not pay close enough attention to what my researchers and writers were doing. I didn’t consciously decide to steal certain lines, paragraphs, ideas, and themes from other authors. My staff—sometimes toward the end of getting the book done there were five or six of them—simply didn’t bother to transform other people’s work into different words for me, and I was too busy to pay attention to what they were doing.”

*Id.* at 190.

Hoffer and Wiener judge the media coverage as subversive. Hoffer condemns the circulation of confusion and mixed signals.<sup>89</sup> Wiener detects the frenzy as supplying a cover for attack by right-wing interest groups.<sup>90</sup> Robin says the media influence is self-inflicted by historians and the AHA, who abdicated authority and responsibility to police and discipline plagiarism irregularities. Without the authority of gatekeepers, discipline is abandoned to an “alternative method” of control—the media. “In other words, the public airing of deviancy occurs when the conventional means for controlling doctrinal discourse malfunction.”<sup>91</sup> Ron Robin concludes that the media “border control” pressure has had a salutary impact by exposing and condemning violations of the canon.<sup>92</sup>

It soon became evident that the plagiarism controversy was driven by more than squabbles over echoing and attribution, and in fact served as convenient pretext for a more serious concern over the cultural directions of History. The dynamics of the cultural implications justify an analysis under Thomas Kuhn’s description of paradigm change.<sup>93</sup> In its totality, the conflict resembles Kuhn’s notion of a “crises”<sup>94</sup> in which existing problem

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89. Hoffer explains:

Indeed, when the frauds were unveiled, professional historians were not the whistle blowers. It was through anonymous tips to journalists looking for scoops that the misconduct came to light. Interviewed by reporters on the case, leading historians voiced judgments so complex and vague that the oracle at Delphi would have been envious. While professionals fumbled the opportunity to construct a virtual national classroom in which they could have used the cases to teach sound historical methods, the journalists and pundits got all the lessons wrong. The critics saw the cases either as symptoms of a global meltdown of standards or proof of the cupidity of a few sneaks. Because they did not think in historical terms, or understand the long historical causes of the crisis, they did not see the long dark side of the American history writing.

HOFFER, *supra* note 3, at 237.

90. Wiener explains:

Charges of misconduct that become media spectacles have ended careers only when powerful groups outside the profession organize campaigns that demand punishment. Typically, the right rather than the left has organized, and succeeded with, such campaigns. Could the history profession itself counter the power of these organized interest groups? The American Historical Association recently abandoned its procedures for addressing charges of plagiarism and professional misconduct. That 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.

WIENER, *supra* note 2, at 9.

91. ROBIN, *supra* note 4, at 231.

92. *Id.* at 232.

93. See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).

94. “[R]ecognized anomalies whose characteristic feature is their stubborn refusal to be assimilated to existing paradigms.” *Id.* at 97. The next step is a “revolution” in which an alternate paradigm competes with existing paradigms for support within the community. “Conversions will occur a few at a time until, after the last holdouts have died, the whole profession will again be practicing under a single, but now a different, paradigm.” *Id.* at 152.

solutions are ineffective, prompting a “revolution”: and eventually a new paradigm<sup>95</sup> and new cultural criteria.<sup>96</sup>

The original reigning history paradigm, which Hoffer connects to the Ambrose and Kearns Goodwin issues, was predicated on the legacy of the Founding Fathers who left a trail of “self-congratulatory” stories to memorialize the history they were making.<sup>97</sup> A group of “white, Protestant elite” sought to compile a consensus of “self-sustaining truisms” that excluded reference to indigenous people, women, and slaves.<sup>98</sup> “Consensus History” was entrenched by the emergence of a cadre of professional historians and the formation of the AHA in 1884.<sup>99</sup> Events like the Cold War emboldened self-congratulatory harmony under an ideological imperative that carried “Consensus History” into a face-off with the crisis of the 1960s.<sup>100</sup>

Plagiarism was not a benchmark issue in sustaining consensus. History recorded facts from the public domain, hence “[o]ne could never steal a fact from another author . . . .”<sup>101</sup> George Bancroft and Francis Parkman, role models for Consensus History professionals, anticipated Ambrose and Kearns Goodwin (who received the prestigious prize awarded in Bancroft’s name)<sup>102</sup> by appropriating secondary material without attribution. Both disdained quotation marks—“something that men of letters did all the time.”<sup>103</sup> While Ambrose and Kearns Goodwin may have offended manners, they did not violate professional ethics of the Consensus School of History.<sup>104</sup>

The Kuhnian antenna would detect crisis from the obstinate refusal of consensus advocates to assimilate the voices from “shadow” participants in history, a phenomenon that “gives rise to new theories.”<sup>105</sup> Critical dissent throughout the academy during the turmoil of the 1960s produced a counter paradigm. Composed of New Left practitioners of the personal experience narrative, they became advocates of history as an ideological

95. *Id.* at 109.

96. When a new paradigm is established, “there are usually significant shifts in the criteria determining the legitimacy both of problems and of proposed solutions.” *Id.*

97. HOFFER, *supra* note 3, at 1-10.

98. “It relied on plagiarism—repeating, without citation and without criticism, the old self-sustaining truisms, as though they were not the precise language of past writers but a kind of secular Scripture.” *Id.* at 14.

99. An “elite” from the same social stratum—Protestant, British, and from the Northeast. *Id.* at 33.

100. “It was the old consensus history, refitted and pressed into service in the global struggle against Communism.” *Id.* at 44.

101. *Id.* at 20. “[E]ven if one used the same language, word for word.” *Id.*

102. *More Questions Raised Over Ambrose’s Books*, *supra* note 18.

103. HOFFER, *supra* note 3, at 26.

104. *Id.*

105. KUHN, *supra* note 93, at 97.



weapon—“[a] good dose of tear gas makes us think more clearly as historians”<sup>106</sup>—as they collectivized to oust an obsolete paradigm that “hides the blemishes, the injustice, oppression, and divisiveness that marred our past.”<sup>107</sup>

Hoffer acknowledges the overwhelming triumph of the New History paradigm throughout the academy but he also laments the failure to achieve a Kuhnian unconditional surrender: “an acceptance that is so strong it eliminates the need for further discussion of foundational questions about the subjected matter . . . .”<sup>108</sup> With what Hoffer calls “mischievous arrogance,”<sup>109</sup> the winners assumed an authority to politicize scholarship to more effectively influence public policy.<sup>110</sup>

Overconfidence invited criticism, which quickly became a Kuhnian crisis. The effort to play “expert” entangled academic historians in the media flap over Columbus Day—and a needless brush with cultural cross-fire. Then came the politically charged National History Standard imbroglio over charges of revisionist history. Enola Gay was a replay of New History *vs.* Consensus world views. The most embarrassing crisis involved prominent New Historians insinuating their personal views into congressional testimony on the Clinton impeachment and in the process repudiating the principle of “multiple viewpoints and evolving understandings of past events.”<sup>111</sup> In effect, they subsidized the crises by reverting to Consensus History.<sup>112</sup>

### B. *Interpretive Communities and Context*

Reviving the bitter tensions between the two contesting paradigms produced friction between what Stanley Fish calls “interpretive communities.”<sup>113</sup> He uses the term to recognize conflicts over the accepted interpretation of texts. The communities are groups—here composed of histori-

106. HOFFER, *supra* note 3, at 70 (quotations and citation omitted). Hoffer replied, “That is nonsense.” *Id.*

107. *Id.* at 5.

108. Gary Gutting, *Introduction to PARADIGMS AND REVOLUTIONS: APPRAISALS AND APPLICATIONS OF THOMAS KUHN’S PHILOSOPHY OF SCIENCE* 13 (Gary Gutting ed., 1980).

109. HOFFER, *supra* note 3, at 93.

110. *Id.* at 94.

111. *Id.* at 124.

112. Hoffer highlights this reversion remarking of Wilentz:

Wilentz had also rejected David Thelen’s notion that historians must tell the public that historians often disagree, in favor of an older, essential-facts-from-which-no-one-can-dissent view. Wilentz had adopted the tone of the impartial, objective consensus historian when he pointedly warned one pro-impeachment congressman, “Later generations of historians will judge these proceedings” and pronounce a verdict.

*Id.*

113. STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?* 14 (1980).

ans—a chorus “of those who share interpretive strategies not for reading (in the conventional sense) but for writing texts, for constituting their properties and assigning their intentions.”<sup>114</sup> The interaction between communities is vacillatory as each group revises its reading tactics, alignments fade, and new contexts force adjustments. Unlike Kuhn’s conclusive winner, Fish sees a long duration with “just enough stability for the interpretative battles to go on, and just enough shift and slippage to assure they will never be settled.”<sup>115</sup> The ultimate resolution often depends on context: “Yet setting things in context is always worth doing, always illuminating. It helps us enlarge the picture. It peers behind the masks that writers and theorists take up to convince us that they have given birth to themselves.”<sup>116</sup>

Context—“words, persons, and circumstances”<sup>117</sup>—energizes paradigm building. Context is bipolar; it empowers paradigms but inhibits finality by injecting influences prompting disputes and subplots.<sup>118</sup> The inference from the subplots of the consensus paradigm engendered different strategies for evaluation and judgment. Ambrose and Kearns Goodwin were “popular” “celebrity” authors with television credentials. Both were tarnished by similar attribution accusations. There was, however, a noticeable difference in the constructed subplots that led to the successful resurrection of Kearns Goodwin and the condemnation of Ambrose.

With the combat ethos of Arthur Empey,<sup>119</sup> Ambrose made World War II popular and profitable. But even Arthur Schlesinger’s<sup>120</sup> endorsement could not salvage him from sharp rebuke by peers and media. Robin summarizes the indictment: Ambrose produced “boilerplate history, replete with sentimental and derivative storytelling.”<sup>121</sup> Plagiarism was not the central issue, but rather an example of the type of transgression that occurs when scholars cross the line dividing intellectual activity from sentimental

114. *Id.* at 171.

115. *Id.* at 172.

116. Morris Dickstein, *Literary Theory and Historical Understanding*, CHRON. HIGHER EDUC., May 23, 2002, at B7, B10.

117. JONATHAN CULLER, ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM 121 (1982). The “structural openness of context is essential to all disciplines . . . the historian brings new or reinterpreted data to bear on a particular event.” *Id.* at 124.

118. As one commentator observes:

In other words, determining the relevant context of an utterance is a process just as dependent on inference as any other part of the interpretive process, and therefore just as open to dispute. We can always disagree about what the proper context is of any utterance, and this disagreement creates the possibility of indeterminacy.

Gerald Graff, *Determining/Indetermining*, in CRITICAL TERMS FOR LITERARY STUDY 163, 167 (Frank Lentricchia & Thomas McLaughlin eds., 1990).

119. ARTHUR GUY EMPEY, MACHINE GUNNER SERVING IN FRANCE, OVER THE TOP (1917).

120. See Feeney, *supra* note 26 (quoting Schlesinger’s comments of Ambrose in obituary).

121. ROBIN, *supra* note 4, at 7-8.

boosterism. “The recycling of the prose of others was . . . an inevitable occurrence in a commodified historical enterprise. Such standardization of the historical imagination, which precludes complexity and instead offers facile hero-worshipping, was the cardinal sin of . . . Ambrose.”<sup>122</sup>

While Ambrose was a victim of unfavorable inferences, Kearns Goodwin choreographed subplot strategic themes enabling her to tilt the playing field to her advantage. Taking cues from the politically astute subjects of her books she invoked apology, accessibility, and political contacts to co-opt the media frenzy. While maintaining contact with her television base, she carefully distanced her work from the assembly line characterization, always emphasizing the serious research supporting her books by reference to years of digging through rooms of documents. It accomplished two goals—support for the minuscule defense while reminding the New Historians that she is one of them.

The latter tactic was so successful it became a subplot by attracting canonizing support from academic Liberals, including public endorsement by Tribe and Schlesinger.<sup>123</sup> In confirming her status as a certified member of the “liberal intellectual establishment,”<sup>124</sup> it further distanced Kearns Goodwin from Ambrose and the “popular” history label. Richard Posner attributes her rehabilitation to the influence of the Left which dominates intellectual thought and is “soft” on plagiarism.<sup>125</sup> The notoriety of the subplot reached off-Broadway in Wendy Wasserstein’s 2005 play which played on irony by casting the accuser as a Liberal.<sup>126</sup>

### C. *Postmodern Context: Deconstruction*

In seeking relevancy New History engages methodology by taking cutting edge postmodern techniques from the social sciences and literary criticism to define context.<sup>127</sup> Language is indeterminate,<sup>128</sup> rendering facts

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122. *Id.* at 8.

123. Letter to the Editor, *supra* notes 57 and accompanying text.

124. HOFFER, *supra* note 3, at 202.

125. POSNER, *supra* note 4, at 94.

I note that one reason for the ambivalence of reactions to plagiarism is that the Left, which dominates intellectual circles in the United States, is soft on plagiarism. Notions of genius, of individual creativity, and of authorial celebrity, which inform the condemnation of plagiarism, make the leftist uncomfortable because they seem to celebrate inequality and possessive individualism (that is, capitalism).

*Id.* (quotation omitted).

126. Howard Kissel of *The New York Daily News* noted: “It’s as if Wasserstein is trying to tweak liberal orthodoxies but is afraid to wholly do so. Her liberal is so ultrarigid we don’t buy her malevolence, while her conservative is also too virtuous to believe.” *Broadway.com, Was Wendy Wasserstein’s Third Number One with Critics?*, Nov. 28, 2005, [http://www.broadway.com/gen/Buzz\\_Story.aspx?ci=519931](http://www.broadway.com/gen/Buzz_Story.aspx?ci=519931).

127. HOFFER, *supra* note 3, at 94.

derivative, “not bricks ready to hand, but imaginative constructs,”<sup>129</sup> personal to the historian and a vehicle for deconstructing privileged context.<sup>130</sup> By elevating reader/interpreter over author, deconstruction imposes plagiarism implications.<sup>131</sup>

Professor Hoffer identifies a subplot in which New History empowers the author to jolt conventional assumptions with new contingent models, using interpretative text not fungible with previous constructs. Each construct has its own identity. Under construct creation, Hoffer concludes that historians “took great pains not to reproduce unique phrases or key ideas without some form of attribution.”<sup>132</sup> By assuming an obligation to cite primary and secondary sources he sets up a clash with an emerging deconstructionist construct.

History is a narrative of a past and present comprised of facts and interpretation. Deconstruction imposes an infinity of deferred meaning, a “trace” in which each descriptive fact of an event is composed of past meanings simultaneously anticipating subsequent meanings: “Each sign in the chain of meaning is somehow scored over or traced through with all the others, to form a complex tissue which is never exhaustible; and to this extent no sign is ever ‘pure’ or ‘fully meaningful.’”<sup>133</sup> The New History deconstructionists have adhered to this tracing process from Homer through Ambrose. In rejecting originality, Professor Bloom is preaching deconstruction.<sup>134</sup>

Unless one is willing to carve out a unique permeance for the snapshots of historical trace, Hoffer’s citation obligation is irrelevant. All writ-

128. “For the ironic reader belief is always accompanied by the belief that what one believes cannot be the full story: there is always something further, something more, to be understood in understanding.” WILLIAM RAY, *LITERARY MEANING: FROM PHENOMENOLOGY TO DECONSTRUCTION* 188 (1984).

129. HOFFER, *supra* note 3, at 85.

130. “Language both presupposes and creates the context of interpretation.” ROBIN, *supra* note 4, at 223. “The chain of social construction, then, is supposed to jolt out pre-theoretical commitments by taking something that we previously thought to be natural/universal/inflexible and instead showing it to be constructed—local—deconstructable.” Douglas Litowitz, *The Social Construction of Law: Explanations and Implications*, in *STUDIES IN LAW, POLITICS, AND SOCIETY* 215, 217 (Austin Sarat & Patricia Ewick eds., 2000). For more on this topic, see Ian Hacking, *Are You a Social Constructionist?*, *LINGUA FRANCA*, May/June 1999, at 65, 66 [hereinafter Hacking I] and IAN HACKING, *THE SOCIAL CONSTRUCTION OF WHAT?* (2002).

131. “[D]econstruction elevates the interpreter or critic above the literary or philosophical figure that he studies. His (or her) Shakespeare has nothing to learn from Shakespeare himself. The thrill of being Shakespeare’s superior is not to be understated.” Joel Schwartz, *Antihumanism in the Humanities*, *PUB. INTEREST*, Spring 1990, at 42, 43.

132. HOFFER, *supra* note 3, at 85.

133. TERRY EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 128 (1983). “At the same time as this is happening, I can detect in each sign, even if only unconsciously, traces of the other words which it has excluded in order to be itself.” *Id.*

134. See, e.g., Attiyeh, *supra* note 63 (interviewing Bloom).

ing is “intertextual,”<sup>135</sup> thus by Derrida’s ukase, history is immune to “conceptual definition,”<sup>136</sup> i.e., snapshot closure. A Derridaian deconstructionist would eschew an obligation to attribute as a subversion of the principle of the free-play of text, and a repudiation of the duty to subject the false authority of text.<sup>137</sup> Why cite “a bottomless linguistic abyss” when one can rely on the postmodern regionalist rationalization?<sup>138</sup>

For example, consider this familiar script: A young English Professor publishes a short story collection under the University of Georgia Press label and receives the Flannery O’Connor prize for Short Fiction award.<sup>139</sup> A librarian is piqued by first story’s title and discovers paraphrasing—“All told, at least 40 lines of Mr. Cramer’s work turn up in Mr. Vice’s story.”<sup>140</sup> The original title “Tuscaloosa Nights” became “Tuscaloosa Knight.” After the discovery of multiple copying incidents—“a long journey of highway robbery,”<sup>141</sup> the Prize is revoked, books are recalled by University of Georgia Press. Following the usual litany of rationalizations, the accused confesses—as a “postmodern regionalist” he used the original text as a “nonfiction source.”<sup>142</sup> The context came from a colleague who identified the “real culprits” as “youthful inexperience and creative experimentation”—“The full context, I think, tells another story . . . the story of postmodern critical theory and creative-writing theory that centers on multivocality, on the notion of creative writing being a response to and reshaping

135. “There is no such thing as literary ‘originality,’ no such thing as the ‘first’ literary work: all literature is ‘intertextual.’” EAGLETON, *supra* note 133, at 138. “[I]ntertextuality does not indicate merely the strategy of reading one text with another, but the fact that every text is itself already an intertextual event . . . . [T]he text is not itself—because the present is not itself.” FRANK LENTRICCHIA, *AFTER THE NEW CRITICISM* 175 (1980) (quoting John Rowe) (quotations omitted).

136. CHRISTOPHER NORRIS, *DERRIDA* 95 (1987).

137. JOHN ELLIS, *AGAINST DECONSTRUCTION* 69 (1989).

138. EAGLETON, *supra* note 133, at 145 (referring to Paul deMan, Yale deconstructionist admired as “the only man who ever looked into the abyss [of deconstruction] and came away smiling.” DAVID LEHMAN, *SIGNS OF THE TIMES* 156 (1991)).

139. Jennifer Howard, *Scholar Concedes ‘Terrible Error’ in Not Attributing Lines from an Earlier Work*, *CHRON. HIGHER EDUC.*, Nov. 11, 2005, at 18; Robert Clark Young, *A Charming Plagiarist*, *N.Y. PRESS*, Nov. 30, 2005, <http://www.nypress.com/18/48/news&columns/RobertClarkYoung.cfm>.

140. Howard, *supra* note 139, at 18.

141. Young, *supra* note 139.

Plagiarism tends to be a first-draft offense; it is now possible to trace Vice’s plagiarism from its genesis in his original documents. The pattern sketches itself out—plagiarism in manuscript form, plagiarism in a dissertation, plagiarism in a story appearing in the small magazine *Five Points*, plagiarism in a story in the *Atlantic Monthly*, plagiarism in a story reprinted in the anthology *New Stories from the South*, plagiarism in at least two stories reprinted in a book that is awarded the Flannery O’Connor Award for Short Fiction.

*Id.*

142. Howard, *supra* note 139, at 18. “As a writer interested in using history as my backdrop, I was foolish and naïve to think I could make use of this material without including an official acknowledgment . . . . I intended my story to be homage to Carmer.” *Id.* (quoting Brad Vice’s message to *The Chronicle*).

of previous stories, previous texts.”<sup>143</sup> Otherwise known as “postmodern pastiche.”<sup>144</sup> Attribution is therefore a superfluous gesture and its absence implies no culpability.<sup>145</sup> “Conduct that might otherwise be stigmatized as plagiarism [is recast by reference to] morally neutral, even morally favorable, terms such as ‘voice merging,’ ‘echoing,’ ‘intertextualizing,’ ‘synthesizing,’ ‘textual appropriation,’ ‘resonance,’ and ‘patchwriting.’”<sup>146</sup>

#### IV. LAW SCANDALS

“Admired scholars”<sup>147</sup> at Harvard Law School, entangled in serious plagiarism, triggered a media ricochet effect comparable to Ambrose/Kearns Goodwin, and company. Alan Dershowitz’s response to an aberrant accusation is a definitive text on strategy. Compared to the Dershowitz and Tribe bookends, Charles Ogletree’s infraction is seemingly minor except for the “managed” book implication. Any chance of an ephemeral media inquest ended with Professor Tribe’s encounter with plagiarism and constitutional politics.

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143. *Id.*

144. One commentator observes:

I was very systematic in my use of the material—I never copied any unique idea or used any concept word for word. Rather I replicated the structure, ideas, and tone of the academics I stole from. I completely changed the language, varied the emphasis, and altered the conclusions. In truth, the plagiarized end product was a very sophisticated transformation of other people’s work. When I submitted the plagiarized chapter, I told myself that it had in fact taken on some of the qualities of a postmodern pastiche, an idea that I now regard as self-justification. In truth, I had submitted a forgery.

Michael Thompson, *Hidden in Plain Sight*, CHRON. HIGHER EDUC., Dec. 2, 2005, at B5.

145. “At one extreme are those—sometimes identified as postmodernists—who say that originality and ownership of intellectual property are anachronistic hang-ups of Western capitalism. Originality is dead, they say with Nietzschean chutzpah.” Samar Farah, *Taking a Page out of Another’s Book*, CHRISTIAN SCIENCE MONITOR, Jan. 31, 2001, at 11. Critiquing Viswanathon’s plagiarism, a journalist speculated: “The ultimate act of chutzpah for a Harvard English major would have been to say the similarities were part of a deliberate postmodern intertextual take on ‘real’ genre novels.” Andersen, *supra* note 7, at 26.

146. Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcement of Intellectual Property Rights*, 54 HASTINGS L.J. 167, 179 (2002). For a discussion of voice merging, see THEODORE PAPPAS, PLAGIARISM AND THE CULTURAL WAR 59-60 (1998).

147. Rimer, *supra* note 5.

A. Alan Dershowitz

1. “Like the two professors in Irvine Welsh’s *The Acid House* who abandon their high-minded theoretical clashes for a drunken brawl in a car park, Finkelstein and Dershowitz hover between principle and raw verbal pugilism in which the personal and the political are almost indistinguishable.”<sup>148</sup>

Alan Dershowitz practices multiple *personas*—criminal law professor, public intellectual, peripatetic consultant—while etching a reputation as a shrewd advocate of liberal causes who wins by defining the rules of engagement. *The Case for Israel* is classic Dershowitz—an aggressive presentation of data supporting Israel’s right to nationality by controlling the dialogue with writhing rebuttal to thirty-two “charges” he posits against Israel’s case. He features a discussion of the “new anti-Semitism” as a dominant bias in academia which proselytizes a double standard of tolerating Palestinian terrorist activities while condemning Israel’s relatively benign presence.<sup>149</sup>

His aggressive strategy triggered fierce reaction—he was “ambushed”<sup>150</sup> while plugging his book on Pacifica Radio by Norman Finkelstein, an assistant professor of political science at DePaul University, who accused him of lifting primary material from Joan Peters’ *From Time Immemorial* without attribution. The *Harvard Crimson* headline read “Harvard Professor Accused of Plagiarism,”<sup>151</sup> introducing alleged “wholesale lifting of source material” refined to mean the use of “more than 20 quotes cited to primary and secondary sources—which mirrored the quotes Peters selected for use in her 1984 book.”<sup>152</sup> It was a piggyback form of plagiarism. Dershowitz took, for example, a quote from Mark Twain’s *Innocents Abroad*, gave the Twain book credit as primary reference but did not attribute Peters’ secondary use of the Twain quote. Proof of Dershowitz’s reliance on Peters came from the fact that she spliced quotes from different pages from *Innocents Abroad* which Dershowitz did not pick up, i.e., he duplicated her splice. According to Finkelstein, “[h]e didn’t even bother to

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148. Gary Younge, *G2: Inside Story*, GUARDIAN (London), Aug. 10, 2005, (Guardian Features Pages), at 6.

149. Dershowitz got sympathy from a *Weekly Standard* review which noted his “bewilderment” at the Liberal predisposition to favor Israel’s enemies. Aitan Goelman, *Israel’s Right to Fight*, WKLY. STANDARD, Feb. 23, 2004.

150. *Id.* Finkelstein replaced Noam Chomsky, who was supposed to debate Dershowitz. ALAN DERSHOWITZ, *THE CASE FOR PEACE* 180-81 (2005).

151. Lauren A. E. Schuker, *Harvard Professor Accused of Plagiarism*, HARVARD CRIMSON, Sept. 29, 2003.

152. *Id.*

check the page numbers.”<sup>153</sup> In a simultaneous auditing of Dershowitz in *The Nation*, Alexander Cockburn defined the crime as “repeated, unacknowledged looting of Peters’ research.”<sup>154</sup>

Mystified by a plagiarism charge that in effect credits him for doing what he was supposed to do, i.e., cite primary sources, Dershowitz offered the testimony of an expert to support his categorical denial.<sup>155</sup> James O. Freeman, former president of the Academy of Sciences, matched the allegation against the Chicago Manual of Style which states: “With all reuse of others’ material it is important to identify the original as source.” Freeman’s conclusion—that is precisely what Dershowitz did, therefore it is “simply not plagiarism, under any reasonable definition of that word.”<sup>156</sup> At Dean Kagan’s request to review the case, Derek Bok confirmed Freeman’s judgment.<sup>157</sup> Dean Kagan subsequently expressed her confidence in Dershowitz by rewarding him with an award for “exceptional scholarship.”<sup>158</sup>

## 2. *Accusation as Pretext*

The “intractable problems”<sup>159</sup> of the Israeli-Palestinian conflict activated a complicated “interpretative communities” confrontation in Academia. Competing paradigms of national sovereignty, human rights, anti-semitism, *etc.*, play out in classrooms with energy that often spills over to spirited street protest, all under an umbrella of contentious scholarship often bordering on propaganda. History is the frame of reference, embracing narratives about civilizations filtered through interpretations of data subjected to barroom brawls over credibility and context.<sup>160</sup> In the Dershowitz-Finkelstein brawl, plagiarism is a roadside bomb, throwing out verbal shrapnel.

From Dershowitz’s bunker the ambush was the beachhead of “a carefully coordinated”<sup>161</sup> response to the influence of *The Case for Israel*. The radio encounter with Finkelstein was a lead-in to Alexander Cockburn’s

153. *Id.*

154. Alexander Cockburn, *Alan Dershowitz, Plagiarist*, NATION, Oct. 13, 2003, at 9.

155. Alan M. Dershowitz, *Plagiarism Accusation Political, Unfounded*, HARVARD CRIMSON, Sept. 30, 2003.

156. *Id.* “We should also be wary of ‘plagiarism denouncing’ as a device of professional self-promotion.” POSNER, *supra* note 4, at 76.

157. Marcella Bombardieri, *Academic Fight Heads to Print Authorship Challenge Dropped from Text*, BOSTON GLOBE, July 9, 2005, at B1.

158. DERSHOWITZ, *supra* note 150, at 184.

159. Amy Wilentz, *Just Another Rant*, L.A. TIMES, Sept. 23, 2005, at E1.

160. *See, e.g.*, Isi Leibler, *Norman Finkelstein’s World*, JERUSALEM POST, Nov. 1, 2005, at 16; Michael R. Oren, *Quiet Riot: Tenfold Hats in Harvard Yard*, NEW REPUBLIC, Apr. 10, 2006, at 9.

161. DERSHOWITZ, *supra* note 150, at 180.



*Nation* article accusing Dershowitz of indulging in an “array of plagiarism” while “looting” Peters’ research.<sup>162</sup> Finkelstein echoed with an e-mail to Dean Kagan tracing Dershowitz’s plagiarism to Peters’ book capped by an inflammatory ghosting allegation—“he’s had so many people write so many of his books [that] it’s sort of like a Hallmark line for Nazis.”<sup>163</sup> When Finkelstein announced an intention to put the accusation in a book, Dershowitz countered the University of California Press with a threat of a libel suit: “If you say I didn’t write the book or plagiarized it, I will own your company.”<sup>164</sup>

Despite his disdain for the intellectual challenge of plagiarism,<sup>165</sup> Jon Wiener was an active participant in the Dershowitz-Finkelstein crossfire. Before excoriating Dershowitz for seeking to “squelch”<sup>166</sup> Finkelstein’s book, he reviewed an advance copy of the manuscript to confront the plagiarism allegation, in the process incorrectly quoting the charge that Dershowitz “plagiarizes large swaths”<sup>167</sup> from Peters. In a last minute concession, the University of California Press softened “the specific language about plagiarism,”<sup>168</sup> revising the introduction to read “Dershowitz *appropriates* large swaths from the Peters hoax.”<sup>169</sup> It was a concession with significant implications for Finkelstein’s plagiarism strategy.

162. Cockburn, *supra* note 154, at 9.

163. Daniel J.T. Schuker, *Accusations Fly in Academic Feud*, HARVARD CRIMSON, July 8, 2005 (brackets in original). Dershowitz’s response: “That’s like being accused of being a child molester.” *Id.*

164. Bombardieri, *supra* note 157, at B1. It was no idle threat, Dershowitz reportedly received a \$75,000 settlement from the *Boston Globe* over a racial slur by reporter Mike Barnicle. Mark Lisher, *As the Globe Turns*, AM. JOURNALISM REV., Nov. 1998, at 31.

165. “Plagiarism itself is intellectually uninteresting.” WIENER, *supra* note 2, at 192.

166. Wiener explains:

Even if Dershowitz really believes the new book is wrong—even if he believes Finkelstein has misrepresented him in the past—he would be out of line in seeking to stop its publication. To do so would violate the author’s free speech and challenge the academic freedom of the University of California.

Jon Wiener, *Chutzpah and Free Speech: Civil Liberties Lawyer Alan Dershowitz Is Out of Line in Challenging the Decision to Publish a Book that Harshly Criticizes Him*, L.A. TIMES, July 11, 2005, at 11. In a letter to the Editor Dershowitz responded:

I never tried to stop publication of the book; I merely tried to protect myself against willful defamation. I did say that I believed it was inappropriate for a university press to publish the bigoted falsehoods in which Finkelstein specializes, but that the book should be published. The UC Press made Finkelstein take out his false defamatory charge. I fully answer his other charges in my forthcoming book, “The Case for Peace.”

*Dershowitz Argues His Case*, L.A. TIMES, July 14, 2005.

167. Jon Wiener, *Giving Chutzpah New Meaning*, NATION, July 11, 2005, <http://www.thenation.com/doc/20050711/wiener>.

168. Jennifer Howard, *Calif. Press Will Publish Controversial Book on Israel*, CHRON. HIGHER EDUC., July 22, 2005, at 1.

169. NORMAN G. FINKELSTEIN, *BEYOND CHUTZPAH: ON THE MISUSE OF ANTI-SEMITISM AND THE ABUSE OF HISTORY* 17 (2005) (emphasis added).

Wiener agrees with Ron Robin that agenda driven scholars sometimes capitalize on the plagiarism accusation for use as “pretext” for injecting other issues.<sup>170</sup> Plagiarism provided the New Historians with a forum to criticize Ambrose for failing to acknowledge—attribute—the importance of the Russian war effort.<sup>171</sup> Both Wiener and Finkelstein used the pretext maneuver to finesse Dershowitz’s irrefutable argument that he followed the manual by citing primary sources. Plagiarism, even if unproven, provides the wedge to allege other scholarly lapses, such as “academic dishonesty.” When Dershowitz admits he first found some of the quoted sources in Peters, he covers himself by verifying it in the original. But by using a notation to his research assistant to “cite sources on pp” (indicating Peters),<sup>172</sup> he provides Wiener with a “pretext” to surmise an order to insert the quotes into Dershowitz’s footnote, “presumably to give readers the impression that he consulted the original source.”<sup>173</sup> Wiener concedes that while not plagiarism “it’s clearly dishonest for Dershowitz to have passed off another scholar’s research as his own.”<sup>174</sup> Issues from the publication of Dershowitz’s book led Finkelstein to refine the pretext maneuver.

Concern over the validity of Finkelstein’s accusation persuaded the University of California Press to negotiate with the author for changes in the manuscript. At issue was the accepted meaning of plagiarism: “the objective and factual meaning in the world of academic research and scholarship.”<sup>175</sup> The objective fact that Dershowitz had cited primary sources elevated the risk of successful legal action to “the real threat” category.<sup>176</sup> The compromise: replace the offending word with “lifts from” or “appropriates . . . without attributions” while relegating the plagiarism topic to an appendix.<sup>177</sup> It was a compromise that satisfied Noam Chomsky who warned that an overly aggressive focus on plagiarism—“Since it is unclear what counts as plagiarism”<sup>178</sup>—would allow Dershowitz to divert attention from the substantive issues. A compromise would avoid this

170. WIENER, *supra* note 2, at 192-95.

171. “The contributions of both Great Britain and the Soviet Union to the defeat of Nazi Germany have no place in Ambrose’s glorification of America’s wars. Much to the chagrin of professional historians, Ambrose had practically transformed Normandy into the pivotal battle of the war.” ROBIN, *supra* note 4, at 53.

172. Wiener, *supra* note 167.

173. *Id.*

174. *Id.*

175. David Glenn, *A Reputation Under the Gun*, CHRON. HIGHER EDUC., Apr. 28, 2006, at A20. From a defamation suit between economists the definition of the word “replicate” and the accusation that the defendant defamed the plaintiff in a book by saying, “When other scholars have tried to replicate his results, they failed.” *Id.* at 21.

176. Howard, *supra* note 168, at 1.

177. *Id.*

178. Mandy Garner, *The Good Jewish Boys Go Into Battle*, TIMES HIGHER EDUC. SUPP., Dec. 16, 2005, at 16.

effort while still leaving Finkelstein an opening to exploit the pretext strategy.

Finkelstein adhered to the ground rules of the compromise by inverting<sup>179</sup> the source of the accusation to Dershowitz by referring to the latter's denials of plagiarism. After forcing Dershowitz to put the "word" into play—"Beyond denying that he plagiarized from" Peters<sup>180</sup>—Finkelstein shifted the context to "academic derelictions."<sup>181</sup> Dershowitz's "apparently unacknowledged lifting of Peters' research"<sup>182</sup> implicates "deceitfulness" to constitute one of "the most spectacular academic frauds ever published on the Israel-Palestine conflict."<sup>183</sup> He cites "objective facts"—the twenty-two quotes from Peters with similar ellipsis, no secondary attribution, and the Mark Twain split quote that both Peters and Dershowitz cite as a continuous quote.<sup>184</sup> A cluster of academic derelictions proffers a double negative conclusion: Dershowitz "appropriates a crucial idea from Peters—which he keeps repeating and which is demonstrably false—without referencing her."<sup>185</sup>

Chomsky's caution on the overzealous use of the accusation is a shrewd insight into plagiary dynamics. His message: be wary of the law of diminishing returns in pushing pretext strategy. Whatever the potential rewards, expect a reaction—which came from Dershowitz in a chapter called "A Case Study in Hate and Intimidation."<sup>186</sup> In an essay from a victim's perspective, he defines the accused's burden: "The media regards plagiarism as such an explosive charge that even absolute innocence is no defense."<sup>187</sup> It took a conspiracy of Chomsky, Finkelstein, and Cockburn to use the plagiarism accusation as a lever to circulate a Newspeak vocabulary of "hoax," "fraud," "fake," and "plagiarism"<sup>188</sup> to infect Dershowitz's scholarship with a reputation for academic skullduggery more ominous than hardcore plagiarism. The charges of dereliction were "transmogrified into the usual accusation that my *entire* book was a 'hoax,' a 'fraud,' a

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179. Inversion is defined as, "the reversal of the normally expected order of words . . . . Inversion of word-order (syntax) is a common form of poetic license allowing a poet to . . . to place special emphasis on particular words." CHRIS BALDICK, *THE CONCISE OXFORD DICTIONARY OF LITERARY TERMS* 113 (1991).

180. FINKELSTEIN, *supra* note 169, at 243.

181. *Id.* at 229.

182. *Id.* at 230.

183. *Id.* at 17.

184. *Id.* at 231.

185. *Id.* at 254.

186. ALAN DERSHOWITZ, *THE CASE FOR PEACE* 167-88 (2005).

187. *Id.* at 184.

188. *Id.* at 177.

‘fake,’ and a ‘lie.’”<sup>189</sup> Even an exoneration of plagiarism could not silence a rap for sloppy work by passing off someone else’s research as his own.<sup>190</sup>

#### B. *Ogletree: Serious Mistake or a Managed Book?*

In response to an anonymous letter, Professor Ogletree issued an apology on the Harvard web site for failing to give Jack Balkin, a Yale law professor, attribution for the use of six verbatim paragraphs in his new book.<sup>191</sup> He admitted “negligence”: poor oversight of the editorial process by delegating too much responsibility to research assistants. Specifically, one assistant inserted Balkin’s material in a draft section of Ogletree’s book with attribution “for the purpose of being reviewed, researched, and summarized by another research assistant.”<sup>192</sup> The second assistant deleted the attribution and “edited the text as though it had been written by me.”<sup>193</sup> The revised draft went to the publisher. A review of the revised draft by Ogletree did not catch the error.

Initial media coverage was benign. Dean Kagan’s response that it was “a serious scholarly transgression”<sup>194</sup> was downgraded with a special review by former deans Derek Bok and Robert Clark to the category of an accident: “There was no deliberate wrongdoing at all.”<sup>195</sup> Like Ambrose, Ogletree was pressured by publishers—a tight deadline to get the book out to meet the fiftieth anniversary of *Brown v. Board of Education* and “in the process some quotation marks got lost.”<sup>196</sup> Professor Tribe attributed

189. *Id.* at 184.

190. One commentator explains:

Before letting the fur fly, let’s sort out what Dershowitz did and did not do. Dershowitz did not plagiarize anything, in any meaningful sense. What Dershowitz did do, and what I consider to be both sloppy and wrong, is exploit another author’s footnotes, passing her research off as his own. On several occasions in his new book, Dershowitz cites research from Joan Peters’ 1984 book, *From Time Immemorial*, and footnotes it, e.g. “*James Finn to Viscount Palmerston*, November 7, 1851,” as if he had consulted the original document.

I have been in the same situation, and I think if one is working with secondary sources, one should say so. I think the proper cite would be, “*James Finn to Viscount Palmerston*, as quoted in Peters, p. 231.” Writers don’t like to do that, because it conveys the (correct) impression that they are perhaps over-relying on someone’s work.

Alex Beam, *Another Middle East Conflict*, BOSTON GLOBE, Oct. 2, 2003, at E1.

191. Harvard Law School, News, Ogletree Statement Concerning Corrections Is All Deliberate Speed, Sept. 3, 2004, [http://www.law.harvard.edu/news/2004/09/03\\_ogletree.php](http://www.law.harvard.edu/news/2004/09/03_ogletree.php).

192. *Id.*

193. *Id.* “The cases discussed within this passage were then footnoted as if they were original material written by me, when in fact the passages were from Professor Balkin’s book.” *Id.*

194. Marcella Bombardieri & David Mehegan, *Ogletree’s Book Contains Lifted Text Harvard Professor Cites Editing Mistake*, BOSTON GLOBE, Sept. 9, 2004, at B1.

195. *Id.*

196. *Id.*

Ogletree's negligence to spreading his attention too thin in helping others.<sup>197</sup>

In a replay of Pareto's mice-bird metaphor, Bok saw harmless birds from an inadvertent omission of attribution in a final draft, the product of the pressure of a publishing deadline and a breakdown in communication. The *Weekly Standard's* vision of mice originated in Ogletree's use of research assistants as ghost writers. His admission that their function was the revision and summarization of outside material followed by his editing raised the red flag of a form of "double plagiarism": "He set out to put his name on work done by his assistants, who, he knew, were merely rephrasing work written by other people."<sup>198</sup>

The imprimatur of Bok and Clark's tolerance of an "honest mistake" rationalization deflated a potential media blitz. It did not, however, inhibit the legacy of the ghosting interpretation. A blog by the dean of the Massachusetts School of Law decoded Ogletree's instructions to assistants on reviewing, researching, and summarizing source material as tantamount to the creation of work for hire employment, which would raise a public acknowledgment issue.<sup>199</sup>

Moreover, work for hire takes on more serious implications in a professor-student assistant connection.<sup>200</sup> In criticizing Harvard's exoneration of Ogletree as "a ludicrous double standard," the *Harvard Crimson* addressed the "legitimacy" of "the extensive use of research assistants and students to do much of the project's grunt work."<sup>201</sup> Hence while Ogletree

197. *Id.* The incident was revived in October 2006, when the *Harvard Crimson* "found new evidence that Ogletree's book also contains an additional paragraph that is very similar to a 1996 work by a University of California—San Diego civil rights expert." The paragraphs of four "nearly identical" sentences are "significantly less than the parallel between Ogletree's book" and the Balkin book. Pavas D. Bhayani, *More Similarities in Law Prof's Book*, HARVARD CRIMSON, Oct. 27, 2006, available at <http://www.thecrimson.com/article.aspx?ref=515321>.

198. Joseph Bottum, *Another Harvard Copycat*, WKLY. STANDARD, Sept. 20, 2004.

199. Torres explains:

Dean Lawrence Velvel . . . questioned on his blog Ogletree's method of producing the book. Pointing out Ogletree's acknowledgment that two research assistants helped him on the book, Velvel questioned whether their work went beyond help in research. "[Ogletree] says one was inserting material in the book. The other, he says, was reviewing, researching and summarizing the material for inclusion in the book," writes Velvel. "What these two assistants were doing sounds awfully much as if they were writing the book, or at least some parts of it . . . . Yet only Ogletree's name appears as the author."

Hugo Torres, *Ogletree Admits to Plagiarism*, INDEP. NEWSPAPER HARVARD LAW SCHOOL, Sept. 24, 2004, available at <http://www.hlrecord.org/media/storage/paper609/news/2004/09/24/News/Ogletree>.

Admits.To.Plagiarism-731271.shtml?norewrite200701191332&sourcedomain=www.hlrecord.org.

200. See Bill L. Williamson, *(Ab)using Students: The Ethics of Faculty Use of a Student's Work Product*, 26 ARIZ. ST. L.J. 1029 (1994).

201. *What Academia Is Hiding*, HARVARD CRIMSON, Dec. 12, 2005, available at <http://www.thecrimson.com/article.aspx?ref=503313>.

may constitute a blip on the plagiarism radar he implicates the interaction of “managed books”<sup>202</sup> and law authorship issues like judge and clerk.<sup>203</sup>

C. *The “Third One”*: “You get to say this is a special thing, a focused problem at the Law School.”<sup>204</sup>

### 1. *Bork Chop Revenge*

The Laurence Tribe accusation would qualify as a mandatory inclusion in an update of Mallon’s plagiarism classic. The uniqueness of his case comes from the historical significance of his alleged plagiarizing book, *God Save This Honorable Court*, the authority in establishing the contemporary process and criteria for Supreme Court nominations. He capped this by playing a key role in the first implementation of his notion of Senatorial advice and consent in the Bork hearing,<sup>205</sup> unleashing a political legacy that recently played out in the Roberts and Alito confirmations.

Joseph Bottum, of the *Weekly Standard*, dramatized the political significance of the revelation with the title, “The Big Mahatma,” juxtaposed to a photo of Tribe plus six inserts of parallel comparisons of original and borrowed material.<sup>206</sup> They, along with additional comparisons mostly constituting “plagiaphrasing” (i.e., “rewording a quote without putting the idea in your ‘voice’”),<sup>207</sup> satisfied Bottum that Tribe borrowed without attribution facts and conclusions from Henry Abraham’s *Justices and Presidents*<sup>208</sup> to support his argument favoring the Senate’s activism in nominations.

The suggestive title and pop culture graphics, atypical for the *Weekly Standard*, window dress an article on a mission. The author establishes the

202. In discussing managed books, a professor concluded: “Scholarship—the core activity of the university—cannot be delegated to assistants.” Rimer, *supra* note 5.

203. Williamson, *supra* note 200.

204. Hemel & Schuker, *supra* note 6 (comment by the President of Harvard, made before the Tribe accusation, referencing the Dershowitz and Ogletree accusations).

205. ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA 127-28 (1989).

206. Joseph Bottum, *The Big Mahatma: Laurence Tribe and the Problem of Borrowed Scholarship*, WKLY. STANDARD, Oct. 4, 2004, at 31. “[H]e’s a big mahatma and thinks he can get away with this sort of thing.” *Id.* at 34 (quoting Henry Abraham, author of the “borrowed” book).

207. *Id.* at 35.

208. A review of *God Save This Honorable Court* anticipated the revelation by noting:

In a work of advocacy, it is not surprising that historical examples are often poorly chosen and inaccurately presented. (Anyone who cares about the historical background should read Henry Abraham’s ‘Justices and Presidents,’ from which Tribe apparently borrowed most of his examples.) This book was written in evident haste and lacks the coherence and careful research one has come to expect in Tribe’s public writings.

Dennis Mahoney, *Book Review*, L.A. TIMES, Feb. 2, 1986, at 12.

*motif* with a reference to the Harvard three—Kearns Goodwin, Dershowitz, and Ogletree—to dwell on “their problem” as a preface to Tribe’s ostensible support of Ogletree that ultimately led to an anonymous tip to the *Weekly Standard* about his own transgressions.<sup>209</sup> Tribe’s dissembling is contrasted with Professor Abraham’s dignity, the “venerable historian” who originated the source material and “always [did] his own work.”<sup>210</sup> Bottum’s mission statement acknowledges Tribe’s reputation as “the most famous and widely cited constitutional law professor in the United States.”<sup>211</sup> What separates Tribe from the other players in the Scandals is his unique status as scholar, lawyer, and political power-broker: “The great legal champion of the Democratic party.”<sup>212</sup> In this capacity, Tribe is credited as the “intellectual architect”<sup>213</sup> for the rejection of Robert Bork’s nomination to the Supreme Court, a defeat that resonances in Bottum’s article.

*God Save This Honorable Court* gave the Democrats a context<sup>214</sup> for strategy. Tribe’s constitution is incomplete, requiring gap filling according to mainstream social and political references which mandated a context giving the Senate the “advice and consent” obligation to assure the presence of a mainstream Court. For the Conservatives the Bork hearing was “Bork Chop,”<sup>215</sup> the Democrats prevailed on both the acceptance of the Tribe context and a bitter conflict over Bork’s mainstream credentials.<sup>216</sup>

Bronner called Bork Chop a “watershed,” enhancing “[Tribe’s] national fame—and notoriety—outside legal circles.”<sup>217</sup> Tribe’s legal scholarship status registered when he passed on an update of his constitutional law text drawing a comparison to Michael Jordan retiring at the top of his game.<sup>218</sup> But for the *Weekly Standard* his “retirement” was too late; Bronner explains: “After Bork’s defeat the right constantly referred to a Tribe

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209. Torres, *supra* note 199. In replying to Dean Velvel’s blog, Tribe qualified his defense of Ogletree—it “was not intended to be a complete explanation or justification.” He added that the “problem of writers, political office-seekers, judges and other high government officials passing off the work of others as their own . . . [is] a phenomenon of some significance.” Bottum, *supra* note 206, at 33.

210. *Id.* at 34.

211. *Id.* at 32.

212. *Id.* at 34-35.

213. BRONNER, *supra* note 205, at 127.

214. See *supra* notes 116-18 and accompanying text. “The context of a nomination should be considered along with the views of the nominee himself, [Tribe] said.” BRONNER, *supra* note 205, at 125.

215. Mickey Kaus, *Bork Chop*, NEW REPUBLIC, Nov. 6, 1989, at 118.

216. For Bork’s explanation of his constitutional philosophy, see ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990). For reviews of the book see John Patrick Diggins, *The Judge Pleads His Case*, N.Y. TIMES, Nov. 19, 1989, §7, at 15.

217. BRONNER, *supra* note 205, at 297.

218. Tony Mauro, *A Big Surprise from Laurence Tribe*, LEGAL TIMES, June 6, 2005, at 10. Jack Balkin, the Yale law professor whose book Professor Ogletree borrowed from, said, “I can’t think of a scholarly decision of similar symbolic importance.” *Id.*

judicial nomination as the one event for which they would, without hesitation, go to war. This was not only because Tribe was a feared liberal advocate but because he had taken such a public role in stopping Bork.”<sup>219</sup> Noting the effectiveness of Tribe’s book in blocking Reagan’s nominations, Dershowitz said: “It worked, and the Right has been pissed at Tribe ever since.”<sup>220</sup>

It was no accident that Bottum allocated six paragraphs describing the effect of the book on the hearings while suggesting that portions of it were ghost written.<sup>221</sup>

The intensity of the *Standard*’s mission traveled to the annual Harvard Law School parody show by providing readers with a few representative stanzas, including:

For 19 years  
I wasn’t caught  
I made a killing on my books  
Assigned in every class I taught  
It would’ve never been revealed  
The *Weekly Standard* wouldn’t see  
I would still be at the top  
If not for stupid Ogletree<sup>222</sup>

## 2. More “Pretext” Strategy

Six months after the *Standard*’s attack, Ramesh Ponnuru of the *National Review* gave the law academy its own version of Joseph Ellis by accusing Tribe of fictionalizing his role in a Supreme Court appearance.<sup>223</sup> Imitating the autobiographical narrative genre of the law storytellers of the 1980s, Tribe told of his use of a Ninth Amendment argument in his first Supreme Court case in defiance of strong pressures from peer lawyers.<sup>224</sup> In a highly personal account, he connects his controversial decision to the death of his father two weeks prior to oral argument. He writes of the plane flight home when told of his father’s collapse, looking out the win-

219. BRONNER, *supra* note 205, at 298; Max Lerner, *The Demonizing of Bork*, WALL ST. J., Oct. 19, 1989, at A18.

220. Hemel & Schuker, *supra* note 6.

221. Bottum, *supra* note 206, at 35. “Many of Klain’s friends and former colleagues say that he wrote large sections of the book, a claim Tribe disputes.” *Id.* (quoting the *Legal Times*).

222. *He’s Tribe!*, WKLY. STANDARD, Apr. 4, 2005, at 3. “I’m Larry Tribe” (to the music of Gloria Gaynor’s “I Will Survive”). *Id.*

223. Ramesh Ponnuru, *How to Be a Hero of Liberty: You May Have to Gild the Lily . . .*, NAT’L. REV., Mar. 14, 2005, at 32.

224. Laurence Tribe, *Public Rights, Private Rites: Reliving Richard Newspapers for My Father*, 6 GREEN BAG 2D 289, 293-94 (2003).



dow and thinking he saw a shooting star: “Somehow I knew it was my father.”<sup>225</sup> It was grief that drove him to ignore the pressure from colleagues who disdained the use of the Ninth Amendment.

Tribe’s client won with Chief Justice Burger citing the Ninth Amendment—but not, according to Ponnuru, because of Tribe’s efforts. In fact, Tribe did not “argue his case in Ninth Amendment terms,”<sup>226</sup> nor did he mention it in his oral argument;<sup>227</sup> at best it was “mere rhetorical flourish.”<sup>228</sup> Like Ellis, Tribe was engaging in self-serving fantasy.

Neither Ellis nor Tribe replicated Joe Biden, who Mallon calls “the most famous political plagiarist of our time,”<sup>229</sup> for lifting a passage from an English politician’s television commercial for use in a debate.<sup>230</sup> A textbook case of plagiarism—the theft of a chorus of words by a politician seeking an edge. On the other hand, Ellis and Tribe were “authors,” not thieves. Ellis created a fictional Walter Mitty life spanning over fifteen years through combat in Vietnam and civil rights work in Mississippi.<sup>231</sup> Tribe argued that he was writing as a memoirist, “in a voice deliberately ‘personal, not professional or academic.’”<sup>232</sup> He accused Ponnuru of engaging in overzealous citation gamesmanship as a ploy to transform the personal story of how the death of Tribe’s father interacted with the issues of the case: the opportunity of the victims to see the processes of justice as proxy for coping with his father’s death. Ponnuru ignored the intended context of Tribe’s narrative to manufacture an Ellis accusation. Tribe makes a plausible case.

Ponnuru’s implication is that by casting “himself as a kind of hero for breathing life into the [Ninth A]mendment,”<sup>233</sup> and overcoming the negative pressure for his decision, he became an Ellis clone. Tribe did not mention the Ninth, did not brief it except for seven pages out of seventy-two pages, leaving the friends-of-court briefs to raise the issue. Ponnuru’s egocentric reading ignores context—Tribe was responding to the *Green Bag*’s request for a personal memory, an autobiographical slice of life, of his first appearance before the Court. He obliged with an encounter/conflict version of storytelling, popular in the law academy during the 1970–1980s.<sup>234</sup>

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225. *Id.* at 292.

226. Ponnuru, *supra* note 223, at 33.

227. *Id.* at 34.

228. *Id.*

229. MALLON, *supra* note 4, at 127.

230. *See* ST. ONGE, *supra* note 4, at 79-90.

231. Walter V. Robinson, *Professor’s Past in Doubt Discrepancies Surface in Claim of Vietnam Duty*, BOSTON GLOBE, June 18, 2001, at A1.

232. Laurence H. Tribe & Ramesh Ponnuru, *Defense and Prosecution (Letters to the Editor)*, NAT’L REV., Apr. 11, 2005, at 2.

233. Ponnuru, *supra* note 223, at 32.

234. Kim Lane Scheppelle, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2079-80 (1989).

“Stories supply both the individualized context and emotional aspect missing from most legal scholarship.”<sup>235</sup>

For Tribe it was the “painful truth” of what the achievement of a Supreme Court appearance “happened to mean by virtue of its seemingly accidental intersection with my life’s trajectory.”<sup>236</sup> The readers were informed that “here’s my story”<sup>237</sup>—the personal memory of the conflict between emotional drain and the reality of a constitutional issue, dealing with what he perceived is an allergic view of “that ‘crazy Ninth Amendment argument,’”<sup>238</sup> recollections of exchanges with the Justices, including the Chief—“I imagine—this is pure supposition, not actual memory . . . [that he] was seemingly asking for help in sketching what was to become the analysis in his plurality opinion . . . .”<sup>239</sup>

Ponnuru quotes the above passage as a preface to Tribe’s alleged fact fantasies but misses its message as a declaration of the storyteller’s autonomy, which Tribe punctuates with the inclusion of five family photographs in a nine page article. cursory research would have informed Ponnuru that the *Green Bag* gives its authors considerable latitude in what and how they present their “miscellany.”<sup>240</sup> Tribe covered the tenuous connection between Burger’s debt to the Ninth Amendment by clearly advertising his subjectivity and acknowledging Burger’s fleeting reference.<sup>241</sup> Instead of a

235. Daniel A. Farber & Suzanna Sherry, *Telling Stories out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 811 (1993).

236. Tribe, *supra* note 224, at 291.

237. *Id.* at 292.

238. *Id.* at 293.

239. *Id.* at 297.

240. “We accept material that is short, clear, interesting, and law-related—up to 5,000 words, and 0 to 50 footnotes. We especially encourage the submission of poetry, anecdotes, cartoons, and other miscellany.” Submission Statement, 2 GREEN BAG 2D ii (1999). To prove the point I can cite my own work: Arthur Austin, *Law Professor Salaries*, 2 GREEN BAG 2D 243 (1999); Arthur Austin, *The Cleveland School of Scholarship?*, 3 GREEN BAG 2D 73 (1999); Arthur Austin, *The Dark Side of the Second Amendment*, 4 GREEN BAG 2D 229 (2001).

241. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

Madison’s comments in Congress also reveal the perceived need for some sort of constitutional “saving clause,” which, among other things, would serve to foreclose application to the Bill of Rights of the maxim that the affirmation of particular rights implies a negation of those not expressly defined. Madison’s efforts, culminating in the Ninth Amendment, served to allay the fears of those who were concerned that expressing certain guarantees could be read as excluding others.

*Id.* at 579 n.15 (citations omitted). In concurring, Justice Blackmun confirmed the Ninth Amendment connection:

The Court, however, has eschewed the Sixth Amendment route. The plurality turns to other possible constitutional sources and invokes a veritable potpourri of them—the Speech Clause of the First Amendment, the Press Clause, the Assembly Clause, the Ninth Amendment, and a cluster of penumbral guarantees recognized in past decisions. This course is troublesome, but it is the route that has been selected and, at least for now, we must live with it. No purpose would be served by my spelling out at length here the reasons for my saying

law review article explicating a point of law, Tribe was journalizing the effect of a personal family issue on legal strategy.

To further irritate the Conservatives it was Professor Tribe who provided gravitas to push acceptance of Kearns Goodwin's "sloppy work" explanation.<sup>242</sup> Hence Ponnuru's article makes sense as pretext strategy—the Bottum accusation as a launching pad for a "scholarly dereliction" censure. While one can ponder over Tribe's resort to the storytelling genre—aesthetically his narrative hardly compares to *The Veraswami Story*<sup>243</sup>—one can also reflect on an effort at pretext that translates to "gotcha" journalism. Moreover, it gives vitality to Chomsky's concern on the potential counter-effects of pretext excesses—especially when it is perceived as gotcha.<sup>244</sup> Indeed a month after the gotcha piece came out, Harvard announced Tribe's exoneration, his errors were the "product of inadvertence rather than intentionality . . . the unattributed material related more to matters of phrasing than to fundamental ideas."<sup>245</sup>

## V. CONCLUSION: PARSING INDEFINITENESS

### A. *Summing up Historians on History*

In their histories of the Scandals, Hoffer, Robin, and Wiener chart perspectives and blame. For the first two, it is the postmodern influence that accounts for destructive breakdowns in the profession's response to plagiarism. Robin argues that the habit of putting history into constructs forces a constant face-off between subplots of equal credibility.<sup>246</sup> Hacking calls this a historical type of construct, "noncommittal about whether X is good or bad."<sup>247</sup> Hence, judgments on an accused plagiarist's guilt are postponed as contingent background for new incidents. Hoffer agrees, blaming the consumer/reader addiction to faddish controversy for driving New History into the clutches of the truth-is-dead canon: "There are no immutable

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that the course is troublesome. I need do no more than observe that uncertainty marks the nature—and strictness—of the standard of closure the Court adopts.

*Id.* at 603 (Blackmun, J., concurring).

242. Tribe, *supra* note 51 and accompanying text.

243. Norval Morris, *The Veraswami Story*, 52 U. CHI. L. REV. 948 (1985).

244. Garner, *supra* note 178.

245. Daniel J. Hemel, *School Won't Punish Tribe*, HARVARD CRIMSON, Apr. 15, 2005.

246. ROBIN, *supra* note 4, at 223.

247. "The least demanding grade is *historical*. Someone presents a history of X and argues that X has been constructed in the course of social processes. Far from being inevitable, X is the contingent upshot of historical events." Hacking I, *supra* note 130, at 66 (emphasis in original).

facts . . . each interest group and each generation will make up its own facts.”<sup>248</sup>

In a period of divisive chaos begging for discipline, the AHA opted out of enforcing professional conduct standards.<sup>249</sup> Citing ineffectual sanction powers, the confidentiality of a process that inhibited public awareness,<sup>250</sup> while implicitly conceding the growing ideological illusiveness of history *qua* history, the AHA suggested that the best solution is reliance on “public debate.”<sup>251</sup> Hoffer calls the AHA solution “pious moralism” that would be a superfluous gesture in “an increasingly shameless culture” while leaving ultimate authority to the journalist and Consensus History.<sup>252</sup>

Robin endorses a public debate as the logical response to the demise of a centralized authority that cannot respond to cultural changes. It is a matter of obsolescence caused by an increase in the voices of interpretative communities fed through high-tech communication systems.<sup>253</sup> The net effect is public dialogue rejecting “those who seek to experiment with the canon, retool scholarly guidelines, or transgress conventional rules and regulations.”<sup>254</sup> When deviance does pass through the media “border control,” it will come from the “bottom up.”<sup>255</sup>

As members of the history profession, Hoffer and Robin investigate the institutional consequences of plagiarism. They are insiders concerned with how the intersections of methodology, paradigm, and context implicate plagiarism. Their discussion evaluates dissension over the acceptable scope of coverage of the nuts and bolts issues of definition, detection, and sanction. Jon Wiener is, on the other hand, an outsider voice who as a Contributing Editor to *The Nation* magazine offers critique from the Left agenda. He reflects on the forces that converted accusations into media events. To Wiener, the controlling factor is power, the way “organized pressure groups have taken action against authors they regard as enemies.”<sup>256</sup> Wiener’s agenda ends with a warning to historians: “The real

248. HOFFER, *supra* note 3, at 234.

249. See *supra* note 90 and accompanying text.

250. In describing how AHA secrecy allowed a plagiarist to escape public exposure, Mallon injects another factor—the cover up syndrome: “This tendency, not so much to cover up as simply to shut up, to keep the dirty secret from spreading through the extended professional family, and perhaps above all, to keep from getting sued, would keep Sokolow alive professionally for years.” MALLON, *supra* note 4, at 152.

251. WIENER, *supra* note 2, at 205.

252. HOFFER, *supra* note 3, at 238-39.

253. “Alternative and highly visible forums of adjudication become visible and vocal when conventional avenues for projecting rules are contested, reassessed, reframed, or rendered obsolete by cultural and technological shifts.” ROBIN, *supra* note 4, at 231.

254. *Id.* at 232.

255. *Id.*

256. WIENER, *supra* note 2, at 2.

need over the longer term is to find ways to counter the excessive power of right-wing advocacy groups.”<sup>257</sup>

### B. *Paradigm Politics—Scottish Verdicts*

The shared experiences from the History Scandal are remnants from a temperamental definitional spectrum ranging from “nothing is original” to the wary parsing of echoes. By eschewing the policing authority, the AHA abdicated the responsibility to develop a common law on process, definition, and sanction. The law academy is equally idiosyncratic in its response, subject to the multiple venues of university codes, ABA canon, and Media Inquest. Hoffer and Robin identify postmodernism for creating uncertainty by sponsoring interpretative communities espousing differing views on plagiarism. When legal education embraced interdisciplinary influences from the humanities in the 1970s, it served as a conduit for the infiltration of postmodernism.<sup>258</sup>

Tracking New History’s bias, law postmodernism originates from the bottom by embracing narratives depicting the marginalizing effect of the white male dominant voice. A young group of Tenured Radicals encouraged an influx of indoctrinated students to participate in the construction of paradigms—Critical Legal Studies, Critical Race Theory, plus feminist constructs—to defy the prevailing Langdellian paradigm of objectivity and rational analysis. However the competing paradigms disagreed amongst themselves, the accepted goal was to open the closed anatomy of law to the wrecking ball of indeterminacy.<sup>259</sup> Professor Kahn defines the emancipatory consequences of postmodernism: “Understanding the constructed character of the rule of law allows us to see its contingent character and to understand that law’s claim upon us is not a product of law’s truth but of our own imagination—our imagining its meanings and our failure to imagine alternatives.”<sup>260</sup>

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257. *Id.* at 213. He also blames “the glorification of money” influence of the Reagan Revolution which engendered a “‘cheating culture’ thesis” that has infiltrated the world of scholarship. *Id.* at 211. “The ‘cheating culture’ argument explains scholarly misconduct as the result of a calculus in which the potential benefits resulting from dishonesty are seen to be great and the chances of paying a penalty, small. That certainly proved to be the case for John Lott.” *Id.* at 210.

258. Arthur Austin, *The Postmodern Infiltration of Legal Scholarship*, 98 MICH. L. REV. 1504, 1504 (2000).

259. See ARTHUR AUSTIN, *THE EMPIRE STRIKES BACK: OUTSIDERS AND THE STRUGGLE OVER LEGAL EDUCATION* ch. 6 (1998).

260. PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* 39 (1999).

In 1993, Harvard Law School was *Beirut on the Charles*,<sup>261</sup> a combat zone for unseemly paradigm politics. Infighting over hiring, tenure, and student power, along with *ad hominem* faculty exchanges,<sup>262</sup> drew national glares from media venues like *G.Q.* and *Vanity Fair*.<sup>263</sup> Eventually the focus settled on scholarship as the key method of influence with the postmodernists taking control behind advocacy articles which sought to embarrass opponents with what became known as “trashing”: “Take specific arguments very *seriously* in their own terms; discover they are actually *foolish* ([tragi]-comic); and then look for some (external observer’s) *order* (*not* a germ of truth) in the internally contradictory, incoherent chaos we’ve exposed.”<sup>264</sup> Trashing became postmodern chic—a form of “got-cha” journalism.

The cultural affinity between law and history is derived from a shared esteem of syntax. Both exult objectivity as an ideal but succumbed to the sirens of indeterminacy. During a ten month post-accusation period, Stephen Ambrose was favored by a postmodern check list defining the implications of plagiarism. He was the beneficiary of a paradigm defense—as a Consensus Historian he adhered to the Homer/Thucydides code by churning out “popular” history for the legacies of the Greatest Generation. He openly defied the New History interpretative community who exploited his obvious plagiarism to hang him for ignoring recognition of Stalingrad.<sup>265</sup> His death terminated a final decision on a paradigm winner but speculation favors the favorable judgment of an interpretative community of Consensus readers who subsidize popularity by buying books.

Like Ambrose, Kearns Goodwin was in the *per se* violation zone, which she compounded with a settlement cover-up generating extensive media chastisement. Yet as a poster professor to graduate students on what not to do she is also an instruction manual on survival. She and her advisors surmised that her best defense was to rely on a friendly Media Inquest to establish a “not proven” defense.<sup>266</sup> As a verdict between guilty/not

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261. John Sedgwick, *Beirut on the Charles*, *G.Q.*, Feb. 1993, at 153. “But at Harvard, even if you don’t take a side, you are given one. Everyone is typecast by his or her race, gender, sexual orientation and political perspective, be it Left, Right or center.” *Id.* at 155.

262. “The terms were laid out by professor of corporate law, Robert Clark, who said the crits were huns, not hippies, committed only to ‘a ritual slaying of the elders.’” Peter Collier, *Blood on the Charles*, *VANITY FAIR*, Oct. 1992, at 144, 152.

263. *Id.*; Ken Emerson, *When Legal Titans Clash*, *N.Y. TIMES*, Apr. 22, 1990, (Magazine), at 26 (discussing “beneath the surface” disagreement among Harvard Law School faculty over school’s role in legal profession).

264. Mark G. Kelman, *Trashing*, 36 *STAN. L. REV.* 293, 293 (1984) (emphasis in original).

265. See *supra* note 65 and accompanying text.

266. Joseph M. Barbato, *Scotland’s Bastard Verdict: Intermediacy and the Unique Three-Verdict System*, 15 *IND. INT’L & COMP. L. REV.* 543, 543 (2005).

guilty, the Scottish “not proven” verdict is an amicable strategy to sway a media court where stroking, and all that implies, is the definitive influence. The model instruction to a media jury:

You say where does not proven come, well where indeed? It is not easy to define the not proven verdict . . . . [I]f the not proven verdict was not available your verdict almost certainly would be guilty . . . . You have a niggling concern at the back of your mind that you do not want to let the accused person free and without stain on his character, yet you are unhappy about the quality and standard . . . of the Crown[’s] evidence.<sup>267</sup>

Kearns Goodwin deflected the negative implication of a “celebrity,” “popular,” best selling author in the Ambrose mold by finessing paradigms. She cultivated support from Consensus people—where she was “Ragmop,”—and New History Liberals—where she could count on the support of Tribe and Schlesinger. The strategy satisfied the “principle justification” for not proven: “it provide[d] an additional outlet for reasonable doubt.”<sup>268</sup>

By deleting consideration of intention or motive as an element of a prima facie case, the AHA implicitly sanctioned a “not proven” category. Hoffer’s “waffle” on Kearns Goodwin was tantamount to reliance on “not proven.”<sup>269</sup> Likewise, labeling Ogletree’s lapse an “honest mistake” was code for a Scottish verdict. He also satisfied the sympathy justification: while not “innocent” he did not deserve the stigma of a guilty verdict.<sup>270</sup> There is precedent for this rationale in Senator Arlen Specter’s “not proven” vote on President Clinton’s impeachment. “This is not to say the president is not guilty, but to specifically say that the charges have not been proven . . . . My view is the Senate has done partial justice.”<sup>271</sup>

267. *Id.* at 553.

268. *Id.* at 560.

269. See *supra* note 72 and accompanying text.

270. “In theory, he has been acquitted, but it is fair to assume that his reputation is blemished, and that his career is likely to be affected . . . . He is not guilty but, after that verdict, he is not innocent, either.” Barbato, *supra* note 266, at 563.

The verdict of not proven, as we know, did not fall into the limbo of legal antiquities. It had so impressed itself on the mind of the layman during its brief span of life that it continued to be used and by Hume’s time had acquired a new shade of meaning. As he puts it, “Not uncommonly, the phrase *not proven* has been employed to mark a deficiency only of lawful evidence to convict the panel; and that of not guilty, to convey the jury’s opinion of his innocence of the charge.” That description might still hold good today. The consequence is that the verdict of not proven carries with it a certain stigma, as if the jury wished to record their disapproval of the accused and his behaviour.

IAN DOUGLAS WILLOCK, THE ORIGINS AND DEVELOPMENT OF THE JURY IN SCOTLAND 221-22 (1966) (emphasis in original).

271. Barbato, *supra* note 266, at 572-73.

C. *The Vicissitudes of a Media Inquest: Ward Churchill*

The accused involved in the five case studies discussed so far were investigated and judged according to a public inquest scripted by an open admissions media court.

From the “elite” to the “beat”: the *New York Times* to the *Harvard Crimson*, it was “a dense thicket of tangled jurisdiction, misunderstandings, rumors, and lawsuit.”<sup>272</sup> A form of “Frontier Justice”<sup>273</sup> often runs amok, justifying the Dershowitz gospel that an accused is presumed guilty even if proven innocent. Perhaps the most menacing effect of a media venue is the transmogrification factor—a plagiarism allegation, even if not proven, leverages colorable credibility for other real or speculative charges. In a media court, it is the power to fuel the controversy that sustains the inquest.

Professor Hoffer chastises New Historians for embracing “its own worst tendencies” by denying the existence of “historical truth.”<sup>274</sup> “It’s all a matter of taste, not truth.”<sup>275</sup> These two impulses commingle to expose History to the indeterminacy of a media venue willing to tolerate serious breaches of academic protocol—a willingness “to let bygones be bygones.”<sup>276</sup> The Ward Churchill controversy narrates the consequences of Media Inquest indeterminacy.

As the head of the University of Colorado’s ethnic studies department, Ward Churchill was nationally known for Indian Rights activism and disputatious writings. He added scandal to his vitae with an incendiary article describing the 9/11 Twin Towers attack as a deserving blowback for U.S. policies, allegedly comparing the victims to Adolph Eichmann.<sup>277</sup> In the

272. David Glenn, *Judge or Judge Not?*, CHRON. HIGHER EDUC., Dec. 17, 2004, at A16.

273. Tom Zeller, Jr., *In Internet Age, Writers Face Frontier Justice*, N.Y. TIMES, May 1, 2005, at C5. Eric Alterman identifies an ominous threat from anonymous web sites:

The problem has arisen in a variety of contexts of late. When discussing reactions to the news that Bob Dylan appears to have borrowed lyrics from nineteenth-century Confederate Henry Timrod, the *New York Times* quoted an anonymous denizen of a Dylan web fan forum complaining in a juvenile and malicious fashion as a counterpoint to the more learned quotations from genuine Dylan scholars. Who was the guy? Who knows? He didn’t even have a name. The Bobster’s reputation may have suffered microscopic degrees of damage, but the primary casualty was the *Times*’ reputation for veracity.

Eric Alterman, *No ‘Comments,’* NATION, Oct. 30, 2006, at 10.

274. HOFFER, *supra* note 3, at 233.

275. *Id.* at 234.

276. *Id.* at 235. Hoffer refers specifically to the tolerance and continued success of Ambrose, Bellesiles, Ellis, and Kearns Goodwin.

277. One commentator observes:

The essay surfaced only after Professor Churchill accepted an invitation to speak at Hamilton College, near Utica, N.Y., about his area of expertise, American Indian activism. After the essay was brought to light, Hamilton College said it had to honor its invitation in the interests of free speech, though the college president, Joan Hinde Stewart, said she found



midst of a media crossfire over free speech, a long simmering plagiarism accusation against Churchill surfaced, providing a window for pretext strategy. The ensuing media frenzy focused on Colorado politics, eventually leading to demands from the Governor and the state legislature for an “investigation” of the plagiarism charges.<sup>278</sup> At the instigation of the Interim Chancellor, the University of Colorado’s Standing Committee on Research Misconduct (SCRM) turned over seven allegations of research misconduct by Churchill to an Investigation Committee.<sup>279</sup>

Adhering to *AHA Standards of Professional Conduct* under a preponderance of evidence burden of proof standard, the committee unanimously found Churchill guilty<sup>280</sup> of “serious” misconduct, differing only on sanction.<sup>281</sup> The laundry list of misconduct was extensive: the deliberate falsification of evidence;<sup>282</sup> fabrication of supporting authority by citing articles he wrote and published under other names (including his wife, a colleague at the time);<sup>283</sup> misleading footnoting;<sup>284</sup> and plagiarism by “the repeated

the remarks personally repugnant. The College received thousands of e-mail messages and telephone calls protesting the planned panel discussion. On Tuesday, it abruptly canceled the discussion, which had been scheduled for tonight, after a caller threatened to bring a gun to the event and the local police said they could not guarantee Professor Churchill’s safety.

Michelle York, *Professor Is Assailed by Legislature and Vandals*, N.Y. TIMES, Feb. 3, 2005, at B6. Another commentator observes:

Earlier Monday, Churchill said in a statement issued through his wife, Natsu Saito, that he hadn’t compared all of the World Trade Center victims to Nazis, just the “technicians” who died in the Sept. 11 attacks. “I have never characterized all the Sept. 11 victims as Nazis. What I said was that the ‘technocrats of empire’ working in the World Trade Center were the equivalent of ‘little Eichmanns.’ Thus, it was obviously not directed to the children, janitors, food-service workers, firemen and random passers-by killed in the 9-1-1 attack,” Churchill said.

Howard Pankratz, *Prof. Quits Chair Over 9/11*, DENVER POST, Feb. 1, 2005, at A01.

278. One commentator observes:

“The professor’s remarks go beyond dissent. His interpretation of what happened on 9/11 is factually inaccurate, and his defamation of the attack’s victims is indefensible and reprehensible,” said Rep. Mark Udall, D-Colo.

Rep. Bob Beauprez, R-Colo., said that although Churchill is tenured at CU, he should immediately resign and offer an apology for “his outrageous comments.”

“The utter and callous disregard shown by Churchill toward the family members of those who lost their lives on 9/11 is beyond comprehension,” Beauprez said.

Howard Pankratz, *CU Prof. Won’t Take Back 9/11 Comments*, DENVER POST, Jan. 28, 2005, at A1.

279. MARIANNE WESSON ET AL., REPORT OF THE INVESTIGATIVE COMMITTEE OF THE STANDING COMMITTEE ON RESEARCH MISCONDUCT AT THE UNIVERSITY OF COLORADO AT BOULDER CONCERNING ALLEGATIONS OF ACADEMIC MISCONDUCT AGAINST PROFESSOR WARD CHURCHILL 113 (May 9, 2006), available at <http://www.colorado.edu/news/reports/churchill/download/WardChurchillReport.pdf>.

280. On the charge of plagiarism in Allegation F, the SCRM concluded not guilty but found a “different form of research misconduct”: misattributing his own work as “authority for claims that he makes in his own later scholarship.” *Id.* at 89.

281. *Id.* at 102.

282. *Id.* at 27.

283. *Id.* at 30, 92 n.228.

occasions of near-verbatim repetition” of another’s work.<sup>285</sup> The plagiarism allegations flushed out Churchill’s habit of “pseudonyming,”<sup>286</sup> using ostensibly independent articles as “authority for claims that he makes in his own later scholarship,”<sup>287</sup> permitting him “to create the false appearance that his claims are supported by other scholars when, in fact, he is the only source for such claims.”<sup>288</sup> Despite the media’s reference to the plagiarism accusation as the primary misconduct, the actual violations were considerably broader.

The Churchill Inquest perseveres. After a review of the report and upon recommendation of the SCRM,<sup>289</sup> the Interim Chancellor recommended outright dismissal<sup>290</sup> countered by Churchill’s lawyer vowing litigation, describing the report as “window dressing, . . . they want to make it look legitimate so then they can fire him saying, ‘Look, it had nothing to do with free speech.’”<sup>291</sup> The report, packed with rebuke, self-serving rationalizations, and lecturing, will more than likely be used as a source of support by Churchill for the political retribution argument.<sup>292</sup>

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284. “It is simply false to assert that the pages cited from Salisbury’s work support the claims made in the relevant passages by Professor Churchill.” *Id.* at 34.

285. *Id.* at 86.

286. Harry W. Mazal, What’s in a Nym? (2000), <http://www.mazal.org/GermarRudolf/Nym.htm>. Pseudonyming refers to the multiple use of “nyms” to conceal identities in footnotes, references, and attributions.

287. WESSON ET AL., *supra* note 279, at 89.

288. *Id.* at 90.

289. *See infra* notes 305-11 and accompanying text.

290. Phil Distefano, Recommendation of Interim Chancellor Phil DiStefano with Regard to Investigation of Research Misconduct (June 26, 2006), <http://www.colorado.edu/news/reports/churchill/distefano062606.html>.

291. Kirk Johnson, *Colorado U. Chancellor Advises Firing Author of Sept. 11 Essay*, N.Y. TIMES, June 27, 2006, at A11.

292. In an interview with Amy Goodman, Churchill accused the investigators of committing:

WARD CHURCHILL: [E]gregious examples of everything they accused me of having done, including fabrications, suppression of evidence, disregarding of inconvenient facts, plagiarism, false assertion of authorship, and on and on and on.

AMY GOODMAN: How did they engage in that?

WARD CHURCHILL: Well, on plagiarism, basically by plagiarizing, just taking one of the essays that formed the basis of complaint from the interim chancellor, stripping of it its annotation, presenting it as their own. And that’s not simply a matter of doing it, but of saying that they had come up with the information that was in the original essay. That qualifies on AHA standards grounds and every other set of professional standards that I’m aware of that preside in the academy. You don’t assert co-authorship to a book that was written before you were born. You may have a hand in editing it. But you’re not a coauthor. That’s a false assertion of authorship.

Suppression of evidence, for example, with regard to the so-called Ft. Clark incident, the smallpox epidemic of 1837, I presented them with information that what I said had been said in print by prior authors. They’re right, they’re wrong. But I could not have invented what was already in print. They disregarded that altogether.

Ward Churchill Defends His Academic Record & Vows to Fight to Keep His Job at University of Colorado (Sept. 27, 2006), <http://www.democracynow.org/article.pl?sid=06/09/27/146255> [hereinafter Interview].

Sensitive to the echoes from the Media Inquest over the free speech issue, the report made a point of limiting its role to the determination of seven allegations of academic misconduct.<sup>293</sup> It was a conscious effort, emphasizing that they were limited to determining misconduct involving Churchill's academic work, not his journalism,<sup>294</sup> quoting his dedication to make "proper attribution to those upon whose ideas and research one relies."<sup>295</sup> Simultaneously, the report notes concern over the timing and motives of the charges.<sup>296</sup> The challenge of parsing the commingling academic writing and journalism persists throughout the report, culminating in an acknowledgment of Churchill's inability to distinguish scholarship from polemic, finding "repeated instances of . . . fabricating details or ostensible written evidence to buttress his broader ideological arguments."<sup>297</sup> It is a critically important distinction: the greater the polemical context of the alleged scholarship misconduct, the greater the relevance of the First Amendment argument.

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293. Wesson explains:

Thus, in conformity with the Regents' Laws, the Committee understands its role as limited to determining academic misconduct under scholarly norms of research and does not conceive itself as an ultimate arbiter of the truth or falsity of the claims made by Professor Churchill that sparked some of these charges. The Committee was careful to distinguish the question of misconduct in research, which is addressed by the University of Colorado's Administrative Policy Statement on Misconduct in Research and authorship, from the issue of truth addressed by the Regents' Laws' definition of academic freedom.

WESSON ET AL., *supra* note 279, at 3.

294. Wesson further explains:

Professor Churchill's work frequently challenges established narratives and conventional interpretations of previous and current events. Articulating an Indian perspective, he argues forcefully and bluntly on behalf of the positions he presents. He has been a major figure in promoting the argument that Indians have been the target of racist policies by the United States government and racist actions by individual whites over a period of nearly four hundred years, causing the deaths of countless indigenous peoples and the destruction of many aspects of their earlier cultures. The members of this Committee concur with that general assessment. We will nevertheless focus our report, as we were charged, upon seven specific allegations concerning how he has used evidence and other people's writing to support his claims.

*Id.* at 7.

295. *Id.* at 11.

296. Wesson again observes:

Before addressing directly the contents of those allegations, the Investigative Committee ('Committee') notes its concern regarding the timing and, perhaps, the motives for the University's decision to initiate these charges at this time. While the history of this matter is not before the committee, it is well known that these charges were commenced only after Professor Churchill had published some highly controversial essays dealing with, among other things, the 9/11 tragedy. While not endorsing either the tone or the contents of those essays, the Committee reaffirms, as the University has already acknowledged, that Professor Churchill had a protected right to publish his views.

*Id.* at 3.

297. *Id.* at 95. "While his general claims may be correct, it is unacceptable scholarship to create fictitious support for them." *Id.*

The SCRM approved the report's findings recommending dismissal (six votes), with three others voting for suspension.<sup>298</sup> The Interim Chancellor announced initiation of the dismissal process. The First Amendment impacts at two points susceptible to media filtering. First, on the media's primary market—public opinion—a persuasive advocacy/scholarship commingling argument renders negative public opprobrium less likely while discouraging institutional action. As a general proposition in a media context, free speech trumps arcane rules of academic propriety. Secondly, media filtering is dominated by History's reliance on postmodernism, which the AHA defines: "Multiple, conflicting perspectives are among the truths of history . . . . [W]e understand that interpretive disagreements are vital to the creative ferment of our profession, and . . . contribute to some of our most original and valuable insights."<sup>299</sup> As Professor Hoffer concedes, history is determined by paradigm, context, and interpretative communities<sup>300</sup> which would provide Churchill with license to define his "truth," including interpretation of events and documents, according to the voice of the Native American constituency without interference from the dominant culture.<sup>301</sup> Professor Robin would testify that New History assumes that "both alleged wrongdoers and their accusers are engaged in equally imaginative and imaginary intellectual constructions."<sup>302</sup> Hence, for example, "nyming," to define context, is an exercise of free speech.

By generating controversy over Churchill's 9/11 remarks, the media filter fertilized the political pressure that forced Churchill's First Amendment response to threats of dismissal. Unlike the erratic media venue, he is bound to follow the designated roadmap of Chief Justice Rehnquist: to prove that his conduct was constitutionally protected and that it was a "substantial" cause of his dismissal, shifting the burden to the defendant to

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298. JOSEPH ROSSE ET AL., REPORT AND RECOMMENDATIONS OF THE STANDING COMMITTEE ON RESEARCH MISCONDUCT CONCERNING ALLEGATIONS OF RESEARCH MISCONDUCT BY PROFESSOR WARD CHURCHILL 3 (June 13, 2006), available at <http://www.colorado.edu/news/reports/churchill/download/ChurchillStandingCmteReport.pdf>.

299. WESSON ET AL., *supra* note 279, at 45.

300. HOFFER, *supra* note 3, at 85, 94, 223.

301. In defending his assertion that the U.S. army gave Native Americans blankets infested with smallpox, Churchill explains:

Well, I don't know what to say about that, other than just bald assertion. The problem that they had on that count was that I contended all along—this is the grounding that I come from, this is fairly well known, not a great mystery—that I'm coming from an indigenous perspective, lived experience, and directly from grassroots understandings of historical phenomena, events. They interviewed several people from a tradition of the peoples most directly affected by the 1837 smallpox epidemic, discovered to their dismay that the history of those peoples confirms essentially what I said.

Interview, *supra* note 292.

302. ROBIN, *supra* note 4, at 223.

prove by “a preponderance of the evidence that it would have reached the same decision [to dismiss him] even by the absence of the protected conduct.”<sup>303</sup>

While too early to assess litigation prospects, it is nevertheless appropriate to recognize the relevance of the University of Colorado’s investigation to the Rehnquist roadmap.<sup>304</sup> The report and the SCRM recommendations make a discernable effort to reflect skepticism over the University of Colorado’s role in tolerating a problematical situation involving Churchill’s academic brinkmanship ventilated by the investigation. “Problematical” refers to the toleration of “deliberate and serious misconduct” in the face of annual reviews,<sup>305</sup> a persistent endorsement that had the effect of keeping dirty linen secret,<sup>306</sup> suggesting that had not the 9/11 incident occurred, Churchill would still be an esteemed member of the faculty.<sup>307</sup> Equally probative for the Rehnquist roadmap are the SCRM’s remarks on the “timing” of the university’s quick and aggressive reaction to media filtering and political pressure that bluntly implicates a nexus between Churchill’s dismissal and 9/11.<sup>308</sup> Underwriting the overall disquietude emanating from the SCRM is the effort to evade responsibility for Churchill’s “serious misconduct” by invoking a non-accountability clause—“The SCRM—by rule and for practical reasons—responds only to written allegations that are presented to it.”<sup>309</sup> This is a ploy reminiscent of issuing price-fixing non-accountability directives to employees as a “quiet wink” message encouraging “price stabilization.”<sup>310</sup>

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303. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

304. The university conceded that Churchill’s commentary was protected. *WESSON ET AL.*, *supra* note 279, at 3.

305. Rosse explains:

More broadly, the Investigative Committee’s statement could be construed as suggesting that the University somehow should have known about Professor LaVelle’s critique even without a formal complaint being filed. The SCRM—by rule and for practical reasons—responds only to written allegations of misconduct that are presented to it. The SCRM cannot be responsible for monitoring all the publications of University faculty, nor does it believe such a role would be appropriate even if it was practical. However, the Committee is sympathetic to the construction that others in the University—particularly those involved in Professor Churchill’s discipline and in his annual and promotion reviews—should have been aware of Professor LaVelle’s critique and have brought it to the attention of responsible University officials and the SCRM. We do not know and cannot speculate, on why this did not occur, because it is outside the purview of the SCRM’s charge.

*ROSSE ET AL.*, *supra* note 298, at 14.

306. *MALLON*, *supra* note 4, at 152; *see supra* note 250 and accompanying text.

307. *See supra* note 296 and accompanying text.

308. *Id.*

309. *ROSSE ET AL.*, *supra* note 298, at 14; *see supra* note 305 and accompanying text.

310. One commentator observes:

For the record, a superior officer might say to his underling: “Joe, let’s have none of this price-fixing monkey business, remember that!” And he would punctuate his remark with a broad smile and the neutralizing wink which would mean, far beyond the words on the

The most appropriate way to conclude this Article, while awaiting a new installment in the Churchill drama (most likely a settlement), is to cogitate over some advice from the echo slippery slope: the last refuge for a plagiarist is the First Amendment.<sup>311</sup>

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corporate records: "Get off your tail and 'stabilize' those prices with the competitors, or we're going to be in trouble with the profit side of the ledger."

JOHN G. FULLER, *THE GENTLEMAN CONSPIRATORS* 124 (1962).

311. On echoes, see *Salinger v. Hamilton*, 811 F.2d 90, 99 n.5 (2d Cir. 1987).