

# JUDICIAL DEFERENCE AND UNIVERSITY ACADEMIC POLICY MODIFICATIONS: WHEN SHOULD COURTS INTERVENE ON BEHALF OF INJURED STUDENTS?

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## INTRODUCTION

During the last several years, faculties from countless colleges and universities have voted to introduce or modify existing academic policies at their universities.<sup>1</sup> Many college academic policies are considered purely academic in nature, such as permitting a professor to determine her students' academic performance in class and what grade each student has earned. There are other university policies, such as a university's disciplinary procedures and graduation requirements, which may be considered academic questions in some sense, but have been more appropriately characterized by most courts as procedural in nature.<sup>2</sup> Other policies cannot be characterized very easily as either academic or administrative in nature.<sup>3</sup> College policies in this category are seemingly neither purely academic nor purely administrative in nature, but seem to embody elements from both of those categories where neither the academic nor the administrative characteristics of the policy can be changed without somehow having an influence on the other.

One such timely example is university grading policies. In recent years, countless colleges and universities have modified their grading policies to include plus and minus grades.<sup>4</sup> Discussions regarding the benefits and

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1. Donald E. Coleman, *Grading Proposal Defeated: Fresno State's Academic Senate Rejects System of Pluses, Minuses*, FRESNO BEE, Apr. 28, 1998, at B3; Kevin Cullen, *Plus/Minus Grading Policy Scrutinized*, J. & COURIER, Apr. 27, 1999, at 1B; Amy Olson, *Committee Evaluates Plus-Minus Grading at U. Minn.*, MINN. DAILY, Jan. 14, 1999; Brian Westley, *James Madison U. Implements Plus/Minus Grading System*, THE BREEZE, Dec. 10, 1998; Ryan D. Wilson, *Grading System Under Fire*, TOPEKA CAPITAL-J., Nov. 29, 1998.

2. See, e.g., Johanna Matloff, Note, *The New Star Chamber: An Illusion of Due Process Standards at Private University Disciplinary Hearings*, 35 SUFFOLK U. L. REV. 169, 200 (2001); Scott R. Sinson, Note, *Judicial Intervention of Private University Expulsions: Traditional Remedies and a Solution Sounding in Tort*, 46 DRAKE L. REV. 195 (1997).

3. See *infra* Part III.B.

4. See Lindsey Baker, *Nebraska Faculty Ponders New Plus-Minus System*, DAILY NEBRASKAN, Feb. 8, 2001; Gale Chambers, *Baylor U. Council of Deans Considering Adding Minuses to Grading System*, LARIAT, May 2, 2002; Erica Cordova, *U. Hawaii Professors Petition for Grading Change*, KA LEO O HAWAII, Nov. 13, 2001; Jason Gallagher, *Pluses, Minuses May Be in Kent State U. Students' Futures*, DAILY KENT STATER, Feb. 21, 2002; Melissa Lee, *At First Look, U. Nebraska's New Grading Scale Has Little Effect*, DAILY NEBRASKAN, Jan. 17, 2002 [hereinafter Lee, *At First Look*]; Melissa Lee, *Plus/Minus System Here to Stay at U. Nebraska*, DAILY NEBRASKAN, Aug. 26, 2002; Anna Simon, *Clemson Faculty Oks Plus, Minus Grades*,

shortcomings of such grading policy changes have circulated among faculty at colleges and universities across the country.<sup>5</sup> While one school of thought maintains that the change will aid students in the long term,<sup>6</sup> there is no question that resident students who receive grades in the interim transition period may indeed be harmed.<sup>7</sup> For instance, the implementation of a plus/minus grading system where none previously existed presents the following possible harms: (1) straight-A students that would have received a 4.0 could receive a GPA as low as 3.67 under the new system,<sup>8</sup> (2) the lack of an A+ in most plus/minus systems does not allow the best students to compensate for lower A grades, and (3) because a C- is weighted as a 1.67, a student could be put on academic probation if he/she had straight C minuses (as opposed to 2.00 good standing before).<sup>9</sup> This average GPA decline for the top of the class creates problems for those students regarding scholarship funds,<sup>10</sup> graduate school prospects,<sup>11</sup> job prospects, and academic honors.<sup>12</sup> Accordingly, many students in the top of their class have

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GREENVILLE NEWS, May 9, 2001, at 1B.

5. Kim Aichele, *UI Grading Policies Subject of Debate*, DAILY ILLINI, May 4, 1998. See Baker, *supra* note 4; Cordova, *supra* note 4.

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Faculty say the system will more accurately reflect the quality of a student's work and will allow better student comparisons. For example, under the traditional A, B, C, D, F system, a student whose average is an 89 throughout the semester and a student whose average is 80 could both receive a B, which is worth 3 points when calculating a student's grade point average. Under the new system, the first student would receive a B, or a 3.3 GPA, and the other student would receive a B-, or a 2.7 GPA—a difference of more than half a grade point.

Randy Gleason, *Illinois Wesleyan Looks at Grades' Pluses, Minuses*, THE PANTAGRAPH, Feb. 8, 1997. See also Chambers, *supra* note 4; Lee, *At First Look*, *supra* note 4; James Shepherd, *Follow Towson U.'s Lead*, THE TOWERLIGHT, Apr. 24, 2000.

7. David Lord, *CSU Better Off Minus Plus/Minus System*, ROCKY MOUNTAIN COLLEGIAN, Mar. 24, 1998 (asserting plus/minus grading is the most atrocious grading).

8. *Id.* "Students who usually score on the lower end of each grade are punished by plus/minus. No longer will students have the motivation to work extra hard at the end of the semester in the hopes of pushing their grade to the next level." *Id.*

9. *Id.* "Finally, the worst aspect of this system is that it reeks of potential breach [sic] of contract. Students who entered CSU under one system of grading have had the carpet pulled out from under their feet and the rules changed in the middle of the game. This is completely unfair." *Id.* "Of equal importance is the lack of uniformity among classes and sections. Theoretically, two students could take different sections of the same class. If both scored a 92 percent and one student had a teacher who used plus/minus and the other did not, one would receive a 4.0 and the other would receive a 3.67." *Id.*

10. Melissa Lee, *U. Neb. Students Fear Loss of Scholarships with New Grading System*, DAILY NEBRASKAN, Jan. 16, 2002.

11. Patti Vannoy, *U. Neb. Students Concerned About Grading System's Effect on Grad School Admissions*, DAILY NEBRASKAN, Jan. 18, 2002.

12. Lindsey Baker, *Honors Students Feel Effects of New U. Neb. Grading System*, DAILY

adamantly opposed the introduction of new plus/minus grading systems at their universities through their student governments, petitions, or pleas to faculty and administrations.<sup>13</sup> The question now arises whether courts should even entertain student claims that are seemingly academic in nature, such as ones involving grading policy modifications, and if so, what legal model should courts use to adjudicate those claims?

School faculty and administrators often make decisions which modify university academic policies, or at least alter the method in which those policies are implemented. In many cases, those policy changes are provided for in the university's catalogue. For example, many universities retain the right to change the academic criterion on which they may expel a student as long as the student is notified in advance.<sup>14</sup> There are instances where institutions of higher education make substantial modifications to their academic grading policies in student catalogues and handbooks, and those modifications result in serious detrimental effects on students.<sup>15</sup> For example, college catalogues prescribe graduation criteria, major coursework requirements, grade point average requirements for good standing and honors, and various administrative procedures. When these requirements are altered unexpectedly, students may suffer injurious effects, such as the additional tuition and time required to take a newly-required class, or graduating at a later date than anticipated. Litigation has arisen between students and universities regarding policy modifications that have deprived students of the educational benefit the students expected to receive when they enrolled.<sup>16</sup>

Judicial treatment of student academic challenges has a profound effect on the self-determination of students seeking higher education, a profound effect on the degree of latitude educational institutions have to change their academic policies, and a profound effect on the range of legal recourses students may pursue when confronted with academic policy changes that are injurious to them. Not only have grading policy modifications and other academic policy adjustments been intensely debated between college faculty and administrations,<sup>17</sup> but it also has motivated scores of news stories, student

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NEBRASKAN, Mar. 22, 2001.

13. *Id.*; Sonja Bjelland, *Students Read Between the Lines*, THE MANEATER, Sept. 2, 1997 (Student Senator Matt Dimmic led a protest against the new grading system last spring, and a task force sent information to all voting faculty); Caroline Craig, *Clemson U. Students Speak Out Against Grading Changes*, TIGER, Jan. 18, 2002; Kevin Darst, *Student Election at CSU Drawing to Close*, FORT COLLINS COLORADOAN, Mar. 25, 2001; Aaron Sorenson, *Year-old U. Minn. Grading System Meets Mixed Responses*, MINN. DAILY, Dec. 4, 1998; Ryan D. Wilson, *ESU Faculty Urges Plus/Minus Choice*, TOPEKA CAPITAL-J., Apr. 8, 1999; Ryan D. Wilson, *Students Participate in Walkout to Protest Grading System*, TOPEKA CAPITAL-J., Apr. 23, 1999.

14. *See generally* BUTLER UNIV., CATALOGUE 12 (2000-02); ANDERSON UNIV., CATALOGUE 6 (1998-00).

15. *See supra* notes 10-13.

16. Specific cases are addressed in *infra* Part II of this Note.

17. *See supra* notes 1, 4.

government initiatives, and education journal articles on the advantages and disadvantages of such changes.<sup>18</sup> No journal article has yet addressed the legal issues confronted when academic policy changes are enacted.

This Note contends that the judicial deference historically accorded to institutions of higher education making academic policy modifications is misplaced and that courts should not hesitate to intervene on behalf of student claimants. Courts have already recognized the validity and utility of student suits under theories of contract, quasi-contract, and estoppel regarding many types of student-university disputes, in large part due to the changed expectations of the parties reflecting economic and academic pressures. Academic policy modification cases constitute the precise type of student claim which courts have increasingly recognized as appropriate to protect students and to ensure the viability of higher education altogether.

Part I of this Note discusses the judicial deference historically accorded to educational institutions, the current trends and adjustments of judicial deference to educational institutions, and the pervasiveness of the increased commercialization of higher education. Part II discusses possible claims against universities making academic policy modifications under contract, quasi-contract, and estoppel theories, and also briefly discusses the possible remedies under those various theories. Finally, in Part III, the author briefly recommends a possible model which courts may use to evaluate student claims involving academic policy modifications in order to achieve the fairest remedy possible.

## I. THE STUDENT-UNIVERSITY LEGAL RELATIONSHIP

The judicial deference historically accorded to institutions of higher education making academic policy modifications is misplaced. Courts should not hesitate to intervene on behalf of student claimants. The courts have come far from their strict adherence to the principles of *in loco parentis* by protecting student expectations and incurred costs under claims of contract and estoppel in a variety of situations. Nevertheless, courts frequently hesitate to intervene on the behalf of injured students in many cases when the alleged university action may be deemed academic in nature. Institutions of higher education are becoming more commercialized in nature all the time, and no longer maintain the same status they did during Colonial times when the doctrine of *in loco parentis* was the legal rule applied to student-university disputes. Indeed, the academic expectations of both students and universities concerning their obligations to each other require that courts extend their willingness to depart from their deferential position and hear student academic claims.

While courts have recognized that the laws of contract may define the student-university relationship in many respects, they have largely avoided applying ordinary commercial contract doctrines completely.<sup>19</sup> Today, most courts do acknowledge the contractual nature of the student-university

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18. See *supra* notes 5-13.

19. See, e.g., *Slaughter v. Brigham Young Univ.*, 514 F.2d 622 (10th Cir. 1975).

relationship, but nevertheless rationalize exceptionally harsh treatment of student litigants.<sup>20</sup> This harsh treatment of student claims is particularly surprising in light of the general trend of contract law in other areas, where modern courts interpret vague or ambiguous terms against the drafter and have not hesitated to void unconscionable provisions.<sup>21</sup> Typically, courts rationalize their harsh treatment of student litigants by asserting that contract law should not be rigidly applied. Furthermore, courts have also justified a stricter standard for students by declaring that the student-university relationship is by its very nature unique. It is unclear exactly how such statements are helpful, since any business is in some sense unique when compared with other businesses.<sup>22</sup> Nevertheless, many courts seem to think that some particular, unidentifiable characteristic of higher education makes commercial contract doctrine inappropriate.<sup>23</sup>

Of course, not all courts use this rationale to deny student contract claims. Several, such as in the case of *Lowenthal v. Vanderbilt University*, have rejected assertions that the special nature of universities made them immune to ordinary contract principles.<sup>24</sup> The court also dismissed Vanderbilt's argument that a ruling for the plaintiff would have "dire consequences" for higher education.<sup>25</sup> A brief discussion of the transformation of institutions of higher education from *in loco parentis* to primarily an economic transaction explains why courts should, as some courts already have, shed deferential treatment toward educational institutions.

During the first years of the Republic and the Colonial period, colleges provided higher education modeled after those institutions in Great Britain.<sup>26</sup> The English model was characterized by unqualified institutional control of students by the educational institution. The concededly one-sided relationship between the student and the college in American schools mirrored the situation at English schools where the emphasis on hierarchical authority stemmed from

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20. William W. Van Alstyne, *The Student as University Resident*, 45 DEN. L.J. 582, 584, 591 (1968).

21. See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965); see also Brian Jackson, *The Lingering Legacy of In Loco Parentis: An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135 (1991).

22. Contract law has been flexible enough to adjudicate disputes among people in very complex relationships; it is applied, for example, to disputes among family members, *Bogigian v. Bogigian*, 551 N.E.2d 1149 (Ind. Ct. App. 1990), in intimate relationships, *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976) (en banc), between physicians and their patients, *Sullivan v. O'Connor*, 296 N.E.2d 183 (Mass. 1973), and in long-term, complex commercial relationships, *Oglebay Norton Co. v. Armco, Inc.*, 556 N.E.2d 515 (Ohio 1990).

23. *Jansen v. Emory Univ.*, 440 F. Supp. 1060, 1062 (N.D. Ga. 1977).

24. No. 8-8525, Chancery Court of Davidson County, Tennessee (Aug. 15, 1977); see also *Niedermeyer v. Curators of Univ. of Mo.*, 61 Mo. App. 654 (1895) (where student plaintiff had accepted an offer contained in a catalogue of the university defendant fixing the tuition fee).

25. *Lowenthal*, No. 8-8525.

26. J. BRUBACHER & W. RUDY, *HIGHER EDUCATION IN TRANSITION* 3 (3d ed. 1976).

medieval Christian theology and the unique legal privileges afforded the university corporation.<sup>27</sup> The dominant legal philosophy courts used to describe this one-sided relationship was a doctrine called *in loco parentis*.<sup>28</sup> Essentially, courts refused to interfere with college authorities regarding either academic or disciplinary matters, and students had very little chance of successfully petitioning the courts for redress in practically any situation.<sup>29</sup>

Following the Civil War, an increasingly industrialized society forced colleges to respond to the demand for technically specialized workers. As the schools grew in size, the intimacy and paternalism that characterized the English and Colonial models of higher education became increasingly difficult to maintain. Thus, the old college ideal based on the cohesiveness of a small community diminished with time.<sup>30</sup> By the second half of the twentieth century, many courts acknowledged that the doctrine of *in loco parentis* no longer provided a satisfactory solution to student-university disputes. Courts increasingly used principles found in contract law, but usually applied those principles more strictly when the application favored the institution, and less strictly if the application would have favored the student.<sup>31</sup>

The tendency of institutions of higher education to become more commercialized in nature from Colonial times to the present supports the contention that those institutions should no longer maintain the same status they once did.<sup>32</sup> The nature of the student-university relationship explains why courts deferred to institutions of higher education in Colonial times, why courts have hesitated to defer quite as heavily in many cases involving student-university disputes in the last century, and why courts today should not hesitate to set aside their deferential treatment of educational institutions in the academic arena. Indeed, judicial treatment of the legal relationship between students and universities has in part reflected the evolution of the other facets of the student-university relationship, including economic, academic, and social relationship changes. What students and universities actually expect from each other and their agreements today is quite different than what they expected in past years. Courts today have recognized student suits in contract, quasi-contract, and estoppel theories.<sup>33</sup> However, because much, if not all, of the protections afforded students turn on the degree of deference accorded educational institutions by courts, it is very important to understand why courts have withdrawn from absolute deference in many cases and chosen to evaluate student

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27. Brian Jackson, *The Lingering Legacy of in loco parentis: An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135, 1138 (1991).

28. *Id.* at 1139.

29. *Id.*

30. *Id.* at 1142.

31. See, e.g., *Slaughter v. Brigham Young Univ.*, 514 F.2d 622 (10th Cir. 1975); *Carr v. St. John's Univ.*, 231 N.Y.2d 410 (App. Div. 1962); *Koblitz v. Western Reserve Univ.*, 21 Ohio C.C. 144 (1901).

32. See Jackson, *supra* note 27, at 1148-49.

33. See *infra* Part II.

claims in the first place. Once the reasons for not according absolute deference to educational institutions in some cases are understood and articulated, one can easily extend those reasons not to accord undue deference to colleges, where appropriate, to the academic arena as well.

Relying on the “unique characteristics” of educational institutions, many courts have avoided acknowledging the evolution of most schools from intimate colleges to massive universities. However, the trends of universities to implore marketing practices and become more consumer-oriented best describes the transformation of the paternalistic college described by *in loco parentis* to the modern university. By purposefully pursuing “university-status” through these practices, institutions of higher education have characterized themselves in different terms than those traditionally accorded judicial deference. First, contemporary active marketing is one of the clearest indications that institutions of higher education are becoming more commercial in nature. Higher education is viewed, and views itself, as a business with education as its product. Since the 1960s, there has been a tremendous growth in higher education; between 1960 and 1990, the number of institutions of higher education increased by fifty-seven percent, from 2008 to 3535.<sup>34</sup> Due to the skyrocketing number of student applications during these decades, colleges and universities began competing aggressively for students.<sup>35</sup> The explosion of the number of colleges and the number of students attending college necessitates that student choice increasingly drives recruitment efforts; therefore, colleges must actively and aggressively market themselves to stand apart from other colleges.<sup>36</sup> In addition, institutions developed many new academic programs and majors to attract new students; as a result, many colleges increasingly relied on marketing and a self-developed image to promote their schools.<sup>37</sup>

A second indicator of the increasing commercialism in higher education is the tendency of institutions of higher education to become more consumer-oriented. As a trend in higher education, the typical college student is increasingly less characterized as an innocent child sent away to college, and is more often regarded as a knowledgeable buyer. For example, many students are now non-traditional students who work and raise families while attending school.<sup>38</sup> Many students have specific career goals and desire convenience and flexibility. Today, many students expect the university to accommodate the

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34. Richard A. Matasar, *A Commercialist Manifesto: Entrepreneurs, Academics, and Purity of the Heart and Soul*, 48 FLA. L. REV. 781, 792 (1996) (describing the commercial nature of higher education).

35. *See id.*

36. John Martin & Thomas Moore, *Problem Analysis: Application in Developing Marketing Strategies for Colleges*, 66 C. & UNIV. 233, 235 (1991).

37. Mark S. Neustadt, *Is Marketing Good for Education?*, J.C. ADMISSION, Winter 1994, at 21.

38. *See* Hazel Glenn Beh, *Student Versus University: The University's Implied Obligations of Good Faith and Fair Dealing*, 59 MD. L. REV. 183, 193 (2000).

student's schedule and interests, and not vice versa.<sup>39</sup> Indeed, many colleges cater their programs to consumer-oriented students, and have influenced the market in a dramatic way, encouraging even those schools who wish to maintain a traditional image to rethink how they sell education and treat students as consumers.<sup>40</sup>

Courts must scrutinize the nature of modern education to decide if it remains entitled to extraordinary deference. Undoubtedly, education serves an important role in society; yet, no rationale justifies a unique and peculiarly harsh treatment of students in litigation. Indeed, most schools now resemble small towns instead of intimate collegiate institutions. Without a well-defined judicial role, the deference accorded to institutions of higher education leaves students vulnerable and without an adequate remedy when those institutions place their own economic goals over their students' needs. Though some courts are understandably reluctant in certain cases to step into the middle of university-student disputes, and they correctly note that it is inappropriate to substitute their own judgment for the institution's academic and management decisions, they nevertheless must find a comfortable role that acknowledges the consumer nature of the student-university relationship. After all, students lose other opportunities when they purchase an educational product from an institution of higher education. The judicial deference historically accorded to institutions of higher education making academic policy modifications is misplaced, and courts should not hesitate to intervene on behalf of injured student claimants.

## II. ANALYSIS OF STUDENT LEGAL THEORIES

This Section discusses the complicated and vague university-student legal relationship. Some aspects of the relationship are analogous to commercial contracts, yet other aspects of the relationship seem to reveal that the student-university relationship is also status-oriented and described in associational terms. Courts have struggled over the last half-century to find a unifying theory with which to define the student-university relationship and resolve conflicts that arise between students and the universities they attend. Courts have relied on principles of contract, estoppel, and quasi-contract and implied-in-law principles to evaluate student claims. When an institution changes its academic policies or criteria in its various programs, the interests of the university and the student may

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39. See William A. Kaplin & Barbara A. Lee, *A Legal Guide for Student Affairs Professionals* § 12.3.3.3, at 542 (1997). The Student-Right-to-Know provisions of the Higher Education Act evidences congressional recognition that higher education is a product and that parents and students are properly asking more consumer-oriented questions before making the decision to attend a particular college or university. H.R. Rep. No. 101-518, at 1-2 (1990), reprinted in 1990 U.S.C.C.A.N. 3363, 3363-64 at 3364.

40. It is further noteworthy that schools themselves have contributed to the commercialization of education by an increasing involvement in nonacademic enterprises, such as retirement homes, vacation homes, and real estate development. See Eric N. Berg, *Academic Capitalism Helps Make Ends Meet*, N.Y. TIMES, Jan. 5, 1986, at 39.

collide, and courts will again be asked to intervene on the behalf of injured students.

Undoubtedly, many courts have chosen in many situations not to interfere in university-student disputes at all for fear of encroaching upon the university's academic judgment. However, courts striving for equitable results to both universities and students given the modern nature of their relationship may follow in the direction of other courts under contract and estoppel theories. Most court opinions regarding student-university disputes do not build a complete framework with which to evaluate student claims. This Part attempts to build such a framework by imposing some organization on the legal principles emerging from student-university dispute cases. The following discussion illustrates the routes a court may pursue if it chooses to shed its deferential view and adjudicate student claims on their merits.

### A. Contract Theory

The most frequently used legal claim of students for challenges against institutions of higher education at present is contract law. This legal theory is also the most successful by students. Much reputable authority holds that a contractual relationship exists between the student and the university.<sup>41</sup> Essentially, the contract is the agreement that if the student pays tuition and achieves satisfactory results in the course of study, the student will eventually receive a degree.<sup>42</sup> The obvious sources of such contract rights are university catalogues, student handbooks, "guidelines," and other published texts on the one hand, and oral representations by teachers and administrators on the other. This section discusses the student-university contract and its primary sources, the terms of the contract, and the interpretation of those terms, including how

41. See *Kraft v. William Alanson White Psychiatric Found.*, 498 A.2d 1145, 1148 (D.C. 1985) (interpreting terms in School of Psychiatry catalogue creating contract); *DeMarco v. Univ. of Health Scis.*, 352 N.E.2d 356, 366 (Ill. App. Ct. 1976) (ordering school to issue degree to plaintiff in recognition of student's fulfillment of contract between university and student); *Booker v. Grand Rapids Med. Coll.*, 120 N.W. 589, 591 (Mich. 1909) (finding student has contractual right not to be arbitrarily dismissed from college); *Barker v. Bryn Mawr Coll.*, 122 A. 220, 221 (Pa. 1923) (stating that private college's relationship with students is contractual); Victoria Dodd, *The Non-Contractual Nature of the Student-University Contractual Relationship*, 33 U. KAN. L. REV. 701, 702-09 (1985) (tracing development of student-university contractual relationship).

42. See, e.g., *John B. Stetson Univ. v. Hunt*, 102 So. 637, 640 (Fla. 1924) (noting that implied condition of contract between student and institution is that student will follow rules and regulations of school and that such terms and conditions are those set forth by publications of institution at time of student's enrollment); *Univ. of Miami v. Militana*, 184 So. 2d 701, 704 (Fla. Dist. Ct. App. 1966) (accepting that conditions and terms for graduation are to be found in college's publications which are available to student at time of enrollment); *People ex rel. Cecil v. Bellevue Hosp. Med. Coll.*, 28 N.E. 253 (N.Y. 1891) (holding that college's announcement in its circulars specifying fees to be paid, course of study, and necessary qualifications for degree are terms of offer that, once accepted by student, must be fulfilled by college).

specific the terms must be to be enforced, the effect of a catalogue disclaimer, and some other various rules governing contract interpretation in the academic challenge setting.

1. *The Source: The College Catalogue.*—Colleges make representations and offer their terms of enrollment to students both orally and through certain printed resources, in particular the college catalogue.<sup>43</sup> One of the reasons that the college catalogue is so useful to determine exactly what promises are made to a student is because the policies and procedures outlined in the catalogue are definite and measurable.<sup>44</sup> The typical college catalogue contains policies and procedures concerning admissions, financial aid, registration, academic and disciplinary matters.<sup>45</sup> The catalogue also outlines other requirements and expectations, including grade-point-average requirements, required courses, and application procedures.<sup>46</sup>

The college catalogue serves marketing and informative purposes. The catalogue is intended to inform students of the college's expectations, advise students of the requirements and the standards of the college, and describe the educational offerings and the other resources of the institution.<sup>47</sup> Again, although one of the catalogue's functions is to advertise for the institution by offering statements on the high quality and excellence of the institution, the college's objectives, and the college faculty, the catalogue also tries to convey the substance of the agreement between the student and the university, or at the least the expectations that the student should have of the institution and vice versa.<sup>48</sup>

College catalogues often contain dull, technically-written descriptions of courses, degree requirements, schedules, and procedures. Colleges make both very vague and very specific promises and representations to students in their catalogues. On a general level, colleges promise to educate and to enhance the attending student's life and character.<sup>49</sup> On a more specific level, the college institution might also inform students of the faculty-student ratio, the credentials of its faculty, the value of a degree, the costs of education, the courses offered, and the specific degree requirements of the institution.<sup>50</sup>

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43. See *Zumbrun v. Univ. of S. Cal.*, 101 Cal. Rptr. 499, 504 (Ct. App. 1972) (stating that "catalogues, bulletins, circulars, and regulations of the institution made available to the matriculant become part of the [student-university] contract"); David Davenport, *The Catalog in the Courtroom: From Shield to Sword?*, J.C. & U.L. 201, 202 (1985).

44. Davenport, *supra* note 43, at 202.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 202, 208 ("Although it is not generally labeled as a contract and the parties do not sign it, the catalog is widely considered the central document in the university-student contractual relationship.").

49. See *Trs. of Columbia Univ. v. Jacobsen*, 148 A.2d 63, 67 (N.J. Super. Ct. App. Div. 1959).

50. Johnson & David Sallee, *Marketing Your College as an Intangible Product*, J.C. ADMISSION, Summer 1994, at 19.

Most frequently, a court does not dispute the existence of a student-university contract, but focuses its efforts on deciphering what exactly each party has obligated itself to do; this is where the language of the catalogue, what it contains, and what it is understood to be by the entering student is of utmost importance.

2. *Unconscionability—Is There a Contract at All?*—Despite the obvious adhesions attributes of the student-university contract, including those one-sided, take-it-or-leave-it express terms in the catalogue as well as the general vulnerability of students,<sup>51</sup> courts do not generally find that the contract between the student and the institution is unconscionable.<sup>52</sup> Adhesion contracts are not necessarily unconscionable as long as the terms are fair; but, if there is a lack of meaningful choice and unequal bargaining power, unfair provisions within a contract generally are subject to a heightened vulnerability to judicial intervention.<sup>53</sup> Though most courts do not find that a student-university contract is unconscionable, several successful claims of unconscionability have been found in proprietary trade school cases.<sup>54</sup>

Interestingly enough, courts seldom consider the relative age, immaturity, economic status, or lack of education of students as factors to evaluate the unconscionability of a student-university contract, even under those precise circumstances that they would recognize unconscionability in a contract case in another context. In fact, demonstrating this peculiarity, one court implied an equality of sophistication when it noted that the student-plaintiff “was not an unsophisticated teenager at the time and admitted that she was familiar with university ‘ropes.’”<sup>55</sup>

Interestingly, when a university benefits by enforcing a contract between itself and a student, courts generally find the contract valid and not unconscionable on the grounds that the student is indeed a savvy, sophisticated shopper of higher education.<sup>56</sup> It is those precise qualities which have led courts to dispose with the doctrine of *in loco parentis* and rely on contract principles to resolve student challenges in the first place. Ironically, it is this precise recognition of contract principles that has allowed the court to bind students to the agreements they made when they enrolled at their college and lends support to the position that commercial contract principles should be used when the student stands to benefit from enforcing the same contract. It seems that the court’s refusal to find university-student contracts unconscionable, along with its

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51. See generally Dodd, *supra* note 41, at 714-18 (discussing adhesion contracts and arguing that the “student-university contractual relationship” is an example of an adhesion contract).

52. Davenport, *supra* note 43, at 212-13 (noting courts’ reluctance to apply the doctrine of unconscionability in the student-university relationship).

53. *Id.*

54. See, e.g., Weaver v. Am. Oil Co., 276 N.E.2d 144, 148 (Ind. 1971).

55. Hershman v. Univ. of Toledo, 519 N.E.2d 871, 876 (Ohio Misc. 1987).

56. See generally Don F. Vaccaro, Annotation, *Absence from or Inability to Attend School or College as Affecting Liability or Right to Recover Payments for Tuition or Board*, 20 A.L.R.4th 303, 306 (1983).

reasons for doing so, supports the proposition that the court should apply commercial contract principles to a challenging student's claim and not make a finding that the student-university relationship is somehow "unique." If the student was a savvy buyer who had shopped around for this particular school which had made particular promises in its contract, then the university should be held to the terms which it had promulgated as a part of its enticement to the challenging student. Is there a contract at all? The courts have almost without exception answered yes. The reasons the courts have rejected the contention that the student-university contract is unconscionable are the precise reasons why contract law should be used to afford students more protection.

3. *What Are the Terms of Student-University Contract?*.—A number of rules guide the interpretation of contracts. Some of these rules of interpretation found in most major contract hornbooks have been particularly helpful to many courts hearing student-university disputes, and offer particular devices that may help courts determine which factors to weigh when resolving the precise terms to which the university and the student have obligated themselves.

a. *Catalogue disclaimers and the possible boilerplate problem.*—Although a college's catalogue may constitute the written part of the contract between the educational institution and the student, many college catalogues also contain broad language disclaiming liability and reserving the institution's right to alter the contract.<sup>57</sup> The disclaimer contained in most catalogues is very similar in nature. Many educational institutions have added the disclaimer to the beginning of their most recently-published catalogues in response to the complaints and possible suits by injured students.<sup>58</sup> Anderson University's catalogue contains a typical disclaimer:

The university and its various units reserve the right to revise, amend, alter and change from time to time its policies, rules, regulations and financial charges including those related to admission, instruction and graduation, without notice to students. The university reserves the right to withdraw curricula and specific courses, alter course content, change the calendar and withdraw or change programs and majors offered by the university without notice to students.<sup>59</sup>

In addition to reserving the right to change anything and everything, some catalogues specifically disclaim contractual liability as well.<sup>60</sup> The Anderson University catalogue further states: "The material contained in the Anderson University Undergraduate College Catalogue is for information only and does not

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57. See *Basch v. George Washington Univ.*, 370 A.2d 1364, 1366-67 (D.C. 1977) (relying on a reservation of rights clause to justify an abrupt and marked tuition increase at a medical school); *Eisele v. Ayers*, 381 N.E.2d 21, 26 (Ill. App. Ct. 1978) (upholding a university's reservation to increase tuition).

58. See, e.g., ANDERSON UNIV., CATALOGUE (2001-03); BUTLER UNIV., CATALOGUE (2000-02); PURDUE UNIV., CATALOGUE (2000-02); see also *supra* notes 1, 6, 9, and 13.

59. ANDERSON UNIV., CATALOGUE (2000-02), at 2.

60. *Tobias v. Univ. of Tex.*, 824 S.W.2d 201, 211 (Tex. App. 1991).

constitute a contract between the student and the university.”<sup>61</sup> If interpreted literally, then the pages of pictures and descriptions are meaningless, and the school has essentially promised nothing at all to the student.

Courts have been inconsistent in interpreting the meaning of the disclaimer’s effect on the student-university contract.<sup>62</sup> Some courts, even after they have held that the implied contract between students and the university encompasses more than only the provisions of the catalogue, nevertheless hold that the disclaimer, even a broad-sweeping or severe one, is a valid waiver of contractual liability for representations made to students and for program modifications after enrollment.<sup>63</sup> On the other hand, many courts regard the express disclaimer within the catalogue as completely ineffective in the broader context of the relationship.<sup>64</sup> As a sort of middle ground, other courts have interpreted disclaimers within catalogues as valid only to the extent the changes to policies and terminations of the educational programs are instituted in good faith and are not arbitrary.<sup>65</sup>

**The Boilerplate Problem:** According to Murray, no set of problems in modern contract law may be more perplexing than those associated with the massive use of standardized, printed writings to evidence the contract.<sup>66</sup> The basic problem may be stated as follows: since virtually no consumer bothers to read the printed clauses in documents in regular use, is the non-drafting party bound by all the terms contained in the document? One view responds that one is bound by the terms of a form whether she read it or not; this view has been deemed unrealistic as demonstrated by the continuing failure of consumers to read the boilerplate provisions of standardized forms. There have always been exceptions to the idea that one is bound to a particular document whether he reads it or not.<sup>67</sup> This problem is akin to what Murray calls the “battle of the forms” where merchants do not read or understand their own printed forms, much less those received from the other party.<sup>68</sup>

Murray points out the substantial intersection between the problem of

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61. ANDERSON UNIV., CATALOGUE (2000-02), at 2.

62. See Davenport, *supra* note 43, at 221.

63. Tobias, 824 S.W.2d at 211.

64. See Craig v. Forest Inst. of Prof'l Psychology, 713 So. 2d 967, 969, 973-76 (Ala. Civ. App. 1997).

65. The middle ground applies in quasi-contract and implied-in-law contracts discussed in Part II.C. See also Lesure v. State, No. 89-347-II, 1990 WL 64533, at \*3 (Tenn. Ct. App., May 18, 1990).

66. John E. Murray, Jr., *The Standardized Agreement Phenomena in the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 735 (1982).

67. These exceptions include documents that may not even be contractual such as checks and invoices, when one party signs under duress or misrepresentation, and where a contract is unconscionable. See Charles v. Charles, 478 S.W.2d 133 (Tex. App. 1972) (holding a written statement in promissory note not part of the contract).

68. See John E. Murray, Jr., *The Chaos of the “Battle of the Forms”*: Solutions, 39 VAND. L. REV. 1307, 1317 (1986).

whether one is bound by particular printed clauses and the concept of unconscionability discussed in the previous section: certain boilerplate provisions in agreements are not binding because they would result in "surprise or hardship" to the party against whom they are designed to operate.<sup>69</sup> The relationship between these concepts is designed to permit courts to exercise their power to remove terms that do not manifest apparent assent.<sup>70</sup> The *Restatement (Second)* adds more clarification: "[w]here the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement."<sup>71</sup>

A party has "reason to believe" that the other party would not have manifested assent to the agreement if the inclusion of a particular term is "bizarre or oppressive, from the fact that it eviscerates the non-standard terms explicitly agreed to, or from the fact that it eliminates the dominant purpose of the transaction."<sup>72</sup> If the term is hidden, then the "adhering party" had no opportunity to read the term, and the inference is further reinforced.<sup>73</sup> However, the Restatement no place suggests that "reason to believe" is predicated upon the terms being illegible or hidden.<sup>74</sup>

Applying these settled principles to the disclaimer of liability in college catalogues regarding the academic obligations of the university and the student, if the college has "reason to believe" that the students would not assent to the agreement if they understood what the disclaimer would mean for the student's and the university's obligations, then the disclaimer is not part of the agreement.<sup>75</sup> First, the college has "reason to believe" the student would not assent if the particular term is "bizarre or oppressive;"<sup>76</sup> the court may note the student's poor bargaining under this language, position or lack of expertise and find the disclaimer term itself bizarre or oppressive, and thus give it no effect. However, this is unlikely because courts have almost uniformly held that the general contract between the student and the university is not unconscionable.<sup>77</sup> Of course, the court may nevertheless deem the particular language and

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69. JOHN E. MURRAY, JR., *MURRAY ON CONTRACTS* § 97(A), at 503 (3d ed. 1990).

70. *Id.* at 504.

71. *RESTATEMENT (SECOND) OF CONTRACTS* § 211(1) (1981) [hereinafter *RESTATEMENT*].

72. *Id.* § 211 cmt. f.

73. *Id.*

74. *Id.*; see also *MURRAY*, *supra* note 69, at 505. Also, the test is very similar to that of unconscionability, leading critics to argue that if a term is legible, then it is not governed by this section in the Restatement, but should be governed by the unconscionability sections, *id.*; however, the language of the Restatement here with respect to hidden clauses includes "eviscerate the non-standard terms explicitly agree to" and "the dominant purpose of the transaction," language which does not exist in the unconscionability tests. Thus, though the test here is similar to the one for unconscionability, it is not identical, and the court may find a term unenforceable even if the contract as a whole is enforceable. *Id.*

75. See *supra* note 71.

76. See *MURRAY*, *supra* note 69, at 505.

77. See *supra* note 52.

placement of the disclaimer in the catalogue as oppressive even where it finds the contract as a whole enforceable.

Secondly, the college has “reason to believe” the student would not assent if the particular term “eviscerates the non-standard terms explicitly agreed to.”<sup>78</sup> This language serves to draw into doubt the validity of a clause disclaiming all liability because the disclaimer would explicitly conflict with the rest of the catalogue, where pages upon pages of promises, descriptions and obligations of students, faculty, departments and registrars are set forth. In most cases, the other promised terms in the catalogue, such as course requirements and majors offered, may certainly be characterized as “non-standard terms explicitly agreed to”<sup>79</sup> by students because it was likely upon those criteria that the students selected the particular college and programs they chose. Students choose the college they wish to attend because of the education and college life offered,<sup>80</sup> not because of the standard disclaimer of liability in the catalogue. It would not be a stretch for a court to disregard a clause disclaiming liability for changing the terms of its catalogue because the term would eviscerate the non-standard terms to which the parties explicitly agreed.

Third, the college has “reason to believe” the student would not assent if the particular term “eliminates the dominant purpose of the transaction.”<sup>81</sup> The “dominant purpose” of the transaction between the student and the university is for the student to conform and obligate herself to the rules and procedures contained in the college catalogue and handbooks in return for those promises obligating the college to confer upon the student that which it stated it would in its own college catalogue.<sup>82</sup> If the university’s disclaimer of liability “reserves the right to revise, amend, alter and change from time to time its policies, rules, regulations and financial charges including those related to admission, instruction and graduation, without notice to students . . . and to withdraw curricula and specific courses, alter course content, change the calendar and withdraw or change programs and majors offered by the university without notice to students,”<sup>83</sup> the disclaimer is arguably diametrically opposed to the very purpose of the transaction. The court may disregard the disclaimer for changing the terms of its catalogue because the term eliminates the dominant purpose of the transaction; in that case, the court may eliminate the clause altogether, or the court may choose to limit the degree to which the clause allows the institution to make modifications to its catalogue that would “eliminate the dominant purpose of the transaction.”<sup>84</sup>

The courts have also fashioned a concept called the “reasonable expectation” test for such boilerplate provisions: the parties are bound by those terms in a

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78. RESTATEMENT, *supra* note 71, § 211 cmt. f.

79. *See id.*

80. *See supra* note 39.

81. RESTATEMENT, *supra* note 71, § 211 cmt. f.

82. *See supra* note 48.

83. *See* ANDERSON UNIV., CATALOGUE (2000-02), at 2.

84. *See* RESTATEMENT, *supra* note 71, § 211 cmt. f.

printed document that they *reasonably expect* document to contain, regardless of what the actual document contains.<sup>85</sup> Thus, if the written agreement contains unexpected, materially risk-shifting terms, the non-drafting party is not bound to those terms.<sup>86</sup> This test is most often used by courts in the “take-it-or-leave-it” contracts, such as insurance contracts and automobile sales.<sup>87</sup>

Applied to catalogue clauses disclaiming liability, the court may find that a particular disclaimer fails to meet the reasonable expectation test. In the first regard, it is not dispositive whether the document actually contains the provision, it is only relevant what the students expect the catalogue to contain.<sup>88</sup> If the disclaimer is risk-shifting, the court may find it does not meet the reasonable expectation test. Since the disclaimer effectively obligates the university to do nothing despite its many pages of specific promises regarding major coursework, grading policies and student behavior, the entire risk of enrolling at the college rests squarely and solely upon the students. Furthermore, the college catalogue terms are typically “take-it-or-leave-it” terms because the student cannot negotiate the terms in the catalogue. Thus, if a court adopted the “reasonable expectation” test, it would not have much trouble concluding that it has not been met regarding a disclaimer of liability in a catalogue.

In sum, a court may find that a clause disclaiming liability should not be enforced if the college has “reason to believe” that the students would not assent to the agreement if they understood what the disclaimer would mean for their and the university’s obligations. The court may note the students’ poor bargaining position or lack of expertise and thus find the disclaimer term bizarre or oppressive, it may disregard a clause disclaiming liability for changing the terms of its catalogue because the term would eviscerate the non-standard terms to which the parties explicitly agreed, or it may disregard the disclaimer for changing the terms of its catalogue because the term eliminates the dominant purpose of the transaction. Furthermore, the court may choose not to exclude the disclaimer term altogether, but to limit the degree to which the clause allows the institution to make modifications to its catalogue that would eliminate the dominant purpose of the transaction. The court may also find the disclaimer clause in a student catalogue should not be enforced because it does not meet the “reasonable expectation” test. Thus, there are several ways that a court may alleviate the harsh all-encompassing disclaimer in college catalogues by applying settled principles of contract law regarding boilerplate clauses. However, if a court chooses to defer heavily to the educational institution, it may find that the disclaimer clause, however broad and encompassing, is a valid waiver of all the students’ contract protections.

*b. Specificity of terms.*—The principle requiring definiteness or specificity generally maintains that, even though the parties intended to form an agreement, if the terms of their agreement are not sufficiently definite or reasonably certain,

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85. MURRAY, *supra* note 69, at 506.

86. *Id.*

87. *Id.*

88. *Id.*

then the contract, or at least the part that lacks sufficient specificity, does not exist.<sup>89</sup> At some point, the terms of an agreement may be so unclear that a court will not be able to determine whether any breach occurred because the court cannot be certain of what may have been breached.<sup>90</sup> The modern tendency is found in *Restatement (Second)* and focuses on the overriding question of whether the parties manifestly intended to make an agreement; if that can be shown, the remaining concern is whether the terms are definite enough to permit the courts to appropriate a remedy.<sup>91</sup> Professor Corbin summed up the principle of definiteness nicely: “[a] court cannot enforce a contract unless it can determine what it is.”<sup>92</sup>

Students sometimes allege that their college misrepresented certain specific characteristics of their program, that officials gave false assurances of student ability to succeed or to find employment, that the institution failed to follow or changed stated procedures or prescribed requirements, or that the school failed to deliver the program as it specifically promised.<sup>93</sup> Contract claims that challenge the general quality of instruction and are not based on specific breaches that are objectively verifiable are more likely to fail because the promises are often too vague and illusory.<sup>94</sup>

However, courts tend to shed their deferential view when colleges make concrete representations. For example, when personnel misrepresent the type and quality of equipment and facilities available to recruiting students, the claim of misrepresentation is potentially viable, or when schools misrepresent the accreditation status of the school, or fail to deliver the educational program promised, the claims may succeed if the terms the college allegedly breached were sufficiently specific.<sup>95</sup> Though vague promises about a student’s future

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89. MURRAY, *supra* note 69, § 38(A); *see also* Ault v. Pakulski, 520 A.2d 703 (Me. 1987); Porter v. Porter, 637 S.W.2d 396 (Mo. Ct. App. 1982).

90. *See, e.g.*, Klimek v. Perisich, 371 P.2d 956 (Or. 1962). Many older cases found indefiniteness to be fatal; however, modern courts are much less willing than their predecessors to regard indefiniteness as fatal. *See In re Sing Chong Co.*, 617 P.2d. 578 (Haw. Ct. App. 1980). Modern courts follow the following policy: “[t]he law leans against the destruction of contracts for uncertainty.” *Id.* at 581.

91. MURRAY, *supra* note 69, § 38(A).

92. 1 CORBIN CONTRACTS § 95, at 394 (1963).

93. *See* Blane v. Ala. Commercial Coll., Inc., 585 So. 2d 866, 868 (Ala. 1991) (finding that recovery under a breach of contract or fraud claim is unavailable when a college merely promised that the student would have the minimum skills necessary for a job in a particular field); Dizick v. Umpqua Cmty. Coll., 599 P.2d 444, 445 (Or. 1979) (en banc) (holding that the college made fraudulent misrepresentations when representatives of the college told a student that he could receive advanced welding training).

94. Gupta v. New Britain Gen. Hosp., 687 A.2d 111, 119-20 (Conn. 1996) (holding that general claims about quality are not actionable).

95. *Dizick*, 559 P.2d at 449 (reinstating a damages award to a student where a community college falsely represented the type of equipment that would be available to him in welding classes); Lesure v. State, No. 89-347-II, 1990 WL 64533, at \*4-5 (Tenn. Ct. App. May 18, 1990) (finding

advantage in the job market are generally not actionable (such as when a student is not prepared for a particular job), institutions are certainly more vulnerable to student claims when the student alleges that the institution made specific and objectively determinable promises or representations. These promises, if sufficiently specific, are a part of the agreement between the student and the university and are enforceable, whether the promise was made in a college catalogue, by a recruiter, or in the college's promotional materials.

The degree of specificity of the terms outlining an institution's academic policies may well determine whether a student challenge regarding those academic policies when modified by the university will be successful. The academic terms at issue in those disputes may include such items as course content, grading criterion, grade-point-average requirements for graduation, or courses required to graduate with a particular major.<sup>96</sup> On one end of the spectrum, it may be very clear to a court what the parties expected from the presence of a particular term, such as where a catalogue term dictates that a history major must take at least two courses from European history courses offered.<sup>97</sup> On the other end of the spectrum, it may be very ambiguous what the parties expect from a particular term, such as where the college catalogue states that a particular course cannot be taken until either a prerequisite course is completed or the student gets her faculty advisor's permission, and then the student actually enrolls in the course assuming her faculty advisor would grant permission, and the faculty advisor later indeed affirms that such permission would have been given.<sup>98</sup>

In the case of modified academic policies, such as a specific term in the college catalogue prescribing the grading scheme or effective curve that professors should use to grade students, the court will likely consider the specificity with which the term is stated in the catalogue as a factor when determining if that term was breached by the modification. For example, where a college does not state its grading scheme at all, students likely have less chance of success in challenging the modification of the grading scheme; whereas a college that prescribes in detail in its catalogue circulated to students the precise grading curve, or the precise grading scheme, the court will more likely consider that term's modification without consent a breach of contract. In sum, if the promise made by the educational institution is specific, it is much more likely that a court will enforce that provision.

*c. The transaction must be viewed as a whole.*—The guiding principle that the transaction must be viewed as a whole states that different parts of an agreement must be viewed together, i.e., as a whole, and each part interpreted in

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liability where the university misrepresented that the respiratory therapy school was accredited); *Am. Commercial Colls., Inc. v. Davis*, 821 S.W.2d 450, 452 (Tex. App. 1991) (finding a breach where a catalogue promised such things as qualified teachers, modern equipment, a low teacher to student ratio, and excellent training aids).

96. *Hershman v. Univ. of Toledo*, 519 N.E.2d 871, 876 (Ohio Misc. 1987).

97. *See, e.g., ANDERSON UNIV., CATALOGUE* (2000-02), at 100.

98. *See, e.g., id.* (caption number 4650).

the light of all the other parts.<sup>99</sup> Thus, an interpretation which gives meaning to every part of the agreement will be preferred to one that gives no effect to a part.<sup>100</sup> A corollary to the rule that the contract should be interpreted as a whole is that all of the different writings relating to the same agreement should be interpreted together.<sup>101</sup>

Applied to terms found in the college catalogue that prescribe the academic obligations of the university and the student, the court will look not just at the term at issue in isolation, but also at the other obligations as the parties understood them at the time the parties committed to their agreement. For example, when a college catalogue prescribes a particular grading scheme in its catalogue, the court should also look to other sections in the catalogue, in the student handbook, and in other writings that give effect to that grading scheme. Thus, the court may observe the grade point average (GPA) required to maintain scholarships in one section of the catalogue, the GPA required to remain in good standing in another section of the catalogue, the GPA required to receive academic honors in another section of the catalogue, the GPA required to participate in extracurricular activities in the student handbook, and the GPA required by that school's graduate school programs in different writings or catalogues altogether. The requirements in each of these materials together must be interpreted in the light of all the other parts, and an interpretation which gives meaning to every one of those sections of the agreement will be preferred.

With this principle in mind, on the one hand, a court may determine that the GPA requirements in every section, including the section which outlines the grading scheme, were designed in such a way to reward certain categories of students (those with high GPAs) and punish other categories of students (those with low GPAs).<sup>102</sup> That design, as a whole, constitutes the terms to which the student agreed to submit to evaluation; thus, modifying only one section, such as the section outlining the grading scheme, also alters the effective terms outlined in the other sections.<sup>103</sup> In that instance, the court could easily find that modifying one aspect of the grading policy, without adjusting the other terms accordingly to not punish or reward students in different categories than would have been punished or rewarded under the terms the students agreed, would constitute a breach of those terms. Thus, this rule of interpretation may aid those students injured by losing scholarship moneys, good standing, academic honors, or denial to their school's graduate program by virtue of the modification.

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99. MURRAY, *supra* note 69, § 88(A); *see also* RESTATEMENT, *supra* note 71, § 202(2) cmt. d.

100. *Intertherm, Inc. v. Coronet Imperial Corp.*, 558 S.W.2d 344 (Mo. App. 1977).

101. *See Paisner v. Renaud*, 149 A.2d 867 (N.H. 1959); RESTATEMENT, *supra* note 71, § 202(2).

102. For example, GPA requirements for academic honors reward the students with high GPAs, and GPA requirements for academic dismissal punish students with low GPAs. *See supra* notes 6, 8.

103. *See supra* notes 8-13 (explaining the harm when a college changes one aspect of its grading policy without adjusting for the change in other sections).

On the other hand, if a court defers to the judgment of the college because of its unique character as an institution of higher education, and because the grading policy seems academic in nature and thus left to the college's expert judgment, then the court will likely conclude the modification is not a breach. However, the court would still need to explain why a change in the "academic" section that produces many effective modifications in other sections that are not academic in nature is not a breach of those terms.

*d. The public interest should be favored.*—If the agreement in question affects the public interest, it is often stated that an interpretation will be preferred that is most favorable to the public interest.<sup>104</sup> This rule is closer to one of construction than interpretation because the theory is not that it aids in determining the intention of the parties, but that it is based on the policy that it is desirable to favor the public interest where there is doubt as to the intended meaning.<sup>105</sup>

Applied to terms addressing the academic obligations of the university and the student, the courts have noted that there is certainly a public interest that should be taken into account before any substantial modifications are enacted. Community groups, affected businesses, alumni, donors, and others are particularly situated to have their voices and opinions considered by college decision-makers regarding university administrative or academic decisions.<sup>106</sup> Participation by such interest groups should be liberally granted in such cases where broad community interests are at stake. The court demonstrates how important it believes these public sentiments to be because after litigation commences, even where those groups are not parties to the litigation, their opinion provides a complete presentation of difficult issues so that the court may reach a proper decision.<sup>107</sup>

It is difficult to determine how these public interests would affect the court's evaluation of the modification without much speculation. One could speculate that certain businesses near a college campus would desire that the college keep as many students enrolled as possible, while graduate school admissions boards may desire that the college institute more strict grading policies to help them evaluate students' undergraduate work. In any event, when interpreting exactly what a catalogue term promises, the court should pay attention to what interpretation would be most favorable to the public interest.

*e. The subsequent conduct of the parties should be considered.*—Evidence that the parties have started to perform and their performance manifests a common understanding of the prior agreement will be given a great deal of

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104. MURRAY, *supra* note 69, § 88(E); *see also* RESTATEMENT, *supra* note 71, § 207.

105. MURRAY, *supra* note 69, § 88(E). This rule is used most frequently in challenges involving governmental units.

106. The courts welcome and encourage *amicus curiae* submissions from these entities in student-university cases. *United States v. El-Gabrownny*, 844 F. Supp. 955, 957 n.1 (S.D.N.Y. 1994).

107. *Alexander v. Hall*, 64 F.R.D. 152, 155 (D.S.C. 1974).

weight in determining the meaning of the agreement.<sup>108</sup> Sometimes the expression “course of performance” is used to refer to that conduct the parties engage in pursuant to their agreement.<sup>109</sup> Course of performance requires repeated occasions for performance with knowledge of the nature of the performance and opportunity for objection to it by the other party that would indicate acceptance of or acquiescence in such performance.<sup>110</sup> Furthermore, as few as two instances could qualify as “repeated occasions.”<sup>111</sup> Where there are repeated occasions for performance by one party with knowledge and opportunity for objection by the other party who does not object, there is no question that a course of performance has been established.<sup>112</sup> Also, if the parties have knowingly engaged in repeated occasions of performance which are inconsistent with the express terms of the contract, they have manifested their intention to modify their contract.<sup>113</sup>

Applied to terms addressing the academic obligations of the university and the student, it seems that a course of performance can be established rather easily. The court may view each semester of enrollment as a “repeated occasion” for performance; also, no objection on the part of the student to the manner in which the student is treated academically, though given the opportunity to object, would be considered acquiescence to that interpretation of the term in the agreement.<sup>114</sup> Once the “repeated occasion” and the “no objection” requirements are met, course of performance is established.<sup>115</sup> Thus, the court would lend a great deal of weight to the course of performance as it represents a common manifestation of their understanding of the prior agreement.<sup>116</sup> Once the terms of the agreement are interpreted with more specificity by the course of performance doctrine, any modification of the those terms can be considered breach of contract. An even more compelling situation exists where the term at issue was both expressly stated in the catalogue and then subsequent action by the university confirmed the modified contract language.

Thus, for example, if a university’s grading criteria were prescribed for in its academic catalogue, but reasonable persons could differ as to what the catalogue language actually meant, the court could use the rule of course of performance

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108. MURRAY, *supra* note 69, § 88(F); *see also* RESTATEMENT, *supra* note 71, § 204 cmt. g. “It is quite the universal holding that, where the interpretation of a contract is fairly debatable, the court will adopt the practical construction which the parties to the contract have heretofore adopted.” *Fort Dodge Co-op Dairy Mktg. Ass’n v. Ainsworth*, 251 N.W. 85, 87 (N.D. 1935).

109. MURRAY, *supra* note 69, § 89(E).

110. *Id.*

111. *Id.*; *Nanakuli Paving & Rock Co. v. Shell Oil Co.*, 664 F.2d 772 (9th Cir. 1981).

112. *Blue Rock Indus. v. Raymond Int’l, Inc.* 325 A.2d 66 (Me. 1974); MURRAY, *supra* note 69, § 89(F).

113. *See Westinghouse Credit Corp. v. Shelton*, 645 F.2d 869 (10th Cir. 1981).

114. Of course, the university must also not object; however, this will not likely be the issue because it is the university’s academic policy modifications that are generally at issue.

115. *See* MURRAY, *supra* note 69, at 432.

116. *Id.*

to conclude that the language was to be interpreted in accordance with the manner in which the university currently applies the grading criteria. Any subsequent modification of the current application of the grading criteria, even if reasonable persons could conclude that the modification is consistent with the catalogue's explicit terms, could thus be considered a breach of contract because the term was altered, provided that the challenging students either were not made aware of the change or objected to the change if they were aware of it.

The one difficulty faced by students regarding course of performance is that once an academic policy modification is made known to them, they must object or else risk modifying their contract with respect to that particular term. One of the requirements of a valid modification of a term is that the students have knowledge of the nature of the performance and be provided an opportunity for objection to it.<sup>117</sup> Therefore, if the students are not presented with a forum in which to learn about, and object to, a new academic policy modification, then they could not have acquiesced to the modification.

However, if the students are unmistakably made aware of new proposed academic policy changes, and have knowledge that the new modified policy affects their agreement with the university, and the students nevertheless do not object, then the court may consider the university contract modified to include the new academic policy. For example, even if a new grading change is inconsistent with the express terms of the catalogue, since the students have manifested their intention to modify their contract by having knowledge of the change and not expressing their objection, the new grading change will become the new term of the contract, and the students will not likely subsequently challenge the new academic policy.

*f. Construction against the drafter.*—It is a general rule of interpretation that an agreement is to be interpreted most strongly against the party responsible for its drafting.<sup>118</sup> The rule is particularly applicable where the person or party who drew the writing had special competence in the matter. The rule finds its most frequent application in cases dealing with insurance contracts and other contracts containing standardized terms.<sup>119</sup> The reason for the approach in this rule is that the drafter had control over the language and may have left the language less than clear so as not to assert the other party to certain troublesome possibilities of which the drafter now seeks a favorable interpretation.<sup>120</sup> Because the drafter is responsible for the unclear language, it should be interpreted against him even if he intended no advantage to himself in drafting it.

Applied to terms regarding the academic obligations of the university and the student, the student may benefit where a term in the catalogue is ambiguous. Because the college is the part that drafted the catalogue and is thus responsible for any possible unclear language, the ambiguous language should be interpreted against the college, even where the college did not intend to create an advantage

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117. *See id.*

118. *Id.* § 88(G); *see also* United States v. Turner Constr. Co., 819 F.2d 283 (Fed. Cir. 1987).

119. Nat'l Ins. Underwriters v. Carter, 551 P.2d 362 (Cal. 1976).

120. MURRAY, *supra* note 69, § 88(G); RESTATEMENT, *supra* note 71, § 206 cmt. a.

for itself.<sup>121</sup> Also, the university may not be vague in its terms only to ask the court to interpret the term in its favor. For example, if the college catalogue describes a particular grading system, and the new modified grading system is more detailed, so that it may be interpreted either as a new grading system (the students' position) or merely a more detailed description of the same grading system (the university's position), the students' interpretation will likely prevail.

These rules of interpretation will not apply in every circumstance in which an academic policy is challenged. However, one or more may be factors that the court weighs when considering how to interpret the contract language in the college catalogue, and the individual facts and context of each academic challenge will likely trigger the use of the various rules of interpretation, and thus make the determination of whether a breach of a term occurred at all a very fact-sensitive endeavor for the court.

6. *Summary of a Contract Theory of Liability.*—In summary, it is “black letter law” that a university catalogue, bulletin, or other such formal document helps to define the nature of the contractual relationship that exists between the university and a student.<sup>122</sup> On the other hand, an institution may retain a largely free hand if it takes the precaution of inserting a disclaimer in the catalogue stating that the institution reserves the discretion to make changes in academic regulations and course requirements from time to time. In such instances, the courts may not conclude that a student has an entitlement to be governed by the precise terms of the rules and regulations in effect at the time of matriculation.

On the other hand, the court may not necessarily conclude that every one of the university's obligations are discharged due to its disclaimer, especially if the court determines the disclaimer is of the boilerplate type that would only deprive the agreement of any substance at all. In that case, the court may endeavor to determine the true agreement between the university and student, using the common rules of contract interpretation to aid in that determination. In that instance, the determination of whether a breach of a term occurred may be more fact-sensitive, as each term must be determined in the context of the particular student-university relationship. Moreover, the specificity of the terms in the catalogue and the course of performance between the parties up to the time of the academic policy modification may be considered.

In an effort to safeguard academic freedom and discretion, many courts are reluctant to apply commercial contract principles across the board to the university-student relationship. At the same time, many courts have also recognized that the old doctrine of *in loco parentis* is not feasible any longer, and

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121. See MURRAY, *supra* note 69, § 88(G).

122. *Vidor v. Peacock*, 145 S.W. 672, 674 (Tex. Civ. App. 1912) (stating that the act of enrolling a student in school constitutes acceptance of a contract governed by terms embodied in school catalogue). Courts have sometimes been willing to hold both institutions and students to the terms of such publications. *Tex. Military Coll. v. Taylor*, 275 S.W. 1089, 1091 (Tex. Civ. App. 1925) (holding conditional verbal contract between student and school is binding despite unquestioned validity of legal proposition that catalogue constitutes written contract between educational institution and patron when entrance is under its terms).

have applied contract law in many situations. However, courts still largely defer to the institution of higher education where they deem the issue is better characterized as an academic matter.<sup>123</sup> Though historically accorded to institutions of higher education, this judicial deference is misplaced, and courts should not hesitate to intervene on behalf of student claimants. Institutions of higher education are becoming more commercialized in nature all the time, and no longer maintain the same status they did during Colonial times when the doctrine of *in loco parentis* was the legal rule applied to student-university disputes. Indeed, the academic expectations of both students and universities concerning their obligations to each other no less than demands that courts extend their willingness to depart from their deferential position and hear student academic claims. Furthermore, the court has many tools at its disposal to adjudicate these student claims, and there is no reason why the university should be afforded a unique position.

### B. Estoppel Theory

Action brought under a theory of estoppel is another way students may challenge academic and nonacademic decisions of the institutions of higher education that they attend. "The purpose of contract law is often stated as the fulfillment of those expectations induced by the making of a promise."<sup>124</sup> While the expectation interest has been recognized as the normal interest protected by contract law, it is also true that the reliance interest presents a greater claim to protection.<sup>125</sup> If a party has reasonably relied to her detriment on the promise of another, that party has suffered a loss which is an out-of-pocket quantity. In such an instance, estoppel theory reasons that the relying promisee is obviously injured, even without the strict adherence to the existence and breach of a contract, since the promisee has already suffered a measurable loss when the promisor refuses to perform.<sup>126</sup>

In order to succeed under an estoppel theory, section ninety of the *Restatement (Second)*<sup>127</sup> explains that there must be a promise<sup>128</sup> which the promisor must reasonably expect to induce reliance, and the promisee (or even a third party under the *Restatement (Second)* version) must actually rely.<sup>129</sup> The

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123. See *Slaughter v. Brigham Young Univ.*, 514 F.2d 622, 626 (10th Cir. 1975).

124. See MURRAY, *supra* note 69, § 66(A).

125. *Id.*; see also Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 373 (1936).

126. MURRAY, *supra* note 69, § 66(A).

127. Note that both *Restatement* and *Restatement 2d* are very similar, except for their provisions regarding partial enforcement.

128. *McCroskey v. State*, 456 N.E.2d 1204 (Ohio 1983). Some courts are willing to apply the doctrine where the promise and the details of the arrangement are not definite enough to be enforced if consideration had existed. See *Hoffman v. Red Owl Stores, Inc.*, 133 N.W.2d 267 (Wis. 1965).

129. See, e.g., *Landess v. Borden, Inc.*, 667 F.2d 628 (7th Cir. 1981).

*Restatement (Second)* differs from the first *Restatement* in one important regard: it created a flexible remedy that would permit either full or partial enforcement of the promise.<sup>130</sup> Using this seemingly small change, courts have used the estoppel device much more liberally, not limiting the device to the particular fact situations. For example, the theory can be found in various cases such as promises made by employers,<sup>131</sup> franchisors,<sup>132</sup> leases,<sup>133</sup> stock acquisitions,<sup>134</sup> and many other matters originally thought to be only matters of contract.<sup>135</sup> With this increased recognition of estoppel theory, the promisee may seek to have the promisor estopped after detrimental reliance can be shown; furthermore, the promisor is estopped to the degree that would make the relying party whole, which in many cases turns out to be in fact the expectation interests.<sup>136</sup>

Student plaintiffs have scored several victories using estoppel claims. Under an estoppel theory, a student-plaintiff argues that a professor or university administrator made a specific representation about graduation requirements, testing criteria, or other requirements. Accordingly, though the representations may have been inconsistent with the university's *actual* rule, since the student acted in detrimental reliance on the accuracy of the professor's or administrator's statement, the university is bound by the substance of such representation and is estopped from requiring that the student comply with the actual rule. Several cases demonstrate how an estoppel claim may be asserted, and indicate those factors which support an estoppel.

1. *The Estoppel Cases*.—One student success in an academic challenge based on estoppel theory is found in *Blank v. Board of Higher Education*.<sup>137</sup> In that case, an academic advisor at Brooklyn College told an undergraduate student that he was eligible to participate in an accelerated curriculum. In addition, the chairman of the student's department advised the student that he could take the two remaining major courses he needed at Brooklyn College without attending classes.<sup>138</sup> However, after the student satisfactorily completed the courses, the student learned that the college was going to deny him a bachelor of arts degree because he had not attended classes for the two courses he took.<sup>139</sup>

The president of Brooklyn College testified that the actual rule was that the

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130. See Reporter's Note to Restatement 2d § 90. The change was fostered by Professor Corbin who emphasized the origin of the action where damages were measured by the extent of reliance injury rather than by the value of the promised performance.

131. *Div. of Labor Law Enforcement v. Transpacific Transp. Co.*, 69 Cal. App. 3d 268 (Dist. Ct. App. 1980).

132. *Hoffman*, 133 N.W.2d at 267.

133. *Kramer v. Alpine Valley Resort, Inc.*, 321 N.W.2d 293 (Wis. 1982).

134. *Gruen Indus. v. Biller*, 608 F.2d 274 (7th Cir. 1982).

135. See, e.g., *Reeve v. Georgia-Pacific Corp.*, 510 N.E.2d 1378 (Ind. Ct. App. 1987) (discussing workmen's compensation benefits).

136. See MURRAY, *supra* note 69, § 66.

137. 273 N.Y.S.2d 796 (Sup. Ct. 1966).

138. *Id.* at 798-99.

139. *Id.*

college strictly enforced attendance requirements and did not grant credit for courses taken without attendance in class.<sup>140</sup> The court found that the student-plaintiff acted in reliance on the counsel and advice of administrators of the college,<sup>141</sup> and that the student spent time, money, and effort taking the recommended courses and completing them.<sup>142</sup> Because the student's claim satisfied all the elements of an estoppel claim, and because the student satisfied all the requirements for a Brooklyn College Bachelor of Arts degree, the court found in his favor and directed the college to confer upon Blank his degree.<sup>143</sup>

The court also made one other noteworthy finding: the president's statements were based on a Brooklyn College schedule of classes which became effective on the 1966-68 college bulletin, which was issued *after* the year the student-plaintiff enrolled for the two courses at issue.<sup>144</sup> This finding shows that at least one court thought it most equitable to evaluate a student's obligations as of the date of his matriculation, which was evaluated in this case by the explicit statements contained in the catalogue in place when the student-plaintiff matriculated. In sum, the court's holding in this case turns on the student's reliance to his detriment on specific representations made by agents of the college, but the court also indicates that the representation needed for a successful estoppel claim could also be found in the catalogue under which a student matriculates.

In *Healy v. Larsson*,<sup>145</sup> the student-plaintiff consulted with the dean, the director of admissions, the acting president, a guidance counselor, and the mathematics department chairman to establish a course of study leading to graduation. Even after the student successfully completed the subjects recommended to him, the school denied him the associate of arts degree because he failed to take the proper number of credits in his "concentration."<sup>146</sup> Following the example set forth in *Blank*, the court held that the student had satisfactorily completed a course of study at the community college as prescribed by authorized representatives of the college, and therefore ordered the college to grant the student the associates degree.<sup>147</sup>

The court in *Olsson v. Board of Higher Education of New York*<sup>148</sup> reached a different result. In that case, at a review session for an examination, one of the student-plaintiff's professors misinformed the student that he would have to pass three out of five questions on the test, when the college actually required its

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140. *Id.* at 800.

141. *Id.* at 802.

142. *Id.*

143. *Id.* at 802.

144. *Id.* at 800.

145. 323 N.Y.S.2d 625 (Sup. Ct. 1971), *aff'd*, 348 N.Y.S.2d 971 (App. Div. 1973), *aff'd*, 318 N.E.2d 608 (N.Y. 1974).

146. *Id.* at 626.

147. *Id.* at 627.

148. 412 N.Y.S.2d 615 (App. Div. 1979), *rev'd*, 402 N.E.2d 1150 (N.Y. 1980).

students to pass four of the five questions.<sup>149</sup> The actual rule was not written in any of the university's regulations or handbooks.<sup>150</sup> On the test, the student passed under the erroneous criteria (three of the five questions), but did not pass under the school's actual criteria for passing (four of the five questions). Despite the detrimental result to the student, the court found that the college manifested its good faith because it offered the student the opportunity to retake the examination.<sup>151</sup> Moreover, it would be pure speculation to argue that the student might have passed the examination even if he had known the actual rule. Thus, the court concluded that if it found for the student, then it would be interfering with the academic judgment of the faculty at the school.<sup>152</sup>

While estoppel claims have been rarer than contract claims in academic challenge cases, *Blank* and *Healy* represent the manner in which successful estoppel theories may be utilized for academic challenge cases by student-plaintiffs. Important qualifications seem to emerge from the cases: in both, the academic record of the prevailing student was strong and unquestioned. While there was no question about the student's academic competence in *Blank*, the same could not necessarily be said about the student in *Olsson*, who might have failed the examination even if he had not heard the professor's misstatement.<sup>153</sup> Further, the dispute over whether a diploma was due did not relate to the quality of the student's academic performance, but only whether the school should be bound by its own representations concerning the rules on discretionary matters such as class attendance policy and courses required for graduation.<sup>154</sup>

2. *Estoppel Applied to Academic Policy Changes*.—The principles of estoppel claims as described in these cases may be indicative of how a court would evaluate a student-university conflict where the university has changed its position regarding academic policies. For an estoppel claim to succeed, representations about policies or criteria made by the university must have been inconsistent with the university's *actual* alleged policies or criteria; additionally, the student must have acted in detrimental reliance on the accuracy of the misrepresented policy or criteria. If these representations are made and the student detrimentally relies on them, then the university is bound by the substance of the representation and is estopped from requiring that the student comply with the actual rule.<sup>155</sup>

First, the student-plaintiff must rely on her university's statements to her detriment. As the court in *Blank* noted, the university's misrepresentation can be

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149. *Id.* at 616.

150. *Id.*

151. *Id.* at 617.

152. *Id.*

153. *Id.*

154. *Id.* Thus, it is apparent that when faculty advisors misinform students about critical academic requirements, their misstatements may in some cases create both estoppel and contract claims against the university.

155. *Blank v. Bd. of Higher Educ.*, 273 N.Y.S.2d 796 (Sup. Ct. 1966).

found in the catalogue under which a student matriculates.<sup>156</sup> In an academic policy estoppel case, the *actual* rule is the modified policy or criterion, such as newly required courses in a particular major, changes in the number of credit hours needed for graduation, changes in the grading system, and the academic standards for honors, scholarships, and sports participation.<sup>157</sup> The *misrepresented* rule is the policy or criterion that was stated to the student either before or after the actual rule went into effect. As soon as the student makes a decision based on the misrepresented rule and the university imposes its actual rule on the student, placing that student in a worse position than she would have been in if the misrepresented rule had actually been in place, the student successfully shows detrimental reliance.<sup>158</sup>

Proving the existence of both the misrepresented rule and the actual rule necessary for a successful estoppel claim may be met rather easily if the college makes its policy change in one of its printed publications, such as its student catalogue. However, there are still two hurdles that the student must overcome in order to prevail: the student must demonstrate actual reliance and must establish that the university was not engaging in employing its academic discretion.<sup>159</sup>

In order to clear the first hurdle, the student must be deemed to have actually relied on the university's misrepresented rule. What constitutes actual reliance? In *Olsson*, the student relied when he took an examination, a one-time effort.<sup>160</sup> In *Blank*, the student had begun and had completed his educational program at his college.<sup>161</sup> In *Healy*, the student had begun the program at his college, but had not yet completed the program.<sup>162</sup> In order to have detrimental reliance, the student must have made a commitment to begin what she believed to be her part of the bargain, and have begun reliance by acting on that decision.<sup>163</sup> In situations where academic policies have been altered, there are two approaches. First, at one end of the spectrum, reliance could be deemed to exist once the student has begun the academic program. Second, at the other end of the spectrum, the student could be deemed only to have relied upon that portion of

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156. *Id.* at 800.

157. *See, e.g.*, ANDERSON UNIV., CATALOGUE (2000-02), at 37, where the catalogue dictates modified grading policies.

158. Detrimental reliance is not measured in magnitude, but mere status, especially concerning those matters which are subjectively valued in nature. *See* MURRAY, *supra* note 69, § 66.

159. *See id.* § 66(D).

160. 412 N.Y.S.2d 615, 616 (App. Div. 1979).

161. 273 N.Y.S.2d at 800.

162. 323 N.Y.S.2d 625, 626 (Sup. Ct. 1971).

163. Notice that the student, like in *Healy*, need not actually complete reliance. *See* MURRAY, *supra* note 69, § 66. The application of the actual reliance is not strict. In fact, promises are generally enforceable where commitments are made in furtherance of economic activity, regardless of whether there was any bargained-for-exchange; applied here, students must not show any bargained-for-exchange, but a mere commitment to hold up their end of the bargain promised by the college.

the program that she has completed, such as enrollment for one particular semester. Clearly, whether the student actually relied on any specific policy will be very fact-sensitive. For example, a change in program requirements, such as the number of hours needed to graduate, is more likely to be viewed under the former interpretation, whereas a change to the requirements under which students receive academic honors may be more appropriately viewed under the latter interpretation. The *Restatement (Second) of Contracts* indicates a preference for the former interpretation through its use of partial performance, provided that the promisee can show at least some minimal evidence of detrimental reliance.<sup>164</sup>

The second hurdle a student must overcome is to show that her reliance was not purely academic in nature. As explained in *Olsson*, the modified or actual rule may be imposed regardless of the student's reliance on another rule if that imposition reflects the academic judgment of the faculty that the student possesses the necessary skills to achieve an end which the actual rule does not actually prohibit.<sup>165</sup> Therefore, whether an estoppel claim will succeed turns on whether a court deems the particular case as academic in nature (in which it would likely follow the court in *Olsson* and defer to the judgment of the institution) or administrative or non-academic in nature. It is clear that performance on an exam is purely academic in nature (*Olsson*), while residence requirements (*Blank*) and required courses for a program (*Healy*) are non-academic. Though this will be discussed in more detail later,<sup>166</sup> suffice it to say that it may be this precise distinction may determine whether or not a particular estoppel claim brought by an aggrieved student will prevail in court.

3. *Estoppel Theory Summary*.—In conclusion, in deciding whether or not an estoppel claim will succeed, the court may need to determine first whether a particular issue is more appropriately characterized as “academic” in nature, and thus left to the institution, or whether the issue is more appropriately characterized as a discretionary matter, where the courts have had no problem interfering with the decisions of institutions whenever the student has actually detrimentally relied on misrepresentations regarding a policy by the university.

### C. *Quasi-Contract and Implied-in-Law Theory*

A student may also challenge an academic policy decision under a theory of quasi-contract and implied-in-law contract. This approach, characterized as a judicially-defined relationship and examination of good faith and fair dealing, allows the court to balance student expectations and university fiscal interests.<sup>167</sup> The quasi-contract and implied-in-law contract approach protects both student

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164. See *supra* note 130.

165. See *Olsson*, 412 N.Y.S.2d at 616.

166. See *infra* Part III.B.

167. This approach is not purely a quasi-contractual approach, though the court labels it as such. Quasi-contract actually results in a restitution remedy, where the court returns to the prevailing students those payments they made to the school, on the theory that the school received an undeserved benefit, having failed to meet its obligations to the students.

interests and the university's need to respond to academic market demands. By relying on custom and practice in higher education to determine the appropriateness of the university's decision to change a particular academic policy or program, a reviewing court may attempt to avoid judicial legislation while simultaneously avoiding the unfairness of excessive deference.<sup>168</sup>

1. *Beukas v. Board of Trustees of Fairleigh Dickinson University*.—The court in *Beukas v. Board of Trustees of Fairleigh Dickinson University* approached a student suit under the quasi-contract and implied-in-law theory.<sup>169</sup> The case offers a framework that allows courts to examine decisions made by colleges to change programs by balancing competing interests. When Fairleigh Dickinson University decided to close its dental college, degree candidates were disappointed. The university maintained that the decision was due to a financial necessity caused by the withdrawal of state aid.<sup>170</sup> The university set a closure date, suspended the enrollment of new students, and developed a process to phase out the dental program that allowed upper-class students to remain at the university until graduation.<sup>171</sup> The school also addressed affected students by assisting those students' transfers to dental schools in neighboring states, and even allowing each individual student the choice of immediate transfer or transfer at the closure of the university's program.<sup>172</sup> Lastly, the school ensured that its accreditation would remain intact through closure.<sup>173</sup> Despite all of these measures, the injured students filed suit.<sup>174</sup> The student-plaintiffs claimed that representations in the university's publications created a contract that the institution would remain functional until the completion of their degree programs.<sup>175</sup>

The *Beukas* court recognized that some discretion must be given to institutions making an administrative decision to terminate an academic program on the grounds of necessity.<sup>176</sup> The court considered how much protection

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168. This theory, which the court likely erroneously labels here as quasi-contract, is a good example of Ian Macneil's relational theory of contracts. See Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978). Macneil suggests that there are particular types of arrangements for which pure contract law does not work: typically those relations with traits such as complexity, multiple parties, increased duration, lack of discreteness, and interdependent obligations. There is a point at which the relation has become essentially a minisociety with a vast array of norms beyond those contemplated by contract law. *Id.* at 878. The student-university relationship may fall squarely into Macneil's relational theory.

169. 605 A.2d 776 (N.J. Super. Ct. Law Div. 1991), *aff'd*, 605 A.2d 708 (N.J. Super. Ct. App. Div. 1992).

170. *Id.*

171. *Id.* at 778-79.

172. *Id.* at 779.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at 781.

detrimentally-affected students deserve under circumstances where the university has unilaterally changed student academic programs or policies, and more specifically, under what circumstances the university may decide to terminate an entire college for financial reasons. The *Beukas* court also noted that the university-student relationship is complex and that many different interests are at stake in each of the university's decisions, and then declared that the university-student relationship is inadequately defined by contract doctrine.<sup>177</sup> Rather than an express or an implied-in-fact contractual theory, the court understood the relationship as quasi-contractual, or implied-in-law.<sup>178</sup> The university-student contract is one of mutual obligations implied, not in fact, but by law, and it is also quasi-contractual in nature, created by law, for reasons of justice without regard to expressions of assent by either words or acts. The creation of an implied-in-law contract allows recognition that the student-university relationship carries vestiges of status, not just that of contract.<sup>179</sup> Others agree that many modern contracts embody complex relationships and carry elements of both custom and status.<sup>180</sup>

The *Beukas* court concluded that the students were entitled to expect the university to act in good faith and to deal fairly with them in accordance with this "law-defined" relationship.<sup>181</sup> The court went on to hold that the college did not act arbitrarily or in bad faith, that the students were given adequate notice, and that the college showed good faith in arranging transfer students to other dental schools.<sup>182</sup> Ultimately, the court concluded that, under these circumstances, any loss or detriment suffered by plaintiffs cannot be said to have been unjustly caused by defendants.<sup>183</sup>

2. *Application of Beukas to Academic Policy Changes.*—Applying *Beukas* to claims by students of changes in academic policy, the court's framework remains a good guide to balance a university's obligation to treat students fairly with the other important societal interests served by a university. The two-part test emerging from the case consists of: (1) whether the university demonstrated good faith in reaching the decision to implement program closure; and (2) whether the university dealt fairly with students in light of the decision to close the program.<sup>184</sup> The first question balances societal interests in protecting the institution against student interests. The second question recognizes and defines the university's obligations to its students.

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177. *Id.* at 782.

178. *Id.* at 783-84.

179. *See also* *Napolitano v. Princeton Univ. Trs.*, 453 A.2d 263, 272 (N.J. Super. Ct. App. Div. 1982) (explaining that the relationship between student and university cannot be described either in pure contractual or associational terms).

180. *See* HOWARD O. HUNTER, *MODERN LAW OF CONTRACTS* § 25.03 (1987) (commenting on the transition from a status and custom based society to one based largely on freedom of contracts).

181. *Beukas*, 605 A.2d at 784.

182. *Id.*

183. *Id.*

184. *Id.* *See also* MURRAY, *supra* note 69, § 66(D).

Applying the first part of this test to academic policy changes, it is clear that an administrative decision is of such significant import that the decision deserves a careful, deliberative process and an application of carefully-drawn criteria. These standards are expressed in the literature of higher education, and these same standards should form the basis to test good faith.<sup>185</sup> There are numerous factors to consider when deciphering what the standards in a particular case should be and what facts tend to satisfy the university's burden.

Some of the questions include the following: Did the process include collaboration and deliberation or was the university's action arbitrary? Were other alternatives that would cause less disruption to students fairly considered and rejected? Drawing on the literature of higher education, did the university exercise sound judgment in reaching its decision? When the court considers whether the university developed and fairly applied its articulated criteria to its decisions, the court has a prepared framework by which to test the university's good faith.<sup>186</sup> In this case, if a university proposes academic policy changes via an established and reasonable process, such as faculty committee voting procedures, the first part of the *Beukas* test will likely be easily met.

However, making the decision to change an academic policy in good faith only satisfies one part of *Beukas*. Applying the second part of the *Buekas* test in academic policy changes requires that the university deal fairly with its affected students. Questions that may be relevant when considering this part of the test include the following: Did the university take steps to ameliorate the impact on affected students by assisting them in achieving their educational objectives despite the change? Did the university keep students informed and provide them with timely information so that students might take appropriate steps to protect themselves? For example, the university in *Beukas* continued to provide sufficient resources to the program so that it could retain its accreditation until the last students graduated or transferred. Specifically in changed-academic policy cases, did the university offer its resources to ameliorate any harm caused to the student when that ameliorating action would not have been a burden to the university?<sup>187</sup> Under *Beukas*, the university can only be excused from the payment of money damages when students are treated fairly.

3. *Quasi-Contract and Implied-in-Law Summary*.—The quasi-contract and implied-in-law contract approach protects student interests beyond the semester for which tuition is paid, while still recognizing the university's need to respond to academic market demands. This approach is particularly powerful because it imposes an obligation upon college administrators to act with due care toward both students and the larger community and to stand ready to justify

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185. See *supra* notes 26, 37, 39.

186. See Paul G. Haskell, *The University as Trustee*, 17 GA. L. REV. 1 (1982) (“[T]he university should be considered a trustee for the public generally and the students, faculty, donors, and alumni particularly . . .”).

187. For example, did the university offer to treat different categories of students (such as those matriculating under different catalogues) differently with respect to a changed academic policy? Would the relative burden such as a software-update be significant?

administrative actions. By adopting this type of standard, courts merely ask that universities comport with the expectations and the standards articulated by educators and academic institutions. This standard allows courts to examine the conduct of the university and to ask whether it has acknowledged its many relationships during its decision-making process and has fairly balanced the many competing interests that are impacted by the decision to change a long-standing academic practice. This legal theory may greatly aid the courts; by relying on custom and practice in higher education to determine the appropriateness of the university's decision to change a particular academic policy, a court can avoid the unfairness of excessive deference.<sup>188</sup>

#### *D. Possible Remedies in Student-University Challenges*

*1. Availability of Monetary Damages.*—The decision to alter an academic policy may be unanticipated and result in substantial burdens on students. Students choose schools for academic as well as social, economic, and reputational reasons.<sup>189</sup> Since college degrees, class rank, GPA, or future prospects are not fungible, students are understandably disappointed by injurious administrative decisions to alter academic policies that they expected to remain constant from the date of their matriculation. In some cases, students may be deprived of the opportunity to earn the GPA they could have earned, lose scholarship moneys, or lose minimum qualifications for participation in extra-curricular activities. Additionally, there simply may be no other acceptable alternatives for students when all similarly-situated institutions make the same academic policy changes.<sup>190</sup>

When students prevail, damage awards may be measured in several different manners: reliance, restitution, and expectation interests.<sup>191</sup> Under a theory of restitution, the court would return to the prevailing students those payments they made to the school, on the theory that the school received an undeserved benefit.<sup>192</sup> Using reliance interest analysis, the court would measure student injury in terms of losses suffered as a result of student reliance on a promise that the school would award a degree with final grades reflecting evaluation under standards in place at the time the student matriculated if the student fulfilled the school's requirements.<sup>193</sup> Less frequently, students may be able to show monetary expectation and consequential damages by proving the losses suffered

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188. The approach is also powerful because it empowers students with a right to challenge whether the decision is grounded in good faith.

189. See Meir G. Kohn et al., *An Empirical Investigation of Factors Which Influence College-Going Behavior*, Rand Report R- 1470-NSF Sept. 1974, at 23 (explaining role of cost in formulating college-choice model).

190. See, e.g., *supra* notes 1, 2, 4, 14.

191. RESTATEMENT, *supra* note 71, § 344.

192. Behrend v. State, No. 80AP-328, 1981 WL 3591, at \*3 (Ohio Ct. App. Nov. 12, 1981); RESTATEMENT, *supra* note 71, § 344.

193. Eden v. Bd. Trs. of State Univ. of N.Y., 374 N.Y.S.2d 686, 689 (App. Div. 1975).

as a result of delay or nonconferral of a degree.<sup>194</sup>

2. *Availability of Injunctive Relief and Specific Performance.*—When academic policy changes are made to a program, affected students may engage in activities to rally public support and dissuade decision-makers from their chosen course of action.<sup>195</sup> Although the best decisions come from collaborative decision-making by a broad community of voices, once an institution of higher education ultimately decides to change an academic policy, students and others who may seek injunctive relief to block the implementation infrequently succeed.<sup>196</sup> Even those courts recognizing a breach of contract and approving the award of damages to injured students reason that the students' remedies would be to seek damages for the actual harm that the students have incurred: the lack of their educational program as they believed it existed.<sup>197</sup> With respect to ordering specific performance or injunctive relief, many courts have been reluctant to take the management of the institution away from its administrators.<sup>198</sup>

However, judicial reluctance to order specific performance or injunctive relief is very likely ill-founded. Specifically, especially for courts following the model asserted in *Beukas* and quasi-contract approaches, student relief is mostly, if not only, beneficial when carried out, not when remedied through money damages. Additionally, true consequential and expectation damages are difficult to compute because it is nearly impossible to value future education, work, and school opportunities. Future opportunities are often speculative because the court does not know what decisions a student will make. Ultimately, injunctive relief may be the best type of remedy to satisfy injured students. Generally, specific performance and injunctive relief are appropriate where damages would not be adequate to protect the expectation interest of the injured party:

Adequacy is to some extent relative, and the modern approach is to

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194. See generally Robert R. DeKoven, *Challenging Educational Fee Increases, Program Termination and Deterioration, and Misrepresentation of Program Quality: The Legal Rights and Remedies of Students*, 19 CAL. W. L. REV. 467, 483-87, 502-03 (1983) (noting the difficulty of determining damages due to failure of general terms, but relative ease of ascertaining damages where particular costs and foregone opportunities would certainly have not have accrued but for a particular decision by the college).

195. The "protest march and rally" remains an effective method for students to communicate their concerns. See *Alabama A&M Students Oppose Tuition Hikes*, CHRON. HIGHER EDUC., Apr. 10, 1998, at A8 (describing student rally to protest tuition hike and cutbacks, including faculty jobs and academic programs); *supra* note 13 and accompanying text for examples involving academic modifications.

196. When money damages will suffice for breach of contract, a court should not exercise its equitable power to order specific performance. RESTATEMENT, *supra* note 71, § 359(1).

197. See *Behrend v. Ohio*, 379 N.E.2d 617, 620 (Ohio Ct. App. 1977).

198. See *Soderbloom v. Yale Univ.*, No. CV-91-0324553-S, 1992 WL 24448, at \*4 (Conn. Super. Ct. Feb. 3, 1992) (denying injunction to varsity wrestling team members when Yale terminated program).

compare remedies to determine which is more effective in serving the ends of justice. Such a comparison will often lead to the granting of equitable relief. Doubts should be resolved in favor of the granting of specific performance or injunction.<sup>199</sup>

A college career of academia, once interfered with by an unanticipated academic policy modification, cannot be easily rebuilt. Equitable remedies may be the only way to prevent such harm. If the university's decision to change its academic policies is not made appropriately, under whichever model a court chooses to adjudicate the student complaint, then the students, community, alumni, and donors will be unnecessarily harmed by judicial inaction. Courts should carefully scrutinize rather than shield the decision of an institution of higher education under a misguided concept of judicial deference.

### III. A PROPOSED ACADEMIC POLICY MODIFICATIONS MODEL

Injuries resulting from decisions to modify academic policies constitute the precise type of valid student claims which courts have increasingly recognized as appropriate to protect students and to ensure the viability of higher education altogether. Courts must find a comfortable and unobtrusive approach, with which to deal with academic challenges brought by students that acknowledges the consumer nature of the student-university relationship and that demands more accountability from the institution. Courts should not meddle with an institution's academic judgment, but should review academic challenges with close scrutiny to avoid harsh results for students who rely on promises which the institution itself has used to entice the students' business.

In Section A, this Part recommends that courts evaluate student claims under a contract theory because that theory would afford students the most protection while not interfering with the institution's academic judgments. There is no reason why contract law cannot safeguard an institution's ability to maintain academic standards while simultaneously protecting students' expectations. In Section B, this Part recommends a possible model upon which courts may draw to some extent to evaluate student claims involving academic policy modifications to achieve the fairest remedy possible.

The judicial deference historically accorded institutions of higher education making academic policy modifications is misplaced, and courts should not hesitate to intervene on behalf of student claimants. The preceding section shows that courts have already recognized the validity of student suits under theories of contract, quasi-contract, and estoppel regarding many types of student-university disputes. This is in large part due to the changed expectations of the parties, reflecting economic and academic pressures. However, it is also apparent that most, if not all, of the protections afforded students have turned on the willingness of courts to shed the deferential treatment historically accorded to educational institutions. As explained in Part I of this Note, courts should not defer to institutional decision-making in all academic policy modification cases

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199. RESTATEMENT, *supra* note 71, § 359 cmt. a.

today because universities implore marketing practices and are consumer-oriented, and thus do not deserve any unique judicial protection.

### A. *Legal Theory*

Each theory discussed in Part II has its own advantages and disadvantages as far as proving the necessary elements to succeed and the type of remedy available. Though the establishment of a contract between the university and student is not very difficult to show, interpreting the precise terms of that agreement to determine whether a breach has occurred may be a very fact-sensitive endeavor, possibly involving application of many rules of contract interpretation, such as the ones discussed in Part II.A. of this Note. An estoppel claim may be easier to prove if there are specific representations and the student can show detrimental reliance; in that instance, the court might not need to delve into the interpretation of terms in the catalogue to determine the precise degree of protection the student should be afforded. Of course, if the contract terms can be proved, a breach of contract claim would theoretically accord the injured student more protection because her damages would be expectation interests rather than reliance interests.

My preference is to base the law governing student-university disputes squarely on contract principles because that theory would afford students more protection as well as expectation damages. Some advantages of this approach would be to produce a uniform standard applicable to both large and small institutions, to reduce doctrinal ambiguity (the same rules of interpretation must apply in all types of cases), and to establish unequivocally the principle that all students in higher education, including both those that could show great reliance and those who have just begun their academic careers, have certain basic expectations and entitlements contingent on successful completion of their studies. Additionally, contract law has been a sufficiently flexible doctrine to adjudicate disputes among people in very complex relationships where many expectations are unstated, such as relationships among family members, physicians and their patients, and in long-term, complex commercial relationships.<sup>200</sup> If contract law is so flexible that its principles have been deemed proper to protect the interests of both parties in these complex situations, there is no reason why contract law cannot also afford universities and students equally acceptable protections, especially in light of the commercial nature of higher education today.<sup>201</sup> The university does not stand in a "unique" position in comparison to other industries and should not be treated as if it does.

It is true that a number of courts have hesitated to apply strict commercial contract principles to the academic arena.<sup>202</sup> There is, however, no reason why an academic contract law, which safeguards an institution's ability to maintain academic standards while simultaneously protecting students, is not feasible. In

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200. See *supra* note 22.

201. See *supra* Part I.

202. See *Slaughter v. Brigham Young Univ.*, 514 F.2d 622, 627 (10th Cir. 1975).

fact, as the discussion of contract claims above demonstrates, it is entirely possible for courts to interpret the terms embodied in the student-university contract, deciphering the terms that are sufficiently specific to bind both parties, treating boilerplate clauses that renounce all liability with suspicion, and taking note of the university's and student's prior conduct.<sup>203</sup> Thus, by virtue of matriculating, paying tuition and fees, and expending time and effort on the course of study, the student has a contractual right to be judged fairly, accurately, and consistently by the university in compliance with the institution's own rules.<sup>204</sup>

The students' contract rights with respect to academic evaluations and assessments is not equivalent to a democratic right of students to collaborate in setting academic standards, nor an absolute right to enrollment or unwavering evaluation regardless of academic performance.<sup>205</sup> The faculty must retain that power if academic freedom is to be safeguarded.<sup>206</sup> It is true that there are students whose academic achievement is totally inadequate, whether because of insufficient aptitude, lack of application, or nonacademic problems. To maintain the university's academic standards, such students must be evaluated by those in the best position to judge academic performance.

### *B. Which University Decisions Are Properly "Academic"?*

This Note addresses how student claims regarding student-university academic policy disputes should be handled. Whether a court chooses to hear the merits of a particular student claim, under contract, estoppel, or quasi-contract and implied-at-law contract theories, turns on whether the court believes that the university's decision is an academic judgment or a nonacademic judgment.<sup>207</sup> Unquestionably there is a legitimate place for judicial deference to decisions made by educators, particularly those decisions that are purely academic in substance. On the other hand, some policies are only "academic" by a university's own designation, but actually reflect policy choices made by administrators or faculty, and do not endeavor to evaluate student academic

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203. See *supra* Part II.A.3.

204. See *supra* note 42.

205. See *Marquez v. Univ. of Wash.*, 648 P.2d 94, 96-97 (Wash. Ct. App. 1982) (affirming dismissal of student who failed to meet minimum academic standards despite breach of contract claim asserting that school failed to provide structured or mandatory tutorial assistance program).

206. See *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter and Harlan, JJ., concurring) ("The four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.").

207. Note that the question whether a decision is academic or not does not arise at all in the discussions involving boilerplate clauses, unconscionability, the catalogue as the primary source, specificity of terms, or subsequent conduct of the parties, indicating that contract theory would likely provide students more protection than the other theories. Also, students may recover under estoppel even if the promise involved a purely academic decision.

performance whatsoever. For example, no one would consider a decision to repave a school parking lot or a modification of the school's fee policy for parking violators to be academic decisions, even though universities make those decisions. Thus, though there is a place for judicial deference in academic cases, judicial intervention may also be needed when the policy modification is not academic in nature.

As applied to student evaluations, the term "academic" may encompass a very broad range of matters. It can be used to describe virtually *any* report or evaluation of a student, such as those dealing with plagiarism and cheating on examinations, violation of disciplinary rules, failure to pay tuition, excessive absence from classes, or failure to comply with registration forms and technicalities. It is obvious that not all "academic" decisions by professors and administrators deserve judicial deference, and courts have the competence to distinguish when intervention is warranted to promote fairness in many student cases. Accordingly, it is necessary to break down the broad "academic" category into its component parts and to analyze where, and to what extent, judicial intervention is warranted.

1. *The Pure Academic Decision.*—The purest example of an academic decision is the professor's academic role of grading student examinations, papers, and class performance.<sup>208</sup> Justice Rehnquist stated the obvious concern in *Horowitz*—that a professor's decision regarding the proper grade "requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking."<sup>209</sup> It is obvious that a third party without expertise in the subject matter of a course is incapable of assessing a student's performance on an examination. The need for judicial deference to academic evaluations and decisions is at its maximum in a pure academic decision.

Generally speaking, modified academic policies do not fall into this category of decisions made by educators. Policy changes do not involve evaluating any particular student's performance academically. Of course, the policy may set guidelines and standards to be used for aiding student evaluations, but those types of decisions do not appraise a student's academic performance and may more appropriately be characterized as policy determinations about which reasonable educators may differ.

2. *The Marginally-Academic Decision.*—Less deference is due to an institution's decision in instances in which professors or administrators aggregate the evidence and information constituted by grades and other academic impressions concerning students to determine whether the students should be promoted or graduated. Such decisions made by a university most often consist of numerical data averaging, and those making such decisions may be registrars,

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208. Of course, grading is not capable of being utterly objective. On the boundary lines between grades, there is a "more likely than not" belief that an examination being graded deserves one grade rather than another. Indeed, greater demand for precision and accuracy in grade determination likely indicates that a higher portion of grades are questionable.

209. *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 90 (1978).

department chairs, or other professors who have not had the student in class.<sup>210</sup> Of course, such decisions are rarely pure calculations, and courts may thus exercise some degree of caution before concluding that the denial of a benefit to a student was a violation of the student's protected rights under either a contract, estoppel, or quasi-contract and implied-in-law claim. Despite this caution, if incongruent treatment of a student should occur, which cannot be explained on the basis of any relevant data, a court may conclude that such treatment violated the contract, quasi-contract, or estoppel rights of the student.

Policy modifications typically do not fall into the marginally-academic decision category. Policy changes do not involve evaluating any particular student's academic performance, no matter whether that evaluation is individualized in nature, as with the pure academic decision described above, or aggregate in nature. A difference exists between an academic policy modification and an academic decision based on aggregate evidence, and that difference should also provide guidance to the extent that a court is willing to lend deference to the institution's decision.

For example, suppose a scholarship program requires a recipient student to maintain a cumulative 3.00 GPA to continue receiving scholarship moneys. When the registrar's office calculates the student's cumulative GPA by aggregating the student's various course grades, it is making an entirely arithmetical calculation; it is not making an academic judgment. Therefore, if the university fails to calculate accurately, and the university refuses to change the student's GPA, certainly the student may ask a court to intervene and restore the student's promised scholarship. On the other hand, if the continuation of the scholarship funds also required satisfactory completion of a student thesis accepted by the department head, then the university is not making an entirely arithmetical calculation. The determination of satisfactory completion is an academic judgment. In that instance, the court should lend deference to the professor's academic determination if challenged.

Thus, although judicial intervention should not be frequent regarding marginally-academic decisions, courts should not hesitate to intervene where incongruent treatment of a student occurs which cannot be explained on the basis of any other relevant data, such as when a university denies a student scholarship funds on the basis of cumulative GPA calculated erroneously.

3. *The Non-Academic Decision.*—Another category of decisions exists that are not academic because they do not evaluate student academic performance at all. Those non-academic decisions are best characterized as policy decisions made by administrators and faculty about how their educational institutions should be managed. These decisions are characterized as those academic and educational policies about which reasonable educators can differ.

Again, suppose a scholarship fund requires a student recipient to maintain a cumulative 3.00 GPA and to receive a grade of B or better on a thesis to continue receiving scholarship moneys. The evaluation of the thesis is a pure academic

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210. *Stoller v. Coll. of Med.*, 562 F. Supp. 403, 406 (M.D. Pa. 1983), *aff'd*, 727 F.2d 1101 (3d Cir. 1984).

assessment of the student's performance. The evaluation of the cumulative GPA is an entirely arithmetical calculation. However, the mere establishment of the scholarship's requirements does not evaluate the student recipient at all; in fact, it is likely that the criteria were established before any particular student received the scholarship award. The criteria were initially established entirely on the bases of reasonable educators' policy choices and judgments. Clearly, the mere fact that educators must make determinations regarding which categories of students should be rewarded does not indicate that they are actually evaluating the academic performance of a particular student. Thus, policy decisions requiring a particular GPA to receive honors, to receive scholarship moneys, or to participate in extracurricular activities or athletic programs are just that—policy decisions.

Other examples of such policy determinations include the following: should credit be denied for an excessive number of class absences, even if the student performs well on the final examination?<sup>211</sup> What GPA should be required for retention at each stage of the student's studies? How many credits should be required for graduation? Should D grades be given credit toward graduation and toward satisfaction of requirements in the student's major? Can and should students who score only marginally above the grade point average levels for automatic dismissal be dismissed as well?<sup>212</sup>

Is a newly-imposed plus-minus grading scheme an academic evaluation? There is no question that the grading scheme guides professors' evaluations, but the policy in no way determines the proper grade for a student in her course or even aggregates the information constituted by other academic impressions concerning students to determine whether they should be promoted or graduated. In fact, the modification of the grading scheme is precisely the type of decision that is characterized as an educational policy about which reasonable educators differ.<sup>213</sup> The establishment of a university grading scheme is analogous to the establishment of scholarship requirements in that educators determine criteria that they believe will serve the students' and the university's interests well. Any grading scheme is established entirely on the bases of reasonable educators' policy judgments. The idea that educators must make determinations about which categories of students should be rewarded (the new plus-letter grades) and punished (the new minus-letter grades) does not suggest that they are actually evaluating the academic performance of any particular student. In fact, those criteria are established before the students' academic performance is evaluated. Thus, academic policy modifications, including the implementation of plus-minus grading criterion, fall into the category of nonacademic decisions, and

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211. *Blank v. Bd. of Higher Educ.*, 273 N.Y.S.2d 796, 802-03 (Sup. Ct. 1966) (holding that the college's absence policy was not academic, but a nonacademic decision, though made by educators).

212. *See supra* notes 1, 4 (demonstrating that reasonable minds in education can and do differ over the wisdom of newly-implemented academic policy modifications).

213. *See supra* notes 4-7, 9 (discussing faculty and other educators' disagreement as to the wisdom of a plus-minus grading system, and the benefits and shortcomings of such a system).

deserve the least amount of judicial deference because they do not evaluate the academic performance of students.

As noted in Part II, the terms of many academic policies are found in the college catalogue,<sup>214</sup> and students are expected to be evaluated according to those terms. It would be absurd to assert that a breach of those terms is an “academic evaluation” when those terms were implemented for the students’ protection and inducement to attend the institution long before the student was ever actually evaluated academically. The decisions in this category, which are characterized as those academic and educational policies about which reasonable educators can and do differ, deserve the least amount of judicial deference because they do not evaluate the academic performance of students. Adoption of such an approach would not change the results in the great majority of cases, indicating that the expansion of judicial intervention in cases where an academic policy is modified is not a radical idea. The benefits, however, are abundant. Not only would it promote doctrinal uniformity, but it would also establish a firm contractual basis for all the rights to fair treatment which should inure to the student because of the time, money, and effort that the student expends on university education.

#### CONCLUSION

The judicial deference historically accorded to institutions of higher education making academic policy modifications is misplaced, and courts should not hesitate to intervene on behalf of student claimants. Courts have already recognized the validity and utility of student suits under theories of contract, quasi-contract, and estoppel regarding many types of student-university disputes, in large part due to the changed expectations of the parties reflecting economic and academic pressures. Most, if not all, of the protections afforded students have turned on the willingness of courts to shed their deferential treatment accorded educational institutions.

Courts should not defer to institutional decision-making in academic policy modification cases today because universities employ marketing practices, are consumer-oriented, and do not deserve any “unique” judicial protection. Indeed, academic policy decisions constitute the precise type of valid student claims which courts have increasingly recognized as appropriate to protect students and to ensure the viability of higher education altogether. Moreover, academic policy decisions, such as implementing a modified plus-minus grading system, are nonacademic decisions about which reasonable educators differ; thus, academic policy decisions deserve the least amount of judicial deference.

Though some courts are understandably reluctant in certain cases to intervene in university-student disputes, and they correctly note that it is inappropriate to substitute their own judgment for the institution’s academic and management decisions, they nevertheless must find a comfortable and unobtrusive role that acknowledges the consumer nature of the student-university relationship and demands more accountability from the institution. After all,

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214. See Davenport, *supra* note 43; see, e.g., *supra* notes 97-98.

students have foregone other opportunities and purchased an educational product based on representations that the institution made to induce them to enroll. If the consumer nature of higher education is ignored and the courts continue to accord institutions deference, students' expectation interests, and even their reliance costs, are not adequately protected.

The university-student legal relationship is complicated. Some aspects of the relationship resemble other types of commercial contracts; yet other aspects of the relationship reveal that the student-university relationship is status-oriented and described in associational terms. Courts have struggled with how to resolve conflicts that arise between students and universities. Courts that do not defer to institutional decision-making regarding academic policy modifications may rely on principles of contract and estoppel to evaluate student claims. It appears that contract law may safeguard an institution's ability to maintain academic standards while simultaneously protecting students' expectations. Courts should not hesitate to intervene on behalf of student claimants injured by academic policy modifications and set aside the judicial deference historically accorded to institutions of higher education.