Kentucky Law Journal

Volume 68 | Issue 2 Article 7

1979

Wanted: A Strict Contractual Approach to the Private University/Student Relationship

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WANTED: A STRICT CONTRACTUAL APPROACH TO THE PRIVATE UNIVERSITY/STUDENT RELATIONSHIP

INTRODUCTION

Institutions of higher education command and receive considerable respect in our society.[1] An apparent corollary of this revered status is the deference accorded colleges and universities by the courts. This deferential attitude is brought into sharp focus when a contractual dispute arises between a private university[2] and one of its students.

It is well settled that the private university/student relationship is contractual in nature.[3] Educational contracts, however, are regarded as possessing unique features that require special consideration;[4] a construction which preserves schools'

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[1] *See* Parsons & Platt, *Considerations on the American Academic System*, in READER ON THE SOCIOLOGY OF THE ACADEMIC PROFESSION (W. Mitzger ed. 1977).

See also Medalia, *On Becoming a College Teacher: A Review of Three Variables*, in READER ON THE SOCIOLOGY OF THE ACADEMIC PROFESSION (W. Mitzger ed. 1977). Medalia describes what he terms the "truly exalted standing" of the college professor in American society. His conclusions are based on several public opinion polls that place college instructors at the high end of respected occupations.

[2] Although some of the issues discussed in this comment are equally applicable to public universities, this comment primarily will concentrate on private university/student contract disputes.

[3] Jansen v. Emory Univ., 440 F. Supp. 1060 (N.D. Ga. 1977), *aff'd mem.*, 579 F.2d 45 (5th Cir. 1978); Auser v. Cornell Univ., 337 N.Y.S.2d 878 (1972); Carr v. St. John's Univ., 231 N.Y.S.2d 410, *aff'd mem.*, 187 N.E.2d 18 (1962); 15A AM. JUR.2D. *Colleges & Universities* § 31 (1976); WILLISTON ON CONTRACTS § 90D (3d ed. 1957). *See Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1145 (1968); Note, *Legal Relationship Between the Student and the Private College or University*, 7 SAN DIEGO L. REV. 244 (1970); Note, *Judicial Review of the University-Student Relationship: Expulsion and Governance*, 26 STAN. L. REV. 95 (1973-74); Comment, *Contract Law and the Student-University Relationship*, 48 IND. L.J. 253 (1972-73); Comment, *Consumer Protection and Higher Education—Student Suits Against Schools*, 37 OHIO ST. L.J. 608 (1976).

Although several years ago courts and legal scholars were expressing doubts about the applicability of contract law in the context of the student/university relationship, recent cases have adopted the contract approach virtually without question. *See* notes 40-47 *infra* and accompanying text for a discussion of the criticisms of applying contract law to these disputes.

[4] Lyons v. Salve Regina College, 565 F.2d 200, 202 (1st Cir. 1977), *cert. denied*, 435 U.S. 971 (1978); Slaughter v. Brigham Young Univ., 514 F.2d 622, 626 (10th Cir.), *cert. denied*, 423 U.S. 898 (1975); Jansen v. Emory Univ., 440 F. Supp. 1060, 1062 (N.D. Ga. 1977), *aff'd mem.*, 579 F.2d 45 (5th Cir. 1978).

broad discretionary powers is often viewed as essential.[5] Thus, courts have refused to invoke a strict contractual approach in their consideration of these contracts. The result is that the contract theory, as it is currently employed, excessively supports the university's interests while those of the student receive little protection.[6]

The recent decision by the Kentucky Court of Appeals in *Lexington Theological Seminary v. Vance*[7] is illustrative. In *Vance*,[7.1] the court rejected a student's argument that catalog provisions[8] used to deny the student his degree were too vague to be enforceable. While this ruling is consistent with the overwhelming majority of decisions upholding university regulations challenged on the basis of vagueness,[9] a strict application of contract law presumably would have resulted in a decision favoring the student.[10]

This Comment proposes that the *Vance* decision demonstrates the need for a strict contractual approach to the private university/student relationship. Without such an application, student interests will continue to be shortchanged. Because contract law provides a suitable framework for resolving these disputes, it should be stringently applied. The result would be

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[5] *See* Case Note, *Contracts*—Paynter v. New York University: *How Discretionary are the Inherent Powers of Universities?*, 21 DE PAUL L. REV. 861, 874 (1971-72).

> The goal of a university is to maintain a climate adequately suitable for the advancement of learning. A natural concomitant, therefore, is that the university can promulgate its own rules to uphold this academic atmosphere, and take any necessary steps to punish or forestall conduct implicitly deleterious to the university system. Thus, a further rationale for the inherent discriminatory powers of the university is sustained by the basic needs of higher learning institutions themselves.

Id.

[6] For a similar view, *see Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1145-47 (1968).

[7] Nos. 78-CA-1169-MR & 78-CA-1172-MR (Ky. Ct. App. May 18, 1979), discretionary rev. granted, 589 S.W.2d 897 (Ky., Nov. 13, 1979).

[7.1] As this issue went to press, the Kentucky Supreme Court ruled that discretionary review in the *Vance* case had been improvidently granted, remanding the case to the court of appeals. For a discussion of this recent decision, see the Louisville Courier-Journal, Apr. 2, 1980, at B 8, col. 1.

[8] Catalogs and other publications of a university are deemed to contain the terms of the contract. *See* note 13 *infra* for relevant authority.

[9] Depperman v. Univ. of Ky., 371 F. Supp. 73 (E.D. Ky. 1974); Esteban v. Central Mo. State College, 290 F. Supp. 622 (W.D. Mo. 1968), *aff'd*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970); Buttny v. Smiley, 281 F. Supp. 280 (D. Colo. 1968); Carr v. St. John's Univ., 231 N.Y.S.2d 410, *aff'd mem.*, 187 N.E.2d 18 (1962). *See* Note, *Bringing the Vagueness Doctrine on Campus*, 80 YALE L.J. 1261 (1970-71).

[10] For a discussion of the *Vance* case, *see* notes 71-82 *infra* and accompanying text.

a more equitable protection for student and university interests alike.

I. DEVELOPMENT AND STATUS OF THE UNIVERSITY/STUDENT CONTRACTUAL RELATIONSHIP

Today the relationship between a student and private university is based on an implied contract.[11] If the student complies with graduation requirements, a degree will be conferred.[12] The terms and conditions of the contract are those found in catalogs, bulletins and other publications of the college.[13]

The vast majority of disputes arising from these contracts involve disciplinary actions.[14] While authority to discipline now is regarded as the university's express or implied contractual right,[15] this view has not always been the case. In eighteenth-

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[11] *See* note 3 *supra* for a list of relevant source material.

[12] However, this contract is subject to conditions. In Andersen v. Regents of Univ. of Cal., 99 Cal. Rptr. 531, 535, *cert. denied,* 409 U.S. 1006 (1972), the court said the idea that the student will conduct himself according to a university's reasonable rules and regulations is an implied graduation requirement.

[13] Univ. of Miami v. Militana, 184 So.2d 701, 704 (Fla. Ct. App. 1966), *aff'd,* 236 So.2d 162 (Fla. 1970); 15A AM. JUR. 2d *Colleges and Universities* § 31, n.67 (1976). *But see* Healey v. Larsson, 323 N.Y.S.2d 625, *aff'd,* 348 N.Y.S.2d 971 (1973), *order aff'd,* 360 N.Y.S.2d 419 (1974) (In this case the university was ordered to grant a degree to a student who purportedly had not taken the proper courses. Because university officials had directed the student to take certain courses to ensure a degree, they were not allowed to assert later that the student lacked the required credits for graduation).

[14] It should be noted from the outset that when disciplinary or academic considerations are not involved student contractual rights receive more protection from the courts. *See* Peretti v. Mont., 464 F. Supp. 784 (D. Mont. 1979) (where the school's discontinuance of an aviation program midway during the student's course work was seen as a breach of an implied contract to allow the student an opportunity to complete the program and receive a degree); Steinberg v. Chicago Medical School, 371 N.E.2d 634 (Ill. 1977) (where a prospective student who paid a fifteen dollar application fee was held entitled by contractual right to an evaluation according to criteria the school had established and published in its admissions brochure); Stad v. Grace Downs Model & Air Career School, 319 N.Y.S.2d 918 (1971) (where the puffery statements included in the school's publications were held to create an implied contract of guaranteed job placement which the court determined the school had breached); Behrend v. State, 379 N.E.2d 617 (Ohio Ct. App. 1977) (where the school was held to a contractual obligation to make every attempt to gain accreditation).

[15] Krasnow v. Va. Polytechnic Inst. & State Univ., 414 F. Supp. 55, 56 (W.D. Va. 1976), *aff'd,* 551 F.2d 591 (4th Cir. 1977); Andersen v. Regents of Univ. of Cal., 99 Cal. Rptr. 531, 535 *cert. denied,* 409 U.S. 1006 (1972); Pride v. Howard Univ., [1973-78 Transfer Binder] COLL. & UNIV. REP. (CCH) ¶ 18,638, p. 16,151; Robinson v. Univ. of

century England, a school's disciplinary powers were based on its status as a self-governing entity,[16] while the concept of *in loco parentis* was the early justification for regulation of student conduct in the United States.[17] Later, written enrollment contracts often spelled out the university's right to formulate and enforce disciplinary rules.[18] In modern times, the publications of the college, with their general terms concerning student conduct, give schools the right to dismiss students for rule infractions.[19] When these dismissals occur and the matter is litigated, courts give great deference to the university's decision that the particular "misconduct" of the student has breached the contract.[20]

While there is nothing wrong with the traditional discretion courts have accorded colleges and universities in *establishing* conduct and graduation requirements, determining when a *breach* of those requirements has taken place is all too often left to the university's sole judgment. When schools are exercising this discretion, courts seldom interfere with that exercise.[21] This restraint is perhaps wise, and certainly more

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Miami, 100 So.2d 442, 444 (Fla. Ct. App.), *cert. denied,* 104 So.2d 595 (Fla. 1958); Carr v. St. John's Univ., 231 N.Y.S.2d 410, 413, *aff'd mem.,* 187 N.E.2d 18 (1962).

[16] *See* The King v. Chancellor of the Univ. of Cambridge, 6 T.R. 89, 106, 101 Eng. Rep. 451, 460 (K.B. 1794).

[17] Gott v. Berea College, 161 S.W. 204, 206 (Ky. 1913). *Gott* held that a university could impose any disciplinary regulation for a student that a parent might make to control his child. In *Gott,* students were forbidden from entering any restaurant not operated by the college. The court viewed such a regulation as a proper exercise of the school's discretionary power to guard the student's welfare.

[18] Comment, *Contract Law and the Student-University Relationship,* 48 IND. L.J. 253, 253 (1972-73).

[19] In fact courts have upheld catalog provisions that enable the school to dismiss a student at any time. *See* Robinson v. Univ. of Miami, 100 So.2d 442 (Fla. Ct. App.), *cert. denied,* 104 So.2d 595 (Fla. 1958).

[20] According to the court in Dehaan v. Brandeis Univ., 150 F. Supp. 626 (D. Mass. 1957), "The problem of what constitutes an appropriate reason must clearly be left to those authorites charged with the duty of maintaining the standards and discipline of the school." *Id.* at 627. Likewise, in Goldberg v. Regents of Univ. of Cal., 57 Cal. Rptr. 463 (Ct. App. 1967), it was stated: "[I]n an academic community, greater freedom and greater restrictions may prevail than in society at large, and the subtle fixing of these limits should, in a large measure, be left to the educational institution itself." *Id.* at 472. *Accord,* Bright v. Nunn, 448 F.2d 245, 249 (6th Cir. 1971); Tedeschio v. Wagner College, 402 N.Y.S.2d 967, 970 (1978), *aff'd,* No. 778 E (N.Y. Sup. Ct. June 18, 1979), [1979] COLL. & UNIV. REP. (CCH) ¶ 19,213, p. 16,466.

[21] *See* note 20 *supra* for citation to cases illustrating this deference.

frequent, when an academic matter, such as grading, is involved. Courts feel uncomfortable, as well they might, in intruding into the academic arena.[22] When a student is expelled or denied his degree for misconduct, however, greater judicial probing should and sometimes does occur.[23] In disciplinary proceedings, a university is exercising quasi-judicial powers, and a higher standard of judicial review is thus warranted.[24]

When a private university is involved, contract law is the basis for resolving the dispute.[25] When the student pays his fees and matriculates at the college there is an implied agreement that he will comply with the school's rules and regulations.[26] It is unquestionable that private universities have the power to set forth conduct standards, and those standards can permissibly require above-average morals and behavior.[27] In fact, when a student enters a private religious university, he should be

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[22] *See* Jansen v. Emory Univ., 440 F. Supp. 1060 (N.D. Ga. 1977), *aff'd mem.*, 579 F.2d 45 (5th Cir. 1978). The *Jansen* court alluded to the "traditional rule of nonintervention in academic matters" and declined to review grading methods or degree requirements. *Id.* at 1063. *See* Walker v. George Washington Univ., [1979] COLL. & UNIV. REP. (CCH) ¶ 17,838 p. 15,644, No. 4724-77 (D.C. Aug 4, 1977). In *Walker*, the court said that scrutiny of academic records involves "subjective judgments that schools are best able to make and with which the court will not interfere." *Id.*

[23] "[T]he traditional rule of nonintervention in academic matters does not apply to review of disciplinary actions by educational institutions." Jansen v. Emory Univ., 440 F. Supp. 1060, 1063 (N.D. Ga. 1977), *aff'd mem.*, 579 F.2d 45 (5th Cir. 1978).

[24] "The tendency has been to treat the academic administrator's judgment in the same fashion as the business judgments of a corporate director. The deference has been extended, however, from the academic realm to the realm of conduct, in which the expertise of the court is unsurpassed." Case Note, *Contracts*—Paynter v. New York University: *How Discretionary Are the Inherent Powers of Universities?*, 21 DE PAUL L. REV. 861, 875 (1971-72).

[25] *See* notes 11-13 *supra* and accompanying text for a discussion of this point and citations to relevant authorities.

[26] Anderson v. Regents of Univ. of Cal., 99 Cal. Rptr. 531, 535, *cert. denied*, 409 U.S. 1006 (1972).

[27] Krasnow v. Va. Polytechnic Inst. & State Univ., 414 F. Supp. 55, 56 (W.D. Va. 1976), *aff'd*, 551 F.2d 591 (4th Cir. 1977). According to *Krasnow*, conduct rules formulated by a school may permissibly apply to student actions off campus. *See* Auser v. Cornell Univ., 337 N.Y.S.2d 878 (1972), in which the court said:

> There is nothing inherently illegal in the setting by a private, or even a public, institution of higher learning of conditions upon which it will accept a candidate for a degree. Even if the stipulation made as a condition is regarded as unreasonable or oppressive, the contract made by the parties must govern in the absence of fraud or mistake.

Id. at 883.

aware that high standards of conduct will be imposed and that dismissal will be the likely result of their breach.[28] What is important, however, is that those standards be defined in unambiguous terms. Unfortunately, such explicitness is seldom the rule.[29]

II. PUBLIC V. PRIVATE UNIVERSITIES

The importance of applying strict contract law to private university/student agreements becomes more apparent when the rights of a private college student are contrasted with those of his counterpart at a public institution. For the private university student, contract law is the only avenue available for safeguarding the student's interests.[30] Thus a rigid application of contractual theory is necessary to fully implement those rights.

Since the Fifth Circuit decided *Dixon v. Alabama State Board of Education,*[31] public university students have been afforded the protections of procedural due process.[32] Therefore, a public university seeking to dismiss a student is subject to constitutional restraints;[33] these restraints provide the student

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[28] Comment, *supra* note 18, at 265.

[29] For an illustration of this problem, *see* notes 58-60 *infra* and accompanying text.

[30] Occasionally, courts will hold that mandamus lies to compel a university to grant a degree. Ordinarily, however, courts will consider a denial of a diploma a breach of contract for which the student's remedy is a suit for breach or an action for specific performance. 52 AM. JUR. 2d *Mandamus* § 250 (1970).

[31] 294 F.2d 150 (5th Cir.), *cert. denied,* 368 U.S. 930 (1961).

[32] The *Dixon* court held that a public university is an agent of the state so that its actions are state actions. Thus the university is bound by due process requirements in its dealings with students. *Id.*

[33] In Board of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978), the Supreme Court outlined what procedures must be afforded a student dismissed from a public educational institution. While notice and a hearing were found necessary for disciplinary suspensions, the Court said the fourteenth amendment does not require a hearing for an academic dismissal. As long as the decision to dismiss for academic reasons is "careful and deliberate," due process is satisfied. *See also General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax-Supported Institutions of Higher Education,* 45 F.R.D. 133 (1968). These standards were promulgated by the United States District Court for the Western District of Missouri:

> A federal court should not intervene or reverse or enjoin disciplinary actions relevant to a lawful mission of an educational institution unless there appears one of the following:

significant protection from discriminatory and unwarranted expulsions.[34]

These due process protections, however, are not applicable to private universities.[35] Arguments based on state financial support[36] or state certification and supervision have generally failed to shift the courts from their position that private universities are exempt from the fourteenth amendment.[37] Such exemption does not mean that private schools may arbitrarily

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(1) a deprival of due process, that is, of fundamental concepts of fair play;
(2) invidious discrimination, for example, on account of race or religion;
(3) denial of federal rights, constitutional or statutory, protected in the academic community; or
(4) clearly unreasonable, arbitrary or capricious action.

Id. at 143.

[34] Such protection is by no means complete. With one exception, Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969), courts have refused to hold disciplinary standards void for vagueness. Public, as well as private, universities are given considerable latitude in determining if the student's misconduct has breached the applicable regulation. *See* Esteban v. Central Mo. State College, 290 F. Supp. 622 (W.D. Mo. 1968), *aff'd*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970); Buttny v. Smiley, 281 F. Supp. 280, 284 (D. Colo. 1968).

In *Esteban*, the court clearly said the "void for vagueness" doctrine does not apply to student conduct standards. But in *Soglin*, the one reported case to apply the vagueness doctrine to student conduct regulations, the court held that university regulations must be expressed in clear and narrow rules. In discussing this issue, the court stated:

> Power alone does not supply the standards needed to determine its application to types of behavior or specific instances of "misconduct." . . .
> . . . .
> The use of "misconduct" as a standard for imposing the penalties threatened here must therefore fall for vagueness. The inadequacy of the rule is apparent on its face. It contains no clue which could assist a student, an administrator or a reviewing judge in determining whether conduct not transgressing statutes is susceptible to punishment by the University as "misconduct."

418 F.2d 163, 167-68 (7th Cir. 1969).

For an excellent discussion of the vagueness problem with respect to public universities, see Note, *Bringing the Vagueness Doctrine on Campus*, 80 YALE L.J. 1261 (1970-71).

[35] Note, *supra* note 34, at 1270 n.47.

[36] Greene v. Howard Univ., 271 F. Supp. 609 (D.D.C. 1967), *issue moot on appeal*, 412 F.2d 1128 (D.C. Cir. 1969).

[37] *But see* Ryan v. Hofstra Univ., 324 N.Y.S.2d 964, 982 (1971), *supplemented*, 328 N.Y.S.2d 339 (1972). In *Ryan*, the court said state financial contributions, regulations by the New York Dormitory Authority and operation of the university under a franchise from the State Board of Regents constituted sufficient state action to justify requiring notice and a hearing before the private university could expel a student. *Id.*

expel their students at any time for any reason.[38] Rather, the common law requirements to which private universities are subject closely approximate those imposed on public colleges by the due process clause.[39] However, in order for these common law restraints to be effective, particularly in the area of contract law, they must be stringently applied.

III. PROBLEMS WITH THE CONTRACTUAL APPROACH

One must be aware that strict application of the law of contracts will not solve all disputes between private universities and their students. In fact, there are significant problems with even using contract law in this context. Courts and commentators alike have sharply criticized the application of contract law to the university/student relationship for reasons that are certainly valid.[40]

One of the major problems arises from construing the university catalog as supplying the terms of the contract.[41] It has been noted that most students do not view a catalog as containing contractual rights.[42] Rather, catalogs are perused for academic and tuition information, and it is rarely realized that the included disciplinary regulations are binding contract terms.[43] Additionally, some courts have concluded that the unique nature of the student/university relationship prevents strict application of formal contract law.[44] These courts refuse to view colleges as business entities subject to commercial contractual doctrines.

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[38] Tedeschi v. Wagner College, 402 N.Y.S.2d 967, 970 (1978), *aff'd*, 417 N.Y.S.2d 521 (App. Div. 1979).

[39] Abbariao v. Hamline Univ. School of Law, 258 N.W.2d 108, 113 (Minn. 1977).

[40] *See* Slaughter v. Brigham Young Univ., 514 F.2d 622 (10th Cir.), *cert. denied*, 423 U.S. 898 (1975); Note, *Legal Relationship Between the Student and the Private College or University*, 7 SAN DIEGO L. REV. 244 (1970); Note, *Judicial Review of the University-Student Relationship: Expulsion and Governance*, 26 STAN. L. REV. 95 (1973-74); Note, *Common Law Rights for Private University Students: Beyond the State Action Principle*, 84 YALE L.J. 120 (1974-75).

[41] In fact, in Slaughter v. Brigham Young Univ., 514 F.2d 622 (10th Cir.), *cert. denied*, 423 U.S. 898 (1975), the court refused even to find that any contract, as evidenced by the graduate school catalog, was ever formed.

[42] Comment, note 18 *supra*, at 264.

[43] *Id.*

[44] Jansen v. Emory Univ., 440 F. Supp. 1060, 1062 (N.D. Ga. 1977), *aff'd mem.*, 579 F.2d 45 (5th Cir. 1978).

Another problem arises with using a contractual approach when the student is a minor. In such cases, the contract between the student and the university would not be enforceable against the student, while the university would be considered an adult party and therefore bound by the contract terms.[45] Furthermore, when a public university is involved[46] the element of freely entering into a bargain would be absent, inasmuch as state-supported schools are generally required to accept any student who applies.[47]

These difficulties with the contractual approach have led various commentators to suggest alternative methods for handling student/school disputes. Using private associations law,[48] treating wrongful expulsion as a tort[49] and viewing the student/university relationship in a fiduciary context[50] have all been suggested as superior ways of resolving conflicts. Courts, however, have not accepted these suggestions, and contract law remains the primary instrument at their disposal.[51] That instrument could be applied more effectively if courts would use a strict contract theory as opposed to the watered-down approach presently employed.

IV. USING A STRICT CONTRACTUAL APPROACH

Most breach of contract actions in the student/university area center on dismissal of a student for alleged misconduct. Courts rarely overturn a university's decision and order rein-

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[45] Ryan v. Hofstra Univ., 324 N.Y.S.2d 964, 973-74 (1971), *supplemented*, 328 N.Y.S.2d 339 (1972).

[46] Contract law is used to resolve public university/student disputes not involving constitutional questions. Comment, note 18 *supra*, at 255.

[47] K. ALEXANDER & E. SOLOMON, COLLEGE AND UNIVERSITY LAW 413 (1972).

[48] Note, *Judicial Review of the University-Student Relationship: Expulsion and Governance*, 26 STAN. L. REV. 95 (1973-74); Note, *Common Law Rights for Private University Students: Beyond the State Action Principle*, 84 YALE L.J. 120 (1974-75).

[49] Note, *Legal Relationship Between the Student and the Private College or University*, 7 SAN DIEGO L. REV. 244 (1970).

[50] *Id.*; Seavey, *Dismissal of Students: "Due Process,"* 70 HARV. L. REV. 1406, 1407 (1957).

[51] For a discussion of the Statute of Frauds' application to the private university/student contract, see Comment, *Consumer Protection and Higher Education—Student Suits Against Schools*, 37 OHIO ST. L.J. 608, 616 (1976). The author views the Statute of Frauds as posing no problem for recovery on one of these contracts.

statement,[52] but if courts would apply a strict contractual approach, decisions supporting the university would not be as widespread.

College catalogs or publications generally include a provision reserving the right to dismiss a student for misbehavior, lack of good character or immoral behavior.[53] The problem arises when a student challenges the school's determination that his conduct has breached the contract term. Even when these conduct provisions are ambiguous, courts have been reluctant to reverse a university's interpretation of its regulations, in distinct contradiction to the result demanded by formal contract law.

When a disciplinary provision in a college publication is challenged for vagueness, the question ultimately becomes one of degree.[54] In ordinary situations, a standard of reasonable expectations should be used in interpreting a contract. The term should be construed to mean whatever the party drafting the contract (the university) should reasonably expect the student to think it means.[55] Also, terms should be given their

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[52] *See* notes 20-24 *supra* and accompanying text for a discussion of this point.

[53] Some colleges even include disclaimers or statements that no irrevocable contract exists, leaving the university free to change its rules and regulations. *See* K. ALEXANDER & E. SOLOMON, *supra* note 47, at 413. It is fair to say, however, that courts would imply a good faith requirement not to dismiss a student or to change regulations in an arbitrary manner. Otherwise, there would be an apparent lack of consideration, for the university would not have bound itself to anything, and a contract, therefore, would not exist.

[54] Vagueness, indefiniteness and uncertainty are matters of degree, with no absolute standard for comparison. It must be remembered that all modes of human expression are defective and inadequate. Every student of language knows this to be true of words. Every good dictionary shows that most important words have been given several, or even many, meanings; and these meanings themselves must be expressed in other words that are equally difficult of definition.

1 A. CORBIN, CONTRACTS § 95 (1963).

[55] Lyons v. Salve Regina College, 565 F.2d 200, 202 (1st Cir. 1977), *cert. denied*, 435 U.S. 971 (1978). *See* J. MURRAY, CONTRACTS § 111 (2d rev. ed. 1974), where it is stated:

> The practical aim of interpretation might be stated as follows: to approximate as closely as possible, consistent with proper precautionary safeguards, the meaning of manifestations of intention which the party employing them should reasonably anticipate they would convey to the other party, and the party receiving them would reasonably understand them to mean.

See also 17 AM. JUR. 2d *Contracts* § 248 (1964); 4 WILLISTON, CONTRACTS § 605 (3d ed. 1961).

common, everyday meaning when being construed.[56] As long as a term has an accepted meaning and the university is interpreting it reasonably,[57] there will be no justification for reversing the university's decision.

Many terms relating to conduct, however, are so ambiguous that formal rules of contract construction must be applied

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[56] Basch v. George Washington Univ., 370 A.2d 1364, 1367 (D.C. Cir. 1977); 17 AM. JUR. 2d *Contracts* § 247 (1964); J. MURRAY, CONTRACTS §§ 116, 121 (2d rev. ed. 1974).

That words should be given their common meaning is one of the primary rules of construction established by the American Law Institute in its *Restatement of Contracts.* According to the *Restatement,* these primary rules should be applied when an ambiguity arises:

> (a) The ordinary meaning of language throughout the country is given to words unless circumstances show that a different meaning is applicable.
> (b) Technical terms and words of art are given their technical meaning unless the context or a usage which is applicable indicates a different meaning.
> (c) A writing is interpreted as a whole and all writings forming part of the same transaction are interpreted together.
> (d) All circumstances accompanying the transaction may be taken into consideration . . . .
> (e) If the conduct of the parties subsequent to a manifestation of intention indicates that all the parties placed a particular interpretation upon it, that meaning is adopted if a reasonable person could attach it to the manifestation.

RESTATEMENT OF CONTRACTS § 235 (1932).

[57] For example, the university in Slaughter v. Brigham Young Univ., 514 F.2d 622 (10th Cir.), *cert. denied,* 423 U.S. 898 (1975), contended that its code provision requiring students to observe "high principles of honor, integrity and morality," and that students "[b]e honest in all behavior," including "not cheating, plagiarizing or knowingly giving false information," precluded a student from using the name of a professor as a coauthor on several writings. *Id.* at 624. The court quite properly agreed with this interpretation. However, the Brigham Young code contained sufficiently clear and precise conduct standards rarely seen in such provisions.

But even when standards are unclear and the university is acting reasonably, the court will agree with the interpretation. According to 17 AM. JUR. 2d *Contracts* § 242(1964), "The courts will give a contract a fair and reasonable construction, and will give effect to whatever may reasonably be implied by the language employed." Thus, a reasonable interpretation by the university will find favor with the courts.

It should be noted, however, that Professor Corbin has rejected the "reasonable man" approach. He would look instead to what one or both of the parties actually meant by the words employed. 1 A. CORBIN, CONTRACTS § 543 (ed. 1952). But when it is the university, a party to the contract, who is adopting a reasonable interpretation, both Corbin and the majority of courts would seem to be satisfied. The important element is that the courts actually find that a reasonable interpretation is being supplied, rather than merely relying on the university's judgment.

to safeguard the student's interests.[58] Because students often have a limited choice regarding which school they will attend, there is a lack of equal bargaining power.[59] Consequently, students are faced with a "take it or leave it" contract comparable

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[58] *See* 17 AM. JUR. 2d *Contracts* § 241 (1964), which states that when the intentions of the parties are doubtful, "[a]greements inartificially drafted or containing language which is obscure, imperfect, or ambiguous are always open to interpretation. In such a case established rules of interpretation are invoked to determine the meaning." These rules of interpretation include the primary rules listed in note 56 *supra* as well as these secondary rules promulgated by the *Restatement:*

> (a) An interpretation which gives a reasonable, lawful and effective meaning to all manifestations of intention is preferred to an interpretation which leaves a part of such manifestation unreasonable, unlawful or of no effect.
> (b) The principal apparent purpose of the parties is given great weight in determining the meaning to be given to manifestations of intention or to any part thereof.
> (c) Where there is an inconsistency between general provisions and specific provisions, the specific provisions ordinarily qualify the meaning of the general provisions.
> (d) Where words or other manifestations of intention bear more than one reasonable meaning an interpretation is preferred which operates more strongly against the party from whom they proceed, unless their use by him is proscribed by law.
> (e) Where written provisions are inconsistent with the printed provisions, an interpretation is preferred which gives effect to the written provisions.
> (f) Where a public interest is affected an interpretation is preferred which favors the public.

RESTATEMENT OF CONTRACTS § 236 (1932).

The *Restatement* advocates resort to these secondary rules only when the primary rules have not resolved the ambiguity. It can be said with relative certainty, however, that when conduct terms are involved which have more than one reasonable meaning, these secondary rules should almost always be necessarily employed. Unfortunately, courts seldom do so in the university/student contract context.

Courts are likewise reluctant to hold that these conduct terms are void as vague, even when rules of interpretation cannot resolve the ambiguity. In Carr v. St. John's Univ., 231 N.Y.S.2d 403, 409 (1962), the trial court said terms in the college bulletin pertaining to "Christian education and conduct" were impermissibly vague. The court said:

> The rule of reasonableness however requires that the regulations in question be subjected to the test whether or not they are certain as to their meaning. If they are ambiguous and uncertain they must be condemned. They should be sufficiently explicit to inform those who are subject to them what conduct on their part will render them liable to its penalties.

Id. While this decision was a good example of applying strict contract law to a university/student contract, it unfortunately was reversed, 231 N.Y.S.2d 410, *aff'd mem.*, 187 N.E.2d 18 (1962).

[59] *But see* Note, *Legal Relationship Between the Student and the Private College or University,* 7 SAN DIEGO L. REV., 244, 264 (1970).

to a contract of adhesion.[60] In adhesion contracts, ambiguities are resolved against the more powerful party.[61] Furthermore, the well-established maxim of *contra proferentem* dictates that a term is to be strictly construed against the draftsman.[62] By application of these principles a university's interpretation of the ambiguous term would be carefully scrutinized and any doubt resolved in favor of the student.[63]

Additionally, courts could find that there was no agreement on the contract term in question and then imply a reasonable term.[64] In so doing, courts could point to the lack of a

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[60] *Id. Developments in the Law—Academic Freedom,* 81 HARV. L. REV. 1045, 1147 (1968). An adhesion contract is defined as "one which is dictated by a predominant party to cover transactions with many people rather than with an individual, and which resembles an ultimatum or law rather than a mutually negotiated contract." J. CALAMARI & J. PERRILLO, THE LAW OF CONTRACTS, 341 n.39 (2d ed. 1977).

[61] *See* Galligan v. Arovitch, 219 A.2d 463 (Pa. 1966); North Gate Corp. v. Nat'l Food Stores, 140 N.W.2d 744 (Wis. 1966).

[62] Basch v. George Washington Univ., 370 A.2d 1364, 1369 (D.C. Cir. 1977) (Harris, J., concurring). *See* Comment, *supra* note 18, at 265.

This term is a fundamental principle of contract law. According to 17 AM. JUR. 2d *Contracts* § 276 (1964):

> It is fundamental that doubtful language in a contract should be interpreted most strongly against the party who selected that language, especially where he seeks to use such language to defeat the contract or its operation. . . . Also, in case of doubt or ambiguity a contract will be construed most strongly against the party who drew or prepared it, or whose attorney drew or prepared it.

Id. This prinicple should be applied when ordinary (primary) rules of construction have not resolved the ambiguity. *See* note 56 *supra* for a review of these rules.

See also 1 A. CORBIN, CONTRACTS § 559 (ed. 1952); J. MURRAY, CONTRACTS § 119 (2d rev. ed. 1974).

The *Restatement (Second) of Contracts* has even placed this rule of construction in a separate section, apart from other secondary rules. *See* RESTATEMENT (SECOND) OF CONTRACTS § 232 (Tent. Draft Nos. 1-7 1973).

[63] "[A] contract provision which does not clearly express the intention of the parties should be construed against the one for whose benefit it was inserted." 17 AM. JUR. 2d *Contracts* § 275 (1964).

Additionally, due to the student's lack of bargaining power, a court could find vague disciplinary rules unconscionable regulations of student conduct and thereby regard them as not binding on the student. And the "in terrorem" effect of vague rules is an indication of their unconscionability. *See Developments in the Law—Academic Freedom,* 81 HARV. L. REV. 1045, 1147 (1968); Comment, *Consumer Protection & Higher Education—Student Suits Against Schools,* 37 OHIO ST. L.J. 608, 616 (1976).

[64] By so doing, courts could follow an approach similar to that found in the Uniform Commercial Code. *See* U.C.C. §§ 2-204(3), 2-305—2-309 (1972 version). Although these contracts do not involve a sale of goods, the U.C.C. method for resolving vagueness problems makes sense in this context.

formal, integrated contract[65] and thus take cognizance of custom and usage in defining the contract provisions.[66] Also, original vagueness could be alleviated if the conduct of the parties after the formation of the contract shed light on the meaning intended by the agreement.[67] As another alternative, courts could refuse to imply a reasonable term and hold that there is no contractual obligation arising from overly broad contract terms.[68] Finally, the burden of proof should be placed on the university, since it is the party attempting to show that the contract has been breached by the student's misconduct.[69]

This strict contractual approach would protect student interests without unduly prejudicing the rights of the university. Schools would merely be required to protect themselves by spelling out in clear language exactly what sort of conduct is prohibited.[70] Indubitably, this type of explicit drafting would more adequately safeguard student rights.

See also RESTATEMENT (SECOND) OF CONTRACTS § 230 (Tent. Draft Nos. 1-7 1973).

[65] Lyons v. Salve Regina College, 565 F.2d 200, 202 (1st Cir. 1977), *cert. denied,* 435 U.S. 971 (1978).

[66] Peretti v. State of Mont., 464 F. Supp. 784 (D. Mont. 1979). *See* 17 AM. JUR. 2d *Contracts* § 77 (1964).

[67] J. MURRAY, CONTRACTS § 118 (2d rev. ed. 1974); 1 A. CORBIN, CONTRACTS § 558 (ed. 1952); LÜCKE, *Illusory, Vague & Uncertain Contractual Terms,* 6 ADEL. L. REV. 1, 10 (1977).

[68] This rule was applied in favor of the university in Basch v. George Washington Univ., 370 A.2d 1364, 1366 (D.C. Cir. 1977), where the school's projection of tuition increases was found to be too broad to create a binding contractual obligation. *Accord,* Mahavongsanan v. Hall, 529 F.2d 448 (5th Cir.), *reh. denied,* 531 F.2d 575 (1976).

This rule is stated generally in 17 AM. JUR. 2d *Contracts* § 75 (1964), which says, "It has been held that, under some circumstances, where only one provision of a contract is before the court for determination and it is so vague and uncertain as to be unenforceable, it may be left unperformed and the remainder of the contract left subject to performance."

[69] Comment, note 18 *supra,* at 267 n.68.

[70] Application of these general contract principles should not bind students to any terms unless the catalogue provisions are presented in such a way that the student can reasonably be expected to read them and understand them to be part of a binding contract with the university. If the university desires to enforce any rule or waiver clause against the student, it should be required to bring these provisions to the attention of the student before he enrolls.

Id. at 268.

V. THE VANCE CASE

The inequitable result that can occur when a strict contractual approach is not followed is aptly demonstrated in a recent Kentucky case, *Lexington Theological Seminary v. Vance.*[71] After completing all required course work, Ottie David Vance was denied a degree from the Lexington Theological Seminary because he was a homosexual. The Seminary contended that Vance's homosexuality breached the contract's requirements of "fundamental character" consistent with seminary principles.[72]

Vance had enrolled in the Seminary in 1972 and in 1974 applied for degree candidacy. In 1975, Vance told both a dean at the Seminary and the Seminary president that he was a homosexual. The president advised Vance that his homosex-

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[71] Nos. 78-CA-1169-MR & 78-CA-1172-MR. (Ky. Ct. App. May 18, 1979), discretionary rev. granted, 589 S.W.2d 897 (Ky., Nov. 13, 1979). Lexington Theological Seminary had appealed a judgment ordering it to grant Vance a Master of Divinity graduate degree. Vance cross-appealed on the issue of damages. Although constitutional issues were raised by the Seminary at both the trial and appellate court levels, both courts refused to consider the constitutional arguments and decided the case purely on a contractual basis. Any constitutional issues raised by the *Vance* case are clearly beyond the scope of this comment.

[72] The Seminary bulletin for the admission years of 1972-73 contained these provisions:

> Lexington Theological Seminary is engaged at the graduate level in professional education for the Christian ministry. Finding its charter in the gospel transmitted through the Bible and born through history by the ongoing life of the church, it seeks to equip its graduates to serve as contemporary servants of that gospel.
>
> By the time of graduation, students are expected, having worked through problems of vocational indecision, to be firmly committed to the role and mission with which they will begin their ministry. At the time of his application for candidacy, the student's overall seminary profile, including performance, field education leadership, financial responsibility, and fundamental character, is evaluated by the faculty. No student on probation may be admitted to candidacy.
>
> Standards and policies: Lexington Theological Seminary will consider for admission applicants who hold a BA Degree or its equivalent. Preference will be given to graduates of accredited institutions who have concentrated in the Liberal Arts, maintained a minimum of B average in their preseminary studies, and display traits of character and personality which indicate probable effectiveness in the Christian ministry.

Brief for Appellant at 7, Lexington Theological Seminary Inc. v. Vance, Nos. 78-CA-1169-MR, & 78-CA-1172-MR (Ky. Ct. App. May 18, 1979), discretionary rev. granted, 589 S.W.2d 897 (Ky., Nov. 13, 1979).

uality could jeopardize his chances of receiving a degree. However, in January of 1976, Vance received a letter stating that his degree application was being deferred until one course was completed. Vance completed the course and in May of 1976 the faculty recommended that Vance receive his Master of Divinity degree. Neither the school's Executive Committee nor its full Board of Trustees would approve this recommendation and the degree was therefore denied.[73]

Vance sued the school, and the trial court ordered the Seminary to confer the degree, saying that the catalog did not set forth reasonably clear standards.[74] The Kentucky Court of Appeals reversed, taking the position that the standards concerning character were sufficiently clear and easily understandable by "anyone who possesses the intelligence to gain admission to an accredited institution of higher learning."[75]

A rigid application of contractual doctrine would yield a different result in the *Vance* case. Undoubtedly, such terms as "servants of the gospel," "firmly committed to the role and mission with which they will begin their ministry," "fundamental character" and "display traits of character and personality which indicate probable effectiveness in the Christian ministry"[76] are ambiguous.[77] Because the catalog provi-

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[73] *Id.* at 3-5.

[74] Vance v. Lex. Theological Seminary, et. al., Dkt. No. 76-2773 (Fayette Cir. Ct. June 30, 1978). The court stated:

> These phrases [*see* note 72 *supra* for the catalog provisions] might be clear to the members of Disciples of Christ and to the Board of Trustees, but they do not seem to be that clear to this court. If the defendant wants to deny admission or a degree to students then it should state clearly in its catalog that it will not admit or confer degrees for certain stated reasons.

Id.

[75] Lex. Theological Seminary, Inc. v. Vance, Nos. 78-CA-1169-MR & 78-CA-1172-MR (Ky. Ct. App. May 18, 1979), discretionary rev. granted, 589 S.W.2d 897 (Ky., Nov. 13, 1979). The court of appeals seemed to view this requirement of "Christian character" as an academic requirement, rather than a disciplinary standard. The court said, "The courts will not generally interfere in the operations of colleges and universities, especially in actions challenging the institution's academic regulations, since the courts possess minimum expertise in this area." *Id.* at 8.

Possessing Christian character could quite plausibly be deemed more a regulation of *conduct* than an *academic* requirement. If so, then this dismissal for "misconduct" should have been more carefully scrutinized. *See* notes 20-24 *supra* and accompanying text for a discussion of the need for closer scrutiny of dismissals for misconduct.

[76] *See* note 72 *supra* for the relevant catalog provisions.

[77] Certainly their meaning was not so clear as to definitely exclude homosexuals

sions were vague, the court should have applied strict principles of contractual interpretation[78] and resolved the ambiguity in the adhesion contract in favor of the student—the nondrafting party.[79] Furthermore if the actions of the parties are seen as illuminating the meaning of the terms,[80] the school's acceptance of Vance for another semester after his homosexuality had been revealed would necessitate a determination that homosexuality was not inconsistent with the contract provisions. Also, if broadly drafted terms are not to create specific contractual obligations,[81] then Vance would not be required to comply with those vague provisions in order to graduate.

Even if the various terms mentioned above were not viewed as ambiguous, application of the doctrine of equitable estoppel should have prevented the Seminary from withholding Vance's degree.[82] After school officials were aware of Vance's homosexuality, they recommended he take another course and accepted additional tuition. Such action would presumably supersede the tentative warning of *possible* dismissal that the Seminary's president had issued. Estoppel principles thus would preclude subsequent denial of the degree.

CONCLUSION

The *Vance* decision is a clear example of the need for strict application of contract law to the student/private university relationship. Forcing schools to clearly define their terms would not result in an intolerable burden on the university and would put students on notice as to the precise standards with which

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or the faculty would not have recommended that Vance graduate. Even the Seminary president was not certain that Vance's homosexuality would mandate his dismissal. Lex. Theological Seminary, Inc. v. Vance, Nos. 78-CA-1169-MR & 78-CA-1172-MR (Ky. Ct. App. May 18, 1979), discretionary rev. granted, 589 S.W.2d 897 (Ky., Nov. 13, 1979).

[78] *See* notes 58-70 *supra* and accompanying text for discussion of these principles.

[79] *See* notes 60-61 *supra* and accompanying text for a short discussion of adhesion contracts.

[80] *See* note 67 *supra* and accompanying text for a discussion of this point.

[81] *See* note 63 *supra* for a review of cases that have applied this principle in favor of universities. Seemingly, if universities will not be bound to generally stated terms, then students should be accorded the same treatment.

[82] *See* Lexington Theological Seminary, Inc. v. Vance, Nos. 78-CA-1169-MR & 78-CA-1172-MR (Ky. Ct. App. May 18, 1979), discretionary rev. granted, 589 S.W.2d 897 (Ky., Nov. 13, 1979) (Howerton, J., dissenting). Howerton's dissent was based primarily on the estoppel issue.

compliance would be required. Additionally, courts whose duty it is to interpret the contract would be better equipped to accomplish their task. The greater the degree of specificity, the less chance for either party to be placed in a disadvantageous position.

Clear definition of terms will not occur, however, unless the courts take a firm approach to interpreting these contracts. As long as schools are free to vaguely define conduct requirements and to later interpret those requirements when a dispute arises, the threat of potential injustice will accompany each student's entrance into an implied university contract.

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