STUDENT VERSUS UNIVERSITY: THE UNIVERSITY'S IMPLIED OBLIGATIONS OF GOOD FAITH AND FAIR DEALING

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Consider the higher education product from the consumer perspective: Despite the time and expense you invest, there are no guarantees that you will find the experience useful or enjoyable. You may not succeed, and failure may come early or late in your college career. Failure will be attributed to your own intellectual or character deficiencies; inferior teaching is not an excuse nor grounds for a refund of your tuition. The measures of success will be developed unilaterally by the institution and kept a closely guarded secret from you. Should you fail, review or appeal is virtually foreclosed, for a professor's award of grades and the institution's conferral of degrees is accorded great deference. The stigma of failure may dog you for the rest of your life; you will probably have to disclose your failure to every potential employer with whom you seek work. Although you will be held to a high standard of ethics, and you must comply strictly with all of the conditions that the institution specifies is necessary to earn a degree, the institution, on the other hand, reserves the right to change anything it has promised you without notice. Despite your investment of thousands of dollars and years of your life, the educational product offers a mere chance at success but holds no guarantees. Finally, students are not invited to bargain with the institution over the terms and the conditions of the educational contract—a contract that is largely implied or finds its terms scattered throughout various unreadable publications that contain fine print disclaimers of institutional liability.

Postsecondary institutions serve important societal interests,[1] and courts accord them extreme deference when judging their relations

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1. *See generally* RUDOLPH H. WEINGARTNER, THE MORAL DIMENSIONS OF ACADEMIC ADMINISTRATION 1-31 (1999) (discussing the competing tensions between the institution's societal obligations and the institution's obligations to students). *See also* Daniel Noah Moses,

with students.[2] Courts have only reluctantly and begrudgingly employed contract principles to adjudicate claims by disappointed students when institutions of higher education fail to abide by their promises or to meet student expectations; courts often complain that contract law is too inflexible either to capture the complexity of the student-university relationship or to provide sufficient latitude to institutional decision making.[3] Moreover, courts have nearly uniformly rejected educational malpractice claims, refusing to intrude into either the classroom or the management of the educational institution.[4]

This Article argues that while acceding to the institution's desire to preserve its autonomy and its authority to carry out its educational missions, when courts accord too much deference to the institution, they abrogate judicial responsibility to protect students.[5]

This Article argues that the work horses of contract law, the implied obligations of good faith and fair dealing, hold the potential to define and to police the student-university relationship while avoiding

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Distinguishing a University from a Shopping Mall, 15 THOUGHT & ACTION 85 (1999) (tracing the historical role played by institutions of higher education and noting their increasing consumer orientation).

2. *See infra* notes 68-75 and accompanying text (discussing the judicial tendency to grant educational institutions significant latitude when dealing with students and noting journal articles that debate the ineffectiveness of contract theory in protecting student interests).

3. *See* Slaughter v. Brigham Young Univ., 514 F.2d 622, 626-27 (10th Cir. 1975) (reversing the district court's rigid application of the commercial contract doctrine and upholding the university's expulsion of a student); Marquez v. University of Wash., 648 P.2d 94, 96 (Wash. Ct. App. 1982) (commenting that, while the student-university relationship is "primarily contractual, . . . '[t]his does not mean that contract law must be rigidly applied in all its aspects'" because "'[t]he student-university relationship is unique, and it should not be and can not be stuffed into one doctrinal category'" (quoting Lyons v. Salve Regina College, 565 F.2d 200, 202 (1st Cir. 1972))); *see also* WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION § 4.1.3, at 373 n.1, 373-77 (3d ed. 1995) [hereinafter LAW OF HIGHER EDUCATION] (discussing the student-university relationship and noting that "contract theory is by far the primary theory for according legal status to students beyond that derived from the Constitution and state and federal statutes"). *See generally* MICHAEL A. OLIVAS, THE LAW AND HIGHER EDUCATION: CASES AND MATERIALS ON COLLEGES IN COURT 631-89 (2d ed. 1997) (exploring the range of legal relationships between colleges and students).

4. *See infra* notes 143-173 and accompanying text (discussing whether educational malpractice is a viable theory of tort liability and citing cases illustrating judicial reluctance toward educational malpractice claims).

5. *Cf.* Hazel G. Beh, *Downsizing Higher Education and Derailing Student Educational Objectives: When Should Student Claims for Program Closures Succeed?*, 33 GA. L. REV. 155, 160 (1998) (analyzing the negative effects of viewing the student-university relationship as a semester-long relationship and the positive effects of viewing that relationship as an implied-in-law contract which "affords students some protection while also allowing the university to protect other societal interests associated with the operation and preservation of a university" (footnote omitted)).

the pitfalls of judicially second-guessing and intruding into the management of the institution or into its academic freedoms.[6] Part I of this Article explores the changing nature of education, suggesting that increasing consumerism and competition justifies less deference and more judicial involvement in higher education disputes between students and their schools. Part II discusses claims against universities based on educational malpractice and on breach of contract. This section explores judicial reluctance to intrude into management and into educational decisions and the resulting lack of a constructive and satisfactory judicial role. Part II concludes by discussing a few of the university-student contract cases where contract law's good faith and fair dealing obligations have offered a comfortable and workable method to regulate the educational contract without substituting the court's judgment for the institution's own best judgment. By holding schools to the morals of their own marketplace,[7] courts can protect a student's legitimate and reasonable expectations and hold institutions accountable for their abuses without diminishing the value of the university as a social institution.

I. THE CHANGING NATURE OF HIGHER EDUCATION

Increasingly, higher education is viewed and views itself as a business with education as its a product.[8] For many years, postsecondary

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6. This Article attempts to avoid discussion of cases that are clearly grounded in academic freedom issues such as grade challenges and disciplinary matters. Instead, this Article examines claims based upon allegations that the postsecondary institution promised something that it did not deliver.

7. *See generally* Nicola W. Palmieri, *Good Faith Disclosures Required During Precontractual Negotiations*, 24 SETON HALL L. REV. 70, 107-09 (1993) (discussing the role ethical standards play in the marketplace). For various interpretations and applications of the obligation of good faith and fair dealing, see Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 388-89 (1980), inferring good faith from "the ordinary course of business and customary practice." *See also* Eric M. Holmes, *A Contextual Study of Commercial Good-Faith: Good-Faith Disclosure in Contract Formation*, 39 U. PITT. L. REV. 381, 400-09 (1978) (discussing various definitions of good faith and attempting to clarify the concept of good faith through the vehicle of insurance cases); Robert S. Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 195 (1968) [hereinafter *"Good Faith" in General Contract Law*] (commenting that the general enforceability of promises is derived from the basic principle that individuals should act in good faith toward those with whom they deal); Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810, 835 (1982) [hereinafter *General Duty of Good Faith*] (analyzing the potential effects of adopting a Duty of Good Faith and Fair Dealing Section of the Restatement (Second) of Contracts to general contract law).

8. *See* Andre v. Pace Univ., 618 N.Y.S.2d 975, 979 (City Ct. 1994), *rev'd*, 655 N.Y.S.2d 777 (App. Div. 1996) (stating that "Colleges and Universities are in the business of marketing and delivering educational services and Degrees to the general public"); THE NEW

schools regarded themselves as above the marketplace, serving lofty and important societal interests, unconcerned with competition for students or pandering to student interests.[9] As a result of the institution's elevated societal status, courts traditionally have accorded postsecondary schools broad discretion and latitude to educate and to treat students as they deem appropriate.[10]

GUIDE TO STUDENT RECRUITMENT MARKETING (Virginia Carter Smith & Susan Hunt, eds., 1986) [hereinafter STUDENT RECRUITMENT] (noting the stiff competition that admissions officers face in soliciting and in attracting the business of graduating high school seniors); THOMAS J. AUDLEY & CHARLES F. DORLAC, INTERVIEWING METHODS FOR ENROLLING, GUIDING AND RETAINING STUDENTS 3 (1991) (discussing the need for college officials to employ effective marketing efforts to attract the "[i]ncreasingly discriminating buyers of the American marketplace"); David Brodigan & George Dehne, *Data for Effective Marketing in an Uncertain Future*, J.C. ADMISSION, Spring 1997, at 16, 18-20 (stressing the importance of a university understanding its audience as a prerequisite to effective marketing plans); Jody Johnson & David Sallee, *Marketing Your College as an Intangible Product*, J.C. ADMISSION, Summer 1994, at 16, 20 (examining colleges' use of personal marketing to differentiate themselves and to capitalize on their strengths); Robert E. Johnson, *Where Consumer Has Become King*, TRUSTEESHIP, Mar.-Apr. 1998, at 26 (examining higher education marketing as a response to intense consumer pressure); John Martin & Thomas Moore, *Problem Analysis: Application in Developing Marketing Strategies for Colleges*, 66 C. & UNIV. 233, 234 (1991) (discussing the value of using market information to attract and to keep students); Richard A. Matasar, *A Commercialist Manifesto: Entrepreneurs, Academics, and Purity of the Heart and Soul*, 48 FLA. L. REV. 781, 792-93 (1996) (describing higher education as a commercial activity); Mark S. Neustadt, *Is Marketing Good for Education?*, J.C. ADMISSION, Winter 1994, at 17, 22 (concluding that the exercise of marketing techniques to articulate an institution's view of its core educational experience is productive if it hones the institution's sense of what it is and what it is not providing); Robert Zemsky et al., *In Search of Strategic Perspective: A Tool for Mapping the Market in Postsecondary Education*, 29 CHANGE 23, 35 (1997) (commenting that increasingly, college consumers "see themselves as shoppers . . . search[ing] for the best price, the most convenient time, and the most appropriate place").

Students also market themselves to colleges by taking entrance exam preparatory courses and hiring private admissions consultants. *See* Patricia McDonough & Larry Robertson, *Reclaiming the Educational Role of Chief Admissions Officers*, J.C. ADMISSION, Spring 1995, at 23, 24 (noting the changing role of admissions officers from a once quasi-academic profession to a largely administrative profession).

9. *Cf.* Matasar, *supra* note 8, at 783 (urging the acceptance of the "reality by institutions of higher education that commercialism exists within these institutions"); Neustadt, *supra* note 8, at 17 (discussing faculty opinions on the marketing trend and noting that some believe marketing has "little or nothing to contribute to the ultimate mission of [an educational] institution").

10. *See* LAW OF HIGHER EDUCATION, *supra* note 3, § 1.2, at 4-7 (discussing the evolution of higher education suits and noting the judiciary's reluctance to part from its traditional hands-off approach); OLIVAS, *supra* note 3, at 631-34 (examining patterns in higher education litigation and noting that students seldom prevail in these suits); William A. Kaplin, *Law on the Campus, 1960-1985: Years of Growth and Challenge*, 12 J.C. & U.L. 269, 272 (1985) (noting that "[t]raditionally, the law accorded postsecondary institutions extensive autonomy" and that "[t]he judiciary developed various doctrines" to protect the autonomy of the institutions); *see also* Michael A. Olivas, *Reflections on Professorial Academic Freedom: Second Thoughts on the Third "Essential Freedom,"* 45 STAN. L. REV. 1835, 1856 (1993) (discussing professors' wide discretion in formulating teaching methods).

Times have changed. 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.[11] The number of college students also swelled by 346 percent, from "just over" 4.1 million in 1961 to almost 14.2 million in 1991.[12] During these decades, the college age cohort also ebbed and flowed as it always does, resulting in years of keen competition for students as well as years of high demand.[13] In years of low demand, there is an increased risk of sharp recruitment practices such as disparaging competitors and misleading students.[14] The proliferation of colleges means that student choice now drives the recruitment scene; colleges must actively market themselves to stand apart and can no longer simply wait for student applications.[15]

Although marketing is no longer a dirty word in higher education, ethical and appropriate marketing tactics remain a subject of debate.[16] While in the decades of the 1960s and 1970s, institutions developed new academic programs and majors to attract new students,[17] increasingly colleges rely on marketing, and particularly on "image" marketing to promote their schools.[18] As one commentator described the current state, colleges seek "to differentiate themselves in an increasingly crowded playing field," by becoming "active market-

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11. *See* McDonough & Robertson, *supra* note 8, at 24.

12. *See id.*

13. *See id.* at 25 (discussing studies of admission officers undertaken in the 1960s, 1970s, and 1980s and noting the changing concerns and conclusions of each).

14. *See id.*; Nancy Harper, *Why We Need Marketing: An Interview With Philip Kotler, in* STUDENT RECRUITMENT, *supra* note 8, at 17 (discussing the "hard-sell approach" and noting its use by "troubled colleges").

15. *See* Martin & Moore, *supra* note 8, at 233-34 (considering how "colleges need market information for making decisions which enhance their ability to retain and attract students" and addressing strategies for colleges and for universities to implement to remain competitive under the current market conditions).

16. *See* Harper, *supra* note 14, at 18 (discussing ethical issues associated with marketing focused on "selling and manipulation," as opposed to those associated with "research and response").

17. *See* Neustadt, *supra* note 8, at 19 ("During the sixties and seventies, colleges and universities sought to attract students by investing in new academic programs and majors."); *see also* Zemsky, *supra* note 8, at 23 (noting the "build it, they will come" philosophy in higher education that marked the period from the end of World War II through the early 1970s).

18. *See* Zemsky, *supra* note 8, at 23 (commenting that the 1970s witnessed an onslaught of marketing as institutions worried that their expanded capacity had exceeded the demand for higher education); *see also infra* note 39 and accompanying text (describing image marketing).

eers in pursuit of the finite number of young people undertaking a four-year education."[19]

Colleges entice students through both printed material and personal contacts.[20] "Personal marketing" occurs when university employees such as admissions officers, faculty members, and coaches make personal contact through e-mail, letters, telephone calls, and/or campus visits.[21] These personal contacts are highly touted marketing tools with a goal of influencing student choice.[22] During the personal contacts between students and admissions officers, many specific representations are often made.[23]

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19. *See* Zemsky, *supra* note 8, at 23.

20. The amount of communication between the school and the student is great. One small school with an enrollment of under 1500 (in 1986) described the recruitment campaign as including "200,000 personalized letters, 11,000 phone calls, and 500 high school and college night visits." *See* R. Dana Paul & Ken Stark, *The Mixmasters*, in STUDENT RECRUITMENT, *supra* note 8, at 9-10 (describing recruitment efforts of Adrian College in Adrian, Michigan).

21. With a focus on consumers, personal contact is ever more important, including e-mail to admissions officers and to faculty during recruitment, and segmented marketing via the Internet. *See* Johnson, *supra* note 8, at 28-29 (discussing the impact of personal communications and of "changing communication technologies" in higher education marketing); M. Fredric Volkmann, *Avoiding the Impersonal Touch*, in STUDENT RECRUITMENT, *supra* note 8, at 51 (noting how to personalize recruitment by establishing "one-to-one relationships with carefully targeted audiences"); William H. Turner, *Admission: Possible*, in STUDENT RECRUITMENT, *supra* note 8, at 53 (discussing the need for admissions officers to personalize contact with prospective students through mailings, phone calls, and face-to-face contacts); Johnson & Sallee, *supra* note 8, at 18-19 (emphasizing the importance of personal marketing in convincing students that the product—the university—is worthy of their enrollment).

22. *See* AUDLEY & DORLAC, *supra* note 8, at 66 (stating that "[t]he objective of the recruiting interview is to influence the student to choose a particular college"); Johnson & Sallee, *supra* note 8, at 29 (noting that "[a]dmissions counselors who personally call accepted students with the good news will retain a marketing advantage" and stating that "[f]aculty who are accessible to prospective and current students and willing to engage them in conversation help project a student-friendly culture").

23. The following example, explaining how best to respond to an applicant's question about the student-faculty ratio, demonstrates how recruiters are advised to become more effective in personal marketing contacts:

> The ratio is 13:1. (Give this as a reference point and as an answer to the direct question.) But the important issue is the number of students in each class and how well you get to know the professor. The published ratio does not mean much if the classes on any level are too large. For example, freshman English closes at 25. If we get too many students, we add sections. Old Testament closes at 45. Psychology closes at 40. The largest class you would have would likely be the sophomore course, Western Civ. at 66 . . . . (This educates the students to an important issue, setting an expectation, on which we look good. It also enhances your credibility by showing that you know these details. These figures and examples are also memorable. Another important point to remember is that all classes are taught by professors, not grad assistants. Let me tell you about Dr. Mitchell

Colleges also market themselves and make representations and promises to students through printed materials, most notably the catalog.[24] The college catalog attempts to serve many marketing and educational purposes; many criticize the college catalog because it seldom achieves its goals and often creates uncertainty and confusion.[25] The catalog is intended to inform students of the college's expectations and to advise students of the requirements and the standards of the college.[26] The catalog describes the educational offerings and the other resources of the institution.

Also chief among the catalog's functions is advertisement. As marketing and advertising tools, catalogs, "contain[ ] profusions of econiums on the goodness of the institutions, their high objectives, [and] the profundity of their professors."[27] The catalog 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

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. . . . (This answer concludes with a concrete example that illustrates that our faculty care about their students, especially freshmen).

Johnson & Sallee, *supra* note 8, at 19-20 (internal quotation marks omitted); *see also* AUDLEY & DORLAC, *supra* note 8, at 3-7 (describing personalized marketing techniques in college recruitment as a recent development).

24. *See* Zumbrun v. University of S. Cal., 101 Cal. Rptr. 499, 504 (Ct. App. 1972) (stating that "catalogs, bulletins, circulars, and institutional regulations 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) (describing the development of the college catalog as a basis for legal liability and noting that the "typical catalog . . . contain[s] policies and procedures concerning admissions, financial aid, registration and academic and disciplinary matters" (citing Peterson, *Legal Responsibilities and Contractual Obligations Imposed on a University by its Catalog*, 56 C. & J. 254 (1981))).

25. *See generally* Robert L. Cherry, Jr. & John P. Geary, *The College Catalog as a Contract*, 21 J.L. & EDUC. 1, 30 (1992) (noting that because many catalogs are not published yearly, information is often outdated and inaccurate); Davenport, *supra* note 24, at 204-06 (discussing cases in which students have brought suits based, in part, on catalog misrepresentation); Eileen K. Jennings, *Breach of Contract Suits by Students Against Postsecondary Education Institutions: Can They Succeed?*, 7 J.C. & U.L. 191, 200 (1980) (discussing student-university suits in which the catalog provision in question is nonspecific or missing, and noting that in such cases, "courts are likely to uphold the college procedure, so long as it is not arbitrary or an abuse of discretion"); Marty Terrill & James O. Hammons, *Can They? Will They? Did They? Probably Not. College Students and College Catalogs*, J.C. ADMISSIONS, Spring 1996, at 2 (remarking that catalogs are "often published but never read" because they are "written by the institution, about the institution and for the institution").

26. *See* Davenport, *supra* note 24, at 202 (noting that the typical college catalog contains the institution's policies and procedures for a variety of matters such as academics and financial aid); Terrill & Hammons, *supra* note 25, at 2 (listing some common topics covered in college catalogs and noting that catalogs often pay specific attention to the "rules, regulations, policies and concerns of the institution").

27. Davenport, *supra* note 24, at 202 (quoting Harper, *Catalogs and the Law*, 49 COMMUNITY & JR. L.J. 3 (1978)).

have of the institution and vice versa.[28] Catalogs often contain dull, technically written descriptions of courses, degree requirements, schedules, and procedures.[29] In fact (and ironically), catalogs require advanced reading comprehension skills, well beyond that of their intended student market.[30] As one critic commented, "[c]ollege and university catalogs may well belong on the list of 'often published but never read' books."[31]

Importantly, between the "pictures in the front [and] the listing of courses in the back," catalogs have "many pages of promises [and] representations."[32] Yet notably, within their printed material, colleges often disclaim their own liability and reserve the right to change anything about the program without notice.[33] These reservations are quite broad, so that in the end, the institution promises the student nothing at all:

> The University reserves the right in its sole judgment to make changes of any nature in the University's academic program, courses, schedule, or calendar whenever in its sole judgment it is deemed desirable to do so. The University also reserves the right to shift colleges, schools, institutes, programs, departments, or courses from one to another of its campuses. The foregoing changes may include, without limitation, the elimination of colleges, schools, institutes, programs, departments, or courses, the modification of the contents of any of the foregoing, the rescheduling of classes, with or without extending the announced academic term, the cancellation of scheduled classes, or other academic activities.[34]

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28. *See id.* at 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." (footnote omitted)).

29. *See* Terrill & Hammons, *supra* note 25, at 2 (describing college catalogs as "boring" as well as "difficult to use" and "confusing").

30. *Id.* (reporting on an analysis of 21 college catalogs which concluded that the average reader would need a comprehension level comparable to that of a college graduate to read and to comprehend the catalogs).

31. *Id.*; *see also supra* notes 24-25.

32. Davenport, *supra* note 24, at 201.

33. *See* Beh, *supra* note 5, at 180-81 (noting that college catalogs often disclaim contractual obligations); Davenport, *supra* note 24, at 219-21 (discussing cases in which universities modified their programs described in their catalogs and noting that courts often give "great deference toward the university's need for academic flexibility" in such modification cases).

34. Beukas v. Board of Trustees, 605 A.2d 708, 708-09 (N.J. Super. Ct. App. Div. 1992) (quoting FAIRLEIGH DICKINSON UNIVERSITY GRADUATE STUDIES BULLETIN 1989); *see also* Thornton v. Harvard Univ., 2 F. Supp. 2d 89, 92-95 (D. Mass. 1998) (finding that representations and promises contained within a law school's catalog did not create a binding con-

Colleges make both very vague and very specific promises and representations to students in their printed literature and in personal contacts. At a general level, colleges promise to educate and to enhance the student's life and character.[35] More specifically, the 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.[36]

Institutions are at best schizophrenic in how they promote themselves, for all the while they are promising a great deal, they are also disclaiming most of those same promises. For example, as a recent marketing tool to enhance the perception of accountability and to improve "public notions about the educational barriers that prevent students from graduating in generally accepted time periods," colleges have begun to offer "four-year degree guarantees" that promise students who follow a prescribed plan that they can complete their degrees within four years.[37] Yet, the remedies for the institution's failure to meet its obligations are expressly limited or nonexistent in

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tract where it referred the reader to a financial aid guide that reserved the school's right to change any terms of assistance to students); 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); Laura Krugman Ray, *Toward Contractual Rights for College Students*, 10 J.L. & EDUC. 163, 171 (1981) (noting various ways courts interpret student-university contracts in favor of the institution).

In addition to reserving the right to change anything and everything, some catalogs specifically disclaim contractual liability as well. *See* Tobias v. University of Texas, 824 S.W.2d 201, 211 (Tex. App. 1991) (upholding a catalog provision that gave "express notice that '[t]he provisions of this catalog do not constitute a contract, express or implied, between any applicant, student, or faculty member and The University of Texas at Arlington or The University of Texas System'" (quoting UNIVERSITY OF TEXAS AT ARLINGTON CATALOG 1985)).

35. *Cf.* Trustees of Columbia Univ. v. Jacobsen, 148 A.2d 63, 67 (N.J. Super. Ct. App. Div. 1959) (holding that a college's promise to teach wisdom cannot be relied upon in a suit for misrepresentation).

36. *Cf.* Johnson & Sallee, *supra* note 8, at 19 (explaining that admissions counselors can be more effective when responding to student questions by relaying facts, features, and benefits of the university with concrete language and anecdotes).

37. F. King Alexander, *Four-Year Undergraduate Degree Guarantees: A Comparative Inquiry* (1998) (unpublished paper on file with author). Some guarantees provide that the university will waive or substitute requirements or pay tuition if promised courses are unavailable. Others, however, provide no remedy despite making very specific promises about course availability. *See id.* (discussing and comparing four-year guarantees at the University of California, University of Iowa, Indiana University, University of Minnesota Twin Cities, and University of Wisconsin-Madison).

most of these,[38] thus making these graduation guarantees better marketing tools than true contractual promises.

In addition to making specific promises, colleges also market by projecting an image. Inaccuracies occurring through a school's image marketing, so long as it is not grossly misleading, is probably best characterized as nonactionable puffery,[39] those exaggerations and vague superlatives that contract law has long tolerated. This passage from a University of Phoenix brochure is a good example of puffery: "No other university in America is more dedicated to your success. . . . Because all our students are busy professionals, service is our priority. You will find no long lines for registration, no need for frequent trips to college bookstores, and no unnecessary administration."[40] Although the statement projects an "image" of the institution, even if inaccurate, no single statement is actionable, as each statement is either a subjective opinion, a superlative, or a mere exaggeration, and all of it is too vague and too general to enforce.

Legally permissible puffery aside, college administrators have established ethical standards to govern their marketing conduct. Admission counselors govern themselves by a code of ethics that precludes false and deceptive recruiting practices and encourages providing accurate and truthful information to applicants.[41] Importantly, the code of ethics, to which many college admission counselors ascribe, forbids commission-driven recruitment, thus avoiding the ob-

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38. *See id.* at 1, 2.

39. *See* IVAN L. PRESTON, THE GREAT AMERICAN BLOW-UP: PUFFERY IN ADVERTISING AND SELLING 17 (1975) (defining puffery as "advertising or other sales representations which praise the item to be sold with subjective opinions, superlatives, or exaggerations, vaguely and generally, stating no specific facts"); IVAN L. PRESTON, THE TANGLED WEB THEY WEAVE: TRUTH, FALSITY, AND ADVERTISERS 103-05 (1994) (discussing the general concept and the history of puffery and providing examples thereof); *see also* JEF I. RICHARDS, DECEPTIVE ADVERTISING: BEHAVIORAL STUDY OF A LEGAL CONCEPT 19 (1990) (defining puffery and distinguishing the concept from that of unfairness).

40. Jacqueline Raphael & Sheila Tobias, *Profit-Making or Profiteering? Proprietaries Target Teacher Education*, 29 CHANGE 44, 47 (1997) (internal quotation marks omitted) (quoting UNIVERSITY OF PHOENIX BROCHURE 1997).

41. Originally promulgated by the National Association for College Admission Counseling (NACAC) to promote ethics in recruiting, a joint Code of Ethics was developed by the NACAC, the American Association of Collegiate Registrars and Admission Officers, The College Board and endorsed by the American Council on Education, the National Association of Secondary School Principals, the National Student Association, and the American School Counselor Association. *See* NATIONAL ASSOCIATION FOR COLLEGE ADMISSION COUNSELING, STATEMENT OF PRINCIPLES OF GOOD PRACTICE (rev. 1997) [hereinafter GOOD PRACTICE]; *see also* AMERICAN ASS'N OF COLLEGIATE REGISTRARS AND ADMISSIONS OFFICERS, 1998-99 AACRO MEMBER GUIDE, PROFESSIONAL PRACTICES AND ETHICAL STANDARDS, at xi (prescribing a Code of Professional Practices and Standards for college registrars and admissions officers).

vious conflicts and the temptations associated with per capita payments.[42] Moreover, the code of ethics for admissions officers charges them with oversight obligations for the admission and the recruitment practices of their institution generally.[43]

Good practice requires that, among other things, admissions counselors assume responsibility for all publications used to promote and to recruit students and ensure that their institution refrains from false and misleading advertising.[44] Admissions counselors are expected to provide precise and accurate information concerning program offerings at their institution, to give accurate information regarding costs of attendance, and to "speak forthrightly, accurately, and comprehensively in presenting their institutions to counseling personnel, prospective students, and their families."[45] Good practice favors providing "comprehensive," "current and accurate," "clear" and "precise" information, and "current and realistic" pictures and descriptions of the institution to prospective students.[46] In addition, admissions counselors must refrain from initiating contacts and enticing students enrolled or intending to enroll at other institutions to transfer.[47] In their marketing efforts, admission counselors are admonished "not [to] use disparaging comparisons of secondary or postsecondary institutions."[48]

Active marketing is not the only vestige of commercialism in higher education; the typical college student is less and less characterized as wide-eyed and innocent and is more often regarded as a savvy shopper.[49] Many students are now nontraditional students who work and who raise families while attending school.[50] Many students no

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42. *See* GOOD PRACTICE, *supra* note 41, at I.A.1-2.

43. *See id.* at I.A.2-3.

44. *See id.*

45. *Id.* at I.A.4.

46. *Id.* at I.A.1-2.

47. *See id.* at I.A.6.

48. *Id.* at I.A.4.d.

49. *Cf.* AUDLEY & DORLAC, *supra* note 8, at 3 (noting that, since the late 1970s, "discriminating buyers in the American marketplace [have] expected the same consideration from educational institutions as they [have] received from others"); Martin & Moore, *supra* note 8, at 234 (assessing student satisfaction with the college "product" as a critical marketing factor); Zemsky, *supra* note 8, at 24 (describing differing student markets including the typical "traditional-aged students matriculating at largely residential campuses" and the recent rise of "user-friendly institutions that stress convenience and value for students of a variety of ages, those who increasingly mix work and learning while pursuing their degrees one or two courses at a time").

50. The traditional 18-22 year old undergraduate students desiring a "holistic" educational experience that is preparatory in nature and includes "co-curricular activities" has been replaced by a "new majority of part-time and intermittent learners who are older,

longer desire a liberal education and instead have specific career goals and desire convenience and flexibility. Today, many students expect the school to accommodate the student's schedule and interests and not vice versa. Proprietary colleges that cater to consumer-oriented students have influenced the market, causing many traditional schools to rethink how they sell education, treat student-consumers, and define themselves.[51]

The federal government has long recognized the consumer nature of education and the need for congressional oversight.[52] The Student-Right-to-Know provisions of the Higher Education Act[53] evidence congressional recognition that higher education is both a product and a relationship that begs for external review.[54] Congress imposes numerous disclosure requirements on postsecondary schools receiving federal funds, including the requirement to provide all students with general descriptive information and information regarding the nature of the program, its costs and its financial aid terms,[55] crime data,[56] and student-athlete consumer information.[57] Congress specifi-

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[and] frequently combine work and schooling" and colleges often market to both constituencies. Zemsky, *supra* note 8, at 35-36.

51. In terms of efficiency and cost, it is difficult for the traditional college to compete with the "streamlined," standardized proprietary school. These schools cater to working students, teach specifically to licensing (minimum) requirements, do not expect and do not fund faculty research, and use part-time faculty who have developed their expertise at the expense of another employer. *See* Raphael & Tobias, *supra* note 40, at 46-47 (identifying the University of Phoenix as an example of an institution that has been successful in delivering a "streamlined" education).

52. The government has turned over much of the oversight function to private accrediting agencies by requiring institutions receiving federal funds to be accredited by federally approved and recognized accrediting agencies. In essence, "the Secretary of Education accredits the accreditors." *See* Jeffrey C. Martin, *Recent Developments Concerning Accrediting Agencies in Postsecondary Education*, 57 LAW & CONTEMP. PROBS. 121, 124 (1994) (discussing the historical and the current relationship between the federal government, private accrediting agencies, and higher education institutions).

53. 20 U.S.C. § 1092 (1994 & Supp. 1998). *See generally* WILLIAM A. KAPLIN & BARBARA A. LEE, A LEGAL GUIDE FOR STUDENT AFFAIRS PROFESSIONALS § 12.3.3.3, at 542 (1997) [hereinafter STUDENT AFFAIRS] (discussing the Student-Right-to-Know Act); LAW OF HIGHER EDUCATION, *supra* note 3, § 4.15.1, at 559, § 7.4.3.3 (explaining information sharing requirements imposed on higher education institutions by the Student-Right-to-Know Act).

54. *See* H.R. REP. NO. 101-518, at 1-2 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3363, 3363-64 [hereinafter HOUSE REPORT] (commenting that "[i]n an era marked by increasing college costs and greater scrutiny of our nation's system of higher education, it is not surprising to find that parents and students are asking more 'consumer oriented' questions before making the decision to attend a particular college or university").

55. *See* 20 U.S.C. § 1092(a)(1)(A)-(F), (b), (c).

56. *See id.* § 1092(f) (describing the required "[d]isclosure of campus security policy and campus crime statistics" and codifying the Crime Awareness and Campus Security Act; *see also* Michael C. Griffaton, Note, *Forewarned is Forearmed: The Crime Awareness and Campus Security Act of 1990 and the Future of Institutional Liability for Student Victimization*, 43 CASE W.

cally noted that parents and students are properly asking more "'consumer-oriented' questions before making the decision to attend a particular college or university"[58] and so to assist and to protect students and prospective students, federal law now compels colleges to collect and to disclose quantitative graduation data and other information to make sound consumer choices.[59] Congressional hearings suggested that colleges were not providing adequate information and student-consumers and their parents need more "outcome[ ] oriented measures" to make informed choices "before any financial commitment is made to the institution."[60]

Emphasizing the consumer nature of the relationship, the House Committee commented that they "believe[d] that the reporting of graduation rates will protect parents and students from institutions that encourage students to enroll but fail to focus on student retention as part of providing a quality educational experience."[61] Moreover, the House specifically acknowledged the special vulnerability of students and noted that this "information is especially important for first generation college students who have had little experience in dealing with institutions of higher education."[62] These federal reporting requirements demonstrate the congressional view that education

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RES. L. REV. 525, 561 (1993) (explaining the disclosure requirements mandated by the Crime Awareness and Campus Security Act).

57. *See* 20 U.S.C. § 2092(e) (Supp. 1998); *see also* Chris Truax, *Why Can't the Football Team Read?: The Student Athlete's Right-to-Know Act and the Growing Threat of Liability*, 4 VILL. SPORTS & ENT. L.J. 301, 302 (1997) (explaining that the Student Athlete Right-to-Know Act "seeks to minimize the exploitation of student athletes by requiring institutions to disclose graduation rates for athletes to potential recruits"); STUDENT AFFAIRS, *supra* note 53, at 431-32 (noting that any postsecondary institution that administers federal aid to students and awards "[a]thletically-related student aid" is bound by the Act); LAW OF HIGHER EDUCATION, *supra* note 3, § 4.15.1, at 559 (explaining that the Student Right-to-Know Act attempts to ensure that potential student-athletes will have access to data that will help them make informed choices when selecting a university or college).

58. HOUSE REPORT, *supra* note 54, at 3364; *see also id.* (stating that "[a]s with all major investments, families should have the opportunity to ask what sort of return they can expect from their investment").

59. *See* 20 U.S.C. § 1092(a)(1)(L) (1994). A "'prospective student' means any individual who has contacted an eligible institution requesting information concerning admission to that institution." *Id.* at (a)(2); *see also* HOUSE REPORT, *supra* note 54, at 3364 (noting that as amended, House Report 1454 requires institutions to provide information in areas such as graduation rates, campus security policies, and crime statistics).

60. HOUSE REPORT, *supra* note 54, at 3368-69. When Congress enacted the Student Athlete Right-to-Know Act, it initially intended to mandate graduation data disclosure for student athletes only, but, "[f]ollowing two days of oversight hearings on student athletics the Committee developed an interest in the need to provide rate data not only for student athletes, but for all students who attended postsecondary institution." *Id.*

61. *Id.*

62. *Id.* at 3368-69.

is a consumer product and ensure that the educational institution imparts some useful information to student-consumers about such matters as crime on campus, financial aid, and education costs. The federal requirements, however, are not so comprehensive that they police the many other important types of specific representations and promises colleges often make to students and to applicants concerning the nature of the courses, the quality of instruction, and the opportunities that education at their institution promises.

II. CLAIMS AGAINST COLLEGES

The deeply rooted hostility toward student claims and judicial deference to university conduct toward students becomes increasingly less defensible as bottom-line, commercial concerns motivate university actions and students seek a more consumer friendly product. Driven by economic factors or by simple poor judgment, agents of the university make representations and promises that are either untrue or that the institution fails to keep.[63] The following sections discuss the current judicial posture toward student claims and suggests that judicial reluctance to get involved in college classrooms leaves students vulnerable and their futures uncertain. Traditional judicial deference toward institutions of higher education makes courts reluctant to apply general contract principles liberally. For example, courts resist calling the educational contract unconscionable despite its adhesionary qualities, courts typically do not find the student-professor or student-institution relationships fiduciary ones despite their confidential nature, and courts are reluctant to imply broadly contractual obligations for the benefit of the student.[64] Courts have rejected tort claims based on educational malpractice as a source of judicial oversight for similar reasons.[65] A few courts, however, dissatisfied with so little a role in the adjudication of student-university disputes, have found that contract law's implied obligations of good faith and fair dealing[66] hold tremendous potential to accord

63. Untrue factual representations give rise to claims for misrepresentation while broken promises give rise to breach of contract claims. Although substantively different, this Article makes little of the distinction because in this instance judicial antipathy toward either claim is similar.

64. *See generally infra* notes 78-142 and accompanying text.

65. *See infra* notes 143-173 and accompanying text.

66. *See* Burton, *supra* note 7, at 378-94, 403 (discussing failure to perform in good faith as a contract breach and as being "derived from a cost perspective on the contractual expectation interest"); Holmes, *supra* note 7, at 400-09, 451 (explaining good faith in contract formation); Palmieri, *supra* note 7, at 78-120, 199-200 (noting that disclosures have long been recognized as required in contract negotiations to the extent that one is bound

deference, to preserve institutional autonomy, and to protect students.[67]

A. Student Claims Based Upon Specific Promises and Representations

The awkward role of contract law in adjudicating student claims against colleges has long been noted by both courts[68] and by scholars.[69] Many problems exist with rigidly applying contract law. The

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by good faith to disclose information material to the transaction); Summers, *"Good Faith" in General Contract Law, supra* note 7, at 195, 199-207 (discussing good faith in performance and urging that good faith should be a minimal standard); Summers, *General Duty of Good Faith, supra* note 7, at 812-25, 835 (predicting that the adoption of Section 205 of the *Restatement (Second) of Contracts* will result in an acceleration of the growth of general contract law on good faith); *see also* E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 272 (1987) (explaining precontractual good faith and best efforts); Charles L. Knapp, *Enforcing the Contract to Bargain*, 44 N.Y.U. L. REV. 673, 721-23 (1969) (analyzing conduct tantamount to bad faith).

67. Contract law has been a sufficiently flexible doctrine to adjudicate disputes among people in very complex relationships where many expectations are unstated. 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).

68. One court explained:

> [I]n light of the wide latitude and discretion afforded by the courts to educational institutions in academic matters, the University is entitled to some leeway in modifying its programs from time to time so as to properly exercise its educational responsibility. The concept of a binding, absolute, unchangeable contract is particularly anomalous in the context of post graduate level work.

Marquez v. University of Wash., 648 P.2d 94, 96-97 (Wash. App. 1982) (internal citations omitted). Courts have gone as far as to say that "[e]ven to think that a university could be found to have broken its contract when it changed the dates of classes, or the curriculum, for reasons beyond its control, or changed teachers should startle anyone familiar with university life." Cuesnongle v. Ramos, 713 F.2d 881, 885 (1st Cir. 1983); *see also* Davenport, *supra* note 24, at 215-16 (discussing *Cuesnongle v. Ramos* and noting how courts have agreed that universities have distinct qualities, which requires that they have great latitude in management decisions). Davenport attributed judicial resistance to holding colleges to the representations of their catalogs as deference and indulgence of flexibility as based on the "educational responsibility and expertise" theory and the "notion that . . . flexibility will enhance the quality of education." *Id.*

69. *See* LAW OF HIGHER EDUCATION, *supra* note 3, § 4.1.3, at 373-77 (exploring the various ways in which contract theory is implicated by the student-university relationship); Davenport, *supra* note 24, at 211 (noting that many rules of contract interpretation have been applied to college catalogs and discussing courts' general reluctance to recognize a college catalog as a contract of adhesion); Victoria J. Dodd, *The Non-Contractual Nature of the Student-University Contractual Relationship*, 33 U. KAN. L. REV. 701, 709-12 (1985) (discussing the application of contract theory to student-university cases); Elizabeth L. Grossi & Terry D. Edwards, *Student Misconduct: Historical Trends in Legislative and Judicial Decision-Making in American Universities*, 23 J.C. & U.L. 829, 839-52 (1997) (acknowledging that the student-university relationship, now shaped by constitutional and contractual theories, is fraught with complexities and ambiguities); Jennings, *supra* note 25, at 198-202 (discussing the

complex relationship between the student and the university is largely implied rather than explicitly stated, thus making it difficult for courts to determine the contractual terms of the apparent "contract."[70] The terms expressed in the college catalog, if one is to view the catalog as the principle source of contractual terms at all, are usually subject to a one-sided and broad disclaimer of liability and reservation of rights that confounds courts.[71] Moreover, pure contract law presumes equality among the parties, or else tends to give an advantage to the weaker.[72] Yet, courts typically are solicitous of the educational institu-

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reluctance of courts to overturn decisions made by educators when the dispute involves strictly academic relationships); Virginia Davis Nordin, *The Contract to Educate: Toward a More Workable Theory of the Student-University Relationship*, 8 J.C. & U.L. 141, 145-48 (1980) (discussing the application of academic abstention to student-university cases); Douglas R. Richmond, *Students' Right to Counsel in University Disciplinary Proceedings*, 15 J.C. & U.L. 289, 290-92 (1989) (exploring the difficulties in giving a legal definition to the student-university relationship); Thomas A. Schweitzer, *"Academic Challenge" Cases: Should Judicial Review Extend to Academic Evaluations of Students?*, 41 AM. U. L. REV. 267, 288-96, 362 (1992) (noting the need for judicial deference in the student-university relationship but advocating that arbitrary and capricious departures from institutional process and standards constitute a breach of contract); Comment, *Common Law Rights for Private University Students Beyond the State Action Principle*, 84 YALE L.J. 120, 142-44 (1974) (discussing the basic rationales behind the law of property and concluding that they provide a firm foundation for applying protections to the student-university relationship); Comment, *Private Government on the Campus—Judicial Review of University Expulsions*, 72 YALE L.J. 1362, 1377 (1963) (suggesting more effective alternatives to the traditional contract analysis for use in judicial review of student expulsions); Developments in the Law, *Academic Freedom*, 81 HARV. L. REV. 1045, 1146-47 (1968) [hereinafter *Academic Freedom*] (noting that "contract theory—as it has heretofore been applied—unduly favors the institution and has been of limited effectiveness in conferring rights upon students"); Robert Faulkner, Note, *Judicial Deference to University Decisions Not to Grant Degrees, Certificates, and Credit—the Fiduciary Alternative*, 40 SYRACUSE L. REV. 837, 853-54 (1989) (noting the unwillingness of the judiciary to apply any contract principle evenhandedly in the student-university context); Brian Jackson, Note, *The Lingering Legacy of In Loco Parentis: An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135, 1151-55 (1991) (noting that courts "have avoided applying ordinary commercial doctrine" to the student-university relationship and have instead applied "exceptionally harsh standards to student litigants" and maintaining that "the courts have yet to explain why this justifies a unique and peculiarly harsh application of contract law").

70. *See* Peretti v. Montana, 464 F. Supp. 784, 786 (D. Mont. 1979) (noting that because a formal contract is rarely prepared between the student and the university, "the general nature and terms of the agreement" are considered to be implied), *rev'd on other grounds*, 661 F.2d 759 (9th Cir. 1981); *Marquez*, 648 P.2d at 96 (adopting the view that the nature of the student-university agreement is implied).

71. *See infra* notes 85-91 and accompanying text (surveying cases in which courts concluded that colleges acted within the authority and guidelines expressed in the disclaimers of the catalogs).

72. *Cf.* ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1, at 3 (1952) (stating that "[i]t cannot truthfully be said that the law operates uniformly with respect to the promises of the rich and the poor, the employer and the employee" and maintaining that "[j]udges as well as juries moderate the operation of the law in favor of the poor as against the rich").

tion's societal value and the desirability of its own autonomy.[73] Courts, therefore, reject characterizing the institution or its employees as fiduciaries despite the trust and the confidence placed in them.[74] This judicial deference is not limited to academic matters but also extends to the school's business judgments.[75]

Yet, despite the general judicial reluctance to police the bargain between the student and the university,[76] no one can deny that the university-student relationship is one filled with promises and representations by the institution and by student expectations.[77] The next section explores the judicially imposed marginalization of contract law.

1. The University-Student Contract Is Not Unconscionable.—Despite the obvious adhesionary aspects of the student-university contract,[78]

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73. *Cf. supra* note 68.

74. *See infra* notes 91-96 and accompanying text (citing cases that found no fiduciary relationship to exist between the college and the students).

75. *See* LAW OF HIGHER EDUCATION, *supra* note 3, § 3.4.1, at 299 (commenting that "academic freedom refers not only to the prerogatives of faculty members and students but also to the prerogatives of institutions"); *see also* Beh, *supra* note 5, at 179-80 (discussing the courts' struggle to strike a balance between a desire to defer to the university's decision-making authority and a desire to protect legitimate student interests); Ray, *supra* note 34, at 180 (urging courts to reexamine their notion of university autonomy).

76. *See* Alsides v. Brown Inst., Ltd., 592 N.W.2d 468, 472 (Minn. Ct. App. 1999) (acknowledging courts' general reluctance to oversee school operations but noting approval for breach of contract claims where a school "fail[s] to provide specifically promised educational services" (citing CenCor, Inc. v. Tolman, 868 P.2d 396, 399 (Colo. 1994))); *see also* Davenport, *supra* note 24, at 215 (recognizing courts' tendency to interpret college catalogs in such a manner as to accord universities flexibility that would not otherwise be extended to parties in a normal contract); Jennings, *supra* note 24, at 200 (noting that where a catalog provision is vague or entirely missing, "courts are likely to uphold the college procedure, so long as it is not arbitrary or an abuse of discretion").

77. Oral representations that conflict with written standards sometimes pose particular analytical problems, including whether the employee had authority to bind the institution. *See* Ottgen v. Clover Park Technical College, 928 P.2d 1119, 1121-22 (Wash. Ct. App. 1996) (noting the tensions between oral representations and written standards and stating that there is no legal authority for the notion that "a contract between students and a school can be created by oral representations of a teacher"); Mangla v. Brown Univ., 135 F.3d 80, 83 (1st Cir. 1998) (discussing the problems raised by statements made by faculty when they conflict with the university's printed materials). On the other hand, oral representations may be the basis of equitable and of promissory estoppel claims. *See* Davenport, *supra* note 24, at 224 (noting that in "two New York cases, the doctrine of equitable estoppel was applied where a degree was denied even though the plaintiff relied on oral representations of university officials in conflict with catalog provisions" (citing Healy v. Larson, 323 N.Y.S.2d 625 (Sup. Ct. 1971); Blank v. Board of Higher Educ., 273 N.Y.S.2d 796 (Sup. Ct. 1966))).

78. Adhesionary contracts are not necessarily unconscionable especially if the terms are fair; however, the lack of meaningful choice and unequal bargaining power, which erode the freedom of contract, give unfair provisions within a contract heightened vulnera-

including those one-sided, take-it-or-leave-it express terms in the catalog as well as the general vulnerability of students,[79] courts do not generally find that the contract between the student and the institution is unconscionable.[80] Successful claims of unconscionability are usually found only in proprietary trade school cases.[81]

Curiously, courts seldom consider the youthful immaturity, economic status, or lack of education of students except in the proprietary school cases.[82] Quite the opposite, at least one court implied an

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bility to judicial intervention. *See, e.g.*, Weaver v. American Oil Co., 276 N.E.2d 144, 148 (Ind. 1971) (concluding that where a party can show that a contract is unconscionable due to a vast imbalance of bargaining power on behalf of the stronger party, unbeknownst to a lesser party, the contract will not be enforceable for public policy reasons); JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 9.43 (4th ed. 1998) (discussing unequal bargaining power between contracting parties in relation to unconscionability and adhesion contracts).

79. Students are often inexperienced in contractual matters. They are certainly less educated than the university administrators with whom they deal and are often poor—many are borrowing money to finance their education—and immature.

80. *See* Eisele v. Ayers, 381 N.E.2d 21, 24, 26 (Ill. Ct. App. 1978) (holding that Northwestern's tuition increase of 57.6%, which was seven times higher than any previous increase, was not unconscionable where it was pursuant to a catalog provision allowing increases without notice and when such increase is instituted by financial necessity); President and Bd. of Trustees v. Smith, No. 98CA11, 1999 WL 51799, at *4 (Ohio Ct. App. Feb. 1, 1999) (holding that a term in a medical school contract requiring five years of practice in Ohio in exchange for a more favorable admission review is not unconscionable); *see also* Davenport, *supra* note 24, at 212-13 (noting courts' reluctance to apply the doctrine of unconscionability in the student-university relationship). Additionally, a lower court found the tuition refund policies at Pace University to be unconscionable under the circumstances, but the ruling was reversed on appeal. *See* Andre v. Pace Univ., 618 N.Y.S.2d 975, 982-83 (City Court 1994), *rev'd*, 655 N.Y.S.2d 777 (App. 1996). *See generally* Dodd, *supra* note 69, at 714-18 (discussing adhesion contracts and arguing that the "student-university contractual relationship" is an example of an adhesion contract); Jackson, *supra* note 69, at 1152 (stating that "[a]lmost without exception, courts apply exceptionally harsh standards to student litigants").

One author has noted, "[a]lthough it is . . . possible to create and preserve student rights by appealing to the principles of contracts of adhesion, the contract theory seems to misrepresent the intentions of the parties involved." *Academic Freedom*, *supra* note 69, at 1147.

81. *See* Lawless v. Ennis, 415 P.2d 465, 470 (Ariz. Ct. App. 1966) (remanding for factual determination whether a dance lesson contract was unconscionable); James v. SCS Bus. & Technical Inst., 1992 WL 465670, at *11, *withdrawn*, 595 N.Y.S.2d 885 (N.Y. Civ. Ct. Nov. 26, 1992) (holding tuition reimbursement terms of proprietary vocational school were unconscionable); Albert Merrill Sch. v. Godoy, 357 N.Y.S.2d 378, 384 (Civ. Ct. 1974) (finding that terms of tuition refund of proprietary vocational school were unconscionable, especially in light of the student's education and language ability and in light of consumer protection interests of the state in regulating such schools); *see also* LAW OF HIGHER EDUCATION, *supra* note 3, § 4.1.3, at 376 (discussing the limited instances in which courts have found a student-university contract unconscionable).

82. *See supra* note 81; *cf.* Moy v. Adelphi Inst., Inc., 866 F. Supp. 696, 706 (E.D.N.Y. 1994) (finding fraud in recruiting "welfare and public assistance recipients" into a vocational program).

equality of sophistication by commenting that in ruling against a student the "plaintiff was not an unsophisticated teenager at the time and admitted that she was familiar with university 'ropes.'"[83] Courts generally do not object to the abbreviated withdrawal periods or to partial refund schedules that schools employ, despite the obvious difficulties students have in judging the suitability of a course at the time of enrollment.[84]

2. *Catalog Disclaimers and Reservations of Rights.*—Although "a school's catalog constitutes a written contract between the educational institution and the patron,"[85] the typical catalog contains broad language disclaiming liability and reserving the institution's right to change the contract.[86] If interpreted literally, then despite the pages and pages of pictures, descriptions and promises, despite the personal contacts and inducements made, the school has promised nothing to the student, not even that it will continue as an educational institution during the student's term of enrollment.[87]

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83. Hershman v. University of Toledo, 519 N.E.2d 871, 876 (Ohio Ct. Cl. 1987).

84. *See generally* Don F. Vaccaro, Annotation, *Absence From or Inability to Attend School or College as Affecting Liability For or Right to Recover Payments for Tuition or Board*, 20 A.L.R.4th 303, 306 (1981) (noting that many courts have taken the position that where an educational institution provides instruction and a student or a parent agrees to pay a definite amount the entire contract price is payable regardless of whether the student attended or withdrew once classes began).

85. Eiland v. Wolf, 764 S.W.2d 827, 837 (Tex. App. 1989) (quoting University of Tex. Health Science Ctr. v. Babb, 646 S.W.2d 502, 506 (Tex. App. 1982)).

86. *See supra* notes 32-36 and accompanying text (discussing the broad assertions and reservations often found in college catalogs).

87. While courts and scholars rely on contract law to define the relationship, not all agree on the source of the contractual terms. Some courts rely principally on implied terms and less on the written catalog. *See* Peretti v. Montana, 464 F. Supp. 784, 786 (D. Mont. 1979) (stating that because "a formal contract is rarely prepared [in the student-university context,] the general terms of the agreement are usually implied"), *rev'd on other grounds*, 661 F.2d 756 (9th Cir. 1981); Marquez v. University of Wash., 648 P.2d 94, 96 (Wash. Ct. App. 1992) (citing the *Peretti* decision to find an implied agreement between the student and the university).

Other courts rely heavily on the catalog and its disclaimers, if any. *See* Beukas v. Board of Trustees, 605 A.2d 708, 709 (N.J. Super. Ct. App. Div. 1992) (approving the closure of a dental school and noting that "[e]ven if we assume for analytic purposes, that the various University bulletins constituted an enforceable contract, that contract would include the reservation of rights"); *Eiland*, 764 S.W.2d at 838 (relying on catalog disclaimers and deciding that university officials acted within the authority granted to them and the guidelines provided in the school catalog).

Oral promises and representations throughout the student-university relationship are often regarded as contractual in nature. *See* Ho v. University of Tex., 984 S.W.2d 672, 691 (Tex. App. 1998) (discussing the implications of oral representations and silence and noting that "[a] duty to speak may arise when a fiduciary relationship exists between the parties, or when a party makes a material representation relied upon by the other party that he later finds out to be untrue and fails to reveal this change in events" (internal citations

The catalog disclaimer's effect on the university-student relationship has an inconsistent meaning among courts.[88] Some courts view the implied contract between students and the university as much broader than the provisions of the catalog and regard the express disclaimer within the catalog as ineffective in the broader context of the relationship.[89] Other courts have found that the disclaimer is a valid waiver of contractual liability for representations made to students and for program modifications after enrollment.[90] Still others interpret disclaimers within catalogs as valid only to the extent the changes to and terminations of the educational programs are instituted in good faith and are not arbitrary.[91]

3. The University and its Faculty are Not Fiduciaries.—Even though there is an increasing tendency for courts to create fiduciary duties in moral, social, domestic, or in purely personal relationships where one party needs additional protection,[92] students are out of luck.[93] Were

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omitted)). Commentators are equally divided as to the contractual effect of catalogs, personal written and oral contacts, and other implied terms. *See generally* Kevin P. McJessy, Comment, *Contract Law: A Proper Framework for Litigating Educational Liability Claims*, 89 NW. U. L. REV. 1768, 1793 n.115 (1995) (discussing the varying views among scholars).

88. *See* Davenport, *supra* note 24, at 221 (noting that the legal effect given to a catalog's disclaimer is "less than clear"); *see also* Ralph D. Mawdsley, Commentary: *Litigation Involving Higher Education Employee and Student Handbooks*, 109 WEST'S ED. L. REP. 1031, 1046 (1996) (discussing college catalog ambiguities due to language that is subject to more than one interpretation and noting the "number of legal strategies" that courts use "to clarify contract interpretation").

89. *See* Craig v. Forest Inst., 713 So. 2d 967, 969, 973-76 (Ala. Civ. App. 1997) (holding that a broad disclaimer in a catalog did not permit abrupt program closure); Aase v. South Dakota, 400 N.W.2d 269, 277 (S.D. 1986) (Sabers, J., dissenting) (rejecting a disclaimer as necessarily binding).

90. *See Beukas*, 605 A.2d at 708-09 (deciding that payment of tuition constitutes a student's acceptance of the university's reservation of rights paragraph in the catalog); Tobias v. University of Tex., 824 S.W.2d 201, 211 (Tex. App. 1991) (holding that a catalog's disclaimer of contractual liability was valid); *Eiland*, 764 S.W.2d at 838 (upholding language in a catalog disclaiming contractual liability).

91. *See* Basch v. George Washington Univ., 370 A.2d 1364, 1369 (D.C. 1977) (Harris, J., concurring) (supporting a tuition increase based on a catalog reservation of rights because the tuition increases were implemented in good faith); Eisele v. Ayers, 381 N.E.2d 21, 25-27 (Ill. Ct. App. 1978) (holding that a seven-fold tuition increase was permissible when a catalog provided for tuition increases without notice so long as the increase is not instituted in bad faith); Gamble v. University Sys., 610 A.2d 357, 363 (N.H. 1992) (holding that a reservation of rights clause permitted a tuition increase after the registration deadline because the university had a "fiscal emergency" and forewarned most of its students and failure to notify some of the students "was an oversight, rather than an act of bad faith"); Lesure v. State, No. 89-347-II, 1990 WL 64533, at *3 (Tenn. Ct. App., May 18, 1990) (finding that a disclaimer of contractual liability and of reservation of rights does not avoid liability for misrepresentation regarding accreditation).

92. There is an increasing tendency to find fiduciary relationships outside of the educational context:

the relationship between the university and the student a fiduciary one, then there would be "[a] heavier burden of disclosure . . . with respect to matters within the fiduciary relation."[94] Courts, however, are surprisingly insensitive to the relationship that exists between the inexperienced students and the faculty or the advisors. Courts generally regard the "normal student-teacher relationship" involving "usual job duties of teaching, supervising, advising and evaluating" as insufficient to establish an informal fiduciary relationship based on trust and reliance.[95] In light of the tremendous judicial deference to the self-governance of universities and to their academic freedoms, and the vulnerability of students, perhaps the glib rejection of a fiduciary status is not particularly grounded in law.[96]

> [Fiduciary relationships] include the relationship between an employer and employee, brothers and sisters, husband and wife, persons engaged to be married, children and parents, attorney and client, officers of the corporation and stockholders, joint purchasers, joint owners selling jointly owned property, partners, joint venturers, physician and patient, priest and parishioner, rabbi and congregation, principal and agent, and trustee and cestui que trust . . . . At least two courts have even found that close friends stand in such a relationship of trust and confidence as to require full disclosure of material facts.

Palmieri, *supra* note 7, at 127-28 (footnotes omitted).

93. *See* Zumbrun v. University of S. Cal., 101 Cal. Rptr. 499, 506 (Ct. App. 1972) (finding that facts giving rise to a fiduciary duty had not been pleaded and that "[t]he mere placing of trust in another person does not create a fiduciary relationship"); Shapiro v. Butterfield, 921 S.W.2d 649, 651-52 (Mo. Ct. App. 1996) (holding that no fiduciary relationship between faculty advisor and student existed); Nigro v. Research College of Nursing, 876 S.W.2d 681, 686-87 (Mo. Ct. App. 1994) (holding that there is no fiduciary relationship between an educational institution and its applicants); President and Bd. of Trustees v. Smith, 1999 WL 51799, at *2 (Ohio Ct. App. Feb. 1, 1999) (finding that there was no support for the existence of a "fiduciary relationship between an educational institution and a prospective student"); Ho v. University of Tex., 984 S.W.2d 672, 693 (Tex. App. 1998) (finding, as a matter of law, that no fiduciary duty between student and faculty member/advisor existed); Abrams v. Mary Washington College, 1994 WL 1031166, at *4 (Va. Cir. Ct. Apr. 27, 1994) (finding no basis in common law for creating a fiduciary relationship between senior college officials and students). *But see* Faulkner, *supra* note 69, at 866 (concluding that "fiduciary theory more realistically depicts the relation between individual and institution" than does contract theory). *See generally* Michael J. Polelle, *Who's On First, and What's a Professional?*, 33 U.S.F. L. REV. 205, 224-29 (1999) (discussing fiduciary ethics).

94. E. ALLAN FARNSWORTH, 1 FARNSWORTH ON CONTRACTS § 3.26(c), at 344 (1990).

95. *See Ho*, 984 S.W.2d at 693; *see also* Maas v. Corporation of Gonzaga Univ., 618 P.2d 106, 108 (Wash. Ct. App. 1980) (rejecting a student's claim that confidential or fiduciary relationship arose "since the university is in a better position to know of the student's probable success than is the student").

96. *See* Polelle, *supra* note 93, at 213 (concluding that "the decision to disallow a tort action for educational malpractice is not based on a principled definition of professionalism or the lack of it but, rather, on pragmatic policy grounds").

4. Claims Based On Specific and Objective Promises and Representations.—Even though courts do not regard the university-student contract as adhesionary, or the relationship as fiduciary, students are occasionally permitted to press their claims when the student can allege that the university made very specific and objectively verifiable promises or representations that induced his or her enrollment.[97] This section explores contract claims based on specific representations and promises.

Students sometimes allege that the college misrepresented certain specific characteristics of the program,[98] that officials gave false assurances of student ability to succeed or to find employment,[99] that the institution failed to follow or changed stated procedures or pre-

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97. In misrepresentation cases, there must be reliance upon the statements made. *See Nigro*, 876 S.W.2d at 687 (holding that appellants failed to establish the reliance element of fraud); Linson v. Trustees of Univ. of Pa., No. Civ. A. 95-3681, 1996 WL 4795332, at *11 (E.D. Pa. Aug. 21, 1996) (finding that because the plaintiff did not rely on statements made in the college catalog his fraud claim was without merit).

98. *See* Idrees v. American Univ., 546 F. Supp. 1342, 1346 (S.D.N.Y. 1982) (discussing allegations that the college falsely represented that it had a library with periodicals, books, and visual aids); CenCor, Inc. v. Tolman, 868 P.2d 396, 399 (Colo. 1994) (en banc) (regarding the argument that "CenCor's catalog constituted express terms and conditions of a contract and that CenCor breached the contract by failing to provide specific educational services promised therein"); *Nigro*, 876 S.W.2d at 687 (concluding that there was no fraud absent a showing that nurses had relied on statements made by the nursing college in relation to anticipated accreditation); Trustees of Columbia Univ. v. Jacobsen, 148 A.2d 63, 67 (N.J. Super Ct. App. Div. 1959) (holding that quotations from Columbia University's catalog as to the nature of courses in the curricula did not constitute a false representation); Dizick v. Umpqua Community College, 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); Lesure v. State, No. 89-347-II, 1990 WL 64533, at *3 (Tenn. Ct. App. May 18, 1990) (finding that the university made a misrepresentation in its catalog about the certification of the program in Respiratory Therapy).

99. *See* Ross v. Creighton Univ., 957 F.2d 410, 415 (7th Cir. 1992) (discussing allegations that Creighton University had a duty to "recruit and enroll only those students reasonably qualified and able to academically perform" and that duty was breached when Creighton failed to inform the appellant that he was unprepared for the academic rigors of the university (internal quotation marks omitted)); Blane v. Alabama Commercial College, 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); Andre v. Pace Univ., 655 N.Y.S.2d 777, 781 (App. Term 1996) (regarding claims that a representative of the college assured students that "their background was sufficient to enter the graduate program and they would have no problems with the course"); Abraham v. New York Univ. College of Dentistry, 593 N.Y.S.2d 229, 230 (App. Div. 1993) (concluding that a student could not base a fraud or a breach of contract claim against the university on the theory that the university allegedly represented that graduation would qualify her to take licensing exams in every state); York v. Branell College, No. 02A1993-9209-CV-00257, 1993 WL 484203, at *5 (Tenn. Ct. App. Nov. 23, 1993) (discussing claims that the school misrepresented the possible employment opportunities that would be available upon graduation).

scribed requirements,[100] or that the school failed to deliver the program as it specifically promised.[101] Contract claims that attack the general quality of instruction and are not based on specific breaches that are objectively verifiable are more likely to fail.[102]

When college personnel make concrete and easily verifiable representations that do not intrude too extensively into the academic realm, courts shed their deferential view.[103] For example, when per-

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100. *See* Lyons v. Salve Regina College, 565 F.2d 200, 201 (1st Cir. 1977) (alleging that the college's refusal to allow a student to continue her studies after receiving a failing grade constituted breach of contract); Thornton v. Harvard Univ., 2 F. Supp. 2d 89, 94 (D. Mass. 1998) (concluding that Harvard's financial aid guidelines explicitly reserved Harvard University's right to change the terms of various programs in order to make the best use of funds); Steinberg v. Chicago Med. Sch., 371 N.E.2d 634, 638 (Ill. 1977) (alleging that the school failed to evaluate a student's application according to academic criteria presented in the school's bulletin); Keles v. New York Univ., No. 91 CIV. 7457, 1994 WL 119525, at *3 (S.D.N.Y. Apr. 6, 1994) (alleging that the college breached an implied contract by denying the plaintiff the right to retake qualifying examinations an indefinite number of times).

101. *See* Moy v. Adelphi Inst., Inc., 866 F. Supp. 696, 700 (E.D.N.Y. 1994) (alleging that the school failed to provide the promised vocational training); Cooper v. Peterson, 626 N.Y.S.2d 432, 432-33 (1995) (regarding claims of misrepresentation and fraud against the school that sought to eliminate varsity wrestling prior to graduation); Marquez v. University of Wash., 648 P.2d 94, 96-97 (Wash. Ct. App. 1982) (discussing a breach of contract claim for failure to provide academic aid and noting that universities are "entitled to some leeway in modifying . . . programs from time to time").

102. The promises can be obviously vague, unenforceable, and illusory:

> I have really only one charge against Columbia: that it does not teach Wisdom as it claims to do. From this charge ensues an endless number of charges, of which I have selected fifty at random. I am prepared to show that each of these fifty claims in turn is false, though the central issue is that of Columbia's pretense of teaching Wisdom.

Jacobsen, 148 A.2d at 66; *see also id.* (holding that quotations from Columbia University's catalogs and brochures and inscriptions over its buildings and statements of its officers setting forth its goals and desires including factual statements as to the nature of its courses do not constitute false representations); Gupta v. New Britain Gen. Hosp., 687 A.2d 111, 119-20 (Conn. 1996) (holding that general claims about quality are not actionable); Sirohi v. Lee, 634 N.Y.S.2d 119, 120 (App. Div. 1995) (holding that a claim against Columbia University alleging breach of "atmosphere conducive to academic pursuits" promised and represented was not actionable); Lawrence v. Lorain County Community College, 713 N.E.2d 478, 480 (Ohio Ct. App. 1998) (holding that a student's claim that a college provided a "substandard education, guidance and supervision" was a nonactionable educational malpractice claim in the guise of a contract claim).

103. The deference has its roots, in part, in academic freedom. Academic decisions touching on academic freedom concepts are accorded tremendous deference by courts. *See* Board of Curators v. Horowitz, 435 U.S. 78, 92 (1978) (warning against "judicial intrusion into academic decisionmaking" (footnote omitted)); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (reversing a professor's criminal contempt conviction for refusal to answer a legislative committee and finding that "there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread"); Haberle v. University of Ala., 803 F.2d 1536, 1540 (11th Cir. 1986) (noting that "in the absence of an improper motive, an academic dismissal must be 'such a substantial departure from accepted academic

sonnel misrepresent the type and quality of equipment and facilities available in recruiting students, the claim of misrepresentation is potentially viable.[104] When schools misrepresent the accreditation status of the school, the employability of students with a degree, or fail to deliver the educational program promised, the claims may succeed when sufficiently specific.[105]

On the other hand, vague promises regarding the student's future advantage in the job market or representations that the school teaches valuable skills are generally not actionable.[106] Similarly, fail-

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norms as to demonstrate that the faculty did not exercise professional judgment'" (quoting Regents of Univ. of Mich. v. Ewing, 474 U.S. 214 (1985))); Wirsing v. Board of Regents, 739 F. Supp. 551, 553 (D. Colo. 1990) (recognizing that "[t]he 'four essential freedoms' of the university are to determine for itself on academic grounds: 1) who may teach; 2) what may be taught; 3) how it shall be taught; and 4) who may be admitted to study" (citing *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring))); Arizona Bd. of Regents v. Wilson, 539 P.2d 943, 946 (Ariz. 1975) (stating that a university's admissions decision provides "a prime example of when a court should not interfere in the academic program of a university"). *See generally* LAW OF HIGHER EDUCATION, *supra* note 3, § 3.7 (describing faculty academic freedom); Olivas, *supra* note 10, at 1857 (discussing academic freedom and noting increasing "legal involvement in classroom affairs"); Ray, *supra* note 34, at 183-85 (explaining judicial deference to academic freedom); Schweitzer, *supra* note 69, at 362 (noting the need for judicial deference but discussing instances where arbitrary and capricious departures from the institutional process and from standards would constitute a breach of contract).

104. *See* CenCor, Inc. v. Tolman, 868 P.2d 396, 399 (Colo. 1994) (en banc) (reversing the trial court ruling in favor of the school and holding that students have a cause of action where they allege that a school represented in their catalog that students would train on "up-to-date equipment and instruments" and work under "qualified faculty"); Dizick v. Umpqua Community College, 599 P.2d 444, 449 (Ore. 1979) (en banc) (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 liability where the university misrepresented that the respiratory therapy school was accredited); American Commercial Colleges, 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" but that the "college actually provided one unqualified teacher in a room with seating for 42 students, all taking different level courses, with only two 10-key adding machines" and the "only training aid was an unused overhead projector").

105. *See* Behrend v. State, 379 N.E.2d 617, 621 (Ohio Ct. App. 1977) (finding in favor of students where the college lost accreditation for its school of architecture); *York*, 1993 WL 484203, at *1 (affirming a decision against a "private, for-profit, business and technical [trade] school[ ]" where training received made students no more employable in the medical profession than they would have been without the training); Delta Sch. of Commerce, Inc. v. Harris, 839 S.W.2d 203, 205 (Ark. 1992) (affirming a finding of fraud where the school promised a "position would be waiting for her after graduation"); Beckett v. Computer Career Inst., 852 P.2d 840, 844 (Or. App. 1993) (affirming a finding of liability under consumer protection laws for misrepresenting job placement rates).

106. *See, e.g.*, Blane v. Alabama Commercial College, Inc., 585 So. 2d 866, 868 (Ala. 1991) (holding no recovery under contract theory where the college "promised to provide

ing to disclose that marginal applicants may fail is not actionable[107] nor is admitting students who run a risk of failure.[108] An unexpressed but pronounced for-profit/non-profit distinction seems to exist when courts characterize the claims; courts are more sympathetic to student claims when the educational enterprise is proprietary.[109]

Institutions are vulnerable to student claims when the student alleges that the institution made specific and objectively determinable promises or representations. A recent case involving specific broken commitments, *Guckenberger v. Boston University*,[110] is instructive. In *Guckenberger*, three disabled students alleged that Boston University broke specific promises that the school had made during recruitment to accommodate the students' disabilities.[111] Students with attention deficit hyperactivity disorder filed suit against Boston University alleging violations of the Americans with Disabilities Act,[112] the Rehabilitation Act[113] and also asserting breach of contract and promissory estoppel.[114] Their breach of contract claim alleged that Boston University had provided printed promotional materials to the students

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[the student] . . . with minimum clerical skills to compete in jobs in the clerical field" but did not "guarantee[ ] . . . a job or [give] . . . assurance that she would find a job").

107. *See, e.g.*, Maas v. Corporation of Gonzaga Univ., 618 P.2d 106, 109-10 (Wash. Ct. App. 1980) (finding that the decision to award a degree is "within the academic sphere" and, as such "courts should abstain from interference").

108. *See* Ross v. Creighton Univ., 957 F.2d 410, 415 (7th Cir. 1992) (rejecting a claim of "negligent admission"); *Maas*, 618 P.2d at 109 (concluding that there is "no duty on the part of the university to warn applicants of prospective failure").

109. *See Tolman*, 868 P.2d at 399 (involving a claim against "a Delaware corporation transacting business in Colorado as Colorado College of Medical and Dental Careers" and upholding a breach of contract claim); Delta Sch. of Commerce, Inc. v. Harris, 839 S.W.2d 203, 207-08 (Ark. 1992) (holding that students were not required to exhaust federal administrative remedies against the Delta School of Commerce, a corporation, as those remedies were inadequate); Albert Merrill Sch. v. Godoy, 357 N.Y.S.2d 378, 382-84 (N.Y. City Civ. Ct. 1974) (holding that the contract requiring the defendant to pay a certain tuition and fees for a course offered by the plaintiff school was unconscionable); Lawless v. Ennis, 415 P.2d 465, 470 (Ariz. Ct. App. 1966) (finding genuine issues of material fact such that summary judgment for the plaintiff who brought the action for rescission of a dancing lesson contract should not have been granted).

110. 974 F. Supp. 106 (D. Mass. 1997).

111. *Id.* at 118. This case has some notoriety. The then president of Boston University had publicly condemned the increasing trend of making educational accommodations, claiming that these accommodations supported lazy students. *See id.* In the infamous "somnolent Samantha" speech, he fabricated the story of a lazy student claiming learning disabilities. *See id.*; *see also* Coddington v. Adelphi Univ., 45 F. Supp. 2d 211, 218-19 (E.D.N.Y. 1999) (holding that the plaintiff-student had sufficiently pled a breach of contract claim based on promises within published materials and oral representations of institution that it would accommodate disabled students with untimed tests and notetakers).

112. *See Guckenberger*, 974 F. Supp. at 114; *see also* 42 U.S.C. § 1210 (1996).

113. *See Guckenberger*, 974 F. Supp. at 114; 29 U.S.C. § 794 (1997).

114. *See Guckenberger*, 974 F. Supp. at 150.

touting a "highly trained staff," and offering "reasonable accommodations in testing and coursework" and that the college breached specific promises made to the students during recruitment.[115] The court summarized the specific promises made and broken:

> BU made specific promises to these three individual students and . . . BU reneged on its representations. Rather than the promised course substitution for her foreign language obligation, BU required LaBrecque to take Swahili, a language that had both an oral and written component. Greeley labored from August until December of his freshman year without LDSS support and, just prior to finals, he was informed that his request for exam accommodations had been denied because of inadequate documentation. When Guckenberger sought to submit her learning disabilities specialist's evaluations so that she could get exam accommodations during her second year of law school, she was told that she would have to be completely retested for dyslexia within the three weeks prior to exams.[116]

As to the students' contract claims based upon the promises within the promotional materials, the court made no finding as to whether the promises were sufficiently specific to constitute an enforceable contract. Instead, the court noted that there was no evidence of offer, acceptance, or reliance because the materials were likely received after the students had decided to enroll.[117] The court concluded, however, that the personal promises made in letters and orally by employees at the college constituted enforceable contractual agreements which the college breached.[118] *Guckenberger* is representative of a fair number of cases[119] where courts find colleges making

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115. *Id.* at 151.

116. *Id.* at 152.

117. *See id.* at 151. The court noted that only one of the plaintiffs, Greeley, did in fact rely on the brochure, but failed to resolve or to distinguish this reliance. *See id.*

118. *See id.* at 152. The court awarded money damages and ordered the school to "cease and desist implementing its current policy" toward students with learning disabilities. *Id.* at 154. The court also ordered Boston University to review its academic policy on allowing foreign language substitutions. *See id.* at 154-55. In subsequent proceedings under the ADA and Rehabilitation Act, the court upheld Boston University's decision against allowing course substitutions. *See* Guckenberger v. Boston Univ., 8 F. Supp. 82, 87-90 (D. Mass. 1997). While not decided under contract law, the decision reflects judicial reluctance generally not to substitute its own standards for that of the institution's.

119. *See, e.g.*, Ross v. Creighton Univ., 957 F.2d 410, 416-17 (7th Cir. 1992) (ruling that a student stated breach of contract claim based on promises to provide "meaningful" access to academic programs); Coddington v. Adelphi Univ., 45 F. Supp. 2d 211, 218-20 (E.D.N.Y. 1999) (ruling that students stated a breach of contract claim based on promotional materials and on oral representations concerning accommodations provided to disabled stu-

specific and concrete commitments to students that have created contractual liability.[120]

Ross v. Creighton University[121] is probably the most notable recent case to extend breach of contract claims to less specific promises. In this case, basketball player and student, Kevin Ross, filed suit against Creighton University alleging educational malpractice and breach of contract.[122] Creighton recruited Ross and awarded him an athletic scholarship although his academic record did not comport with Creighton's normal standards; Ross tested in the "bottom fifth percentile of college-bound seniors" while "average freshman admitted to Creighton with him scored in the upper twenty-seven percent."[123] Ross played for Creighton for four years, during which time he maintained a "D" average "in courses such as Marksmanship and Theory of Basketball."[124] Upon leaving Creighton after his athletic eligibility ended (and thirty-two credits shy of his graduation requirements), Ross read at a seventh grade level and had the language skills of a fourth grader.[125] Creighton attempted to assist Ross by providing remedial education at a private grade school, which Ross attended with young children.[126] Ross, however, attempted but never finished college elsewhere and finally suffered a "major depressive episode."[127]

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dents); Idrees v. American Univ., 546 F. Supp. 1342, 1348-51 (S.D.N.Y. 1982) (finding that the college misrepresented the quality of facilities and its credentials in its bulletin); CenCor v. Tolman, 868 P.2d 396, 399-400 (Colo. 1994) (en banc) (finding that the college failed to meet promises in its catalog concerning the quality of equipment and the experience of the instructors); Alsides v. Brown Inst., Ltd., 592 N.W.2d 468, 474 n.3 (Minn. Ct. App. 1999) (ruling that the students stated a claim based on the failure to deliver on specific promises concerning the type of training that students would receive); Behrend v. State, 379 N.E.2d 617, 619-21 (Ohio Ct. App. 1977) (finding that the students stated a cause of action where the school breached its promise of reestablishing accreditation); Dizick v. Umpqua Community College, 599 P.2d 444, 445-47 (Or. 1979) (en banc) (finding that the oral assurances made concerning the program quality were fraudulent).

120. Kaplin and Lee warned administrators:

> Language suggestive of a commitment (or promise) to students should be used only when the institution is prepared to live up to the commitment. Limitations on the institution's commitments should be clearly noted where possible. Administrators should consider the adoption of an official policy, perhaps even a "code of good practice," on fair dealing with students.

LAW OF HIGHER EDUCATION, *supra* note 3, § 4.2.1, at 376-77 (citation omitted).

121. 957 F.2d 410 (7th Cir. 1992).

122. *Id.* at 410.

123. *Id.* at 411.

124. *See id.* at 412.

125. *See id.*

126. *See id.*

127. *Id.*

Ross filed suit asserting claims sounding in contract and in tort.[128] The lower court dismissed all counts for failure to state a claim.[129] Ross's contract claim alleged that Creighton promised Ross a "meaningful college education" and that it:

> breached this contract by failing to provide Mr. Ross adequate tutoring; by not requiring Mr. Ross to attend tutoring sessions; by not allowing him to "red-shirt," that is, to forego a year of basketball, in order to work on academics; and by failing to afford Mr. Ross a reasonable opportunity to take advantage of tutoring services.[130]

On appeal, the Court of Appeals for the Seventh Circuit affirmed summary judgment in favor of Creighton as to the educational malpractice claims, noting the "overwhelming majority of states that have considered this type of claim have rejected it."[131] The court identified a variety of policy reasons to justify rejection of the tort claim including the inability to establish a uniform and satisfactory standard of care, the uncertainty of the cause and nature of damages,[132] and the risk of overburdening schools with many lawsuits.[133] Finally, the court cited a reluctance to permit a cause of action that "threatens to embroil the courts into overseeing the day-to-day operations of schools."[134] For similar policy reasons, the court rejected a "negligent admission" claim as well.[135]

The court viewed the contract claims quite differently than the malpractice claims, although noting the danger it faced in distinguishing between them. The court explained that contract duties cannot be "arbitrarily disregarded and may be judicially enforced" but that "a decision of the school authorities relating to the academic qualifica-

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128. *See id.*

129. *See id.* at 412-13.

130. *Id.* at 412.

131. *Id.* at 414 (footnote omitted); *see infra* notes 143-173 and accompanying text (discussing judicial rejection of educational malpractice claims).

132. *See Ross*, 957 F.2d at 414 (citing Helm v. Professional Children's Sch., 431 N.Y.S.2d 246, 246-47 (App. Term 1980) (per curiam)). The court explained that "[f]actors such as the student's attitude, motivation, temperament, past experience and home environment may all play an essential and immeasurable role in learning" and therefore, it would be a "practical impossibility [to] prov[e] that the alleged malpractice of the teacher proximately caused the learning deficiency of the plaintiff student." *Id.* (alteration in original) (internal quotation marks omitted) (quoting Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352, 1355 (N.Y. 1979) (Wachtler, J., concurring)).

133. *See id.* (citing Moore v. Vanderloo, 386 N.W.2d 108, 114-15 (Iowa 1986)).

134. *Id.* (citing *Donohue*, 391 N.E.2d at 1354); Hoffman v. Board of Educ., 400 N.E.2d 317, 320 (N.Y. 1979); Hunter v. Board of Educ., 439 A.2d 582, 585 (Md. 1982)).

135. *Id.* at 415.

tion of the students will not be reviewed" because courts "are not qualified to pass an opinion as to the attainments of a student."[136]

While purporting to follow the typical rule that contractual promises must be specific and objective,[137] the opinion is notable because the promises Ross alleged were neither particularly specific nor capable of objective measurement.[138] The court read Ross's complaint to allege the "specific promise that he would be able to participate in a meaningful way in that program because it would provide certain specific services to him."[139] The court instructed the lower court on remand to ask narrowly whether Ross "was barred from *any* participation in and benefit from the University's academic program without second-guessing the professional judgment of the University faculty on academic matters."[140]

Unfortunately, the appellate court gave little guidance as to how to answer the narrow question it instructed to be determined on remand, including whether Ross enjoyed a benefit or participation in the academic program. Moreover, by rejecting educational malpractice, the appellate court made clear that the logical and common sense types of questions one might ask about the nature of the program were not to be considered, lest the court intrude into the classroom. This Article will return to *Ross v. Creighton University* in a later discussion of good faith[141] to explore whether good faith might yield a workable framework for evaluating Ross's "claim without second-guessing the professional judgment of the University faculty on academic matters."[142]

B. The Rejection of Educational Malpractice Claims

Although many scholars and commentators have found numerous sound reasons to hold colleges liable for professional negligence claims,[143] courts have roundly refused to recognize educational mal-

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136. *Id.* at 416 (internal quotation marks omitted) (quoting Demarco v. University of Health Sciences, 352 N.E.2d 356, 361-62 (Ill. App. Ct. 1976)).

137. *See id.* at 416-17.

138. *See id.* at 417.

139. *Id.*

140. *Id.* Ross later settled the suit for $30,000. *See* OLIVAS, *supra* note 3, at 694.

141. *See infra* notes 192-198 and accompanying text.

142. *Ross*, 957 F.2d at 417.

143. *See* Jody M. Alholinna, *Why Johnny Still Can't Read—What Should Minnesota Do to Address the Issue of Abysmal Test Scores Among Inner City Kids*, 18 HAMLINE J. PUB. L. & POL'Y 169, 177, 181 (1996) (arguing that educational malpractice claims may become more accepted as schools improve and as social arguments for substandard achievement are given less weight by the judiciary); Sharan E. Brown & Kim Cannon, *Educational Malpractice Actions: A Remedy for What Ails Our Schools?*, 78 WEST'S ED. L. REP. 643, 656-57 (1993) (calling for

practice.[144] At the very least, scholars and commentators urge recognition of the tort in the student athlete context because of the grave potential for exploitation.[145] However, even when presented with an ideal student athlete case, such as in *Ross v. Creighton University*, there remains judicial reluctance to educational malpractice claims.[146]

Andre v. Pace University[147] is similarly representative of those many cases eschewing judicial oversight of the educational product through tort claims. In *Andre*, several students with very modest math and sci-

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recognition of educational malpractice claims as having potential to improve schools); Johnny C. Parker, *Educational Malpractice: A Tort is Born*, 39 CLEV. ST. L. REV. 301, 302 (1991) (asserting that "educational malpractice is a viable theory of tort liability and that traditional negligence analysis and public policy support the recognition of such a cause of action"); Laurie S. Jamieson, Note, *Educational Malpractice: A Lesson in Professional Accountability*, 32 B.C. L. REV. 899, 964-65 (1991) (arguing for recognition of educational malpractice). *But see* Frank D. Aquila, *Educational Malpractice: A Tort en Ventre*, 39 CLEV. L. REV. 323, 324 (1991) (arguing that educational malpractice claims should not be allowed).

There is no clear answer to the question of whether educators are professionals, a necessary preliminary question to 'malpractice' claims as opposed to negligence. *See* Aquila, *supra*, at 353-55 ("Establishing the status of education as a profession would help the court to determine the appropriate standard of care to apply in negligence situations."); Polelle, *supra* note 93, at 212-13 (discussing whether educators are professionals for purposes of malpractice claims).

144. *See Ross*, 957 F.2d at 414-15 (refusing to recognize the tort of educational malpractice and noting that "the overwhelming majority of states that have considered" educational malpractice have rejected it); CenCor, Inc. v. Tolman, 868 P.2d 396, 398, 400 (Colo. 1994) (en banc) (affirming the rejection of educational malpractice claims); Finstad v. Washburn Univ., 845 P.2d 685, 692-94 (Kan. 1993) (rejecting educational malpractice); Alsides v. Brown Inst., Ltd., 592 N.W.2d 468, 473 (Minn. App. 1999) (same); Andre v. Pace Univ., 655 N.Y.S.2d 777, 779-80 (App. Term 1996) (same); Cavaliere v. Duff's Bus. Inst., 605 A.2d 397, 401 (Pa. Super. 1992) (same).

145. Many authors have noted that the college athlete is tremendously vulnerable to exploitation and that there is a great need to police this relationship judicially. *See* John R. Alison, *Rule-Making Accuracy in the NCAA and its Member Institutions: Do Their Decisional Structures And Processes Promote Educational Primacy for the Student-Athlete?*, 44 U. KAN. L. REV. 1, 58-59 (1995) (calling for "external pressure[s]" such as litigation to police university's treatment of student athletes); Leroy D. Clark, *New Directions for the Civil Rights Movement: College Athletics as a Civil Rights Issue*, 36 HOW. L.J. 259, 281-82 (1993) (discussing the need for educational malpractice claims to help educate the public and to protect the student athlete); Timothy Davis, *Examining Educational Malpractice Jurisprudence: Should a Cause of Action Be Created for Student-Athletes?*, 69 DENV. U. L. REV. 57, 91-95 (1992) (arguing that a special relationship exists between a university and a student athlete that is a sufficient basis for allowing educational malpractice claims); Monica L. Emerick, Comment, *The University/Student-Athlete Relationship: Duties Giving Rise to a Potential Educational Hindrance Claim*, 44 UCLA L. REV. 865, 869 (1997) (advocating the allowance of educational malpractice claims in specific circumstances); Harold B. Hilborn, Comment, *Student-Athletes and Judicial Inconsistency: Establishing a Duty to Educate as a Means of Fostering Meaningful Reform of Intercollegiate Athletics*, 89 NW. U. L. REV. 741, 782 (1995) (arguing that courts "should acknowledge that universities have a duty to educate student-athletes based on the special relationship between the parties").

146. *See supra* note 131.

147. 655 N.Y.S.2d 777 (App. Term 1996).

ence backgrounds sought the advice of the chairman of the computer science department before enrolling in the computer program course.[148] The chairman "assured plaintiffs in substance that their background was sufficient to enter the graduate program and that they would have no problems with the course."[149] The course, "Fundamental Pascal Programming," was "the first in a five course sequence of required courses" for a graduate certificate in computer programming.[150] The course grew more challenging after the first class;[151] the plaintiffs encountered difficulty beginning with the second assignment.[152] The students solicited and received additional help from their professor, but they still could not grasp the material.[153] At the fourth session, problems from the second day of class still stymied them.[154] When the students realized, after diligent work and discussion with the professor, that their background was not sufficient for the level of the course, they sought but were denied a tuition refund.[155]

The students filed suit on both contract and tort theories.[156] The case was tried in small claims court,[157] and the court entered judgment in favor of the students.[158] The lower court noted the consumer nature of the relationship:

> Dr. Merritt accused plaintiffs of being "consumers and not students." In fact, the plaintiffs are both. Students are con-

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148. *See id.* at 778.

149. *Id.* Specifically, Dr. Murthy, the chairman, "assured them that the Pascal Course did not require an advanced math background and that with their rudimentary high school math background they could complete the Pascal Course without difficulty." Andre v. Pace Univ., 618 N.Y.S.2d 975, 979 (City Ct. 1994), *rev'd*, 655 N.Y.S.2d 777 (App. Div. 1996).

150. *Andre*, 655 N.Y.S.2d at 778.

151. According to the lower court, the preface to the textbook selected indicated that the course was geared toward scientists, engineers, or computer science majors. *See Andre*, 618 N.Y.S.2d at 977.

152. *See Andre*, 655 N.Y.S.2d at 778.

153. The students tried to set up a meeting with the department chair, but he was unable to meet with them "[n]otwithstanding the urgency of plaintiffs' request" until after the deadline to drop the course had expired. *Andre*, 618 N.Y.S.2d at 978.

154. *See id.* at 977-78.

155. *See id.* at 978. Tuition was $1655, paid in two installments. *See id.* at 977. Although they had passed the withdrawal date, as a conciliatory measure, the dean offered a tuition credit for the following semester, which the students refused. *See Andre*, 655 N.Y.S.2d. at 778.

156. *See Andre*, 618 N.Y.S.2d at 979 (claiming breach of contract, want of consideration, rescission, unconscionability, misrepresentation, breach of fiduciary duty, educational malpractice, and violation of state consumer laws).

157. *See id.* at 978-79.

158. *See id.* at 983.

> sumers of educational services. There is nothing holy or sacred about educational institutions. Colleges and Universities are in the business of marketing and delivering educational services and Degrees to the general public. In New York State *caveat venditor* has replaced *caveat emptor* as the guiding principle of consumer transactions including those involving educational services.[159]

The lower court also noted that students are particularly "susceptible" to fraud[160] and that by giving advice to students, educators assumed fiduciary duties toward students.[161]

The court concluded that under these circumstances, an educational malpractice claim could be sustained against the institution.[162] In finding educational malpractice, the lower court noted that it was not finding fault based on the general quality of the program or upon a general appraisal of the soundness of the teaching.[163] The court did not examine the quality of teaching or the classroom conduct, instead it focused on the department chair's assurances and on the textbook selection for the course.[164] The court noted that the text specifically stated that it was intended for students experienced in math and science and that use of the book "in a beginners' course . . . is a *per se* example of negligence, incompetence and malpractice."[165] The court also held for the students on the breach of contract claim.[166]

Pace appealed the ruling. The appellate court reversed and denied the students recovery in either tort or in contract and held that Pace was entitled to its final tuition installment payment from each student.[167] In reversing, the court explained that it would not "entertain actions sounding in 'educational malpractice'"[168] that would require the court to examine "broad educational policies" and to "review [their] day-to-day implementation."[169] Although students alleged that the course was taught at an advanced level despite the affirmative assurances of the department chair and the representations to the contrary in the catalog, the court refused to engage "in a com-

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159. *Id.* at 979.
160. *Id.*
161. *See id.* at 980-81.
162. *See id.* at 981-82.
163. *See id.* at 981 (citing Paladino v. Adelphi Univ., 454 N.Y.S.2d 868 (App. Div. 1982)).
164. *See id.* at 981-82.
165. *See id.* at 981.
166. *Id.* at 979-80.
167. Andre v. Pace Univ., 655 N.Y.S.2d 777, 780-81 (App. Term 1996).
168. *Id.* at 779 (citing Hoffman v. Board of Educ., 400 N.E.2d 317 (N.Y. 1979); Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352 (N.Y. 1979)).
169. *Id.* (quoting *Donohue*, 391 N.E.2d at 1354).

prehensive review of a myriad of educational and pedagogical factors, as well as administrative policies that enter into the consideration of whether the method of instruction and choice of textbook was appropriate. . . ."[170]

Finally, in rejecting the contract claim, the court commented on the character of the chairman's affirmative assurances and held that "Dr. Murthy's representation that the plaintiffs would have no difficulty with the class was mere expression of opinion which cannot give rise to an actionable claim."[171]

With the wholesale rejection of educational malpractice or contract as a basis of liability, courts run the risk of leaving themselves without an adequate role to hold schools accountable when they fail to meet the reasonable expectations of students.[172] The lack of an adequate judicial role is troubling; as many scholars have noted, it leaves the institution without external accountability and students without judicial recourse.[173]

C. *Good Faith: Finding a Judicial Role in University-Student Disputes*

Courts are steadfast that viable contract claims must be intrinsically different than mere malpractice claims,[174] yet the distinction they seek is often blurred.[175] Good faith and fair dealing can provide a framework to adjudicate student claims that is not unduly intrusive in that gray area where student claims are less specific but reasonable expectations seem clear. Although good faith and fair dealing terms

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170. *Id.* at 779-80.

171. *Id.* at 780.

172. A thoughtful decision, *Doe v. Yale University*, No. CV900305365S, 1997 WL 766845 (Conn. Super. Ct. Nov. 28, 1997), carefully distinguishes nonactionable educational malpractice from ordinary negligence and upholds a claim for the latter. *See id.* at *1-2. There, a resident alleged that he received inadequate instruction prior to being ordered to establish an arterial line in a terminally ill AIDS patient in the ICU. *See id.* at *1. The resident became infected following a needle stick. *See id.* The court noted that the case did not involve "purely academic decisions" or did not ask the court "to make judgments about the quality of broad educational policies" but instead asked "the court to consider the allegedly negligent failure of the university to provide appropriate instruction and supervision in the performance of a particularly risky procedure." *Id.* at *4.

173. *See supra* note 69.

174. *See, e.g.*, Ross v. Creighton Univ., 957 F.2d 410, 416 (7th Cir. 1992) (distinguishing educational malpractice claims from contract claims).

175. *See* Gupta v. New Britain Gen. Hosp., 687 A.2d 111, 119 (Conn. 1996) (commenting that "[j]urisprudential considerations that shed doubt on the viability of the tort of educational malpractice also inform our analysis of a contract claim based on inadequate educational services" (citing Ross v. Creighton Univ., 740 F. Supp. 1319, 1331 (N.D. 1990), *aff'd in part, rev'd in part*, 957 F.2d 410 (7th Cir. 1992); Paladino v. Adelphi Univ., 454 N.Y.S.2d 868 (App. Div. 1982))).

are usually left unexpressed by the parties, courts generally agree that these terms exist and are implied within every contract.[176] These implied terms are sufficiently determinable as to justify a remedy for breach.[177]

At the formation stage, good faith and fair dealing compels honesty and the avoidance of fraud and misrepresentation.[178] At the performance stage, good faith and fair dealing demands cooperation,[179] observation of reasonable commercial standards[180] and excludes "behavior inconsistent with common standards of decency, fairness, and reasonableness, and with the parties' agreed-upon common purposes and justified expectations."[181] As one court explained, good faith requires that one party "do nothing destructive of the other party's right to enjoy the fruits of the contract and to do everything that the contract presupposes they will do to accomplish that purpose."[182]

Importantly, external sources such as custom, community standards in the academic community, literature of higher education, and codes of ethics of professional organizations[183] can provide the court

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176. *See, e.g.*, Lowell v. Twin Disc, Inc., 527 F.2d 767, 770 (2d Cir. 1975) (finding that "[i]t is a fundamental principle of law that in every contract there exists an implied covenant of good faith and fair dealing" (citing Kirklehebon Shelle Co. v. Paul Armstrong Co., 188 N.E. 163, 167 (1933); Van Valhenburgh, Nooger & Neville, Inc. v. Hayden Publ'g Co., 281 N.E.2d 142, 144 (1971))).

177. *See* 2 FARNSWORTH, *supra* note 94, § 7.17, at 550-51 ("In recent years, courts have often supplied a term requiring both parties to a contract to exercise what is called 'good faith' or sometimes 'good faith and dealing.'" (footnotes omitted)).

178. *See* Palmieri, *supra* note 7, at 151-80 ("There is substantial authority stating that the reason why disclosures are mandated in the negotiation of a contract is that notions of good faith and fair dealing require such disclosures."); Holmes, *supra* note 7, at 435-49 (asserting that the duty of good faith, which leads to disclosure, lies, in part, in fraud, deceit, and misrepresentation).

179. *See, e.g.*, *Lowell*, 527 F.2d at 770 (stating that "[i]t is . . . implied in every contract that there is a duty of cooperation on both sides" (quoting Rochester Park, Inc. v. City of Rochester, 238 N.Y.S.2d 822, 827 (Sup. Ct.), *aff'd*, 241 N.Y.S.2d 263 (1963))).

180. *See* U.C.C. § 2-103(1)(b) (1996) ("'Good faith' in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.").

181. Centronics Corp. v. Genicom Corp., 562 A.2d 187, 191 (N.H. 1989) (citing Summers, *General Rule of Good Faith*, *supra* note 7, at 826); *see also* Summers, *"Good Faith" in General Contract Law*, *supra* note 7, at 196-99 (arguing that good faith "is best understood as an 'excluder'—it is a phrase which has no general meaning or meanings of its own, but which serves to exclude many heterogeneous forms of bad faith" (citing Hall, *Excluders*, 20 Analysis 1 (1959))); Burton, *supra* note 7, at 371 (stating that "courts employ the good faith performance doctrine to effectuate the intentions of parties, or to protect their reasonable expectations").

182. Conoco, Inc., v. Inman Oil Co., 774 F.2d 895, 908 (8th Cir. 1985) (quoting Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 728 (7th Cir. 1979)).

183. *See* LAW OF HIGHER EDUCATION, *supra* note 3, § 1.3.2.3, at 17 (noting that whenever the terms of the contractual understandings between the university and the student are

with external, objective measures of implied obligations of good faith and fair dealing.[184] Relying on objective, external standards addresses judicial concern that it should not substitute its own judgment for that of the institution, while still imposing a standard of conduct upon the institution.[185] As one court observed,

> Since a formal contract is rarely prepared, the general nature and terms of the agreement are usually implied, with specific terms to be found in the university bulletin and other publications; custom and usages can also become specific terms by implication.[186]
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> . . .
>
> Only that which is reasonable may be implied. Certainly in the period of time between a student's matriculation and graduation, an educational institution, which is a living, changing thing, may not reasonably be expected to remain static; and conversely, change may reasonably be expected. Hence, each statement in a publication of what now is true does not necessarily become a term in the contract between the school and the student.[187]

Imposing obligations of good faith and fair dealing, derived in part from the absence of improper motivations and in part from the educational community's own standards of conduct, allows courts to protect the greater societal interests at the root of its traditional deference while acknowledging a need to protect students entering

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"unclear, courts may look to academic custom and usage in order to interpret the terms of the contract"); Beh, *supra* note 5, at 193-95 (commenting that a college's good faith and fair dealing can be established by balancing reasonable student expectations with the standards advanced in higher education management literature and by those prescribed by educational accrediting agencies); Nordin, *supra* note 69, at 165 (noting that "[r]eliance on community custom and practice seems peculiarly appropriate to the academic community which has managed to transmit and keep intact its unique characteristics over centuries").

184. *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981) (quoting U.C.C. § 2-103(1)(b) with approval and stating that "good faith means 'honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade'"); *see also supra* note 180 (providing the text of U.C.C. § 2-103(1)(b)).

185. *See* LAW OF HIGHER EDUCATION, *supra* note 3, § 1.3.2.1, at 18-19 (noting that courts have jurisdiction "for the enforcement of obligations whether arising under express contracts, written or oral, or implied contracts, including those in which a duty may have resulted from long recognized and established customs and usages, as in this case, perhaps, between an educational institution and its students" (quoting Strank v. Mercy Hosp., 117 A.2d 697, 698 (Pa. 1955))).

186. Peretti v. Montana, 464 F. Supp. 784, 786 (D. Mont. 1979), *rev'd on other grounds*, 661 F.2d 756 (9th Cir. 1981) (quoting Eugene L. Kramer, Note, *Expulsion of College and Professional Students—Rights and Remedies*, 38 NOTRE DAME L. REV. 174, 183 (1962)).

187. *Id.*

the marketplace of higher education.[188] While flexibility is desirable for the institution, without good faith and fair dealing to restrain them, students are at the mercy of the school and societal interests are not served. In favoring the institution's autonomy and flexibility over student needs, one court callously commented:

> Even to think that a university could be found to have broken its contract when it changed the dates of classes, or the curriculum, for reasons beyond its control, or changed teachers, should startle anyone at all familiar with university life. Indeed, it should surprise them even if the changes were simply a matter of voluntary internal policy, and they were held invalid by the court.[189]

This view utterly fails to appreciate the extremely negative consequences to a student's educational objectives that unilateral and abrupt changes can have.[190] Moreover, it ignores the unfairness of allowing the institution to reap the value of the consumer-student's choice to attend its institution without assuring that it will in turn provide the student with what it promised.

Good faith and fair dealing provides a bridge between institutional autonomy and flexibility and student vulnerability. Even in those cases where a catalog provision broadly permits unbridled changes and disclaims liability, the demands of good faith and fair dealing in instituting changes afford some protection to students.[191]

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188. *Cf.* Beh, *supra* note 5, at 188-95 (arguing for the application of good faith in evaluating college program closures); Timothy Davis, *The Myth of the Superspade: The Persistence of Racism in College Athletics*, 22 FORDHAM URB. L.J. 615, 695-99 (1995) (urging application of the implied obligation of good faith to discriminatory treatment in college athletics).

189. Cuesnongle v. Ramos, 713 F.2d 881, 885 (1st Cir. 1983) (citations omitted).

190. *See* Beh, *supra* note 5, at 175-76 (commenting on students' frustration and disappointment when a college cancels a degree program and noting how "[t]here simply may be no other acceptable alternative for some students when an institution closes" (citations omitted)); *Cf.* Peretti v. State, 777 P.2d 329, 331 (Mont. 1989) (noting that seven out of the sixteen terminated students failed to achieve their desired career goal after their program was canceled); Lesure v. State, No. 89-347-II, 1990 WL 64533, at *3 (Tenn. Ct. App. May 18, 1990) (noting that following the loss of accreditation, the student became a respiratory technician, with less earning potential, rather than a respiratory therapist); Behrend v. State, No. 80AP-328, 1991 WL 3591, at *1 (Ohio App. 1981) (describing the downward adjustment of student educational goals and the outcomes when a program closes).

191. *See* Beh, *supra* note 5, at 190-91 (commenting that students in a legal relationship could expect good faith and fair dealing with a university (citing Beukas v. Board of Trustees, 605 A.2d 776, 784 (1991))). *But see* Gupta v. New Britain Gen. Hosp., 687 A.2d 111, 120-22 (Conn. 1996) (finding that the occasional "positive feedback" during medical residency and dismissal in the fourth year did not constitute a breach of the implied covenant of good faith and fair dealing).

Returning to *Ross v. Creighton University*[192] and *Andre v. Pace*[193] to examine how to determine whether the institutions acted in good faith is instructive. In *Ross*, a court might have examined whether there was evidence of bad faith during recruitment; for example, did the school even assess Ross's academic ability or did it focus exclusively on his athletic talents; did the school know that its program was educationally inadequate to meet Ross's needs; did the school misrepresent the nature of the academic support program to Ross through their written or oral communications; and did the school follow the ethical tenets of the professional organizations to which it belonged.[194] In evaluating good faith during performance, the court might have examined whether Creighton provided any tutoring program at all, and if so, whether it was comparable to other academic support programs at other institutions, whether adequate resources were devoted to the program, or whether the tutors held credentials similar to tutors at other similar schools. The court might have asked whether Ross's practice schedule left him adequate time for class, tutoring, and studying. The court might have asked whether the school engaged in ethical conduct toward Ross, as demanded by membership in the NCAA.[195] These questions avoid significant intrusion into how Creighton taught or failed to teach Ross.[196] Instead, these questions focus on the objective reasonableness of the program in comparison to similar programs, external standards of good practice, and any evidence of bad faith and improper motives.[197] This result is

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192. 957 F.2d 410 (7th Cir. 1992).

193. 655 N.Y.S.2d 777 (App. Div. 1996).

194. *See generally* 1999-00 NCAA DIVISION I MANUAL, *Principles for Conduct of Intercollegiate Athletics* art. 2, at 2.01-2.16 (1999) [hereinafter NCAA] (outlining guidelines for members of the National Collegiate Athletic Association); NATIONAL ASS'N OF ACADEMIC ADVISORS FOR ATHLETES, CODE OF ETHICS art. II, sec. 2 C (1997) (requiring members to "always represent program offerings, course offerings and majors in a truthful and appropriate manner, especially when dealing with recruits"); *see also* notes 41-48 and accompanying text (regarding ethical conduct).

195. *See* NCAA, *supra* note 194, art. 10, at 10.1 (discussing the ethical conduct of NCAA members, and noting, for example, that it is unethical for an employee of the institution to arrange for "fraudulent academic credit or false transcripts").

196. *Cf.* Wirsing v. Board of Regents, 739 F. Supp. 551, 553 (D. Colo. 1990) (stating that "[t]he 'four essential freedoms' of the university are to determine for itself on academic grounds: 1) who may teach; 2) what may be taught; 3) how it shall be taught; and 4) who may be admitted to study" (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J. concurring))). *See generally* Olivas, *supra* note 10, at 1835-37 (discussing academic freedom).

197. As Ross made his selection among colleges as a high school senior, he likely assumed that Creighton's academic support for athletes was at least comparable to other athletic programs. Indeed, while students do not generally "know" what a college should be like, they expect some sort of "commercial reasonableness" to what is provided to them.

more satisfying than complete abdication of judicial oversight in that it can protect students from exploitive conduct while still according deference to academic decisions.[198]

Returning to *Andre v. Pace*, a similar inquiry might have been productive. In *Andre*, the appellate court rejected the contract claim, viewing it as a reformulated malpractice claim, stating that "[i]t is clear that the essence of plaintiffs' breach of contract claim necessarily entails an evaluation of the adequacy and quality of the textbook used and the effectiveness of the pedagogical method chosen . . . ."[199] Less intrusive questions, however, might have been asked to determine whether Pace acted in good faith. For example, to determine whether Pace acted in good faith at the formation stage, the plaintiffs might be allowed to adduce evidence of whether these students shared similar math and science backgrounds to others who commonly took the course or whether the school encouraged these students to enroll in order to fill an otherwise undersubscribed class, thus showing an improper and bad faith motivation for encouraging the students' enrollment. At the performance stage, the court might have considered whether the withdrawal deadline was a reasonable policy in comparison to other institutions and whether the administration's delay in meeting with students and responding to the students' timely complaints violated the good faith standards of fairness and decency.[200]

The vacuum left by judicial abdication is apparent in *Andre*. The opinion is not satisfying because it reinforces the arrogance of an institution that mocked students for expressing their reasonable expectations; "Dr. Merritt accused the plaintiffs of being 'consumers and not students.'"[201] The *Andre* decision gives short shrift to these students who informed their college advisor prior to taking the course of their limited math ability and experience; who each agreed to pay $885 to take a course they soon realized was completely unsuitable for them; who despite diligent work, failed to master the subject matter; and who attempted to complain in a timely manner without suc-

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See Nordin, *supra* note 69, at 158-60 (suggesting that the doctrine of reasonable expectations is well suited to define the student-university relationship); McJessy, *supra* note 87, at 1796 (arguing for the application of reasonable expectations principle which "if applied by the courts in a consistent manner, would provide the necessary guidance universities need . . . to structure their relationships with their students").

198. *See* Nordin, *supra* note 69, at 158-60 (commenting that a "reasonable expectation" test would exclude extrinsic evidence as to what the parties agreed upon and simply rely upon what is "reasonable" in the college-athlete relationship).

199. Andre v. Pace Univ., 655 N.Y.S.2d 777, 779 (App. Term 1996).

200. *See supra* note 153 (discussing evidence that the school delayed meeting with the students).

201. Andre v. Pace Univ., 618 N.Y.S.2d 975, 978 (City Ct. 1994).

cess.[202] In this case, regardless of whether the students would ultimately prevail or not, contract law's implied obligations of good faith and fair dealing return dignity to students and provide a role for the court without intruding into the classroom. As one scholar commented,

> Even a highly idealistic community can develop conflicting interests and different ideas of right activity. The judiciary is peculiarly suited for the balancing of rights and the weaving of constitutional standards and the university could use the gentle guidance of the courts to evolve clearer standards of procedures and more codified concepts of academic custom and usage. It is terribly important to our society that college students be taught not only the theory but the practice of democratic usage, even in private associations.[203]

Student claims should not prevail when schools exercise good faith in modifying or disbanding programs, otherwise an institution might stagnate. *Marquez v. University of Washington*[204] is illustrative of this point. There, a "specially admitted" law student was promised formal tutorial assistance as part of the terms of his special admission status.[205] During the student's first year, the school made a determination to disband the formal program "[d]ue to student concern about stigmatization and a general dissatisfaction with the student tutors. . . ."[206] There was no evidence that this decision was not made "in good faith" for exploitive or otherwise improper motives, and the court characterized the termination of the program as a "reasonable modification of the Law School's academic assistance program."[207] Thereafter, the student was offered informal, unstructured academic assistance including "faculty assistance outside the classroom," "small class sections," "a rigidly structured legal writing and research program," and "the possibility of taking lighter course loads" in lieu of the formal program.[208] The student had a troubled academic history at law school; he was academically dismissed and readmitted following his first year and finally terminated after academic failure in his sec-

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202. *See id.* at 977-79. The Pace policy only permitted full refunds prior to the first scheduled class but no refund at all by the fifth class meeting. *See id.* at 978; *see also supra* notes 147-171 and accompanying text (describing, in detail, the facts of *Andre*).

203. Nordin, *supra* note 69, at 148.

204. 648 P.2d 94 (Wash. Ct. App. 1982).

205. *Id.* at 95.

206. *Id.* at 97 n.1.

207. *Id.* (citing Mahavongsanan v. Hall, 592 F.2d 448, 450 (5th Cir. 1976)).

208. *Id.* at 97.

ond year.[209] The student complained that the school failed to provide the formal tutoring it had promised on his admission.[210] The court, however, determined that the modification of the program was permissible, having been "made in a good faith exercise of its educational responsibility."[211]

The good faith and fair dealing inquiry is well-developed in *Beukas v. Board of Trustees of Fairleigh Dickinson University*,[212] and demonstrates the concept's usefulness in balancing competing interests.[213] There, Fairleigh Dickinson University decided to close its dental school when it lost 38.1% of the dental college budget and faced a $6.2 million dollar deficit without internal resources to cover it.[214] The school suspended admissions to the dental school and worked with its accrediting agency to retain accreditation through graduation of the admitted students.[215] The school also assisted those students who desired to transfer to other institutions.[216] The school obtained monies from the State of New Jersey to give tuition subsidies to "make up the tuition difference."[217]

Students filed suit, claiming that their admission into the dental college and payment of the first year's tuition created a binding contract with the institution including an implied term that the school would continue in existence.[218] The court acknowledged competing interests and recognized that universities need discretion to make "administrative decisions to terminate an academic or professional pro-

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209. *See id.* at 95.

210. *See id.* at 95-96.

211. *Id.* at 97 n.1 (citing *Mahavongsanan*, 592 F.2d at 450); *see also* Keles v. New York Univ., No. 91 CIV. 7457, 1994 WL 110525, at *6 (S.D.N.Y. Apr. 6, 1994) (allowing the school to change its rules limiting the number of times a student may take qualifying examinations so long as changes are not "arbitrary and capricious").

212. 605 A.2d 776 (N.J. Super. Ct. Law Div. 1991), *aff'd*, 605 A.2d 708 (Super. Ct. App. Div. 1992) (per curiam).

213. *See Beukas*, 605 A.2d at 784. A similar approach has been identified in the student-athlete relationship. As with other student-university relationships, courts struggle to define the legal obligations of a school to its recruits when vaguely defined academic or athletic promises and expectations are unfulfilled. *See generally* Robert N. Davis, *The Courts and Athletic Scholarships*, 67 N.D. L. REV. 163, 195-96 (1991) (discussing the contractual nature and the legal obligation involved in the relationship between the student athlete and the university); Timothy Davis, *An Absence of Good Faith: Defining a University's Educational Obligation to Student-Athletes*, 28 HOUS. L. REV. 743, 788-91 (1991) (same); Timothy Davis, *Balancing Freedom of Contract and Competing Values in Sports*, 38 S. TEX. L. REV. 1115, 1141-45 (1997) (same); Hilborn, *supra* note 145, at 748-50 (same).

214. *See Beukas*, 605 A.2d at 778.

215. *See id.*

216. *See id.* at 778-79.

217. *Id.* at 779.

218. *Id.*

gram on the grounds of financial exigency."[219] In a novel twist, the court decided that the university-student relationship was not purely contractual, but was quasi-contractual,[220] noting that "[t]he 'true' university-student 'contract' is one of mutual obligations implied, not in fact, but by law; . . . 'for reasons of justice without regard to expressions of assent by either words or acts.'"[221] *Beukas* then asked the difficult question, how much protection do affected students deserve "under circumstances where the university has unilaterally determined to terminate an entire college for financial reasons?"[222]

The court held that the university must act in good faith and deal fairly with students and explained how future courts might examine good faith and fair dealing:

> Had defendants acted arbitrarily; had they refused to avail themselves of reasonably available alternative funding; had they failed to promptly disclose the withdrawal of state funding; had they lulled plaintiffs into believing the funding would be restored; or had they failed to make proper arrangements for transfer of plaintiffs to other dental schools, thus causing a delay in plaintiffs' opportunities to pursue their educational goals, the situation would be different.[223]

The court noted that good faith will give courts a comfortable role that balances judicial deference with the need for judicial oversight. The broad construction of the student-university relationship, coupled with a generous dose of contractual good faith gives courts a workable standard that still provides deference to institutional autonomy:

> This approach will give courts broader authority for examining university decisionmaking in the administrative area than would a modified standard of judicial deference and will pro-

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219. *Id.* at 781.

220. *Id.* at 783-84.

221. *Id.* (citing West Caldwell v. Caldwell, 138 A.2d 402 (1958), quoting from ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 19 (1952)); *see supra* text accompanying note 138 (noting that the decision in *Ross v. Creighton University*, 957 F.2d 410, 417 (1992) was not based upon express or upon specific promises); *see also* 1 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 1:6, at 25 (4th ed. 1990) ("Quasi contractual obligations are imposed by the courts for the purpose of bringing about a just result without reference to the intention of the parties."); 3 WILLIAM HERBERT PAGE, THE LAW OF CONTRACTS § 1494 (2d ed. 1920) (tracing the history of quasi-contract development).

222. *Beukas*, 605 A.2d at 781.

223. *Id.* at 784.

duce a more legally cohesive body of law than will application of classic contract doctrine . . . .[224]

III. CONCLUSION

Almost twenty years ago, Professor Virginia Nordin argued that courts needed a workable framework to hold universities accountable for their administrative and business judgments—as opposed to disciplinary and academic decisions—and that contract law held such potential.[225] She complained that judicial opinions were not "unified or consistent in their application of the contract approach."[226] The jurisprudence of higher education is no more clear today. Moreover, today's consumerism and marketing practices make the case for a stronger judicial role even more compelling. Without a well-defined judicial role, the unchecked deference accorded to institutions leaves students vulnerable and without adequate remedy when institutions of higher education place their own economic and commercial goals over their students' educational needs.[227]

Courts are understandably reluctant to step into the middle of university-student disputes. They correctly note that it is inappropriate to substitute their own judgment for the institution's academic and management decisions. Courts, however, 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, students potentially have foregone other opportunities and purchased an educational product based on promises and on representations that the institution made to induce them to enroll.[228] Ignoring the consumer nature of the relationship allows the institution too much discretion.

The implied obligations of good faith and fair dealing give courts an appropriate role that allows the right mix of discretion and accountability. By asking schools to abide by the standards in the educational community and to refrain from decision-making for improper motives, courts can provide at least some protection to students while not usurping the university's autonomy.

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224. *Id.* While *Beukas* was affirmed on appeal, the appellate court did not discuss good faith and fair dealing, instead noting that the disclaimer in the catalog would allow program closure. *See* Beh, *supra* note 5, at 192 (citing Beukas v. Board of Trustees, 605 A.2d 708 (N.J. Super. Ct. App. Div. 1992)).

225. Nordin, *supra* note 69, at 178-79.

226. *Id.* at 179.

227. *See id.* at 149-51 (discussing the increase in the "'business' or academic-administrative function of the university").

228. *See id.* at 151 (discussing *Behrend v. State*, 379 N.E.2d 617 (1979)).