

Winter 1973

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Recommended Citation

Buchter, Jonathan Flagg (1973) "Contract Law and the Student-University Relationship," *Indiana Law Journal*: Vol. 48: Iss. 2, Article 5.

Available at: <https://www.repository.law.indiana.edu/ilj/vol48/iss2/5>

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CONTRACT LAW AND THE STUDENT-UNIVERSITY RELATIONSHIP

The relationship between universities and their students has been analyzed by courts under many different legal doctrines. The most enduring and pervasive of these has been the theory that there exists an implied contract between the student and the institution. Over the years, a patchwork of holdings has created a common law of contract governing the student-university relationship. Principles espoused by these holdings merit more careful consideration than that provided in recent literature on the subject.¹ In addition the common law resulting from such decisions deserves comparison with the general law of contract.

EVOLUTION OF STUDENT-UNIVERSITY CONTRACT DOCTRINE

Until the early 1900's, the relationship between the student and the institution was expressly stated in a written enrollment contract, which was essentially a business agreement between the parent of the student and the institution.² Among other things, the agreement provided that the university assume the parental, supervisory role over the child.³ The doctrine of *in loco parentis* was developed in order to reflect the legal incidents of this relationship.⁴ Since this theory viewed the institution as standing "in place of the parent," the school had the right to control

1. See generally K. ALEXANDER & E. SOLOMON, *COLLEGE AND UNIVERSITY LAW* (1972) [hereinafter cited as *UNIVERSITY LAW*]; Goldman, *The University and the Liberty of Its Students—A Fiduciary Theory*, 54 KY. L.J. 643 (1966); Goodman, *A Trial Lawyer's View of Lawsuits Against the Schools*, in *LAW AND DISCIPLINE ON CAMPUS* 173 (G. Holmes ed. 1971); Seavy, *Dismissal of Students—"Due Process"*, 70 HARV. L. REV. 1406 (1957); Stamp, *Comment*, 45 DENVER L.J. 663 (1968); Van Alstyne, *The Student as University Resident*, 45 DENVER L.J. 582 (1968); Wasserstein, *The Courts and the Campus*, in *WITH JUSTICE FOR SOME* 38 (B. Wasserstein & M. Green eds. 1970) [hereinafter cited as Wasserstein], *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045 (1968) [hereinafter cited as *Developments*]; Note, *Legal Relationship Between the Student and the Private College or University*, 7 SAN DIEGO L. REV. 244 (1970); Note, *The Student-School Legal Relationship: Toward a Unitary Theory*, 5 SUFFOLK L. REV. 468 (1971); Note, *Judicial Intervention in Expulsions or Suspensions by Private Universities*, 5 WILLAMETTE L.J. 277 (1969); Note, *Private Government on the Campus—Judicial Review of University Expulsions*, 72 YALE L.J. 1362 (1963).

2. See, e.g., *McClintock v. Lake Forest University*, 222 Ill. App. 468 (1921); *Kabus v. Seftner*, 34 Misc. 538, 69 N.Y.S. 983 (App. T. 1901). See also *Hutt v. Haileybury College*, 4 T.L.R. 623 (1888).

3. *Comment, Colleges and Universities: The Demise of In Loco Parentis*, 6 LAND & WATER L. REV. 715 (1971).

4. The *in loco parentis* doctrine was first applied to higher education in *Gott v. Berea College*, 156 Ky. 376, 161 S.W. 204 (Ct. App. 1913).

and discipline the child. *In loco parentis* proved to be of limited usefulness as a legal framework in many situations.⁵ Thus, courts began to rely on the actual written contract for guidance. When no written contract existed, the courts found it useful to use an implied contract theory to delineate the relationship of the parties.⁶

During the early part of this century, the contract approach became the dominant theory under which student-university cases were litigated. Other concepts of the relationship were occasionally used to supplement implied contract law. One such theory was that the student was granted the privilege of attendance by the university,⁷ allowing courts to uphold any university action since students had no rights under such a relationship. Another theory used to sustain institutional judgment was that the student was the beneficiary in a trust relationship.⁸

This theoretical mixture was applied in student-university litigation until *Dixon v. Alabama State Board of Education*⁹ was decided in 1961. *Dixon* held, generally, that a public university's actions were state actions and therefore subject to constitutional restraints and, more particularly, that a student must be afforded procedural due process prior to expulsion.¹⁰

However, the state action doctrine in *Dixon* has not replaced the implied contract theory. Courts still view the student-university relationship as one of contract with certain constitutional protections required if the institution is public.¹¹ Thus, there may currently be some limits on what the public university may demand from the student. For example, a public university may not be able to deny a student certain first amend-

5. For example, in disputes over academic performance, the theory that the school stood in place of the parents was not useful. Similarly, if the courts wished to allow students to be reinstated where the school had acted arbitrarily, a new theory was needed. Moreover, parents had begun to assert claims for fees which could not be resolved using *in loco parentis*. See, e.g., *McClintock v. Lake Forest University*, 222 Ill. App. 468 (1921); *Kentucky Military Institute v. Bramblet*, 158 Ky. 205, 164 S.W. 808 (1914); *Kabus v. Seftner*, 34 Misc. 538, 69 N.Y.S. 983 (App. T. 1901).

6. See, e.g., *Booker v. Grand Rapids Medical College*, 156 Mich. 95, 120 N.W. 589 (1909); *Barker v. Bryn Mawr College Trustees*, 1 Pa. D. & C. 383 (Dist. Ct. 1922).

7. See *Hamilton v. Regents of the University of California*, 293 U.S. 245 (1934). Some institutions have attempted to revitalize this concept by stating in their catalogue that attendance at the university is a privilege which can be withdrawn at any time at the university's discretion. See, e.g., *WILBERFORCE UNIVERSITY, WILBERFORCE UNIVERSITY BULLETIN*, 1971-72, at 39 (1971).

8. *Koblitz v. Western Reserve University*, 11 Ohio C. Dec. 515, 21 Ohio C.C.R. 144 (1901).

9. 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961).

10. 294 F.2d at 158.

11. "A contract is created with the state which, by its very nature, incorporates constitutional principles of due process." *Anderson v. Regents of the University of California*, 22 Cal. App. 3d 763, 770, 99 Cal. Rptr. 531, 535 (1972).

ment rights.¹² However, since the *Dixon* holding is limited to public institutions, a private university may be able to contract in such a way as to limit these constitutional rights.¹³

Many litigants have attempted to extend the *Dixon* holding to private institutions on the grounds that state action is involved in funding, tax exemptions and grant programs. These attempts have been almost universally unsuccessful.¹⁴ Thus, contract considerations remain the prevalent judicial tools used to settle disputes between a private university and its students, and to judge public university litigation not involving constitutional claims.

THE IMPLIED STUDENT-UNIVERSITY CONTRACT

Courts still approach student-university implied contracts¹⁵ by using essentially traditional, early twentieth century contract doctrines. Under such an approach, there is

the implication that the institution had obligated itself—subject, of course, to changes in plan, curriculum, and the like—to permit a student in good standing to continue the particular course for which he has entered upon payment of the necessary fees and compliance with other reasonable requirements.¹⁶

12. See, e.g., *Brooks v. Auburn University*, 296 F. Supp. 188 (M.D. Ala.), *aff'd*, 412 F.2d 117 (5th Cir. 1969); *Dickson v. Sittersen*, 280 F. Supp. 486 (M.D.N.C. 1968). For a general discussion of these cases see UNIVERSITY LAW, *supra* note 1, at 420-21; Note, *Student Constitutional Rights on Public Campuses*, 58 VA. L. REV. 552 (1972) [hereinafter cited as *Public Campuses*].

13. It is clear, therefore, that the principle which counsel for the plaintiffs seek to invoke, namely, that a Government college or university may not expel its students without notice of charges and an opportunity to be heard, is not applicable to Howard University, for it is not a public institution nor does it partake of any governmental character.

Greene v. Howard University, 271 F. Supp. 609, 612 (D.D.C. 1967).

14. See *Blackman v. Fisk University*, 443 F.2d 121 (6th Cir. 1971); *Coleman v. Wagner College*, 429 F.2d 1120 (2d Cir. 1970); *Brown v. Mitchell*, 409 F.2d 593 (10th Cir. 1969); *Rowe v. Chandler*, 332 F. Supp. 336 (D. Kan. 1971); *Torres v. Puerto Rico Junior College*, 298 F. Supp. 458 (D.P.R. 1969); *Grossner v. Trustees of Columbia University*, 287 F. Supp. 535 (S.D.N.Y. 1968); *Greene v. Howard University*, 271 F. Supp. 609 (D.D.C. 1967), *dismissed as moot*, 412 F.2d 1128 (D.C. Cir. 1969); *Guillory v. Trustees of Tulane University*, 212 F. Supp. 674 (E.D. La. 1962). But see *Ryan v. Hofstra University*, 67 Misc. 2d 651, 324 N.Y.S.2d 964 (Supp. Ct. 1971). For the case of the schizophrenic student body—i.e., half public, half private—see the description of Alfred University in *Powe v. Miles*, 407 F.2d 73 (2nd Cir. 1968).

15. This note covers the basic student-university contract. Other contractual relationships between the parties, such as dormitory contracts and athletic scholarships, will not be discussed.

16. *Samson v. Trustees of Columbia University*, 101 Misc. 146, 148, 167 N.Y.S. 202, 204 (Sup. Ct. 1917).

Fees,¹⁷ student conduct and discipline,¹⁸ academic matters,¹⁹ and even the continued existence of the college²⁰ have all been found to be covered by

17. *Niedermeyer v. Curators of State University*, 61 Mo. App. 654 (Kansas City Ct. App. 1895) (action by student to enforce charges listed in university catalogue and to recover additional amount paid); *Trustees of Columbia University v. Jacobsen*, 53 N.J. Super. 574, 148 A.2d 63, *appeal dismissed*, 31 N.J. 221, 156 A.2d 251 (1959), *cert. denied*, 363 U.S. 808 (1960) (action by university for unpaid tuition); *Auser v. Cornell University*, 71 Misc. 2d 1084, 337 N.Y.S.2d 878 (Sup. Ct. 1972) (action by student to enjoin imposition of additional fees); *Drucker v. New York University*, 59 Misc. 2d 789, 300 N.Y.S.2d 749 (App. T. 1969) (action by student to recover tuition paid prior to registration at an institution he never attended); *Silver v. Queens College of City University*, 63 Misc. 2d 186, 311 N.Y.S.2d 313 (Civ. Ct. of City of New York 1970) (action by student to enforce contract based upon previous statement of fees).

18. *Dehaan v. Brandeis University*, 150 F. Supp. 626 (D. Mass. 1957) (student expelled for protesting the amount of his graduate fellowship); *John B. Stetson University v. Hunt*, 88 Fla. 510, 102 So. 637 (1925) (student expelled for ringing cowbells and other "disorderly acts" in dormitory); *Robinson v. University of Miami*, 100 So. 2d 442 (Fla. Dist. Ct. App. 1958) (university declined to place student in student-teaching position because he was a "fanatical atheist"); *People ex rel. Pratt v. Wheaton College*, 40 Ill. 186 (1866) (student expelled for joining a "secret society"); *McClintock v. Lake Forest University*, 222 Ill. App. 468 (1921) (student expelled for smoking); *Carr v. St. John's University*, 17 App. Div. 2d 632, 231 N.Y.S.2d 410, *aff'd mem.*, 12 N.Y.2d 802, 187 N.E.2d 18, 235 N.Y.S.2d 834 (1962) (students expelled for witnessing a civil marriage ceremony); *Anthony v. Syracuse University*, 224 App. Div. 487, 231 N.Y.S. 435 (1928) (student expelled for not being a "typical Syracuse girl"); *Goldstein v. New York University*, 76 App. Div. 80, 78 N.Y.S. 739 (1902) (student expelled from law school for writing to a woman in class); *Samson v. Trustees of Columbia University*, 101 Misc. 146, 167 N.Y.S. 202 (Sup. Ct.), *aff'd*, 181 App. Div. 936, 167 N.Y.S. 1125 (1917) (student expelled for making off-campus speech encouraging draft resistance); *People ex rel. Cecil v. Bellevue Hospital Medical College*, 60 Hun 107, 14 N.Y.S. 490 (Sup. Ct. 1890), *aff'd*, 128 N.Y. 621, 28 N.E. 253, 14 N.Y.S. 490 (1891) (student refused the opportunity to take final exams for undisclosed conduct); *Cornette v. Aldridge*, 408 S.W.2d 935 (Tex. Civ. App. 1966) (student expelled for violations of driving regulations and general conduct regulations).

19. *Zumbrun v. University of Southern California*, 25 Cal. App. 3d 1, 101 Cal. Rptr. 499 (1972) (action by student for damages resulting from loss of class time); *University of Miami v. Militana*, 184 So. 2d 701 (Fla. Dist. Ct. App. 1966) (student expelled for poor academic performance); *State ex rel. Nelson v. Lincoln Medical College*, 81 Neb. 533, 118 N.W. 122 (1903), *aff'd*, 86 Neb. 269, 125 N.W. 517 (1910) (student denied degree because of failing grades); *Balogun v. Cornell University*, 70 Misc. 2d 474, 333 N.Y.S.2d 838 (Sup. Ct. 1971) (student denied degree because of poor grades); *Healy v. Larsson*, 67 Misc. 2d 374, 323 N.Y.S.2d 625 (Sup. Ct. 1971) (student denied degree because he had not completed prescribed course work); *Edde v. Columbia University*, 8 Misc. 2d 795, 168 N.Y.S.2d 643 (Sup. Ct. 1957), *aff'd*, 6 App. Div. 2d 780, 175 N.Y.S.2d 556 (1958), *cert. denied*, 359 U.S. 956 (1959) (student action to compel acceptance of his doctoral thesis); *Paynter v. New York University*, 64 Misc. 2d 226, 314 N.Y.S.2d 676 (Civ. Ct. of City of New York), *rev'd*, 66 Misc. 2d 92, 319 N.Y.S.2d 893 (App. T. 1971) (action by parent for fees based on class time lost due to university closing); *Koblitz v. Western Reserve University*, 11 Ohio C. Dec. 515, 21 Ohio C.C.R. 144 (1901) (student denied class advancement because of poor grades); *Strank v. Mercy Hospital*, 383 Pa. 54, 117 A.2d 697 (1955) (action by former student for transfer credits and transcript); *Foley v. Benedict*, 122 Tex. 193, 55 S.W.2d 805 (1932) (student expelled for failing grades).

20. *Galton v. College of Pharmaceutical Sciences*, 70 Misc. 2d 12, 332 N.Y.S.2d 909 (Sup. Ct. 1972).

this implied contract.²¹

In general, if no specific contract document is signed at the time of application, admission, or registration, entry of the student onto the university campus, or into university life is regarded as the point of formation of the student-university contract.²² This construction is consistent with the contract principle that acceptance of an offer may be inferred from the parties' actions.²³ Moreover, even if the student has not yet arrived at the university, some courts have held that advance payment and acceptance of tuition may create binding obligations on both parties.²⁴ Therefore, although the student notifies the university in writing of his intention not to attend, the school may not be obligated to refund his tuition. If there is a catalogue provision stating that tuition is not refundable, the student is bound by his implied contract with the university.²⁵ For the same reason, the university cannot increase its charges to the student after accepting payment of full tuition.²⁶

The implied contract is considered to be between the individual student and the university as a corporate body. Although students have attempted to join faculty members, administrative officers, and trustees in suits, courts have usually dismissed such defendants on the grounds that they were not parties to the contract.²⁷

In the older cases, the parent was often considered one of the parties to the contract.²⁸ More recently, a parent sued to enjoin a college from implementing new liberal parietal hours. The court found that the set-

21. However, a recent case limited the scope of the implied contract in holding that the student did not waive possible tort actions. *Jay v. Walla Walla College*, 53 Wash. 2d 590, 335 P.2d 458 (1959). The limitation on liability urged by the college was not set forth in the institution's catalogue or regulations. The court's position might have been different if such an express clause had been included.

22. See *Greene v. Howard University*, 271 F. Supp. 609 (D.D.C. 1967); *Anderson v. Regents of University of California*, 22 Cal. App. 3d 763, 99 Cal. Rptr. 531 (1972); *McClintock v. Lake Forest University*, 222 Ill. App. 468 (1921); *People ex rel. Cecil v. Bellevue Hospital Medical College*, 60 Hun 107, 14 N.Y.S. 490 (Sup. Ct. 1890).

23. 1 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 90 (3d ed. 1957) [hereinafter cited as WILLISTON]; RESTATEMENT OF CONTRACTS §§ 21, 72(2) (1932).

24. *Drucker v. New York University*, 59 Misc. 2d 789, 300 N.Y.S.2d 749 (App. T. 1969); *Ewing v. State*, 69 Misc. 2d 923, 331 N.Y.S.2d 287 (Ct. Cl. 1972); *Silver v. Queens College of City University*, 63 Misc. 2d 186, 311 N.Y.S.2d 313 (Civ. Ct. of City of New York 1970); *Cornette v. Aldridge*, 408 S.W.2d 935 (Tex. Civ. App. 1966).

25. *Drucker v. New York University*, 59 Misc. 2d 789, 300 N.Y.S.2d 749 (App. T. 1969).

26. *Silver v. Queens College of City University*, 63 Misc. 2d 186, 311 N.Y.S.2d 313 (Civ. Ct. of City of New York 1970).

27. See, e.g., *Zumbrun v. University of Southern California*, 25 Cal. App. 3d 1, 101 Cal. Rptr. 499 (1972).

28. See, e.g., *Manson v. Culver Military Academy*, 141 Ill. App. 250 (1908); *Kentucky Military Institute v. Bramblet*, 158 Ky. 205, 164 S.W. 808 (1914).

ting of students' hours was within the college's authority, but, in finding no breach of contract, the decision implied that parents were still considered parties to university contracts involving their children.²⁹

In attempting to determine the terms of the implied contract, the courts have usually looked to the documents which are familiar to the student in the university setting. Generally, the university catalogue or bulletin is considered the primary document in the relationship.³⁰ Statements made in other documents have also been held to constitute terms of the bargain. Thus, dormitory contracts,³¹ registration cards,³² admission applications,³³ catalogue supplements,³⁴ as well as oral statements³⁵ have all been found to contain contract terms. Such terms are binding on the parties, independent of whether the university so intended, and regardless of whether the student knew of them or understood them to be a part of the contract.³⁶

Courts apply varying degrees of scrutiny to different categories of contract terms. In litigation over fees, the rule is that the courts will enforce whatever the university's published statements prescribe.³⁷ In

29. *Jones v. Vassar College*, 59 Misc. 2d 296, 299 N.Y.S.2d 283 (Sup. Ct. 1969).

30. *Dehaan v. Brandeis University*, 150 F. Supp. 626 (D. Mass. 1957); *University of Miami v. Militana*, 184 So. 2d 701 (Fla. Dist. Ct. App. 1966); *Robinson v. University of Miami*, 100 So. 2d 442 (Fla. Dist. Ct. App. 1958); *Drucker v. New York University*, 59 Misc. 2d 789, 300 N.Y.S.2d 749 (App. T. 1969); *Carr v. St. John's University*, 17 App. Div. 2d 632, 231 N.Y.S.2d 410, *aff'd mem.*, 12 N.Y.2d 802, 187 N.E.2d 18, 235 N.Y.S.2d 834 (1962); *Silver v. Queens College of City University*, 63 Misc. 2d 186, 311 N.Y.S.2d 313 (Civ. Ct. of City of New York 1970).

31. *Cornette v. Aldridge*, 408 S.W.2d 935 (Tex. Civ. App. 1966).

32. *Anthony v. Syracuse University*, 224 App. Div. 487, 231 N.Y.S. 435 (1928).

33. *Culver Military Academy v. Staley*, 250 Ill. App. 531 (1928); *McClintock v. Lake Forest University*, 222 Ill. App. 468 (1921). *See also* *Hutt v. Haileybury College*, 4 T.L.R. 623 (1888).

34. *Balogun v. Cornell University*, 70 Misc. 2d 474, 333 N.Y.S.2d 838 (Sup. Ct. 1971).

35. *Healy v. Larsson*, 67 Misc. 2d 374, 323 N.Y.S.2d 625 (Sup. Ct. 1971); *Foley v. Benedict*, 122 Tex. 193, 55 S.W.2d 805 (1932).

36. An excellent discussion of the expectations of the parties in such cases may be found in the lower and appellate court opinions in *Drucker v. New York University*, 57 Misc. 2d 937, 293 N.Y.S.2d 923 (Civ. Ct. of City of New York 1968), *rev'd*, 59 Misc. 2d 789, 300 N.Y.S.2d 749 (App. T. 1969).

37. For example, it has been held that since there was a statement in the catalogue mailed to the student that no fees paid were refundable, the student was bound by that term and could not receive a refund even though he had never read those provisions of the catalogue or attended the school. *Drucker v. New York University*, 59 Misc. 2d 789, 300 N.Y.S.2d 749 (App. T. 1969).

Recently, a New York court admitted "to serious difficulty in understanding the purpose of the transfer tuition charge" assessed by Cornell University. *Auser v. Cornell University*, 71 Misc. 2d 1084, —, 337 N.Y.S.2d 878, 880 (Sup. Ct. 1972). However, the court upheld a transfer assessment on contract grounds. Since Cornell's catalogue contained a provision stating that a transferring student must pay the fee, the court refused to look into the rationale behind such a charge. In some cases, however, the university's statements on fees conflicted. The issue then became which statements con-

disputes over grading or curricula, courts have usually avoided any action on their part which might be construed as judicial interference with academic judgments, unless arbitrary or unreasonable conduct can be shown.³⁸ However, student reliance on misrepresented academic standards may estop the university from later changing its agreements.³⁹ In disagreements concerning student conduct, courts have generally favored the university's interpretation of the contract.⁴⁰

stituted the terms of the implied student-university contract. For example, in one case, a catalogue statement made upon a student's entrance into law school as to the fees for the following three years conflicted with the fee schedule established between his second and third years. The court held that the institution's original statement as to fees, coupled with acceptance of the first two years' tuition, bound the institution to its original bargain. *Neidermeyer v. Curators of State University*, 61 Mo. App. 654 (Kansas City Ct. App. 1895).

38. One court recently refused to revise an academic evaluation, stating:

Beyond the mere allegation, there is no showing that denial of plaintiff's degree was arbitrary, malicious, capricious, or in any way discriminatory. The unrefuted evidence is that standard procedures of review of academic achievement and professional potential were equally applied to all members of [the student's] class and that the decision to withhold a degree from him resulted from the rightful exercise of honest discretion based upon justifying facts. Abuse of discretion or gross error has not been shown.

Balogun v. Cornell University, 70 Misc. 2d 474, 477, 333 N.Y.S.2d 838, 841-42 (Sup. Ct. 1971).

Another court refused to measure academic services by the number of classes. While noting that the student may have contracted for a number of classes, the court said, "[t]he circumstances of the relationship permit the implication that the professor or college may make minor changes in this regard." *Paynter v. New York University*, 66 Misc. 2d 92, 92-93, 319 N.Y.S.2d 893, 894 (App. T. 1971). An additional, albeit mechanistic, analysis of some of the contract implications of *Paynter* may be found in Note, *Contracts—Paynter v. New York University: How Discretionary Are the Inherent Powers of Universities?*, 21 DEPAUL L. REV. 861 (1972).

Similarly, in *Trustees of Columbia University v. Jacobsen*, 53 N.J. Super. 574, 148 A.2d 63, *appeal dismissed*, 31 N.J. 221, 156 A.2d 251 (1959), *cert. denied*, 363 U.S. 808 (1960), a student unsuccessfully attempted to defend against a suit for unpaid tuition on the ground that the university had breached a promise to impart wisdom and make him an educated man. The court refused to find that general statements on the ideals of education written in the catalogue and sculpted on university buildings constituted such an obligation.

39. For example, in *Healy v. Larsson*, 67 Misc. 2d 374, 323 N.Y.S.2d 625 (Sup. Ct. 1971), the court compelled an institution to issue a degree on the ground that an oral statement of an official prompted specific student reliance and was therefore a binding contract term. The university was found to be bound by the statement of the student's advisor who had erroneously outlined the course of study necessary for a degree.

40. In student conduct cases, the terms of the contract are more difficult to determine. Generally, conduct terms fall into two categories. The first includes specific rules and regulations, such as dress codes, drinking regulations, dorm hours, and driving regulations. See *Cornette v. Aldridge*, 408 S.W.2d 935 (Tex. Civ. App. 1966). Reported cases involving such specific rules are rare. This lack of cases may be explained by the fact that colleges rarely write specific rules, and that if such rules are written, students would probably not contest their application.

The second category of terms is non-specific. It includes broad rules which state, for example, that students shall conduct themselves "in conformity with the ideals of Christian education and conduct." *Carr v. St. John's University*, 17 App. Div. 2d 632,

The remedies granted for breach of the student-university contract are of three types: damages, injunction, and specific performance.⁴¹

231 N.Y.S.2d 410, *aff'd mem.*, 12 N.Y.2d 802, 187 N.E.2d 18, 235 N.Y.S.2d 834 (1962). Also included are the broad grants of discretionary power commonly reserved by the universities in their catalogues, often called "waiver clauses":

Students are expected to conduct themselves with due regard for the rights of others and for reasonable standards of behavior. In cases where students have not done so, the University reserves the right to take disciplinary measures, including the requirement to withdraw.

TUFTS UNIVERSITY, BULLETIN OF TUFTS UNIVERSITY 1971-72, at 43 (1971).

If it is in the interests of the College, its members, or the privacy of the persons involved, the College reserves the right to take such disciplinary action [dismissal] with or without public statement of the reason therefor, and neither the College nor any of its officers shall be under any liability for such action.

RIPON COLLEGE, RIPON COLLEGE BULLETIN 1972-73, at 133 (1972).

The continuance of each student upon the rolls of his school, receipt of academic credits, graduation, and the conferring of any degree are strictly subject to the disciplinary powers of the university, which is free to cancel registration at any time on grounds which are deemed advisable.

GEORGETOWN UNIVERSITY, GEORGETOWN UNIVERSITY BULLETIN—1972-73, at 2 (1972).

Finally, the second category of terms includes those which are read into the contract by courts when no writing exists. In such cases the courts use a reasonableness standard similar to that used in the case of a written contract. There is an implied condition "that the student will obey reasonable rules and regulations of the school." *Hood v. Tabor Academy*, 296 Mass. 509, 510, 6 N.E.2d 818, 819 (1937). *See also John B. Stetson University v. Hunt*, 88 Fla. 510, 102 So. 637 (1924); *Koblitz v. Western Reserve University*, 11 Ohio C. Dec. 515, 21 Ohio C.C.R. 144 (1901).

This second category of rules generates the most litigation. In such cases, the court is usually faced with the unilateral interpretation or *ad hoc* creation of a rule by the institution. The judicial response has been to defer to the university's judgment on the matter, thereby requiring the student to prove that the university's action was arbitrary or unreasonable. *See, e.g., Dehaan v. Brandeis University*, 150 F. Supp. 626 (D. Mass. 1957); *Robinson v. University of Miami*, 100 So. 2d 442 (Fla. Dist. Ct. App. 1958); *Carr v. St. John's University*, 17 App. Div. 2d 632, 231 N.Y.S.2d 410, *aff'd mem.*, 12 N.Y.2d 802, 187 N.E.2d 18, 235 N.Y.S.2d 834 (1962); *Anthony v. Syracuse University*, 224 App. Div. 487, 231 N.Y.S. 435 (1928); *Foley v. Benedict*, 122 Tex. 193, 55 S.W.2d 805 (1932). Such an allocation of burdens usually results in a determination upholding the university's action. For example, a student who objected to the amount of his graduate fellowship was expelled from the institution, and sued for reinstatement. *Dehaan v. Brandeis University*, 150 F. Supp. 626 (D. Mass. 1957). The university defended on the ground that a clause in the catalogue stated that the university might take any action it "deemed appropriate." In upholding the student's expulsion, the court found this clause to be a term of the student-university contract to which the student had agreed. *Id.* at 627. In another case, a university found one of its students to be a "fanatical atheist" on the basis of two letters he wrote to a local newspaper. The university refused to place him in a student teaching position—a prerequisite to an education degree and teaching certification. The court upheld the university's action, citing a clause in the university catalogue which stated that the university could change "any provision or any requirement at any time within the student's terms of residence." *Robinson v. University of Miami*, 100 So. 2d 442 (Fla. Dist. Ct. App. 1958).

41. There were several early decisions in which mandamus was granted against a private educational institution to enforce reinstatement orders. *See Pennypacker, Mandamus to Restore Academic Privileges*, 12 VA. L. REV. 645 (1926); *Recent Cases*, 77 U. PA. L. REV. 694 (1929). However, later courts refused to follow these precedents.

Money damages may be sought by either side in fee disputes, but cases contesting fees are rare.⁴² Recent cases have also raised the question of availability of consequential damages for failure of the university to provide promised academic services.⁴³ Plaintiffs in these cases requested damages to replace earnings which were alleged to have been lost as a result of university acts or inadequacies. While none of these cases reached the damage issue, such claims may become more prevalent in the future as the courts increasingly recognize the income value of education.

Injunctive relief is usually sought in expulsion-reinstatement disputes. The relief prayed for is an injunction barring the institution from denying the student the use of university facilities or attempting to hamper his education by disciplining him for previous misconduct. Such injunctions

See, e.g., Booker v. Grand Rapids Medical College, 156 Mich. 95, 120 N.W. 589 (1909); Kaelin v. University of Pittsburgh, 421 Pa. 220, 218 A.2d 798, *cert. denied*, 385 U.S. 837 (1966). Mandamus was apparently granted in the earlier cases because of the inadequacy of contract damages and the unavailability of injunctive relief as a remedy when the cases were decided.

42. The university commonly receives payment in advance of its performance so that suits for tuition by the institution are seldom needed, although they are occasionally reported. *See, e.g.,* Trustees of Columbia University v. Jacobsen, 53 N.J. Super. 574, 148 A.2d 63 (1959); Taylor v. Wake Forest University, — N.C. App. —, 191 S.E.2d 379 (1972). Moreover, students withdrawing from schools do not sue for refunds, presumably because refund schedules are now prevalent in school catalogues and would be considered binding. Typically, these schedules state a percentage of tuition which may be recovered after the semester has started. For example, the Indiana University "Fee Refund Schedule" provides for a 100 per cent refund during the first week of the semester, a refund of the larger of fifty per cent or 100 per cent minus fifty dollars for the second week, and no refund thereafter. INDIANA UNIVERSITY, INDIANA UNIVERSITY BULLETIN, 1972/73, at 5 (1972).

In addition, there is a long-standing common law interpretation, dating back to the nineteenth century, that university contracts do not provide for partial relief. The essential reason given for this rule is that the institution has certain fixed costs, and that its income may also be fixed by admitting a definite number of students. Thus, allowing a refund after the term has started would deprive the university of expected revenue which it could not replace. *See* Wentworth Military Academy v. Marshall, 225 Ark. 591, 283 S.W.2d 868 (1955); Manson v. Culver Military Academy, 141 Ill. App. 250 (1908); Kentucky Military Institute v. Bramblet, 158 Ky. 205, 164 S.W. 808 (1914); Drucker v. New York University, 59 Misc. 2d 789, 300 N.Y.S.2d 749 (App. T. 1969); Kabus v. Seftner, 34 Misc. 538, 69 N.Y.S. 983 (App. T. 1901); Castle Heights School v. Russ, 4 Tenn. C.C.A. 288 (1913). *But see* McClintock v. Lake Forest University, 222 Ill. App. 468 (1921).

Students wrongfully expelled by the university could presumably demand either a partial or total refund, but such action has been rarely requested. One court has stated that part of the tuition is refundable if the expulsion is found to be arbitrary or unreasonable. Miami Military Institute v. Leff, 129 Misc. 481, 220 N.Y.S. 799 (City Ct. of Buffalo 1926).

43. Zumbrun v. University of Southern California, 25 Cal. App. 3d 1, 101 Cal. Rptr. 499 (1972) (alleged damages for delay in earning degree); Balogun v. Cornell University, 70 Misc. 2d 474, 333 N.Y.S.2d 838 (Sup. Ct. 1971) (loss of future earnings from failure to grant veterinary degree); Huckabay v. Netterville, 263 So. 2d 113 (La. App. 1972) (alleged damages for poor legal education resulting in failure to pass bar exam three times).

have been granted by trial courts which have found a contract breach by the university, but these have not been enforced because of appellate reversals on other grounds.⁴⁴

Specific performance has been held to be a possible remedy in disputes which involve academic services. Since the courts are reluctant to review the professional judgment of university academicians, specific performance has been limited to those cases in which the professional requirements have apparently been satisfied, and there remains only university action of a clerical or administrative nature.⁴⁵

THE CONTRAST BETWEEN STUDENT-UNIVERSITY CONTRACT LAW AND THE GENERAL LAW OF CONTRACT

The view that the student-university relationship was one of implied contract grew out of the necessity for a description that adequately depicted the nature of the relationship and the kinds of litigation it was generating. Originally, contract theory in this area provided results which reflected the parties' expectations. It reinforced general nineteenth century notions of freedom of contract and equality of parties. Today, however, many of these theories have been modified or abandoned by courts which have recognized that contract principles developed to adjudicate disputes between commercial interests may not be appropriate in consumer affairs and other relationships where lay individuals are parties.

In the area of fees, courts have viewed the contract between the student and the university as a commercial relationship, in which specific prices are agreed upon and paid. This approach appears to coincide with the intentions of the parties. Both the student and the university desire certainty in their financial obligations and are likely to view the published statement of fees as binding. However, courts' decisions upholding refund schedules have not adhered to current commercial contract law. Under the Uniform Commercial Code, an aggrieved seller is unable to retain the full contract price after breach if that amount exceeds his damages.⁴⁶ The mechanical university catalogue rules relating weeks of at-

44. See, e.g., *Carr v. St. John's University*, 34 Misc. 2d 319, 231 N.Y.S.2d 403 (Sup. Ct.), *rev'd*, 17 App. Div. 2d 632, 231 N.Y.S.2d 410, *aff'd mem.*, 12 N.Y.2d 802, 187 N.E.2d 18, 235 N.Y.S.2d 834 (1962); *Goldstein v. New York University*, 38 Misc. 93, 77 N.Y.S. 80 (Sup. Ct.), *rev'd*, 76 App. Div. 80, 78 N.Y.S. 739 (1902).

45. For example, a court recently compelled a nursing school to grant a former student credits already earned and to give her a copy of her transcript. *Strank v. Mercy Hospital*, 383 Pa. 54, 117 A.2d 697 (1955). In another case, after finding that the college had bound itself to certain degree requirements, the court awarded specific performance, the granting of a degree, to a student who had completed that course. *Healy v. Larsson*, 67 Misc. 2d 374, 323 N.Y.S.2d 625 (Sup. Ct. 1971).

46. See UNIFORM COMMERCIAL CODE § 2-708 (1972 version).

tendance to percentage refunds,⁴⁷ do not accurately reflect the costs to the university as they actually exist over the semester. Thus, under the commercial model, a court faced with litigation concerning such a schedule would have to determine the actual monetary loss and would not accept the university's specification of damages as controlling.⁴⁸

In the area of academic services, the courts' approach has been similar to that used with contracts conditioned upon the satisfaction of one party.⁴⁹ The university requires that the student's academic performance be satisfactory to the university in its honest judgment. Absent a showing of bad faith on the part of the university or a professor, the court will not interfere.⁵⁰ The good faith judgment model both maximizes academic freedom and provides an acceptable approximation of the educational expectations of the parties.

In the area of student conduct and discipline, the courts' view of the contract which governs the student-university relationship has not followed contract law trends. Two areas of divergence are notable.

First, courts have upheld waiver clauses and other catalogue provisions even though there was no finding that they had been read or understood as binding by a reasonable student.⁵¹ Contract law has adopted a different approach in similar situations. The courts will not bind a party to terms of a document, such as a catalogue, unless

the facts present a case where the person receiving the paper should as a reasonable man understand that it contained terms of the contract which he must read at his peril, and regard as part of the proposed agreement.⁵²

47. See discussion of refund schedules in note 42 *supra*.

48. At least two commercial theories could be used in this situation. First, mechanical refund schedules could be struck down as penalty clauses. See 5 A. CORBIN, CORBIN ON CONTRACTS §§ 1073-74 (1964) [hereinafter cited as CORBIN]. Second, an approach similar to that of the Uniform Commercial Code, which has specific provisions for buyers' partial recovery after their own breach, could be adopted. See UNIFORM COMMERCIAL CODE § 2-718, particularly subsection 2.

49. 3A CORBIN, *supra* note 48, §§ 644-647.

50. More demanding characterizations of the university's duty are conceivable; for example, one might analogize to the reasonable skill standard used in the case of contracts for professional services.

51. See cases cited in WILLISTON, *supra* note 23, § 90D. See also *Drucker v. New York University*, 59 Misc. 2d 789, 300 N.Y.S.2d 749 (App. T. 1969).

52. WILLISTON, *supra* note 23, § 90D. For example, in general contract law a liability limitation printed on a parcel check or ticket is not binding unless the recipient could reasonably expect it to be there. The courts have found that one receiving such a check would not expect it to contain a liability limitation. See, e.g., *Klar v. H & M Parcel Room, Inc.*, 270 App. Div. 538, 61 N.Y.S.2d 285 (1946), *aff'd.*, 296 N.Y. 1044, 73 N.E.2d 912 (1947); *Healy v. New York Central & Hudson River R.R. Company*, 153 App. Div. 516, 138 N.Y.S. 287 (1912).

The student is not likely to expect that the catalogue contains such binding terms regulating conduct.

Although this absence of a knowledge requirement is found in the areas of fees and academic services, the considerations which make such action justifiable in those areas are not valid in the discipline situation. Viewing the catalogue as the contract document does not accurately reflect the apparent expectation of either party as to its role in conduct regulation. The student, in attempting to decide which university to attend, is most likely to make comparisons on the basis of the academic program and tuition of each institution, and will look to the catalogue for this information. Differences among universities as to conduct regulations and discipline powers, on the other hand, are probably not considered by the student. In addition, the very nature of a catalogue does not suggest that binding conduct rules are contained therein. The majority of a catalogue is devoted to the listing of academic offerings.⁵³ Conduct clauses are usually found in miscellaneous sections, often surrounded by idyllic descriptions of student life and campus ambiance.⁵⁴

The second major divergence from general contract law occurs when there are either no written provisions governing discipline or else the provisions are unclear or ambiguous. In these situations, courts have required the student to prove that the university's unilateral action was not within the terms of his agreement, as interpreted by the university.⁵⁵ Here again, the normal expectations of the student seem to conflict with the courts' interpretation of the contract and its terms. A student is not likely to view the university campus as an area requiring a standard of conduct any different from that provided for any other public or private area by the state's criminal law. The university administration is similarly viewed as having no special insight as to the propriety of a student's non-academic conduct.⁵⁶ A student will expect that his interpretation of a term requiring reasonable conduct will not differ from the standard applied by the university. And when a disagreement over meaning occurs, the student has no reason to expect that his interpretation will be given any less

53. See, e.g., *DRAKE UNIVERSITY, DRAKE UNIVERSITY 1969-70 CATALOGUE* (1969); *HOWARD UNIVERSITY, HOWARD UNIVERSITY CATALOG 1971-73* (1971).

54. See, e.g., *MANCHESTER COLLEGE, MANCHESTER COLLEGE CATALOG*, 1972-73, at 40 (1972); *MARSHALL UNIVERSITY, MARSHALL UNIVERSITY GENERAL UNDERGRADUATE CATALOG 1972-73*, at 76 (1972). See also *AMERICAN UNIVERSITY, THE AMERICAN UNIVERSITY BULLETIN*, 1972 (1972), which puts its waiver clause in small print immediately after the title page and before the table of contents.

55. See *Dehaan v. Brandeis University*, 150 F. Supp. 626 (D. Mass. 1957); *Robinson v. University of Miami*, 100 So. 2d 442 (Fla. Dist. Ct. App. 1958); note 51 *supra*.

56. However, students probably expect university administrators to have a special insight in matters concerning academic conduct, i.e., cheating and plagiarism.

credence than that of the institution. Thus, a student may well be surprised when a regulation which states that the university will be allowed to discharge a student for grounds it deems reasonable is held to mean that the student must prove his expulsion unreasonable and that the court will accept, without scrutiny, the university's interpretation.

Contract law has dealt with analogous situations with different results. Two methods of interpreting the student-university contract may be derived from courts' experience with these situations. First, since the institution maintains exclusive control over the drafting of the contract terms, the logic applied to contracts of adhesion could be employed. In viewing such agreements, the courts have construed ambiguous terms of the contract against the party who wrote them, reasoning that the drafter's advantage in being able to write the agreement should have resulted in a contract which clearly expressed his position.⁵⁷ If such an analysis were applied to the student-university contract, students could not be expelled unless the university had, prior to the violation, either spelled out as prohibited the specific conduct of the student or declared clearly and openly that it did not consider itself bound by a standard of reasonableness in matters concerning student conduct.

An alternative and less severe method of resolving a dispute over interpretation of any provision is simply to find no agreement on the type of conduct in question. A decision that there was no meeting of the minds would allow the court to imply a term which it felt to be reasonable in the context of the parties' relationship.⁵⁸ Under this view, the university can still discipline without specific rules if it is willing to risk an unfavorable, independent determination of reasonableness by a reviewing court.

APPLICATION OF CONTRACT DOCTRINE TO THE PRIVATE UNIVERSITY

Much recent litigation has sought to extend constitutional protections to students at private universities.⁵⁹ These efforts have relied upon characterization of private university discipline as state action because of governmental involvement in funding and taxation. This constitutional focus has neglected the possibility of achieving many of the same results through the law of the implied student-university contract which constitutes the basic legal relationship in both public and private universities.

General contract law, through its protection of expectations and intents, often produces outcomes which parallel those obtained through

57. 1 CORBIN, *supra* note 48, § 128. See also Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

58. 1 CORBIN, *supra* note 48, §§ 95-107; 3 *id.*, § 562; 4 WILLISTON, *supra* note 23, § 618.

59. See note 14 *supra*.

constitutional analysis. For example, students in public universities have sought reinstatement after expulsion on the ground that the rules allegedly violated were unconstitutionally vague.⁶⁰ Contract law doctrine provides a method of resolving the same types of disputes by construing ambiguous terms against the drafting party.⁶¹ Where constitutional law prohibits implication of a waiver of rights by conduct without clear manifestation of intent,⁶² contract law provides that agreement to terms will be implied only when it is reasonable to believe such assent was intended.⁶³

Contract theory also has the potential to establish in the private university many of the substantive rights which are protected by the state action theory in the public university.⁶⁴ When a court finds that there has been no meeting of the minds as to university rules or powers in these areas, either because there is nothing written or because the meaning of what is written is unclear, the court may imply a term which reflects an accommodation of the parties' reasonable expectations.

It is unlikely that a student will perceive any rationale for differences in conduct regulation based on the private-public distinction unless there is something special about the character of the particular private institution which would draw this distinction to his attention.⁶⁵ Therefore, in most cases he will expect the same freedoms on the private campus as he would enjoy at a public university. As for the university's expectations, one noted commentator has suggested a reasonable perspective:

Historically private colleges and universities have allowed more freedom to their students than has been true at public institutions, and, in the turbulent atmosphere on today's campuses, it seems to me unthinkable that the faculty and administration of any private institution would consider recognizing fewer rights

60. See, e.g., *Soglin v. Kauffman*, 418 F.2d 163 (7th Cir. 1969); *Esteban v. Central Missouri State College*, 415 F.2d 1077 (8th Cir. 1969).

61. See note 59 *supra* & text accompanying.

62. *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 156 (5th Cir. 1961). See generally *Johnson v. Zerbst*, 304 U.S. 458 (1938).

63. See note 60 *supra* & text accompanying.

64. See generally *UNIVERSITY LAW*, *supra* note 1; Wasserstein, *supra* note 1, at 43; *Public Campuses*, *supra* note 12.

65. A student attending a military institution or a religious university would be more likely to perceive the differences in discipline between his college and others, as well as the rationale for those differences. In general, however, it is often difficult to determine whether the institution is private or public. For instance, names are often deceiving. While *Purdue University* and *Southern University* are public institutions, *Ohio University* and *New York University* are private. Moreover, even if the student carefully studies the catalogue, he may be unable to tell whether the university is public or private, especially in the case of the "schizophrenic university." See note 14 *supra*.

in their students than the minimum the Constitution exacts of the state universities.⁶⁶

Thus a court, in defining a term based on the parties' expectations, could find that the substantive protections afforded students in the public university would have been adopted as an expression of their agreement.⁶⁷

Contract law cannot assure private university students all the protections enjoyed by their counterparts in public institutions. For example, many of the elements of procedural due process, such as pre-expulsion notice and hearings, are not provided under traditional contract analysis. All that can be established by contract law is that after a university has acted, the decision will be reviewed by a court which has no preconceived notion of the correctness of the action, and that the burden of proof will be on the university.⁶⁸

In addition, traditional contract law, based on the expectations of the parties, cannot prevent the private university from contracting for terms which would be considered unconstitutional waivers of rights in the public university.⁶⁹ It would, however, insure that the university

66. Wright, *The Constitution on Campus*, 22 VAND. L. REV. 1027, 1035 (1969) (footnotes omitted).

67. The public university protections could also be deemed the "standard of the industry." Under this analysis, the courts could substitute the standard practice in the industry—as they do in general contract law—for the vague or ambiguous term. For a discussion of the general contract law use of this analysis, see 3 CORBIN, *supra* note 48, §§ 560, 570; 4 WILLISTON, *supra* note 23, §§ 600, 618.

68. The burden of proof would be on the institution since it would be attempting to prove a breach. Generally, the burden is on the aggrieved party, not the alleged breaching party. 5A CORBIN, *supra* note 48, §§ 1228, 1230; 10 WILLISTON, *supra* note 23, § 1288. See also *Developments*, *supra* note 1, at 1146.

69. Protection of the public's sensibilities has become a major factor in certain types of general contract law decisions. In consumer sales, for example, the doctrines of "unconscionability" and "public policy" have been used to void particularly hard bargains. These court forays into traditional contract law have been the strongest attacks to date on freedom of contract. See generally *Williams v. Walker-Thomas Furniture Company*, 350 F.2d 445 (D.C. Cir. 1965); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *Frostifresh Corp. v. Reynoso*, 52 Misc. 2d 26, 274 N.Y.S.2d 757 (Nassau County Dist. Ct. 1966), *rev'd in part*, 54 Misc. 2d 119, 281 N.Y.S.2d 964 (App. T. 1967).

In considering the student-private university contract, proponents of this approach argue that it is the best method for the courts to use in striking down agreements which ignore student rights. They argue that as a matter of rationality and justice, the courts should remove what they view as the arbitrary distinction between the public and private institution. Opponents view such methods as judicial interference with essentially legislative matters. They argue that such decisions are not up to the courts to impose on the public, which has other less drastic means of accomplishing the same ends. See O'Neill, *Private Universities and Public Law*, 19 BUFFALO L. REV. 155 (1969) [hereinafter cited as O'Neill].

There appears to be little movement toward application of this essentially commercial analysis to student-university disputes. In the recent case of *Auser v. Cornell University*, the court spoke in language directly opposed to the consumer sales doctrine of "unconscionability":

make these conditions both specific and obvious so that both parties, as well as others outside the relationship, are aware of what is being done.

CONCLUSION

Application of these general contract principles should not bind students to any terms unless the catalogue provisions are presented in such a way that the student can reasonably be expected to read them and understand them to be part of a binding contract with the university.⁷⁰ If the university desires to enforce any rule or waiver clause against the student, it should be required to bring these provisions to the attention of the student before he enrolls.⁷¹ Contract law upholds the value of private agreements and diversity, what Judge Friendly has called

the very possibility of doing something different than government can do, of creating an institution free to make choices government cannot—even seemingly arbitrary ones—without having to provide a justification that will be examined in a court of law.⁷²

At the same time, the application of contract law can protect the student by making sure that this "something different" is well-known to him and something he intended to do.

JONATHAN FLAGG BUCHTER

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

71 Misc. 2d 1084, —, 337 N.Y.S.2d 878, 883 (Sup. Ct. 1972) (emphasis added). Compare UNIFORM COMMERCIAL CODE § 2-302, Comment 1, which states that "[t]he principle is one of the prevention of oppression and unfair surprise." See also J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 56 (1970).

70. See, e.g., *Miami Military Institute v. Leff*, 129 Misc. 481, 220 N.Y.S. 799 (City Ct. of Buffalo 1926).

71. For a commercial approach to this type of problem, see UNIFORM COMMERCIAL CODE §1-201(10) (1972 version).

72. H. FRIENDLY, *THE DARTMOUTH COLLEGE CASE AND THE PUBLIC-PRIVATE PENUMBRA* 30 (1969). See also O'Neill, *supra* note 69.