JUDICIAL INTERVENTION OF PRIVATE UNIVERSITY EXPULSIONS: TRADITIONAL REMEDIES AND A SOLUTION SOUNDING IN TORT

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I. INTRODUCTION

The rights of students to a due process hearing, to be afforded procedural protections when a private university expels them, have been in dispute for more than a century.[1] Whether the law entitles a student to a hearing before expulsion depends largely on how the courts define the student-university relationship. With well over thirty law review articles specifically on this subject, the student-university relationship remains one of the true doctrinal dilemmas of this century. Recently, courts have adopted a contract-based analysis to define the relationship, but with the limited applicability of contract law, most judges and commentators readily admit that the relationship between the student and the university is enigmatic.[2]

Part of the difficulty in defining the student-university relationship stems from the existence of competing interests: the autonomy of the university versus the rights of students. As to the former interest, courts recognize that the university performs an essential social function–it is fundamental to the education of the individual, and imparts skills needed for a person to find employment.[3] The university also constitutes a private association, and like other associations, must retain some autonomy from governmental interference.[4] Courts respect this autonomy because the courts consider disciplinary actions, such as those for academic cheating, to be internal problems that the judiciary can not adequately

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1. The earliest cases of importance include Baltimore Univ. v. Colton, 57 A. 14 (Md. 1904) (regarding a law student who was expelled for failure to regularly attend lectures or pay tuition); Booker v. Grand Rapids Medical College, 120 N.W. 589 (Mich. 1909) (regarding medical students who were told not to return because they were black); Anthony v. Syracuse Univ., 231 N.Y.S. 435 (App. Div. 1928) (regarding a student who was expelled for no given reason); People *ex rel.* Goldenkoff v. Albany Law Sch., 191 N.Y.S. 349 (App. Div. 1921) (regarding a student who was expelled for being sympathetic to the doctrines of Socialism); Goldstein v. New York Univ., 78 N.Y.S. 739 (App. Div. 1902) (regarding a student who was expelled for writing a letter to a girl in school).

2. The scholarship addressing this dilemma, authored primarily by students, is extensive. *See generally* Project, *An Overview: The Private University and Due Process*, 1970 DUKE L.J. 795; Note, *Common Law Rights for Private University Students: Beyond the State Action Principle*, 84 YALE L.J. 120 (1974) [hereinafter *Beyond the State Action Principle*].

3. State v. Schmid, 423 A.2d 615, 632 (N.J. 1980). Today, public and private universities educate over fourteen million students in over 3600 institutions. THE ALMANAC OF HIGHER EDUCATION 4 (The Editors of the Chronicle of Higher Education ed., 1994).

4. *See* Greene v. Howard Univ., 271 F. Supp. 609, 613 (D.D.C. 1967) ("Higher education can flourish only in an atmosphere of freedom, untrammelled by Governmental influence in any degree. The courts may not interject themselves into the midst of matters of school discipline."); State v. Schmid, 423 A.2d at 632 ("[P]rivate colleges and universities must be accorded a generous measure of autonomy and self-governance if they are to fulfill their paramount role as vehicles of education and enlightenment.").

evaluate.[5] Additionally, the universities need autonomy because many schools, reflecting various standards, attitudes, and values concerning student behavior, attract students because they embody either a particular conservative or liberal view.[6] For example, many people enter religious universities with the sole expectation that school officials will hold all students to a higher standard of moral conduct.

The autonomy of a private association competes against the student's interest. One court articulated a student interest:

> This [college] corporation cannot take the money of a student, allow him to remain and waste his time, (because it would be a waste of time if he cannot get a degree,) and then arbitrarily refuse, when he has completed his term of study, to confer upon him that which they have promised, namely, the degree . . . .[7]

Although many expulsions are for legitimate reasons,[8] a substantial number of the expulsions appear to be arbitrary and capricious, and some cases suggest that the administrators acted maliciously.[9] Examples of unusual expulsions include: a student expelled for writing a love letter to a woman in class;[10] student expelled for smoking;[11] and student expelled for failing to be a "typical Syracuse girl."[12] In addition, the consequences to a student can be substantial; a student with an expulsion on their record likely will have difficulty in gaining entrance to another

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5. Harvey v. Palmer College of Chiropractic, 363 N.W.2d 443, 444 (Iowa Ct. App. 1984) ("Courts are reluctant to intervene in cases involving dismissal for academic deficiencies since such decisions are within the expertise of the school . . . .").

6. Schulman v. Franklin & Marshall College, 538 A.2d 49, 52 (Pa. Super. Ct. 1988).

7. People *ex rel.* Cecil v. Bellevue Hosp. Med. College, 14 N.Y.S. 490, 490 (App. Div. 1891), *aff'd*, 28 N.E. 253 (N.Y. 1891); *see also* Booker v. Grand Rapids Med. College, 120 N.W. 589, 591 (Mich. 1909) ("[I]t is clear that the fees for the first year are, in fact, paid and received with the understanding that the work of the year will not be made fruitless, a graduation and a degree made impossible, by an arbitrary refusal to permit further attendance.").

8. *See, e.g.*, Banks v. Dominican College, 42 Cal. Rptr. 2d 110, 112-13 (Ct. App. 1995) (ordering the plaintiff to pay $17,000 in sanctions for filing a frivolous appeal in what the court defined as "erratic and sometimes disturbing episodes of unprofessional behavior as a student teacher").

9. Russell v. Salve Regina College, 890 F.2d 484, 489 (1st Cir. 1989).

> The College, the jury found, forced [the student] into voluntary withdrawal because she was obese, and for no other reason. Even worse, it did so after admitting her to the College and later the Nursing Department with full knowledge of her weight condition. Under the circumstances, the "unique" position of the College as educator becomes less compelling.

Id.

10. Goldstein v. New York Univ., 78 N.Y.S. 739, 741 (App. Div. 1902).

11. McClintock v. Lake Forest Univ., 222 Ill. App. 468, 472 (1921).

12. Anthony v. Syracuse Univ., 231 N.Y.S. 435, 437 (App. Div. 1928).

school, and in cases of expulsion from a graduate school, may have to abandon the vocation they were pursuing.[13]

This Note will focus on the legal relationship between the student and the university. The Note achieves a dual purpose: in Parts II-VI the history, theory, and possible remedies available to students will be addressed; and in Part VIII, the Note will advocate using tort principles as the solution to the student-university dilemma.

Specifically in Part II, the Note will analyze the nature of the injury, addressing the various bases for a cause of action and what are truly the "internal affairs" of the university. Part III will give a brief survey of the current law, focusing on the three bases courts have used to overturn university decisions. Part IV will examine the critical question of how courts first determine whether to classify the expulsion as academic or nonacademic. Part V will summarize the eight theories which the courts and the commentators have used to attempt to define the relationship. Although damages are rarely awarded in expulsion cases, Part VII examines the specifics of damages, and the problems associated with seeking compensation. Finally, Part VIII will advocate that the student-university relationship should be governed by tort law and by placing a duty upon the school.

The Note primarily focuses on whether a suspension or expulsion entitles a student to a pre-expulsion hearing and the adequacy of such a hearing.[14] The Note will analyze students that have been either suspended or expelled from private high schools and universities, and will omit public school dismissals.[15] The Note will also examine the important issue of how much due process a student is entitled to, assuming that the student has a right or interest violated.[16]

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13. *See* Horowitz v. Board of Curators, 538 F.2d 1317, 1321 (8th Cir. 1976), *rev'd*, 435 U.S. 78, 160 (1978) (noting that plaintiff "will be unable to continue her medical education, and her chances of returning to employment in a medically related field are severely damaged"); Jansen v. Emory Univ., 440 F. Supp. 1060, 1062 (N.D. Ga. 1977), *aff'd*, 579 F.2d 45 (5th Cir. 1978) ("Since his dismissal, the plaintiff has applied to and been rejected by every dental school in the United States, Canada, and Puerto Rico.").

14. This Note will not examine whether, if a hearing has been afforded, the hearing sufficiently complies with due process. For discussion of this topic, see E.H. Schopler, Annotation, *Right of Student to Hearing on Charges Before Suspension or Expulsion from Educational Institution*, 58 A.L.R.2d 903, 917-20 (1958).

15. Public school dismissal cases will be discussed only in subject areas where the dichotomy between public and private schools is irrelevant to the analysis.

16. One approach to what due process requires in expulsion cases utilizes the test laid out by the United States Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976). The *Eldridge* factors are the canonical test for how much process is due, and the courts have recently applied it to university disciplinary proceedings. *See* Osteen v. Henley, 13 F.3d 221, 226 (7th Cir. 1993). The test requires the consideration of three aspects: the cost of the additional procedure sought; the risk of error if withheld; and the consequences of error to the person seeking the procedure. *Id; see also* Edward J. Golden, *College Student Dismissals and the* Eldridge *Factors: What Process Is Due?*, 8 J.C. & U.L. 495 (1981-82).

II. THE NATURE OF THE INJURY

The inherent problem in creating a uniform remedy for expelled students, or specifying the procedural requirements that a university must follow, occurs because students do not suffer similar injuries. A university often plays the role of legislative body by enacting rules of governance, fact-finder by investigating allegations of wrongdoing, and adjudicator by determining the student's status. When a university expels or suspends a student, the injury complained of generally falls into one of the following categories: (1) a substantive due process violation occurred—the rules adopted by the university are unfair and not a rationally cognizable reason for expulsion;[17] (2) the procedures adopted by the university for expulsion hearings are unreasonable or insufficient;[18] (3) although the rules and procedures are fair and reasonable, the university did not substantially adhere to them;[19] (4) there was insufficient evidence that the student actually committed the action resulting in expulsion, or was based on erroneous and uncorrected facts;[20] (5) the university has not uniformly applied the rules or procedures—similarly situated individuals are arbitrarily treated differently;[21] (6)

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17. Hall v. Lee College, Inc., 932 F. Supp. 1027, 1033 (E.D. Tenn. 1996) (upholding the expulsion of a Christian College student who violated the school's rule of engaging in premarital sex); Lexington Theological Seminary, Inc. v. Vance, 596 S.W.2d 11, 12-13 (Ky. Ct. App. 1979) (challenging the rule that allowed the Seminary to expel him for being homosexual); Hood v. Tabor Academy, 6 N.E.2d 818, 819 (Mass. Dist. Ct. 1937) (arguing that expulsion based on a smoking ban was unreasonable); Harris v. Trustees of Columbia Univ., 470 N.Y.S.2d 368, 373 (App. Div. 1983) (holding that expulsion was arbitrary because the student was not expelled for any specific rule violation, but for allegedly failing to comply with the dean's order to vacate student housing, which was conduct unrelated to his status as a student).

18. Frederick v. Northwestern Univ. Dental Sch., 617 N.E.2d 382, 473 (Ill. App. Ct. 1993) (claiming the right to call witnesses, cross-examine witnesses, or be represented by counsel); Ahlum v. Administrators of the Tulane Educ. Fund, 617 So. 2d 96, 100-01 (La. Ct. App. 1993) (claiming that plaintiff was denied legal counsel and forced to cross-examine witnesses on his own).

19. *See infra* notes 62-66 and accompanying text.

20. Burke v. Emory Univ., 338 S.E.2d 500, 501 (Ga. Ct. App. 1985) (arguing that the school's decision to expel was based on the erroneous and mistaken fact that the student failed a course he had actually passed); Life Chiropractic College, Inc. v. Fuchs, 337 S.E.2d 45, 47 (Ga. Ct. App. 1985) (challenging evidence that the student forged a teacher's signature on grade change form); Fussell v. Louisiana Bus. College, 519 So. 2d 384, 385-86 (La. Ct. App. 1988) (denying any conduct constituted a "disruptive influence"); King v. American Academy of Dramatic Arts, 425 N.Y.S.2d 505, 507 (Civ. Ct. 1980) (challenging evidence that the student was an "exhibitionist").

21. Hall v. Lee College, Inc., 932 F. Supp. at 1033 (rejecting argument by pregnant student that a rule against premarital sex was applied differently between the sexes); Napolitano v. Trustees of Princeton Univ., 453 A.2d 263, 278 (N.J. Super. Ct. App. Div. 1982) (rejecting the student's argument that in twenty or more similar incidents of plagiarism, the other individuals were not penalized as severely stating, "To us this is totally irrelevant. Each penalty obviously must be tailored to the offense committed, and the offense committed must be viewed with regard to the offender and the community."); Heisler v. New York Med. College, 449 N.Y.S.2d 834, 836-37 (Sup. Ct. 1982), *rev'd sub nom.* Patti Ann H. v. New York Med. College, 453 N.Y.S.2d 196 (App.

the adjudicator or committee is biased or not impartial;[22] (7) the student did not receive adequate warning of the consequences of violations;[23] and (8) the sanctions are inconsistent or disproportionate with the nature of the alleged violation.[24]

By characterizing students' injuries as one of the eight distinct areas, it becomes possible to clearly define those areas in which the judiciary has and should intervene, and those areas not subject to judicial review, which represent the school's "internal workings." With regard to rulemaking, schools should have complete discretion to adopt rules and regulations that it deems necessary.[25] Rules should only be reviewable if they are unconstitutional,[26] unreasonable,[27] unauthorized, or against a common right.[28] The second injury, the judicial review of improper or lack of sufficient procedures, should not only be reviewable, but should be fundamentally fair.[29] The now accepted rule that if a school adopts a certain rule or regulation, it must substantially comply with it,

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Div. 1982) (finding that the school failed to apply its procedures and standards of review equally to all students by allowing three of the four students that failed four classes, which violated a school rule requiring expulsion, to repeat a school year, as opposed to the plaintiff who was expelled), *aff'd*, 445 N.E.2d 203 (N.Y. 1982); Kwiatkowski v. Ithaca College, 368 N.Y.S.2d 973, 979 (Sup. Ct. 1975) (arguing that it was not uncommon for articles to be thrown off the 10th floor of dormitory and to not be prosecuted by university); Maas v. Corporation of Gonzaga Univ., 618 P.2d 106, 107-09 n.4 (Wash. Ct. App. 1980) (rejecting the fact that a person had graduated with a lower grade point average than the plaintiff five years earlier as not determinative stating, "What may have been one mistake, is not justification for a second.").

22. Ray v. Wilmington College, 667 N.E.2d 39, 42 (Ohio Ct. App. 1995) (arguing that members of the Board had conflicts of interest).

23. Wisch v. Sanford Sch., Inc., 420 F. Supp. 1310, 1316 (D. Del. 1976) (stating that the absence of a university having a written code with the procedures articulated does not *ipso facto* make the actual procedures followed in a given case unfair); Abbariao v. Hamline Univ., 258 N.W.2d 108, 110 (Minn. 1977) (alleging that the university failed to properly inform him of his grades despite requests, and failed to notify him of his probationary status until four weeks before final examinations); Bonwitt v. Albany Med. Center Sch. of Nursing, 353 N.Y.S.2d 82, 85 (Sup. Ct. 1973) (alleging that the student never received adequate warnings of the consequences of excessive tardiness).

24. Bonwitt v. Albany Med. Center Sch. of Nursing, 353 N.Y.S.2d at 85-86 (arguing that the sanction of indefinite suspension was not warranted for being excessively tardy); Napolitano v. Trustees of Princeton Univ., 453 A.2d at 277 (arguing that a one-year postponement of degree conferral is "out of line" with the offense of plagiarism).

25. *See* Holert v. University of Chicago, 751 F. Supp. 1294, 1301 (N.D. Ill. 1990) ("[A] private university may proscribe the moral, ethical and academic standards that its students must observe, it is not the court's function to decide whether student misbehavior should be punished.").

26. Smith v. Denton, 855 S.W.2d 322, 323 (Ark. 1993) (finding as constitutional the rule of a university barring the possession of firearms on campus).

27. Bilut v. Northwestern Univ., 645 N.E.2d 536, 541 (Ill. App. Ct. 1994); Napolitano v. Trustees of Princeton Univ., 453 A.2d at 272; Schoppelrei v. Franklin Univ., 228 N.E.2d 334, 336 (Ohio Ct. App. 1967); Boehm v. University of Penn., 573 A.2d 575, 578 (Pa. Super. Ct. 1990).

28. John B. Stetson Univ. v. Hunt, 102 So. 637, 640 (Fla. 1925).

29. *See infra* Part VIII.F.

governs the third injury: not following one's own rules and regulations.[30] This clearly appears to be an aspect that the court can and should review. With respect to the fourth category, the evidentiary or proof issue, courts state they are reluctant to review all expulsions to determine the guilt of the student. Nevertheless, almost all courts invariably review this evidence. Courts are not in agreement, however, on whether the appropriate standard in reviewing the school's findings should be "substantial evidence," "sufficient evidence,"[31] or "rationally based on evidence and credibility determinations."[32] Regarding the fifth injury, arbitrary application of the rules and regulations, the courts generally give the schools wide discretion in the application of their standards.[33] The rationale for judicial nonintervention in this area lies in the university's need for flexibility to administer punishments. The sixth injury, a biased or impartial committee, the courts will and should review under certain circumstances.[34] One court acknowledged that a disciplinary body possesses a presumption of integrity that can be rebutted by "a showing of actual bias such as animosity, prejudice, or a personal or financial stake in the outcome."[35] Complicated issues arise under the seventh injury, the lack of adequate warnings. In general, the courts have not intervened solely because of inadequate notice of a violation, but no reason exists why this could not be actionable under certain circumstances.[36] The last injury, improper sanctions, is an area in which courts have rarely intervened.[37]

From the preceding discussion, the "internal affairs" of the school can be characterized as two areas. Universities should have near absolute discretion in creating and administrating purely academic decisions, and second, universities should have wide latitude in creating rules for expulsion. All other aspects of

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30. *See infra* Part III.C.

31. Slaughter v. Brigham Young Univ., 514 F.2d 622, 625 (10th Cir. 1975).

32. Holert v. University of Chicago, 751 F. Supp. 1294, 1301 (N.D. Ill. 1990).

33. Cosio v. Medical College of Wis., Inc., 407 N.W.2d 302, 305 (Wis. Ct. App. 1987) (holding that the test of a valid dismissal is whether it was based on sufficient reasons, not whether other students that had cheated were allowed to graduate).

34. Cloud v. Trustees of Boston Univ., 720 F.2d 721, 725 (1st Cir. 1983) ("In some cases, a Hearing Examiner could be so biased as to destroy the fairness of the hearing.").

35. Buckholz v. Massachusetts Inst. of Tech., No. 852720, 1993 WL 818618, at *5 (Mass. Dist. Ct. July 6, 1993) (holding that the plaintiff had presented enough facts to give the slightest inference of bias regarding the committee); *see also* Schulman v. Franklin & Marshall College, 538 A.2d 49, 52 (Pa. Super. Ct. 1988) ("Courts should not become involved in that process unless the process has been found to be biased, prejudicial or lacking in due process."). Although this is a high standard to prove, courts have found enough circumstantial evidence of bias in some committees to present a jury question.

36. Maas v. Corporation of Gonzaga Univ., 618 P.2d 106, 108 (Wash. Ct. App. 1980) ("A graduate student seeking admission to a university knows a certain level of performance is necessary to obtain a degree. It is unreasonable to require the university to warn applicants of the obvious.").

37. *See, e.g.*, Bonwitt v. Albany Med. Center Sch. of Nursing, 353 N.Y.S.2d 82, 86 (Sup. Ct. 1973) (stating that punctuality is an absolute requisite in the proper function of a nurse and justified an indefinite suspension).

expulsions should not be given deference and should be subject to reasonable standards of fairness.

III. OVERVIEW OF THE CURRENT LAW

A. *The Public and Private University Dichotomy*

The courts have developed a strict dichotomy between the due process protections afforded at public and private universities.[38] The United States Supreme Court has spoken on the subject of the procedural protections afforded to students expelled from a public university.[39] The Court in *Goss v. Lopez*[40] held that due process requires, for students suspended for disciplinary reasons, that the student receive oral or written notice of the charges against him, an explanation of the facts against him, and an opportunity to present his side of the story.[41] It did not, however, require a formal hearing, citing that such a hearing would be too expensive and would destroy the effectiveness of the teaching process.[42]

The Supreme Court has yet to address private university expulsions, and the lower level courts remain divided over the correct basis of analysis.[43] The lack of a uniform and coherent remedy for students expelled from private universities results in judicial opinions that lack clarity, and are often evasive on substantive issues of law. Some courts openly acknowledge the difficulty in defining the student-university relationship.[44] Other courts will offer or suggest theories that might be pleaded, but will not state what the correct cause of action should be;[45] and still other courts, recognizing the inherent ambiguity of the rela-

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38. State v. Schmid, 423 A.2d 615, 619 (N.J. 1980). *But cf.* Slaughter v. Brigham Young Univ., 514 F.2d 622, 625 (10th Cir. 1975) (holding that because the private university had satisfied the higher due process procedures for public universities, it was unnecessary to delineate between public and private universities); Abbariao v. Hamline Univ., 258 N.W.2d 108, 113 (Minn. 1977) (holding that the duties imposed by the common law on private universities parallel those imposed by the due process clause on public universities).

39. *See generally* Board of Curators v. Horowitz, 435 U.S. 78 (1978); Goss v. Lopez, 419 U.S. 565 (1975).

40. Goss v. Lopez, 419 U.S. 565 (1975).

41. *Id.* at 581.

42. *Id.* at 583.

43. *See infra* Part III.B.

44. Tedeschi v. Wagner College, 404 N.E.2d 1302, 1304-05 (N.Y. 1980) ("The legal theory upon which review should be predicated in . . . [student expulsion] cases is, however, not entirely clear.").

45. *See, e.g.*, Slaughter v. Brigham Young Univ., 514 F.2d 622, 626-27 (10th Cir. 1975) (examining both procedural due process and contractual issues in the appeal of an expelled graduate student); Mitchell v. Long Island Univ., 309 N.Y.S.2d 538, 540 (Sup. Ct. 1970) (discussing claim that an expelled student's due process rights were violated), *aff'd*, 314 N.Y.S.2d 328 (N.Y. App. Div. 1970).

tionship, will attempt to avoid the problem by not specifying the remedy they use to decide the merits of the case.[46]

In general, private universities do not fall under similar procedural protections, and students do not have the right to a hearing prior to an expulsion.[47] Remedies suggested by commentators or utilized by the courts against private universities include relief based on contract law, *in loco parentis*, fiduciary-trustee relationship, property interest, liberty interest, state involvement in the university, judicially protectable interests, tort remedies, and the law of associations.[48]

B. *The Arbitrary and Capricious Standard*

Although some courts have suggested other bases for interfering with schools' internal affairs,[49] the courts have, by way of application, used three ways to overturn a school's decision: (1) if it was arbitrary and capricious; (2) if the school failed to follow its own rules; and (3) if the school lacked substantial evidentiary support for its decision.[50]

A substantial number of courts review student expulsions by the arbitrary and capricious standard.[51] This standard represents a highly deferential review that has predominately been employed in the judicial review of administrative agencies. It raises two questions: what exactly do these terms mean, and why should this standard apply in student expulsions?

1. *The Standard Defined*

The definition of arbitrary and capricious is an elusive concept in the student expulsion cases. Some courts define it as requiring the plaintiff to prove the dismissal was "'without any discernible rational basis;'"[52] other courts have held

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46. *See, e.g.*, Tedeschi v. Wagner College, 404 N.E.2d at 1306 (stating that the court "did not find it necessary in the present case to resolve" the conflicting theories argued by the plaintiff).

47. *See, e.g.*, Anthony v. Syracuse Univ., 231 N.Y.S. 435, 440 (App. Div. 1928) (holding that a student is not entitled to a hearing after signing a registration card, applying a school rule reserving the right to dismiss any student whose presence was deemed detrimental).

48. *See generally Developments in the Law—Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983 (1963) [hereinafter *Developments in the Law*] (providing the best overview of the remedies that have been utilized in association expulsions).

49. *See, e.g.*, John B. Stetson Univ. v. Hunt, 102 So. 637, 640-41 (Fla. 1924) (suggesting an even higher standard of proving the administrators acted wantonly, willfully, or maliciously).

50. *See supra* notes 19-21.

51. *See, e.g.*, Paulsen v. Golden Gate Univ., 602 P.2d 778, 780 (Cal. 1979); Bilut v. Northwestern Univ, 645 N.E.2d 536, 542-43 (Ill. App. Ct. 1994); Ahlum v. Administrators of the Tulane Educ. Fund, 617 So. 2d 96, 98-99 (La. Ct. App. 1993); Coveney v. President & Trustees of Holy Cross, 445 N.E.2d 136, 138 (Mass. 1983); Abbariao v. Hamline Univ., 258 N.W.2d 108, 112 (Minn. 1977); Tedeschi v. Wagner College, 404 N.E.2d at 1304; Frank v. Marquette Univ., 245 N.W. 125, 127 (Wis. 1932).

52. Frederick v. Northwestern Univ. Dental Sch., 617 N.E.2d 382, 387 (Ill. App. Ct. 1993) (quoting Holert v. University of Chicago, 751 F. Supp. 1294, 1301 (N.D. Ill. 1990)).

that it means administrators must act with reasonable grounds and in good faith;[53] other courts define it as decisions arrived at "honestly and with due consideration;"[54] and still others define it as requiring "sufficient reasons."[55] The Louisiana Supreme Court specifically defined capricious as a "conclusion [made] with no substantial evidence to support it, or a conclusion contrary to substantiated competent evidence" and defined arbitrary as "imply[ing] a disregard of evidence or of the proper weight thereof."[56]

2. *The Origins of the Standard*

The courts apply this deferential standard primarily for public policy reasons. As one court explained, "Courts have adopted this deferential standard because of a reluctance to interfere with the academic affairs and regulation of student conduct in a private university."[57] Requiring plaintiffs to meet such a high standard of conduct has summarily made it insurmountable for most expelled students. As one court stated, "A plaintiff's burden of establishing arbitrary and capricious conduct on the part of a private college or university, however, is a heavy one."[58]

Only one court has ever discussed why, other than for policy reasons, this deferential standard applies to student expulsions. In *Ryan v. Hofstra University*,[59] the court rhetorically posed the question of why courts use the arbitrary standard.[60] The court stated that there were three possibilities why the arbitrary and capricious standard has been applied to student expulsions: (1) contract law establishes that the university provide for fair discipline; (2) a New York statutory rule—similar to the common law of mandamus—that allowed private citizens to prevent a "body or officer" from acting arbitrarily; and (3) the Federal and state constitutions require due process and equal protection.[61]

C. *The* Tedeschi *Rule—Must Comply with Own Procedures*

A general rule has emerged that applies to both private and public universities. A considerable number of courts[62] embrace the holding in *Tedeschi v.*

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53. Coveney v. President & Trustees of Holy Cross, 445 N.E.2d at 138-39.

54. Maas v. Corporation of Gonzaga Univ., 618 P.2d 106, 110 (Wash. Ct. App. 1980).

55. Cosio v. Medical College of Wis., Inc., 407 N.W.2d 302, 305 (Wis. Ct. App. 1987); Frank v. Marquette Univ., 245 N.W. at 127.

56. Coliseum Square Assoc. v. City of New Orleans, 544 So. 2d 351, 360 (La. 1989).

57. Holert v. University of Chicago, 751 F. Supp. 1294, 1301 (N.D. Ill. 1990).

58. Bilut v. Northwestern Univ., 645 N.E.2d 536, 543 (Ill. App. Ct. 1994).

59. Ryan v. Hofstra Univ., 324 N.Y.S.2d 964 (Sup. Ct. 1971).

60. *Id.* at 973.

61. *Id.*

62. *See, e.g.*, Fellheimer v. Middlebury College, 869 F. Supp. 238, 242 (D. Vt 1994); Clayton v. Trustees of Princeton Univ., 608 F. Supp. 413, 435 (D.N.J. 1985); Harvey v. Palmer College of Chiropractic, 363 N.W.2d 443, 445-46 (Iowa Ct. App. 1984); Weidemann v. State Univ., 592 N.Y.S.2d 99, 100-01 (App. Div. 1992); Stone v. Cornell Univ., 510 N.Y.S.2d 313, 314 (App. Div. 1987).

Wagner College[63] that if a university has established any procedural protections, it must substantially comply with those procedures.[64] The *Tedeschi* court, however, refused to proscribe the theory for its holding:

> Whether by analogy to the law of associations, on the basis of a supposed contract between university and student, or simply as a matter of essential fairness in the somewhat one-sided relationship . . . we hold that when a university has adopted a rule or guideline establishing the procedure to be followed in relation to suspension or expulsion that procedure must be substantially observed.[65]

The majority of the courts still follow this rule; however, one court rejected the *Tedeschi* rule that procedures must be "substantially" complied with, and held instead that if the school departs from its own established rules, it "must have good and sufficient reasons for doing so."[66]

D. *Evidentiary Review*

There has been some confusion among the courts as to whether insufficient evidence in making an expulsion decision can be a basis for interfering with university proceedings. Many courts have emphatically stated that courts are not to re-examine the merits of a school's decision, fearing that they would in effect become a "super-trier" over the administrator's judgments.[67]

In reviewing expulsions from private universities, however, courts inquire into the evidence supporting the basis for an expulsion.[68] In *Slaughter v. Brigham Young University*,[69] the court held that judicial deference applies only if the school's findings are supported by "substantial evidence."[70] The court stated:

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63. Tedeschi v. Wagner College, 404 N.E.2d 1302 (N.Y. 1980).

64. *Id.* at 1306.

65. *Id.*

66. Clayton v. Trustees of Princeton Univ., 608 F. Supp. at 439 (holding that despite this weakening of the *Tedeschi* doctrine the student had a judicially protected interest).

67. Napolitano v. Trustees of Princeton Univ., 453 A.2d 263, 275 (N.J. Super. Ct. App. Div. 1982).

68. *See, e.g.*, Babcock v. New Orleans Baptist Theological Seminary, 554 So. 2d 90, 97 (La. Ct. App. 1989) ("It was incumbent upon [the school] to show by competent evidence that their decision was reasonably based on facts that show [the student] is unfit to receive a degree."); Fussell v. Louisiana Bus. College, 519 So. 2d 384, 385 (La. Ct. App. 1988) (holding that it was "incumbent upon the defendant to show by competent evidence that the breach was that of the plaintiff, rather than its own, and to show that the plaintiff's dismissal was justified"); Napolitano v. Trustees of Princeton Univ., 453 A.2d at 275 ("The trial judge was required to review the evidence before [the University Committee] and to determine whether the evidence presented was sufficient to support the charge of plagiarism.").

69. Slaughter v. Brigham Young Univ., 514 F.2d 622 (10th Cir. 1975).

70. *Id.* at 625.

"The adequacy of the procedure plus the substantial evidence element constitute the basis and the record to test whether the action was arbitrary."[71]

In addition, an examination of the definition of arbitrary and capricious reveals that courts must engage in some evaluation of the charges against a student. As discussed earlier "capricious" has been defined as a "conclusion made without substantial evidence or a conclusion contrary to substantial evidence," and "arbitrary" "implies a disregard of evidence or the proper weight thereof."[72] The mere definition of arbitrary and capricious necessitates that a court review the university's expulsion decision to ensure that it comports with substantial evidence.[73] If one defines arbitrary and capricious as requiring a showing of "any discernible rational basis," then an expulsion can apparently not be "rational" if based on insufficient evidence.

The courts also dispute the degree of proof required for a university decision to be proper. Some courts require only a preponderance of the evidence[74] as proof, while other courts insist there be substantial evidence.[75] One commentator has even questioned the appropriateness of placing the burden on the student to prove himself innocent because of the impossible task of proving that the administrators acted corruptly when the university denies the student the information needed to defend the charges.[76]

IV. ACADEMIC VERSUS NONACADEMIC MISCONDUCT

Apart from the due process distinction between private and public universities, the courts have also differentiated between academic and disciplinary dismissals.[77] Affording great deference to schools and universities, the courts adopted the widely accepted rule of judicial nonintervention in expulsions and suspensions based on academics.[78] Discussing the rationale for this judicial

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71. *Id.*

72. *See supra* Part III.B.

73. Ahlum v. Administrators of the Tulane Educ. Fund, 617 So. 2d 96, 100 (La. Ct. App. 1993).

74. *See, e.g.*, Croushorn v. Board of Trustees, 518 F. Supp. 9, 20 (M.D. Tenn. 1980) (finding that the plaintiff proved by a preponderance of the evidence that the "defendant acted with a retaliatory motive").

75. *See, e.g.*, Ahlum v. Administrators of the Tulane Educ. Fund, 617 So. 2d at 100 (rejecting the notion that the arbitrary and capricious standard can be satisfied by a showing of "any evidence," and holding instead that the proper standard is whether the decision was based upon substantial evidence or was contrary to substantial evidence).

76. Warren A. Seavey, *Dismissal of Students: "Due Process,"* 70 HARV. L. REV. 1406, 1410 (1957).

77. *See generally* Robert N. Roberts, *Public University Responses to Academic Dishonesty: Disciplinary or Academic*, 15 J.L. & EDUC. 369 (1986). Although Roberts discusses public university expulsions, the issues he addresses apply equally to private universities.

78. *See* Connelly v. University of Vermont & State Agric. College, 244 F. Supp. 156, 159-61 (D. Vt. 1965); Mustell v. Rose, 211 So. 2d 489, 493-94 (Ala. 1968); Paulsen v. Golden Gate Univ., 602 P.2d 778, 781 (Cal. 1979); Militana v. University of Miami, 236 So. 2d 162, 164 (Fla. Dist. Ct. App. 1970); Napolitano v. Trustees of Princeton Univ., 453 A.2d 263, 273-74 (N.J. Super.

deference, the Supreme Court stated "whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking."[79] This same deference does not apply to nonacademic dismissals, and therefore the categorization of the infraction is of vital importance.[80]

In many cases, the line blurs between these two types of dismissals. For instance, bizarre and disruptive conduct of graduate students in clinical work may be academic or nonacademic because it "reflect[s] both on the student's academic performance and the student's deportment."[81] Another problem presents itself when graduate students are paid employees of the school; the courts, however, consider the expulsion as an academic dismissal rather than an employment termination.[82] An additional problem exists in situations that involve university expulsions of students for both academic and nonacademic reasons.[83] Also, the

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Ct. App. Div. 1982). One court has held that in academic decisions, the court will not intervene absent a "deprivation of major proportion." Burke v. Emory Univ., 338 S.E.2d 500, 502 (Ga. Ct. App. 1985) (quoting Woodruff v. Georgia State Univ., 304 S.E.2d 697 (Ga. 1983)).

79. Board of Curators v. Horowitz, 435 U.S. 78, 89 (1978). "A school is an academic institution, not a courtroom or administrative hearing room. . . . Academic evaluations of a student, in contrast to a disciplinary determinations, bear little resemblance to the judicial and administrative fact-finding proceedings to which we have traditionally attached a full-hearing requirement." *Id.* at 88-89.

The doctrine of judicial deference has two major flaws. First, it fails to recognize that administrators sometimes make mistakes and may step outside the boundaries of an educator. *See supra* note 9 and accompanying text. Second, because many expelled students had earlier spoken out against the administration, the administrators are not always evaluating them with unbiased judgment. *See* Fussell v. Louisiana Bus. College, 519 So. 2d 384, 387 (La. Ct. App. 1988).

80. Roberts, *supra* note 77, at 373; *see also* Pflepsen v. University of Osteopathic Med., 519 N.W.2d 390, 390-91 (Iowa 1994) ("A key question in most challenges to a student's dismissal is whether it was for academic reasons.").

81. Pflepsen v. University of Osteopathic Med., 519 N.W.2d 390, 391 (Iowa 1994) (holding that a medical student's dismissal was academic). "Practical aspects of professional training and discipline, especially in the health sciences, are part of the student's academic training." *Id.* at 392; *see also* Lekutis v. University of Osteopathic Med. & Health Sciences, 524 N.W.2d 410, 413 (Iowa 1994) (holding that a medical student expelled because of bizarre behavior during clinical rotations was academic-based even though the plaintiff's "failure stemmed from gross lack of interpersonal skills, rather than any intellectual deficit").

82. *See, e.g.*, Davis v. Mann, 721 F. Supp. 796, 798 (S.D. Miss. 1988), *aff'd*, 882 F.2d 967 (5th Cir. 1989).

83. *See, e.g.*, Jansen v. Emory Univ., 440 F. Supp. 1060, 1063 (N.D. Ga. 1977) (holding that the student was expelled for academic reasons after finding that honor code violations in his first two years did not play a role in his dismissal stating, "As long as the decision to dismiss [the student] was essentially academic and neither alleged nor shown to be a mere pretense to punish him for disciplinary infractions, it is not subject to judicial review . . . ."); Pflepsen v. University of Osteopathic Med., 519 N.W.2d at 391 (holding that dismissal was academic even though the university brought formal charges against the student alleging one count of academic failure and two counts of student misconduct).

classification of cheating on exams presents problems because the cheating itself is academic, but the cover-up and denial of cheating is often viewed as nonacademic.[84] Nonetheless, most universities generally treat expulsions based on cheating or plagiarism as nonacademic.[85]

V. TRADITIONAL THEORIES OF RECOVERY

The use of certain remedies can have a determinative effect on whether a student will be afforded a hearing prior to expulsion from a university. Several remedies have little case law discussing them–some are mostly theoretical, others are in disrepute. This part of the Note examines the function of each doctrinal remedy and its subsequent limitations.

A. *Contract Law*

A majority of the courts find the student-university relationship to be contractual because of its consensual nature.[86] The procedural obligations owed by the parties during a student expulsion are defined by the contract because the contract "places duties upon both parties which cannot be arbitrarily disregarded and may be judicially enforced."[87] The rights of the parties can be based on either the express or implied provisions of the contract.[88] The terms of the contract are derived from catalogues and manuals,[89] bulletins,[90] registration

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84. *See, e.g.*, Corso v. Creighton Univ., 731 F.2d 529, 532 (8th Cir. 1984) (holding that lying about cheating on an exam was academic even though the district court believed the plaintiff was expelled for the denial of cheating rather than the cheating itself).

85. Napolitano v. Trustees of Princeton Univ., 453 A.2d 263, 270-71 (N.J. Super. Ct. App. Div. 1982) (holding that an allegation of plagiarism was not misconduct as contended by the student, but was academic fraud); Roberts, *supra* note 77, at 374.

86. Corso v. Creighton Univ., 731 F.2d at 531; Williams v. Howard Univ., 528 F.2d 658, 660-61 (D.C. Cir. 1976); Wisch v. Sanford Sch., Inc., 420 F. Supp. 1310, 1315 (D. Del. 1976); John B. Stetson Univ. v. Hunt, 102 So. 637, 640 (Fla. 1924); Wilson v. Illinois Benedictine College, 445 N.E.2d 901, 906 (Ill. App. Ct. 1983); Barker v. Trustees of Bryn Mawr College, 122 A. 220 (Pa. 1923). *See generally* Jonathan Butcher, Note, *Contract Law and the Student-University Relationship*, 48 IND. L.J. 253 (1973); Rebecca White, Comment, *Wanted: A Strict Contractual Approach to the Private University/Student Relationship*, 68 KY. L.J. 439 (1979-80).

87. Frederick v. Northwestern Univ. Dental Sch., 617 N.E.2d 382, 387 (Ill. App. Ct. 1993).

88. Booker v. Grand Rapids Med. College, 120 N.W. 589, 591 (Mich. 1909). "[W]hen one is admitted to a college, there is an implied understanding that he shall not be arbitrarily dismissed therefrom." *Id.*; *see also* Wisch v. Sanford Sch. Inc., 420 F. Supp. at 1315; King v. American Academy of Dramatic Arts, 425 N.Y.S.2d 505, 507 (Civ. Ct. 1980); *see also* Eugene L. Kramer, Note, *Expulsion of College and Professional Students–Rights and Remedies*, 38 NOTRE DAME LAW. 174, 183 (1962-63) ("Since a formal contract is rarely prepared, the general nature and terms of the agreement are usually implied . . . .")

89. *See, e.g.*, Pride v. Howard Univ., 384 A.2d 31, 34 (D.C. Cir. 1978); Anthony v. Syracuse Univ., 231 N.Y.S. 435, 439 (App. Div. 1928).

90. *See, e.g.*, Jansen v. Emory Univ., 440 F. Supp. 1060, 1062 (N.D. Ga. 1977); Cosio v. Medical College Inc., 407 N.W.2d 302, 304 (Wis. Ct. App. 1987).

forms and other institutional documents.[91] When there are several conflicting documents, most courts have held that the student catalogue takes precedence;[92] however, some courts state that the issue of which documents constitute a contract presents a jury question.[93] For these provisions to be binding on the student, courts have not required the student to have actual knowledge of the rules, but deem that they have constructive knowledge of the rules.[94]

Other courts view the student-university relationship not strictly in contractual terms, but hold that certain elements of contract law should be applied to these situations. The court in *Slaughter v. Brigham Young University*,[95] the leading case of this view, states:

> It is apparent that *some* elements of the law of contracts are used and should be used . . . to provide some framework into which to put the problem of expulsion for disciplinary reasons. This does not mean that "contract law" must be rigidly applied in all its aspects, nor is it so applied when the contract analogy is extensively adopted.[96]

The court, however, failed to discuss what specific aspects of contract law should apply in its framework analysis.[97] Moreover, no court has ever stated the *legal* basis for only applying some aspects of contract law to the bulletins or catalogues.

Judges, and especially commentators, have acknowledged that several problems and inherent limitations occur when describing the student-university relationship in terms of contract law.[98] Generally, the student argues against the rigid application of contract law, mostly because of the limited damages it pro-

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91. *See, e.g.*, Zumbrun v. University of S. Cal., 101 Cal. Rptr. 499, 504 (Ct. App. 1972) ("The catalogues, bulletins, circulars, and regulations of the institution made available to the matriculant become a part of the contract.").

92. *See, e.g.*, Corso v. Creighton Univ., 731 F.2d 529, 531 n.2 (8th Cir. 1984) (holding that the student handbook overrides other sources including registration forms, bulletins, and policy booklets). *But see* Swanson v. Wesley College, Inc., 402 A.2d 401, 403 (Del. Super. Ct. 1979) (finding that terms were contained in both the school bulletin and the catalogue).

93. Warren v. Drake Univ., 886 F.2d 200, 202 (8th Cir. 1989) (citing Cannon v. National By-Products, Inc., 422 N.W.2d 638 (Iowa 1988)).

94. Kwiatkowski v. Ithaca College, 368 N.Y.S.2d 973, 979 (Sup. Ct. 1975); Anthony v. Syracuse Univ., 231 N.Y.S. at 439.

95. Slaughter v. Brigham Young Univ., 514 F.2d 622 (10th Cir. 1975).

96. *Id.* at 626.

97. *See id.*; Pride v. Howard Univ., 384 A.2d 31, 36 n.7 (D.C. Cir. 1978) (discussing hypothetically what the outcome would be if traditional contract rules were applied, even though agreeing that traditional standards of contract interpretation should not be rigorously applied in academic expulsions); Robert L. Cherry, Jr. & John P. Geary, *The College Catalog as a Contract*, 21 J.L. & EDUC. 1, 9-11 (1992) (discussing the extent to which contract law applies to university catalogs).

98. Napolitano v. Trustees of Princeton Univ., 453 A.2d 263, 272-75 (N.J. Super. Ct. App. Div. 1982); *Developments in the Law*, *supra* note 48, at 1001-02.

vides.[99] In rare instances, however, the university actually disputes the application of contract law because there are rules in the contract that it does not want to follow.[100] The difficulty with defining the relationship as contractual can be summarized as both a theoretical and pragmatic problem.

The theoretical problem of contract law stems largely from applying contract doctrine inconsistently. The most notable example, the Statute of Frauds, requiring all contracts that can not be performed within one year to be signed by the party to which the contract is being asserted against, is never mentioned in the expulsion opinions.[101] As another example, one court held the contract may be unenforceable against a student who is a minor because of contract principles prohibiting minors from contracting.[102] One court stated:

> The imagined contract is not enforceable against the minor, although by familiar contract principles, the adult party, the University, could be bound to deal under it. If a university is to expel a student arbitrarily as a contract right, it meets the legal stalemate of seeking to enforce that legal right against a minor student.[103]

Finally, despite the trend in contract law to apply the concept of unconscionability in adhesion contracts, the courts have failed to adopt this concept in student expulsion cases.[104] Despite their applicability, none of these three contract principles are mentioned in opinions much less consistently applied.

The practical limitations of contract law are numerous. First, contract law is a fictitious presumption because the nature of contract law results in it being assumed rather than proven.[105] Put differently, contract doctrine, as applied to student expulsions, is conclusory; by a mechanistic application of the term "'contract,'" the courts fail to address the substantive issue of whether the student has a protectable interest, and what, if any, duties are imposed upon the parties irrespective of contract law.[106] Second, neither the students, the administrators,

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99. *See infra* Part VI.

100. Felheimer v. Middlebury College, 869 F. Supp. 238, 242-43 (D. Vt. 1994). The university argued that it was not an enforceable contract on the following basis: "[I]t was unilaterally developed by the College; its provisions were not bargained for by the plaintiff; and its broad informational nature is such that no rational trier of fact could conclude that plaintiff and the College intended to enter into a contract on the terms of the Handbook." *Id.*

101. *See* RESTATEMENT (SECOND) OF CONTRACTS § 110(1)(e) (1981).

102. Ryan v. Hofstra Univ., 324 N.Y.S.2d 964, 973-74 (N.Y. Sup. Ct. 1971).

103. *Id.* (citations omitted).

104. Cherry & Geary, *supra* note 97, at 13-14; David M. Rabban, *Judicial Review of the University-Student Relationship: Expulsion and Governance*, 26 STAN. L. REV. 95, 104 (1973). *But see* King v. American Academy of Dramatic Arts, 425 N.Y.S.2d 505, 507 (N.Y. Civ. Ct. 1980) ("[T]his Court finds such agreement unconscionable in the substantive sense in light of the agreement's one sidedness, the absolute discretion it purports to give the Academy, and the fact that a hearing was not necessary prior to dismissal.").

105. Tedeschi v. Wagner College, 404 N.E.2d 1302, 1305 (N.Y. 1980).

106. *Beyond the State Action Principle*, *supra* note 2, at 144.

nor faculty view their relationship strictly in contractual terms.[107] Third, contract law does not properly allow, and even forecloses inquiry into an assessment or a balancing of interests between the student and university.[108] An additional problem, making contract law ineffective in the expulsions, occurs because universities can redraft the regulations to predominately favor the university's position.[109] Due to the nature of the relationship, the university occupies a superior bargaining position over the student.[110]

B. In Loco Parentis

Many early courts applied the doctrine of *in loco parentis* to describe the duties and rights the university owed its students;[111] however, today the doctrine is virtually dead, with most commentators and courts agreeing that the doctrine does not adequately define the relationship.[112] The doctrine literally means "in the place of the parent,"[113] and the assumption was that when a parent sends a student to a private school, he permits the school authorities to administer the disciplinary rules of the school.[114]

The doctrine came into disrepute in the 1960s when courts dismissed it as being no longer tenable.[115] One reason for its demise is the recognition that

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107. *Developments in the Law–Academic Freedom*, 81 HARV. L. REV. 1045, 1147 (1968) [hereinafter *Academic Freedom*].

108. Tedeschi v. Wagner College, 404 N.E.2d at 1305.

109. *Cf.* Coveney v. President & Trustees of Holy Cross, 445 N.E.2d 136, 140 (Mass. 1983) (holding that the college has the right to modify and alter the procedural protections at any time).

110. Note, *Private Government on the Campus–Judicial Review of University Expulsions*, 72 YALE L.J. 1362, 1390 (1963). "[T]he college's potential to exercise coercion is substantially unrestrained by market pressures—the student may be said to have freedom to contract but in fact has only the freedom to adhere. When he 'chooses' a university, he must choose a relationship on an 'all-or-nothing' basis." *Id.*

111. *See, e.g.*, John B. Stetson Univ. v. Hunt, 102 So. 637, 640 (Fla. 1924) ("As to mental training, moral and physical discipline, and welfare of the pupils, college authorities stand in loco parentis and in their discretion may make any regulation for their government which a parent could make for the same purpose . . . .").

112. *See generally* Theodore C. Stamatakos, Note, *The Doctrine of* In Loco Parentis, *Tort Liability and the Student-College Relationship*, 65 IND. L.J. 471 (1989-90). *But see* Brain Jackson, Note, *The Lingering Legacy of* In Loco Parentis: *An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135 (1991).

113. BLACK'S LAW DICTIONARY 787 (6th ed. 1990).

114. RESTATEMENT (SECOND) OF TORTS § 153 cmt. a (1965). "In sending his child to the school the parent agrees, unless he specifies otherwise, that the rules of the school will be applied, even though he may not know what they are." *Id.*

115. *See, e.g.*, Buttny v. Smiley, 281 F. Supp. 280, 286 (D. Colo. 1968) (rejecting the doctrine of *in loco parentis*, the court nonetheless held that university officials possess an inherent power to maintain order on campus, provide students with freedom of movement, and egress to the school's facilities).

many students today are of the age of majority or free of parental control.[116] Furthermore, because the university lacks the sympathies of a parent, the doctrine condones excessive regulation of the student, and does not promote enough individuality.[117] Universities also do not share the same motives and concerns of parents–when dispensing disciplinary sanctions, the schools often consider the views of alumni, benefactors, and the local press.[118] Additionally, the student-university relationship is more impersonal than the typical parental role; large universities do not have the same emotional identification with students as parents, and thus can not discipline students with the compassion and temperance of a parent.[119]

C. *University as a Trust*

Some commentators have suggested that the student-university relationship should be described as fiduciary; that it embodies a trust-trustee relationship.[120] According to Professor Haskell, the university is analogous to a corporate trust company, which must use care and fairness in managing the private and charitable trusts under its control.[121]

Under this theory, the university, as a trustee for students, owes the fiduciary duties of "selflessness, care, fairness, and disclosure in all its dealings with students . . . ."[122] The student places a high degree of trust and confidence in the university that it will properly educate him, and expects the university, in its authoritative position, to act in accordance with his well-being and to his benefit.[123] Professor Haskell believes the fiduciary standard of care should augment contract law and be "superimposed upon the contractual relationship."[124]

The trustee theory has not received any support from the courts in student expulsion cases.[125] The courts have applied trustee theory to other associations' expulsions, such as trade unions and medical societies, where the courts view the

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116. William W. Van Alstyne, *The Judicial Trend Toward Student Academic Freedom*, 20 U. FLA. L. REV. 290, 294 (1968).

117. *Academic Freedom*, *supra* note 107, at 1145.

118. Van Alstyne, *supra* note 116, at 294-95.

119. *Id.* at 294.

120. Paul G. Haskell, *The University as Trustee*, 17 GA. L. REV. 1, 32 (1982) ("The private university exists to serve the students particularly and the community generally, and it should be required to be more responsive to this obligation. . . . The relationship with its students is fiduciary in nature, and its duties to them should reflect this.").

121. *Id.* at 1. Similarly, the corporate trust company and the university are chartered to perform charitable services, and although the former is primarily an investment manager, universities also fulfill this role with respect to managing its endowment assets. *Id.* at 1-2.

122. *Id.* at 1.

123. Alvin L. Goldman, *The University and the Liberty of Its Students–A Fiduciary Theory*, 54 KY. L.J. 643, 672 (1966).

124. Haskell, *supra* note 120, at 2.

125. *See, e.g.*, Maas v. Corporation of Gonzaga Univ., 618 P.2d 106, 108 (Wash. Ct. App. 1980) (rejecting that a fiduciary relationship exists).

organization as a true association.[126] In student expulsions, the courts continue to reference it as only a possible remedy.[127]

D. *The Fourteenth Amendment*

In order to receive the protections of the Fourteenth Amendment Due Process Clause, a claimant must allege that the government infringed upon a liberty or property interest, and that it involves some form of state action.[128] This section will summarily address this two-fold analysis in the student-university relationship.

1. *Protectable Interests*

a. *Property Interest.* Does a student expulsion involve the deprivation of a property interest? A property interest exists when a person has a claim on the use or ownership of property; in an association context, the member is said to possess some interest in the assets of the organization.[129] The United States Supreme Court, in defining a property right, held that property interests do not originate from the Constitution, "[r]ather, they are created and their dimensions defined by existing rules of understandings that stem from an independent source such as state law–rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[130] The property right must be more than a unilateral expectation of one's continued receipt of a benefit or continued participation in a particular endeavor; the person must have a legitimate claim of entitlement.[131] For example, in *Goss v. Lopez*,[132] the Supreme Court found that a property interest existed for an expelled student from an university on the basis of an Ohio statute that required authorities to provide free education to all residents between the ages of five and twenty-one.[133] Aside from a specific statute, the Supreme Court has also suggested that expelled students may have a protectable property interest. In *Board of Curators v. Horowitz*,[134] the Court did not rule on the issue of whether an expulsion deprives a student of a property interest, but assumed a property right existed in deciding the case.[135]

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126. *Developments in the Law*, *supra* note 48, at 1002-03.

127. *See, e.g.*, Nowak v. Rush Med. College, No. 93-4368, slip op. at 5 (Ill. App. Ct. Mar. 3, 1995).

128. The Fourteenth Amendment provides in part that "no state shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV.

129. Zechariah Chafee, Jr., *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993, 999 (1930). The theory of a property interest is that upon the dissolution of the association, a member of the association would possess a right to share in the property. *Id.*

130. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

131. *Id.*

132. Goss v. Lopez, 419 U.S. 565 (1975).

133. *Id.* at 573.

134. Board of Curators v. Horowitz, 435 U.S. 78 (1978).

135. *Id.* at 84-85.

Notwithstanding these Supreme Court decisions, student expulsion cases rarely engage in property law analysis; property law as a legal remedy remains primarily a topic among commentators.[136]

The property law remedy has received criticism from several commentators. Dean Pound argues that the alleged property interest in expulsion cases presents a legal fiction because the courts are really protecting interests in personality and not property.[137] Professor Chafee concurs with Pound criticizing the property doctrine because it "distracts their attention from the real interests of the member which have been injured."[138] Moreover, Chafee believes it improper to argue that a student possesses any property in the association because he cannot sell it or transmit it to others.[139] Finally, the argument that a person possesses a share of the association creates a legal fiction because upon dissolution of an association, there generally exists no real property left to distribute among the members.[140]

b. *Liberty Interest.* Does the student lose a liberty interest when he is expelled from a university? The Supreme Court in *Meyer v. Nebraska*[141] described a liberty interest as "not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge . . . and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men."[142] The Court further defined liberty interest as existing "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him."[143]

The dispositive case on liberty analysis is *Board of Regents v. Roth*.[144] In *Roth*, the plaintiff asserted that her dismissal from medical school deprived her of a liberty interest by substantially hindering her ability to continue her medical education and to gain employment in the medical field.[145] The United States Supreme Court refrained from deciding whether a liberty interest existed when a

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136. *See generally* *Beyond the State Action Principal*, *supra* note 2; James M. Picozzi, Note, *University Disciplinary Process: What's Fair, What's Due, and What You Don't Get*, 96 YALE L.J. 2132 (1987).

137. Chafee, *supra* note 129, at 999 (citing ROSCOE POUND, CASES ON EQUITABLE RELIEF AGAINST DEFAMATION AND INJURIES TO PERSONALITY 127 (Chafee ed., 1930)). Personality is the "actual human interests which suffer from an expulsion." *Id.* at 998. For instance, when expelled, a person is likely to be blackballed by other institutions, and his reputation will be scarred. *Id.* And for the student, an expulsion deprives the person intimate associations with places and other students. *Id.*

138. *Id.* at 1001.

139. *Id.* at 1000-01.

140. *Id.* at 999.

141. Meyer v. Nebraska, 262 U.S. 390 (1923).

142. *Id.* at 399.

143. Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

144. Board of Regents v. Roth, 408 U.S. 564 (1972).

145. *Id.* at 568-69.

university expels a student.[146] Instead, the Court assumed a liberty interest was present and found that the student was afforded enough procedural protections.[147]

Apart from *Roth*, the deprivation of a liberty interest in student expulsions has received little notice from the courts. Perhaps this reflects the Supreme Court's refusal to recognize the existence of such an interest. Nonetheless, the student does suffer from an expulsion. Most significantly, the stigma associated with the expulsion often prevents the student from enrolling at another institution.[148] And financially, the inability to graduate from college has a substantial effect on the student.[149]

2. *State Action*

In several cases, students have claimed the expulsion by the private university should receive procedural protection under the Fourteenth Amendment Due Process Clause because the university involves significant state action.[150] As noted by one commentator, "Universities, like unions, are not realistically described as private, but as quasi-public institutions . . . . The disciplinary power of college officials seems to partake more of the characteristics of legislative power than does the power to bargain."[151] Generally, students have argued state action under either the state involvement or public function doctrines.[152]

a. *State Involvement.* To be the basis of a Fourteenth Amendment claim, the involvement must be "substantial."[153] The mere showing of some involvement will not be sufficient. The Supreme Court noted: "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."[154] In *Burton v. Wilmington Parking Authority*,[155] the Supreme Court laid out the test for state action: "Only

146. *Id.* at 592.

147. *Id.*

148. Picozzi, *supra* note 136, at 2138.

149. *Id.* at 2139.

150. *See, e.g.*, Browns v. Mitchell, 409 F.2d 593, 596 (10th Cir. 1969) (holding that suspension of students that engaged in a civil rights sit-in at a nonpublic area of a building in a private university that did not receive state funds, but received tax benefits of $210,000, did not involve a state action); Bright v. Isenbarger, 314 F. Supp. 1382, 1396 (N.D. Ind. 1970), *aff'd*, 445 F.2d 412 (7th Cir. 1971) (finding that although the state had general supervision over the quality of education at a private parochial school, and the school received a tax exemption, the governmental involvement did not constitute state action).

151. Note, *supra* note 110, at 1382.

152. Tynecki v. Tufts Univ., 875 F. Supp. 26, 31-34 (D. Mass. 1994) (finding no state action under the state involvement, public function, or the state compulsion tests); Huff v. Notre Dame High Sch., 456 F. Supp. 1145, 1147 (D. Conn. 1978) (addressing these two theories but not addressing the third theory or the state likeness doctrine because of the question of its continuing viability).

153. Reitman v. Mulkey, 387 U.S. 369, 380 (1967).

154. Evans v. Newton, 382 U.S. 296, 299 (1966).

155. Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[156]

The primary argument for state involvement focuses on the amount of financial aid received by private universities from governmental entities.[157] Private universities accept financial aid in the form of scholarships, fellowships, student loans, and research grants.[158] In addition, the universities indirectly obtain benefit by their tax-exempt status.[159] Federal funds may constitute one-fourth or more of a private university's income.[160] Despite these governmental connections, a review of the private university expulsion cases reveals that courts have not embraced the receipt of financial assistance as a basis for judicial intervention.[161]

b. *Public Function.* The "public function" doctrine represents another basis for the existence of state action in university expulsions.[162] The doctrine asserts that when the private association engages in a function normally performed by the state, or is governmental in nature, the acts of the association constitute state action.[163] The courts, nonetheless, are unsympathetic to claims

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156. *Id.* at 722.

157. *See* Stone v. Cornell Univ., 510 N.Y.S.2d 313, 314-15 (App. Div. 1987).

158. *Beyond the State Action Principal*, *supra* note 2, at 797-98.

159. *See, e.g.*, Browns v. Mitchell, 409 F.2d 593, 596 (10th Cir. 1969) (conferring of tax-exempt status does not create state action because the state does not "dictate or influence the administration of University affairs"); Wisch v. Sanford Sch., Inc., 420 F. Supp. 1310, 1314 (D. Del. 1976) (holding that "mere exemption from taxation, without a showing of substantially more state involvement, cannot be a basis for finding state action").

160. Note, *supra* note 110, at 1383 n.113.

161. *See* Grafton v. Brooklyn Law Sch., 478 F.2d 1137, 1141-42 (2d Cir. 1973) (holding that the mere granting of property at a price below market to assist in the construction of an educational facility and the receipt of $400 for every degree awarded does not constitute state involvement); Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535, 546-49 (S.D.N.Y. 1968) (concluding that although the university's income from public funds amounted to $59,700,000 out of the school's total university income of $134,300,000, there was no state action); Greene v. Howard Univ., 271 F. Supp. 609, 613 (D.D.C. 1967) (holding that "it would be a dangerous doctrine to permit the government" to exert control over private universities merely because it provides financial assistance). *But see* Taylor v. Maryland Sch. for the Blind, 409 F. Supp. 148, 151 (D. Md. 1976), *aff'd*, 542 F.2d 1169 (4th Cir. 1976) (finding a substantial connection between the state and the school even though it was not a governmental agency); Ryan v. Hofstra Univ., 324 N.Y.S.2d 964, 979-83 (Sup. Ct. 1971) (finding state action because the state had a relationship with the dormitory authority, and because of the financial contributions by the government).

162. Swanson v. Wesley College, Inc., 402 A.2d 401, 403 (Del. Super. Ct. 1979) ("[T]he educational process, is in and of itself, sufficient to constitute state action due to its nature as a public function.").

163. Terry v. Adams, 345 U.S. 461, 470 (1953) (holding that a private political association conducting elections that controlled the slating of candidates of the Democratic Party constituted a public function and invoked the protections of the Fifteenth Amendment); Marsh v. Alabama, 326 U.S. 501, 507-10 (1946) (finding that a private corporation that constructed a company town for its employees was a public function because it performed a function normally provided by the state, and implicated Fourteenth Amendment protections).

that the private universities fulfill a public function.[164] The reasons given for rejecting this approach include: the private college campus does not contain public property and education does not serve an exclusive private function.[165]

E. *Judicially Protectable Interest*

In *Clayton v. Trustees of Princeton University*,[166] without defining it as a property interest, the court held nonetheless that a student has a "judicially protectable interest."[167] The court stated the student had a judicially protectable interest because "his suspension greatly impairs the value of his degree from Princeton and tarnishes his reputation in that community."[168] The court, however, never elaborated on the scope of this interest, and courts have not followed *Clayton*.

The second case which has given special status to the student's interest is *DeMarco v. University of Health Sciences*.[169] DeMarco was expelled in 1944, six weeks prior to graduation, for misinterpreting a question on the application form he filled out in 1941 that asked if he had attended another medical school.[170] Twenty-nine years later DeMarco sought judicial review to have the degree conferred to him based on the wrongful expulsion.[171] The court agreed with DeMarco and stated, "We believe that withholding a diploma conferring the degree of Doctor of Medicine is a unique injury of which the courts will take cognizance."[172] Despite *DeMarco* stating that withholding a degree is a "unique injury" and *Clayton*'s recognition that a student has a "judicially protectable interest," courts have failed to acknowledge the potential significance of these two cases.

F. *Statutory Requirements*

Nothing prevents legislatures from prescribing that students are to be afforded procedural protections from improper expulsions. Despite this power,

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164. *See* Powe v. Miles, 407 F.2d 73, 80 (2d Cir. 1968) (finding that a private university does not perform a "public function," the court asserted that "[e]ducation has never been a state monopoly in this country"); Tynecki v. Tufts Univ., 875 F. Supp. 26, 31-32 (D. Mass. 1994) (arguing unsuccessfully that the school engaged in a public function when it dismissed him from dental school because it denied his ability to pursue his chosen career—an act of professional regulation that is traditionally a public function); Counts v. Voorhees College, 312 F. Supp. 598, 607 (D.S.C. 1970) ("Even where the state has created a college by special legislation, regulated it extensively and contributed substantially to its support, there must be an additional element that some action by the state is the subject of the complaint rather than private action.").

165. Counts v. Voorhees College, 312 F. Supp. at 607.

166. Clayton v. Trustees of Princeton Univ., 608 F. Supp. 413 (D.N.J. 1985).

167. *Id.* at 436.

168. *Id.* at 439.

169. DeMarco v. University of Health Sciences, 352 N.E.2d 356 (Ill. App. Ct. 1976).

170. *Id.* at 359.

171. *Id.* at 360.

172. *Id.* at 362.

state legislatures have refrained from interjecting themselves into the student-university conflict. The exception is New York's Henderson Act enacted in 1969.[173] The Act required every college in New York to file with the commissioner of education "rules and regulations for the maintenance of public order on college campuses."[174] Furthermore, "the penalties for violations of such rules and regulations shall be clearly set forth therein" and could include "suspension, expulsion, or other appropriate disciplinary action" for student violators.[175] Colleges that failed to file rules would lose eligibility for state aid.[176]

Students have argued that this statute confers state action when schools have adopted rules pursuant to the Act, and then used those rules to expel them. In *Coleman v. Wagner College*,[177] the court remanded the case, holding that although the Act according to its terms, could not be a basis for state action in a private university's disciplinary actions,[178] it may mean more than it purports to say.[179] The Second Circuit did not revisit the issue until *Albert v. Carovano*,[180] in which the court held that the Act did not establish state action because New York has never sought to compel schools to enforce their rules and administrators do not believe that the Act requires any particular sanctions to be imposed.[181] Thus, although the Henderson Act has been found to not constitute state action, the possibility still exists that legislatures in the future might involve themselves in this field.

G. *Traditional Tort Theories*

Claims based on a tortious injury are rarely pleaded,[182] and, except for one noted article,[183] commentators have yet to substantially address the various tort theories applicable to protect students from wrongful expulsions. Expulsion cases only lend themselves to certain tortious claims. Students have claimed an interference of prospective economic advantage when the injury is to their future economic interest.[184] An injury to an individual's reputation states a cause of

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173. N.Y. EDUC. LAW § 6450 (McKinney 1985).

174. *Id.*

175. *Id.*

176. *Id.*

177. Coleman v. Wagner College, 429 F.2d 1120 (2d Cir. 1970).

178. *Id.* at 1124.

179. *Id.* at 1125.

180. Albert v. Carovano, 851 F.2d 561 (2d Cir. 1988).

181. *Id.* at 570.

182. *Developments in the Law*, *supra* note 48, at 1005. *But see* Banks v. Dominican College, 42 Cal. Rptr. 2d 110, 116 (Ct. App. 1995) (holding that there was no "valid claim for tort damages as a result of a breach of a covenant implied by law or fact into [a] contract").

183. *See Developments in the Law*, *supra* note 48, at 1005.

184. *Id.*; *see also* Life Chiropractic College, Inc. v. Fuchs, 337 S.E.2d 45, 47 (Ga. Ct. App. 1985); Napolitano v. Trustees of Princeton Univ., 453 A.2d 263, 268 (N.J. Super. Ct. App. Div. 1982).

action for defamation.[185] Expelled students have pleaded infliction of emotional distress when the individual suffers from an allegedly wrongful or negligent act.[186] Students have also framed the cause of action as negligence; however, the courts have yet to universally recognize a duty pursuant to which university officials must act when expelling a student.[187] Finally, when any unjustified intentional act causes an injury, a person may plead a "prima facie tort."[188] Some jurisdictions have not acknowledged the use of the prima facie tort, and the courts also vary on whether the tort requires proof of malice.[189]

H. *Law of Associations*

In the famous 1930s article, *The Internal Affairs of Associations Not for Profit*, Professor Chafee advocated his belief that the law of associations, which is analogous to the law of business corporations and partnerships, should apply to university expulsions as well.[190] The law of associations provides judicial relief to members expelled or suspended by rules or proceedings that are contrary to natural justice, or were expelled without adherence to the association's rules, or the proceedings were done in bad faith; that is, with malice.[191] Although Professor Chafee addresses several types of nonprofit associations, he specifically includes discussion of the university expulsion.[192]

For Chafee, the tortious nature of the harm to the expelled member demands that, the courts should have jurisdiction over all members dismissed from an association.[193] The more important question of whether the court should intervene and exercise this jurisdiction over the expulsion decision depends on various policy considerations.[194]

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185. Tynecki v. Tufts Univ., 875 F. Supp. 26, 34-35 (D. Mass. 1994); Kraft v. William Alanson White Psychiatric Found., 498 A.2d 1145, 1150 (D.C. 1985); Life Chiropractic College, Inc. v. Fuchs, 337 S.E.2d at 49; *Developments in the Law*, *supra* note 48, at 1005.

186. Fellheimer v. Middlebury College, 869 F. Supp. 238, 247 (D. Vt. 1994); Banks v. Dominican College, 42 Cal. Rptr. 2d at 116; Anderson v. Massachusetts Inst. of Tech., No. 940348, 1995 WL 81318, at *3 (Mass. Dist. Ct. Jan. 31, 1995).

187. Banks v. Dominican College, 42 Cal. Rptr. 2d at 116.

188. *Developments in the Law*, *supra* note 48, at 1005.

189. *Id.*

190. Chafee, *supra* note 129, at 1008.

191. *Id.* at 1014; *see also* 6 AM. JUR. 2D *Associations and Clubs* §§ 36—37 (1963) (providing additional cases discussing the mode and course of procedure required in hearings for the expulsion and suspension of members from associations, societies, and clubs).

192. Chafee, *supra* note 129, at 1029. In addition to university expulsions, Chafee's analysis includes clubs, trade unions, and church expulsions. *Id.*

193. *Id.* at 1020.

194. *Id.* at 1021. Chafee lists four policies to consider. *Id.* The Strangle-Hold Policy considers the seriousness of the consequences of an expulsion. *Id.* at 1021-23. The Dismal Swamp Policy is aimed at secret societies in which it would be difficult and time consuming for a judge to learn the rituals to decide if the expulsion was proper. *Id.* at 1023-26. The Hot Potato Policy considers the ramification and resentment of judicial intervention of a religious organization or trade

Since Chafee's article, several law review articles and judicial opinions have addressed the law of association. The cases have uniformly held that the law of associations does not adequately describe the student-university relationship.[195] The *Tedeschi* court explained: "The parallel between associations and universities is, of course, not exact because students do not participate in the governance of a university with the same voice as generally do members in the functioning of an association."[196]

VI. DAMAGES

In student expulsion cases, the courts have recognized three types of damages: injunctions, specific performance, and monetary damages.[197] Temporary injunctions are often sought by students as part of their claim for relief to preserve the status quo until the student can seek judicial review,[198] and permanent injunctions are sought as a complete form of relief preventing an expulsion.[199] Courts are generally reluctant to grant an injunction,[200] however, because of the disruptive nature of a suspension or an expulsion and the potential for irreparable injury, some courts have granted temporary injunctions.[201]

Students can receive specific performance in instances in which the student has satisfied all the academic requirements, and the school withholds the degree.[202] Specific performance is based on the contractual relationship between

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union. *Id.* at 1026-27. The Living Tree Policy considers the value of the association's autonomy and the right to manage one's own affairs. *Id.* at 1027-29.

195. *See, e.g.*, Napolitano v. Trustees of Princeton Univ., 453 A.2d 263, 272 (N.J. Super. Ct. App. Div. 1982) (holding that the law of associations does not completely delineate the relationship between student and university).

196. Tedeschi v. Wagner College, 404 N.E.2d 1302, 1305 (N.Y. 1980).

197. Butcher, *supra* note 86, at 260.

198. Ben-Yonatan v. Concordia College Corp., 863 F. Supp. 983, 985-88 (D. Minn. 1994); Abbariao v. Hamline Univ., 258 N.W.2d 108, 110 (Minn. 1977).

199. DeMarco v. University of Health Sciences, 352 N.E.2d 356, 362 (Ill. App. Ct. 1976); Babcock v. New Orleans Baptist Theological Seminary, 554 So. 2d 90, 93 (La. Ct. App. 1989).

200. Boehm v. University of Pa., 573 A.2d 575, 586 (Pa. Super. Ct. 1990) (reversing order granting a preliminary injunction because although suspension would cause a delay in student's education, it would not prevent him from completing educational process).

201. Melvin v. Union College, 600 N.Y.S.2d 141, 142-43 (App. Div. 1993) (being suspended for two semesters would cause irreparable harm where there was a factual dispute as to whether the school conformed to the disciplinary guidelines).

202. DeMarco v. University of Health Sciences, 352 N.E.2d at 364-66 (ordering the school to confer degree to a student who had completed all reasonable requirements); Babcock v. New Orleans Baptist Theological Seminary, 554 So. 2d at 97-98 (ordering the issuing of a degree for a student who had completed all course requirements despite the school's allegation that he violated its no divorce policy). *But see* Lexington Theological Seminary, Inc. v. Vance, 596 S.W.2d 11, 12 (Ky. Ct. App. 1979) (upholding the withholding of a divinity degree from the plaintiff, who had completed all academic requirements for the degree, because he was found to be homosexual).

student and university, and thus, for performance to be granted, the court must first find a contract in existence.[203]

One question that arises under specific performance is whether the doctrine of substantial performance applies to students expelled from a university. One case applied the substantial performance doctrine by instructing the jury that if the student had substantially performed her side of the bargain, the college's actions constituted a breach.[204] The student had performed 124 out of 128 credits, and the court upheld the jury verdict that this constituted substantial performance.[205]

Monetary damages, also based on the contractual relationship of the parties, are available for the wrongful expulsion of a student.[206] These damages, as acknowledged by the court in *Slaughter*, may include what the plaintiff would have earned had he received his doctorate.[207] Courts have denied claims for unjust enrichment where a student sought return of his past tuition after being expelled.[208] In expulsion cases, the courts prefer the granting of monetary damages over specific performance because "the concept of compelling the continuance of a personal relationship to which one of the parties is resistant is repugnant as a form of involuntary servitude."[209]

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203. *See* Kramer, *supra* note 88, at 183.

204. Russell v. Salve Regina College, 890 F.2d 484, 489 (1st Cir. 1989).

205. *Id.*

206. Bilut v. Northwestern Univ., 645 N.W.2d 536, 541 (Ill. App. Ct. 1994). "Illinois . . . recognizes the availability of a remedy of monetary damages for a private school's wrongful expulsion of a student." *Id.*

207. Slaughter v. Brigham Young Univ., 514 F.2d 622, 627 (10th Cir. 1975). The court held that the plaintiff failed to properly plead or show expectation damages in the case at bar, but stated that in the right circumstances such damages may be compensable. *Id.*

208. Life Chiropractic College, Inc. v. Fuchs, 337 S.E.2d 45, 49 (Ga. Ct. App. 1985).

209. Bloch v. Hillel Torah N. Suburban Day Sch., 426 N.E.2d 976, 977 (Ill. App. Ct. 1981) (citations omitted).

VII. THE FUTURE OF THE RELATIONSHIP

The most recent trend of student expulsions rejects relief to the student by either characterizing the misconduct as academic and applying the standard of nonintervention,[210] or by applying contract law favorable to the university.[211] For expelled students to obtain equitable relief and procedural protections during expulsion proceedings, the student-university relationship must evolve in one of three theoretical ways: the expansion of a current remedy, the Hybrid Approach, or the creation of a tort.

A. *Expanding a Doctrine*

One solution to the relational problem between the student and university would expand a current doctrine so that the cases reflect a more equitable resolution. Because of the courts' current views, contract law represents the most likely candidate for expansive application. If, for example, the courts started to apply recent trends of contract theory such as the unconscionability of an adhesion contract to expulsion cases, students would receive more procedural protections. Another possible expandable doctrine would be the law of associations. For this to occur, the courts would need to view the university as a variation of an association, one worth treating as other true associations.

B. *The Hybrid*

Another solution, and one advocated by several judges, frames the problem among several different theories.[212] Under the Hybrid Approach, or Framework Approach, the courts analyze the student expulsion under several remedies such as contract law, property law, and tort law. This approach recognizes the uniqueness of the relationship,[213] and the inability to categorize the student-university relationship under one theory. In the leading case on this approach, *Slaughter v. Brigham Young University*,[214] the court stated:

> Many sources have been used in this process, and combinations thereof, and in none is it assumed or required that all the elements of a particular doc-

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210. The Iowa Supreme Court has recently taken this approach to dealing with the expulsion problem. *See* Lekutis v. University of Osteopathic Med. & Health Sciences, 524 N.W.2d 410, 413 (Iowa 1994); Pflepsen v. University of Osteopathic Med. & Health Sciences, 519 N.W.2d 390, 390-91 (Iowa 1994).

211. This reflects the approach taken in Illinois courts. *See* Holert v. University of Chicago, 751 F. Supp. 1294, 1300-02 (N.D. Ill. 1990); Frederick v. Northwestern Univ. Dental Sch., 617 N.E.2d 382, 389 (Ill. App. Ct. 1993).

212. Slaughter v. Brigham Young Univ., 514 F.2d at 626.

213. State v. Schmid, 423 A.2d 615, 619 (N.J. 1980); *see also* Napolitano v. Trustees of Princeton Univ., 453 A.2d 263, 272 (N.J. Super. Ct. App. Div. 1982) ("The relationship is unique. . . . Such a relationship, we submit, cannot be described either in pure contractual or associational terms.").

214. Slaughter v. Brigham Young Univ., 514 F.2d 622 (10th Cir. 1975).

> trine be applied. The student-university relationship is unique, and it should not be and cannot be stuffed into one doctrinal category. It may be different at different schools.[215]

This solution contains two problems. First, the courts have failed to adequately identify which aspects of the various theories should apply. Second, this approach reflects more the judiciary's frustration with the student-university relationship rather than an expositive solution.

VIII. A SOLUTION IN TORT

The unjust expulsion of a student from a university should lie in tort, and not contract. The judiciary should abandon the untenable approach of searching for the existence of a property or liberty interest, trying to find state action where it does not lie, or using contract analysis to define "some" parts of the relationship.[216] Instead, the judiciary should acknowledge what the injury to the student really is—a tort. The advantages of creating the tort are numerous. First, the issue of student expulsion would be enormously simplified. Courts would no longer be struggling with defining arbitrary and capricious or searching for a theoretical remedy. Second, by defining the injury as a tort, it allows for a balancing of the competing interests that contract and property law fail to do.[217] Third, the duties imposed on colleges would be codified and university administrators would have a better understanding of what actions are lawful. Tangential to this, the universities for the first time would have an incentive to provide a fair process to students facing expulsion. The current state of the law actually encourages universities to provide as little protections as possible.[218]

A. *Creation of New Torts*

The law of torts continues to expand. Professor Prosser stated, "New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out bodily to create a new cause of action, where none had been recognized

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215. *Id.* at 626.

216. Walter Saurack, Note, *Protecting the Student: A Critique of the Procedural Protection Afforded to American and English Students in University Disciplinary Hearings*, 21 J.C. & U.L. 785, 823 (1995).

217. *Developments in the Law*, *supra* note 48, at 1005. "[E]xplicit weighing of interests embodied in a tort approach, while offering no mechanistic guidelines, would seem likely to lead to fair solutions for most association cases while serving as an invitation to courts to explain their adjudications in a way meaningful." *Id.*

218. The reason for this is that many states accept the *Tedeschi* doctrine that universities must substantially comply with their own rules and procedures. The university is thereby encouraged to provide little if any protections because it would only be opening itself up to liability.

before."[219] For example, the intentional infliction of mental suffering, the alienation of the affections of a parent, and injury to go where one likes, to name a few instances, "could not be fitted into any accepted classifications when they first arose, but nevertheless have been held to be torts."[220] The injury that a student suffers upon erroneous expulsion has also been described as one not fitting into any classifications,[221] and qualifying it as a tort would be easily justified.

B. *The Injury as Tortious*

Although there has been an abundance of law review articles on student expulsions, mostly student written notes, commentators have neglected to analyze the nature of the injury to the expelled student. Chafee, perhaps the last to adequately address the issue, argues that the real injury a student suffers is a tort; that is, the injury impairs the student's *status* or relationship as a member of the institution.[222] The student suffers a tortious injury because the injury is personal—the member of the association "does not merely recover for the loss of expected benefits, but also recovers for injury to his reputation."[223] As Chafee correctly states, "The wrong is a tort; not a breach of contract, and the tort consists in the destruction of the relation rather than in a depravation of the remote and conjectural right to receive property."[224]

Whether a tort exists, courts have traditionally created a distinction between misfeasance and nonfeasance.[225] Typically, a person's nonfeasance—a passive failure to perform a promise—will result in an action based solely on contract.[226] However, once a person starts to perform the promise and fails to complete it or does so negligently, the action may lie in tort.[227] This represents misfeasance—a defective performance or doing it improperly.[228] For example, a physician that undertakes a surgical procedure, but does it negligently, will also be held liable in tort for failure to render service with reasonable care despite the fact that the parties may have a contractual relationship.[229] In the student expulsion situation, the basis for the injury is not usually nonfeasance but misfeasance. The university, when it expels a student, is performing or engaging in the process of investigating and expelling the student; the injury results from the deviation of this reasonable care.

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219. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 1, at 3 (5th ed. 1984).

220. *Id.* at 4.

221. *See supra* notes 214-16 and accompanying text.

222. Chafee, *supra* note 129, at 1007.

223. *Id.* at 1003-04.

224. *Id.* at 1007.

225. W. PAGE KEETON ET AL., *supra* note 219, § 92.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

C. *The Duty Arising from Contract*

The courts have recognized that a duty in tort can arise from a private contractual relationship.[230] Chafee states that although relationships such as principal and agent, landlord and tenant, vendor and purchaser are consensual and may grow out of the contract, the contract or intent of the parties determines some but not all of the incidents of these relationships.[231] Prosser has stated,

> Duties of affirmative action . . . are often imposed by law on the basis of certain factors and especially the relationship between the two parties. . . . [T]he breach of these affirmative duties imposed by law may coincide with an implied promise giving rise to a contract action for breach of the promissory obligation. This may be a duty that cannot be disclaimed.[232]

Some special relationships, even absent an express contract, can give rise to a duty to protect another from harm. For example, duties have been imposed between: (1) carrier-passenger;[233] (2) innkeeper and guests;[234] (3) business invitor and invitee;[235] and (4) one who voluntarily takes custody of another and, under the circumstances, increases that individual's vulnerability.[236]

The critical issue therefore is whether a special relationship exists between a university and a student that substantiates the imposition of a duty. One historical basis for the establishment of a special relationship between the student and university is the doctrine of *in loco parentis*.[237] Whether the basis for this special relationship is specifically the *in loco parentis* doctrine, or simply the recognition of the unique aspects of the relationship between students and school officials, an affirmative duty should be imposed upon the university to protect the status of students.

D. *Factors for the Existence of a Duty*

The courts have provided various guidelines which should be considered in deciding whether a duty should exist. Courts have considered, among others, the following factors: (1) the foreseeability of the harm; (2) the likelihood of the

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230. *See, e.g.*, Rozny v. Marnal, 250 N.E.2d 656, 660 (Ill. 1969).

231. Chafee, *supra* note 129, at 1007.

232. W. PAGE KEETON ET AL., *supra* note 219, § 92, at 657-58.

233. Lopez v. Southern Cal. Rapid Transit Dist., 710 P.2d 907, 909-14 (Cal. 1985).

234. RESTATEMENT (SECOND) OF TORTS § 314A (1965).

235. *Id.*

236. Zelenko v. Gimbel Bros., 287 N.Y.S. 134, 135 (Sup. Ct. 1935) (finding that a duty arises when a department store undertakes to assist an ill patron although prior to rendering assistance no duty to aid existed).

237. *See* Stamatakos, *supra* note 112, at 471-73 (discussing the *in loco parentis* doctrine as providing a basis for institutional tort liability for criminal acts committed by the university, and liability arising on campus property).

harm; (3) the burden of guarding against the injury; and (4) the consequences of placing that burden upon the defendant.[238]

When a university levies charges against a student without proper investigation or allows a biased committee to decide the student's guilt, the foreseeability of harm to the student is great. The harm occurs either in the form of expulsion or injury to the person's status in the university. Consequently, the ability to find admission in another school may be impossible, especially when matriculating in a specialty field such as law or medicine because of the limited number of schools.

The likelihood of the harm to the student is apparent. A failure to provide procedural fairness to a student that results in dismissal will always result in some harm. A student will likely suffer a diminished earning capacity, a stigma from the expulsion, and will be prevented from possibly continuing their chosen profession.[239]

The burden on the university to avoid the injury of the student is neither oppressive nor debilitating. When the university charges a student with a school violation, it has the benefit of time to ensure fair treatment of the student. In other words, the university's duty to the student arises only when it brings the formal charges itself. In addition, the number of expulsion cases a university must consider each year is minimal.

Finally, the consequences of placing the burden on the defendant must be considered. Despite this factor weighing perhaps in favor of the university, the duty to avoid unfair conduct has long been imposed upon public institutions. There has been no damage to or destruction of public high schools or universities. The only serious detriment the creation of the tort would impose on universities is that in certain circumstances of reprehensible conduct punitive damages would be available. The availability of punitive damages, however, will result only in the university creating procedures that are more fair and equitable to the student, thus protecting itself from liability.[240]

E. *The Duty*

The university has a duty to provide the student with a fair process when engaging in any activity that could adversely affect the status of a student. There would be a rebuttable presumption that if the charges brought against the student are purely academic in nature, the university is presumed to have acted in good faith and acted reasonably. This presumption could be rebutted by clear and convincing evidence that the academic charges were arbitrary or capricious. Thus, when the university charges a student with academic deficiency, a truly internal matter, the university would be able to expel the student so long as this action is not arbitrary or capricious. Conversely, if the expulsion was discipli-

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238. Ward v. K Mart Corp., 554 N.E.2d 223, 226-27 (Ill. 1990); *see also* Ballard v. Uribe, 715 P.2d 624, 628 n.6 (Cal. 1986) (enumerating seven factors); Lyons v. Nasby, 770 P.2d 1250, 1254 (Colo. 1989) (listing five factors).

239. *See supra* note 13.

240. The benefit of having punitives available in student expulsions is exemplified in union expulsions. *See infra* notes 269-71.

nary, the school would be held to the strictures of the duty. The burden on whether the expulsion was for academic or disciplinary reasons would be on the university.

There are two options available that could be used to limit the harshness of imposing tort liability on a school. One solution uses the tort concept of foreseeability to limit liability to only certain conduct. The other option courts could utilize if it feared that a duty on the school would be too pro-student would be to require the student to prove that the degree is a "practical necessity."[241] By requiring the student to establish the deprivation of a "practical necessity," courts would ensure recovery only for students that actually suffer a cognizable injury and protect universities from frivolous suits in tort.[242] Thus, students expelled from law schools and medical schools would most likely have a suit in tort because expulsion from medical school in all practicality will prevent the student from ever receiving a medical degree. At the opposite end of the spectrum, a student expelled from the first year at a college or a private high school is not likely to suffer any substantial hardship. The student could change majors or transfer or re-apply to another school. Most first-year students are unlikely to have suffered great financial loss in pursuing their education. Thus, the rule would be that before a student would be able to sue the school under tort for "fair process," the court must first have a finding that the expulsion deprives the injured student of a practical necessity.

F. *The Specifics of the Duty*

The imposition of the duty on administrators would eventually evolve into set rules of what that duty will specifically entail. Rules of law serve no function unless they are reasonably predictable, and those subject to the law have means of knowing what it entails.[243] Creation of the tort would satisfy this purpose because universities would finally have their duty codified under a specific tort. Although procedural fairness is an elusive concept, often depending on the specific factual context,[244] it is suggested that the tort would embody the following duties. First, schools would have complete discretion to adopt rules and regulations that it deems necessary as long as they are reasonably related to the purposes of the school. Second, the school must provide reasonable procedures, which would require at a minimum, notice of the charges, the right to a hearing, and the right to have counsel present. Third, the school would be required to substantially follow its own rules and procedures. Fourth, the school would be required to provide an impartial committee. Thus, if university administrators adhered to the above duties, with the same care that doctors treat patients, and lawyers deal with clients, there would be no liability.

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241. *See infra* Part VIII.H.

242. *Id.*

243. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989).

244. Wisch v. Sanford Sch., Inc., 420 F. Supp. 1310, 1315 (D. Del. 1976).

G. *Courts Are Already Imposing Duties on the University*

Many courts today are imposing "duties" on universities although they are not defined in terms of a tort. The creation of a tort would be formalizing the duties that many courts are beginning to recognize. For example, in *Anderson v. Massachusetts Institute of Technology*,[245] the court specified six minimal duties that the university must follow during a student expulsion.[246] In *Abbariao v. Hamline University*,[247] the Minnesota Supreme Court imposed the common-law duties on private universities, which parallel those imposed on public universities.[248] Other courts have come to the conclusion that student expulsion hearings at private universities must conform to "fundamental fairness,"[249] be "fair and reasonable,"[250] or have a just cause.[251]

H. *Similar Duties*

The imposition of a duty upon administrators for certain actions would not revolutionize tort law. Not only have some courts acknowledged the tort of "fair

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245. Anderson v. Massachusetts Inst. of Tech., No. 940348, 1995 WL 813188, at *4 (Mass. Dist. Ct. Jan. 31, 1995).

246. *Id.*

> A court may only intervene in the student-university relationship when the student demonstrates that the university's action was arbitrary and capricious; that the university failed to follow its own disciplinary rules; and that the university did not afford the student a hearing which was fundamentally fair. Such hearing at the very least should provide the student with written notice of the charge against him or her; a written description of the evidence upon which the charges are based; the names of the witnesses which the university intends to call at the hearing; an unbiased disciplinary committee or tribunal; an opportunity to be heard and present witnesses in his behalf; and the right to confront and controvert the evidence presented by the university.

Id.; *see also* A. & B. v. C. College & D., 863 F. Supp. 156, 159 (S.D.N.Y. 1994) (stating six similar type procedures, although not mandated to be followed, would be useful, if adopted by a university, in determining whether the court should apply the judicial nonintervention doctrine).

247. Abbariao v. Hamline Univ., 258 N.W.2d 108 (Minn. 1977).

248. *Id.* at 113 (recognizing the existence of duties of universities but would not delineate them).

249. Cloud v. Trustees of Boston Univ., 720 F.2d 721, 725 (1st Cir. 1983); Anderson v. Massachusetts Inst. of Tech., No. 940348, 1995 WL 813188, at *4 (Mass. Ct. Jan. 31, 1995); Buckholz v. Massachusetts Inst. of Tech., No. 852720, 1993 WL 818618, at *14 (Mass. Ct. July 6, 1993); Boehm v. University of Penn., 573 A.2d 575, 580 (Pa. Super. Ct. 1990) (recognizing that courts are becoming more willing to require that school rules comport with "basic notions of due process and fundamental fairness").

250. Kwiatkowski v. Ithaca College, 368 N.Y.S.2d 973, 977 (Sup. Ct. 1975) (holding that the courts "will not permit a student's efforts to attain this goal [of higher education] to be thwarted because of an innately unfair disciplinary proceeding").

251. King v. American Academy of Dramatic Arts, 425 N.Y.S.2d 505, 507-08 (Civ. Ct. 1980).

process," but the courts have continued to expand its scope. The common-law right of "fair procedure" was first extended to those expelled from labor unions;[252] it was then judicially expanded to include application to admission practices of professional societies, membership which is a "practical necessity" to the pursuit of a medical or dental specialty;[253] it was then expanded to apply to access by practicing physicians to staff privileges in private hospitals;[254] and lastly, "fair process" has been applied to resident physicians prior to their dismissal from hospital residency programs.[255]

The rationale for the above rules is that certain organizations have the authority to end or successfully limit the pursuit of a medical or other professional career.[256] The California Supreme Court recognized that certain private associations may "possess substantial power either to thwart an individuals pursuit of a lawful trade or profession, or to control the terms and conditions under which it is practiced."[257]

The inquiry in these cases is not whether the association has a monopolistic power to exclude one from a profession.[258] Courts initially required the injured party to demonstrate that it was of "economic necessity" to be a member of the association before the duty of "fair process" would become applicable.[259] Instead the courts have focused on "the *practical* power of the entity in question to affect substantially an important economic interest."[260] Clearly a student in the final year at medical school or law school attends class at the mercy of the university. For all practical purposes, if the university expels the student, the likelihood of the student finding another college to matriculate in is negligible. It appears a logical extension that if a student at a university can demonstrate that the school possesses a practical power to affect the student's interest in a particular field, the student has an action in tort upon wrongful expulsion.[261]

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252. *See, e.g.*, James v. Marinship Corp., 155 P.2d 329, 338-39 (Cal. 1944) (holding that union's discriminatory conduct in segregating black members to the union auxiliary denied those members privileges and protection of union membership).

253. *See, e.g.*, Pinsker v. Pacific Coast Soc'y of Orthodontists, 460 P.2d 495, 499 (Cal. 1969) (holding that membership in the orthodontic organization appeared to be a "practical necessity for a dentist who wishes not only to make a good living as an orthodontist but also to realize maximum potential achievement and recognition in such specialty").

254. Ascherman v. Saint Francis Mem'l Hosp., 119 Cal. Rptr. 507 (Ct. App. 1975) ("We conclude, therefore, that denial of staff membership would effectively impair the physician's right to fully practice his [or her] profession.").

255. Ezekial v. Winkley, 572 P.2d 32, 39 (Cal. 1977); Northeast Ga. Radiological Assoc. v. Tidwell, 670 F.2d 507, 510-11 (5th Cir. 1982).

256. Ezekial v. Winkley, 572 P.2d at 36.

257. *Id.* at 35.

258. *Id.* at 38-39.

259. Pinsker v. Pacific Coast Soc'y of Orthodontists, 460 P.2d 495, 498 (Cal. 1969).

260. Ezekial v. Winkley, 572 P.2d at 39 (emphasis added).

261. The courts have held in the professional society cases that the only reason the tort may lie is that the person already has a professional license and present right to enjoy the fruits of his labors. This limitation, however, should not be dispositive; for a student one week away from

I. *The Effects of a Tort*

Applying the tort of "fair process" on universities would have very little impact. First, the majority of the duties imposed are duties that courts have long held to exist in other contexts.[262] Second, public universities have had these duties imposed upon them without any serious repercussions. The tort would only impose uniformity and predictability on all universities, public and private. Third, the argument that there would be a deluge of lawsuits and that every expelled student would be filing frivolous actions against colleges are unfounded. The worry of increased litigation does not justify a court's refusal to remedy a wrong.[263] More importantly, although there would perhaps initially be an increase of lawsuits, once the courts delineated the procedures administrators are to follow, litigation would invariably decrease. Once a university sets up a fair system and substantially follows it, the probability of an erroneous expulsion would be minimal. Currently, with no duty on universities to treat expelled students fairly, no incentive exists for them to clean up their system, much less follow their own rules.

J. *Punitive Damages*

In the area of damages, the student faces a major obstacle–with the courts describing the student-university relationship as contractual, an expelled student can not successfully plead punitive damages. Without the threat of ever paying punitive damages, universities know that their liabilities for acting capriciously or maliciously will always be limited to granting a degree or minimal damages. The highest reported recovery in any student expulsion case was approximately $25,000 for a school that maliciously expelled a nursing student for being overweight, the sum representing a year of her salary.[264]

There are two solutions to the problem of not having punitive damages available when the university arbitrarily or in bad faith dismisses a student. One solution would be to recognize that the expulsion incorporates a tort as well as a breach of contract. This would be similar to the bad faith breach.[265] Some courts

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graduation from medical school should not be treated as having no rights while a graduate student is afforded due process protections.

262. *See supra* Part VIII.H.

263. Ross v. Creighton Univ., 740 F. Supp. 1319, 1329 (N.D. Ill. 1990).

264. Russell v. Salve Regina College, 890 F.2d 484, 489 (1st Cir. 1989). The trial court in *Slaughter v. Brigham Young Univ.*, 514 F.2d 622 (10th Cir. 1975), awarded $88,283, but the appellate court reversed.

265. The movement toward this expanded liability appears to have originated in California, in cases involving insurance companies' failures to deal in good faith with their insureds. *See* Comunale v. Traders & Gen. Ins. Co., 328 P.2d 198, 203 (Cal. 1958) (finding that an insurer that failed to deal in good faith, created a cause of action that sounds both in contract and tort).

have held that a breach of contract may also constitute a tortious breach of the covenant of good faith and fair dealing.[266]

Chafee advocates another solution—to treat the expulsion strictly as a tortious act.[267] Believing that expulsion damages should be based on tort, Chafee states, "[T]he measure of damages in actions at law by an expelled member appears to be based on a theory of tort rather than of contract."[268] A similar type of expulsion, the expulsion of a union member, supports Chafee's position. In *International Brotherhood of Boilermakers v. Braswell*,[269] the court held that punitive damages may be awarded where an association member was maliciously or with reckless and wanton indifference expelled from a union.[270] The deterrence rational used by the court for awarding punitive damages applies to student expulsions:

> Strong reasons of policy promote the use of exemplary damages to deter union officials from conduct designed to suppress the rights of members to a fair and democratic hearing on legitimate disciplinary charges. . . . Imposition of exemplary damages, when the requisite elements of malice, gross fraud, wanton or wicked conduct, violence or oppression are present, serves to achieve the deterrence they were designed to effect.[271]

Nonetheless, courts have yet to award punitive damages in a contractual breach involving an expelled university student.[272]

IX. CONCLUSION

In the year 1723, the Court of the King's Bench in *The King v. University of Cambridge*[273] articulated the problem of the case:

> This is a case of great consequence, both as to the property, the honour, and the learning, of this university, and concerns every graduate there, though at present it is the case only of one learned man, and the head of a college.

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266. *See* Seaman's Direct Buying Serv., Inc. v. Standard Oil Co., 686 P.2d 1158, 1166 (Cal. 1984), *overruled by* Freeman & Mills, Inc. v. Belcher Oil Co., 900 P.2d 669 (Cal. 1995) (recognizing that California courts have recognized the existence of the implied covenant of good faith and fair dealing and enforced it in cases involving a wide variety of contracts).

267. Chafee, *supra* note 129, at 1007.

268. *Id.* at 1003.

269. International Bhd. of Boilermakers v. Braswell, 388 F.2d 193 (5th Cir. 1968).

270. *Id.* at 200-01.

271. *Id.* at 200 (citing Fittipaldi v. Legassie, 239 N.Y.S.2d 792, 796 (App. Div. 1963)).

272. *See, e.g.*, Banks v. Dominican College, 42 Cal. Rptr. 2d 110, 116 (Ct. App. 1995) (holding that an expelled student teacher with behavioral problems could not receive tort damages from breach of covenant because the university "did not engage in any action extraneous to the contract which would frustrate" the students' contractual rights, nor did it breach any duty owed to the student).

273. The King v. University of Cambridge, 92 Eng. Rep. 818 (K.B. 1723).

> The question is, whether the university may suspend and degrade, and by what rules they may proceed in either or both of these cases?[274]

Chief Justice Pratt concluded "that a man shall not be deprived of his property without being heard" because of the harshness of "the power of one man to suspend or degrade another without appeal; for if he should err, as all men are subject to error, then the person suspended or degraded has no remedy."[275] The court held that since the university failed to give the student a prior hearing, the court ordered that the university grant him his degree.[276] Since this pronouncement over 250 years ago, the students' interests have sadly given way to the universities' strong need for autonomy.

It has long been recognized in tort law that worthy professions and valuable community institutions may be held accountable for the harm they have wrongly caused. The courthouse is accessible to individuals that are injured by doctors that deviate from standards of care, by lawyers that transgress, by clergymen that abuse, and by governmental bodies that ignore constitutional protections. Educational institutions and their administrators make mistakes, and sometimes act improperly. An unjust expulsion destroys not only a relationship, but may extinguish the efforts of a wronged student.

A duty established in negligence would aid the students, the attorneys, the university, and the courts. The student would for once be provided with a viable remedy; the attorneys for both sides would be saved the trouble of laboring over the propriety of over a half dozen theories none which apply; the university would finally have a clear articulation of the standard of care they must meet and follow; and the courts would finally put to rest the incertitude of this area of law and their opinions which reflect this indeterminateness. The relationship is still contractual—universities can create any rule or procedure necessary to uphold their beliefs and ideals; their only constraint is that they be fair and equitable in applying those rules and procedures.

Scott R. Sinson

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274. *Id.*, *quoted in* Waliga v. Board of Trustees, No. 1444, 1984 WL 6436, at *4 (Ohio Ct. App. Nov. 30, 1984).

275. *Id.*

276. *Id.*