

DOWNSIZING HIGHER EDUCATION AND DERAILING STUDENT EDUCATIONAL OBJECTIVES: WHEN SHOULD STUDENT CLAIMS FOR PROGRAM CLOSURES SUCCEED?

*Hazel G. Beh**

It is, sir, as I have said, a small college, and yet there are those who love it.¹

I. INTRODUCTION

A few years ago, while the State of Hawaii was enduring a substantial fiscal crisis, some officials publicly suggested that the Board of Regents of the University of Hawaii consider closing certain professional schools, including the state's only law school, as a cost-saving measure.² Law students were understandably concerned.³ However, the threat had an unanticipated educational value for first-year contracts students as they found themselves well-equipped with the tools for a sound legal analysis of their potential legal claims.

* Hazel Glenn Beh, Assistant Professor of Law, William S. Richardson School of Law, University of Hawaii. The author thanks Marc Garren for his preliminary research and Professors Karen Gebbia Pinetti, Randall Roth, Jon Van Dyke and Eric Yamamoto for thoughtful suggestions.

¹ Daniel Webster, *Dartmouth College Case* (1818), quoted in JOHN BARTLETT, FAMILIAR QUOTATIONS, at 394 (16th ed. 1992) [hereinafter FAMILIAR QUOTATIONS].

² See Mary Adamski, *Fans of UH's Law School Urged to Rally*, HONOLULU STAR-BULLETIN, Oct. 28, 1995, at A4 ("The possibility that state budget woes will force closure of the school along with other University of Hawaii professional and graduate programs has been raised.").

³ University students and faculty (including law students) marched to the state capital to protest threatened cuts to the university budget. See Pat Omandam, *UH Protestors To March Over State Budget Fright*, HONOLULU STAR-BULLETIN, Oct. 26, 1995, at A1 (describing planned "Death of Education" march to protest budget cutbacks and threatened school's programs).

Periodic budget crises in higher education across the nation are as certain as death and taxes.⁴ During these crises, some outraged students⁵ have discovered how easily their colleges forsake them.⁶

⁴ Budgetary crises in education are cyclical. See Sheila Slaughter, *Criteria for Restructuring Postsecondary Education*, 10 J. HIGHER EDUC. MGMT. 31, 33 (Winter/Spring 1995) (describing "ebb and flow" of budgetary crises). However, the last two decades suggest to some that higher education, at least public education, may require dramatic restructuring. Decreasing federal funding for research and development and federal student aid and increasing educational costs and competition means successful institutions should consider moving toward a more self-sufficient, revenue-generating, and financially leaner institution. William J. Kettinger & Richard D. Wertz, *The Financial Restructuring of Higher Education: Reengineering or Radical Reform?*, 9 J. HIGHER EDUC. MGMT. 13 (Summer/Fall 1993); see also Patrick Healy & Peter Schmidt, *At Public Colleges, the Tuition Debate Is a Mix of Philosophy and Practicality*, CHRON. HIGHER EDUC., May 30, 1997, at A17 (noting that federal budget cuts may compel institutional restructuring).

⁵ Student opposition to threatened budget cuts and restructuring appear commonplace across the nation. The "protest march and rally" remains a very effective method for students to communicate their concerns. See, e.g., *Alabama A&M Students Oppose Tuition Hikes*, CHRON. HIGHER EDUC., Apr. 10, 1998, at A8 (describing student rally to protest tuition hike and cutbacks, including faculty jobs and academic programs); *Chancellor Chu: Ohio Regents Makes a Smart Pick*, COLUMBUS DISPATCH, Nov. 19, 1997, at A10 (noting protests by faculty and students concerning budget cuts and phasing out of programs identified as redundant or weak); Sharline Chiang, *Students Call For Funding: Mission Pupils Plead Case at Trustees Meeting*, L.A. DAILY NEWS, July 24, 1997, at N4 (describing student protests against elimination of classes and sports programs); *Grambling's Interim Chief Has Much to Do, Little Time: His Goal Is To Rebuild School's Reputation*, NEW ORLEANS TIMES-PICAYUNE, Nov. 6, 1997, at A3 (detailing student protests over tuition hikes at Grambling State University, Louisiana); Patrick Healy, *Showdown Pits Popular Governor Against University of Kentucky*, CHRON. HIGHER EDUC., May 30, 1997, at A36 (noting student protest to changes in university governance and restructuring); Adrienne Knox, *College Bills Soar Despite Extra Aid / State Money Alters Few Tuition Plans*, STAR-LEDGER (Newark, N.J.), June 27, 1997, at 1 (discussing New Jersey college student protest over proposed double-digit tuition hikes across state); *Making Higher Education a Priority*, BALTIMORE SUN, Oct. 13, 1997, at A10 (detailing University of Maryland protests to governor and legislators over tuition increases and budget cuts); John Mooney, *\$30M Boost in State Aid Expected to Ease College Tuition Hikes*, RECORD (Northern N.J.), June 19, 1997, at A3 (describing protest including overnight sit-in at Montclair State University and one-day strike at Ramapo College); *Nursing Students Protest Program's Possible End*, L.A. TIMES, Apr. 30, 1991, at B2 (noting protest at University of Southern California); Barrington Salmon, *UDC Students Reprise 1996 Protest of Cuts*, WASH. TIMES, Mar. 19, 1997, at C7 (describing day-long student rally blocking traffic on Connecticut Avenue); Adrienne T. Washington, *One More Reason Why UDC Must Survive*, WASH. TIMES, May 23, 1997, at C2 (describing student protests in reaction to severe budget cuts and threatened closure for closure).

⁶ Small or large, public or private, the potential is surprisingly universal. See, e.g., Stephanie Banchemo, *NU May Close Its Dental School: Final Decision Up to Board; But School Not Taking Applications*, CHI. TRIB., Dec. 16, 1997, Metro at 1 (reporting Northwestern University's proposal to close dental school); Barbara Boyer, "Tampa College Closes In Money Flap; Parent Company Loses Bid to Unfreeze Federal Funding," TAMPA TRIBUNE,

Professional schools seem particularly vulnerable,⁷ perhaps because the closure of an insular professional school has less immediate impact on the undergraduate program, disrupts fewer students, and rankles fewer critics.⁸

Sept. 29, 1995, at 1 (reporting on closure of century-old college due to financial crisis); Dana DiFilippo, *Students Aren't Waiting Around to See What Happens*, CINCINNATI ENQUIRER, July 4, 1996, at A12 (reporting on threatened closure of Central State University); John Dunbar, *EWC's Legacy: Controversy, Contributions*, FLA. TIMES-UNION, Feb. 23, 1997, at A1 (reporting that oldest historically black college in Florida faces financial trouble which may result in closure); Mark Fisher, *More Trustees Expected To Leave*, DAYTON DAILY NEWS, June 3, 1997, at B2 (describing threatened closure of an Ohio public university for financial difficulties); Phil Kabler, *Colleges Must Recruit to Live, Report Says Out-of-State Students Critical For Survival*, CHARLESTON GAZETTE & DAILY MAIL, Jan. 30, 1997, at A1 (reporting that lawmakers in West Virginia worry that closing existing colleges may be necessary as enrollment declines); Suzanne Muchnic, *UCLA Merges Architecture and Arts Into a New School Education*, L.A. TIMES, Oct. 14, 1994, at F2 (reporting on UCLA Professional School Restructuring Initiative); *Nursing Students Protest Program's Possible End*, L.A. TIMES, Apr. 30, 1991, at B2 (noting students protesting possible closure of nursing school at the University of Southern California); Leo Reisberg, *Rutgers University Considers Future of Livingston College*, ASBURY PARK PRESS, (Neptune, N.J.), Oct. 27, 1996, at A10 (reporting on university's deliberations concerning closure of small undergraduate college operated by Rutgers); Peter Schmidt, *Plan to Move a Small College Ignites a Furor in a Fading Nebraska Town*, CHRON. HIGHER EDUC. Apr. 17, 1998, at A35 (discussing plan to move 132-year-old Peru State College because otherwise it will "probably close"); Allen Lee Sessoms, *Will Pataki's Plans Hurt SUNY and CUNY?*, NEWSDAY, Mar. 16, 1997, at G7 (reporting that New York campuses face severe budget cuts which may result in closing departments); Jack Solomon, *CSUN's Misery Turns Macabre If the State Budget Goes Haywire As Usual: The 'Trigger' Clause Could Mean Disaster For the Cal State System*, L.A. TIMES, Oct. 2, 1994 at B17 (warning of consequences if state balances budget on the "back of higher education"); Cal Thomas, *College Collapse: Financially, Intellectually, Morally*, ORLANDO SENTINEL, Mar. 16, 1994, at A15 (editorializing on closures and reorganizations of professional schools and academic departments at UCLA and University of Maryland); *University Closing May Threaten \$4.5M Le Mars, Iowa Bonds*, CAP. MKT. REP., Oct. 10, 1997 (noting budgetary crisis threatens closure of Westmar University, Le Mars, Iowa); Amy Walsh, *SPJC to Shut 250-student Oldsmar Campus in May*, ST. PETERSBURG TIMES, Mar. 27, 1996, at 3 (reporting on plan to close junior college campus and various programs as cost-saving measures).

⁷ Law schools may be particular targets because of negative public sentiment toward lawyers. See, John Bicknell, *Business Book Makes a Big Splash*, PANTAGRAPH (Bloomington, Ill.), Feb. 19, 1995 (noting in jest, "technology will allow us to better understand our arcane legal system, which will mean one-third fewer lawyers and the closing of 1 in 10 U.S. law schools"); Richard Grossman, *Close Law Schools for Seven Years*, POST-STANDARD (Syracuse), Dec. 25, 1995 (describing, in jest, beneficial effects if United States stopped producing lawyers for seven years); Tom Hritz, *Just Becoming Dumb, Dumber*, PITTSBURGH POST-GAZETTE, Mar. 14, 1995 (encouraging, in jest, closing law schools for ten years).

⁸ Although not all professional schools "pay for themselves" or generate revenue for the institution, it is foolhardy not to recognize that they serve as "rainmakers" for the institution, contributing to its prestige and reputation, and drawing in research money. HUGH DAVIS GRAHAM & NANCY DIAMOND, *THE RISE OF AMERICAN RESEARCH UNIVERSITIES* 210-11 (1997)

In many cases, it is as much the process of decisionmaking that causes frustration as the decision itself.⁹ For example, in 1997, Northwestern University officials announced that they were considering closing their century-old dental school¹⁰ within a year in order to focus the university's limited resources on programs closer to its central mission.¹¹ Although the decision drew protests from affected students and the university community, the board made a final decision to close the dental school in March of 1998.¹² In apparent response to months of protests, however, the trustees agreed to postpone the target closing date in order to allow enrolled students the opportunity to graduate.¹³ Even with the brief reprieve, the school's 350 students fear that its best faculty, foreseeing their eventual layoffs or relocation to non-teaching tasks, will leave before the students complete their degrees.¹⁴ The students sense that the school at which they began their education will be an empty shell by the time their education is completed.

Medical schools may soon face review. In 1995, the Pew Health Professions Commission recommended closing twenty percent of U.S. medical schools to curb unemployment due to a shrinking demand for medical doctors.¹⁵

(describing "unusual independence" of medical school and "distance" between university and its medical school, but noting effect of medical school as "powerful magnet of funding" for university); Stephen D. Grunig, *Research, Reputation, and Resources*, 68 J. HIGHER EDUC. 17 (1997) (examining the impact of graduate research and reputation on undergraduate education and reputation).

⁹ See *infra* notes 48-52 and accompanying text (describing difficulties in deciding whether and which programs to cut).

¹⁰ The dental school's 1996-97 catalog describes an affiliation with Northwestern since 1891 when the school was established by Dr. Greene Vardman Black, regarded as "the father of modern dentistry." NORTHWESTERN DENTAL SCHOOL CATALOG 4 (1996-1997).

¹¹ Banchemo, *supra* note 6, at 1.

¹² Adrienne Drell, *NU Dental School to Close in 2001*, CHICAGO SUN-TIMES, Mar. 3, 1998, at 4.

¹³ *Id.*

¹⁴ *Northwestern U. to Close Dental School*, CHRON. HIGHER EDUC., Mar. 13, 1998, at A47. The school will not accept more students. Presumably, an ever-shrinking student body and a school geared to shut down will not provide students with the educational environment they once expected. During a planned phase-out, premature loss of accreditation may hasten the program's demise; see also Behrend v. State, 379 N.E.2d 617, 618 (Ohio Ct. App. 1977) (noting transfer of credit hours denied student due to school's loss of accreditation).

¹⁵ Mike Mitka, *Some New Doctors Can't Find Jobs*, AM. MED. NEWS, Mar. 11, 1996 at 1.

The obvious disruptive and detrimental impact of school and program closures on students' educational plans has led the American Medical, American Bar, and American Dental Associations, among others, to promulgate guidelines to mitigate the educational harm and disruption caused by school closures.¹⁶

Students are not the only affected group whose interests must be considered when schools and programs close. Others, especially faculty, but also alumni, donors, and the community at large, are also impacted by the decision to close a school and may share the students' disappointment and loss.¹⁷ Despite the widespread impact the decision to close a college or a program within a college may have on a community, few have legal standing to challenge the decision to close programs.¹⁸

This Article explores causes of action against colleges and universities for closure of degree programs. Part II discusses the financial state of higher education, the prevalence of "downsizing," and the role of accrediting agencies in developing plans to ameliorate the impact of program closures on students. Part III discusses student claims against universities for program closures under various contract and quasi-contract theories. Part IV then describes other affected groups and discusses how imperfectly the law currently protects them from the effects of university downsizing. Finally, Part V criticizes the judicial reluctance to intervene in program closure decisions by granting equitable remedies. Because the harm to students is so great and often not remediable through money damage awards, the availability of injunctive relief and specific performance should be expanded.

Three judicial approaches to student claims based on degree program terminations have emerged.¹⁹ One judicial approach treats the relationship between student and university as merely

¹⁶ See *infra* Section II.B (discussing measures used by schools to mitigate harm to students caused by closures).

¹⁷ See *infra* notes 183-209, 215-218 and accompanying text (recognizing loss to academic community, as well as to students, due to school closure); see also Joseph P. O'Neill, *The Closing of a College / Resolving the Contradictions*, 15 CHANGE 23, 24 (1983) ("In every college closing we studied, the most wrenching problems were securing employment for faculty and determining some equitable form of severance pay for them.").

¹⁸ See *infra* notes 211-214, 219-235 and accompanying text (exploring limited remedies available to larger community when school or program closes).

¹⁹ See *infra* Section III (discussing contractual relationship between school and student).

a semester-long express contract. This approach allows the university to act with impunity and without accountability toward its students and to ignore any responsibility for assisting students in attaining their educational goals once a program closes.²⁰ The second judicial approach creates a broad implied-in-fact contract between student and university and holds that a university may be excused from providing the promised degree program only when it has become impossible to do so.²¹ This rigid approach approximates commercial contract law and favors affected students. By making school responsibilities to students paramount, however, this approach may place the resources of an already financially troubled institution at greater risk and, thus, may cause greater social harm than program closure would. The third approach, formulated in *Beukas v. Board of Trustees of Fairleigh Dickinson University*,²² provides a novel, workable method to judge student claims in light of the university's social value, as well as the amorphous and complex student-university relationship. By characterizing the relationship as an implied-in-law contractual relationship and imposing contract law's good faith and fair dealing obligations upon the university, courts are able to approximate the true nature of the relationship between student and university. *Beukas* requires the university to demonstrate that it reached the decision to close a program in good faith and that it dealt fairly with affected students following that decision.²³ This approach affords students some protection while also allowing the university to protect other societal interests associated with the operation and preservation of a university.²⁴ Moreover, although the injury and disappointment suffered by alumni, donors, and the community when a program or college closes may justifiably be accorded little or no legal recognition, the good-faith approach to student claims in *Beukas* charges the university with the responsibility to act in good faith in

²⁰ See *infra* Section III.B.1 (exploring concept of semester-long contract between university and student).

²¹ See *infra* Section III.B.2 (scrutinizing university and student implied-in-fact contract).

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

²³ *Id.* at 784.

²⁴ See *infra* Section III.B.3 (discussing framework of *Beukas* that allows courts to examine decision to terminate programs and also to balance competing interests).

reaching its decisions and in so doing promotes broader societal interests in the sound operation of a university.

II. THE IVORY TOWER'S TROUBLED FOUNDATION

This Section discusses the prevalence of and underlying reasons for school and program closure. When faced with a shrinking budget, determining which programs to eliminate is a painful, difficult institutional dilemma. Higher education literature discusses the problem and suggests methods of arriving at thoughtful decisions. The literature suggests that with careful deliberation, a university can emerge from a period of downsizing as a stronger and more focused institution. Accrediting agencies recognize that universities must sometimes eliminate programs and encourage universities to make such plans in a manner that affords affected students with some protections.

A. DISMANTLING EDUCATION: RESPONDING TO FINANCIAL CRISES IN EDUCATION

"Downsizing" in higher education has become commonplace.²⁵ Before taking such drastic measures, however, colleges may first try raising tuition in order to generate immediate revenue.²⁶

²⁵ A sense of "crisis" and "decline" in higher education is prevalent. "[H]igher education is purported to be 'in the worst financial shape in the last 50 years.'" Kim S. Cameron & John C. Smart, *Maintaining Effectiveness Amid Downsizing and Decline in Institutions of Higher Education*, 39 RESEARCH IN HIGHER EDUC. 65, 66 (1998). "At least one institution per year has closed its doors over the last decade, including four public institutions." *Id.* The closure rate in higher education "matched or exceeded the business death rate during the early 1980s." *Id.* Faculty layoffs and program terminations have occurred at such prestigious universities as Yale (50 arts and science faculty), MIT (offering buy-outs to 300 faculty members), the University of California System (3500 positions), the University of Maryland (closed 56 academic departments on 11 campuses and reorganized 59 others), San Diego State (147 tenured professors and nine academic departments), Arizona State (200 teaching positions), and Ohio State (500 faculty positions). *Id.* at 67.

²⁶ See Larry L. Leslie, *What Drives Higher Education Management in the 1990's and Beyond?: The New Era in Financial Support*, 10 J. HIGHER EDUC. MGMT. 5, 8 (1995) (noting "primary response to increasing financial pressures"); Healy & Schmidt, *supra* note 4, at A17, A19 (illustrating tuition increases within last 10 years); Julie L. Nicklin, *60% of All Colleges Hit by Cuts in Operating Budget, Survey Shows*, CHRON. HIGHER EDUC., Aug. 5, 1992, at A25 (stating many colleges and universities raise tuition to compensate for operating budget cuts).

Tuition revenue alone cannot support the education machine and raising tuition will rarely suffice.²⁷ Furthermore, a tuition-driven financing plan jeopardizes our prized, democratic principle of broad and equal access to education.²⁸ In recent years, policymakers have shifted to a high-tuition/high-financial-aid paradigm for financing higher education,²⁹ hoping that this model will generate more revenue while maintaining broad access.³⁰ A liberal financial-aid policy, however, is imperfect at ensuring access.³¹ Simply put, some students will be priced out of the college market by tuition prices even with generous financial-aid packages.³² Moreover, tuition increases alone cannot raise sufficient revenue to replace higher education's declining resources.

Instituting "across-the-board cuts"³³ or other cost-containment measures in educational programs is another early response to budgetary shortfalls.³⁴ The theory behind these "horizontal cuts" is that some identifiable, nonessential, or less essential expendi-

²⁷ Leslie, *supra* note 26, at 6-9.

²⁸ See Healy & Schmidt, *supra* note 4, at A17 (showing tuition increases have resulted in some students not continuing their education for financial reasons).

²⁹ See Donald E. Heller, *Student Price Response in Higher Education: An Update to Leslie and Brinkman*, 68 J. HIGHER EDUC. 624, 650 (1997) (studying effect of high-tuition/high-aid model and suggesting that they correlate imperfectly depending on population studied and nature of aid (i.e., loan or grant)).

³⁰ See Leslie, *supra* note 26, at 7-9 (outlining history of high-tuition/high-financial-aid state and federal policy).

³¹ See Heller, *supra* note 29, at 633-34 (showing varying effects of financial aid depending upon nature of aid and population studied). *But see* Leslie, *supra* note 26, at 10 ("Public higher education enrollments have maintained themselves and have even grown while tuition has increased substantially beyond inflation.").

³² See James C. Hearn et al., *Region, Resources, and Reason: A Contextual Analysis of State Tuition and Student Aid Policies*, 37 RESEARCH IN HIGHER EDUC. 241 (1996) (compiling national study of pricing trends including effects of high-aid/high-tuition model); cf. Leo Reisberg, *Survey Finds Growth in Tuition 'Discounting' by Private Colleges*, CHRON. HIGHER EDUC., Mar. 13, 1998, at A52 ("Many colleges are setting a price that they know few students will pay.").

³³ The metaphors described by Gumpert related to budget cutbacks initially suggest healthfulness and efficiency: "belt-tightening," "trim the fat," "streamlining," "trimming deadwood," and cutting "weak" and "nonessential" programs. Patricia J. Gumpert, *The Contested Terrain of Academic Program Reduction*, 64 J. HIGHER EDUC. 283, 289-90 (1993). As the crisis worsens, the patient submits to "deeper cuts," as the surgeon "cut[s] to the bone" and "amputat[es] healthy limbs." *Id.* These "surgical strikes" are viewed as lifesaving measures. *Id.* at 290.

³⁴ See Kettinger & Wertz, *supra* note 4, at 13 ("Cornell, Chicago, Michigan and Stanford have established vast cost-containment efforts.").

tures hide within the budgets of each department which each department can identify and cut when its budget is reduced.³⁵ When cost-containment measures are imposed irrationally, especially when imposed in a "top-down" management style without collaboration, the hardships of the measures may be uniquely disproportionate on certain units or programs.³⁶

When financial problems persist, the institution may conclude that simple cost-containment measures are insufficient³⁷ or that continued incremental, horizontal cuts jeopardize the institution's mission and standards.³⁸ The institution may decide instead to implement deep, selective cuts.³⁹ This shift from horizontal to vertical cuts necessarily means that some programs will be disproportionately impacted or even terminated. Typically, the institution establishes a procedure to evaluate its programs before selectively terminating, merging, or downsizing its peripheral programs in order to save its core programs.⁴⁰ Administrators

³⁵ Leslie, *supra* note 26, at 14 (urging devolution of budget cutting process to operating units to achieve most effective cuts).

³⁶ Gary Rhoades, *Rethinking Restructuring in Universities*, 10 J. HIGHER EDUC. MGMT. 17, 18 (Winter/Spring 1995); Leslie, *supra* note 26, at 14-15.

³⁷ See Slaughter, *supra* note 4, at 32 (noting while faculty resist selective cuts and prefer across-the-board cuts and even retrenchment, restructuring is superior for institution).

³⁸ KENNETH P. MORTIMER & MICHAEL L. TIERNEY, *THE THREE "R'S" OF THE EIGHTIES: REDUCTION, REALLOCATION AND RETRENCHMENT* 53 (1984) ("[C]ontinuation of the cut, squeeze, and trim mentality will lead to the gradual deterioration of quality in postsecondary institutions. We consider it imperative that each institution develop procedures and criteria for selected program closures, reductions in force, and internal reallocations.").

³⁹ *Id.* (commenting on difficulty of seeing how institutions can escape necessity of continued expenditure control policies); see also WILLIAM BRAND SIMPSON, *COST CONTAINMENT FOR HIGHER EDUCATION: STRATEGIES FOR PUBLIC POLICY AND INSTITUTIONAL ADMINISTRATION* 84 (1991) (describing option of institutional merger followed by closure of one institution); Cameron & Smart, *supra* note 25, at 66 (acknowledging that downsizing is "prevalent condition in colleges and universities").

⁴⁰ See Board of Community College Trustees for Baltimore County-Essex Community College v. Adams, 701 A.2d 1113, 1115 (Md. Ct. Spec. App. 1997), *cert. denied*, 702 A.2d 290 (Md. 1997) (describing "Four Flags for Andy" decisionmaking process—after program received four negative votes from committee it was sacrificed to college president, "Andy," and was terminated).

The University of Hawaii employed a particularly onerous method of setting priorities:

The University of Hawaii has pitted teachers against researchers in an effort to decide what programs to cut in the university's continuing budget crisis, administrators acknowledged.

....

... Smith [Interim Executive Vice Chancellor] said that he asked the research and instruction camps last summer to hunt for budget cuts on each other's turf.

view selective, vertical cuts, as opposed to horizontal budget cuts, as an opportunity to restructure the institution and to protect the quality of flagship programs or those identified as central to the institution's mission.⁴¹

Restructuring, as opposed to traditional retrenchment,⁴² became the watchword of higher education in the 1980s.⁴³ "Restructuring meant [that colleges and universities were] reallocating internal resources so that some fields, colleges, personnel, and functions received more resources while other fields, colleges, faculties, and functions received none or were cut."⁴⁴ The shift from the concept

. . . .

It makes more sense, he said, for the university to look at completely eliminating some programs if that is what it takes to retain quality in those that survive.

Walter Wright, *Turmoil Erupts over University Cutback Rumors*, HONOLULU ADVERTISER, Mar. 12, 1998, at A1, A5.

⁴¹ See Banchemo, *supra* note 6, at 1 ("We have taken a careful look at all of our educational programs and we believe we should focus our resources on those areas that are central to the mission of the university and where we have a competitive edge."); Kettinger & Wertz, *supra* note 4, at 13 (stating Columbia University institutes selective excellence programs which divert resources from "mediocre programs"); Molly Sinclair, *GWU Closing Paralegal Program*, WASH. POST, Oct. 13, 1988, at D3 (stating "program has run up a tremendous deficit in recent years and is not worthy of keeping afloat" in describing decision of GWU to close paralegal program because of its financial deficit) (internal quotes omitted). See generally, Mortimer & Tierney, *supra* note 38, at 29-35 (describing manifestation of administrative intent to resort to greater internal reallocations).

⁴² Retrenchment requires the institution to declare a financial exigency and then to begin laying off faculty under preestablished rules. Slaughter, *supra* note 4, at 31. The concept of retrenchment is criticized as protecting jobs but not facilitating the redefinition of the resource-poorer institution through prioritizing and restructuring. *Id.*; see also AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *On Institutional Problems Resulting from Financial Exigency, Some Operating Guidelines*, in POLICY DOCUMENTS AND REPORTS, 128 (1990) (providing guidelines for reduction of instructional and research programs); Gary Rhoades, *Retrenchment Clauses in Faculty Union Contracts: Faculty Rights and Administrative Discretion*, 64 J. HIGHER EDUC. 312, 313 (1993) (stating most recent retrenchment clauses give administration discretion to select among programs).

⁴³ See, e.g., *In re Antioch Univ.*, 418 A.2d 105, 113 (D.C. 1980) (denying law school right to exercise complete control over law school funds where survival of law school in question); *Goode v. Antioch Univ.*, 544 A.2d 704, 707 (D.C. 1988) (finding student may maintain action for money damages against law school for breach of contract); *Behrend v. State*, 379 N.E.2d 617, 622 (Ohio Ct. App. 1977) (finding university could be liable for decision to close school of architecture due to budget cuts); *Beukas v. Board of Trustees of Fairleigh Dickinson Univ.*, 605 A.2d 776, 784 (N.J. Super. Ct. Law Div. 1991) (approving decision to close dental school due to financial exigency), *aff'd*, 605 A.2d 708 (N.J. Super. Ct. App. Div. 1992).

⁴⁴ Slaughter, *supra* note 4, at 32.

of retrenching personnel in response to a financial exigency to restructuring the institution meant that more programs within the institution were vulnerable to elimination:

Academic program reduction has become a common retrenchment strategy for coping with the economic recession of the early 1990s, especially for the public research universities struggling with the tripartite mission of service, teaching, and research. . . . In these times of fiscal constraint, long-existing academic programs with tenured faculty can be targeted for reduction or dismantling, as occurred in the 1980s with occasional retrenchment of semiprofessional schools such as nursing and education as well as departments such as geography and sociology.⁴⁵

While restructuring necessarily means that some programs may close,⁴⁶ some believe that restructuring provides institutions of higher education with the ability to avoid generalized decay during austere periods and allows the institution to emerge from a period

⁴⁵ Gumport, *supra* note 33, at 283. The 1980s marked the beginning of this new retrenchment methodology:

In the 1980s, there were no more declarations of financial exigency, no more across-the-board cuts, no more firing the most junior first, the most senior last. Rather than using formal statements of financial exigency to prove that colleges and universities could not meet their annual operating budgets without firing faculty, college and university managers used projected economic difficulties to justify firing faculty. By the end of the 1980s . . . managers were able to say that restructuring was imperative because an internal reallocation of resources was necessary for the institution to achieve "world class" status. In the early 1980s, administrators cut whole programs so as not to interfere with tenure rights or academic expertise that defined specific areas; they refrained from cutting subprograms or single persons. By the end of the 1980s, administrators began to cut selectively within programs.

Slaughter, *supra* note 4, at 32.

⁴⁶ See MORTIMER & TIERNEY, *supra* note 38, at 53 (considering moves to increase student-faculty ratios); Rhoades, *supra* note 36, at 28-29 (suggesting that current restructuring efforts do not attempt to redefine institution and therefore yield little actual change or opportunity to improve institutional productivity, quality, and resources); Slaughter, *supra* note 4, at 32 (describing nature of restructuring process).

of declining resources positioned as a more focussed institution.⁴⁷

The process of deciding whether and which programs to cut necessarily impacts students, administrators, faculty, and others.⁴⁸ Literature from higher education management suggests that institutions of higher education are best served when the institutions develop criteria for decisionmaking that "address the tension between short-term revenue issues (survival) and the more long-term aspirations for achieving excellence in higher education."⁴⁹ Various methods have been identified to formulate reduction plans and identify programs to cut.⁵⁰ Most researchers agree that program reduction decisions are received more favorably when the process of establishing criteria involves collaborative, thoughtful deliberation.⁵¹ Some educators caution that if the institution

⁴⁷ See Cameron & Smart, *supra* note 25, at 80 (analyzing impact of declining resources on "organizational effectiveness"); Kenneth P. Mortimer et al., *The Project on Reallocation: An Executive Summary*, CTR. FOR STUDY OF HIGHER EDUC., PENN. STATE UNIV. (1985), *microformed on* ERIC Reports (ERIC Document Reprod. Serv.) (advocating flexibility); Rhoades, *supra* note 36. Some fear that focussing on centrality, enrollment, and excellence as restructuring criteria may preserve traditional and conservative educational programs and result in elimination of more innovative programs as well as those that serve minorities and women. Slaughter, *supra* note 4, at 38-39.

⁴⁸ See Cameron & Smart, *supra* note 25, at 82-83 (arguing that successfully downsizing an institution of higher education requires "addressing (1) the satisfaction and morale of students, faculty and administrators . . ., (2) the academic and scholarly productivity and development . . ., and (3) the responsiveness of the institution to key external constituencies"); Gerald R. Kissler, *Who Decides Which Budgets to Cut?*, 68 J. HIGHER EDUC. 427, 428 (1997) (studying decisionmaking processes employed to decide which college programs to close); Leslie, *supra* note 26, at 12-13 (describing competing interests among students, legislators, faculty and "organizational turbulence brought on by major changes in resource patterns"); Slaughter, *supra* note 4, at 32-33 (noting increase in administrative authority to restructure and diminished power of the faculty).

⁴⁹ Cameron & Smart, *supra* note 25, at 80; see also Marilyn K. Brown, *Developing and Implementing a Process for the Review of Nonacademic Units*, 30 RESEARCH IN HIGHER EDUC. 89 (1989) (describing evaluative models to assess relative value of academic support units to institution); Gumport, *supra* note 33, at 204 (suggesting that decision making regarding program closure may be based on power alignment within institution and administration); Slaughter, *supra* note 4, at 33-36 (identifying typical criteria: enrollment, cost, productivity, centrality, excellence, labor-force value, and diversity).

⁵⁰ See Slaughter, *supra* note 4, at 32-36 (describing typical restructuring criteria); see also Gumport, *supra* note 33, at 284 (detailing struggle during university budget cuts); Kissler, *supra* note 48, at 450-56 (illustrating factors in formulating reduction plans); MORTIMER & TIERNEY, *supra* note 38 (reviewing responses of colleges and universities when faced with reduced financial resources).

⁵¹ See Rhoades, *supra* note 36, at 25 ("Too often, institutions are so quick to jump into the process of assessing and prioritizing programs, that they bypass the critical process of engaging in open, extended, and inclusive discussions about the future direction of the

relies heavily on traditional criteria such as centrality, cost, productivity, enrollment, and excellence, the resulting decision may disproportionately impact new and innovative programs as well as those serving women and minorities.⁵²

When a budget crisis becomes sufficiently severe, the entire institution may begin to plan for its own extinction⁵³ or transformation.⁵⁴ In a private institution, such planning occurs when cost-saving measures are insufficient to stave off creditors.⁵⁵

institution."); see also Cameron & Smart, *supra* note 25, at 81 (stating successful downsizing requires "involvement of organization members as well as customers in the planning and implementation of the downsizing or cutback process"); Slaughter, *supra* note 4, at 38-39 (criticizing abrupt, ad hoc nature of many decisions fostered by unexpected loss of legislative funding at public institutions); cf. Kissler, *supra* note 48, at 455-56 (noting program reduction's impact on institutional morale and difficulty of being inclusive at large campus).

⁵² Sheila Slaughter, *Retrenchment in the 1980s: The Politics of Prestige and Gender*, 64 J. HIGHER EDUC. 250, 269-75 (1993); Gumpert, *supra* note 33. The criteria may also devalue the humanities:

No such problem would exist if humanists were not embarrassed to proclaim their traditional eminence in the academy. Humanists willing to stand up for their high relevance have only to assert both "Yes, we too need money—and more than we're getting—to support our activities" and "No, that doesn't mean we accept wealth as the paramount human and educational value." Not having done so, humanists and their disciplines have come to be construed as a dispensable luxury. The scandal is that, collectively, by their silence in general, as well as in faculty meetings and administrative posts, humanists have acquiesced.

James Engell & Anthony Dangerfield, *The Market-Model University—Humanities in the Age of Money*, HARV. MAG., May-June 1998, at 48, 55.

⁵³ See Cameron & Smart, *supra* note 25, at 66 ("At least one institution per year has closed its doors over the last decade, including four public institutions." (citations omitted)); Harriet M. King, *The Voluntary Closing of a Private College: A Decision for the Board of Trustees?*, 32 S.C. L. REV. 547, 547 n.3 (1981) (describing frequency of college closings in 1960s and 1970s).

⁵⁴ See SIMPSON, *supra* note 39, at 83-84 (noting options of merger and closure for institutions needing to make financial cuts); Gillian Rowley, *Mergers in Higher Education: A Strategic Analysis*, 51 HIGHER EDUC. Q. 251 (1997) (surveying recent mergers in higher education); see also *Steenbeck v. University of Bridgeport*, 668 A.2d 688, 690 (Conn. 1995) (noting surrender of control by board of trustees to academic arm of Unification Church in exchange for loan of \$50.5 million); Schmidt, *supra* note 6, at A35 (describing town's anger at plan to move Peru State College).

⁵⁵ See *Craig v. Forest Inst. of Prof'l Psychology*, 713 So.2d 967, 971-72 (Ala. Civ. App. 1997) (discussing closure of Huntsville campus); *Mercer Univ. v. Smith*, 371 S.E.2d 858, 859-60 (Ga. 1988) (noting merger agreement and closure of one campus); *Miller v. Alderhold*, 184 S.E.2d 172, 173 (Ga. 1971) (discussing sale of school's assets); see also Edward A. Johnson & Kent M. Weeks, *To Save a College: Independent College Trustees and Decisions on Financial Exigency, Endowment Use, and Closure*, 12 J.C. & U.L. 455, 475-86 (1986)

Public colleges also close from time to time, principally when lawmakers determine that other more essential state services should be preserved.⁵⁶

The causes of financial decline are varied and complex. The financial health of institutions of higher education follows the country's economic cycle⁵⁷ but is also directly affected by shifting and declining enrollment patterns and by changes in state and federal education funding policies.⁵⁸ As one researcher warned, "Higher education faces a troubling financial future. Contributing to this problem are a decline in governmental assistance, unfavorable economic conditions, greater competition for grants and gifts, and, in some cases, decline in enrollment."⁵⁹ Budget crises are sufficiently widespread and frequent⁶⁰ to draw extensive comment

(discussing legal duties of college boards of trustees with regard to closing the institution); O'Neill, *supra* note 17 (describing role of faculty, administration, and board in decision and process of closing a college and describing closures of Immaculate Heart College (California) and Windham College (Vermont)).

⁵⁶ See *Aase v. State*, 400 N.W.2d 269, 271 (S.D. 1987) (upholding legislative action closing University of South Dakota at Springfield).

⁵⁷ Leslie, *supra* note 26, at 5.

⁵⁸ Richard A. Easterlin, *Demography is Not Destiny In Higher Education*, in SHAPING HIGHER EDUCATION'S FUTURE: DEMOGRAPHIC REALITIES AND OPPORTUNITIES 1990-2000 135 (1989) [hereinafter SHAPING HIGHER EDUCATION]; Alexander W. Astin, *The Changing American College Student: Thirty-Year Trends, 1966-96*, 21 REV. OF HIGHER EDUC. 115 (1998); see Carol Frances, *Uses and Misuses of Demographic Projections: Lessons for the 1990s*, in SHAPING HIGHER EDUCATION, at 142 (discussing misuse of demographic projections in 1980s and suggesting better planning for 1990s); Kettinger & Wertz, *supra* note 4, at 13 (noting decline in government assistance, which causes cost shift from public sector to students); Leslie, *supra* note 26, at 6-11 (noting market nature of higher education funding); MORTIMER & TIERNEY, *supra* note 38, at 8 (describing the challenges of the 1980s and 1990s: "What will make the forthcoming era truly unique is that it will combine shrinking enrollments with expenditure pressures that threaten to outrace the growth in institutional revenues.").

⁵⁹ Kettinger & Wertz, *supra* note 4, at 13.

⁶⁰ "The several state financial crises of the 1980s and 1990s powerfully affected public institutions. The recession of 1983 was very severe, as was that of 1991-92, when two-thirds of public research universities faced cutbacks." Slaughter, *supra* note 4, at 32. Slaughter notes that the budget crises in public colleges resulted in a shift in decisionmaking authority from the faculty to the administration and university president. This concentration of authority made college presidents more accountable to the legislature and facilitated their ability to sacrifice programs unilaterally. *Id.* at 33; see also Kissler, *supra* note 48, at 430-32 (reviewing views of Slaughter and others while attempting to discover who makes budget decisions).

in educational literature,⁶¹ and the response to economic crises is the subject of frequent legal disputes.⁶² In the recent 1991-92 national recession, two-thirds of public research universities faced budget cutbacks sufficiently severe to require administrators to make selective cuts in order to preserve their institutions.⁶³ Since 1989, forty percent of college institutions have eliminated academic programs in response to budget crises.⁶⁴

Researchers warn that the crisis caused by declining resources for higher education will persist and that closure of entire colleges or certain degree programs likely will continue as either a bleak

⁶¹ See, e.g., SIMPSON, *supra* note 39, at 84-85 (discussing budgetary necessity of choosing different areas of excellence on different campuses); Hanna Ashar & Jonathan Z. Shapiro, *Are Retrenchment Decisions Rational? The Role of Information in Times of Budgetary Stress*, 61 J. HIGHER EDUC. 121, 124 (1990) (examining correlation between performance data and size of faculty during time of budgetary constraint); Gumpert, *supra* note 33, at 284 (investigating program reduction as struggle to control professional work); Judith Dozier Hackman, *Power and Centrality in the Allocation of Resources in Colleges and Universities*, 30 ADMIN. SCI. Q. 61, 61 (1985) (introducing theory of resource allocation based on centrality concept); Kettinger & Wertz, *supra* note 4, at 13 (discussing several universities' cost containment proposals); Kissler, *supra* note 48, at 430-32 (summarizing prior studies); Johnson & Weeks, *supra* note 55, at 456 (exploring legal issues of trustees in times of budgetary cutbacks); Leslie, *supra* note 26, at 8 (arguing funding changes were foreseeable but led to surprising changes in operating functions); MORTIMER & TIERNEY, *supra* note 38, at 1 (reviewing response of institutions of higher education to changes in demographics, institutional costs, and student preferences); O'Neill, *supra* note 17, at 23 (discussing definition of college in face of institution's closure); Rhoades, *supra* note 36, at 17-18 (suggesting budget cuts do not require substantial restructuring but marginal reallocation); Slaughter, *supra* note 4, at 31 (examining criteria used to restructure higher education).

⁶² See, e.g., *Peretti v. State*, 777 P.2d 329, 333 (Mont. 1989) (denying students' action for damages for closure of school of aviation technology); *Koenig v. Southeast Community College*, 438 N.W.2d 791, 795 (Neb. 1989) (upholding closure of community college campus); *Galton v. College of Pharm. Sciences, Columbia Univ.*, 332 N.Y.S.2d 909, 912 (Sup. Ct. 1972) (denying temporary injunction to prevent closure of pharmaceutical college); *Eden v. Board of Trustees of the State Univ. of N.Y.*, 426 N.Y.S.2d 197, 200 (Ct. Cl. 1980) (denying liability for closure of school of podiatric medicine at State University of Stony Brook); *Behrend v. State*, 379 N.E.2d 617, 622 (Ohio Ct. App. 1977) (holding students had cause of action under implied contract for closure of school of architecture).

⁶³ Gumpert, *supra* note 33, at 283; Kissler, *supra* note 48, at 428; Rhoades, *supra* note 36, at 17; Slaughter, *supra* note 4, at 32-33.

The early 1970s and early 1980s also resulted in shrinking educational programs. Slaughter, *supra* note 4 at 32-33. While educational recessions may be cyclical, policy shifts in the 1990s toward a "high-tuition/high-student-aid" self-sufficiency model make the return of broad government support following economic recovery unlikely. Leslie, *supra* note 26, at 10-11.

⁶⁴ Rhoades, *supra* note 36, at 17.

reality or at least a perennial threat,⁶⁵ unsettling students,

⁶⁵ See *Bill Reignites Debate Over Law Schools*, TULSA TRIB. & WORLD, Mar. 10, 1993, at A19 (discussing bill introduced to close one of state's two law schools); *Bridgeport College Officials Plan to Move Law School*, HARTFORD COURANT, Dec. 10, 1991, at C7 (reporting on proposal to move University of Bridgeport's law school to Quinnipiac because of severe financial difficulties); William Douglas, *CUNY Officials See Layoffs Ahead*, NEWSDAY, Jan. 18, 1989, at 24 (stating Governor Mario Cuomo plans extensive layoffs at CUNY but not considering school closures previously proposed); Roger Flaherty, *U. of I. to Eliminate 10 Degree Programs*, CHI. SUN-TIMES, Sept. 25, 1992, at 18 (discussing University of Illinois plan to drop 10 graduate and undergraduate degree programs at two campuses and to evaluate 17 more); John Funk, *Regents Seek the Right to Limit Spending on Doctorates*, PLAIN DEALER (Cleveland, Ohio), Jan. 13, 1995, at B1 (reporting that regents desire authority to cap spending on doctoral programs, to review graduate programs for elimination, and to close some by December 1995 and noting "engineering schools, law schools and medical schools are also slated for review, and possible closing in the next few years"); John Funk, *Study Focuses on Law School Standards*, PLAIN DEALER, Apr. 24, 1996, at B1 (reporting on recommendation to terminate state funds to two state law schools unless academic standards are raised); Arnold Hamilton, *Plans for Anita Hill Professorship Draw Fire: Her Opponents Suggest Closing OU Law School*, SAN DIEGO UNION & TRIB., Dec. 3, 1995, at A33 (reporting on protest over decision to endow professorship named for Anita Hill); Gail Kinsey Hill, *Colleges Offer Grim Lessons on Budget*, PORTLAND OREGONIAN, June 9, 1992, at A1 ("[Chancellor] Bartlett also directed campus leaders to consider the closure of high-cost professional schools, including the University of Oregon's law school and Oregon State University's veterinary and pharmacy schools."); Frank James, *College Cutback Plan Criticized*, CHI. TRIB., Sept. 29, 1992, § 2, at 6 (noting Northern Illinois University School of Law targeted for closure, and 190 other programs recommended for elimination review in state report); Frank James, *Crusader Sets Stage for Showdown on College Overhaul*, CHI. TRIB., Jan. 2, 1994, § 2, at 3 (discussing possibility that Illinois will close "dozens of academic programs on the state's 12 university campuses because they were no longer educationally or economically justified"); C. David Kotok, *Kerrey Says He Backs Stronger Education*, OMAHA WORLD-HERALD, Sept. 15, 1988, at 21 (discussing former governor's refusal to advocate closure of state's law and medical schools but support of closure of colleges of pharmacy and nursing at Lincoln, Nebraska); *Lawmakers Back Off Plan to Close Law, Dental Schools*, CINCINNATI ENQUIRER, Dec. 16, 1993, at C1 (reporting Kentucky's legislature backed off plan to close state's law and dental schools); Cathy Milam, *Roberts to Close Hospital, Medical School*, TULSA TRIB. & WORLD, Sept. 14, 1989, at A1 (announcing closure of Oral Roberts University medical school); Vincent S. Morris, *Lawmaker Plans Fund Cut to Close UDC Law School*, WASH. TIMES, June 25, 1997, at C7 (reporting proposed closure of UDC law school); Steve Schmidt, *National University's Law School May Close*, SAN DIEGO UNION & TRIB., July 9, 1993, at B2 (reporting on possible closure of law school); Molly Sinclair, *GWU Closing Paralegal Program*, WASH. POST, Oct. 19, 1988, at D3 (announcing George Washington Law School plan to close paralegal program that ran at deficit for years and was "not worthy of keeping afloat"); Joel Stashenko, *SUNY Nominee Assailed for Comments on System*, BUFFALO NEWS, Aug. 20, 1995, at A28 (reporting on regent nominee's call for closing medical and law schools).

faculty, and communities for years to come.⁶⁶ Scholars now suggest that higher education is undergoing long-term, structural changes and that "colleges must close programs and reduce services in order to adapt to a new, lower level of resources when the reductions are permanent."⁶⁷

B. SCHOOL CLOSURE PLANS: MITIGATING STUDENT HARM

Schools deciding to close or terminate a degree program often make substantial efforts to help students enroll in alternative educational programs.⁶⁸ There are many reasons to develop comprehensive plans to assist students in continuing their education. An institution may view assisting displaced students as part of its continuing commitment to its educational mission, as a moral obligation, or as a social responsibility arising out of the relationship it has enjoyed with the students and from the students' vulnerabilities. Pragmatically, the school may view efforts to assist students as a way to preserve its reputation, even in light of the termination of a program. In addition, reducing the extent of student damages may prove a sound legal strategy. Certainly comprehensive transition plans are noted with approval by courts.⁶⁹

⁶⁶ See Kettinger & Wertz, *supra* note 4, at 13 ("Higher education faces a troubling financial future. Contributing to this problem are a decline in governmental assistance, unfavorable economic conditions, greater competition for grants and gifts, and, in some cases, decline in enrollment."); Leslie, *supra* note 26, at 6 ("There are important new developments in American higher education and there are outgrowths of the past suggesting that the good times may not return, at least not in the foreseeable future and not to the degree they have in the past.").

⁶⁷ Kissler, *supra* note 48, at 428.

⁶⁸ See *Beukas v. Board of Trustees of Fairleigh Dickinson Univ.*, 605 A.2d 770, 784 (N.J. Super. Ct. Law Div. 1991) ("Nor is there any dispute that defendants acted other than in good faith both in giving adequate notice of their intentions to close the college and in arranging transfer and admission to other dental schools in the area in order to avoid any disruption in their education."), *aff'd* 605 A.2d 708 (N.J. Super. Ct. Law Div. 1991).

⁶⁹ See *Beukas*, 605 A.2d at 709 ("The University, faced with a substantial budgetary shortfall . . . acted reasonably and humanely in arranging for transfers . . . to other dental schools and in subsidizing any differences in tuition.").

Accrediting agencies⁷⁰ promulgate specific standards regarding all aspects of educational programs.⁷¹ When a program is forced to close, many accrediting agencies have promulgated standards that require the closing program to develop a closure plan that facilitates orderly closure and minimizes disruption of student education.⁷² For example, the American Bar Association (ABA) requires closing law schools to adopt a closure plan and asks school officials to "use their best efforts to assist students in transferring to, or acquiring visiting status at, another ABA approved law school for completion of their degree requirements."⁷³ Until closure, an ABA school must maintain adequate facilities and programming designed to qualify graduates for admission to the bar.⁷⁴ Similarly, the American Medical Association (AMA), together with closing schools, attempts "to facilitate the rapid placement of students who are in good academic standing in other LCME-accredited [Liason

⁷⁰ Colleges and programs within colleges may voluntarily seek accreditation from a variety of national accrediting bodies. See generally Carolyn Prager, *Editor's Notes, ACCREDITATION OF THE TWO-YEAR COLLEGE* 1-3 (Carolyn Prager ed., 1993) (introducing essays which discuss accreditation at two-year colleges); UNDERSTANDING ACCREDITATION: CONTEMPORARY PERSPECTIVES ON ISSUES AND PRACTICES IN EVALUATING EDUCATIONAL QUALITY (Kenneth E. Young et al. eds., 1983) (compiling various essays discussing past, current, and future processes and standards of accreditation). Many professions require graduation from an accredited program as prerequisite to practice. In those cases, loss of accreditation is devastating to the school and the student. See, e.g., *Behrend v. State*, 379 N.E.2d 617 (Ohio Ct. App. 1977) (discussing loss of accreditation at school of architecture).

⁷¹ Accreditation generally involves both costs and benefits to the school. It is an expensive undertaking involving the costs of accreditation and maintaining the standards set by the external evaluators. Charles R. Reidlinger & Carolyn Prager, *Cost-Benefit Analyses of Accreditation*, in ACCREDITATION OF THE TWO-YEAR COLLEGE, *supra* note 70, at 39.

⁷² AMERICAN BAR ASS'N, STANDARDS FOR APPROVAL OF LAW SCHOOLS, CLOSURE OF LAW SCHOOL, Rule 20 (1997); AMERICAN DENTAL ASS'N, GUIDELINES FOR PREPARING PHASEOUT REPORTS BY INSTITUTIONS TERMINATING EDUCATIONAL PROGRAMS ACCREDITED BY THE COMMISSION (1993); COMMISSION ON DENTAL ACCREDITATION, AMERICAN DENTAL ASS'N, TERMINATION OF EDUCATIONAL PROGRAMS ACCREDITED BY THE COMMISSION 34 (1997); HOUSE OF DELEGATES, AMERICAN MED. ASS'N, PROTECTION OF MEDICAL STUDENTS IN THE EVENT OF MEDICAL SCHOOL CLOSURE OR REDUCTION IN ENROLLMENT, CME Rep. 4-A-97 (June 1997); NATIONAL ARCHITECTURAL ACCREDITING BOARD, 1998 CONDITIONS AND PROCEDURES, ACCREDITING PROCEDURES FOR DIFFERENT TYPES OF PROGRAMS 24 (1998).

⁷³ AMERICAN BAR ASS'N, *supra* note 72, Rule 20(c)(4). The ABA encourages its member schools to accept such students. *Id.*; see also *Goode v. Antioch Univ.*, 544 A.2d 704 (D.C. 1988) (finding student may still be entitled to money damages despite approved closure plan formulated by university in collaboration with accrediting authority).

⁷⁴ AMERICAN BAR ASS'N, *supra* note 72, Rule 20(5).

Committee on Medical Education] programs so they can graduate on time."⁷⁵ The American Dental Association (ADA) explains in its policy guidelines that the closing institution "has moral and ethical obligations to meet the commitment and responsibility it assumes when it matriculates students into the program."⁷⁶

The fact that accrediting agencies have promulgated guidelines for program terminations belies the image of stability, tradition, and enduring permanence schools attempt to foster.⁷⁷ This fact, as well as the disclaimer buried in most college catalogs,⁷⁸ offers little warning to students that their college degree program may not withstand the next budgetary assault.

III. THE STUDENT-UNIVERSITY CONTRACT

This Section discusses the multi-faceted and ill-defined university-student relationship. Some aspects of it are analogous to adhesionary consumer contracts, yet the university also stands in loco parentis to students. In addition, the university has broad social responsibilities and high social value. Courts face difficulty finding a unifying theory—let alone a contract theory—by which to define the student-university relationship. When an institution downsizes and eliminates academic programs, the interests of the university, the community, and the student collide, and courts struggle to achieve just results without an adequate legal theory from which to draw guidance.

⁷⁵ HOUSE OF DELEGATES, *supra* note 72, at 2.

⁷⁶ COMMISSION ON DENTAL ACCREDITATION, *supra* note 72, at 34. The National Architectural Accrediting Board (NAAB) requires that "programs that intend to close must maintain their compliance with NAAB Conditions. During the phase-out period, students who enrolled in the accredited degree program must be able to complete their entire course of study, with all the necessary resources, as accredited by the NAAB." NATIONAL ARCHITECTURAL ACCREDITING BOARD, *supra* note 72, at 76.

⁷⁷ One need only think of the typical college to understand how surprised students are by a decision to terminate a degree program. The school's architecture, its mature, overgrown vegetation, and its pride in enduring traditions suggest to students that the school will not change substantially or close during the student's brief enrollment. As one court commented, "Fenn has 'built a monument more lasting than bronze.'" *Fenn College v. Nance*, 210 N.E.2d 418, 421 (Ohio Ct. C.P. 1965) (paraphrasing the Roman poet Horace) (adjudicating transfer of college assets to state university).

⁷⁸ *Cf.* David Davenport, *The Catalog in the Courtroom: From Shield to Sword?*, 12 J.C. & U.L. 201, 211 (1985) (discussing effect of disclaimers on contract claims).

A. THE STUDENT-UNIVERSITY RELATIONSHIP

Affected students often challenge an institution's decision to close their degree program before conferral of a degree or to phase the program out, thereby compromising its overall quality.⁷⁹ Like the decision to close or phase out a program, unanticipated and substantial tuition hikes similarly may disrupt the educational goals of students and therefore face similar legal challenges.⁸⁰

The potential for student injury is manifest when schools terminate degree programs. Students choose schools for social, academic, economic, and reputational reasons.⁸¹ Since neither

⁷⁹ See, e.g., *Peretti v. Montana*, 464 F. Supp. 784 (D. Mont. 1979) (concerning closure of aviation school), *rev'd on other grounds*, 661 F.2d 756 (9th Cir. 1981), *state proceedings*, *Peretti v. Montana*, 777 P.2d 329 (Mont. 1989) (reversing award of damages and holding state immune from suit for damages based upon implied contracts); *Craig v. Forest Inst. of Prof'l Psychology*, 713 So. 2d 967 (Ala. Civ. App. 1997) (discussing closure of graduate level psychology program); *Goode v. Antioch Univ.*, 544 A.2d 704 (D.C. 1988) (discussing law school closure); *Koenig v. Southeast Community College*, 438 N.W.2d 791 (Neb. 1989) (regarding closing of Fairbury campus); *Beukas v. Board of Trustees of Fairleigh Dickinson Univ.*, 605 A.2d 708 (N.J. Super. Ct. Law Div. 1991) (noting closure of dental school), *aff'd*, 605 A.2d 776 (N.J. Super. Ct. App. Div. 1992); *Vought v. Teachers College, Columbia Univ.*, 511 N.Y.S.2d 880 (App. Div. 1987) (noting failure to offer combined degree program promised in advertisement); *Eden v. Board of Trustees of the State Univ. of N.Y.*, 374 N.Y.S.2d 686 (App. Div. 1975) (discussing closure of school of podiatric medicine); *Galton v. College of Pharm. Sciences, Columbia Univ.*, 332 N.Y.S.2d 909 (Sup. Ct. 1972) (noting closure of school of pharmaceutical science); *Aase v. State*, 400 N.W.2d 269 (S.D. 1987) (regarding closing of Springfield campus); see also *Claudia G. Catalano*, Annotation, *Liability of Private School or Educational Institution for Breach of Contract Arising From Provision of Deficient Educational Instruction*, 46 A.L.R. 5th 581 (1997) (discussing liability of schools).

⁸⁰ See, e.g., *Basch v. George Wash. Univ.*, 370 A.2d 1364 (D.C. 1977) (rejecting challenge to abrupt and marked tuition increase at medical school); *Eisele v. Ayers*, 381 N.E.2d 21 (Ill. App. Ct. 1978) (rejecting medical students' challenge to 57% tuition increase). See generally Special Report, *Anxiety Over Tuition: A Controversy in Context*, CHRON. HIGHER EDUC., May 30, 1997, at A10-19 (tracking 15-year trend of tuition increases and accompanying hardships on students); MORTIMER & TIERNEY, *supra* note 38, at 10 ("Many of the studies of tuition sensitivity have found that an increase in tuition decreases the probability that a student will enroll."); Robert R. DeKoven, Comment, *Challenging Educational Fee Increases, Program Termination and Deterioration, and Misrepresentation of Program Quality: The Legal Rights and Remedies of Students*, 19 CAL. W. L. REV. 467, 483-87 (1983) (discussing history of student lawsuits to freeze tuition hikes or recoup payments); Annotation, *Increase in Tuition As Actionable in Suit By Student Against College*, 99 A.L.R. 3d 885 (1980) (discussing actions by students against school for tuition increases).

⁸¹ See *Galton*, 332 N.Y.S.2d at 912 (noting "the prestigious name of 'Columbia University' which in some cases was the deciding factor in their choosing to study and teach at the College"); Meir G. Kohn et al., *An Empirical Investigation of Factors Which Influence College-*

college degrees nor schools are fungible, students are understandably disappointed by an administrative decision to terminate their degree program. In some cases, students may be deprived entirely of the opportunity to complete their degrees when a school closes.⁸² There simply may be no other acceptable alternative for some students when an institution closes.⁸³

When students prevail, damage awards may be measured⁸⁴ in terms of reliance,⁸⁵ restitution,⁸⁶ and expectation⁸⁷ interests. Under restitution theory, the court returns to the students payments they made to the school, on the theory that the school received an undeserved benefit, having failed to meet its obligations to the students.⁸⁸ Using reliance interest analysis, the court measures student injury in terms of the foregone opportunities and losses suffered as a result of student reliance on the implied promise that the school would confer a degree if the student fulfilled the school's requirements.⁸⁹ Some students may be able

Going Behavior, RAND REPORT R-1470-NSF Sept. 1974, at 23 (explaining role of cost in formulating college-choice model); Alberto F. Cabrera et al., *The Role of Finances in the Persistence Process: A Structural Model*, 33 RESEARCH IN HIGHER EDUC. 571 (1992) (explaining link between availability of financial aid and college choice); Edward P. St. John et al., *The Nexus Between College Choice and Persistence*, 37 RESEARCH IN HIGHER EDUC. 175 (1996) (documenting importance of cost to students' college preference).

⁸² See *Lesure v. State*, No. 89-347-11, 1990 WL 64533 (Tenn. Ct. App. May 18, 1990) (noting that following loss of accreditation, student became respiratory technician, with less earning potential, rather than respiratory therapist).

⁸³ See, e.g., *Peretti*, 777 P.2d at 330-31 (noting that seven of sixteen terminated students failed to achieve their desired career goals).

⁸⁴ See RESTATEMENT (SECOND) OF CONTRACTS § 344 (1981) (judicial remedies protect expectation, reliance, and restitution interests).

⁸⁵ See *id.* § 349 (defining reliance as expenditures made in performance of contract).

⁸⁶ See *id.* § 373 (defining restitution as any benefit the injured party has conferred).

⁸⁷ See *id.* § 347 (defining expectation as loss in value caused by other party's breach).

⁸⁸ See *Behrend v. State*, No. 80AP-328, 1981 WL 3591, at *3 (Ohio Ct. App. Nov. 12, 1981) (“[A] plaintiff may elect to recover from defendants the amount paid for that which was not received, less the value of any benefit which defendant Ohio University proves it conferred upon the plaintiff.”).

⁸⁹ See *Peretti*, 777 P.2d at 331 (reversing, on sovereign immunity grounds, an award of damages to students based on reliance interest in attending school and expectancy interest in inability to earn degree); *Eden v. Board of Trustees of the State Univ. of N.Y.*, 374 N.Y.S.2d 686, 689 (App. Div. 1975) (“When petitioner . . . was accepted . . . she declined to enter another college which had accepted her . . . and, when she later received notice that SPM [School of Podiatric Medicine] would not open, it was too late to obtain admission to the other college.”); *Lesure v. State*, No. 89-347-11, 1990 WL 64533, at *4 (Tenn. Ct. App. May 18, 1990) (awarding damages based on lost tuition and living expenses when degree program

to prove expectation and consequential damages by proving the losses suffered as a result of delay or nonconferral of a degree.⁹⁰ Ironically, proving the existence and amount of damages related to the value of a future degree is a relatively small obstacle in comparison to the policy issues at the core of each student case.

The larger and more fundamental challenge in student suits is whether the court will allow such claims at all, regardless of the injury suffered. Competing tensions and values lend ambiguity to the legal relationship between the university and the student.⁹¹ The complexity of the student-university relationship defies application of a unifying legal doctrine. In academic⁹² and disci-

lost its accreditation).

⁹⁰ See *Craig v. Forest Inst. of Prof'l Psychology*, 713 So.2d 967, 972 (Ala. Civ. App. 1997) (noting that some students lost nontransferable credits and delayed graduation while another was unable to relocate and did not complete school). See generally *Behrend*, 379 N.E.2d at 621 (finding damages awarded to "students will necessarily vary dependent upon whether or not they were able to transfer credits and, if not, the additional time and expense of taking other courses. Also, there will have to be proof of any pecuniary loss due to delay . . . and proof of loss of delay in being able to take the appropriate state professional exams."). Compare *Lesure*, 1990 WL 64533, at *4 (reversing award for lost wages since student did not carry her burden of proof). See generally *DeKoven*, *supra* note 80, at 502-03 (noting difficulty of ascertaining damages due to failure of educational program).

⁹¹ See *Napolitano v. Princeton Univ. Trustees*, 453 A.2d 263, 273, 275 (N.J. Super. Ct. App. Div. 1982) (acknowledging judicial deference to university autonomy and decision-making); Amy H. Kastely, *Cogs or Cyborgs? Blasphemy and Irony in Contract Theories*, 90 Nw. U. L. REV. 132, 166 (1995) (noting status-based outcome in university-student contract interpretation (citing *Basch v. George Wash. Univ.*, 370 A.2d 1364 (D.C. 1977))).

⁹² Academic decisions touching on academic freedom concepts are accorded tremendous deference by courts. See *Board of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 92 (1978) (concluding "courts are particularly ill-equipped to evaluate academic performance"); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (reversing professor's criminal contempt conviction for refusal to answer legislative committee because "there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread"); *Wirsing v. Board of Regents*, 739 F. Supp. 551, 553 (D. Colo. 1990) (determining university has "four essential freedoms" . . . to determine for itself on academic grounds: 1) who may teach; 2) what may be taught; 3) how it shall be taught; and 4) who may be admitted to study" (citing *Sweezy*, 354 U.S. at 263 (Frankfurter, J. concurring))); see also *Haberle v. University of Ala.*, 803 F.2d 1536, 1540 (11th Cir. 1986) (noting "in the absence of an improper motive, an academic dismissal must be such a substantial departure from accepted academic norms as to demonstrate that the faculty did not exercise professional judgment before it will be overturned" (quoting *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985))); *Arizona Bd. of Regents v. Wilson*, 539 P.2d 943, 946 (Ariz. Ct. App. 1975) (finding admissions decisions represent "prime example of when a court should not interfere in the academic program of a university"). See generally Thomas A. Schweitzer, "Academic Challenge" Cases: Should

plinary decisions,⁹³ courts generally vest discretion in the institution.⁹⁴ However, courts also view the relationship between students and educational institutions and their respective performances as contractual in nature.⁹⁵ Some critics of contract

Judicial Review Extend to Academic Evaluations of Students?, 41 AM. U. L. REV. 267, 362 (1992) (inferring need for judicial deference but noting instances where arbitrary and capricious departures from institutional process and standards would give rise to breach of contract claim).

⁹³ See, e.g., *Slaughter v. Brigham Young Univ.*, 514 F.2d 622, 625 (10th Cir. 1975) (giving deference to university disciplinary decisions); *People ex rel. Pratt v. Wheaton College*, 40 Ill. 186, 187 (1866) (recognizing university's discretionary power to discipline students and judicial deference to school's exercise of discipline); *Aronson v. North Park College*, 418 N.E.2d 776, 782 (Ill. App. Ct. 1981) (recognizing right to dismiss mentally ill student for inappropriate conduct). See generally Elizabeth L. Grossi & Terry D. Edwards, *Student Misconduct: Historical Trends in Legislative and Judicial Decision-Making in American Universities*, 23 J.C. & U.L. 829, 829 (1997) (discussing educational and legal approaches to student discipline).

⁹⁴ Under constitutional analysis, the Supreme Court has instructed that schools enjoy more discretionary authority in academic decisions than in disciplinary decisions. *Horowitz*, 435 U.S. at 88-91; see also *University of Tex. Med. Sch. v. Than*, 874 S.W.2d 839, 844 (Tex. App. 1994) (providing framework by which to characterize actions as disciplinary or academic); Victoria Dodd, *The Non-contractual Nature of the Student-University Contractual Relationship*, 33 U. KAN. L. REV. 701, 709-712 (1985) (noting that courts should generally defer to actions taken by universities); Robert P. Faulkner, *Judicial Deference to University Decisions Not to Grant Degrees, Certificates, and Credit—The Fiduciary Alternative*, 40 SYRACUSE L. REV. 837, 853-54 (1989) (noting New York court decision making it unlikely for students to be granted judicial relief); Brian Jackson, *The Lingering Legacy of In Loco Parentis: An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135, 1151-55 (1991) (criticizing judicial deference to educational institutions); Eileen K. Jennings, *Breach of Contract Suits by Students Against Postsecondary Education Institutions: Can They Succeed?*, 7 J.C. & U.L. 191, 198-202 (1980) (discussing judicial decisions against schools in student-school disputes); Virginia Davis Nordin, *The Contract to Educate: Toward a More Workable Theory of the Student-University Relationship*, 8 J.C. & U.L. 141, 145-48 (1980) (discussing judicial deference intended to leave "untouched the sanctity of the academic process"); Schweitzer, *supra* note 92, at 288-94 (reviewing numerous cases in which universities were given absolute authority to dismiss students).

⁹⁵ See *Neidermeyer v. Curators of Univ. of Mo.*, 61 Mo. App. 654, 657-58 (Ct. App. 1895) (holding contract existed between student and university); see also *Idrees v. American Univ. of the Caribbean*, 546 F. Supp. 1342, 1350 (S.D.N.Y. 1982) (awarding money damages to student where school misrepresented quality of program); *Zumbrin v. University of S. Cal.*, 101 Cal. Rptr. 499, 504 (Ct. App. 1972) (finding contractual relationship between student and university arises out of oral and written representations); *Dizick v. Umpqua Community College*, 599 P.2d 444, 445 (Or. 1979) (upholding monetary damages for school's fraudulent representation of curriculum to student); *Aase v. State*, 400 N.W.2d 269, 270 (S.D. 1987) (deciding contract formed for term in which tuition is paid); *Speier v. Webster College*, 616 S.W.2d 617 (Tex. 1981) (upholding college's liability to students). See generally Jackson, *supra* note 94, at 1153 ("When many modern universities rival large corporations in their numbers of customers, employees, and size, it is unfair for them to remain immune from

doctrine argue that the doctrine is inadequate to protect student expectations because it allows an institution to construe its obligations narrowly, based on the representations and disclaimers made to students at the time of enrollment or in the catalog.⁹⁶ The fit between contract and higher education has never been comfortable.⁹⁷ Scholars have long complained that the lack of a unifying legal doctrine⁹⁸ has led to confusing and unpredictable legal decisions.⁹⁹

basic commercial contract principles.”)

⁹⁶ See Faulkner, *supra* note 94, at 853 (stating “judicial practice indicates an unwillingness to apply any contract principle even-handedly in the student-university context”); Grossi & Edwards, *supra* note 93, at 852 (noting movement away from deferential *in loco parentis* model and toward consumer model); Jackson, *supra* note 94, at 1151-53 (noting judicial hostility to student contract claims); Jennings, *supra* note 94, at 216 (concluding contract suits “unlikely to succeed” because “[c]ourts are very reluctant to involve themselves in the academic life of institutions”); Nordin, *supra* note 94, at 148 (outlining numerous reasons why courts will not interfere with student-school disputes); Comment, *Private Government on the Campus—Judicial Review of University Expulsions*, 72 YALE L.J. 1362, 1377 (1963) (finding courts traditionally refuse to interfere with school-student contracts); Development, *Academic Freedom*, 81 HARV. L. REV. 1045, 1146 (1968) (arguing “contract theory—as it has heretofore been applied—unduly favors the institution and has been of limited effectiveness in conferring rights upon students”).

⁹⁷ See *Napolitano v. Princeton Univ. Trustees*, 453 A.2d 263, 272 (N.J. Super. Ct. App. Div. 1982) (“Such a relationship [between student and university], we submit, cannot be described either in pure contractual or associational terms.”); see also Jackson, *supra* note 94, at 1151-53 (complaining that courts typically justify departure from strict contract rules by vaguely explaining that “the student-university relationship is unique”); Comment, *Common Law Rights for Private University Students: Beyond the State Action Principle*, 84 YALE L.J. 120, 142-44 (1974) (finding contract theory inadequate to protect relationship rights of students, and urging development of status-based property right); Development, *supra* note 96, at 1146-47 (noting that contract theory “seems to misrepresent the intentions of the parties” and, as applied, has not protected student interests).

⁹⁸ The doctrinal difficulty is not reserved to the relationship between the school and the student. It is observable in many modern contracts that embody complex relationships and carry remnants of custom and status. “In trying to distinguish between status or custom on one hand and freedom of contract on the other, there is a natural tendency to try to draw sharp lines, but that is a mistake.” HOWARD O. HUNTER, *MODERN LAW OF CONTRACTS* ¶ 25.03, at 25 (1987) (commenting on the transition from a status and custom based society to one based largely on freedom of contract).

⁹⁹ See *Beukas v. Board of Trustees of Fairleigh Dickinson Univ.*, 605 A.2d 776, 783 (N.J. Super. Ct. Law Div. 1991) (using no doctrinal theory to decide case), *aff’d* 605 A.2d 708 (N.J. Super. Ct. App. Div. 1992). See generally Robert D. Bickel & Peter F. Lake, *The Emergence of New Paradigms in Student-University Relations: From In Loco Parentis to Bystander to Facilitator*, 23 J.C. & U.L. 755, 759 (1997) (stating substantial student-university tort litigation “has produced one inevitable conclusion: traditional and Restatement categories of the relationship are typically under-inclusive, over-inclusive, inappropriate and/or unable

As with other university actions, when judging a decision to terminate a degree program, courts struggle to find balance between a desire to defer to the university's decisionmaking authority and a desire to protect legitimate student expectations.¹⁰⁰ Some courts, recognizing the particular vulnerability of students, favor compensating students for injuries suffered by the closure of an educational program.¹⁰¹ Other courts express reluctance to involve the judiciary in the institution's management decisions.¹⁰² The deference accorded in these cases is not rooted in the concept of academic freedom or in *loco parentis*.¹⁰³ Instead, this deference is better viewed in terms of deference to the

to define the essence of the relationship(s) among students and universities"); Zechariah Chaffee, Jr., *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993, 1000 (1930) (criticizing judicial use of property theory as basis for denying plaintiff's claims against institution); Jennings, *supra* note 94, at 192-94 (discussing historical development of judicial decisions concerning student-school disputes); Nordin, *supra* note 94, at 145-49 (discussing pattern of judicial non-intervention); Schweitzer, *supra* note 92, at 277 (tracing history of judicial characterization of relationship from privilege to contract); Comment, *supra* note 96, at 1369 (explaining foundation of student-school relationship may be status (in *locus parentis*), implied contract, express contract, custom, legislation, or charter); Note, *Expulsion of Students From Private Educational Institutions*, 35 COLUM. L. REV. 898, 899 (1935) (finding sources of student-school law in status, tort and contract theory).

As one author noted, "[a]lthough it is possible to create and preserve student rights by appealing to the principles of contracts of adhesion, the contract theory seems to misrepresent the intentions of the parties involved." Development, *supra* note 96, at 1147.

¹⁰⁰ See *Beukas*, 605 A.2d at 783-84 (adopting a quasi-contractual obligation requiring university to make its decision absent bad faith, negligence, or arbitrariness).

One scholar explained:

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

Nordin, *supra* note 94, at 148.

¹⁰¹ *Peretti v. Montana*, 464 F. Supp. 784, 788 (D. Mont. 1979), *rev'd on other grounds*, 661 F.2d 756 (9th Cir. 1981); *Eden v. Board of Trustees of the State Univ. of N.Y.*, 374 N.Y.S.2d 686, 691 (App. Div. 1975); *Behrend v. State*, 379 N.E.2d 617, 621 (Ohio Ct. App. 1977).

¹⁰² See *infra* notes 244-246 and accompanying text (explaining that standard remedies are monetary rather than injunctive).

¹⁰³ See *supra* notes 92-93 (citing cases in which courts gave deference to administrative decisions of academic freedom and discipline).

institution's business judgment,¹⁰⁴ judicial reluctance to embroil itself in management,¹⁰⁵ and a desire to protect the institution's long-term future, even at the expense of current students.¹⁰⁶

The college catalog further complicates the relationship between student and institution.¹⁰⁷ While college catalogs and other publications may describe some of the mutual expectations of the student and the college,¹⁰⁸ these publications certainly do not capture the entire relationship between college and student nor do these publications necessarily reflect the sum of a student's reasonable expectations.¹⁰⁹ Catalogs are drafted by the school to serve multiple purposes and therefore are nearly always ambiguous.¹¹⁰ On one hand, the catalog attempts to communicate accurate information about the school, its requirements, and student responsibilities.¹¹¹ On the other hand, the catalog is a recruiting tool, intended to entice applicants to enroll, promoting an appearance of stability, quality, and reputational stature.¹¹² The catalog often broadly disclaims contractual obligations; however, it

¹⁰⁴ Nordin, *supra* note 94, at 148 (criticizing tendency of judiciary to defer to universities, and to refuse to balance competing needs).

¹⁰⁵ See Nordin, *supra* note 94, at 148-49 (noting various reasons courts are reluctant to get involved in university decisions); *infra* notes 243-245 and accompanying text (discussing rarity of injunctive relief); see, e.g., *In re Antioch Univ.*, 418 A.2d 105, 113 (D.C. Cir. 1980) (stating that universities are not subject to interference from state in absence of fiduciary abuse).

¹⁰⁶ See *infra* Section V (discussing courts' reluctance to grant injunctive relief).

¹⁰⁷ See Davenport, *supra* note 78, at 202 (acknowledging catalog as significant part of legal agreement).

¹⁰⁸ See, e.g., *Zumbrin v. University of S. Cal.*, 101 Cal. Rptr. 499, 504 (Ct. App. 1972) (including catalogs, bulletins, circulars, and regulations made available to matriculants within contract); *Wickstrom v. North Idaho College*, 725 P.2d 155, 157 (Idaho 1986) (stating that catalogs provide specific terms of implied agreement between student and college).

¹⁰⁹ See *Peretti v. Montana*, 464 F. Supp. 784, 786 (D. Mont. 1979) ("[T]he general nature and terms of the agreement are usually implied, with specific terms to be found in the university bulletin and other publications; custom and usage can also become specific terms by implication." (citing Eugene L. Kramer, Note, *Expulsion of College and Professional Students—Rights and Remedies*, 38 NOTRE DAME L. REV. 174, 183 (1962))), *rev'd on other grounds*, 661 F.2d 756 (9th Cir. 1981).

¹¹⁰ See generally Davenport, *supra* note 78 (describing various purposes served by school catalogs); Dodd, *supra* note 94, at 715 (stating that ambiguity of catalogs allows for generous court interpretation); Jennings, *supra* note 94, at 200 (discussing instances of catalog ambiguity in case law); Nordin, *supra* note 94, at 160-62 (discussing catalogs as evidence of contract but too vague to embody totality).

¹¹¹ Davenport, *supra* note 78, at 202.

¹¹² *Id.*

also conveys the impression that students will enjoy a long, successful relationship with the school that will culminate in a degree.¹¹³ Despite the catalog's ambiguities and the adhesions aspects of a contract created by catalog, courts generally decline to find either catalog terms or the concept of contract-by-catalog-disclaimer unconscionable.¹¹⁴

B. THE STUDENT-UNIVERSITY CONTRACT AND CLOSURE OF DEGREE PROGRAMS

Cases in the next three sections illustrate judicial discomfort with the concepts of contract, privilege, status, and deference in cases of student challenges to program closures. Courts desiring to protect both student expectations and the long-term survival of the institution must steer a difficult course. Briefly stated, courts may choose between three alternatives. A court may construe the contract as only a semester-long agreement, as a broad implied-in-fact contract excused only by impossibility, or as an implied-in-law contract governed by good faith and fair dealing.¹¹⁵

¹¹³ For example, in its 1996-97 catalog, just prior to the announced closure of the school, Northwestern Dental School promised to "prepare our students to be leaders in their profession" following in the century-old tradition and values of the father of modern dentistry and the school's founder, Dr. Greene Vardman Black. The catalog described an extensive curriculum, with broad clinical opportunities in a dynamic, thriving school. NORTHWESTERN DENTAL SCHOOL CATALOG (1996-1997). However, the school "reserve[d] the right to change without notice any statement in this publication concerning, but not limited to, rules, policies, tuition, fees, curricula, and courses." *Id.*

¹¹⁴ See Davenport, *supra* note 78, at 211 (citations omitted) ("Whether based on the premise that students can choose not to attend a particular college, or because the catalog does not take unfair advantage of the student, or based on the general university need for flexibility in interpretation of the catalog, this doctrine has not been widely applied."); Dodd, *supra* note 94, at 714-18 (noting adhesions aspects of university-student relationship, relative youth of student-consumer, one-sidedness of terms, and also criticizing judicial reluctance to scrutinize conduct of university); Jackson, *supra* note 94, at 1152 (noting refusal of courts to apply commercial contract principles).

¹¹⁵ An express contract is one determined by the oral or written expressions of the parties. JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 19, at 34 (3d ed. 1990). An implied-in-fact contract is one inferred by conduct and context. *Id.* There is no legal distinction between express and implied-in-fact contracts. E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.10, at 135 (2d ed. 1990); MURRAY, *supra* § 19, at 34. An implied-in-law contract, on the other hand, is one created and defined by law to achieve justice. MURRAY, *supra* § 19, at 35. As one court explained, "[A] contract implied in law is not a contract at all, but an obligation imposed by law for the purpose of bringing about justice and equity

1. *The Semester-Long Contract.* The narrowest approach to evaluating student claims for program closure is to construe the student-university contract as a semester-long contract encompassing only the term in which the student is currently enrolled.¹¹⁶ Here, courts allow catalog disclaimers to limit school obligations to the current semester and to renounce any other contractual obligations implied by catalog representations as to the enduring stability, quality, or future of the college.¹¹⁷ This narrow approach short-changes legitimate student expectations¹¹⁸ by narrowly defining the duration of the contract as well as its terms.

An example of this approach is *Aase v. State*.¹¹⁹ In *Aase*, the South Dakota legislature enacted a law enabling the closure of the Springfield campus of the University of South Dakota and the conversion of the property to a minimum security prison¹²⁰

without reference to the intent or the agreement of the parties and, in some cases, in spite of an agreement between the parties." *Continental Forest Prods, Inc. v. Chandler Supply Co.*, 518 P.2d 1201, 1205 (Idaho 1974), *quoted in* MURRAY, *supra* § 19, at 35.

The three forms of relationships can be described in the following manner: the semester-long contract most closely approximates the express contract, defined chiefly by the terms of the catalog and the payment of a semester's tuition; the implied-in-fact contract broadly construes the relationship based on conduct, context, and mutual expectations; the implied-in-law contract is "created by law, for reasons of justice without regard to expressions of assent by either words or acts" and is defined by the court to prevent injustice. *Beukas v. Board of Trustees of Fairleigh Dickinson Univ.*, 605 A.2d 776, 783 (N.J. Super. Ct. Law Div. 1991), *aff'd*, 605 A.2d 708 (N.J. Super. Ct. App. Div. 1992).

¹¹⁶ *See, e.g.*, *Eisele v. Ayers*, 381 N.E.2d 21, 26 (Ill. App. Ct. 1978) (explaining, in challenge to increased tuition, that "this argument is based upon the premise that both sides entered into a four-year contract when plaintiffs enrolled at Northwestern. Such is not the case. The contract is renewable on a semester to semester basis."); *Aase v. State*, 400 N.W.2d 269 (S.D. 1987) (stating "the only contract formed between the student and school which he is attending for the term for which the tuition is paid."). The semester approach yields a similar, narrow result to those cases construing the relationship as noncontractual because the catalog expressly disclaims contractual liability. *See* Nordin, *supra* note 94, at 160-61.

¹¹⁷ In *Niedermeyer v. Curators of Univ. of Missouri*, the court said that the projected tuition increases represented in a college catalog at matriculation represented a binding contractual promise even as to subsequent years. 61 Mo. App. 654, 662 (Ct. App. 1895). Now, in order to preserve flexibility, colleges opt for a reservation of rights and disclaimer of contractual obligation within the catalog. *See* DeKoven, *supra* note 80, at 479.

¹¹⁸ *See* Nordin, *supra* note 94, at 158-59 (discussing reasonable expectations standard in describing relationship between student and university).

¹¹⁹ 400 N.W.2d 269 (1987).

¹²⁰ The diversion of resources from schools to prisons is not unexpected. 'Academic research suggests that "half of the increased prison costs in America between 1980 and 1992 came from higher education budgets." Kissler, *supra* note 48, at 427. This statistic suggests that America has abandoned the old adage, "Better build schoolrooms for 'the boy' than cells

because of a state-wide financial crisis.¹²¹ Displaced students filed suit challenging the announced closure of South Dakota's Springfield campus at the end of the 1983-84 school year.¹²² The state moved for summary judgment against the students challenging the closure, and the lower court ruled that the students had no enforceable contract rights against the school's regents.¹²³

There was little dispute about the reality of student injuries.¹²⁴ The university's closure plan inadequately attempted to accommodate students. For example, the plan only allowed students to finish the current school year.¹²⁵ While the legislation enabling closure required the school to facilitate student transfers to other South Dakota institutions,¹²⁶ "most students testified that they were never provided an opportunity to continue the educational programs which they had begun at [the University of South Dakota/Springfield]."¹²⁷ The case makes no mention of any offer by South Dakota of tuition subsidies, relocation expenses, or assistance with transferring.

Construing the relationship between the student and the institution extremely narrowly, the court concluded: "[T]he only contract formed between the student and the school which he is attending is for the term for which the tuition is paid."¹²⁸ This narrow construction of the contract precluded an examination of the basis for the decision to close or of the school's efforts to ameliorate injury caused by the termination of the school.

Two dissenting judges urged the court to continue discovery and permit trial.¹²⁹ The magnitude of harm to the 800 affected

and gibbets for 'the man.' " Eliza Cook, *A Song for the Ragged Schools*, quoted in FAMILIAR QUOTATIONS, *supra* note 1, at 480.

¹²¹ 400 N.W.2d at 270.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 272-73 (Henderson, J., dissenting).

¹²⁵ *Id.* at 270.

¹²⁶ *Id.*

¹²⁷ *Id.* at 273 (Henderson, J. dissenting).

¹²⁸ *Id.* at 270.

¹²⁹ Justices Henderson and Sabers filed separate dissenting opinions. *Id.* at 271, 274 (Henderson & Sabers, JJ., dissenting). One issue involved whether the legislation calling for the closure of the campus and its conversion to a prison actually permitted early closure because legislation instructed regents to "insure that students . . . have the opportunity to complete their course of study in South Dakota." *Id.* at 272 (Henderson, J. dissenting).

students and the inadequacy of the majority's reasoning persuaded Justice Henderson that trial should proceed:

There were hundreds of depositions taken of students and these reflect the composite/deep problems pressed upon these students: Many were forced to relocate out of South Dakota; some were transferred to other institutions and were forced to modify their academic programs which necessitated additional semesters of study; many students were unable to find an equivalent program and had to change their major; some were forced to discontinue their college education—altogether.¹³⁰

Justice Sabers concluded that summary judgment was inappropriate because issues of material fact remained "concerning the length of the contract and its terms."¹³¹ Both dissenting justices would have held that only impossibility should excuse the state from its obligation, and neither dissenting justice was convinced that a contractual impossibility sufficient to excuse the state's breach existed.¹³²

If followed, the majority's construction of the contract will deprive

Justice Henderson argued that the court should have allowed trial on this issue because the mandate of the legislature placed affirmative obligations upon the regents to allow enrolled students to complete their education before closure. *Id.* at 273-74.

¹³⁰ *Id.* at 272-73 (Henderson, J., dissenting).

¹³¹ *Id.* at 277 (Sabers, J., dissenting). While the catalog stated that it was "subject to change without notice" and was "not a contract nor an offer to contract," it ambiguously described the expectation of a lengthier relationship with the student. *Id.*; see Davenport, *supra* note 78, at 212 (noting courts' reluctance to hold catalog terms adhesionary or unconscionable).

¹³² 400 N.W.2d at 273 (Henderson, J., dissenting) (citing general rule that "performance . . . is only excused upon occurrence of extraordinary events which are not capable of control by the party asserting impossibility as an excuse for nonperformance" (citations omitted)); *id.* at 276 (Sabers, J. dissenting) (stating legislation "does not provide the defendants with an impossibility of performance defense because it contains no language that can be in any way construed to direct the Board of Regents to terminate the educational program in which . . . students were enrolled."); see Jennings, *supra* note 94, at 204-07 (discussing cases where university held to have obligation to continue programs for students unless circumstances, including financial difficulties, were beyond their control); Nordin, *supra* note 94, at 177 (discussing cases where court held "financial exigencies" did not justify preventing students from completing expected course of study).

students of their reasonable expectation that they can earn degrees at the school of their choice. The majority's approach in *Aase* allows the university to escape accountability for the harm it causes students.¹³³ Students choosing a particular school anticipate that it will maintain sufficient resources and resolve to continue its programs. The university fosters that perception through its printed material and by projecting an "aura" of permanence and stability. The construction of a narrow, semester-long contract between student and university denies the real, long-term relationship and ongoing, mutual expectations that students and university share.¹³⁴

2. *The Implied-in-Fact Contract.* A second approach, urged by *Aase's* dissenting justices, is to construe the student-university relationship as a broad implied-in-fact contract and to award damages in contract¹³⁵ unless the university successfully demonstrates the impossibility¹³⁶ of continuing the program.¹³⁷ This

¹³³ See *supra* notes 124-128 and accompanying text (describing court's holding).

¹³⁴ See Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 888 (1978) (discussing human tendency to "create strong expectations of the future consistent with the status quo"). See generally IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* (1980).

¹³⁵ 400 N.W.2d at 277 (Sabers, J., dissenting). Sovereign immunity may defeat implied-in-fact contract claims against state universities when the state breaches its implied contract in those states where sovereign immunity has been waived only as to express contracts but not as to implied contracts. For example, consider the long saga of students challenging the closure of Montana's Missoula Technical Center's Aviation Technology Program. In 1979, disappointed students filed a federal suit, only to lose on jurisdictional grounds on appeal. *Montana v. Peretti*, 464 F. Supp. 784 (D. Mont. 1979), *rev'd on other grounds*, 661 F.2d 756 (9th Cir. 1981). Their state suit ultimately failed as well. *Peretti v. State*, 777 P.2d 329, 330-31 (Mont. 1989). The District Court awarded a judgment of \$2,479,916 in damages to fourteen plaintiffs for "the losses they incurred in attending the one-year aviation program (reliance damages) plus the lost expectancy of their bargain." *Id.* at 330-31. However, on appeal the court ruled that Montana waived sovereign immunity only for express contracts—not for the implied contract claims asserted. *Id.* at 333. Similarly, in *Eden v. State*, the court held that "notwithstanding the fact that the State incurred a contractual obligation to enroll the claimants in [the School of Podiatric Medicine at SUNY] . . . and that the State acted arbitrarily and capriciously in failing to so enroll the claimants, it may not be held in damages for its action." 426 N.Y.S.2d 197, 200 (Ct. Cl. 1980).

¹³⁶ See generally RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981):

Discharge by Supervening Impracticability

Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was

approach broadly protects student expectations by holding the university to a commercial contract standard.¹³⁸ The approach, however, gives little recognition to the university's *other* responsibilities: its obligation to make difficult budgetary decisions in the event of declining revenues or enrollment, its need for flexibility, its relationship with its community and society, and its obligation to preserve itself for future generations of students.

*Behrend v. Ohio*¹³⁹ exemplifies the implied-in-fact contract approach. There, students filed suit to recover damages resulting from the closure of the Ohio University School of Architecture.¹⁴⁰ The University's decision to close the architecture school was "based on a significant decrease in student enrollment and rather severe budget constraints" at the University.¹⁴¹ After reviewing the budget allocated to it, the architecture school's parent College of Fine Arts recommended to the University president that the school be closed.¹⁴² Unfortunately, although the University planned a gradual closure that would have allowed students to complete their education, the National Architectural Accrediting Board withdrew its recommendation to grant the school accredita-

made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

¹³⁷ See *Galton v. College of Pharm. Sciences, Columbia Univ.*, 332 N.Y.S.2d 909, 912 (Sup. Ct. 1972) ("Of course, if circumstances beyond the control of the College, such as lack of finances, prevent the College from continuing, the issue is concluded."); see also Jackson, *supra* note 94, at 1151-55 (noting success by universities in most cases).

¹³⁸ See *Niedermeyer v. Curators of Univ. of Mo.*, 61 Mo. App. 654 (Ct. App. 1895) ("The proposition contained in the catalogue of 1892 and 1893 was that of the state, and, when accepted, good faith and fair dealing required it should be carried out on the part of the state to the letter. An enlightened and progressive state can ill afford to trifle with the rights of the citizen in the slightest degree."); *Galton*, 332 N.Y.S.2d at 912 (denying injunctive relief but allowing case to go forward to trial where Columbia decided to close pharmaceutical college because "[s]tudents are entitled to consideration from educational institutions who invite them to pursue their education in the halls of learning of such institutions."); H. EDWARDS & V. NORDIN, *HIGHER EDUCATION AND THE LAW* 432 (1979) ("[S]hould this court ignore the obvious failure of Vanderbilt to live up to its contractual obligations to these students, it would be a signal to Vanderbilt and other institutions that they are immune from the same legal obligations which govern other relationships in our society." (quoting, in edited form, *Lowenthal v. Vanderbilt Univ.*, No. 8-8525, Chancery Court of Davidson County, Tennessee (Aug. 15, 1977))).

¹³⁹ 379 N.E.2d 617 (Ohio Ct. App. 1977).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 619.

¹⁴² *Id.*

tion when it learned of the planned closure.¹⁴³ Students were forced either to transfer to another institution or to complete their education at an unaccredited school.

The court was willing to imply a broad contractual relationship between college and student, extending it both beyond the semester for which tuition was paid and to the quality of the education promised. The court stated that “[i]t is not unreasonable for one matriculating to an institution of higher learning . . . to assume that the credits for courses taken at such institution, and any degree thereafter that might be granted, would qualify the student or the graduate for the appropriate state professional examination.”¹⁴⁴ Finding a broad implied-in-fact contract and relying upon traditional contract analysis, the court explained that the trustees were vested with authority to “make the policy determination of the continued existence of the various departments within the University.”¹⁴⁵ The court continued, however, that “unless there is shown to be an impossibility of performance, the contract must be fulfilled, or damages awarded.”¹⁴⁶ The court explained that the College of Fine Arts, the school’s president, and ultimately its board of trustees “made a selection of academic goals and that the other departments . . . were chosen to continue.”¹⁴⁷ The court therefore implied that while it would recognize the university’s prerogative to make management decisions, it would not excuse the university from liability for those decisions.¹⁴⁸ This approach

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 620. The court was willing to consider representations conveyed to the students by staff and administrators instead of confining itself to the catalog representations. *Id.* at 620-21.

¹⁴⁵ *Id.* at 621.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Money damages were eventually awarded to students. See *Behrend v. State*, No. 80AP-328 1981 WL 3591, at *3 (Ohio Ct. App. 1981) (reversing award of damages and remanding for new trial on damages). Finally, in *Behrend v. State*, money damages were determined. No. 83AP-480 1984 WL 7633, at *3 (Ohio Ct. App. 1984). Student-plaintiffs were awarded damages ranging from a high of \$40,917 (a student requiring three additional years to complete degree at another institution) to \$1,655 (a student requiring two additional semesters to complete degree). See *id.*, at *3-4.

What became of the students speaks to the difficulties students face with school closure. Of 13 architecture students initially involved in the suit, 10 remained in the suit through the 1981 appeal. Of those, only three transferred to accredited schools, six remained at the unaccredited Ohio University, suffering a loss of earning capacity, and one abandoned his

fails to recognize that the university has obligations to a larger community, its student body and faculty, and to future generations that require it to protect rather than deplete its resources.¹⁴⁹ Moreover, it overlooks the flexibility that the institution needs and of which it forewarned students through its college catalog and other representations.

3. *The Implied-in-Law Contract and the Obligation of Good Faith and Fair Dealing.* A New Jersey court, in *Beukas v. Board of Trustees of Fairleigh Dickinson University*,¹⁵⁰ offered a novel framework that allows courts to examine the decision to terminate college programs and to balance competing interests.¹⁵¹ When Fairleigh Dickinson University decided to close its dental college, degree candidates were justifiably disappointed.¹⁵² The university claimed that the decision was prompted by a financial exigency precipitated by the withdrawal of state aid, money constituting 38.1% of the dental college budget.¹⁵³ As a result, the university suffered a \$6,200,000 deficit and "did not have funds available to make up for the loss of state aid to the dental college."¹⁵⁴

The school developed a comprehensive closure process that allowed students in their junior year of dental school to remain

career goals to become a real estate salesman. 1981 WL 3591, at *1. See generally BARRY BLUESTONE & BENNETT HARRISON, *THE DEINDUSTRIALIZATION OF AMERICA* 49-81 (1982) (describing psychosocial and community costs of dislocating workers).

¹⁴⁹ See *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 636-41 (1819) (describing perpetual nature of college, donor's desire, and trustees' obligation to preserve "perpetual application of [the school's] property to the objects of its creation").

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

¹⁵¹ A similar approach has been identified in the student-athlete relationship. As with other student-university relationships, courts struggle to define the legal obligations of a school to its recruits when vaguely defined academic or athletic promises and expectations go unfulfilled. Robert N. Davis, *The Courts and Athletic Scholarships*, 67 N.D. L. REV. 163, 164-65 (1991); Timothy Davis, *An Absence of Good Faith: Defining a University's Educational Obligation to Student-Athletes*, 28 HOUS. L. REV. 743 (1991); Timothy Davis, *Balancing Freedom of Contract and Competing Values in Sports*, 38 S. TEX. L. REV. 1115, 1141-45 (1997); Timothy Davis, *College Athletics: Testing the Boundaries of Contract and Tort*, 29 U.C. DAVIS L. REV. 971, 981-88 (1996); Harold B. Hilborn, *Student-Athletes and Judicial Inconsistency: Establishing a Duty to Educate as a Means of Fostering Meaningful Reform of Intercollegiate Athletics*, 89 NW. U. L. REV. 741, 748-59 (1995).

¹⁵² *Beukas*, 605 A.2d at 778.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

until graduation, suspended the seating of a freshman class, and set a closure date one year and two months from the announcement.¹⁵⁵ The school provided affected students with a range of options. The school assisted its current first, second, and third year students with transfer, reaching formal transfer agreements with dental schools in New Jersey and neighboring states which allowed students the choice of immediate transfer or transfer at closure.¹⁵⁶ New Jersey also offered tuition subsidies to “make up the tuition difference.”¹⁵⁷ Finally, working with its accrediting body, the school ensured that its accreditation would remain intact through closure.¹⁵⁸

Disappointed students filed suit.¹⁵⁹ Students claimed that admission into the dental college and payment of the first year’s tuition created a binding contract with the institution.¹⁶⁰ They claimed that representations in the annual bulletins and other publications created an implied contractual promise that the institution would endure.¹⁶¹ Students further claimed that, absent impossibility of performance, the financial losses the institution was suffering did not excuse the school’s contractual obligation to them.¹⁶²

The court identified competing interests and recognized that some discretion must be accorded institutions¹⁶³ making “an administrative decision to terminate an academic or professional

¹⁵⁵ *Id.* at 778-79.

¹⁵⁶ *Id.* at 779.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* Importantly, even the gradual phase-out of a college program can be the basis of a claim by students suffering a slow deterioration in the scope or quality of the program. See *Behrend v. Ohio*, 379 N.E.2d 617 (Ohio Ct. App. 1977) (holding that students could recover damages after loss of accreditation); see also *Jennings*, *supra* note 94, at 205-07 (discussing various claims against universities for failure to maintain “consistent, quality program[s]”); *Nordin*, *supra* note 94, at 176-78 (analyzing claims against universities by students who had not completed academic programs at time of closure); cf. *Davenport*, *supra* note 78, at 219 (discussing challenges to academic quality and service provided to students, both successful and unsuccessful).

¹⁶⁰ *Beukas*, 605 A.2d at 779.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ See *Davenport*, *supra* note 78, at 215 (“[T]he key principle courts have followed in interpreting college catalogs is that the university must be accorded some flexibility that is not normally extended to the seller of a product”).

program on the grounds of financial exigency."¹⁶⁴ In *Beukas*, the court asked the difficult question: how much protection do affected students deserve "under circumstances where the university has unilaterally determined to terminate an entire college for financial reasons"?¹⁶⁵

The court noted that the university-student relationship is inadequately defined by either express or implied-in-fact contract doctrine.¹⁶⁶ Instead, the court construed the relationship as quasi-contractual, or implied-in-law.¹⁶⁷ "The 'true' university-student 'contract' is one of mutual obligations implied, not in fact, but by law; it is a quasi-contract which is 'created by law, for reasons of justice without regard to expressions of assent by either words or acts.'"¹⁶⁸ This creation of an implied-in-law contract allows recognition that the student-university relationship carries vestiges of status, as well as contract.¹⁶⁹

The court then concluded that students were entitled by this law-defined relationship,¹⁷⁰ to expect the university to act in good faith and to deal fairly with them:

[P]laintiffs and defendants have stipulated that in deciding to close the dental college, defendants did not act arbitrarily, negligently or in bad faith. Plaintiffs appear to acknowledge that defendants could not continue the dental college without state funding. Nor is there any dispute that defendants acted other than in good faith both in giving ade-

¹⁶⁴ 605 A.2d at 781.

¹⁶⁵ *Id.* at 781.

¹⁶⁶ *See id.* (noting that decisions defining university-student relationship by express or implied-in-fact contract doctrine "have been criticized as lacking in a unified and legally consistent application of the law").

¹⁶⁷ *Id.* at 783-84.

¹⁶⁸ *Id.*; *see supra* note 115 (explaining distinction between express, implied-in-fact, and implied-in-law contracts); *see also* 3 WILLIAM HERBERT PAGE, *THE LAW OF CONTRACTS* § 1494 (2d ed. 1920) (tracing history of quasi-contract development); 1 SAMUEL WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* § 1:6 (Richard A. Lord ed., 4th ed. 1990) ("Quasi contractual obligations are imposed by the courts for the purpose of bringing about a just result without reference to the intention of the parties.").

¹⁶⁹ *See supra* notes 96-99 (describing various conceptions of student-university relationship).

¹⁷⁰ *See DeKoven, supra* note 80, at 478-79 (discussing good faith).

quate notice of their intentions to close the college and in arranging transfer and admission of plaintiffs to other dental schools in the area in order to avoid any disruption in their education. Under these facts and circumstances, it cannot be said that defendants breached any obligations to plaintiffs. Any loss or detriment suffered by plaintiffs cannot be said to have been unjustly caused by defendants. "Injustice is always a fundamental aspect of quasi-contract recovery . . . the essence of which is unjust detriment."¹⁷¹

Providing instruction for future decisions, the court then explained what it would not countenance:

Had defendants acted arbitrarily; had they refused to avail themselves of reasonably available alternative funding; had they failed to promptly disclose the withdrawal of state funding; had they lulled plaintiffs into believing the funding would be restored; or had they failed to make proper arrangements for transfer of plaintiffs to other dental schools, thus causing a delay in plaintiffs' opportunities to pursue their educational goals, the situation would be different.¹⁷²

The court recognized that defining the student-university relationship contractually and excusing the school only for performance impossibilities had the potential to impact negatively a broader community.¹⁷³ It explained the virtues of its novel approach:

The judicial inquiry should be directed toward the *bona fides* of the decisionmaking and the fairness of its implementation: whether the institution acted in

¹⁷¹ *Beukas*, 605 A.2d at 784 (citing ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 19a (Supp. 1991)).

¹⁷² *Id.*

¹⁷³ *Id.* at 784 (noting school "has an obligation, not only to the students, but to the public at large").

good faith and dealt fairly with its student body should be the polestar of the judicial inquiry. This approach will give courts broader authority for examining university decisionmaking in the administrative area than would a modified standard of judicial deference and will produce a more legally cohesive body of law than will application of classic contract doctrine¹⁷⁴

An appellate court affirmed Judge Eichen's decision but paid little attention to the lower court's legal analysis.¹⁷⁵ Without commenting upon the implied-in-law contract analysis, the appellate court noted the presence of catalog disclaimer and concluded more narrowly:

Even if we assume, for analytical purposes, that the various University bulletins constituted an enforceable contract, that contract would include the reservation of rights Moreover, to the extent that the University's freedom of action under its reservation of rights was limited by an implied covenant of good faith and fair dealing, we perceive no violation of that covenant.¹⁷⁶

4. *Applying Beukas to Program Reduction Claims by Students.* Judge Eichen's framework remains a valuable roadmap for courts seeking to balance the university's obligation to treat students fairly with the other important societal interests served by a university. The two-part test asks:

- 1) whether the university demonstrated good faith in reaching the decision to implement program closure; and
- 2) whether the university dealt fairly with students in light of the decision to close the program.¹⁷⁷

¹⁷⁴ *Id.* (citations omitted).

¹⁷⁵ *Beukas v. Board of Trustees of Fairleigh Dickinson Univ.*, 605 A.2d 708 (N.J. Super. Ct. App. Div. 1992).

¹⁷⁶ *Id.* at 709.

¹⁷⁷ 605 A.2d 776, 784.

The first question balances societal interests in protecting the institution against student interests in preserving their degree program.¹⁷⁸ The second question recognizes and defines the university's obligations to its students. Both prongs are necessary to achieve just results. While the *Beukas* plaintiffs happened not to contest whether the school acted in good faith when reaching the decision to close the dental school,¹⁷⁹ judicially defining the relationship and examining good faith and fair dealing through the lens of academic custom and usage allows courts to balance student expectations and university fiscal interests.¹⁸⁰

Downsizing a college is of such significant social import that the decision deserves a careful, deliberative process and an application of carefully-drawn criteria. These are the standards expressed in the literature of higher education and these same standards should form the basis to test good faith. Did the process include collaboration and deliberation or was the university's action arbitrary? Were other alternatives that would cause less disruption to students fairly considered and rejected? Drawing on the literature of higher education, the court should ask whether the university exercised sound judgment in reaching its decision.¹⁸¹ When the court considers whether the university developed and fairly applied articulated criteria to its decisions, the court has a ready framework by which to test the university's good faith.¹⁸²

Making the decision to close a program in good faith only satisfies one part of *Beukas*. *Beukas* also requires that the university deal "fairly" with its affected students. Did the university take steps to ameliorate the impact on affected students by

¹⁷⁸ See King, *supra* note 53, at 551 (noting that while "courts have consistently said that they will not second-guess a board's conclusion that a financial exigency exists, they have, in fact, reviewed trustees' decisions").

¹⁷⁹ 605 A.2d at 784 (stipulating that decision was not arbitrary).

¹⁸⁰ See Nordin, *supra* note 94, at 163 (arguing that custom and usage in academia should define reasonable student expectations).

¹⁸¹ See *supra* notes 48-52 and accompanying text (illustrating need for inquiry into soundness of university's judgment in downsizing decisions).

¹⁸² See Paul G. Haskell, *The University As Trustee*, 17 GA. L. REV. 1 (1982) ("[T]he university should be considered a trustee for the public generally and the students, faculty, donors, and alumni particularly, and that as trustee the university owes the fiduciary duties of selflessness, care, fairness, and disclosure in all its dealings with students, in the administration of its admission policy, and in the management and allocation of its assets.").

assisting them in achieving their educational objectives despite the closure of the program? Did the university keep students informed and provide them with timely information so that students might take appropriate steps to protect themselves? Did the university continue to provide sufficient resources to the program so that it could retain its accreditation until the last students graduated or transferred? Did the university provide financial assistance to displaced students? Under *Beukas*, only when students are treated fairly can the university be excused from the payment of money damages.

The implied-in-law contract approach protects student interests beyond the semester for which tuition is paid while still recognizing the university's need to respond to fiscal exigencies. The approach imposes an obligation upon college administrators to act with due care toward both students and the larger community and to stand ready to justify administrative actions.¹⁸³ Adopting this standard, the court asks that the university comport with the expectations of accrediting agencies and the standards articulated by educators.¹⁸⁴ The approach also empowers students with a right to challenge whether the decision is grounded in good faith.¹⁸⁵

The implied-in-law contract approach broadens the narrow focus of traditional contract law beyond examination of the rights of the affected student or the obligations of the university to those students. Instead, it allows courts to examine the conduct of the university and to ask whether it has acknowledged its many relationships during its decisionmaking process and fairly balanced the many competing interests that are impacted by the decision to

¹⁸³ "Because program closures, especially those involving faculty terminations, are certain to be controversial, formal action by the governing board provides another opportunity to consider the merits of the case. It may also help to relieve the tension on campus among groups that must work together long after this particular financial crisis has passed." Kissler, *supra* note 48, at 452.

¹⁸⁴ See *supra* notes 48-52 (describing many competing interests with which universities must deal when restructuring or downsizing curriculum); see also, Nordin, *supra* note 94, at 165-66 ("Reliance on community custom and practice seems peculiarly appropriate to the academic community which has managed to transmit and keep intact its unique characteristics over centuries.").

¹⁸⁵ See Nordin, *supra* note 94, at 163-64 (stating quasi-contract standard prohibits arbitrary and capricious action against students).

terminate a program.¹⁸⁶ Relying on custom and practice in higher education to determine the appropriateness of the university's decision to close a particular degree program "relieves courts from the burden of judicial legislation"¹⁸⁷ while avoiding the perceived unfairness of excessive deference.¹⁸⁸

IV. OTHER POTENTIAL CLAIMANTS: THE IMPLIED-IN-LAW RELATIONSHIP PROTECTS BROADER SOCIETAL INTERESTS

Students are not the only ones affected by major changes and closures within a university. Faculty, other employees, alumni, trustees, donors, and the community may all feel a deep sense of emotional loss and even economic injury.¹⁸⁹ Should a broader circle of interests be considered? Two scholars, writing in different fields, have urged broader legal recognition of community interests when businesses make the decision to close or reorganize.¹⁹⁰ Their thought-provoking work is relevant to the conversation concerning the ripple effect of school or degree program closure on a community.

¹⁸⁶ See King, *supra* note 53, at 547 ("The injunction raised in stark relief the legal dilemma facing trustees of a dying private college: May they permit the college to die with dignity or must they keep it alive until every last penny is expended and the college slowly has dissipated into nothing?").

¹⁸⁷ Nordin, *supra* note 94, at 165-66.

¹⁸⁸ See *supra* note 96 (arguing that contract doctrine does not sufficiently protect student expectations because institution can narrowly define its obligations, and courts are generally fearful of involving themselves in academic aspects of institutions).

¹⁸⁹ See DAVID A. FUNK, *GROUP DYNAMIC LAW: INTEGRATING CONSTITUTIVE CONTRACT INSTITUTIONS* (1982) (noting seven possible groups in educational organizations: trustees, administrators, faculty members, semi-professional staff, nonacademic staff, students, and alumni (citing John J. Corson, *Perspectives on the University Compared with Other Institutions*, in *THE UNIVERSITY AS AN ORGANIZATION*, at 155, 163 (James A. Perkins ed., 1973))); John A. Beach, *The Management and Governance of Academic Institutions*, 12 J.C. & U.L. 301, 333-38 (1985) (noting governance constituencies: faculty, students, trustees, alumni, president, public policy constituency, and accrediting agencies).

¹⁹⁰ See KAREN GROSS, *FAILURE AND FORGIVENESS: REBALANCING THE BANKRUPTCY BUSINESS* 206-11 (1997) (analyzing role that community interests should play within bankruptcy process); Joseph W. Singer, *Baseline Questions in Legal Reasoning: The Example of Property in Jobs*, 23 GA. L. REV. 911, 978-80 (1989) (stating "systematic failure of the market to protect fundamental interests of worker" is replete with social consequences that must be taken into account"); Joseph W. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 712-13 (1988) [hereinafter Singer, *Reliance Interest*] (arguing that private profit is "wholly inadequate as a measure of social utility" so companies should be forced to "take into account all the social costs of closing").

Professor Karen Gross complains that bankruptcy law is currently too insensitive to the many members of the community affected by a business failure.¹⁹¹ She recommends that the bankruptcy code begin to acknowledge¹⁹² those community members whose interests have a "nexus" to the debtor and "for whom there is substantial injury caused by the bankruptcy filing and that injury is redressable through the reorganization process."¹⁹³ She suggests that bankruptcy laws would better serve society if the code expanded the circle of interested parties beyond the debtors and creditors.¹⁹⁴

Similarly, Professor Joseph Singer has examined the widespread, devastating impact on the surrounding community of the decision to close or relocate an industrial plant. He argues that the relationships created by the long-term association of town and industrial plant justify protecting the "reliance" interests of communities, rejecting a narrow concept of property.¹⁹⁵ Singer

¹⁹¹ The universe of communities within the bankruptcy process includes the named participants—the debtors, creditors, and equity holders—and the unnamed participants. These are the families of debtors and creditors. They are future tort claimants. They are affected workers. They are local businesses that are not owed money. They are the communities where the debtor is located. They are the communities where a debtor's acquirer may relocate the debtor's business.

GROSS, *supra* note 190, at 207.

¹⁹² The National Bankruptcy Review Commission recognizes certain societal benefits at the heart of Chapter 11: "Principally through Chapter 11, business bankruptcy creates the opportunity to restructure failing businesses, to preserve jobs, to prevent the spread of economic failure to smaller suppliers and other dependent businesses, and to permit communities to retain their tax base." NATIONAL BANKRUPTCY REVIEW COMMISSION, *BANKRUPTCY: THE NEXT TWENTY YEARS*, Final Report at 303, 309 (Oct. 20, 1997).

¹⁹³ GROSS, *supra* note 190, at 228-29.

¹⁹⁴ These various communities are like the ripples that occur when a stone is thrown into water. Every debtor is a pebble, and when the pebble hits the water, concentric circles are formed. The circles closest to the pebble are the smallest but the strongest. The outermost circles are the largest in size but weakest in form. . . . Many people, including a significant number of bankruptcy scholars, think about bankruptcy as addressing only the circles closest in—creditors and the economic welfare of society based on that creditor's recovery. Seeing the other ripples requires a shift from the narrow to the broad, from the short term to the longer term.

Id. at 207.

¹⁹⁵ See Singer, *Reliance Interest*, *supra* note 190, at 619-21 (discussing denial of worker claims challenging decision to close Youngstown Steel and stating that "[t]he courts should have recognized the workers' property rights arising out of their relationship with the

has explored the wide array of potential remedies that enable a community to cope with the destabilizing impact of industrial plant closures once the focus is shifted to the broader community.¹⁹⁶

As with other business failures, when a university downsizes or closes, the ripple effect on the surrounding community may be significant. Ignoring the impact on the community seems unduly narrow and unsatisfactory in light of the interdependent relationship between the community and the university. But what is the appropriate role for community voices when a school or degree program closes? Ideally, the university should consider the impact on the community and encourage community comment and participation during the decisionmaking process.¹⁹⁷ But should members of the college community be able to file suit if they believe their interests were not addressed?

For the most part, lawsuits by faculty,¹⁹⁸ alumni, donors, and

company. Such a new legally protected interest would place obligations on the company toward the workers and the community to alleviate the social costs of its decision to close the plant.”).

¹⁹⁶ *Id.* at 732-43. Singer has suggested, for example, that corporations might be required to provide reliable information, notice, severance pay, and a right of first refusal; to engage in good faith negotiation; and to provide money damages in the form of funding, retraining, or taxes in order to ameliorate the impact on the community. *Id.*

¹⁹⁷ Kissler notes that when institutions of higher learning undergo severe financial crises requiring program terminations, the influence of “off-campus agencies,” such as “the governor, legislature, coordinating commission, governing board, and chancellor of a multicampus system” typically increases. Kissler, *supra* note 48, at 447. The influence of students and campuswide senates also increase during dramatic budget cuts. *Id.* at 450.

¹⁹⁸ This article does not address faculty and employee contractual claims. Faculty and employees, whether tenured or under contract for a fixed term may, of course, file suit for breach of contract when they are terminated. *See, e.g.,* Board of Community College Trustees for Baltimore County-Essex Community College v. Adams, 701 A.2d 1113 (Md. Ct. Spec. App. 1997) (remanding to determine whether due process was afforded in deciding which faculty positions to eliminate), *cert. denied*, 702 A.2d 290 (Md. 1997); American Ass’n of Univ. Professors v. Bloomfield College, 346 A.2d 615 (N.J. Super. App. Div. 1975) (holding that financial exigency of college was not actual cause for terminating tenured faculty); Washington Educ. Ass’n v. State, 652 P.2d 1347 (Wash. 1982) (en banc) (addressing constitutionality of enactment governing declarations of financial emergency in college system); Christensen v. Terrell, 754 P.2d 1009 (Wash. Ct. App. 1988) (noting that professor can seek judicial review of decision to terminate positions); Keppeler v. Board of Trustees, 688 P.2d 512 (Wash. Ct. App. 1984) (analyzing whether college board of trustees violated terminated professor’s due process rights); Graney v. Board of Regents, 286 N.W.2d 138 (Wis. Ct. App. 1979) (deciding whether board’s layoff of tenured faculty interfered with protection given by tenure statute against arbitrary dismissal).

Contrary to the common belief that tenure equates to absolute job security, most faculty

other community members against the university for program closures seek to preserve the status quo.¹⁹⁹ There are, however, other interested groups who desire that the university make a responsible decision that preserves the school's overall soundness.²⁰⁰ As the following sections reveal, none of these interested parties have been particularly successful at challenging a school's decision to make dramatic restructuring decisions. Nevertheless, although such parties lack a legal interest sufficient to support a legal claim, ignoring their interests seems an unsatisfactory alternative.

A. THE COMMUNITY'S LOSS

Anyone who has lived, worked, or studied in a "college town" knows the importance of the college to the town, and can imagine the impact the closure of a school might have on a community.²⁰¹

contracts allow for retrenchment for financial exigencies. See Gary Rhoades, *Retrenchment Clauses in Faculty Union Contracts: Faculty Rights and Administrative Discretion*, 64 J. HIGHER EDUC. 312 (1993); Ronald C. Brown, *Tenure Rights in Contractual and Constitutional Context*, 6 J.L. & EDUC. 279 (1977).

The questions typically asked in retrenchment cases are: (1) whether an exigency exists and (2) whether procedures were followed. See, e.g., *Adams*, 701 A.2d at 1114 (affirming determination of exigency but remanding to determine whether procedures and practices were followed). The analysis is similar to the two step implied-in-law approach conceived in *Beukas* which requires good faith decisionmaking and fair dealing with affected students. A broad analysis protecting workers from arbitrary decisions is desirable because displaced workers are often impacted for a lifetime. See Barry Bluestone, *Deindustrialization and Unemployment in America*, in DEINDUSTRIALIZATION AND PLANT CLOSURE 3, 6 (Paul D. Staudohar & Holly E. Brown eds., 1987) (noting that while 16% of displaced workers went to lower paying jobs, fewer than 3% made transition to better-paying high-tech industries); BLUESTONE & HARRISON, *supra* note 148, at 49-61 (discussing impact on displaced workers and long-term employment instability of displaced workers); MARIE HOWLAND, *PLANT CLOSINGS AND WORKER DISPLACEMENT* 1-11 (1988).

¹⁹⁹ Those with an interest in retaining the status quo are generally aligned with affected students. See *Steenek v. University of Bridgeport*, No. CV 93 0133773, 1994 WL 463629, at *1 (Conn. Super. Ct. 1994) (noting alignment of one student, five alumni, seven donors, one former trustee, and one "life" trustee), *aff'd* 668 A.2d 688 (Conn. 1995).

²⁰⁰ Their interests are aligned with the university's although these groups might disagree with the university's plan of action. For example, the unaffected faculty, student body, alumni, and donors will want the university to make careful decisions and then implement necessary cuts that preserve the university's long-term financial viability.

²⁰¹ See BLUESTONE & HARRISON, *supra* note 148, at 67-81 (describing "ripple effects" through community's economy following plant closing).

The community's economy²⁰² and character²⁰³ are enhanced by the presence of a college, and the decline of that college will adversely affect its neighbors.²⁰⁴ Moreover, a community loses its private (charitable) and public (tax-supported) investment in the college when it closes its doors, loses stature, or curtails programs.²⁰⁵ Often, the town and community have been part-

²⁰² See generally JOHN CAFFREY & HERBERT H. ISAACS, ESTIMATING THE IMPACT OF A COLLEGE OR UNIVERSITY ON THE LOCAL ECONOMY (1971) (presenting study of economic gains enjoyed by community having college or university); RAYMOND FLORAX, THE UNIVERSITY: A REGIONAL BOOSTER? (1992) (giving historical, economic description of regional significance of colleges and universities internationally); JULIAN MARTIN LAUB, THE COLLEGE AND COMMUNITY DEVELOPMENT (1972) (describing socio-economic impact of colleges and universities in rural and urban communities); Kenneth H. Brown & Michael T. Heaney, *A Note on Measuring the Economic Impact of Institutions of Higher Education*, 38 RES. HIGHER EDUC. 229 (1997) (reviewing methodologies to study local economic impact of college or university).

²⁰³ See generally STEVEN J. DINER, A CITY AND ITS UNIVERSITIES: PUBLIC POLICY IN CHICAGO, 1892-1919 (1980) (describing impact of American university on social change and reform through case study of Chicago); GEORGE NASH, THE UNIVERSITY AND THE CITY (1973) (noting social, political, and economic impact of university); UNIVERSITIES IN THE URBAN CRISIS (Thomas P. Murphy ed., 1975) (emphasizing university role in addressing urban problems).

²⁰⁴ See BLUESTONE & HARRISON, *supra* note 148, at 67-81 (describing adverse ripple effect on towns where important employer closes). Colleges are particularly attractive employers and the loss of a college can hurt many in a community not employed by the college. Higher education is a clean industry, the employees largely "white collar" or professional. Students support neighboring retail businesses. A "college town" is attractive to new residents. See Brown & Heaney, *supra* note 202, at 230-31 (noting that many university students remain in community after graduation). As one economist described the relationship:

In many communities—rural, suburban, and urban—the presence of a college or university is a significant factor. . . . To the community, the college may be a source of entertainment, irritation, pride, political agitation, low-cost labor, and revenue. But members of the community may also be conscious of the fact that the college is a source of expense. It occupies tax-exempt land; children of staff and students attend public schools and use public facilities; some of its operations may compete with local business; it benefits from such tax-supported services as fire and police protection, libraries, utilities, and street maintenance.

CAFFREY & ISAACS, *supra* note 202, at 1 (emphasis omitted); Beach, *supra* note 189, at 337 ("A large university can dominate the economic life of the surrounding community in its double role as a major consumer of goods and services and as an employer. In the aggregate, institutions of higher learning comprise a significant sector of the national economy.").

²⁰⁵ Public universities were built by, and at the expense of, past generations for the benefit of future generations. An ill-considered present decision to terminate a school breaks the trust of the past and robs the future. Similarly, private institutions, established by donors and benefactors, break their pacts with such donors and benefactors by making hasty decisions to close.

ners²⁰⁶ with the school and have facilitated the institution's operation by granting it special concessions or favorable treatment under the law.²⁰⁷ The school may have fulfilled important social roles in the community²⁰⁸ or in the community's commercial enterprises.²⁰⁹ The community may understandably feel a great social and economic loss when a school or program closes.²¹⁰

Despite the widespread impact of a decision to terminate a program,²¹¹ few have a legally recognized interest sufficient to

²⁰⁶ Jobs, job training, community service and economic interdependence are part and parcel of the relationship:

With the aid of many employers in Greater Cleveland Fenn has maintained a Cooperative Education Program that has enabled students to earn their way while getting a college education. It has, throughout the passing years, served many young men and women and also folks beyond the usual college age who but for its ministrations might have lacked the boon of higher education. Fenn, therefore, has had a deep impact upon the life of Greater Cleveland that can never be erased.

Fenn College v. Nance, 210 N.E.2d 418, 421 (Ohio Ct. C.P. 1965); see also Beach, *supra* note 189, at 336-37 (recognizing importance of university to surrounding community).

²⁰⁷ For case studies describing the important roles colleges and universities play in their communities, see, NASH, *supra* note 203 (delineating study of eight communities and their universities and description of varied impacts and roles of universities on communities).

²⁰⁸ See *supra* notes 202-203 (discussing economic, political, and social benefits to community from local universities). Closing Northwestern's dental school would have an adverse impact on many non-students:

Thousands of Hispanic and African-American children, treated by Northwestern students, would face the prospect of reduced access to dental care at pivotal stages of their development. Relatedly, HIV-positive and AIDS patients would suffer, as Northwestern does more dental work on AIDS patients than do all the rest of the dentists in Cook County combined. Where will these patients go?

Matt Dunn, *A Monumental Gaffe: It's a Mistake to Toss Aside Northwestern's Dental School*, CHI. TRIB., Feb. 2, 1998, at 11. The loss is made worse for Illinois because Loyola University closed its dental school in 1993 so only two dental schools remain in the state despite a high demand. Adrienne Drell, *NU Dental School to Close in 2001*, CHI. SUN-TIMES, Mar. 3, 1998, at 4.

²⁰⁹ See *The Cap and Gown Connection*, J. ACCT., Sept. 1995, at 16, 16-17 (describing (by graph) collaborative efforts between universities and 424 small to medium size businesses (citing Coopers & Lybrand Trendsetter Barometer)).

²¹⁰ See Schmidt, *supra* note 6 (describing protests by hundreds of angry alumni and townspeople at plan to relocate college from its home of 132 years: "Don't Fool with My School" warns one of the anti-relocation posters in the windows of nearly every business in Peru[, Nebraska].").

²¹¹ Joseph Singer studied the devastating impact of U.S. Steel's decision to close its two Youngstown steel plants after an 80-year affiliation with the town. In the Youngstown suit, the court initially allowed the steel workers to amend their claim to add claims based upon

challenge administrative decisions to close or curtail programs at colleges and universities.²¹² In fact, current legal theories do little to encourage the institution to invite community participation in the decision to close a program.²¹³ Some limited public participation may occur when public institutions close as a result of legislative decisionmaking.²¹⁴

broader relational interests. These claims eventually failed on defendant's motion for summary judgment. *Local 1330, United Steel Workers v. United States Steel Corp.*, 631 F.2d 1264, 1280 (6th Cir. 1980). The court's initial hesitation to dismiss the worker's suits led Singer to suggest that courts need a legal theory by which to protect broader community interests. Singer, *Reliance Interest*, *supra* note 190, at 744-45. Singer complained that the law offered little or nothing to those who made a social and economic compact with the plant. *Id.* at 744-50. Singer argued that a narrow view of property law, like contract law, fails to recognize intrinsic contributions and investments of employees and communities in a plant and protects the plant owner's individualistic interests in property ownership and freedom of contract at the expense of the worker and the community. *Id.* He urged a broader recognition of interdependent relationships among workers, the community, and the plant, and argued that the breadth of the legal rights should be defined by the strength of the interdependence. *Id.* at 678. By broadly recognizing legal rights of the affected, Singer pointed out that socially beneficial remedies may be had. *Id.* at 738-45.

²¹² See King, *supra* note 53, at 561-63 (describing role of trustees and *parens patriae* role of attorney general to challenge decisions of trustees of private schools and arguing for broader standing to affected groups).

²¹³ Singer's description of the general turmoil of community outrage, protest, and anguish associated with the decision to close the steel plant parallels the public outcry that typically follows the announcement of a school closure. See *supra* note 5 (describing protests to announced changes at schools). Moreover, many of the rights and remedies Singer suggested have equal applicability in the school closing arena. For example, Singer would impose an obligation to give notice and information to the affected workers and community. Singer, *Reliance Interest*, *supra* note 190, at 741. As in plant closures, the decision to close a school or program is often made by regents or trustees in secrecy, and rumors are rampant. The decisions are often characterized by the roller coaster of tentativeness, as if administrators are awaiting the public outcry. See *supra* notes 10-14 (discussing decision of trustees of Northwestern University to postpone closure of dental school in response to local protests).

Singer suggested that the community of those affected should be afforded a right of first refusal in order to protect their reliance interest. Singer, *Reliance Interest*, *supra* note 190, at 742-43. As with plant closings, because of the community investment, the mutual relationship, and interdependence, the community may desire to involve itself in a positive solution to preserve the school or program. Singer also proposed judicial supervision of the closing or restructuring process in order to protect "the reliance interests of the workers and the needs of the community." *Id.* at 743.

²¹⁴ See *Aase v. State*, 400 N.W.2d 269, 270 (S.D. 1987) (involving challenge to legislative decision to close University of South Dakota at Springfield).

B. ALUMNI AND DONORS

Alumni and donors may perceive an injury as a consequence of school or program closure.²¹⁵ Alumni may be concerned that the economic value of their degrees will be diminished by the dissolution of their degree programs or their school, or that they may suffer an associational loss.²¹⁶ Donors may feel that the closure negates or diminishes their contribution to the school.²¹⁷ Although these interested school supporters may have strong feelings about the termination of a program or closure of the school, they have frustratingly little voice, except by the university's grace and good will.²¹⁸

Courts have declined to grant broad legal standing to those not directly and immediately affected by the institution's decisions, including donors, alumni, or alumni organizations. In the case of private colleges, the equitable doctrines *cy pres* and deviation

²¹⁵ See *Ad Hoc Comm. v. Bernard M. Baruch College*, 726 F. Supp. 522, 524 (S.D.N.Y. 1989) ("[A]lumni groups have no standing to challenge college policies . . . because they lack a concrete interest."); *Mercer Univ. v. Smith*, 371 S.E.2d 858 (Ga. 1988) (holding alumni and donors of college cannot block closure of college).

²¹⁶ *Ad Hoc Comm.*, 726 F. Supp. at 525 (stating that college has discretion whether to recognize alumni group, and holding that alumni lack standing to challenge college policies); *Miller v. Alderhold*, 184 S.E.2d 172, 175 (Ga. 1971) (holding students have no standing to challenge administrative decision to sell assets of school).

²¹⁷ But what of Fenn's donors of past years? Do they have any present interest in Fenn's assets? May any givers be heard to complain that the carrying out of the Agreement and the subsequent change of name and program of Fenn violate either the spirit or the terms of their donations?

. . .

There is nothing more certain in life than change. As a wise man has said: "New occasions teach new duties; time makes ancient good uncouth." What is reasonable and helpful today may not remain so with the passing of the years. No man can accurately anticipate the needs of the next generation. Equity has long recognized this, and in dealing with trusts, both private and charitable, has not hesitated to exercise its inherent power over the administration of trusts in order to perpetuate the purposes of the settlors in the face of changed conditions.

Fenn College v. Nance, 210 N.E.2d 418, 422 (Ohio Ct. C.P. 1965).

²¹⁸ See *Beach*, *supra* note 189, at 335 (noting alumni constituency is diverse and has less influence in decisionmaking); *King*, *supra* note 53, at 564-67 (discussing standing of various interested persons: "Although many donors, in fact, may have a substantial influence over the management and disposition of funds during their lives, the mere fact of having given money to the institution does not, under existing law, automatically provide standing to mount a legal challenge.").

generally permit institutions to change, merge, and close with court approval when such changes are necessary.²¹⁹ Moreover, the general rule as to donors is that “[o]nce the property is vested fully in the trustee, the donor has no standing to enforce the prescribed use.”²²⁰

An example of the powerlessness of donors and alumni is well demonstrated by the case of *Steenek v. University of Bridgeport*.²²¹ The trustees of the private University of Bridgeport, suffering under a severe financial burden, decided to accept a \$50.5 million loan from Professors World Peace Academy, an organization affiliated with the Unification Church founded by Reverend Sun Myung Moon, in return for voting control on the board.²²² Students, alumni, “honorary” trustees, and other donors attempted to block the impending changes.²²³ The litigants²²⁴ complained that the heretofore nonsectarian school was deviating from its original charter by affiliating with the church and sought to prevent implementation of the plan.²²⁵

²¹⁹ Now two doctrines have been developed in equity to aid in sustaining trusts under altered circumstances, *cy pres* and *deviation*. *Cy pres* means “as nearly as may be.”

. . .

Deviation is sanctioned by a court of equity to permit a departure from the terms of a trust where compliance is impossible or illegal, or where changed circumstances, not known or anticipated by a donor, would defeat or substantially impair the purposes of the trust.

Fenn College, 210 N.E.2d at 423; see *King*, *supra* note 53, at 550-51 (discussing potential use of *cy pres* and deviation by colleges); see also *Mercer Univ.*, 371 S.E.2d at 860-61 (indicating college organized as nonprofit corporation may assign assets and merge).

²²⁰ *King*, *supra* note 53, at 566-67. Where a gift is conditional or ineffective, or the donor has reserved a right to terminate or revoke it, courts occasionally recognize a donor’s right to challenge its misuse. *Steenek v. University of Bridgeport*, No. CV 93 0133773, 1994 WL 463629, at *7 (Conn. Super. Ct. 1994) (citing 15 AM. JUR. 2D *Charities* § 148, at 175-76 (1976)), *aff’d* 668 A.2d 688 (Conn. 1995).

²²¹ 1994 WL 463629.

²²² *Id.* at *1.

²²³ *Id.*

²²⁴ A student-litigant also complained that her educational experience would be harmed by the University’s association with the Unification Church and that the character of the campus was already changed. *Id.* at *3-*5. The lower court acknowledged that students suffering special harm had limited standing to challenge the actions of the management; however, the lower court concluded that this student lacked evidence of any harm related to the school’s new relationship with the church. *Id.* at *4-*5.

²²⁵ *Id.* at *1.

University of Bridgeport alumni argued that the value of their degrees would be diminished by the change of university ownership, that they were deprived of an interest in their university-sponsored alumni association, and that they had "an implied personal duty" as alumni to protect UB's interests.²²⁶ The court declined to give legal standing to them based upon their perceived duty²²⁷ to protect and preserve their school.²²⁸ The loss of reputation they feared fell within the "impermissible realm of general speculation about unproven hypothetical situations."²²⁹

Donors also joined in the suit.²³⁰ Several of the donors shared their names with campus buildings or endowed scholarships.²³¹ Donors did not want the gifts they had earlier bestowed on the nonsectarian university to become affiliated with the Unification Church.²³² Despite their objections, the court concluded that "the donor plaintiffs have not alleged pecuniary injury or that their donations had any type of condition attached."²³³

Despite the obvious emotional attachment these litigants felt toward the University of Bridgeport that compelled them to participate in litigation concerning its future, none had a legally cognizable interest that accorded them standing to challenge the

²²⁶ *Id.* at *6.

²²⁷ "As has often been said, the youth who loves his Alma Mater will always ask, not 'What can she do for me?' but 'What can I do for her?'" LeBaron Russell Briggs (1855-1934), *Routine and Ideals*, COLLEGE LIFE (1904) (quoted in FAMILIAR QUOTATIONS, *supra* note 1, at 741 (cited as source for John F. Kennedy's Inaugural Address (January 20, 1961))).

²²⁸ *Steenek*, 1994 WL 463629, at *6.

²²⁹ *Id.* (quoting *Maloney v. Pac.*, 439 A.2d 349, 354 (Conn. 1981)).

²³⁰ *Id.* at *7. Another challenger held an honorary title of "life trustee," apparently in recognition of her contributions to the school. The court noted "her obvious affection for the university" and acknowledged her testimony "that she truly cares about the future of UB, having generously dedicated a great deal of her time and resources to UB over the years. However, this alone does not amount to the classical aggravation required to give her standing to bring this action." *Id.* at *8. The life trustee appealed, losing again at the appellate level because her status as "life trustee" did not afford her a managerial role in the university. *Steenek*, 668 A.2d at 696 (Conn. 1995). A dissent noted that because of allegations of conflicts of interest in the merger, the institution lacked a legal representative to challenge its conduct. *Id.* at 697 (Berdon, J., dissenting); see King, *supra* note 53, at 580-81 (urging expansion of standing beyond attorney general to those establishing "injury-in-fact" (students and faculty) but not to plaintiff class such as alumni and donors).

²³¹ *Steenek*, 1994 WL 463629, at *7.

²³² *Id.* at *7. The college-church agreement provided that the college would continue as a nonsectarian institution. *Id.* at *5.

²³³ *Id.* at *7.

action of the trustees under the circumstances.²³⁴ The justification for denying broader standing is obvious:

Though as alums we may love our colleges and certainly do not want to "pull the plug" prematurely, to require the college to die a slow and public death is not desirable. As the hospice movement has demonstrated in the biological world, when death is inevitable, death with dignity should be available. So, when the financial viability of a quality college has ended, the trustees should be permitted to close the college in a clean, orderly manner.²³⁵

While courts are correct in finding no legally cognizable claim by these parties, the decisions leave one troubled that valuable voices are being excluded from the decisionmaking process. In the next section, this Article suggests that *Beukas* restores some participatory dignity to the affected groups by broadening the university's obligations and judicial inquiry.

C. *BEUKAS*: ACCOUNTING FOR SOCIETAL INTERESTS

Without a doubt, colleges and universities serve society. They fill an important role in the community and, indeed, in the character of our country. Many persons and organizations, therefore, have both specific and non-specific interests in preserving institutions of higher education at an optimal level.

While *Beukas* does not expand the number of parties to litigation, *Beukas* does broaden the scope of the inquiry and, in so doing, allows community voices to be considered and accounted for in the decisionmaking process. By requiring that the university make its decision to close a program in good faith, the court invites the university to consider its broadest interests rather than mere expediency. The good faith question is sufficiently comprehensive to allow the university to consider the impact on both the university mission and the community of losing a university-run

²³⁴ *Steenek*, 668 A.2d at 689-93.

²³⁵ King, *supra* note 53, at 584.

HIV/AIDS dental clinic or a poverty law clinic, for example.²³⁶ The university may consider the employment needs of its community's key industries²³⁷ or the impact that declining confidence, prestige, or financial decay may have on its own long-term survival. In explaining the rationale of targeting one program over another, *Beukas* requires the university to develop fair and well-considered criteria. Thus, *Beukas* poses a question that is broad enough to account for community concerns and to achieve socially desirable results.²³⁸

V. CAN THIS COLLEGE BE SAVED? THE TENDENCY TO DENY INJUNCTIVE RELIEF

When closure threatens a program, affected parties may engage in nonlegal activities in order to rally public support and dissuade decisionmakers from their chosen course of action.²³⁹ The frequency of news articles reporting threatened program closures suggests that politicians and university administrators often "float" the idea of closing or reorganizing a program and gauge public reaction prior to final decisionmaking.²⁴⁰ As a matter of policy,

²³⁶ See NASH, *supra* note 203 (discussing eight communities and their universities and describing varied impact and role of university on community).

²³⁷ See *supra* notes 201-210 and accompanying text (discussing socio-economic impact of university on surrounding community).

²³⁸ As one educational researcher explained, the university must involve the community in its plans:

Planning efforts that cut across units should not be restricted to campuses. Units should be encouraged to rethink their relationships, or lack thereof, with constituencies and organizations off campus. Whether the focus is on student recruitment, community service and outreach, or interaction with employers, colleges and university leaders in strategic planning should encourage a systematic treatment of external relations. After all, strategic planning is at least in part an effort to convince the public that the institution is becoming more efficient and to secure that public's political and financial support. To further that end of securing public support and to enhance the breadth and quality of planning, those engaged in restructuring should incorporate external communities in the process *early on*. Members of key external constituencies should develop a sense of commitment to and ownership of the restructuring effort.

Rhoades, *supra* note 36, at 28.

²³⁹ See *supra* note 5 (detailing various methods by which students effectively communicate their concerns).

²⁴⁰ See *supra* note 5 (describing "protest and march rally" as popular public reaction).

higher educational literature suggests that the best restructuring decisions come from collaborative decisionmaking by a broad community of voices.²⁴¹ However, once the decision is ultimately made to terminate a program, students and others seeking injunctive relief to block the implementation²⁴² rarely succeed.²⁴³ Even those courts recognizing a breach of contract and approving the award of damages to injured students reason, "[T]he students' remedy is not an interference in the trustee's control of the University. Instead, their remedy would be to seek damages for the harm that has befallen them."²⁴⁴ Just as courts generally accord broad discretion to universities in disciplinary and academic matters,²⁴⁵ when it comes to ordering specific performance or injunctive relief, courts are reluctant to wrestle the stewardship of the institution away from its administrators.²⁴⁶

²⁴¹ See *supra* notes 48-52 and accompanying text (describing value of input from students, customers, and organizational members).

²⁴² When money damages will suffice for breach of contract, a court should not exercise its equitable power to order specific performance. RESTATEMENT (SECOND) OF CONTRACTS § 359 (1981). "[A]lthough the injured party can always claim damages for breach of contract, that party's right to specific relief as an alternative is much more limited." E. ALLEN FARNSWORTH, 3 FARNSWORTH ON CONTRACTS, § 12.4, at 854 (2d ed. 1990).

²⁴³ See *Steenek v. University of Bridgeport*, 668 A.2d 688 (Conn. 1995) (denying declaratory and injunctive relief to those challenging change of ownership and control of school); *Soderbloom v. Yale Univ.*, No. CV-91-03245535, 1992 WL 24448 (Conn. Super. Ct. 1992) (denying injunction to varsity wrestling team members when Yale terminated program); *In re Antioch Univ.*, 418 A.2d 105 (D.C. 1980) (denying injunction to law school students and deans attempting to exercise control of law school assets), *related proceedings*, *Goode v. Antioch Univ.*, 544 A.2d 704 (D.C. 1988) (remanding for trial on claim for contract damages); *Koenig v. Southeast Community College*, 438 N.W.2d 791 (Neb. 1989) (denying injunction to students challenging campus closure); *Eden v. Board of Trustees of State Univ. of N.Y.*, 374 N.Y.S.2d 686 (Sup. Ct. App. Div. 1975) (denying injunctive relief but authorizing suit for damages), *later proceedings*, 426 N.Y.S.2d 197 (Ct. Cl. 1980) (denying damages on grounds of sovereign immunity); *Galton v. College of Pharm. Sciences, Columbia Univ.*, 332 N.Y.S.2d 909 (Sup. Ct. 1972) (denying interim injunctive relief pending trial); *Zehner v. Alexander*, 3 Franklin County Legal J. 27 (Pa. Orphans Ct. 1979) (injunctive relief granted); *Aase v. State*, 400 N.W.2d 269 (S.D. 1987) (denying injunctive relief); see *King, supra* note 53, at 547 (discussing *Zehner v. Alexander*).

²⁴⁴ See *In re Antioch*, 418 A.2d at 18 (noting development of university's courses of study is not within discretion of students); *Behrend v. Ohio*, 379 N.E.2d 617, 620 (Ohio Ct. App. 1977) (finding architecture students can recover money damages for breach of contract but have no right to interfere in "policy determination of the continued existence of the various departments within the university").

²⁴⁵ See *supra* notes 93-94 (noting deference courts give university decisionmaking).

²⁴⁶ In *Miller v. Alderhold*, when a student challenged the college's decision to sell its assets, the court explained:

As a student he has no standing in court to challenge the act of the trustees or others in the operation and management of the college.

This judicial reluctance to order specific performance or injunctive relief may be ill-founded. The full thrust of *Beukas* and its two-fold requirement of good faith and fair dealing are most beneficial when carried out—not when remedied through money damages. An award of damages to students alone may short-change the institution, the community, and the students. If the university's decision to terminate a program is not a well-conceived decision, then granting these equitable remedies can prevent widespread harm both to students and to the university and its community.

Generally, specific performance and injunctive relief are appropriate where damages would not be "adequate to protect the expectation interest of the injured party."²⁴⁷ Commentary to the Restatement (Second) of Contracts explains:

Adequacy is to some extent relative, and the modern approach is to compare remedies to determine which is more effective in serving the ends of justice. Such a comparison will often lead to the granting of equitable relief. Doubts should be resolved in favor of the granting of specific performance or injunction.²⁴⁸

A college degree program, once dismantled, cannot be rebuilt easily. The years invested in building its reputation will be forever lost. Students cast out by the decision may be detoured forever from their educational objectives.²⁴⁹ Equitable remedies may be

It is inconceivable that one 18-year-old boy or girl the day after his or her admission to a private college could go into court . . . and seek to enjoin the trustees in the management and operation of the college, and ask for a receiver solely because he or she was a student. As Chief Justice Marshall said in the Dartmouth College case, . . . "Students are fluctuating and no individual among our youth has a vested interest in the institution which can be asserted in a court of justice."

184 S.E.2d 172, 175 (Ga. 1971) (quoting *Trustees of Dartmouth College v. Woodward*, 17 U.S. 517, 614 (1819)).

²⁴⁷ RESTATEMENT (SECOND) OF CONTRACTS § 359 (1981); see DeKoven, *supra* note 80, at 503-04 (discussing equitable remedies for program closures).

²⁴⁸ RESTATEMENT (SECOND) OF CONTRACTS § 354 cmt. a (1981).

²⁴⁹ See *supra* note 148 (describing effect on students of closure of Ohio University School of Architecture).

the only way to prevent such irreparable harm. Moreover, to ensure that the serious and far-reaching social consequences of dismantling an educational program have been considered, in addition to considering equitable remedies for students, courts should also encourage amicus curiae participation by the affected community. This helps to ensure the plenary consideration of the public interest in program closure decisions.²⁵⁰ If the university's decision to close is not made in good faith, then students, the community, alumni, and donors will be unnecessarily harmed by judicial inaction. If the university has not dealt fairly with affected students by developing a comprehensive closure plan, then those affected students may be deprived forever of their life goals. In light of the potential dire and widespread consequences of a decision to close a degree program, courts should carefully scrutinize rather than shield the decision under a misguided concept of judicial abstention.

²⁵⁰ Community groups, affected businesses, alumni, donors, and others are particularly suited for the role of amicus curiae. Acceptance of amicus curiae submissions is within the discretion of the court. *United States v. El-Gabrowny*, 844 F. Supp. 955, 957 n.1 (S.D.N.Y. 1994). Participation by such interests should be liberally granted in such cases where broad community interests are at stake. While not parties to the litigation, amicus curiae serve "for the benefit of the court, assisting the court in cases of general public interest by making suggestions to the court, by providing supplementary assistance to existing counsel, and by insuring a complete and plenary presentation of difficult issues so that the court may reach a proper decision." *Alexander v. Hall*, 64 F.R.D. 152, 155 (D.S.C. 1974) (citations omitted); see also *Onondaga Indian Nation v. New York*, No. 97-CV-445, 1997 WL 369389 at *2 (N.D.N.Y. June 25, 1997) (noting amicus submissions can provide additional perspective that would otherwise be unavailable to court); *United States v. Gotti*, 755 F. Supp. 1157, 1158 (E.D.N.Y. 1991) (explaining that amicus participates in court proceedings only to assist court). See generally, Bruce J. Ennis, *Effective Amicus Briefs*, 33 CATH. U. L. REV. 603 (1984) (noting increasing use of amicus briefs); Susan Hedman, *Friends of the Earth and Friends of the Court: Assessing the Impact of Interest Group Amici Curiae in Environmental Cases Decided by the Supreme Court*, 10 VA. ENVTL. L.J. 187 (1991) (noting amici participation is norm in Supreme Court cases); David S. Ruder, *The Development of Legal Doctrine through Amicus Participation: The SEC Experience*, 1989 WIS. L. REV. 1167 (1989) (noting increase in amicus participation); Michael K. Lowman, Comment, *The Litigating Amicus Curiae: When Does the Party Begin after the Friends Leave*, 41 AM. U. L. REV. 1243 (1992) (criticizing expanded litigation role of amicus curiae in recent years).

Although community groups may not have legally cognizable claims sufficient to intervene, courts often recognize that their participation is nevertheless valuable. See Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 823 n.13 (1997) (discussing judicial decision to allow amicus participation by minority groups who will be affected by court's decision).

VI. CONCLUSION

Degree program closures will continue into the next century. Students can do very little to guard against the detrimental impact of university downsizing and students will continue to be caught by surprise by these administrative decisions. In jurisdictions viewing the student-university contract as a semester-long relationship, students will find themselves both vulnerable to program closures and without an adequate remedy. In jurisdictions where affected students are broadly protected from program closures by the award of money damages, the institution, the larger student body, and the community may ultimately pay too steep a price as a troubled school is further drained of its resources. Jurisdictions that view the university-student relationship as an implied-in-law contract can achieve a balance between student and university interests that is in line with the important issues at stake in program closure decisions.

The implied-in-law contract allows a judge to evaluate the harm to affected students and to ask that the university demonstrate the soundness of its decision in light of broader responsibilities. By testing the good faith of the decision, the court invites the university to balance the competing needs of affected students, the larger student body, the faculty, the institution, and its community. The implied-in-law contract also asks the university to protect students from the hardships of the university's budgetary decisions. The fair dealing requirement places a burden on the institution to recognize a long-term relationship with each student that extends beyond the semester and to act with compassion and due care in helping all of its students achieve their educational goals even when the institution downsizes.