Confronting the Perception of Higher Education as a Commodity and the Student as Customer or Product:
(Does the law safeguard the college or university's proper academic relationship with its students, and the comparative obligations of the university and the student regarding the student's education?)

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“A proper education enables young people to put their lives in order, which means knowing what things are more important than other things; it means putting first things first.”

Wendell Berry (Citizenship Papers)

Law and Policy

At the 27th National Conference, we introduced our initial efforts at collaboration on this subject, emphasizing the origins of the faculty-student relationship (indeed the institution – student relationship) in the liberal arts tradition, and a brief history of the notion of the commodification of higher education and its relevance to the purpose and aims of education, and to the question of the right to education – principally from a U.K. historical perspective, as American higher education roots are in the United Kingdom. We then briefly examined the fundamental comparative nature of the secondary and post-secondary curriculum, and the competing premises that the modern evolution of higher education appears to encourage both study designed to impart general knowledge and intellectual skills, and at the same time, study which prepares students for specific occupational or professional roles.

1 LL.B., University of Sheffield; Ph.D., University of Warwick.
2 J.D., Florida State University.
Assuming both purposes worthy of debate, our presentation of U.S. law suggested that the college or university was generally restricted in its educational mission (so defined) only by general principles of contract law, including the preconditions or continuing demands of “accreditation.” This said, we suggested that the reality of the commodification of the right to higher education was largely self-imposed by colleges and universities themselves. It is our intent in this brief paper and presentation to simplify this assertion and facilitate – indeed encourage – an active, ongoing discussion of the topic by connecting the history of U.S. higher education with the settled inclination of courts to defer to academics in matters that relate to higher education per se. This paper is not about students suing colleges and universities, and its brief citation of legal authority is to establish – and emphasize – the simple assertion of general judicial deference to our basic mission and vision. Our paper suggests two basic discussion points, which hopefully can be used in any setting (with a variety of law and policy practitioners) to facilitate a meaningful discussion of the intersection of law and educational philosophy on the subject of the university - student educational relationship:

First: As all students of higher education know, and all higher education attorneys should know, the seminal and still renowned work on the subject of the history of American Higher Education is Frederick Rudolph’s “The American University.” Although new histories may be written, Rudolph’s commentaries remain relevant if we are to understand how our history explains our present and shapes our future.3

The “founding fathers” of the Colonial Colleges were men of Cambridge and Oxford, and their espoused educational principles related to the sustaining of civil leadership and order, influenced by broad religious purpose. However, Rudolph quickly reminds us, there were early debates about the right to education, and our history was immediately influenced by the question whether higher education should be reserved for the sons of rich men, lest it become too common and thus the goal of every man’s son.4 Indeed, Rudolph notes a very young Benjamin Franklin’s suggestion that “…wealthy

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3 Our tendency to define ourselves by reference to “the law of higher education” is appropriate only if those who study and practice higher education law are familiar with the original history of American higher education – and Rudolph’s work on the subject is thus required reading for the higher education lawyer.

4 Rudolph emphasizes here that during the period of the founding of our earliest colleges, formal education beyond the elementary subjects was rare, except for early provision for public elementary education in the Colonies, and denominational Charter schools in eastern coastal towns. See F. Rudolph, “The American College and University: A History,” (University of Georgia Press edition, 1990), p. 20-21.
parents sent their sons to Harvard ‘where for want of a suitable Genius, they learn little more than to carry themselves handsomely, and to enter a room genteely...’”5 The “right to higher education” debate did, of course, give way to a popularizing of higher education, as public institutions became a part of our early history, in the context of an emerging democracy. This movement, Rudolph suggests, carried with it the first major revision of the college or university students’ course of study – a trend away from divinity and toward science, philosophy, public administration and modern languages.6

The identification of this course of study with the emerging college or university reflected an early view of higher education as a social institution. Rudolph presents the vision of President Joseph McKeen, the first President of Bowdoin College, in 1802:

“It ought always to be remembered that literary institutions are founded and endowed for the public good, and not for the private advantage of those who resort to them for education. It is not that they may be able to pass through life in an easy or reputable manner, but that their mental powers may be cultivated and improved for the benefit of society. If it be true no man should live for himself alone, we may safely assert that every man who has been aided by a public institution to acquire an education and to qualify himself for usefulness is under peculiar obligations to exert his talents for the public good.”7

But this sentiment depended upon the willingness of citizens to share this perspective of democracy, and thus this image of the college or university. Thus, Rudolph notes, although such expectations of a higher education may be reflected in the mission, vision and values of many colleges and universities, such expectations quickly gave way to an alternative view which emphasized the expectations of students about college life. In the context of a popular suspicion of the aims of education, and a popular regard for the success of the self-made man, colleges and universities accepted, early-on, that the appeal of college was “that going to college was a way of making more money

7 F. Rudolph, “The American College and University: A History,” at 58-59. President McKeen’s words remain a part of the mission and vision of Bowdoin College and appear prominently on its website. See www.bowdoin.edu/admissions/
than if you did not.”¹⁸ This early shift in popular sentiment about higher education had a profound influence on the image of faculty, and the student-faculty relationship, in the minds of governing boards and therefore presidents – and thus we began to see ourselves, prior to the 20th Century, as a business in which “…trustees are partners, professors the salesmen, and students the customers.”⁹ This harsh description of the subordination of faculty as a governing body being too large a topic for this brief paper, the point here is that this popular image of the university is not a recent phenomenon – it is a part of our own early “conflicted” views prior to any judicial intervention in the student-institution educational relationship. It is not a new thought, although the public image of the institution today is driven even more by governing boards and popular politics.

In sum, our current concern that college boards and presidents (and attorneys) increasingly refer to institutions of higher education as businesses, and students as customers, reveals an image which is growing in popularity because it has almost always been a part of our history. As academics, with the greatest concern for the sustaining of President McKeen’s view of the college, faculty resent this image – and yet in many colleges seem content to leave administrative concerns to “administrators,” and to champion courses of study and teaching methods which have immediate market value. The point is that the courts have not brought this about. This portrait – whatever it is and whatever it becomes – is one we have painted ourselves, with our own brush.

Second (The law): Two basic points might facilitate the discussion of the topic at hand, although the second is most important to the specific integrity of the “educational” relationship between the student and the institution of higher education. All students of higher education history and higher education law are exposed to the importance of the Dartmouth College case,¹⁰ and the seminal decision of the Supreme Court declaring the independence of private colleges, and its legacy – the establishment of the so-called “public-private” distinction which immediately influenced the debate about class and access to higher education, the role of public universities, and the implications of public

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funding of private colleges. Any discussion of the topic at hand cannot ignore the
fundamental influence of the “public-private” distinction on the larger questions
subsumed by the topic.

Indeed, the larger social policy questions raised by the debate about higher
education and the public good must be answered before we can proceed to the level of
legal inquiry into the integrity of the college or university curriculum (student course of
study) *per se*. That said, on the latter and subordinate question, it may be simply and
confidently asserted that American courts have been and remain reluctant to intervene in
the determination of the proper course of study – whether it is designed to impart general
knowledge and intellectual skills, or to prepare students for specific occupational or
professional roles.

The more popular statements of recent time are attributed to cases such as
*Militana v. University of Miami*, and eventually the famous *Horowitz* and *Ewing* cases
decided by the United States Supreme Court in 1977 and 1985. The *Militana* court,
following similar statements of earlier courts, held that: “On the question whether a
student has failed to meet the academic requirements of a school, there is a wide
discretion permitted by school authorities, and courts will not interfere, unless school
authorities are shown to have acted in bad faith, or exercised their discretion arbitrarily.”

The court held it to be established by prior decisions of other jurisdictions that
school authorities have “…absolute discretion in determining whether a student has been
delinquent in his studies…” and that “…in matters of scholarship, school authorities are
uniquely qualified by training and experience to judge the qualifications of a student, and
efficiency of instruction depends in no small degree upon the school faculty’s freedom
from interference from other nonacademic tribunals.” Thus, “…a medical school must be
the judge of the qualifications of its students to be granted a degree; Courts are not
supposed to be learned in medicine and are not qualified to pass opinion as to the
attainments of a student of medicine.”

As we have pointed out in detail in our earlier paper, such cases almost always
arose from the academic dismissal of a student, whether in a private (and thus
contractual) context or a public (constitutional due process) context. The majority of
cases arose from student allegations (in a public university context) that constitutional
due process requirements restricted such discretion, and these claims were consistently unsuccessful. But, even when the student’s allegations were founded on contract law principles, courts refused to apply contract law rigidly, and insisted on the preservation of the education responsibilities of the institution. Thus, in *Mahayongsanan v. Hall*,\(^{11}\) the U.S. Court of Appeals re-affirmed the long established contractual relationship between the institution and its students and held the university’s catalogue to be a part of that relationship – but held that “…matters of traditional educational (academic) decision-making are beyond judicial review....” The *Hall* court expressed general support for the “…wide discretion afforded by the courts to educational institutions in framing their academic degree requirements.” (in this case the decision of the university to require a comprehensive examination as a pre-requisite to the award of a graduate degree in the course of study in which the student was enrolled).

The U.S. Supreme Court’s fundamental pronouncement is identified with its decision in *Board of Curators of the University of Missouri v. Horowitz*,\(^{12}\) a case in which a medical school student’s faculty docent, and other faculty and practitioners, evaluated clinical aspects of the student’s academic performance as unsatisfactory. Again in the context of constitutional due process demands in the public university setting, the Supreme Court observed that “[a] graduate or professional school is...the best judge of its students’ academic performance and their ability to master the required curriculum.” (e.g., the student’s mastering of concepts and skills). University faculties, Justice Powell observed in his separate opinion, “...must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation.”

These general pronouncements were re-affirmed in *Ewing*,\(^{13}\) and are repeated in many cases – some of which are cited in our prior paper and need no repetition here. The *Ewing* court upheld the University’s discretion to decide not to allow a student to retake an examination. Despite the Court’s inclination to discuss the factual circumstances of the case in some detail, the Court held that the conscientious and deliberate decision of a faculty as to a student’s academic fitness is entitled to judicial deference (repeating

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\(^{11}\) 529 F.2d 448 (5th Cir, 1976).
Justice Powell’s observation in Horowitz). This Horowitz-Ewing based view of judicial deference is repeated most recently in Lord v. Meharry Medical College School of Dentistry,\(^{14}\) where a Tennessee appellate court observed that a judicial panel is not equipped to review the application of the academic policies of a college or university as they pertain to the academic performance of a student. Citing a prior decision of the Tennessee Supreme Court in Horne v. Cox,\(^{15}\) the court observed that it could find no case which holds that colleges or universities are subject to the supervision or review of courts in the uniform application of their academic standards.

This observation, although most frequently applied in cases involving a student’s failure of examinations, or clinical skill sets, has been re-affirmed in other settings, including in cases where dismissal is based on a student’s excessive absences from classes. One such recent lower court case, Day v. Yale University School of Drama,\(^{16}\) observes that there are two situations in which a court might review a college or university’s academic decision: where the university fails to offer courses necessary for the obtaining of an “accredited” degree, or where the university fails to comply with a specific representation as to its course offerings, \(i.e.,\) the failure to offer a course actually scheduled for a particular term, and necessary for the student’s timely progress toward the appropriate degree (The subject of Zumbrun v. University of Southern California,\(^{17}\) discussed in our earlier paper).

In sum, although this second general line of cases (which were the subject of some detailed discussion in our prior paper) involve a student’s allegation of breach of contract or denial of due process in the context of his or her challenge to academic dismissal based upon unsatisfactory grades, our point here is that the statements of both state and federal courts regarding judicial deference are quite arguably \(broad\) statements – suggesting judicial deference to the range of decisions that define the student’s academic responsibilities and his or her obligations regarding the course of study being pursued.

\(^{15}\) 551 S.W.2d 690 (Tenn., 1977).
\(^{16}\) 2003 Conn. Super. LEXIS (2006) (Upholding dismissal for excessive absences, and discussing but refusing to review university’s consideration of student’s excuse for such absences).
\(^{17}\) 101 Cal. Rptr. 499 (1972).
And so, in the end, our presentation of American cases suggests that both principles of due process (as applied to public universities) and contract law (as applied to both private and public colleges and universities) reveal significant judicial deference to the judgment of academics (faculty and administration) in matters of curriculum, instruction, and evaluation of student competency as to individual subjects and progress toward or certification for graduation. To be sure, courts will treat us like other institutions in society under tort law, in our capacity as landowners and landlords, or as employers, etc. and that is a large subject– but on the subject at hand they will defer to our own definition of our basic mission and vision. This is, indeed, a question of social policy and not judicial administration – and that is why, for example, what The Lumina Foundation for Education is doing is so important. And the issue is not about just who gets to go to college. It is about the proper courses of study – and what the college experience is – and how it influences the way you spend your life. And these matters are for the moment within our discretion – and are matters of enormous responsibility for higher education attorneys and administrators.

**Exercising Discretion:** The problem is that the exercise of discretion can easily look like arbitrary decision-making. To many observers, the exercise of academic judgement is the prime example of a practice which can look arbitrary even when exercised with all good faith. This is, of course, because there are typically few rules which dictate what grade should be awarded to a student, let alone specify the style of classroom teaching. Individual academics are instead called upon to exercise their own professional expertise in deciding both how to teach and how to grade a student’s performance.

But academic judgement is also an excellent example of a discretionary practice which has already been somewhat refined at many institutions so as to minimize any chance of arbitrariness without at the same time having any significant impact on the status of faculty or on their ability to be the sole judges of academic performance. Thus examination papers are now typically submitted anonymously so that the identity of the candidate remains unknown to the examiner. Indeed, in many cases the examination
papers are submitted in word-processed format, so that a candidate cannot even be recognized through his or her handwriting.

It may be argued that anonymity does not work when students are expected to submit seminar papers, especially if final submission occurs after each candidate has previously submitted one or more drafts. But this only serves to make the point that the exercise of discretion is not the same as the application of a rule. The fact that student anonymity can work effectively in one context does not mean that it has to be practiced in every context. Most importantly, this is a fact which the courts recognize and – as has already been explained – they have no desire to usurp the function of making academic judgments, which rest properly with faculty.

Indeed, discretion is not all bad. In fact, it has many advantages to all concerned. In particular, it allows for a considerable degree of flexibility, so that decisions can be varied according to all the circumstances of each individual case (such as mitigating factors in a disciplinary hearing). It may be that it is very difficult to appeal against a decision arrived at through the exercise of discretion because, since reasonable people may differ about how to exercise that discretion in a given case, it is difficult to conclude that any decision was actually wrong. But, as judges have repeatedly recognized, that is not a problem which they wish brought into their courts.

So adopting and utilizing a system for discretionary decision-making should be done not because it is required by the courts. Nor should it be done because it will provide a good defense to potential litigation. It should be done because it is the right thing to do in the particular academic institution. In this context, ‘right’ means that the system fits the institution’s academic mission and upholds its integrity and reputation, and that it encourages appropriate behavior (and discourages inappropriate behavior) by faculty, staff and students alike. ‘Right’ does not mean that there is necessarily always one correct answer to the issue at hand. On the contrary, there is rarely one “right” answer to be achieved but, rather, a “range” of reasonable answers.

But while arriving at a discretionary decision that falls within this ‘reasonable range’ is a necessary pre-requisite to good governance, it is not in itself sufficient. On the contrary, we should bear in mind that the movement towards student consumerism arose in part because institutions often used to pronounce their decisions in a somewhat
Delphic manner, as though they could not be explained to ‘mere’ students or their families. (Of course, a few institutions still behave in this manner.) A second requirement for good discretionary decision-making is therefore that the institution should be able to give clear and coherent reasons for its decisions. If faculty or staff are reluctant to explain the true reason for a decision, this often is a red flag indicating that the decision is somehow flawed. The best way of avoiding such an awkward situation is to ensure that a suitable procedure for discretionary decision-making is adopted. While, as explained above, it would be inappropriate to attempt here to set down some rules which each institution should follow, it is nevertheless worth bearing in mind two principles as the basis for all decisions taken through the exercise of discretion (whether in the arena of academic judgement or in other fields).

The two principles we propose arise out of the difficulties which may potentially result from the exercise of discretion. The first potential problem, as discussed already, is that discretion may be applied arbitrarily, so that irrelevant or extraneous factors may be taken into account. The second potential problem is that discretion may be exercised beyond the bounds of original intent. Both arbitrary decision-making and decisions which go beyond appropriate limits make rational explanation very difficult.

To counter the first problem, any discretion exercised must be structured. This means that decisions must be taken according to clear criteria known to the parties in advance. To counter the second, the discretion must be limited, so that the exercise of discretion does not go beyond the bounds of what is necessary to perform the task properly. Neither of these principles is particularly onerous or expensive to apply.
**Structured decision-making:** A good example of structuring discretion is having professors lay down the criteria by which students’ examination performance will be graded. This can be particularly useful when the means of examination reflects a somewhat different approach to the material studied than that taken in class. It is very straightforward for professors to explain whether, for example, the style of writing will be graded just as much as the substance of what is said, or whether the style is virtually irrelevant provided that the student demonstrates the requisite substantive knowledge. Of course, well-structured discretion means that the professor must then actually put into practice the grading scheme which s/he has outlined!

Another example of well-structured discretion relates to student discipline, in situations involving academic misconduct. It is no longer sufficient, for example, simply to tell students simply that plagiarism will not be tolerated and that the punishment for such an offence can be severe. Such an admonition carries two unstructured elements. The first relates to the nature of plagiarism itself: what exactly is it? For example, is a failure to cite the source for every sentence written plagiarism, or will citing the source for the paragraph as a whole suffice? Moreover, plagiarism has many degrees of unacceptability: deliberately concealing a source is very different from an inadvertent failure to cite to a precise page. Considerable difficulty can be avoided if students are told clearly in advance what is unacceptable practice. There is even, perhaps, some merit in avoiding use of the word plagiarism to describe all but the worst offences.

The second unstructured element relates to the punishment, since it appears to allow for any sanction to be imposed from a mere verbal explanation as to what constitutes plagiarism and a warning not to do it again to the assignment of a failing grade, dismissal from the academic program or, in extreme circumstances, revocation of a degree. Sound practice therefore would seem to suggest the different levels of plagiarism to be understood. The point is to sustain a guiding principle which will be taken into account by the person or body entrusted with deciding on the penalty. The decision-maker(s) are thus left with the discretion to apply a different sanction if it is felt right to do so in the individual circumstances of the case, but they are at the same time provided with guidance as to what the college considers to be the appropriate level of severity for the nature of the academic misconduct presented by the situation. This will
enable like cases to be treated alike, and different cases differently without any appearance of arbitrary or capricious decision-making.

In keeping with our original suggestion of the judicial view of the educational relationship between student and college, our recommendation for the implementation of the principle of structured decision-making is made not in order to reduce the likelihood of having such decisions challenged in court (with the attendant “legal” lines being drawn between “purely academic judgments” and situations of “misconduct”). The aim of well structured discretion is to sustain good academic governance.

**Limited decision-making:** For the same reason it is also necessary to limit the field of discretionary decision-making. An example of what can go wrong if this principle is not followed occurred a few years ago at a university at which one of the authors was then teaching. A prospective PhD student made a proposal as to the subject-matter of his thesis. This was put before the relevant committee, which included academics who specialized in the area, but the proposal was turned down on the grounds that the topic was not of sufficient originality or complexity to form the basis of a PhD. A member of the committee then contacted the student and together they formulated an alternative proposal, which the committee was happy to approve. A supervisor was then appointed, who was made aware of these facts.

It appears, however, that the student’s heart was never really in the new project and, after a while, he asked his supervisor if his topic could be amended. Without consulting anyone else, the supervisor (actually, a very eminent law professor!) then approved a change of title to something very similar to the original proposal which the committee had previously rejected. The student continued to work on this for another two years before submitting his thesis. Inevitably, the examiners found that the thesis was of insufficient quality and depth to merit the award of a PhD and failed the student. Equally inevitably, the student appealed that decision through the university’s internal review mechanisms and details of this story emerged. The university then felt obliged to instigate a full internal inquiry which took several months to complete. In the end, a very messy compromise was achieved, but the damage to the university’s integrity and reputation – and to the student’s future prospects – had already been done. A simple mechanism by which both student and supervisor would be expected to report regularly on progress
would have nipped this problem in the bud and imposed important – and perfectly legitimate – limits on the discretion of the supervisor.

The fact that court action was eventually avoided can hardly be called a victory for anyone in this case. Once again, therefore, the moral of the story is that we should do what is right and appropriate not because it may be second-guessed by the courts, or because students see themselves as consumers entitled to receive a certain set of grades, but because it is part of the academic mission of institutions of higher education.