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COMMENT

The Confidentiality of University Student Records: A Common Law Analysis

INTRODUCTION

College students are subject to continuous objective and subjective evaluations prior to and throughout their college careers. The results of many of these evaluations eventually find their way into each student's "file." These evaluations can have a significant impact on the student. Selection of fellowship and scholarship recipients, enrollment in special classes, admission to graduate school, and offers of employment are only a sampling of the opportunities that may be contingent upon the information maintained by the university in student files. Obviously the student, as well as the university, has a vital interest in ensuring that the information is accurate and is disclosed only to appropriate persons.

The interests of the student and the university with respect to the confidentiality of, or student access to, the records maintained in the student file often conflict. The student may want access to his file for several reasons, one of which is to obtain feedback pertaining to his past performance and to correct any prejudicial inaccuracies contained in the file. He may also want to control access to his file by prospective employers, parents, and others whose knowledge of unfavorable reports in the file may be against his interests. In contrast, the university is limited by administrative constraints in providing access to students and has an interest in maintaining the usefulness of certain items by controlling access. For example, the university has an interest in denying student access to letters of recommendation since such letters would tend to be less candid—therefore less meaningful—if the authors could not be guaranteed confidentiality. Further, the university may wish to provide access to the records to certain persons—professors, counselors, and prospective employers—against the student's wishes. These student-university conflicts are often significant enough to warrant judicial or statutory resolution.

Although the number of student-university disputes over the confidentiality of student records is increasing, few reported cases directly treat this issue. Twenty years ago, an analysis of this subject would have been largely theoretical. Since that time, a

shift in attitudes toward recognizing student rights, the increased availability of legal services, and important technological advances in the ability to record, store, and facilitate access to vast quantities of data have focused national interest on the issue of student records confidentiality.

Recent federal legislation, known as the Buckley amendment, conditions certain federal funding upon school compliance with the student records confidentiality guidelines set forth in the statute.¹ The Buckley amendment basically provides that a student be given access to his own educational records and that

1. Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (Supp. IV, 1974) [hereinafter cited as Buckley amendment]. The Buckley amendment, a part of the Education Amendments of 1974, became effective November 19, 1974 and was later amended by S.J. RES. 40, 93d Cong., 2d Sess. (1974). An in-depth analysis of the Act is provided by Note, *Federal Genesis of Comprehensive Protection of Student Educational Record Rights: The Family Educational Rights and Privacy Act of 1974*, 61 IOWA L. REV. 74 (1975). For its legislative history see Comment, *The Buckley Amendment: Opening School Files For Student and Parental Review*, 24 CATHOLIC U.L. REV. 588, 594-99 (1975); Comment, *Protecting the Privacy of School Children and Their Families Through the Family Educational Rights and Privacy Act of 1974*, 14 J. FAMILY L. 255, 270-76 (1975).

The statute applies only to educational institutions, public or private, receiving federal funds under programs sponsored by the Commissioner of Education. 20 U.S.C. § 1232g(a)(3) (Supp. IV, 1974). A student is defined as "any person with respect to whom an educational agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution." 20 U.S.C. § 1232g(a)(6) (Supp. IV, 1974). The only sanction for noncompliance is withholding of funds from the offending institution.

The statute provides a student the right of access to his student records within 45 days of a request. The student also has a right to a hearing to challenge the content of his records. A student may not, however, view the following materials:

- a. the financial records of a student's parents;
- b. confidential letters of recommendation entered into the record prior to the effective date of the statute;
- c. confidential letters of recommendation entered into the record subsequent to the effective date of the statute where the student has waived his right to see them;
- d. records made by professionals, e.g., physicians and psychiatrists, while acting in their professional duties;
- e. records in the sole possession of the maker that are not otherwise accessible to other parties.

Without the student's written consent, the educational institution cannot release a student's personal records, except for "directory information" (name, address, major, telephone listing, etc.) to third parties other than (a) other university officials with a valid interest; (b) officials of educational institutions where the student is applying for admission; (c) accrediting organizations; (d) any party presenting a valid court subpoena; (e) certain government officials; and (f) parents of a dependent student. 20 U.S.C. § 1232g(b)(1), (b)(2) (Supp. IV, 1974).

The institution must keep a record of parties who request access to specific student records and must publish their records policy in such a way as to give sufficient notice to the student. 20 U.S.C. § 1232g(b)(4)(A) (Supp. IV, 1974).

public access to a student's educational records be denied absent the student's permission.² The Buckley amendment leaves unresolved, however, numerous issues likely to arise in future student-university litigation.³ Neither the causes of action available to the student nor the defenses available to the university are defined by the statute. The propriety of various remedies, such as compensatory and punitive damages, injunctions, and mandamus, remains unanswered. Further, the Buckley amendment does not affect schools that receive no funds under the specified federal programs.⁴

The case law concerning student records confidentiality is similarly undefined. The few courts that have resolved such disputes have generally either relied upon state statutes⁵ or have summarily disposed of the issue without articulating a legal basis.⁶

Since the statutory and case law of student records confidentiality is unsettled, a careful review of analogous common law doctrines will be helpful. Although judicial precedents directly on point are scant, the common law provides useful tools by which questions of student records confidentiality can be analyzed and resolved. The most important of these are the tort right to privacy, the "right to know," as defined by the law of public records disclosure, and the law of contracts. An orderly judicial development of these common law doctrines would better serve the re-

2. Buckley amendment, 20 U.S.C. § 1232g(a)(1)(A), (b)(1) (Supp. IV, 1974).

3. Although the Buckley amendment applies to elementary, secondary, and university level institutions, no attempt is made in this comment to deal with the record keeping policies of *all*. Rather, it will focus on the problems of record confidentiality in the university setting, and the application of the common law in that same context.

4. The federal funds that are conditioned upon compliance with the terms of the Buckley amendment are those received under any program administered by the Commissioner of Education. 40 Fed. Reg. 1210 (1975).

5. See, e.g., *Valentine v. Independent School Dist.*, 187 Iowa 555, 174 N.W. 334 (1919) (a state law establishing graded schools required finding that student's grades were public property, not the private property of teacher or superintendent); *Wagner v. Redmond*, 127 So. 2d 275, 277 (La. Ct. App. 1960) (en banc) (despite local school board rule, state law required superintendent to provide certain student names and addresses to member of board).

6. See, e.g., *Brown v. Knowlton*, 370 F. Supp. 1119, 1123 (S.D.N.Y.), *aff'd without opinion*, 505 F.2d 727 (2d Cir. 1974) (West Point cadet); *Hagopian v. Knowlton*, 346 F. Supp. 29 (S.D.N.Y.), *aff'd*, 470 F.2d 201 (2d Cir. 1972) (West Point cadet); *Wasson v. Trowbridge*, 269 F. Supp. 900 (E.D.N.Y.), *aff'd*, 382 F.2d 807 (2d Cir. 1967) (Merchant Marine cadet). In each case the court summarily denied plaintiff's request to view his school records. Cf. *Doe v. McMillan*, 459 F.2d 1304 (D.C. Cir. 1972), *rev'd*, 412 U.S. 306 (1973) (official immunity and constitutional protection of congressional speech and debate precluded suit).

spective interests of the student and the university than would burdensome legislative regulation. The purpose of this comment is to assist in that development.

I. THE STUDENT'S RIGHT TO PRIVACY

Prior to 1890, no English or American court had granted relief for an invasion of the "right to privacy."⁷ In that year, the seminal article by Warren and Brandeis articulated for the first time the existence of a common law "right to privacy," the invasion of which was an actionable tort.⁸ Since that time, the right to privacy has been invoked in a number of factual settings.⁹

7. Although several distinct concepts are encompassed under the rubric of privacy, only two major meanings are involved in the context of university recordkeeping. The first is the "right of selective disclosure," which is the "claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others." A. WESTIN, *PRIVACY AND FREEDOM* 7 (1967). The second is a broader principle, well-defined by Judge Cooley's phrase, "the right to be let alone." T. COOLEY, *TORTS* 29 (2d ed. 1888). This right is the "right of personal autonomy" and is concerned with allowing individuals the freedom to decide for themselves whether to engage in certain acts or experiences. See Gross, *The Concept of Privacy*, 42 N.Y.U.L. REV. 34, 37-38 (1967). Confusion of these two principles arises since the same act can simultaneously involve both aspects of privacy. For example, a woman seeking an abortion may wish neither to disclose that fact to the public nor be restricted by the law in making her decision. In the discussion on the confidentiality of student records, the primary focus is on the selective disclosure right. But if student records contain sensitive information regarding such intimate matters as abortion, other matters of moral decision, or psychological reports, then the concept of personal autonomy would also become a relevant consideration in evaluating a university's recordkeeping policies.

8. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). The authors argued for the explicit recognition of a personal right to privacy, claiming that the right had been protected throughout the development of the common law under various legal theories, but had never been recognized as a distinct, legally protected interest.

The article was written after an intrusion by the press into a private party given by one of Boston's social elite, Mr. Warren himself. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960). Consequently, it focused upon undue publicity as a breach of privacy. *Id.* at 389, 392. Privacy was nevertheless defined in broad terms—the authors provided substantial growing room for the varied application of the new tort they had categorized. Since this influential article, a large body of private civil law, both common law and statutory, has developed. See generally W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 117 (4th ed. 1971).

9. See generally Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960). Dean Prosser suggests that the law of privacy has developed in a haphazard manner, sacrificing internal coherency for expediency. He identifies four different interests that are protected by the law of privacy: (1) intrusion upon plaintiff's seclusion, or into his private affairs; (2) public disclosure of embarrassing private facts about plaintiff; (3) publicity that places plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness. *Id.* at 389. See also W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 117 (4th ed. 1971). Prosser's analysis has been criticized as obscuring the deeper interests—the intrinsic values of human dignity—that should be, or are in fact, protected by the law of privacy. See Bloustein, *Privacy As An Aspect of Human Dignity*:

Those cases dealing with the public disclosure of private facts suggest four elements that are indispensable to a cause of action:¹⁰ (1) the information must be private; (2) the information must have been disclosed to the public; (3) the information disclosed must identify the injured party; and (4) the disclosure must be offensive to reasonable sensibilities.

A. *The Information Must Be Private*¹¹

Although the range of information kept in student files varies widely among universities, a typical student file contains three broad categories of information:

(1) Information requested from and furnished by the student, including biographical data, letters of inquiry written by the student to the university, signed statements of intended compliance with university policies, and personal financial data.

(2) Information generated by the university concerning the student, including transcripts and grade reports, current class status, special placement or other test results, and teacher recommendations or evaluations.

(3) Information received by the university from third parties, including high school or former college transcripts, national testing results, and letters of recommendation.

Not all of this information, in fact relatively little of that provided by the student himself, would qualify as private under common law precedent. The cases indicate that "private information" is that which an individual himself would not divulge to the public.¹² "Manifestly an individual cannot claim a right to

An Answer to Dean Prosser, 39 N.Y.U.L. REV. 962, 1000-1007 (1964). Despite Bloustein's criticism, Prosser's classifications provide a helpful structural framework for analyzing privacy interests in the area of student records confidentiality.

10. See generally W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 117 (4th ed. 1971).

11. The terms "private" and "public" have been used to convey a number of meanings. The term "private," as it is here used, refers to the nature of the information itself rather than the nature of the records upon which the information is kept. In subsequent parts of this comment, reference is made to public records. The term "public records" refers to records required to be kept by law and should not be confused with public information (information that is not private). Indeed, public records, as well as nonpublic records, can contain protected private information.

12. The effect of a person's release of information has, in the past, been to prevent his further control.

Once an individual has given up information about himself . . . the presumption has been that he could not exert any control over it and had little legal recourse in the absence of extremely abusive disclosure of information files. Now with several recently enacted laws . . . this presumption has been overthrown.

Symms & Hawks, *The Threads of Privacy: The Judicial Evolution of a "Right of Privacy"*

privacy with regard to that which cannot, from the very nature of things and by operation of law, remain private."¹³ Applying this rule, courts have refused to classify information regarding birth or marriage,¹⁴ home address,¹⁵ military service,¹⁶ and public occupation as private.¹⁷ A university presumably would not incur liability for the public release of similar kinds of information¹⁸—a student's name, date or place of birth, year in school, major field of study, class schedule, address, and awards received—since such information generally is not considered private. On the other hand, grade reports, transcripts, psychological testing results, and similar evaluative information have been held to satisfy the privacy requirement on grounds of public policy¹⁹ or statutory prohibition.²⁰

B. The Information Must Have Been Disclosed to the Public

The extent of publication, the sensitivity of the information disseminated, and the types of persons to whom the information

and Current Legislative Trends, 11 IDAHO L. REV. 11, 21 (1974). See also Hoglund & Kahan, *Invasion of Privacy and the Freedom of Information Act: Getman v. NLRB*, 40 GEO. WASH. L. REV. 527, 529-31 (1972); *Nader v. General Motors Corp.*, 25 N.Y.2d 560, 567, 255 N.E.2d 765, 769, 307 N.Y.S.2d 647, 652 (1970).

13. *Metter v. Los Angeles Examiner*, 35 Cal. App. 2d 304, 311, 95 P.2d 491, 495 (1939) (newspaper's publication of spouse's suicide was not an invasion of privacy since investigation of suicide was required by statute).

14. *Werner v. Times-Mirror Co.*, 193 Cal. App. 2d 111, 14 Cal. Rptr. 208 (Dist. Ct. App. 1961); *Meetze v. Associated Press*, 203 S.C. 330, 95 S.E.2d 606 (1956).

15. *McNutt v. New Mexico State Tribune Co.*, 88 N.M. 162, 538 P.2d 804 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

16. *Stryker v. Republic Pictures Corp.*, 108 Cal. App. 2d 191, 238 P.2d 670 (Dist. Ct. App. 1951); *Continental Optical Co. v. Reed*, 119 Ind. App. 643, 86 N.E.2d 306 (1949) (en banc).

17. *Continental Optical Co. v. Reed*, 119 Ind. App. 643, 86 N.E.2d 306 (1949) (en banc); *Reed v. Orleans Parish School Bd.*, 21 So. 2d 895 (La. Ct. App. 1945).

18. The Buckley amendment specifically exempts "directory information" from the category of student information protected by the statute, including:

[T]he student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student.

20 U.S.C. § 1232g(a)(5)(A) (Supp. IV, 1974). Provision is made, however, for a student to excise this material from public directories if he so desires. 20 U.S.C. § 1232g(a)(5)(B) (Supp. IV, 1974).

19. *People v. Russel*, 214 Cal. App. 2d 445, 452, 29 Cal. Rptr. 562, 567 (Dist. Ct. App. 1963).

20. The Buckley amendment protects "education records," which are defined as "those records, files, documents, and other materials which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution

is made available must be considered to determine whether there has been sufficient public disclosure of a student's records. Although university records policy allowing general publication of a student's private records may violate the student's right to privacy, there is question whether disclosure of those records to only one or even several unauthorized persons is sufficient to constitute "public disclosure." In a 1962 decision involving demonstrative publication by a creditor of information concerning a debtor's alleged nonpayment, the United States Court of Appeals for the Fifth Circuit stated that absent physical intrusion, the tort of invasion of privacy must be accompanied by publicity to a "large number of persons as distinguished from one individual or a few."²¹

On the other hand, some cases suggest that certain information, although part of a public record, must nonetheless be kept confidential and free from any unauthorized public inspection.²² Especially if the privacy interests of the plaintiff are unusually high, for example, where the records treat matters of morality, discipline, or psychological evaluation, courts have taken a more critical view of records disclosure. The courts in these cases have suggested that the importance or sensitivity of the information disclosed may be a decisive factor in determining whether such disclosure is actually considered a "public disclosure."²³

or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A) (Supp. IV, 1974).

21. *Santiesteban v. Goodyear Tire & Rubber Co.*, 306 F.2d 9, 11 (5th Cir. 1962) (tires were removed from plaintiff's automobile and it was left standing on its rims at country club where plaintiff's fellow employees, employer, and country club members viewed this embarrassment to plaintiff; recovery allowed). *Compare* *Kerby v. Hal Roach Studios*, 53 Cal. App. 2d 207, 127 P.2d 577 (Dist. Ct. App. 1942) (letters distributed to 1,000 persons were sufficient publication for invasion of privacy) and *Montgomery Ward v. Larragoite*, 81 N.M. 383, 467 P.2d 399 (1970) (publication of debt to three relatives was invasion of privacy) *with* *Gregory v. Bryan-Hunt Co.*, 295 Ky. 345, 174 S.W.2d 510 (1943) (oral publication in restaurant with "several persons" present was no invasion); *Hendry v. Conner*, 226 N.W.2d 921 (Minn. 1975) (oral publication to a "very small number of persons" in hospital waiting room was no invasion); *French v. Safeway Stores, Inc.*, 247 Ore. 554, 430 P.2d 1021 (1967) (disclosure to son and daughter-in-law was not sufficient); *and* *Vogel v. W.T. Grant Co.*, 458 Pa. 124, 327 A.2d 133 (1974) (notification to one employer and three relatives was not sufficient publication).

22. *See, e.g., Mathews v. Pyle*, 75 Ariz. 76, 251 P.2d 893 (1952); *Patterson v. Tribune Co.*, 146 So. 2d 623 (Dist. Ct. App. 1962), *cert. denied*, 153 So. 2d 306 (Fla. 1963); *State ex rel. Cummer v. Pace*, 121 Fla. 871, 164 So. 723 (1935); *MacEwan v. Holm*, 226 Ore. 27, 359 P.2d 413 (1961).

23. *See, e.g., Runyon v. Board of Prison Terms and Paroles*, 26 Cal. App. 2d 183, 79 P.2d 101 (Dist. Ct. App. 1938); *Massachusetts Mut. Life Ins. Co. v. Board of Trustees*, 178 Mich. 193, 144 N.W. 538 (1913); *Minneapolis Star & Tribune Co. v. State*, 282 Minn. 86, 163 N.W.2d 46 (1968).

Whether private student records are of a sensitive nature sufficient to satisfy the public disclosure element is a question that has not been fully resolved. A California appellate court announced in 1963 that limited disclosure of private student records to even one unauthorized person was against public policy and that the negligent release of a student's transcript to an unauthorized third party "might well subject the school to suit . . . for a violation of [the student's] right of privacy."²⁴ The court held that a fraudulent request by an unauthorized party for a student's transcript was criminal fraud, which "injures the public because it has been determined that the best interests of society are served by not opening to the general public the grades received by individuals."²⁵ This language suggests that disclosure of private student records to even one unauthorized person can be sufficient to satisfy the public disclosure element of a tortious invasion of privacy.

Certain third parties, however, are not considered part of this public. Disclosure of private student records to these parties does not result in liability for invasion of privacy.²⁶ Important among these exceptions are courts of law issuing subpoenas for student records, since the right of privacy exists only so far as its assertion is consistent with law or public policy, and university personnel, who presumably have a right of access to student records for educational or other valid purposes of the university.²⁷ Absent such valid purposes, however, university personnel should have no greater access to a student's records than any other member of the public. The right of access may also extend to "institutions of learning" to which the student is applying for admission. In 1969, a federal district court held:

School officials have a right and, we think, the duty to record and communicate true factual information about their students to institutions of learning, for the purposes of giving to the latter

24. *People v. Russel*, 214 Cal. App. 2d 445, 452, 29 Cal. Rptr. 562, 567 (Dist. Ct. App. 1963).

25. *Id.*

26. The Buckley amendment makes provision for the release of student records, without consent, to the following parties: (a) university officials with a valid interest; (b) officials of educational institutions where the student is applying for admission; (c) certain government officials; (d) accrediting organizations; (e) any party pursuant to presentation of a valid court order. 20 U.S.C. §§ 1232g(b)(1)(A)-(I), (b)(2)(B) (Supp. IV, 1974).

27. See generally Caruso, *Privacy of Students and Confidentiality of Student Records*, 22 CASE W. RES. L. REV. 379 (1971). See also *Growick v. Board of Ed.*, 39 App. Div. 2d 785, 331 N.Y.S.2d 906 (3d Dep't 1972) (school principal required to furnish confidential student records for pretrial examination).

an accurate and complete picture of the applicants for admission.²⁸

Thus, certain information can be disclosed to authorized persons for valid purposes without being considered "disclosed to the public."

C. The Information Disclosed Must Identify the Injured Party

The public disclosure of private information from a student file is not an invasion of the student's right to privacy unless it identifies the student.²⁹ Thus, the release of anonymous student data or statistics to institutions or to individuals for research purposes is appropriate.³⁰ A university should not assume, however, that merely blotting out a student's name will be sufficient to prevent identification. In *Cason v. Baskin*,³¹ the Supreme Court of Florida held that an author who had commented in his book about the coarse speech and brusque manner of the plaintiff, naming her only by her first name, had nonetheless made her recognizable to her friends, and was therefore liable for invading her privacy. Similarly, the release of student records that include the student's photograph, social security number, address, student number, or any other information that identifies the student could constitute an invasion of privacy by a university.

28. *Einhorn v. Maus*, 300 F. Supp. 1169, 1171 (E.D. Pa. 1969). Some high school students had participated in the distribution of literature and had worn black armbands to the graduation service as a means of protest. Plaintiff students sought to enjoin the school from noting these activities on the school records and communicating them to institutions of higher learning. The injunction was not granted since the petitioners failed to show immediate or irreparable harm and the communication was true.

29. *Cf. Bernstein v. National Broadcasting Co.*, 129 F. Supp. 817 (D.D.C. 1955), *aff'd*, 232 F.2d 369 (D.C. Cir.), *cert. denied*, 352 U.S. 945 (1956) (televising life story of criminal 12 years after a pardon, where person was not named and honest effort to avoid possible identification was made, did not constitute an invasion of right to privacy); *Raynor v. American Broadcasting Co.*, 222 F. Supp. 795 (E.D. Pa. 1963).

30. The Buckley amendment allows student records to be used for audit, evaluation, or enforcement of federally supported educational programs provided the data are collected in a manner that will not allow personal identification of the students. 20 U.S.C. 1232g(b)(3) (Supp. IV, 1974).

31. 155 Fla. 108, 20 So. 2d 243 (1944). *See also Nappier v. Jefferson Standard Life Ins. Co.*, 322 F.2d 502 (4th Cir. 1963) (television broadcast which sufficiently identified rape victims, although not mentioning them by name, invaded their right to privacy); *Carlisle v. Fawcett Publ. Inc.*, 201 Cal. App. 2d 733, 20 Cal. Rptr. 405 (Dist. Ct. App. 1962) (plaintiff's given name and general description sufficiently identified plaintiff to invade his privacy).

D. The Disclosure Must Be Offensive to Reasonable Sensibilities

The fourth element of a tortious invasion of privacy requires that the public disclosure of the private student information be offensive to reasonable sensibilities.³² Although no case has defined what kinds of school information, if released, will satisfy this requirement, a New York state district court held in 1971 that the act of a public school or its employees in divulging "information given to [the] school in confidence" by the pupil could constitute outrageous actionable conduct.³³ The court did not, however, discuss the nature of the information disclosed.

Obviously, situations may arise in which it would be convenient for the student—or even to his advantage—for a university to disclose certain information in his record. The common law right to privacy does not handcuff the university to a rigid rule of nondisclosure in such situations. Rather, it requires that the university use reasonable discretion to disclose only information not offensive to reasonable sensibilities. A university may, for instance, wish to publish the academic achievement of its honor students. Since reasonable sensibilities are not offended by recognition of praiseworthy achievement, such disclosure is permissible.

II. THE RIGHT TO KNOW—THE STUDENT'S RIGHT OF ACCESS

The common law right to privacy protects a student's private

32. In *Samuel v. Curtis Publishing Co.*, 122 F. Supp. 327 (N.D. Cal. 1954), plaintiff argued that his right to privacy had been invaded by defendant's publication of a photograph showing plaintiff attempting to dissuade a woman from jumping off a bridge. The court stated:

An invasion of the right of privacy occurs not with the mere publication of a photograph, but occurs when a photograph is published where the publisher should have known that its publication would offend the sensibilities of a normal person, and whether there has been such an offensive invasion of privacy is to some extent a question of law.

Id. at 328 (citations omitted). See also *Davis v. General Fin. & Thrift Corp.*, 80 Ga. App. 708, 57 S.E.2d 225 (1950). There, defendant sent plaintiff a telegram which said, "Must have March payment immediately or legal action." The court held:

[T]he right of privacy must be restricted to "ordinary sensibilities" and not to super sensitiveness There are some shocks, inconveniences and annoyances [sic] which members of society in the nature of things must absorb without the right of redress.

Id. at 711, 57 S.E.2d at 227 (citations omitted).

33. *Blair v. Union Free School Dist. No. 6*, 67 Misc. 2d 248, 254, 324 N.Y.S.2d 222, 228 (Suffolk County Dist. Ct. 1971); cf. *Elder v. Anderson*, 205 Cal. App. 2d 326, 23 Cal. Rptr. 48 (Dist. Ct. App. 1962).

records from unauthorized disclosure. It does not, however, provide the student with the equally important right to examine his own records and, if necessary, to correct any errors contained there. Such a right was fashioned by the New York courts from the common law doctrine of "the right to know."³⁴

The right to know doctrine was originally formulated in England to open public records to the perusal of the interested public.³⁵ In 1912, the Court of Appeals of New York invoked the doctrine as authority for compelling a local water supply board to open its records to a plaintiff citizen.³⁶ The court stated:

We think it may safely be said that at common law, when not detrimental to the public interest, the right to inspect public records and public documents exists with all persons who have a sufficient interest in the subject-matter thereof to answer the requirements of the law governing that question.³⁷

In 1961, the right to know doctrine was extended to student records. In *Johnson v. Board of Education*,³⁸ a lower New York court issued a writ of mandamus compelling defendant school board to make the school records of plaintiff's minor daughter available to plaintiff for his inspection. Faced with similar facts, another New York court, in *Van Allen v. McCleary*,³⁹ implied that upon reaching majority the student himself assumes the same rights of access that the *Johnson* case recognized in the parents of the minor student. The court stated:

Although certain records of the kind here involved are privileged and confidential, such privilege merely prevents disclosure of the communication or record to third parties, i.e., to persons other than . . . the person making the record. The "client" or

34. For a general review of the common law development in the area of student records see H. BUTLER, K. MORAN, & F. VANDERPOOL, *LEGAL ASPECTS OF STUDENT RECORDS* 20-32 (1972); Carey, *Students, Parents and the School Record Prison: A Legal Strategy for Preventing Abuse*, 3 J.L. & EDUC. 365 (1974); Comment, *Parental Right to Inspect School Records*, 20 BUFF. L. REV. 255 (1970).

35. See *Ferry v. Williams*, 41 N.J.L. 332, 334-36, 32 AM. R. 219, 220-22 (Sup. Ct. 1879). The court reviewed English common law cases treating the confidentiality of public records.

36. *Egan v. Board of Water Supply*, 205 N.Y. 147, 98 N.E. 467 (1912).

37. *Id.* at 154, 98 N.E. at 469, quoting *Clement v. Graham*, 78 Vt. 290, 315, 63 A. 146, 153 (1906).

38. 31 Misc. 2d 810, 220 N.Y.S.2d 362 (Sup. Ct. Kings County 1961). Defendant school board argued that (1) the records requested were confidential; (2) since the records were allegedly needed to assist in the preparation of a legal action, plaintiff could obtain them through the more accepted method of a subpoena *duces tecum*; and (3) the parents requesting the records were not a party in interest.

39. 27 Misc. 2d 81, 211 N.Y.S.2d 501 (Sup. Ct. Nassau County 1961).

"patient" within the meaning of the provisions referred to is the child and, since the child is minor, and cannot exercise full legal discretion, [it is] the parent or guardian of the child. . . . It should be noted, further, that the education interest of the pupil can best be served only by full cooperation between the school and the parents, based on a complete understanding of all available information by the parent as well as the school.⁴⁰

As adopted by the New York courts, the right to know doctrine provides the student in a public school with a common law right to examine his school records.⁴¹ Where it exists, however, the right is not without reasonable boundaries—it is not available where access would be "detrimental to the public interest."⁴² For example, disclosure to the student of letters of recommendation written in confidence by third parties may discourage the candor that is necessary to make such letters useful in the university's admission process. Since the resulting loss in the value of these letters may be detrimental to the public interest, student access to them arguably should be disallowed.⁴³

III. THE STUDENT-UNIVERSITY CONTRACT

It is generally held that a contract arises between a student and a university when the student pays the requisite tuition and fees and agrees, sometimes explicitly but more often implicitly, to conform to the school's standards of conduct and performance.⁴⁴ In return, the school promises to provide a package of

40. *Id.* at 86-87, 211 N.Y.S.2d at 507-08 (citations omitted). The court continued: "[A]bsent constitutional, legislative, or administrative permission or prohibition, a parent is entitled to inspect the records of his child maintained by the school authorities as required by law." *Id.* at 93, 211 N.Y.S.2d at 514.

41. As of yet, no case has extended the right to students at private schools.

42. *Clement v. Graham*, 78 Vt. 290, 315, 63 A. 146, 153 (1906) (plaintiff was entitled to inspect state auditor's vouchers); *accord*, *Egan v. Board of Water Supply*, 205 N.Y. 147, 154, 98 N.E. 467, 469 (1912).

43. The original version of the Buckley amendment included an unqualified student right to examine any letters of recommendation in his student file. Strong objections from universities, however, resulted in subsequent legislation that limited this right by forbidding a student to view letters of recommendation submitted prior to January 1, 1975. *See* 20 U.S.C. § 1232g(a)(1) (Supp. IV, 1974). The educators argued that without an assurance of confidentiality, the writers of letters of recommendation would be less objective, thus destroying the value to the university of that important input. *See generally* Comment, *The Buckley Amendment: Opening School Files for Student and Parental Review*, 24 CATHOLIC U.L. REV. 588, 596-600 (1975) (discussion of revision).

Under the present provisions of the Buckley amendment, a student may waive his right to view the confidential letters of recommendation added to his file after January 1, 1975. 20 U.S.C. § 1232g(a)(1)(C) (Supp. IV, 1974).

44. *John B. Stetson Univ. v. Hunt*, 88 Fla. 510, 102 So. 637 (1924); *University of*

services to the student, including instruction and certification of attendance and performance.

The application of contract law to the student-university relationship grew out of its recognition as an alternative to the *in loco parentis* doctrine.⁴⁵ Although recent recognition and creation of constitutional, common law, and statutory rights of students has narrowed the subject matter that can be controlled by contract, contract law still governs a sizable portion of the litigation involving student-university disputes, especially where the university is private.⁴⁶ The courts have shown no hesitancy in enforc-

Miami v. Militana, 184 So. 2d 701, 704 (Fla. Dist. Ct. App. 1966); Anthony v. Syracuse Univ., 244 App. Div. 487, 231 N.Y.S. 435 (4th Dep't 1928); Healy v. Larsson, 67 Misc. 2d 374, 323 N.Y.S.2d 625 (Sup. Ct. Schenectady County 1971).

45. Before 1960, the great majority of student challenges in state courts to the authority of educational institutions were decided in favor of the institutions. Common rationales upon which the courts based their holdings were that a student challenging a university's action is under a heavy burden to show that the action was not taken to safeguard ideals of "scholarship and moral atmosphere," Anthony v. Syracuse Univ., 244 App. Div. 487, 231 N.Y.S. 435 (4th Dep't 1928), or that in the absence of a statute, a school board is free to make policy or to take action without interference from judicial supervision as long as its policies and actions were reasonable and nonarbitrary, Tanton v. McKenney, 226 Mich. 245, 197 N.W. 510 (1924).

Both of these rationales, as well as others used, were buttressed by the English common law doctrine of *in loco parentis*. See, e.g., John B. Stetson Univ. v. Hunt, 88 Fla. 510, 102 So. 637 (1924). Under this doctrine, the same dominion exercised over the child by the parent was granted to the educator. Since responsibility to educate one's children rested upon the parent, the *in loco parentis* doctrine extended that responsibility, with its concomitant rights, to the teacher. As early as 1860, however, the English courts began to modify this doctrine. In Regina v. Hopley, 2 F. & F. 202, 206, 175 Engl. Rep. 1024, 1026 (Home Cir. 1860), the court held that a defendant school teacher had inflicted "excessive" punishment upon a student and was therefore liable for the injuries incurred by the student.

In the United States, the doctrine was unequivocally applied to the private college campus in Gott v. Berea College, 156 Ky. 376, 379, 161 S.W. 204, 206 (1913):

College authorities stand *in loco parentis* concerning the physical and moral welfare, and mental training of the pupils, and we are unable to see why to that end they may not make any rule or regulation for the government, or betterment of their pupils that a parent could for the same purpose. Whether the rules or regulations are wise, or their aims worthy, is a matter left solely to the discretion of the authorities, or parents as the case may be, and in the exercise of that discretion, the courts are not disposed to interfere, unless the rules and aims are unlawful, or against public policy.

Since the Gott decision in 1913, however, the *in loco parentis* doctrine has all but been abandoned in public college cases, see Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961), and is now facing similar extinction in its application to cases involving private colleges, see Comment, *Common Law Rights for Private University Students: Beyond the State Action Principle*, 84 YALE L.J. 120, 141-43 (1974); Comment, *Colleges and Universities: The Demise of In Loco Parentis*, 6 LAND & WATER L. REV. 715 (1971).

46. Contract law has been applied more often in disputes between students and private schools than in disputes between public schools and their students since many

ing both express and implied terms of student-university contracts.⁴⁷ Consequently, an application of contract law can provide a useful tool for the resolution of student-university disputes over the confidentiality of student records.

A. *Express Contractual Terms*

The express terms of a student-university contract are typically derived from the school's catalog or bulletin.⁴⁸ Courts have also found contractual terms in less obvious sources, such as a registration card,⁴⁹ an admission application form,⁵⁰ a catalog supplement,⁵¹ and even from oral statements of university personnel.⁵²

In order to legally bind both the university and the student, however, the contractual terms must be mutually understood by the parties.⁵³ Thus, the prominence and location of an express term may determine whether it is construed as part of the student-university contract. The relative importance of a particular matter to the parties determines the extent of prominence required. If the term applies to a minor matter, such as library policies, it will not be construed as part of the student-university contract unless the term's context clearly indicates that it was meant to be included. On the other hand, if a term concerns a matter that is important to the student, such as the payment of tuition and fees, a less obvious disclosure may be sufficient.⁵⁴

student-public school disputes can be resolved by application of statutory provisions, whereas state statutes do not often apply to private schools. For a discussion of state statutes dealing with student records confidentiality see H. BUTLER, K. MORAN, & F. VANDERPOOL, *LEGAL ASPECTS OF STUDENT RECORDS* 16-21 (1972).

47. See cases cited note 44 *supra*.

48. *University of Miami v. Militana*, 184 So. 2d 701, 704 (Fla. Dist. Ct. App. 1966).

49. *Anthony v. Syracuse Univ.*, 244 App. Div. 487, 231 N.Y.S. 435 (4th Dep't 1928).

50. *Culver Military Academy v. Staley*, 250 Ill. App. 531 (1928).

51. *Balogun v. Cornell Univ.*, 70 Misc. 2d 474, 333 N.Y.S.2d 838 (Sup. Ct. Madison County 1971).

52. *Healy v. Larsson*, 67 Misc. 2d 374, 323 N.Y.S.2d 625 (Sup. Ct. Schenectady County 1971).

53. See generally 1 A. CORBIN, *CORBIN ON CONTRACTS* § 152 (1963). Mutuality of obligation in the context of student-university contracts does not always require mutual promises by both parties as long as consideration is otherwise present. For example, the student's tuition payment may provide such consideration.

54. See *Drucker v. New York Univ.*, 59 Misc. 2d 789, 300 N.Y.S.2d 749 (App. T. 1969). Plaintiff applied for admission to defendant university and made a \$200 deposit; the university's letter of acceptance provided for refund pursuant to a student's withdrawal only in case of serious illness. When plaintiff resigned to attend another institution, the contract was held binding and plaintiff was not allowed to recover \$910 of tuition and fees paid prior to resignation.

Since the confidentiality of his records is generally not of vital importance to the incoming student, prominent disclosure should be necessary to contractually bind the university and the student. Certainly, reasonably prominent disclosure in the university catalog, class schedule, and admission application form would be adequate.⁵⁵

Once the terms of an express student-university contract are discovered, they must be interpreted. Generally, orthodox rules of contract interpretation apply. But when ambiguities have appeared in student-university contracts, courts have departed from the traditional rule of construing ambiguous terms against the drafter of the contract⁵⁶ and have interpreted them in favor of the university.⁵⁷ In *Carr v. St. John's University*,⁵⁸ for example, several students who had been dismissed from a private university for having witnessed or participated in a civil marriage brought an action against the university for reinstatement. The university defended on grounds of a university regulation which stated that, "in conformity with ideals of Christian education and conduct," the university reserved the right to dismiss a student at any time on whatever grounds the university judged advisable. The trial court held against the university on the ground that the regulation was too vague.⁵⁹ The appellate court recognized the existence of a student-university contract providing that if the student complies with the conditions set by the university, he will be awarded a degree. Then, after stating that the university cannot *arbitrarily* expel or refuse a degree to a student, the court reversed, refusing to review the university's exercise of its discretion.⁶⁰

55. See, e.g., cases cited notes 48, 50, 51 *supra*.

56. See 3 A. CORBIN, CORBIN ON CONTRACTS § 559 (1960).

57. The question of interpretation often arises when a student challenges the university's conduct rules, which are usually written in either very general language or not written at all. Faced with the university's unilateral interpretation of its own rules, courts have deferred to the university's judgment, placing the burden on the student to prove that the university's interpretation was unreasonable or arbitrary. See, e.g., *Dehaan v. Brandeis Univ.*, 150 F. Supp. 626 (D. Mass. 1957); *Hood v. Tabor Academy*, 296 Mass. 509, 6 N.E.2d 818 (1937); Note, *Contract Law and the Student-University Relationship*, 48 IND. L.J. 253, 255-60 (1972).

58. 34 Misc. 2d 319, 231 N.Y.S.2d 403 (Sup. Ct. Kings County 1962), *rev'd*, 17 App. Div. 2d 632, 231 N.Y.S.2d 410 (2d Dep't), *aff'd mem.*, 12 N.Y.2d 802, 187 N.E.2d 18, 235 N.Y.S.2d 834 (1962).

59. 34 Misc. 2d 319, 231 N.Y.S.2d 403 (Sup. Ct. Kings County 1962).

60. 17 App. Div. 2d 632, 231 N.Y.S.2d 410 (2d Dep't), *aff'd mem.*, 12 N.Y.2d 802, 187 N.E.2d 18, 235 N.Y.S.2d 834 (1962).

B. Implied Contractual Terms

Contracting parties often implicitly agree to matters not express on the face of the written contract. If a court can ascertain the intent of the parties with respect to such implicit terms from the writing and any circumstances surrounding the agreement, it will imply them as part of the contract.⁶¹ Absent an express statement of university policy, courts have not hesitated to imply such terms to the student-university contract⁶² or to limit the contract to terms that were, or appeared to have been, mutually understood by the parties.⁶³

The interpretation of student-university contracts could be benefited by an analogy to the interpretation of commercial contracts. To ascertain implied terms in commercial contracts, courts often look beyond the written agreement to the context within which the contract was made—custom, trade usage, and other standard practices.⁶⁴ The governing standard, of course, is to reflect the supposed intent manifested by the parties when the contract was formed. Similarly, courts could interpret student-university contracts in light of standard practice. If universities sufficiently conform to a standard practice regarding the confidentiality of student records, courts may be persuaded that, although not express, the student and university implicitly agreed on a records policy. If this theory of contract interpretation is accepted in the student-university context, whatever develops as the "standard practice" will have a significant impact on all universities not having an express contractual policy. Two important influences on the development of a standard university practice are the Buckley amendment and the Constitution.

The Buckley amendment imposes standard student records requirements on schools that receive certain federal funding.⁶⁵ Once these requirements become widely implemented, their influence on universities not covered by the Buckley amendment

61. *E.g.*, *Hudson Canal Co. v. Pennsylvania Coal Co.*, 75 U.S. (8 Wall.) 276 (1868).

62. *John B. Stetson Univ. v. Hunt*, 88 Fla. 510, 102 So. 637 (1924); *Healy v. Larsson*, 67 Misc. 2d 374, 323 N.Y.S.2d 625 (Sup. Ct. Schenectady County 1971); *Barker v. Bryn Mawr College Trustees*, 1 Pa. D. & C. 383 (Dist. Ct. 1922).

63. *Cf.* *Healy v. Larsson*, 67 Misc. 2d 374, 323 N.Y.S.2d 625 (Sup. Ct. Schenectady County 1971); *Drucker v. New York Univ.*, 59 Misc. 2d 789, 300 N.Y.S.2d 749 (App. T. 1969).

64. *See, e.g.*, *Ransome Concrete Machinery Co. v. Moody*, 282 F. 29, 36 (2nd Cir. 1922); *Mortgage Corp. v. Manhattan Sav. Bank*, 71 N.J. Super. 489, 497, 177 A.2d 326, 331 (Super. Ct. 1962); *Frigalment Importing Co. v. B.N.S. Int'l Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960).

65. *See* note 1 *supra*.

could be significant if imposed through the standard practice rule of contract interpretation. On the other hand, it is possible that the use of these requirements will not become sufficiently well known, especially among incoming college students, to be imposed on parties by implication.

Future constitutional requirements on universities in their relationships with students could similarly have a broad impact on student records procedures.⁶⁶ Although constitutional pro-

66. An important, but as yet unanswered question is the extent of constitutional protection in the area of student records confidentiality. The United States Supreme Court has recognized that the unique setting of the academic community requires appropriately tailored applications of the Constitution. But the Court has only ruled on the more pressing campus issues including free speech, due process, and nondiscriminatory admission, without addressing the question of a student's constitutional right to privacy. See generally Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027 (1969).

Even outside the university setting, the right of privacy has not been adequately defined by the Court. See, e.g., Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219 (1965); Hufstедler, *The Directions and Misdirections of a Constitutional Right of Privacy*, 26 RECORD OF N.Y.C.B.A. 546 (1971). The Court's hesitation in this area is a reflection of the enormity of the task—privacy, like freedom, is not a unified, self-contained concept easy of definition. For example, the right of selective disclosure and the right of personal autonomy are both protected by the right to privacy. See note 8 *supra*. The Court has been faulted for discussing the issue of privacy without appropriately discriminating between these two distinct concepts. See Comment, *Roe and Paris: Does Privacy Have a Principle?*, 26 STAN. L. REV. 1161, 1163-66 (1974).

Although there were no significant privacy decisions in the Court's first century, the nonjudicial writings of the early justices provide evidence that the right to privacy, albeit under different appellations, was accepted as an integral aspect of individual dealings; both the right of selective disclosure and the right of personal autonomy appear to be subsumed in the justices' statements that the guarantees of the various constitutional amendments were intended to secure to the individual the rights of "private sentiment, private judgment, personal liberty and security." J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 2 (2d ed. 1851). Although such thinking implied that these privacy rights were of constitutional dimensions, invariably a breach of privacy interest was remedied by a common law action or, less frequently, by statute. There were no attempts to bring an action on constitutional grounds until *Boyd v. United States*, 116 U.S. 616 (1886), in the late 19th century. In *Boyd*, the Supreme Court considered for the first time an action based on a claimed governmental breach of the constitutional right to privacy and struck down as unconstitutional a customs statute that required a person whose goods had been seized as contraband to either produce his business papers in court or forfeit the goods. Justice Bradley, writing for the majority, explained that the "privacies of life" included not only freedom from physical intrusions, but also "indefeasible right[s] of personal security, personal liberty, and private property." *Id.* at 630.

Boyd and succeeding decisions on privacy focused primarily on safeguarding an individual's right of selective disclosure, although the underlying rationale of those cases was the protection of one's property interests, not one's personality. As a result, the right to individual autonomy received little judicial consideration. Until 1965, judicial interpretation alternately expanded and contracted the boundaries of the right to privacy without formulating any rational structure for its classification.

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Supreme Court assembled sufficient "emanations" from certain constitutional amendments to provide both a broad foundation and a name for a newly expanded constitutional right to privacy. The Connect-

hibitions apply only where "state action" is involved,⁶⁷ such prohibitions could, if they become widely adopted and known, be implied into student-university contracts in the private university sector⁶⁸ irrespective of the state action re-

icut criminal statute at issue prohibited the use of contraceptives. By specifically discussing the statute's application to married couples, the Court, by implication, necessarily coupled the right of personal autonomy with the right of selective disclosure and determined that both rights were constitutionally protected.

The autonomy interest was explicitly expanded following *Griswold*. While elevating a woman's abortion decision to the status of a fundamental privacy right, the Court in *Roe v. Wade*, 410 U.S. 113 (1973), clearly showed its determination to broaden the relationships and activities that are constitutionally protected. In the process, the penumbral theory of *Griswold* was replaced by the more expansive "concept of personal liberty." 410 U.S. at 153-54. In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), the Court reaffirmed this extended view of privacy protection by stating that where sufficiently intimate relationships exist, the "protected privacy extends to the doctor's office, the hospital, the hotel room, or as otherwise required to safeguard the right to intimacy involved." *Id.* at 66 n.13 (emphasis added).

Through the *Griswold*, *Roe*, *Paris Theatre* line of cases, the Supreme Court has begun to clarify which autonomy interests and relationships mandate constitutional scrutiny. At the same time, however, the Court has declined several opportunities to confront recent threats to selective disclosure, especially those arising outside the context of direct law enforcement. In *State ex rel. Tarver v. Smith*, 78 Wash. 2d 152, 470 P.2d 172 (1970), cert. denied, 402 U.S. 1000 (1971), the Court denied certiorari to a welfare recipient who attempted to challenge allegedly derogatory material that a caseworker had placed in her welfare file. In *Laird v. Tatum*, 408 U.S. 1 (1972), plaintiffs who attempted to challenge the Army's general surveillance system were denied a hearing on the merits since none of the plaintiffs could demonstrate a sufficiently direct injury or threat of injury from the surveillance. *California Bankers Ass'n v. Schultz*, 416 U.S. 21 (1974), involved the requirements of the 1970 Bank Secrecy Act that banking institutions maintain and disclose certain financial transactions of their depositors. The Court held that the maintenance provisions, as applied, were constitutional, but that any claims by depositors regarding disclosure of personal records were premature, speculative, and could not be asserted vicariously by the banking association.

The Supreme Court's lack of an unequivocal constitutional standard should not justify a university's neglect to formulate a constitutionally acceptable policy of student records confidentiality. The *Griswold*, *Roe*, *Paris Theatre* development implies that a court's jurisdiction probably would be triggered by any university records practice that failed to protect adequately those personal autonomy areas deemed fundamental rights by the Supreme Court. For example, if a student's records contained information regarding a student's sexual behavior, use of birth control methods, or abortions, these records would have to be carefully safeguarded. If not, that student's constitutional right to privacy would arguably be violated.

67. Any application of constitutional rights to students at private universities would require an extension of the "state action" requirement of the Fourteenth Amendment. See Black, *Forward: "State Action," Equal Protection and California's Proposition 14*, 81 HARV. L. REV. 69 *passim* (1967). To date, actions of universities that are neither funded nor operated by a state have been held not to be "state actions." *Wahba v. New York Univ.*, 492 F.2d 96 (2d Cir. 1974); *Grossner v. Trustees of Columbia Univ.*, 287 F. Supp. 535 (S.D.N.Y. 1968). See also H. FRIENDLY, *THE DARTMOUTH COLLEGE CASE AND THE PUBLIC-PRIVATE PENUMBRA* (1971).

68. See generally *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1143-48 (1968).

quirement.⁶⁹ Thus, like the standards imposed on universities by the Buckley amendment, constitutional prohibitions could be implied into student-university contracts to reflect the apparent, but unarticulated, intent of the parties with respect to student records confidentiality.

C. *Duration of the Student-University Contract*

The student-university contract arises and becomes binding at the time the student pays his tuition.⁷⁰ Consequently, contract law provides no cause of action for any disclosure of records pertaining to a nonmatriculated student.⁷¹ The contract terminates at the end of the student's relationship with the university. This termination is not necessarily at the end of a semester or term for which the student has matriculated. Rather, student-university contracts have been construed to include an implied option to renew as long as reasonable conditions for renewal have been met by the student—at least until the student terminates his course of study.⁷² Whether or not a contractual responsibility to keep

69. *Guillory v. Administrators of Tulane Univ.*, 203 F. Supp. 855 (E.D. La. 1962). See also *Wright, The Constitution on Campus*, 22 VAND. L. REV. 1027 (1969). Professor Wright suggests that constitutional standards of conduct could be applied to all colleges and universities, whether or not they come within the state action requirement of the Fourteenth Amendment:

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

Id. at 1035-36; cf. *McKay, The Student as Private Citizen*, 45 DENVER L.J. 558 (1968).

70. *Silver v. Queens College of City Univ.*, 63 Misc. 2d 186, 311 N.Y.S.2d 313 (N.Y.C. Civ. Ct. Queens County 1970). Plaintiff student sued to recover an alleged overcharge of tuition. The defendant had raised the tuition rate after registration and had charged plaintiff the difference. The court held for the student and granted the refund.

The parties to the contract are, of course, the student and the institution. If the student is minor and dependent, then his parents may be considered parties to the contract. See, e.g., *Jones v. Vassar College*, 59 Misc. 2d 296, 299 N.Y.S.2d 283 (Sup. Ct. Dutchess County 1969); cf. *Eden v. Board of Trustees of State Univ.*, 374 N.Y.S.2d 686 (2d Dep't 1975) (contract arises when letter of acceptance is received by student).

71. The Buckley amendment protects "student" records, and defines "student" as:

[A]ny person with respect to whom an educational . . . institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such . . . institution.

20 U.S.C. § 1232g(a)(6) (Supp. IV, 1974).

72. *Booker v. Grand Rapids Medical College*, 156 Mich. 95, 120 N.W. 589 (1909). Solely because they were Black, plaintiffs were not allowed to register for their second year after satisfactorily completing their first year. The court held against the college and

student records confidential is imposed on a university even after the student graduates is not clear. Arguably, since student records continue to remain a sensitive matter after graduation, courts should imply the contractual term to extend as long as the student lives.

D. Contractual Waiver of University Liability

Faced with potential liability for misuse of its students' records, a university may look to a contractual waiver for protection. While a carefully drawn waiver may diminish a university's liability, several important legal theories may limit the effectiveness of such a waiver.

Consent has historically been a defense to most torts.⁷³ Nevertheless, a contractual waiver of tortious liability will be held invalid if the waiver is found to be unconscionable.⁷⁴ Courts have held commercial contracts containing waivers of tort liability unenforceable where the waiver is against public policy and where a large disparity in bargaining power exists between the parties to a contract.⁷⁵ In the student-university context, however, the courts have been hesitant to limit a university's power to contract with the student on any terms agreed upon, however unreasonable:

There is nothing inherently illegal in the setting by a private, or even a public, institution of higher learning of conditions upon which it will accept a candidate for a degree. Even if the stipulation made as a condition is regarded as unreasonable or oppressive, the contract made by the parties must govern in the absence of fraud or mistake.⁷⁶

A second limitation on the validity of a contractual waiver of liability is imposed if it purports to legitimize a violation of a

reinstated the students on the ground that there was an implied understanding that the students would not be arbitrarily dismissed before receiving their diplomas.

73. See *Continental Optical Co. v. Reed*, 119 Ind. App. 643, 86 N.E.2d 306 (1949); *Johnson v. Boeing Airplane Co.*, 175 Kan. 275, 262 P.2d 808 (1953); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 817 (4th ed. 1971).

74. See, e.g., *Fedor v. Mauwehu Council, Boy Scouts of America, Inc.*, 21 Conn. Supp. 38, 143 A.2d 466 (Super. Ct. 1958); 15 S. WILLISTON, *WILLISTON ON CONTRACTS* §§ 1750, 1750A (3d ed. 1972).

75. See, e.g., *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

76. *Auser v. Cornell Univ.*, 71 Misc. 2d 1084, 1089, 337 N.Y.S.2d 878, 883 (Sup. Ct. Tompkins County 1972). A transfer student from a state university to a private university was assessed, pursuant to the terms of a student university contract, a special transfer fee. The court admitted serious difficulty in understanding the purpose of the transfer charge but found, nonetheless, that the contract was valid and binding.

student's constitutional rights. Some commentators have argued that a student's constitutional rights are personal rights and, as such, may be voluntarily waived by the student.⁷⁷ Others vigorously disagree.⁷⁸ In *Dixon v. Alabama State Board of Education*,⁷⁹ students had been expelled from Alabama State College for alleged misconduct. When the expulsion was challenged for a denial of the students' due process rights, the college argued that the students had contractually waived their due process rights upon admission. The court found that even if the alleged contractual waiver had been properly understood by the students, it was ineffective—they could not forfeit their fundamental rights:

We do not read this [Board of Education] provision to clearly indicate an intent on the part of the student to waive notice and a hearing before expulsion. If, however, we should so assume, it nonetheless remains true that the State cannot condition the granting of even a privilege upon the renunciation of the constitutional right to procedural due process.⁸⁰

Thus, it appears that a student cannot waive whatever constitutional right to privacy he may have with respect to student records.⁸¹

The contract doctrine that promises are unenforceable absent consideration imposes another restriction on the use by universities of contractual waivers. Since a contractual consent or waiver given gratuitously is not enforceable,⁸² it becomes important to determine whether or not the promise was supported by consideration. If a waiver is signed or a records policy is published after the payment of tuition, the waiver's efficacy is questionable.⁸³ On the other hand, consent obtained for consideration is usually enforceable.⁸⁴

Contractual waivers, then, can effectively limit a university's liability for improper use of student records to the extent

77. See Caruso, *Privacy of Students and Confidentiality of Student Records*, 22 CASE W. RES. L. REV. 379, 380-81 (1971).

78. See *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1136-37 (1968). See generally Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960).

79. 294 F.2d 150, 156 (5th Cir.), cert. denied, 368 U.S. 930 (1961).

80. 294 F.2d at 156.

81. See note 66 *supra*.

82. *Garden v. Parfumerie Rigaud, Inc.*, 151 Misc. 692, 271 N.Y.S. 187 (Sup. Ct. N.Y. County 1933).

83. See *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1137 (1968).

84. *Lillie v. Warner Bros. Pictures, Inc.*, 139 Cal. App. 724, 34 P.2d 835 (Dist. Ct. App. 1934).

that they are not unconscionable or against public policy, do not attempt to waive a constitutional right, and are supported by consideration.

IV. CONCLUSION

Despite the Buckley amendment's protections for student records, substantial areas of probable dispute remain. A reasoned application of the common law remains a flexible and sure vehicle for the resolution of these disputes. By rational invocation of analogy and precedent, the common law principles of tort, the "right to know," and contract can provide extensive protection for and an adequate balancing of both student and university interests.