Look at the Pretty Colors - Rethinking Promises of Diversity as Legally Binding

Garner K. Weng
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INTRODUCTION

Institutions of higher learning have become much more complex than simple “schools.” Today’s top universities manage billion-dollar budgets and are as much in the business of business as education. Accordingly, universities compete with each other. They compete for business, which among other things means competing for students. School “announcements,” which contain applications for admission, are informative about admissions procedures and school life but also beckon to prospective applicants with promises, testimonials, and sweet talk, just as any commercial advertisement.

In today’s increasingly multicultural and pluralistic society, a student may desire educational settings in which there are both enough people like herself to make her feel comfortable and supported and enough people unlike herself to present her with different perspectives from which she can learn. The more diverse a university is, the more likely it is to have people to satisfy both of these needs. Thus, one “selling” point for universities has become “diversity.”

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1. For example, the Massachusetts Institute of Technology (MIT) has an annual budget of $1.5 billion, boasts an endowment of approximately $1.5 billion, receives annual tuition payments and other income of approximately $158 million, and is governed by a corporation consisting of a Chairman, Executive Committee, over seventy elected members, and eight ex officio members. United States v. Brown University, 805 F. Supp. 288, 289-90 (E.D. Pa. 1992) (summarizing findings of fact). See also CLARK KERR, THE USES OF THE UNIVERSITY 18-20 (1963) (writing on the business aspects of universities).

2. See United States v. Brown University, 805 F. Supp. at 303 (“[C]olleges compete for many things such as students, faculty, and financial support.”); see generally Chris Klein, Faced With A Drop in Applicants, Some Schools Resort to Hard Sell, NAT'L L.J., July 1, 1996, at A19.

3. See generally BOALT HALL 1995-96 ANNOUNCEMENT. For example, the Boalt Hall 1995-96 Announcement opens with a statement from the Dean: “We aim to offer our students an educational experience that will be personally rewarding and intellectually stimulating. Most Boalt graduates look back on their years here with warmth and affection. We hope you will be among them.” Id. at 3.

4. Literally, diversity means “[t]he fact or quality of being diverse; difference” or “variety or multiformity.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 543 (3d ed. 1992) (defining “diversity”).

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Accordingly, today's educational institutions market themselves as being "strong" in diversity. They target particular students who might add to their diversity. They promise diverse student bodies. They promise intellectual diversity. They show pictures of classrooms filled with students and professors of all colors, genders, and types. They declare commitment to diversity.

This article examines whether these and other promises of diversity form a legally binding contract between students and promising educational institutions. For the purposes of narrowing this topic to a manageable level, this article confines itself on two fronts. First, it concentrates particularly on law schools, and somewhat as a case study, on Boalt Hall School of Law, at the University of California at Berkeley. Second, it emphasizes racial and ethnic diversity (and issues accompanying racial and ethnic diversity), and to a lesser extent gender diversity, over other aspects of diversity. These points of focus are especially fitting because


6. See, e.g., BOALT HALL 1995-96 ANNOUNCEMENT 3 ("You will be part of a diverse student body . . . .").

7. See, e.g., id. ("The intellectual diversity of the Berkeley campus will further enrich your understanding of the role of law in a multicultural society.").

8. See discussion infra Part III.

9. See, e.g., BOALT HALL 1995-96 ANNOUNCEMENT 7 ("Today, more than ever, this belief in the value of diversity is central to the philosophy of education at Boalt Hall . . . .").

10. I concentrate especially on contracts because contracts theory is the most viable basis for legal action against a school. Educational malpractice and actions based on torts or constitutional law have generally failed or even been rejected outright as valid bases for claims. See, e.g., Clarke v. Trustees of Columbia Univ., No. 95 Civ. 10627 (PKL), 1996 WL 609271, at *4 (S.D.N.Y. Oct. 23, 1996); Andre v. Pace Univ., 170 Misc. 2d 893, 896-97 (N.Y. App. Term 1996); Kevin P. Mcjessy, Contract Law: The Proper Framework for Litigating Educational Liability Claims, 89 Nw. U.L. Rev. 1768, 1774-84 (1995). Moreover, filing the contract claim in conjunction with weaker or implausible claims may distract the court; some courts have "failed to distinguish contract actions from tort actions, dismissing both on the same grounds without evaluating the merits of the contract claim." Id. at 1784 n.68. However, while I emphasize basic contracts, I attempt some discussion of contracts doctrines such as promissory estoppel and quasi-contracts, if only in passing, and of misrepresentation.

11. By "issues accompanying racial and ethnic diversity," I mean sensitivity to, consciousness of, and appropriate inclusion of issues of race and ethnicity in the educational environment; that is, not only whether a given body of people is itself racially diverse but whether that body of people enjoys the educational benefits of diversity.

12. Defining or limiting diversity is a Herculean task in itself. In the educational context, diversity is often understood to encompass race, ethnicity, nationality, cultural background, gender, sexual orientation, disabled status, and age, among other factors. Cf. BOALT HALL 1995-96 ANNOUNCEMENT 42 (section entitled, "Consideration of Diversity in the Selection of Applicants").
diversity in law schools, and Boalt Hall in particular, have been in the national limelight.\textsuperscript{13}

Part I of this article looks at basic contract theory and how it applies to the relationship between students and educational institutions. Part II considers the value of diversity in education and whether it can constitute consideration for the purpose of forming a \textit{legally binding} contract between students and educational institutions. Upon concluding that diversity can serve as such consideration, Part III explores how to identify terms that form the resulting contract.

Taking its lead from Part III, Part IV surveys the broad range of statements made by law schools in support of diversity which constitute contractual promises. Part V scrutinizes the reality of law schools and finds that law schools are often neither diverse nor supportive of diversity, in apparent contradiction of the contract terms identified in Part IV. Part VI forges the crucial links between Parts IV and V by examining whether such contract terms have been \textit{legally breached}. In particular, it chases the difficult question of what these contract terms require by investigating what law students' reasonable expectations, based on statements made by law schools, are—and whether the realities fulfill these expectations.

Notably, Part VI reveals the results of a survey distributed to 858 J.D. students at Boalt Hall in April 1996 and attempts analysis of events that have transpired at Boalt Hall since the time of the survey. In sum, this Part concludes that law schools (Boalt Hall, in particular) generally have failed to hold up their end of the bargain. Part VII finishes out the heart of the contract analysis, attempting to deconstruct how litigation against law schools would actually fare in court.

This article concludes by calling for further study and documentation of law school promises of diversity and the expectations thereby generated in law students. First, this would bolster a legal action based on promises of diversity, and by such legal action or threat of such legal action, engender better fulfillment of these promises. Second, clinging to a perhaps naive optimism, exposing how empty these promises have been in the past just might grate on law school consciences enough to spark improvement without litigation.

\textsuperscript{13.} See, \textit{e.g.}, Anna Marie Stolley, \textit{A Return to Segregation?}, NAT'L JURIST, Sept. 1997, at 34 ("As states like California and Texas abolish affirmative action in law school admissions, large numbers of blacks and Latinos are being shut out of public classrooms. Critics fear that if this trend continues that if this trend continues, law schools of the future could be ghostly white."). National media turned its eye to Boalt Hall especially in the Fall of 1997, during which Boalt Hall's entering class included only one African American. See, \textit{e.g.}, V. Dion Haynes, \textit{Lone Black in Law Class Fights End of Preferences}, CHI. TRIB., Sept. 29, 1997, at 1; \textit{Berkeley Law Class's Sole Black Student Seizes 'Opportunity,'} COMMERCIAL APPEAL (Memphis, TN), Aug. 19, 1997, at A5; Michelle Locke, \textit{Lone Black Scholar at Boalt Hall Law: End of Affirmative Action Cuts Minority Students' Ranks}, DAILY RECORD (Baltimore, MD), Aug. 19, 1997, at 13.
I.
LEGAL BACKGROUND

A. Basic Contracts Law and Related Doctrines

The definition of a legally enforceable contract is "a promise or set of promises for the breach of which the law gives a remedy, or the performance of which in some way recognizes a duty."\(^\text{14}\) A promise is "a manifestation of intention to act or refrain from acting in a specified way, so as to justify a promisee in understanding that a commitment has been made."\(^\text{15}\)

As seen by the definitions, not every promise, or set of promises, gives rise to a legally enforceable contract. Rather, a legally enforceable contract requires a "bargain, in which there is a manifestation of mutual assent to the exchange and a consideration."\(^\text{16}\) That is, in oversimplified terms, a legally enforceable contract is where two parties agree to an exchange and are thus bound to the deal; that exchange is typically a promise for a promise or an act for a promise. A contract plaintiff is usually the party who has fulfilled her end, that is the promise or the act, and is demanding fulfillment of the other party's promise.

Contracts can be categorized into express and implied contracts. Express contracts are contracts where the terms of the promise are explicit.\(^\text{17}\) Explicit does not equate to perfect clarity. In many instances, even an explicit term is susceptible to multiple interpretations as to what it requires of a promising party. Accordingly, finding a legally binding promise is often only a first step in contracts analysis, to be followed with interpreting exactly what the terms of the promise require from the promising party.\(^\text{18}\)

Implied contracts are contracts where the terms of the promise are inferred from statements or conduct of the parties.\(^\text{19}\) Implied contracts are further categorized as "implied-in-fact" contracts or "implied-in-law" contracts. Implied-in-fact contracts arise where parties fully intend a contract but fail to express such intentions formally; as one court describes:

\(^\text{14}\) RESTATEMENT (SECOND) OF CONTRACTS § 1; see also BLACK'S LAW DICTIONARY 224 (6th ed. 1991) (definition of contract); 1 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, CONTRACTS § 4 (9th ed. 1990) (definition of contract).

\(^\text{15}\) RESTATEMENT (SECOND) OF CONTRACTS § 2.

\(^\text{16}\) RESTATEMENT (SECOND) OF CONTRACTS § 17(1); see also BLACK'S LAW DICTIONARY 210 (6th ed. 1991) (definition of consideration as required element of valid contract); 1 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, CONTRACTS § 5 (9th ed. 1990) (discussing agreement and bargain).

\(^\text{17}\) BLACK'S LAW DICTIONARY 225 (6th ed. 1991) (definition of contract, discussing express and implied contracts).

\(^\text{18}\) RESTATEMENT (SECOND) OF CONTRACTS ch. 9 (on the scope of contractual obligations and interpreting contract terms); see also LON L. FULLER & MEVIN A. EISENBERG, BASIC CONTRACT LAW 16 (6th ed. 1996) (on interpretation).

\(^\text{19}\) Id. (definition of contract, discussing express and implied contracts).
An "implied in fact" contract is essentially based on the intentions of the parties. It arises where the court finds from the surrounding facts and circumstances that the parties intended to make a contract but failed to articulate their promises and the court merely implies what it feels the parties really intended. It would follow then that the general contract theory of compensatory damages should be applied.\(^{20}\)

An implied-in-fact contract is treated the same as an express contract.\(^{21}\) As the terms themselves are inferred, implied-in-fact contracts are also often susceptible of multiple interpretations and often require the additional step of interpretation.\(^{22}\)

On the other hand:

An "implied in law" contract [or "quasi-contract"]... is a fiction of the law which is based on the maxim that one who is unjustly enriched at the expense of another is required to make restitution to the other. The intentions of the parties have little or no influence on the determination of the proper measure of damages. In the absence of fraud or other tortious conduct on the part of the person enriched, restitution is properly limited to the value of the benefit conferred.\(^{23}\)

Thus, even where there is no legally enforceable contract, a court may find a quasi-contract necessitating some liability on the part of a defendant out of equity and fairness.

Similarly, a promise for which there is no exchange or consideration may become enforceable under the theory that a party justifiably relied on the promise to her detriment, again necessitating liability on the part of the defendant out of equity and fairness. The legal standard for "reliance" is as follows:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person


\(^{21}\) FULLER & EISENBERG, supra note 18 at 480-81 (note on implied-in-fact and implied-in-law contracts); see also Bastian v. Gafford, 563 P.2d 48 (Id. 1977), quoted in FULLER & EISENBERG, supra note 18, at 485.

\(^{22}\) In many senses, however, the step of interpretation could be subsumed in the act of inferring the term in the first place. Interpreting a contract term and implying a contract term both entail examining the intentions and reasonable expectations of the parties; whether implied terms require a separate step of interpretation or whether the implication inherently includes interpretation is a conceptual concern only and is of little practical significance for this article.

\(^{23}\) FULLER & EISENBERG, supra note 18.
and which does induce action or forbearance is binding if injustice can be avoided only by enforcement of the promise.24

Finally, there is a tort theory of liability often discussed in the same breath as contracts in misrepresentation. Intentional misrepresentation, or fraud, requires: (1) a misrepresentation made by the defendant to the plaintiff; (2) scienter, or knowledge of the defendant of the falsity of the misrepresentation; (3) intent of the defendant to induce the plaintiff's reliance on the misrepresentation; (4) justifiable reliance by the plaintiff; and (5) injury to the plaintiff caused by the reliance.25

Should a plaintiff succeed on one of these theories, she has several possible remedies including:

(a) a sum of money due under the contract or as damages;
(b) specific performance of a contract or the enjoinment of its nonperformance;
(c) restoration of a specific thing to prevent unjust enrichment; or
(d) a sum of money to prevent unjust enrichment...26

Remedies for a breach of an express or implied-in-fact contract include (a) and (b) above; remedies for a breach of implied-in-law or quasi-contract include (c) and (d) above.27 Remedies for reliance typically are comprised of damages to the extent the plaintiff justifiably relied to her detriment, i.e., changed her position for the worse based upon the defendant's promise.28 Finally, misrepresentation gives grounds for rescinding, or possibly reforming, the contract, as well as damages for the deceit under tort law.29

With the rudiments of contracts and contracts-related theories of liability in mind, we now turn to how the courts apply these in the context of students and educational institutions.

24. RESTATEMENT (SECOND) OF CONTRACTS § 90(1); see also FULLER & EISENBERG, supra note 18, at 21-43 (on reliance).

25. See, e.g., 1 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, CONTRACTS § 393 (9th ed. 1990); 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, TORTS §§ 674-76 (9th ed. 1990); RESTATEMENT (SECOND) OF TORTS ch. 22-23.

26. RESTATEMENT (SECOND) OF CONTRACTS § 345; see also FULLER & EISENBERG, supra, note 18, at 5-8 (on contract remedies).

27. See generally FULLER & EISENBERG, supra note 18, at 6-8.

28. RESTATEMENT (SECOND) OF CONTRACTS § 349; see also FULLER & EISENBERG, supra note 18 ch. 8 (on reliance damages).

29. See, e.g., 1 B.E., SUMMARY OF CALIFORNIA LAW, CONTRACTS §§ 392, 403-409 (9th ed. 1990). If the misrepresentation goes to the inception or execution of the contract, for example, if a party does not know what she is signing, the court may consider the contract void without the necessity of the party affirmatively rescinding it. Id. at § 405.
B. The Contractual Relationship Between Students and Educational Institutions

The nature of the relationship between students and universities has been the subject of debate both in the courts and in academic realms, but "[t]he most pervasive and enduring theory is that the relationship between a student and an educational institution is contractual in nature." The complexity and breadth of such a contractual relationship makes it typical that only some of the contract terms are express and many are implied. Case law examining the contractual relationship between students and educational institutions continually concentrate on the intentions of the parties, indicating that the contract terms most often litigated to the point of published opinions are the implied terms.

However, after having stated that students and educational institutions have a contractual relationship, the courts often do not apply contracts doctrine with any rigor. Instead, they qualify:

It is apparent that some elements of the law of contracts are used and should be used in the analysis of [a student] and the University to provide a framework into which to put the problem... This does not mean that "contract law" must be rigidly applied in all its aspects, nor is it so applied even when the contract analogy is extensively adopted. There are other areas of the law which are also used to provide elements of such a framework.


31. See, e.g., Neel, 435 N.E.2d at 610; Clarke, 1996 WL at *5; Marquez, 648 P.2d at 96; c.f. Andersen, 25 Cal. App. 3d at 769-70 ("By the act of matriculation, together with payment of required fees, a contract between the student and the institution is created containing... implied conditions... ").


33. Implied terms here refers to the implied-in-fact contract portion of this contractual relationship. But see Virginia D. Nordin, The Contract to Educate: Toward a More Workable Theory of the Student-University Relationship, 8 J.C. & U.L. 141, 152-54 (1980-82). Nordin explains quasi-contracts, i.e., implied-in-law contracts, and then says, "This approach has been implicitly accepted by a number of courts which have spoken about the inappropriateness of the straight commercial contract model in the academic context." Id. at 154.

34. Slaughter v. Brigham Young Univ., 514 F.2d 622, 626 (10th Cir. 1975). See also, e.g., Lyons v. Salve Regina College, 565 F.2d 200, 202 (1st Cir. 1977) (quoting Slaughter); Neel v. Indiana
The courts have drawn no lines indicating when contracts law applies and when it does not, leading to considerable confusion in cases involving the contract between students and educational institutions.35

Several commentators have criticized this "waffling" by the courts.36 In particular, they point out the resulting bias of the courts against students. They have lambasted individual decisions, for example, one holding that the contract between students and universities is binding on the student but not on the university.37 They have also looked at the cases as a whole and decided that "when a close contract analysis has led to the conclusion that a court should step in to provide students with relief due to a breach of agreement by the college, judges have backed off from their enthusiastic endorsement of contract law as the basis of the student-school relationship."38 Perhaps this attitude is summed up as, "[o]nce the court has seized upon the contract analogy, it acts as if it were driven to finding for the college."39

This is particularly odd, because in other contexts where courts depart from a strict application of contracts law, they often do so in order to implement sound public policy and protect the party with less bargaining power.40 In the cases at hand, the educational institutions invariably draft all of the terms of the contract, and


40. For example, in the medical field, the doctor-patient relationship is contractual, but courts depart from strictly applying contracts doctrines to reflect a public policy concern that patients cannot bargain equally or effectively with doctors over medical services. See BARRY R. FURROW ET. AL., HEALTH LAW 354-57 (1995); Marjorie M. Shultz, From Informed Consent to Patient Choice: A New Protected Interest, 95 YALE L.J. 219, 223 (1985). Likewise, in the insurance industry there is an insurance contract between the insurer and the insured. However, courts may depart from strictly applying contracts doctrines in such contexts to carry out a general public policy of construing contracts against insurers because of the "tremendous" disparity in bargaining power. See, e.g., 1 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, CONTRACTS, §§ 25-26 (9 th ed. 1990) (on insurance policies).

Marriage, too, starts out as essentially a contractual relationship, but courts depart from contracts law quickly to impose public policy about what types of marital contracts should be enforceable. The particular public policy imposed may have its own problems, however, as this policy seems to be set forth mostly by men only. See generally Marjorie M. Shultz, The Gendered Curriculum: Of Contracts and Careers, 77 IOWA L. REV. 55 (1991).
students have no bargaining position and must accept the terms or go elsewhere. But rather than evening the playing field by favoring students in contracts claims, the courts seem to align themselves with power—the schools.41

With the resulting inequities, scholars and commentators argue vigorously that the proper legal theory for analyzing the student-university relationship is indeed contracts (and contracts alone), which would allow students to hold educational institutions more strictly to their promises.42 Among many reasons, they note that the courts’ reluctance to apply contracts doctrine rigorously is ill-founded. The primary reason for this reluctance seems to be the policy not to second-guess the professional judgments of educational institutions. In particular, courts refuse to make judgments about the quality of education or “the validity of broad educational policies . . . [or] more importantly, to sit in review of the day-to-day implementation of these policies.”43 Thus, courts give wide deference to the schools in an attempt to avoid undue interference.

While there may be sound reasons for such judicial deference, there are equally sound or better reasons not to overuse such judicial deference. First, not every suit against a school involves review of academic decisions or policies, which is the place where schools most need their independence.44 Rather, many involve the marketing and business functions that have also become inherent to educational institutions.45 Second, courts already review many decisions and policies of the school, so it is disingenuous to suggest they never do so—or never should do so.46

41. This is contrary to the general rule of contracts to construe terms against the party drafting the contract, because of that party typically having the more powerful bargaining position and being able to control the terms. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 206 (interpretation against draftsman). This is particularly true where the drafting party has created a form contract which it uses in all such contractual situations and does not allow the other party to vary the terms of the form contract. See generally FULLER & EISENBERG, supra note 18 ch. 18 (interpretation and unconscionability in a form-contract setting). Entire sets of rules, including implied warranties that are not easily disclaimed, have developed in order to protect parties in weak bargaining positions from the power of the drafting party. See, e.g., UNIFORM COMMERCIAL CODE §§ 2-314 to 2-316 (discussing implied warranties).

42. See Mcjessy, supra note 10, at 1768; Nordin, supra note 33, at 141.

43. Andre v. Pace Univ., 170 Misc. 2d 893, 896 (N.Y. App. Term 1996); see also id. at 896-97; Ansari v. New York Univ., No. 96 CIV. 5280 (MBM), 1997 WL 257473, at *2-*3 (S.D.N.Y. May 16, 1997); Altschuler v. Univ. of Penn. Law School, No. 95 Civ. 249 (LLS), 1997 WL 129394, at *5 (S.D.N.Y. Mar. 21, 1997); cf. Linson v. Trustees of Univ. of Penn., No. CIV. A. 95-3681, at *7,1996 WL 637810 (E.D. Pa. Nov. 4, 1996) (in review of academic decisions, court noted a "college is a unique institution which, to the degree possible, must be self-governing and the courts should not become involved in that process unless the process has been found to be biased, prejudicial or lacking in due process.").

44. Cf. Linson, 1996 WL 637910, at *8 ("this case arises in an academic context where judicial intervention in any form should be undertaken only with the greatest reluctance.").

45. See discussion supra notes 1-2 & accompanying text.

46. See Mcjessy, supra note 10, at 1812 ("Courts 'already review many aspects of school administration including desegregation, finance, curriculum' and disciplinary practices.").
Finally, courts would not necessarily be forced into the invasive review of schools that they fear; to the contrary:

[U]nder a contract theory of recovery, the courts would not be forced to decide broad educational policies, nor would they be forced to review day-to-day operation of the schools. Instead, courts would only be forced to address familiar issues such as whether the plaintiff’s complaint establishes the requisite elements of a contract action and if so, whether the defendant breached the terms of the agreement. The focus is not on the correctness of the educational policy, but rather whether the policy was implemented or followed.\footnote{Id. at 1812-13.}

For all of these reasons, courts should apply contracts law more rigorously to student-university cases. To the extent they must depart from contracts law, they should do so with a mind to the unequal bargaining positions of students vis-a-vis educational institutions.

Courts seem to be warming to these trains of thought. For example, in May 1997, one federal district court wrote, “because defendants promised specified services, neither the court nor a jury would be required to review any educational decisions of the sort which should be left to educators.”\footnote{Ansari v. New York Univ., No. 96 CIV. 5280, 1997 WL 257473, at *3 (MBM) (S.D.N.Y. May 16, 1997).} Thus, except in purely academic disputes, students may increasingly pursue contract claims against educational institutions with greater confidence.

II. CONSIDERING DIVERSITY AS CONSIDERATION

As discussed earlier, a threshold element of a legally enforceable contract is that there is an exchange of items that constitute due consideration.\footnote{See discussion supra § I.A. For an overview of other basic contract elements in the educational context, see Kevin P. McJessey, Contract Law: The Proper Framework for Litigating Educational Liability Claims, 89 NW. U. L. REV. 1768, 1790-96 (1995).} That the student provides consideration to the educational institution appears to be quite clear. Among other things, for example, a student pays tuition and fees, follows rules and codes of conduct, and may additionally spread good words about a school or contribute to the school’s reputation through her own achievements.\footnote{1 do not discuss whether the contract is bilateral—an exchange of promises—or unilateral—an exchange of an act for a promise—as it does not substantially affect the analysis here. In either case, the student has performed and is attempting to hold the school to a promise. For a discussion of whether contracts with schools are bilateral or unilateral, see Mark Pettit, Jr., Modern Unilateral Contracts, 63 BOSTON U. L. REV. 551, 572-73 (1983).} In exchange for these, perhaps, or as compensation, she may be seeking diversity.
In the reverse direction, we must examine whether diversity has value and might thereby be something for which students might bargain or which they might seek. The threshold for consideration sufficient to make an enforceable contract is actually quite low; consideration must only be more than nominal. Under the Second Restatement of Contracts, "the general principle is that nominal consideration does not make a promise enforceable whether paid or not . . . ." However, to be found "nominal," consideration must be so worthless or irrelevant as to be nothing more than a "pretense."

A. Diversity of the Student Body

The importance of diversity in the student body was affirmed in no less monumental a case than the Supreme Court's decision in Regents of University of California v. Bakke. Justice Powell's opinion for the Court found that the attainment of a diverse student body was a compelling interest and could allow a university affirmative action program to take account of race and ethnicity in admissions. Such a goal was "clearly . . . constitutionally permissible" and promoted "[t]he atmosphere of 'speculation, experiment, and creation [which is] so essential to the quality of higher education.'" In fact, the "nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples."

Commentators agree:

51. This Part does not attempt rigorous discussion of the contract doctrines of consideration.


53. Cf. id. at 15 (illustrative examples).


55. Id. at 311-19. In this particular case, the university lost, because although attaining diversity in the student body was indeed compelling, the means that the university used were not narrowly tailored to that end. Id. at 315-20. A recent 1996 decision by a United States court of appeals in Texas may have cast some doubt on this holding in its striking down an affirmative action program as unconstitutional. Hopwood v. Texas, 78 F.3d 932 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996).

56. Id. at 311-12.

57. Id. at 312 (internal quotation marks omitted); see also id. at 312 n.48.

58. Id. at 312-13 (quoting Keyishian v. Board of Regents, 385 U.S. 589 (1967)) (internal quotation marks omitted). See also Andrea Guerrero, Affirming Diversity at the University of California: Considering Ethnicity in University Admissions Decisions 3-7 (unpublished manuscript on file with author) (discussing diversity as a compelling interest in higher education for its role in furthering learning, eradicating racism, and furthering equal participation).
A diverse student body in a university environment adds to the educational experience by placing together people of various backgrounds and life experiences. It facilitates interactions between students of the opposite sex or sexual orientation. It brings together students of different races, religions and socioeconomic backgrounds. Individual students have cultivated their own distinct beliefs, ideas, biases, and fears. By introducing and surrounding these students with a vast array of human conditions and experiences in the university setting, students' education is expanded both directly and indirectly.\(^5^9\)

Justice Powell even took note of the particular needs of a law school in a diverse student body:

The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.\(^6^0\)

University officials have long agreed that diversity is important in education. One administrator summed up:

A great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; . . . who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. . . . People do not learn very much when they are surrounded only by the likes of themselves.\(^6^1\)

The President of Stanford University noted, "it is the responsibility of educational institutions such as Stanford to educate those who can become leaders of the future in a multiethnic and multicultural society."\(^6^2\) The President of Harvard University concurred, pointing out that "student diversity has, for more than a century, been valued for its capacity to contribute powerfully to the process of

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60. Id. at 314 (quoting Sweatt v. Painter, 339 U.S. 620, 634 (1950)).


learning. It has also been seen as vital to the education of citizens—and the
development of leaders—in heterogenous democratic societies such as our own.”

The Chancellor of the University of California at Berkeley likewise took a
controversial stand in favor of diversity in the student body, even in the face of the
opposition of the Governor of California.

In the law school context, the Dean of Boalt Hall spoke out for diversity:
“not having diversity in law schools could have serious repercussions throughout
society. [Dean Kay said,] ‘The need to diversify the legal profession is not a vague
liberal ideal: It is an essential component of the administration of justice. . . . The
legal profession must not be the preserve of only one segment of society.’ ”

Some Boalt Hall faculty have also spoken out for diversity. Professors Robert Berring and
Marjorie Shultz and Acting Professor Marina Hsieh all spoke at an August 18, 1997
rally decrying Boalt Hall’s loss of racial diversity in the student body. Professor
Shultz asked, “While Boalt’s new students are [individually] very accomplished,
how can they be excellent collectively if they have experiences that are narrower
than the experiences of this population?” and alluded to the importance of diversity
in the classroom to discussing immigration policy and criminal procedure.

On October 14, 1997, Professor Robert Cole, in the Report of an Ad Hoc Task Force on
Diversity in Admissions, wrote, “Racial and ethnic diversity is essential to provide a
robust program of legal education for all Boalt students,” and “The Law School

49-50 (quoting President of Harvard University).

64. Tien’s Alternative to Affirmative Action, S.F. CHRON., Jan. 2, 1996, at A14. The
opposition may hurt Tien’s chances to become the President of the University of California but bolstered
his reputation for “valuing principle over expediency.” Id.

65. Erin McCormick, Affirmative Action Rally Disrupts UC Regents Panel, S.F. EXAMINER,
May 19, 1995, at A25; see also Christine Riedel, Diversity Dilemma, NAT’L JURIST, April/May 1996, at
14, 15 (quoting how and why Bruce Wolk, dean of the law school at the University of California, Davis,
values diversity). Interestingly, Boalt Hall students have criticized Dean Kay for spouting empty words
in support of diversity while not backing up those words with action. See, e.g., Lloyd Farnham, Students
and Alumni Denounce Administration, BOALT HALL CROSS-EXAMINER, Oct. 1997, at 1; HBTV, Students
Prove Ward Connerly Wrong: White Students Give Up Their Seats to Students of Color
(http://www.hotbed.com/press.htm) (visited Oct. 18, 1997) (“Students are critical of Dean Kay for too
narrowly interpreting the new regulations repealing affirmative action.”); Sidebar, BOALT HALL CROSS-
EXAMINER, October 1995, at 10 (Statement in Response to Dean Kay’s Rejection of Demands in
Support of Affirmative Action). Marvin Peguese, a third-year Boalt student, noted, “We feel the dean’s
been overly cautious in enforcing SP-1. Her heart’s in the right place. But the political and legal fallout
has made her timid.” Annie Nakao, Boalt’s Dean Kay is Caught in the Middle: She Favors Affirmative

(quoting Professor Marjorie Shultz’s remarks at the rally); see also, generally, Marjorie M. Shultz,
Excellence Lost, 13 BERKELEY WOMEN’S L.J. 26 (1998) (discussing how loss of diversity impacts the
classroom and educational experiences, both for students and professors).

67. Pamela Burdman, Boalt Hall Alumni Blast UC Policy, S.F. CHRON., Aug. 19, 1997, at
A13 (paraphrasing Professor Marjorie Shultz’s remarks at the rally).

68. Executive Summary, Report of an Ad Hoc Task Force on Diversity in Admissions 8 (Oct.
14, 1997).
must do everything it can to increase its enrollment of underrepresented minorities.\textsuperscript{69}

Evidence of the importance students place on the diversity of the student body is abundant. Many students find that diversity in the student body is an integral part of their legal education.\textsuperscript{70} A University of Tennessee law student said, "I would be curious to know how many blacks feel the same as Justice Marshall seems to feel,"\textsuperscript{71} indicating his or her desire to hear the opinions of people with different perspectives and backgrounds as part of his legal education.

A first-year law student at Boalt Hall explained, "When choosing a law school, I placed a high value on the diversity of the student body . . . ."\textsuperscript{72} A third-year law student at Boalt Hall noted similarly, "We have a diverse population here in California, and we need to provide a diverse population of lawyers."\textsuperscript{73} In fact, students find diversity so pressing that they engage in civil protests where diversity is lacking, even subjecting themselves to arrest.\textsuperscript{74}

Nor is the importance of diversity limited to traditionally underrepresented minority groups. A white third-year student at the University of Michigan School of Law explained, "It was so important to me to have people of different colors in the classroom. You learn more from them. You start to question assumptions you had."\textsuperscript{75} Similarly, a Boalt Hall alumnus wrote of her time as a law student, arguing in favor of affirmative action because of its effects in increasing diversity:

\begin{quote}
[A]ffirmative action benefits all of us in the community, not just those admitted under its guidelines. I am a white, working-class woman who returned to school after age 30. . . . [W]hen I attended Boalt Hall School of Law, my graduate school education was
\end{quote}

\begin{enumerate}
\item[69.] Id. at 1.
\item[70.] See, e.g., Annie Nakao, \textit{Entering Boalt Students Chafe at Homogeneity}. S.F. EXAMINER, Sept. 13, 1997, at A1 ("In open letter, 71% [of entering Boalt students] say lack of ethnic diversity limits their legal education.").
\item[71.] Frances Lee Ansley, \textit{Race and the Core Curriculum in Legal Education}, 79 CAL. L. REV. 1512, 1548 (1991) (quoting from one of her student's papers).
\item[72.] Annie Nakao, \textit{Diversity Lacking as Boalt Hall Opens; Only Black in new class says he chose UC for its mix}. S.F. EXAMINER, Aug. 19, 1997, at A1 (quoting Eric Brooks); see also Laura Hamburg, \textit{UC Students, Faculty Protest Loss of Affirmative Action}, S.F. CHRON., Oct. 22, 1998, at A19 (quoting undergraduate Jennifer Jackson: "One of the reasons I chose to come to Berkeley is its reputation for diversity.").
\item[73.] Stolley, \textit{supra} note 13, at 37 (quoting Hashona Braun). U.C.L.A law student Veronica De La Cruz echoes this thought: "Our society is plagued with a lot of ills. If we have just one type of student in law schools, who's to say those students will disperse themselves to all the [problem] areas." Christine Riedel, \textit{Diversity Dilemma}, NAT'L JURIST, April/May 1996, at 14, 15.
\item[75.] Stolley, \textit{supra} note 13, at 35 (quoting Jennifer Mezey).
\end{enumerate}
made much more complete, and my life since made richer, by the
daily presence of people whose backgrounds and ethnicities were
different than mine. If that diverse, bright, interesting and
dedicated student population was the result of affirmative action,
then I say affirmative action was on the right track.  

Diversity in a law school student body is important enough to pass several
rigorous constitutional tests and earns the approbation of university presidents,
chancellors, law school deans, law school faculty, and law students. In sum, it is no
nominal matter and can serve as consideration for a contract.

B. Diversity of the Faculty

The importance of diversity in the faculty is somewhat less settled than
diversity in the student body. Some law school deans and professors, for example,
do not find increasing diversity among their ranks to be that important. Some
scholars, however, have written that diversity in the faculty is just as or more
important than diversity in the student body ranks. Moreover, law school faculties
are terribly behind, and "legal scholarship remains one of the last vestiges of white
supremacy in civilized intellectual circles."  

Diversity in law school faculty can afford students with role models. Racial
minorities who are presented with racial minorities as role models in the curriculum
and in the teaching staff learn better, more quickly, and develop higher self-esteem
than those who lack such role models. This in turn can reduce alienation of racial
minorities in law school and legal studies. For instance, African-American law
students who lack such role models, "[c]onsidering the paucity of African-American
law professors, case law authors, and relevant curriculum subjects[,] . . . cannot
avoid noticing the marginal role their culture plays within the legal system." 

Professor Charles Calleros argues that there are many benefits to
confronting issues of diversity in the classroom, and the instructor must take the
lead. Moreover:

A18.

77. Cf. Ken Myers, Berkeley Dean Asks What Fuss on Diversity, Exams Is All About, NAT'L
L.J., Sept. 23, 1991, at 4 (characterizing then-Dean of Boalt Hall Jesse Choper as not knowing what all
the fuss was about and why a student group was willing to protest to the point of being arrested in
pushing the school to diversify the law school faculty).

78. Anthony R. Chase, Race, Culture, and Contract Law: From the Cottonfield to the

79. Cf. id. at 59.

80. Id. See also Kimberlé Williams Crenshaw, Foreword: Toward a Race-Conscious

81. See generally Charles R. Calleros, Training a Diverse Student Body for a Multicultural
Society, 8 LA RAZA L.J. 140 (1995). See also Crenshaw, supra note 80, at 8 ("[U]nless the instructor
[I]t is intuitively obvious that a . . . teacher of color . . . will be particularly well suited to explore nontraditional perspectives [such as those confronting issues of diversity] with her students . . . . [S]he will at least complement other instructors on a diverse faculty, each member of which may have particular insights into one or two perspectives and can learn to productively lead discussion with others.82

Professor Ian Haney López writes:

[M]inority scholars benefit law schools by (1) symbolically challenging the stereotype of intellectual inferiority that burdens people of color; (2) serving as exemplars suitable for student emulation; and (3) acting as mentors to facilitate and aid the growth of students. While minority students benefit particularly, these advantages also accrue to non-minority students.83

Moreover:

The new insights associated with community ties [and diversity in faculty] generate: (1) distinctive methodologies; (2) the reconsideration of established legal debates; (3) the formulation of fresh legal controversies; and (4) the modification of pedagogical styles.84

Law students echo similar thoughts. A Boalt Hall student group informational brochure lists at least five factors why diversity in the faculty is important. First, diversity of “political perspective, academic concentration, and life experience among faculty members enriches legal education at Boalt” and improves the quality of education. Second, the “influences of race, gender, sexual orientation, physical ability and class” will be important in preparing students to practice. Third, students need role models and are discouraged when they look to the faculty “and [do] not . . . see someone who has made it to that position from a starting point similar to [their] own.” Fourth, students need mentors for career success, but “white

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82. Id. at 155. But cf. Arthur Austin, Deconstructing Voice Scholarship, 30 HOUS. L. REV. 1671 (1993) (criticizing the emphasis on the racial/ethnic identities of law school professors over their merit).


84. Id. at 113.
male professors are more likely to see potential (i.e., see themselves) in white male students than in women and people of color." Finally, diversity in the faculty contributes to greater legal scholarship at Boalt.\textsuperscript{85}

While there is more contention about the importance of diversity in law school faculty than about diversity in the student body, many scholars and students are convinced of its value. Consequently, like diversity in the student body, it has enough value to be the subject of a bargain and can constitute consideration for the purposes of forming a contract.

### III.

**DETERMINING THE TERMS OF THE CONTRACT**

Having found the student-school relationship to be contractual, and diversity to be an appropriate subject for a bargain so as to allow a legally enforceable contract, we must examine how to determine what the terms of the contract are. The terms themselves may be found in a variety of sources. Both oral and written statements are important in determining the terms of the contract.\textsuperscript{86} In particular, statements can be found in written materials, such as catalogs, handbooks, policy manuals, bulletins, advertisements, circulars, brochures and other promotional materials, and regulations made available to the matriculant, all of which may yield terms of the contract.\textsuperscript{87} The courts may imply additional terms into such written materials.\textsuperscript{88} For instance, terms may be implied from depictions of facilities and photographs contained in written materials.\textsuperscript{89} There has even been some suggestion a student can rely on the experience of former students.\textsuperscript{90}

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\textsuperscript{85} The information and quotes from this paragraph came from one informational brochure distributed by a student group at Boalt Hall. See \textsc{Coalition for a Diverse Faculty, Diversity in Boalt's Faculty—How, What, & Why?} (October 1995) (on file with author).


\textsuperscript{87} See Corso v. Creighton Univ., 731 F.2d 529, 531 (8th Cir. 1984) (opinion on case about expulsion noting, "[f]or our purposes, the Creighton University Handbook for Students 1981-82 is the primary source of the terms governing the parties' contractual relationship."); Guckenberger v. Boston Univ., 974 F. Supp. 106, 150 (D. Mass. 1997); Altschuler v. Univ. of Penn. Law School, No. 95 Civ. 249 (LLS), 1997 WL 129394, at *5 (S.D.N.Y. Mar. 21, 1997) (contract claims can be based on "promises to provide basic services, such as the courses offered, or basic benefits, such as the credits or degrees to be granted."); Clarke v. Trustees of Columbia Univ., No. 95 Civ. 10627 (PKL), 1996 WL 609271, at *5 (S.D.N.Y. Oct. 23, 1996); Zumbrun v. Univ. of Southern Cal., 101 Cal. Rptr. 499, 504 (Cal. Ct. App. 1972); Andre v. Pace Univ., 170 Misc. 2d 893, 896 (N.Y. App. Term 1996).

\textsuperscript{88} Some courts may be reluctant to do this. See Davenport, \textit{supra} note 36, at 209.

\textsuperscript{89} See Idrees v. American Univ. of the Caribbean, 546 F. Supp. 1342, 1347 (S.D.N.Y. 1982) (action for misrepresentation based on, among other things, a photograph making it appear as if a school had a relationship with the local hospital).

\textsuperscript{90} "A student has a reasonable expectation based on statements of policy by Penn State and the experience of former students that if he performs the required work in a satisfactory manner and pays his fees he will receive the degree he seeks." Altschuler v. Univ. of Penn. Law School, No. 95 Civ. 249 (LLS), 1997 WL 129394, at *5 (S.D.N.Y. Mar. 21, 1997) (emphasis supplied) (internal quotation marks omitted) (citing Ross v. Penn. State Univ., 445 F. Supp. 147, 152 (M.D. Pa. 1978)).
The court may also imply broad obligations as part of the contract, such as a covenant of good faith and fair dealing\(^9\) or certain educational and procedural duties, such as: (1) providing an atmosphere conducive to learning; (2) using fair disciplinary procedures; (3) guarding against invidious discrimination in allowing educational progress; and (4) providing the curriculum promised.\(^9\)

However, the courts are often disinclined to imply broad guarantees, especially where the terms are indefinite or amorphous.\(^9\) Thus, tuition estimates published in the school bulletin were too indefinite to be reasonably construed as a guarantee to abide by those numbers.\(^9\) More poignantly, expressions of a university’s goals to impart wisdom made in a brochure and in a convocation address were mere expressions of hope and could not reasonably be accepted as a contractual promise to teach wisdom.\(^9\) Nevertheless, some “puffing statements” may be treated as contractual guarantees, such as where a stewardess training school makes repeated statements that enrollees need not worry about their future or job placement.\(^9\)

Multiple sources of contractual obligations and implied terms complicate determination of which terms are applicable. For example, schools put out a new catalog each year, but courts have not agreed whether the catalog under which a student is first admitted governs the entire contractual relationship or whether the current catalog constitutes a modification of the existing contract or an entirely new contract.\(^9\) The trend seems to be the latter; more recent cases hold that a new catalog applies to students who enrolled under an earlier catalog as well as to newly enrolling students.\(^9\)

91. See Davenport, supra note 36, at 208.

92. See Nordin, supra note 33, at 156.

93. See Davenport, supra note 36, at 213-16.


97. See Davenport, supra note 36, at 210-11; Jennings, supra note 35, at 192-93. Also, in the employment context, courts have held that employee handbooks distributed after initial hiring and employment can become part of the employment contract; interestingly, courts have also said that student-university contracts are like employment contracts in some cases. Compare Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983), reproduced in LON L. FULLER & MELVIN A. EISENBERG, supra note 18, at 487-95, with Anthony v. Syracuse Univ., 231 N.Y.S 435 (N.Y. App. Div. 1928) (student may agree to allow educational institution to terminate him at will, and the student-university contract is just like an employment contract in this respect). As to issues surrounding the modification of employer handbooks, including balancing out the greater bargaining strength of the employer, see Note on Modification of Employee Handbooks in LON L. FULLER and MELVIN A. EISENBERG, BASIC CONTRACT LAW 496-501 (6th ed. 1996).

98. See Davenport, supra note 36, at 210-11.
With this background as to where and how courts look for the terms of an educational contract, we can now focus on determining the contract terms relating to diversity. To this end, we must first identify statements and representations relating to diversity and diversity-related issues. Such statements may be categorized as follows: (1) statements constituting express promises; (2) statements of policy or philosophies from which one may reasonably infer implied promises to make good-faith efforts to carry out such policies and philosophies; (3) statements of fact regarding the past and/or present from which one may reasonably infer implied promises to achieve reasonably similar conditions in the future; (4) statements of fact regarding the present. The last is a representation which must be true or potentially yield a claim for fraud. The first three are promises which must be fulfilled under the contract—and these are the terms of the contract.

IV.
PROMISES, PROMISES

The cover of the informational brochure handed out by the Harvard Native American Law Student Association bears the title “Native American Students at Harvard Law School” in large print (occupying two-thirds of the entire cover!). The explicit statement to a reader of the brochure is that there are twenty some Native-American students at Harvard Law School. The photograph depicts twenty-four people in total. The explicit statement to a reader of the brochure is that there are twenty some Native-American students at Harvard Law School—a representation of fact. The consequent logical inference is that if you attend Harvard Law School, there will be in the vicinity of twenty some Native American law students there with you—a promise implied from the representation of fact.

However, the photograph is misleading. Actually, the people depicted in the photograph are not all members of the Harvard Native American Law Student Association by any stretch of the ruler. The photograph depicts a group of Native-American students at a pow-wow and includes mostly Harvard undergraduates, several Harvard graduate students in the School of Education, several students from the Massachusetts Institute of Technology, and yes—maybe two or three Harvard law students. Thus, it is probably safe to say that newly matriculating law students did not find even close to the twenty Native American law students impliedly promised by the brochure. In fact, institutionally, Harvard Law School may very well have known that the photograph was misleading, making out a case for fraud as well as breach of contract.

99. HARVARD LAW SCHOOL, NATIVE AMERICAN STUDENTS AT HARVARD LAW SCHOOL (Fall 1995).

100. See id.

101. See id.

102. Interview with Venus S. McGhee, Harvard University Alumnus (Class of 1995), in Oakland, California (May 17, 1996). Ms. McGhee is pictured in the photograph, at which time she was a senior in Radcliffe College.
What promises have law schools made about racial and ethnic diversity and issues related to racial and ethnic diversity? For the purposes of illustration, I shall use Boalt Hall during the academic years 1995-96 through 1997-98 as a case study. The J.D. students enrolled in Boalt Hall during this three-year period first matriculated in the academic years 1993-94, 1994-95, 1995-96, 1996-97, and 1997-98 respectively. After parsing out the promises made prior to matriculation, and then after matriculation, the next part of this article will explore what law schools actually delivered.

A. Promises and Representations Made To Students Prior To Matriculation

Probably the first representations made to students by Boalt Hall were in the Boalt Hall Announcement they received in the mail or picked up in the Boalt Hall Office of Admissions. This booklet contains information about the school, the application process, and the actual application for admission. For most of the students matriculated in Boalt in the 1995-96, 1996-97, and 1997-98 academic years, they would have used the 1992-93, 1993-94, 1994-95, 1995-96, or 1996-97 Boalt Hall Announcements.

The 1993-94 and 1994-95 Boalt Hall Announcements are almost completely identical to each other. The 1992-93 Announcement is slightly different than the 1993-94 and 1994-95 Announcements; it uses one or two different photographs and has different text in several places. The 1995-96 and 1996-97 Announcements, however, are different both from each other and than the previous three Announcements.

All five Announcements open with the same message to prospective students from the dean. That message includes the following passage:

Learning law at Boalt Hall is a unique and challenging experience. You will be part of a diverse student body, and you will study with a faculty composed of philosophers, economists, historians, sociologists, and political scientists, as well as legal scholars . . . . The intellectual diversity of the Berkeley campus will further

103. Compare BOALT HALL 1993-94 ANNOUNCEMENT with BOALT HALL 1994-95 ANNOUNCEMENT. The two booklets use all the same photographs, though one is located in a different portion of the booklet, and substantially all the same text, with minor updated information.


enrich your understanding of the role of law in a multicultural society.

... 

We aim to offer our students an educational experience that will be personally rewarding and intellectually stimulating. Most Boalt graduates look back on their years here with warmth and affection. We hope you will be among them.107

These messages contain several explicit promises: first, that an enrolling student will be part of a diverse student body; second, that an enrolling student will study with a faculty of diverse backgrounds and scholarly concentrations; and third, the intellectual diversity will teach an enrolling student about the role of law in a multicultural society. Additionally, there are statements of goals and educational philosophy, regarding providing a rewarding, stimulating, and fondly remembered experience at Boalt Hall; while these are merely statements of goals, they do imply promises of at least good-faith intent to accomplish these goals.

The 1992-93 Announcement introduces "Studying Law at Boalt Hall" with the following message: "Since its beginning, Boalt Hall has sought to educate men and women not only for the practice of law but for all the varied roles lawyers perform in a modern society."108 The announcements for the next four years contain the same message but elaborate further:

An important part of this tradition has been the conviction that legal education is significantly enriched if students are able to share experiences and exchange and debate ideas and opinions with a diverse mix of colleagues from different backgrounds. Today, more than ever, this belief in the value of diversity is central to the philosophy of education at Boalt Hall, as we seek to prepare our students for careers ... in a complex and changing society.109

Again, these messages underscore the philosophy that diversity is important to the educational experience and evinces an explicit commitment to diversity. These could be seen both as explicit promises that diversity will play a "central" role and as implicit promises that Boalt Hall will make a good-faith effort to achieve diversity in the student body and faculty as part of this philosophy.


The Boalt Hall Announcements list the student body as being composed of 31% minority students in 1991-92, 35% in 1992-93, 35% in 1993-94, 37% in 1994-95, and 35% in 1995-96. All five Announcements note, "It is often said that the diverse Boalt Hall student body is one of the School's great strengths." Even Boalt Hall's Web site comments: "In recent years women have comprised about 50 percent of the class and people of color about 35 percent." The statements of percentages and numbers are all representations of fact regarding the present. However, a potential student could reasonably imply promises that future percentages and numbers will be reasonably in line with these representations about the present, especially when combined with the myriad statements about the importance of diversity to Boalt Hall's philosophy of education and statements that the diverse student body has always been one of the school's greatest strengths.

The admissions portion of the Announcement declares, "Boalt Hall seeks a racially and culturally diverse student body," in the 1992-93 Announcement, and, "Boalt Hall seeks to admit an entering class with diverse characteristics in a manner that takes into account its history of leadership in achieving educational diversity, annual fluctuations in qualified applicant pools, and the pedagogical importance of maintaining a critical mass of students from traditionally underrepresented backgrounds to promote a robust exchange of ideas among all students," in the 1993-1994, 1994-95 and 1995-96 Announcements. These are yet more statements and express promises as to Boalt Hall's philosophy and practice of seeking diversity, which support inferences as to future numbers and percentages on student body diversity and implies a good-faith intent to carry out this philosophy and practice.

110. BOALT HALL 1992-1993 ANNOUNCEMENT 4. See also id. at 7 ("[A]bout one-quarter [of students] have been from minority groups.").

111. BOALT HALL 1993-1994 ANNOUNCEMENT 4. See also id. at 7 ("[A]bout one-third [of students] have been from minority groups.").

112. BOALT HALL 1994-1995 ANNOUNCEMENT 4. See also id. at 7 ("[A]bout one-third [of students] have been from minority groups.").

113. BOALT HALL 1995-1996 ANNOUNCEMENT 4. See also id. at 7 ("[A]bout 40 percent [of students] have been from minority groups.").

114. BOALT HALL 1996-1997 ANNOUNCEMENT 4. See also id. at 7 ("[A]bout 40 percent [of students] have been from minority groups.").


116. Admissions: Frequently Asked Questions (FAQ) About Admission to Boalt Hall (visited Nov. 29, 1997) <http://www.law.berkeley.edu/admissions/faq.shtml>. I cite to the web site as if its content were essentially the same during the relevant periods, i.e., before students in the above-mentioned periods had matriculated, though it is not clear that this is so.


Interestingly, there was a significant change in the 1996-97 Announcement, where the roughly corresponding section stated, "Boalt Hall seeks to enroll a class with varied backgrounds and interests. Such diversity contributes to the learning environment of the law school and has historically has produced graduates who have served all segments of society and who have become leaders in many fields of law." The Boalt Hall Web site's Frequently Asked Questions page includes, "Is consideration given to diversity?" The answer: "Boalt Hall strives each year to admit a diverse group of people to study law at Berkeley. The school's admission policy allows for consideration to be given to a variety of factors in addition to numerical indicators. These include graduate work, special academic distinctions, difficulty of the academic program, work experience and significant achievement in nonacademic activities or public service."

The Web site further details the "Background and Faculty Policy Governing Admission to Boalt Hall":

Boalt Hall is proud of its history of admitting academically excellent and racially and ethnically diverse student bodies. Beginning in the late 1960s, Boalt’s admission policy reflected from diverse backgrounds. Over time, Boalt Hall’s commitment to diversity led to the enrollment of entering classes with very substantial numbers of minority students.

While the page then talks about the effect of the Regents resolution ending affirmative action, it goes on, "Boalt does continue to value having a racially and ethnically diverse student body and seeks to educate lawyers who will serve the legal needs of all members of society. In short, language regarding racial and ethnic diversity was tempered somewhat in the 1996-97 Announcement but still reaffirmed Boalt Hall’s commitment to diversity. However, the new language probably yields less expectation with regard to such diversity than previous years.

The Announcements also characterize the faculty, stating that the "size and diversity" of the faculty allow Boalt to offer "a flexible and varied curriculum."
The introducing message from the dean also refers to the "wide variety of faculty expertise and the diverse areas of study available to our students." These messages are explicit promises of the availability of a diverse curriculum.

The Announcements also detail the availability of concentration programs providing law students "an opportunity to study one subject in a sustained manner and at a more advanced level than is generally possible in ordinary law school courses." Among the available concentrations is "Traditionally Disadvantaged Groups":

The Law School offers a wide variety of classroom courses and clinical opportunities for students interested in the legal concerns of traditionally disadvantaged groups (although not all courses are offered every year). Two overview courses are Civil Rights Law and Courts and Social Policy. Courses organized around specific groups currently include Race and American Law; Indigenous Americans and U.S. Law; Children and the Law; Sexual Orientation and the Law; Disability Rights; Sex-Based Discrimination; Domestic Violence; Sexual Harassment; Work and Gender; and Feminist Theory and the Welfare State. Courses organized around important needs of disadvantaged groups currently include Education and the Law; Employment Discrimination; Community Law Practice; Welfare, Social Security, and the Law; Housing Law; and Public Interest and Legal Services Practice.

Each Announcement also has a separate section listing all courses available at Boalt, and each also has a subheading for courses on traditionally disadvantaged groups. Additional courses listed there that were not listed under the concentration description above include Asian Americans and the Law; Bilingualism and the Law; Comparative Family Law; Equality Seminar; Immigration Law; International Human Rights; Race, Gender, and the Law; and Refugee Law. Interestingly, the


disadvantaged groups section also included such courses as Estates and Trusts and Negotiations. These are all express promises that these courses will be reasonably available to students, especially when coupled with the more general promises of the availability of a diverse curriculum. The promises are qualified, however, in that it is explicitly stated that not all courses are offered every year. Moreover, it is probably the industry practice of all educational institutions to list almost every course they have ever offered; potential students, in turn, would know not to expect to be able to take every listed course at will.

A wide array of photographs appears in each Announcement. The 1992-93 Announcement had sixteen photographs of varying sizes and depicting a total of approximately thirty-eight people. It is, of course, difficult to judge a person's race or ethnicity by appearance. However, in trying to guess at the race or ethnicity of the people in the photographs, I counted five African Americans, five Asian Americans, and two other non-Caucasian people (for a total of twelve non-Caucasians, or 31.58%). Interesting, perhaps, the photographs depicted five professors total. Of these five, I counted two Caucasian women, one African-American woman, and two Caucasian men (which works out to 20% African American and 60% women). Again, the 1993-94 and 1994-95 Announcements contained the same photographs as the 1992-93 Announcement.

The 1995-96 Announcement contained nineteen photographs depicting a total of approximately twenty-nine people. Again guessing at race or ethnicity, I counted four African Americans, one person of Hispanic, Chicano, or Latino descent, and one Asian American (for a total of six non-Caucasians, or 20.7%). The photographs depicted ten faculty, including two Caucasian women, one African-American woman, and seven Caucasian men (which works out to 10% African-American and 30% women).

The 1996-97 Announcement had sixteen photographs depicting a total of approximately thirty people. Guessing at race or ethnicity, I counted five African Americans, four Asian Americans, and two other identifiably non-Caucasians (for a


131. See BOALT HALL 1992-93 ANNOUNCEMENT passim. Where factors such as long-distance shots, large crowds, overexposure, or other blurriness made it difficult or impossible to discern faces and physical characteristics, I did not count the people "blurred."

132. This meant, unfortunately, relying on some stereotypes and commonly regarded physical indicators of race and ethnicity; in some cases, however, I knew the person in a photograph and knew how she self-identified and was able to classify accordingly.

133. See supra note 104.

134. See BOALT HALL 1995-96 ANNOUNCEMENT passim.

135. See BOALT HALL 1996-97 ANNOUNCEMENT passim.
total of eleven non-Caucasians, or 36.7%). The photographs depicted five faculty, including two Caucasian women (which works out to 40% women).

Supplements to the Announcement describe particular programs at Boalt. For example, the Environmental Law Program puts out a brochure describing its program. In that brochure, photographs depict a total of fifty-six people. Again, guessing, I counted six and one-half African Americans, seven and one-half Asian Americans, and six other non-Caucasians (for a total of twenty non-Caucasians, or 35.71%). The photographs show sixteen professors, including one African American and two people of Hispanic, Chicano, or Latino descent (for a total of three non-Caucasians, or 18.75%). Separating the faculty out from the other people, the photographs show forty people total, including twenty non-Caucasians (or 50.00%).

All of these photographs are representations of the current conditions at Boalt Hall. Unlike some of the other representations of present facts in the Announcements and elsewhere, it would probably be a difficult case to imply promises of future conditions from the photographs. Just as for course listings, it is probably industry practice for educational institutions to select photographs for their appeal to the future students, including showing racial and ethnic diversity in such photographs. Moreover, there are more concrete statements, such as numbers and percentages, suggesting it may not be reasonable to imply too much from what is shown in the photographs. However, if enough people do rely on the photographs, it makes a stronger case for the photographs translating directly into promises. For example, in the undergraduate context, one student stated she “applied to the University of California at Berkeley because the catalog showed idyllic photographs of students of different ethnic backgrounds studying together.” Likewise, photographic representations that are false or misleading would make a case for misrepresentation, for example: a photograph of an undergraduate class in a law-school announcement; a photograph of a law-school class from many years ago that is no longer representative of the current student body; or a photograph of a law professor who no longer teaches at the school.

After a student applies and is admitted, Boalt sends other informational materials on the school. In 1997, these informational materials included a booklet.

136. Boalt Hall, Environmental Law Program (1996). I am not sure if this is the same brochure distributed the year before, thus bringing it within the proper purview of students attending Boalt in the 1995-96 academic year.

137. The “one-half” figures stem from my personal knowledge of one of the people in one of the photographs; he is, to my knowledge, half-African American and half-Asian American.

138. Actually, one professor is shown in two different photographs and was counted as two people.

139. Aside from “candids,” there is also a photograph of each professor affiliated with the Environmental Law Program, almost a “face book.” Thus, there is some reason to separate conceptually the “face” shot of each professor and the candid photographs throughout the rest of the brochure.

entitled *Boalt Hall Welcomes You*. There, Dean Kay says, “Our faculty are an eclectic and highly distinguished group of scholars, *diverse in every sense of the word* . . .” Likewise, the section on faculty alludes to the “size and diversity of the faculty,” just as the Announcements do. Also, just like the Announcements, the booklet notes, “It is often said that one of Boalt’s greatest strengths is its diverse and dynamic student body.” Again, these are representations of present fact; and furthermore, may yield implied promises as to future conditions being reasonably similar.

*Boalt Hall Welcomes You* also contains a host of photographs. In particular, along the sides of the pages, it profiles (and pictures) a number of Boalt students, along with their statements about their experiences at Boalt. The profiles feature twenty-three different students, including six African Americans, five Asian Americans, and twelve Caucasians (for a total of eleven non-Caucasians, or 47.8%). These photographs are additional general representations of the current Boalt Hall student body.

Boalt also recruits admittees actively. The Admissions Office coordinates students, especially students of color, to call prospective students to encourage them to enroll in Boalt. Boalt’s Web site also responds to the question, “I’d like to talk to students about Boalt Hall. How can I reach them?” with a list of (and the contact information for) the following student organizations: Boalt Hall Student Association; Boalt Hall Women’s Association; Asian Pacific Law Student Association; La Raza Law Student Association; Law Students of African Descent; and Native American Law Students Association.

Boalt also holds a recruitment day, sometimes called “Visit Day,” in April, to invite prospective students to the school to help them make a final decision about where to attend law school. Visit Day actually began as a minority recruitment

141. Interview with Tania P. Shah, Boalt Hall Student (entered in 1997-98 academic year), in Berkeley, California (November 30, 1997); see also *BOALT HALL WELCOMES YOU* (Spring 1997).

142. *BOALT HALL WELCOMES YOU* 2 (emphasis supplied) (Spring 1997).

143. *BOALT HALL WELCOMES YOU* 8 (Spring 1997).

144. *BOALT HALL WELCOMES YOU* 10. (Spring 1997)

145. *BOALT HALL WELCOMES YOU* passim (Spring 1997).

146. *See BOALT HALL WELCOMES YOU* passim (Spring 1997). I knew almost every student featured, so my estimation of race or ethnicity should have been quite good.

drive, and to date, it still retains several activities directed particularly at minorities.

Prospective students who prefer to come before the scheduled Visit Day, or who cannot make the scheduled Visit Day, can arrange a separate visit through the Admissions Office. The Admissions Office arranges for a current Boalt student to meet and spend some time with the prospective student, taking her around the school and talking about law school. The Admissions Office actively recruits minority students to serve as these tour guides.

All of these are resources for students of color, in particular, and students could make the implied-promises argument that they reasonably expected continued support for and availability of resources for students of color based on these actions. Several years ago, there was a more explicit promise of such support in the Academic Support Program. In July 1994, for example, Boalt Hall sent minorities who were matriculating in Fall 1994 a letter inviting them to the “Introduction to Legal Learning” program taking place in the days right before Orientation. It said:

For some years, Boalt Hall has conducted a brief introductory program for entering minority and disabled students called “Introduction to Legal Learning.”... The program will introduce you to the kind of teaching you will experience during your career at Boalt in a relaxed, non-competitive atmosphere. It will also provide an opportunity to meet some of your fellow classmates and members of the faculty.

The Introduction to Legal Learning Program existed through 1996 and was part of Boalt’s Academic Support Program (ASP), a program originally targeted at racial and ethnic minorities (and persons with disabilities). Included in incoming Boalt

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149. It has even survived one attempt to end it. Id. The inclusion of activities directed at minorities caused some uproar when a prospective student was offended when students attending Visit Day split off into groups, mostly along racial lines, and wrote his displeasure to the Wall Street Journal. See Matthew Covington, Why I Hate the "D" Word, WALL ST. J., May 12, 1995 at A12. This seemed to make the administration more cautious about the whole event, especially the focus on diversity issues. Indeed, in Spring 1998, after students had already started planning for the event and been told the event was going forward, the Boalt Hall administration abruptly canceled Visit Day, also casting doubt over its future. Interestingly, Spring 1998 and the present may be the time Boalt Hall needs Visit Day more than ever. See discussion infra § VI.C. (discussing state of diversity at Boalt Hall in Spring 1998).


151. Id.

152. ASP has been taught by second and third-year Boalt students who serve as teaching assistants. They run a weekly group workshop/seminar and hold office hours to meet with students individually.
students' Orientation packet in Fall 1994 was a letter describing ASP as it then existed:

The School of Law is committed to racial and cultural diversity in its student body and in the legal profession. That commitment is reflected in our admissions policy, which gives positive weight to membership in cultural, ethnic, and racial groups that historically have been prevented from developing their academic potential.

... Boalt affirms the belief throughout the legal community that diversity in the profession can be fully realized only if students from those groups succeed in law school. The Academic Support Program ("ASP") is intended to help achieve this result by providing a supportive learning environment that enables these students to achieve academic excellence at Boalt. In addition, the faculty makes special efforts to provide academic support to all students who require extra assistance to further develop their analytical and writing skills.

... Participation in ASP in the first semester of the first year is generally limited to students who are members of historically under-represented groups. Students not otherwise eligible in the first semester are permitted to participate at the Director's discretion or at the recommendation of their first-year instructors. 153

These statements include several promises as to Boalt Hall's general commitment to diversity and a specific express promise to provide a supportive learning environment for students of color through ASP.

In the 1996-97 academic year, the Introduction to Legal Learning program again targeted racial and ethnic minorities, but once the year began, ASP itself was completely reworked. Participation in ASP the first semester of the 1996-97 and subsequent years was open to all students and no longer targeted racial and ethnic minorities.

B. Promises and Representations Made To Students After Matriculation

Boalt officials have made a number of representations regarding diversity, supporting diversity, and similar issues, after students first matriculated. In December 1994 and February 1995, an unknown source placed a series of racist

153. See Memorandum from Boalt Hall regarding the Academic Support Program (Fall 1994) (on file with author).
anti-affirmative action hate-mail flyers in the boxes of students of color at Boalt. 154
In response, Dean Kay wrote an open letter to the Boalt community on February 13, 1995, condemning the hate mail and promising:

In the days and weeks to come, I plan to meet with students, student group leaders, faculty, staff, and the campus administrators to formulate an effective plan to end this indefensible attack on members of the Boalt Community and to support those who have been victimized. 155

Similarly, the faculty distributed and posted a letter titled, "Statement of Boalt Hall Faculty and Staff Concerning the Recent Hate Mail" on February 14, signed by 91 Boalt faculty and staff: "We reaffirm our commitment to keeping Boalt Hall a place where diversity and excellence are understood to be consistent and consistently honored." 156 These statements all constitute promises of Boalt Hall's commitment to diversity and an environment conducive to and supportive of diversity. Really, in stating they "reaffirm" such commitment, the faculty and staff represented that such commitment has been in place both in the past and in the present, and both expressly and implicitly that such commitment will continue for the foreseeable future.

Dean Herma Hill Kay has made numerous statements on Boalt Hall's commitment to diversity over the years. For example, after the numbers of traditionally underrepresented minorities dropped dramatically with Boalt Hall's entering class in Fall 1997, Dean Kay wrote, "Our results this year [in terms of student body diversity] were a terrible disappointment, and we are committed to doing everything we can to improve them in the future." 157 On October 12, 1995, she declared, "I call on all members of the Boalt community to support the School in its continued commitment to diversity in legal education." 158 Again, these statements continually underscore the philosophies and commitments of Boalt Hall with regard to diversity; and students can reasonably infer good-faith efforts to carry out such philosophies and commitments.


155. Letter from Herma Hill Kay, Dean of Boalt Hall, to the "Boalt Community" (Feb. 13, 1995) (on file with author); see also BOALT HALL CROSS-EXAMINER, January/February 1995, at 8 (reproducing letter).

156. Statement of Boalt Hall Faculty and Staff Concerning the Recent Hate Mail (Feb. 14, 1995) (on file with author); see also Garner Weng, Round Two / More Flyers, BOALT HALL CROSS-EXAMINER, January/February 1995, at 7.


In the mid- to late 1990s, several blows were dealt to the use of affirmative action in law school admissions, which in turn reduced the diversity of law school student bodies and made the law school environment less friendly for traditionally underrepresented groups. In 1994, the United States Court of Appeals for the Fifth Circuit handed down its infamous decision in *Hopwood v. Texas,* holding that a “law school may not use race as a factor in law school admissions.”

In July 1995, the University of California Regents passed Resolution SP-1, prohibiting the consideration of ethnicity or gender in student admissions throughout the University of California system. SP-1 took effect in January 1997. In November 1996, California voters passed General Ballot Proposition 209, prohibiting public entities from considering ethnicity or gender, including in public school admissions.

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159. 78 F.3d 932 (5th Cir.), *cert. denied,* 116 S. Ct. 2581 (1996).


162. See *id.*; Matt Morbello, *Faculty to Revise Admissions Policy,* BOALT HALL CROSS-EXAMINER, Mar. 1996, at 1, 8 (quoting SP-1 Section 2 that the resolution takes effect January 1, 1997).

163. Boalt Hall in the role of contract defendant could argue that these anti-affirmative action measures constitute changed circumstances excusing its performance with regard to any promises regarding diversity. See RESTATEMENT (SECOND) OF CONTRACTS §§ 261 (discharge by supervening impracticability), 264 (prevention by governmental regulation or order). However, changed circumstances must make performance essentially impossible, or so commercially impractical and prohibitively expensive that no one would reasonably hold the promisor to the promise. See generally FULLER & EISENBERG, supra note ch. 8, at 725. Thus, a changed circumstances defense would likely fail. First, many people seem willing to hold Boalt Hall to promises of diversity and have complained about its lack of efforts to fulfill those promises, as discussed herein. Second, the defense would not excuse failures relating to diversity-related promises, such as course offerings and an environment supportive of diversity. Finally, the defense holds an implicit assumption that diversity is impossible without the affirmative action measures prohibited by SP-1 and Proposition 209, which is patently false. See, e.g., Robert S. Daggett, *Hastings College of the Law: A Casebook Model for Diversity Without Race Preferences* (visited Sept. 3, 1998) [http://www.brobeck.com/docs/dicta/dicta0898.html] (criticizing Boalt Hall for undertaking insufficient action to sustain diversity); NEW DIRECTIONS IN DIVERSITY: CHARTING LAW SCHOOL ADMISSIONS POLICY IN A POST-AFFIRMATIVE ACTION POLICY (May 1996) (on reserve at the Boalt Hall law library) (discussing ways to maintain diversity while still complying with anti-affirmative action measures); see also, generally, Andrea Guerrero, Affirming Diversity at the University of California: Considering Ethnicity in University Admissions Decisions (1998) (unpublished manuscript on file with author) (arguing there may still be some room to consider ethnicity even under anti-affirmative action measures).
A. The Numbers at Boalt

The Class of 1997 was initially composed of 269 students, approximately 42% of whom were students of color, including 40 Asian Americans (including Asian subgroups), 31 African Americans, 27 Chicanos, 8 Latinos, and 4 Native Americans. The Class of 1998 was initially composed of 266 students, approximately 38% of whom were students of color, including 36 Asian Americans (including Asian subgroups), 21 African Americans, 27 Chicanos, 9 Latinos, and 5 Native Americans. The Class of 1999 was initially composed of 263 students, approximately 38% of whom were students of color, including 45 Asian Americans (including Asian subgroups), 20 African Americans, 22 Chicanos, 6 Latinos, and 4 Native Americans. As a reference point, by Spring 1996, the aggregate Boalt student body consisted of 943 students, some 35% of whom were students of color.

A striking change occurred with the 1997-1998 entering class, the Class of 2000. The Class of 2000 was initially composed of 268 students, approximately 28% of whom were students of color, including 47 Asian Americans (including Asian subgroups), but only one African American, 6 Chicanos, 8 Latinos, and no

164. Because of limitations in the amount of information currently available to me, the amount of time passing since the original drafts of this article, and publication schedules, numbers for student and faculty diversity are referenced at various points of time which are not as comprehensive as I would like. Thus, student numbers are fairly complete for all of the relevant time periods, that is, the case study of the academic years 1995-96 through 1997-98. However, faculty numbers are most complete for 1995, with only some updated information reflecting hires and losses since then. Likewise, information on the availability of courses is complete for most of the relevant time periods but incomplete in pockets.

165. See UNIVERSITY OF CALIFORNIA AT BERKELEY SCHOOL OF LAW (BOALT HALL), 1997 ANNUAL ADMISSIONS REPORT 13 (data on 1994 enrollees) [hereinafter 1997 ANNUAL ADMISSIONS REPORT]; see also Gil Silberman, The Class of '97, BOALT HALL CROSS-EXAMINER, Aug. 1994, at 1. The Latinos included Puerto Ricans to be consistent with numbers reported in other sources. The Asian Americans included 18 Chinese, 3 East Indians, 4 Japanese, 4 Koreans, 4 Filipinos, 6 Vietnamese/Other, and 1 Pacific Islander. See 1997 ANNUAL ADMISSIONS REPORT 13 (data on 1995 enrollees). All of the totals reported might have been (or might be) different upon graduation, as classes typically suffer some attrition as well as adding transfer students.


168. See BOALT HALL 1996-97 ANNOUNCEMENT 4. 870 were J.D. students. Id.
Native Americans. The downward trend in the number of traditionally underrepresented minorities is even more precipitous when the numbers are deconstructed. Of the one African American and 14 Latinos matriculating, one African American and 7 Latinos had deferred enrollment and had been originally admitted for the entering class in 1995-96; thus, no African Americans and only 7 Latinos who had been admitted in the Spring or Summer of 1997 enrolled in Boalt Hall that Fall. Moreover, while the number of Asian Americans enrolling seems to be consistent with previous years, that number includes significantly fewer Southeast Asians than previous years.

By Fall 1997, when Boalt Hall published its 1997-1998 Announcement, the student body consisted of 909 students. The 1997-98 Announcement breaks away from the previous five years of Announcements by not disclosing the percentage of minorities in this 909-person student body. However, starting with the 35% minorities figure reported for Spring 1996, subtracting the 269 students who graduated in Spring 1997 and adding the 268 students enrolling in Fall 1997, yields a rough approximation that the Fall 1997 student body consisted of 30% minorities. Thus, the turnover of one class out of three still yielded a 5% drop in the number of minority students in the entire student body, so monumental was the change in the composition of the Class of 2000 compared to past classes.

On the faculty side, in October 1995, the tenured faculty consisted of 35 Caucasian men, 6 Caucasian women, one African-American woman, one Latino, one Asian American woman, one African American woman, one Latino, one Pacific Islander.

169. See id. (data on 1997 enrollees); see also Post-Affirmative Action Era Begins With One Black in UC Law School, supra note 167 at 4; Locke, supra note 13, at 13. The Asian Americans included 21 Chinese, 9 East Indians, 4 Japanese, 7 Koreans, no Filipinos, 5 Vietnamese/Other, and 1 Pacific Islander. See 1997 ANNUAL ADMISSIONS REPORT 13 (data on 1997 enrollees). As can be seen, while the overall Asian American numbers appear to be consistent with previous years, certain Asian subgroups declined, most noticeably Filipinos, who dropped to no students after having four or five in each entering class for the previous five or so years. See 1997 ANNUAL ADMISSIONS REPORT 13 (data on Filipino enrollees).


173. See id.

174. This is an imprecise calculation, made by subtracting out the number of minorities known to have enrolled with the Class of 1997 and adding in their place the numbers of minorities known to have enrolled with the Class of 1997. This does not account for attrition or transfer students. Notably, the Spring 1996 total student body is listed as 943 students, versus 909 students in Fall 1997, although only one more student started off in the Class of 1997 than in the Class of 2000. With the information available to the author, it is difficult or impossible to determine the composition of the unaccounted 33 students.
and one Latina. That is, the tenured faculty is 93% Caucasian. Moreover, the Coalition for a Diverse Faculty, a student group at Boalt, reports that four of the eight women (including the African-American woman), are seriously considering leaving the faculty. In fact, even disregarding these possible losses, the numbers "underemphasize the homogeneity of the faculty. Boalt also has 26 emeriti faculty, some of whom continue to teach, and many of whom still play an active role on the faculty. Twenty-five of the 26 emeriti are white men. (The 26th is an African-American man.)" Including the emeriti yields a total of seventy faculty members, of whom approximately 94% are Caucasian.

The scholarship of the faculty echoes the numbers. As of October 1995, "Boalt ha[d] only two tenured professors whose scholarship concentrates on feminist legal studies, and none who study or teach critical legal studies, critical race theory, or issues of sexual orientation and the law." These numbers improved somewhat with hires made during the 1995-96 and 1996-97 academic years. Nevertheless, Boalt was recognized by a National Jurist national survey of law students asking the students about their law schools and whether they agreed with the statement, "Faculty comprises a broadly diverse group of individuals"—Boalt finished as the second worst school in the nation. Moreover, the sole Asian-American woman on the Boalt Hall faculty has been widely reported as leaving Boalt Hall officially after her contract ends, and in the meantime elected to spend the 1997-98 academic year visiting at the University of San Francisco School of Law and to spend the 1998-99 academic year visiting at the University of California, Davis School of Law. Most recently, the sole Latino professor resigned to take a dean position at another school, although Boalt did add an Asian male professor as a tenured lateral. Thus, in the 1998-99 academic year,

175. See COALITION FOR A DIVERSE FACULTY, DIVERSITY IN BOALT'S FACULTY—HOW, WHAT, & WHY? 1 (Oct. 1995).

176. Id.

177. Id.

178. Id. (footnotes omitted).

179. Id.

180. Among others, Boalt hired Professor Ian Haney López, a critical race scholar and person of color, and Professor Linda Krieger, a labor law scholar.


182. See Editorial, Bon Voyage, Professor Hsieh?, BOALT HALL CROSS-EXAMINER, May 1997, at 3; cf. also, Garner K. Weng, Remarks at the Boalt Hall Alumni Association Graduation Reception (May 23, 1997) (introducing and presenting an award to Professor Hsieh and alluding to Professor Hsieh's imminent departure from Boalt Hall); Professor Marina C. Hsieh, Remarks at Boalt Hall Rally (Aug. 18, 1997) (alluding to why she was spending the year at the University of San Francisco School of Law).
it appears that professors of color at Boalt included only the previously mentioned African-American woman and Latina, and one Asian-American man.\textsuperscript{184}

Course offerings listed under "Traditionally Disadvantaged Groups," mentioned previously, were as follows, to the extent information was still available.\textsuperscript{185} In Fall 1995, the following courses were offered: Disability Rights, Domestic Violence Law Seminar (limited to enrollment of 35); Employment Discrimination; Housing Law; Refugee Law; Community Law Practice; Critical Race Theory (limited to enrollment of 18) (Estates and Trusts was also offered).\textsuperscript{186} In Spring 1996, the following courses were offered: Human Rights Writing Seminar (limited to enrollment of 12); Sex-Based Discrimination; Welfare, Social Security & the Law (limited to enrollment of 30); Public Interest Law and Practice (limited to enrollment of 25); Workshop on Race as a Perspective on Current Legal Doctrine (limited to enrollment of 15); Race and American Law (limited to enrollment of 90); Indian Law (limited to enrollment of 30); Sexual Orientation and the Law (limited to enrollment of 20); Immigration Law; Community Law Practice (limited to enrollment of 30); Children and the Law (limited to enrollment of 20) (Estates & Trusts was also offered).\textsuperscript{187}

The courses scheduled for Fall 1996 include: Disability Rights, Domestic Violence Law Seminar; Employment Discrimination; Refugee Law; Community Law Practice (limited to enrollment of 20); International Human Rights; and Critical Race Theory (limited to enrollment of 16) (Estates and Trusts was also offered).\textsuperscript{188}

The courses scheduled for Spring 1998 include: Children and the Law; Courts and Social Policy (open to first-year students); Human Rights Writing Seminar (limited to enrollment of 10); Sex Discrimination: Theory and Practice; Advanced Issues in Employment Discrimination; Bilingualism (limited to enrollment of 15); Education and the Law (limited to enrollment of 35); Public Interest Law and Practice; Race and American Law (limited to enrollment of 30) (open to first-year students); Indian Law; Sexuality, Gender and the Law (limited to enrollment of 24); and Refugee Law (Estates and Trusts and Negotiations were also offered).\textsuperscript{189}

\textsuperscript{183} E-mail from Professor Marjorie M. Shultz, Boalt Hall School of Law, University of California at Berkeley, to Garner K. Weng (Oct. 20, 1998).

\textsuperscript{184} I do not recalculate percentages because I am not sure that I have complete information or numbers on changes in the faculty since October 1995, particularly with regard to the addition of Caucasian male professors since that time. I am aware of at least one Caucasian male professor who joined the Boalt faculty since October 1995.

\textsuperscript{185} Unfortunately, I was unable to obtain the Boalt Hall Spring 1997 Course Guide and Boalt Hall Fall 1997 Course Guide, making any statements about the courses offered during Spring 1997 or Fall 1997 based on memory.

\textsuperscript{186} See \textit{Boalt Hall Fall 1995 Course Guide}.

\textsuperscript{187} See \textit{Boalt Hall School of Law Spring 1996 Course Guide}.

\textsuperscript{188} See \textit{Boalt Hall Fall 1996 Course Guide}.

\textsuperscript{189} See \textit{School of Law (Boalt Hall) Spring 1998 Course Guide}.
Some of the courses promised were not offered once during this three-year (six-semester) period: Sexual Harassment and the Law; Work and Gender; Feminist Theory and the Welfare State; Asian Americans and the Law; Comparative Family Law; Equality Seminar; and some of the courses were offered only once.\textsuperscript{190}

B. Narratives, Anecdotes, and Other Information

Numerous scholars have written eloquent narratives on the effect of race on their experiences in law school and how the law school environment is unfriendly to many issues of race and diversity. Patricia Williams speaks of her time at Harvard:

My abiding recollection of being a student at Harvard Law School is the sense of being invisible. I spent three years wandering in a murk of unreality. . . . Law school was for me like being on another planet, full of alienated creatures with whom I could make little connection. The school created a dense atmosphere that muted my voice to inaudibility.\textsuperscript{191}

Margaret Montoya speaks similarly of Harvard:

I have no memory of ever speaking out again [in class after that first time] . . . While I was at Harvard, my voice was not heard again in the classroom, exploring or explaining the life situations of either defendants or victims. Silence accommodated the ideological uniformity, but also revealed the inauthenticity implicit in discursive assimilation. As time went on, I felt diminished and irrelevant. It wasn’t any one discussion, any one class or any one professor. The pervasiveness of this ideology marginalized me, and others; its efficacy depended on its subtextual nature, and this masked quality made it difficult to pinpoint.\textsuperscript{192}

And Rita Sethi too tells of Harvard:

I sit in the back row of classes and watch the intellectual pin-ball game: from Professor to student, to student to esoteric scholar, DING, to student to meaningless obscure paradigm, to senseless

\textsuperscript{190} See BOALT HALL FALL 1995 COURSE GUIDE and BOALT HALL SCHOOL OF LAW SPRING 1996 COURSE GUIDE and BOALT HALL FALL 1996 COURSE GUIDE and BOALT HALL SPRING 1997 COURSE GUIDE and BOALT HALL FALL 1997 COURSE GUIDE and BOALT HALL SPRING 1998 COURSE GUIDE. Once again, I did not have access to the Boalt Hall Spring 1997 Course Guide or the Boalt Hall Fall 1997 Course Guide; I had personal knowledge of both semesters but am forced to rely on memory rather than the actual school-published schedules.


\textsuperscript{192} Margaret Montoya, Mascaras, Trenzas, Y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse, 17 Harv. Women’s L.J. 185, 208 (1994).
assumptions to self-righteous student, DING DING, to defensive Professor to nitpicking student, DING . . . I become ill, half-unable to follow their unpredictable haphazard path of thought, half-dizzied and perplexed by the insignificance, hollowness, and malice of the subject.  

Relatedly, Professors Lani Guinier, Michelle Fine, and Jane Balin explore the effect of gender on students’ law school experiences in their book *Becoming Gentlemen.* Their study of women law students and review of existing studies and data lead them to the conclusion that law school is “a hostile learning environment for a disproportionate number of its female students. . . . The disparate quality of women’s accumulated credentials interacts with higher levels of alienation and lower self-esteem for many women, even those who do well academically.” In addition to exhaustive research and survey work, Professors Guinier, Fine, and Balin also gathered anecdotes from their subjects. One woman said:

I think that the comments that women make in class are not always taken seriously before the point is even made, because people make the assumption that women may be taking the liberal, “sensitive” position—and these positions are not always given the credit and attention they deserve.

Another woman commented, “Just look at the way many professors here conduct their classes. They call on men predominantly. I sat in classes and had not heard a single female voice and we sort of—one year we did a study of that, an informal thing among ourselves . . . .” In fact, law students sometimes gave women who did speak out in class offensive labels: “After I discovered I was being called a feminazi dyke, I never spoke in class again.”

Mona Herrington’s interviews of women laywers about their law school experiences reveal sentiments identical to those found by Professors Guinier, Fine, and Balin. One woman spoke of her speaking out in class on the topic of rape:

I said, ‘There are so many misconceptions here that I need to correct. First of all, rape is a crime of violence, not a crime of


195. *Id.* at 57.

196. *Id.* at 46.

197. *Id.* at 50.

198. *Id.* at 54.
sex.’ At that point the professor just cut me off. He said, ‘Settle down, settle down, and think about this like a lawyer.’ The message was, If you’re like this, you can’t be a real lawyer, and real lawyers aren’t women and real lawyers don’t have emotions. I felt stifled and hardly ever spoke again in that class.\(^\text{199}\)

Harrington expands:

Over and over again, this is the refrain I heard: ‘I hardly ever spoke again.’ A chorus of stories from my interviewees, as well as reports from other studies, describe the same phenomenon. Even women who have been enthusiastic talkers at every prior academic stage, and those who have talked forcefully in other challenging settings—union meetings, debate competitions, community protests, fund drives, and business conferences—fall silent in the law school classroom.\(^\text{200}\)

Women of color found race compounded the hostility they felt and the marginalization they experienced. A Latina law student said:

Likewise, I think there is a lot of discrediting on the side of the white students. . . . I guess the sense that, perhaps, people won’t listen to me as much as if I was a white person saying it. I think when they listen to me, they say “of course she is going to say that because she is speaking for her own self-interest” and as a result, I don’t feel our feelings are ticking as individuals.\(^\text{201}\)

Similarly, two African-American women commented:

I think that still most people do not understand that African Americans are still struggling or why they are struggling . . . . I listen to some of the comments in class and I realize that I am coming from an entirely different world in that perspective than most people, just because I’m more aware of history and the law and things like that, as it relates to black people. I think that part of it has to do with the fact that the perception of white students is that they are going to be lawyers. They can be whatever kind of lawyers they want to be. They don’t have to represent all black people . . . . \(^\text{202}\)


\(^{200}\) Id.

\(^{201}\) Guinier, et. al., supra note 194, at 51.

\(^{202}\) Id. (internal brackets omitted).
The particular experiences of Boalt Hall students in the classroom have not been well documented, thus far. However, in my class, Race as a Perspective on Current Legal Doctrine, in Spring 1996, the students in the class regularly complained about the degrading treatment, marginalization, and/or exclusion of race or issues pertaining to race in most of their classes. For example, an African-American male third-year student told of his professor taking for granted that teenaged youths' running from the police was an indication of their guilt. He could see, however, youths could fear the police regardless of whether they had done anything wrong and talked about the negative images of police generated by the Rodney King and O. J. Simpson trials.

In Fall 1997, several Boalt first-year students reported a particularly charged experience in their Criminal Law class. The topic for the class in question was the Bernard Goetz case, the notorious incident in which the defendant Goetz, a white male, shot and killed several black youths in a New York City subway, purportedly in self-defense. Three Boalt students not enrolled in that particular section, including a third-year Puerto Rican man, a second-year African-American woman, and a first-year Caucasian man, attended the class in hopes of being able to participate and discuss the racial issues raised by the case. The professor refused to call on the visitors. Interestingly, the professor called on one of the visitors before realizing he was not a regular class member, allegedly inadvertently; that student was the white male. After the class, several of the students who were enrolled in the class went up to talk to the professor to complain about his treatment of both the subject and the visitors. One student suggested the professor called on the one visitor precisely because he was white, to which the professor responded, "Don't go there!" Another student was bothered that with a case brimming over with racial issues and given that two of the visitors were the only students of African-American or Latino descent in the room, refusing to call on them marginalized viewpoints of

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204. See Shultz, supra note 203, at 28-30 (discussing comments by students in this same class, which Professor Shultz taught).

205. See id. (mentioning this same classroom discussion and giving its context as following a search-and-seizure discussion in the student's Criminal Procedure class).

206. See, e.g., Larry McShane, Goetz Says He was 'Set Off' by 'That Smile' of Victim, Associated Press, Apr. 12, 1996 (discussing the civil action that followed the criminal action); Larry McShane, A Message to all Racists with Guns; Goetz Liable for $43M: Ordered to Pay Youth He Paralyzed, Associated Press, Apr. 24, 1996 (discussing the civil action that followed the criminal action).
color and defeated much of the point of discussing the case. The professor said it was his decision what to cover and emphasize, and commented, "You could always take Critical Race Theory."

Moreover, there have been numerous incidents of marginalization outside the classroom. After the racist hate-mail flyers appeared in December 1994 and February 1995, students directed considerable public criticism toward the Boalt administration for its handling of the matter. The incident upset many students. One first-year student expressed his desire to leave law school altogether after the second wave of hate-mail flyers arrived: "I broke down. It escalated to the point I couldn't study . . . . I said, 'I don't need this.'" Another admitted similar feelings, saying she had been deeply hurt: "I was confused. I wanted to go home. I didn't want to be here." Many students felt the administration was slow to act. They felt they had to shoulder the burden of mobilizing the community to denounce the hate mail, organizing a rally and so forth, with little support from the administration. This consequently distracted from their studies at crucial times right before and during exams.

In a meeting with Dean Kay, leaders of student groups made a number of formal requests of the administration. Among these were: "Meet regularly with students to explore proactive ways to prevent future hate-speech incidents and create an environment of comfort" and "The Law School must create a full-time position within the administration to enable Boalt Hall to meaningfully deal with issues of diversity. More specifically, we are reiterating our demand that Boalt Hall establish a 'Dean of Multicultural Affairs.'" Dean Kay readily agreed to the former point and indicated support for the latter point, seemingly indicating the position would be created absent a budgetary veto from the university at large.

The Dean of Multicultural Affairs has long been requested by students over the years, reflecting their concern over the faculty's and administration's inability to handle issues of diversity and multiculturalism effectively. Rita Himes, a law student at the time of the hate mail incidents, indicated a more diverse faculty would

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207. See discussion supra Pt. IV.

208. Dexter Waugh, Students Rally Against Racism: Minority Law Pupils at Boalt Hall Find Hate Mail, S.F. EXAMINER, Feb. 16, 1995 (quoting Cyrus Garay, a first-year law student at the time of the incidents).

209. Id. (quoting Cami Mazard, a first-year law student at the time of the incidents).

210. See Garner Weng, "Dean Kay, This is What We Want", BOALT HALL CROSS-EX., March 1995, at 7.

211. Id.

212. BOALT HALL CROSS-EXAMINER, January/February 1995, at 8 (quoting from the formal requests made to Dean Kay on February 13, 1995).

213. See Garner Weng, "Dean Kay, This is What We Want", BOALT HALL CROSS-EXAMINER, Mar. 1995, at 7-8. See also Editorial, supra note 213.
have assisted students cope with the hate mail better. However, after agreeing to having a Dean of Multicultural Affairs, Dean Kay issued a memorandum on March 9, 1995 declaring there would be no Dean of Multicultural Affairs. Instead, she was forming a committee to study alternative ways to fulfill the functions of such a position. However, she formed no such committee, and no report was ever made on the matter again. Continued meetings with student groups about preventing future hate-speech incidents also assumably ended. Law student Dirk Tillotson expressed his discontent over the administration's attention to diversity issues, noting, the administrators "don't want to politically take on a dean of multicultural affairs. I think the administration is pretty happy with the way things are."

The students also requested increased security in response to the hate mail. While the school eventually hired after-hours security guards, students complained that the administration was again slow to act and did not act in response to the hate mail, but in response to a posted flier saying, "If any black students are hurt, white students will be hurt." That flier was signed "Black Liberation, Inc. from Oakland." Minority students responded to this with an open letter to the Boalt community: "When members of our community were being called niggers, wetbacks, and chinks, increased security was an issue whose 'feasibility would be assessed.' However, when 'Black Liberation, Inc. from Oakland' left its calling card at Boalt there was a security guard in the building that night." The after-hours security continued for the rest of the Spring 1995 semester.


217. Sylvia Trujillo, a law student at the time, said committees are used to "derail issues." Morrison, supra note 214.

218. Morrison, supra note 214.

219. Id.

220. Id.

221. Id.

222. Id. (quoting from the letter; the internal quotes indicate the letter quoting Dean Kay's initial response to their request for additional security). Some of the students of color were also upset that this perceived double standard had started a year earlier, in the reverse context; at that time, a janitor had reported being threatened with a gun in the school by a young African-American man, and flyers showing a police mugshot-style drawing of a young African-American man went up all over the school. Students complained that the school fanned the flames of racial stereotypes and pointed out that when
The repercussions lasted longer than that, and even a year later, students were still decrying the administration's inadequate efforts and poor support for students of color. Amber Alonso, a former Boalt Hall Student Association President, noted, "The dean feels she's doing a great job. But the underlying problem of the school—'race relations'—is not a problem for the administration. If it is, they are not acting on it."\(^{223}\) 

In July 1995, the Regents of the University of California voted to rescind affirmative action in university admissions, including Boalt Hall School of Law.\(^{224}\) Boalt students organized a walk-out of classes on October 12, 1995, in protest, and then asked Dean Kay to take a firm stand against the Regents' decision.\(^{225}\) One third-year student implored her to show leadership and to at least declare that she was personally opposed to the Regents' decision even though she felt obligated to abide by it.\(^{226}\) Dean Kay gave no ground in acceding to student requests but promised to form a committee to look into how to best maintain diversity at Boalt,\(^{227}\) which she did.\(^{228}\) Options for maintaining diversity while complying with the Regents included, for example, admissions committees considering an applicant's commitment to community service or socioeconomic background.\(^{229}\) However, it is unclear what happened to that committee's work or their recommendations, as it appears no particularly innovative options were implemented.

In any case, Proposition 209 overshadowed the Regents' resolution. Even in light of this new blow to the use of affirmative action, however, the faculty and administration of Boalt Hall were slow to act. Students felt obliged to act on their own and to again shoulder the burden. A group of students spent all of their Spring 1996 semester researching and publishing a report entitled, "New Directions in Diversity: Charting Law School Admissions Policy in a Post-Affirmative Action

\(^{223}\) Morrison, \textit{supra} note 214. 


\(^{226}\) \textit{Id.} at 9 (describing requests of John Pacheco, a third-year law student at the time). 

\(^{227}\) \textit{Id.} 


\(^{229}\) Christine Riedel, \textit{Diversity Dilemma}, \textit{Nat'l Jurist}, April/May 1996, at 14, 16 (quoting Stacey Knox, a Boalt student at the time).
It was not until October 16, 1997, that a task force of Boalt Hall faculty and administrators released a report recommending specific, concrete actions to maintain diversity in the student body. This report echoed a number of the recommendations in the *New Directions in Diversity* report. By this time, however, one entering class had already been admitted and matriculated under an admissions policy without affirmative action and without any revisions aimed at diversity, resulting in a significantly less diverse class than previous years. Two years and three months had passed since Boalt Hall had first learned it should plan for admissions without affirmative action. And the report was still just a recommendation, waiting implementation and, as necessary, approval by the faculty.

VI.

**THE "REASONABLE LAW STUDENT"**

We are finally ready to forge the links between Part IV, on the promises made by Boalt Hall in its literature and statements, and Part V, on the realities of Boalt Hall. Students’ reasonable expectations supply the key. If students’ reasonable expectations based on representations made by Boalt Hall have not been met by Boalt Halls’ actions in practice, there is a tenable claim for breach of

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231. *Id.*


233. *See id.* (quoting Marvin Peguese, a third-year Boalt student at the time, on the report: “It’s a mixed bag—advancement on some fronts, resistance on others.”)

234. *See discussion Part V.*

235. *Cf.* Rachel F. Moran, Professor, Boalt Hall School of Law, and Member, Ad Hoc Task Force on Diversity in Admissions, Remarks at the Town Hall Meeting on the Report of an Ad Hoc Task Force on Diversity in Admissions (Oct. 29, 1997) (“I wish we had been in this room talking like this two years ago!”).


237. Let us ignore, for the moment, the paradox here.
In other words, is it reasonable for students to have taken the promises made by their law school, as mentioned in Part IV, and expect more than was delivered, as described in Part V?

As one court put it:

the task before the Court is to interpret the contract to determine the intent of the parties. Contract interpretation is a function of the court where, as here, no extrinsic evidence is necessary to determine an agreement's meaning and/or the meaning is so clear that reasonable men could reach only one conclusion. Since it is apparent that this is not an integrated agreement, the standard is that of reasonable expectation—what meaning the party making the manifestation, the University, should reasonably expect the other party to give it.\(^{239}\)

In the instant cases, however, with the ambiguity of many contract terms relating to diversity, extrinsic evidence will often be necessary to determine an agreement's meaning. To this end, the jury or other trier of fact can look at the representations made by Boalt Hall and decide for itself what students reasonably expected based on the contract terms.\(^{240}\) In this way, the jury or other trier of fact steps into the shoes of the "reasonable person":

[T]he objective theory of contracts dictates that a contract shall have meaning that a reasonable person would give it under the circumstances under which it was made, if he knew everything he should plus everything he actually knew. A reasonable person must therefore be constructed on a case by case basis.\(^{241}\)

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238. See Mcjessy, supra note 10, at 1795-96 (1995). Mcjessy writes:

The courts should look to the student-school relationship in light of the principal purpose of contract law: "to promote the realization of . . . parties' reasonable expectations." The representations that make up the contract between the students and the school are those that reasonable parties, in light of all the circumstances and purposes of the parties' relationship, would reasonably believe to govern the incidents of their relationship.

Id.


240. However, some commentators suggest that this objective standard of "reasonable" suffers from triers of fact and courts using the "white, class-privileged, male" as the norm for what reasonable is. See, e.g., Amy H. Kastely, Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law, 63 U. CIN. L. REV. 269, 293-94 (1994).

The guidelines for constructing a reasonable person are as follows:

The reasonable person is not often a reflection of the ordinary, reasonable person. Instead, the reasonable person is more concerned with what people actually do in a specific marketplace. Courts look to a number of sources in constructing the contractual reasonable person. These sources include the characteristics of the parties, the totality of the circumstances surrounding the formation of the contract, and evidence of pertinent custom and trade usage. In essence, the reasonable person is constructed from the background of the transaction or relationship.\(^\text{242}\)

The characteristics of the parties means the "sophistication of the parties, including their personal or institutional understanding of the meaning of a particular contractual event."\(^\text{243}\) This favors the law student heavily. A prospective law student likely knows very little about the contractual and ultimate legal significance of a particular promise. A matriculated law student likely knows somewhat more. However, the law school itself possesses the highest possible knowledge and understanding. After all, many of the faculty at Boalt Hall have been responsible for shaping the law of contracts.\(^\text{244}\) Furthermore, the promises and language used in those promises have all been completely within the control of the law school. This is not a situation where the parties negotiate over language or terms and then mutually agree and sign on the dotted line; rather, the law school makes all the terms, and the law student simply accedes upon matriculating or by continuing her enrollment.

The totality of the circumstances, of course, allows consideration of any factors that might be relevant. This latitude might be important given the conceptual difficulties of "diversity." Moreover, the trade usage and custom may point to widespread promises of diversity throughout postsecondary schools, which may argue that students' reasonable expectations should be calculated down to account for their understanding that such promises may not be firm.

Given all these difficulties, empirical evidence on reasonable expectations could be quite helpful. That is, rather than relying solely on the jury or other trier of fact to fabricate the reasonable law student or prospective law student from scratch, statistical data could help explain what the typical (reasonable) law student actually was, and whether her expectations were met.

\(^{242}\) Id. at 317-18.

\(^{243}\) Id. at 318.

\(^{244}\) Certain prominent Boalt faculty have played roles in the discussions of and, presumably, the drafting of the Restatements.
A. The Survey—Distribution and Response

In April 1996, I distributed survey questionnaires to the J.D. students of Boalt Hall to attempt to gain a general understanding of their expectations regarding racial and ethnic diversity (and related issues). While not perfectly scientific, the survey should still be illustrative of general student positions. The survey is reproduced in Appendix 1. A more detailed discussion of the methodology of the survey takes place in Appendix 2.

Basically, I placed the survey questionnaires in students' Boalt mailboxes. I did not distribute to any mailboxes that were so packed full of other mail and flyers that it was readily apparent that the owners of the mailboxes did not check their mail. There were 858 J.D. students at that time, and I distributed 834 survey questionnaires. The difference is assumably explained by my omission of the overflowing mailboxes and of myself.

I received 296 responses, a 35.49% response rate, representing 34.50% of the entire J.D. student body. Of these, 117 of the respondents were male, or 39.8%, and 177 were female, or 60.2%. The racial breakdown can be seen in Table 1.

<table>
<thead>
<tr>
<th>Total number of respondents</th>
<th>296 (100%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Caucasians</td>
<td>181 (61.15%)</td>
</tr>
<tr>
<td>Non-Caucasians</td>
<td>105 (35.47%)</td>
</tr>
<tr>
<td>Other (did not specify)</td>
<td>010 (03.38%)</td>
</tr>
<tr>
<td>Asian Americans &amp; Asian subgroups</td>
<td>050 (16.89%)</td>
</tr>
<tr>
<td>Chicanos &amp; Latinos</td>
<td>036 (12.16%)</td>
</tr>
<tr>
<td>African Americans</td>
<td>015 (05.07%)</td>
</tr>
<tr>
<td>Native Americans</td>
<td>004 (01.35%)</td>
</tr>
</tbody>
</table>

SOURCE: Weng survey (see Appendices I & II)

So while the gender breakdown is not very reflective of the actual J.D. population, the racial composition of the respondents is better. The 35.47% minorities is very close to the 37% actual composition²⁴⁵; in fact, omitting the respondents who did not specify their race yields an even closer figure of 36.71%.

The survey posed five chief questions about whether students' expectations on certain diversity issues had been and were being met. The survey further asked several questions about the sources of these expectations. If a student's expectations were not based on any communication, representation, or action by Boalt Hall or a Boalt Hall official speaking in official capacity, then her expectations cannot be factored into a contractual claim. Students were asked to rate the amount of influence Boalt-affiliated sources had on their expectations as (1) a major factor; (2) a somewhat major factor; (3) a medium factor; (4) a somewhat minor factor; (5) a minor factor; or (6) no factor at all (did not influence expectations). Students were

²⁴⁵. BOALT HALL 1995-96 ANNOUNCEMENT 4. Again, the 37% figure was accurate as of Fall 1995, and may have been slightly different at the time of the survey.
asked first about representations made before they entered Boalt as a student, for example, the Announcement, the letter offering admission, and any attendance of Spring Visit Day or other visits to Boalt arranged through the Admissions Office. Students were then asked about representations made during their time as students at Boalt, for example, official statements of Boalt policy, formal statements, letters, or memoranda from the faculty or administration, and handling of incidents revolving around issues of racial and ethnic diversity by the faculty or administration.

B. The Survey—Results

The breakdown of the responses to each of the five chief questions are given in the following tables. Respondents who answered that their expectations were not influenced by any Boalt-affiliated source or who did not answer that question were automatically omitted from the pool. Respondents who answered that Boalt-affiliated sources were only a minor factor in forming their expectations were omitted only in the second column.

The results are further broken down into respondents who were influenced by representations made before they entered Boalt as students (initial formation of the contract) and respondents who were influenced by representations made after they entered Boalt as students (modification of or creation of new contract). Of course, many students are found in both categories.
Table 2. How does the racial and ethnic diversity of the student body compare to what you expect?

The numbers in column B exclude those students that noted Boalt sources as only a "minor influence" on their expectations.

<table>
<thead>
<tr>
<th>Influenced by Boalt sources prior to entering Boalt</th>
<th>A</th>
<th>B</th>
</tr>
</thead>
<tbody>
<tr>
<td>MUCH MORE than I expect</td>
<td>04.07%</td>
<td>04.18%</td>
</tr>
<tr>
<td>SOMEWHAT MORE than I expect</td>
<td>25.79%</td>
<td>24.71%</td>
</tr>
<tr>
<td>SAME as I expect</td>
<td>42.99%</td>
<td>43.53%</td>
</tr>
<tr>
<td>SOMEWHAT LESS than I expect</td>
<td>24.89%</td>
<td>24.71%</td>
</tr>
<tr>
<td>MUCH LESS than I expect</td>
<td>02.26%</td>
<td>02.94%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Influenced by Boalt sources after entering Boalt</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>MUCH MORE than I expect</td>
<td>04.58%</td>
<td>05.19%</td>
</tr>
<tr>
<td>SOMEWHAT MORE than I expect</td>
<td>25.57%</td>
<td>25.54%</td>
</tr>
<tr>
<td>SAME as I expect</td>
<td>42.75%</td>
<td>42.42%</td>
</tr>
<tr>
<td>SOMEWHAT LESS than I expect</td>
<td>24.71%</td>
<td>24.24%</td>
</tr>
<tr>
<td>MUCH LESS than I expect</td>
<td>02.94%</td>
<td>02.60%</td>
</tr>
</tbody>
</table>

SOURCE: Weng survey (see Appendices I & II)

That these numbers do not indicate any type of failing by Boalt dates the survey; as mentioned, the racial and ethnic diversity numbers at Boalt Hall dropped dramatically with the 1997-98 entering class.\(^{246}\) So while the survey indicates as many people whose expectations were exceeded as whose were disappointed, this question in particular needs to be reexamined under the current circumstances.\(^{247}\)

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246. See discussion supra Part V.A. and infra Part VI.C.

247. See discussion infra Part VI.C.
Table 3. How does the racial and ethnic diversity of the faculty compare to what you expect?

The numbers in column B exclude those students that noted Boalt sources as only a "minor influence" on their expectations.

<table>
<thead>
<tr>
<th>Influenced by Boalt sources prior to entering Boalt</th>
<th>A</th>
<th>B</th>
</tr>
</thead>
<tbody>
<tr>
<td>MUCH MORE than I expect</td>
<td>01.36%</td>
<td>01.76%</td>
</tr>
<tr>
<td>SOMEWHAT MORE than I expect</td>
<td>01.36%</td>
<td>01.76%</td>
</tr>
<tr>
<td>SAME as I expect</td>
<td>18.55%</td>
<td>15.88%</td>
</tr>
<tr>
<td>SOMEWHAT LESS than I expect</td>
<td>33.48%</td>
<td>34.71%</td>
</tr>
<tr>
<td>MUCH LESS than I expect</td>
<td>45.25%</td>
<td>45.88%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Influenced by Boalt sources after entering Boalt</th>
<th>A</th>
<th>B</th>
</tr>
</thead>
<tbody>
<tr>
<td>MUCH MORE than I expect</td>
<td>01.14%</td>
<td>01.24%</td>
</tr>
<tr>
<td>SOMEWHAT MORE than I expect</td>
<td>02.66%</td>
<td>02.48%</td>
</tr>
<tr>
<td>SAME as I expect</td>
<td>20.53%</td>
<td>20.25%</td>
</tr>
<tr>
<td>SOMEWHAT LESS than I expect</td>
<td>32.32%</td>
<td>30.17%</td>
</tr>
<tr>
<td>MUCH LESS than I expect</td>
<td>43.35%</td>
<td>45.87%</td>
</tr>
</tbody>
</table>

SOURCE: Weng survey (see Appendices I & II)

These numbers are striking—between 75.67% and 80.59% of the respondents (depending on which sample is examined) felt that their expectations were not being met in the area of faculty diversity. One student wrote, "I am hopeful [ ] that Boalt’s faculty will diversify and be reflected in a more diverse curriculum because I believe such change is necessary for Boalt to remain competitive.” Another wrote, “the student body’s much more fabulous than I expected, and the faculty/administration less so. There are a few faculty members who are outstanding on race and other diversity issues . . . However, they are clearly swimming upstream, and most are untenured and/or probably leaving . . .”

One student disagreed: “I believe the debates over diversity have become far too inflamed for rational discourse. I believe it is distracting from the law school’s primary mission—to teach the law. . . . [D]iversity on the faculty is not as important as good teaching!”

248. The remark about the student body being “fabulous” again may be outdated. See discussion supra notes & accompanying text.
Table 4. How does the inclusion of (and amount of time spent on) issues pertaining to race or ethnicity compare to what you expect?

The numbers in column B exclude those students that noted Boalt sources as only a "minor influence" on their expectations.

<table>
<thead>
<tr>
<th></th>
<th>A</th>
<th>B</th>
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<tbody>
<tr>
<td><strong>Influenced by Boalt sources prior to entering Boalt</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>MUCH MORE than I expect</td>
<td>04.09%</td>
<td>04.71%</td>
</tr>
<tr>
<td>SOMEWHAT MORE than I expect</td>
<td>13.64%</td>
<td>14.12%</td>
</tr>
<tr>
<td>SAME as I expect</td>
<td>28.18%</td>
<td>25.29%</td>
</tr>
<tr>
<td>SOMEWHAT LESS than I expect</td>
<td>36.82%</td>
<td>38.24%</td>
</tr>
<tr>
<td>MUCH LESS than I expect</td>
<td>17.27%</td>
<td>17.65%</td>
</tr>
</tbody>
</table>

| **Influenced by Boalt sources after entering Boalt** |           |           |
| MUCH MORE than I expect  | 04.56%    | 04.74%    |
| SOMEWHAT MORE than I expect | 14.07%  | 14.22%    |
| SAME as I expect         | 27.76%    | 26.72%    |
| SOMEWHAT LESS than I expect | 37.26%  | 38.79%    |
| MUCH LESS than I expect  | 16.35%    | 15.52%    |

**SOURCE:** Weng survey (see Appendices I & II)

One student indicated that inclusion was much less than he/she expected "unless I . . . consider how many times the race of a criminal is mentioned in my Criminal Law class." Another wrote, "Some classes primarily focus on race issues, and others don’t touch on it. It seems that no balance is really being sought out.” Two students felt that a low focus was proper under the circumstances. One second year wrote, “The type of courses I have taken so far do not lend themselves to discussion of these sorts of issues; I expect this will change next year.”

This next question first listed all the courses in the area of study denoted Traditionally Disadvantaged Groups, as listed in the Boalt Hall 1995-96 Announcement. Additionally, first-year students were excluded from the pool, because, at the time of the survey, they had no opportunities to try to take a course in this area. 249

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249. The mandated first-year curriculum at Boalt Hall was revised, first taking effect in the academic year 1997-98. First-year students at Boalt Hall are now allowed one elective in the Spring semester, which they must choose off of a preselected list. In the 1997-98 academic year, their choices included: Comparative Law; Courts and Social Policy; The Lawyer’s Role In Society; Modern Legal Thought; Public Lawmaking; and Race and American Law.
Table 5. How does the availability of classes on “Traditionally Disadvantaged Groups” compare to what you expect?

The numbers in column B exclude those students that noted Boalt sources as only a "minor influence" on their expectations.

<table>
<thead>
<tr>
<th>Influenced by Boalt sources prior to entering Boalt</th>
<th>A</th>
<th>B</th>
</tr>
</thead>
<tbody>
<tr>
<td>MUCH MORE than I expect</td>
<td>06.82%</td>
<td>06.67%</td>
</tr>
<tr>
<td>SOMEWHAT MORE than I expect</td>
<td>23.48%</td>
<td>24.76%</td>
</tr>
<tr>
<td>SAME as I expect</td>
<td>22.73%</td>
<td>23.81%</td>
</tr>
<tr>
<td>SOMEWHAT LESS than I expect</td>
<td>31.06%</td>
<td>28.57%</td>
</tr>
<tr>
<td>MUCH LESS than I expect</td>
<td>15.91%</td>
<td>16.19%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Influenced by Boalt sources after entering Boalt</th>
<th>A</th>
<th>B</th>
</tr>
</thead>
<tbody>
<tr>
<td>MUCH MORE than I expect</td>
<td>06.67%</td>
<td>07.64%</td>
</tr>
<tr>
<td>SOMEWHAT MORE than I expect</td>
<td>23.64%</td>
<td>22.22%</td>
</tr>
<tr>
<td>SAME as I expect</td>
<td>21.82%</td>
<td>22.92%</td>
</tr>
<tr>
<td>SOMEWHAT LESS than I expect</td>
<td>33.94%</td>
<td>34.72%</td>
</tr>
<tr>
<td>MUCH LESS than I expect</td>
<td>13.94%</td>
<td>12.50%</td>
</tr>
</tbody>
</table>

SOURCE: Weng survey (see Appendices I & II)

One student elaborated on his feelings on these course offerings at some length:

Notice that the vast majority of these classes are only 2 units, although many of them require as much work as a 3 unit [course] does. I believe this demonstrates a value judgment by the faculty that these courses are somehow less worthy than the black letter courses. It leaves students who want to pursue civil rights law or public interest law, for example, scrambling for units. I think it also unfairly increases their workload.

Another noted, “These classes may exist. When will they be offered? We have no faculty.”
Table 6. How does the environment for issues of race and ethnicity, and the support of issues of race and ethnicity by the Boalt faculty and administration, compare to what you expect?

The numbers in column B exclude those students that noted Boalt sources as only a "minor influence" on their expectations.

<table>
<thead>
<tr>
<th>Influenced by Boalt sources prior to entering Boalt</th>
<th>A</th>
<th>B</th>
</tr>
</thead>
<tbody>
<tr>
<td>MUCH MORE supportive than I expect</td>
<td>05.09%</td>
<td>06.55%</td>
</tr>
<tr>
<td>SOMewhat MORE supportive than I expect</td>
<td>13.89%</td>
<td>16.07%</td>
</tr>
<tr>
<td>SAME as I expect</td>
<td>25.46%</td>
<td>20.83%</td>
</tr>
<tr>
<td>SOMewhat LESS supportive than I expect</td>
<td>34.26%</td>
<td>34.52%</td>
</tr>
<tr>
<td>MUCH LESS supportive than I expect</td>
<td>21.30%</td>
<td>22.02%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Influenced by Boalt sources after entering Boalt</th>
<th>A</th>
<th>B</th>
</tr>
</thead>
<tbody>
<tr>
<td>MUCH MORE supportive than I expect</td>
<td>05.43%</td>
<td>06.17%</td>
</tr>
<tr>
<td>SOMewhat MORE supportive than I expect</td>
<td>13.57%</td>
<td>14.10%</td>
</tr>
<tr>
<td>SAME as I expect</td>
<td>27.52%</td>
<td>26.43%</td>
</tr>
<tr>
<td>SOMewhat LESS supportive than I expect</td>
<td>33.33%</td>
<td>33.48%</td>
</tr>
<tr>
<td>MUCH LESS supportive than I expect</td>
<td>20.16%</td>
<td>19.82%</td>
</tr>
</tbody>
</table>

SOURCE: Weng survey (see Appendices I & II).

Numerous respondents commented on the support by faculty and administration. Two representative samples: one student wrote, "I came to expect very little sensitivity from admin. on racial/ethnic diversity issues," and another, "In the face of the Regents’ action, the faculty and administration has had a chance to stand up for diversity. They have wholly failed to do so."

Again, the survey results may be dated in regard to this question. Since April 1996, additional tensions between the faculty and administration on one side and the students on the other have erupted, suggesting a survey conducted today would show students finding the environment and support for diversity to have worsened in relation to their expectations. For example, in October 1997, a number of Boalt Hall students participated in protests regarding the school’s implementations of admissions policies. The protests concentrated on what the students perceived as Dean Herma Hill Kay’s overcompliance with the regulations and laws eliminating affirmative action from admissions. The conflict reached a


head when Dean Kay had a number of the protestors arrested for their sit-in at the Registrar's Office.\textsuperscript{252} In fact, through the rest of the Fall 1997 Semester, students reported that the faculty and administration were becoming increasing unfriendly to student activism and diversity issues.\textsuperscript{253}

C. Beyond the Survey

As mentioned, at the time of the survey, the events that propelled Boalt Hall to headlines across the country throughout the Summer and Fall of 1997 had not yet transpired. By Summer and Fall of 1997, however, Boalt Hall and the nation learned that the composition of its 1997 entering class, the Class of 2000, would be dramatically less diverse than previous classes. The 1997 entering class of 268 students included only 28\% minorities.\textsuperscript{254} There were only one African American and 14 Latinos, and of these, the African American and 7 Latinos had deferred admission from the previous year.\textsuperscript{255}

While some drop-off was expected in light of University of California Regents Resolution SP-1 prohibiting the use of affirmative action in admissions and California General Ballot Proposition 209, these numbers were still stark.\textsuperscript{256} In fact, numbers were so far down that the Office of Civil Rights in the Department of Education began an investigation into the University of California admissions

\textsuperscript{252} See, e.g., Burdman, supra note 251; Jackson, supra note 251. Student feelings were further charged when the police became rough, and at least ten of the students filed charges of excessive force. 10 Protestors Allege Campus Police Abuse, WEST COUNTY TIMES, Nov. 14 1997, at A4. Dean Kay had left and was not present when the police were making the arrests.

\textsuperscript{253} Some Boalt Hall alumni became concerned about the reports trickling out of the school about the environment at Boalt Hall. They worried "that certain Boalt professors who are either antagonistic to the political positions of many students who support diversity . . . may take unlawful retaliation against those students during the course of their classes and in grading situations that are not blind." Letter from Boalt Alumni for Students' Rights to Herma Hill Kay, Dean, Boalt Hall School of Law 2 (Nov. 20, 1997) (on file with author). They also noted:

[T]he administration is increasingly unsympathetic to the students involved in the October 13th protest (arrested or not) and that these students are being labeled as troublemakers. We are aware that at the recent Boalt Hall town hall meeting regarding minority admissions you refused to call on certain Boalt students seeking to comment or ask questions. We are also aware that your front-page October 27th BBB announcement suggests that people who recently pulled false fire alarms at Boalt Hall were the same people who participated in the civil disobedience by placing the fire alarm discussion in the same paragraph as discussion of the demonstrations of October 13th.

\textit{Id.} The alumni wrote a letter about these concerns to Dean Kay, and thirty-three individual alumni, spanning the Class of 1973 to the Class of 1997, signed on to the letter. See \textit{id.} at 3.

\textsuperscript{254} See \textsc{Boalt Hall 1996-97 Announcement}, supra note 168.

\textsuperscript{255} See \textsc{Annual Admissions Report}, supra note 169.

policies to determine whether they were racially discriminatory.\textsuperscript{257} While university officials say they were not to blame for the poor numbers,\textsuperscript{258} many students felt Boalt Hall had acted too slowly and done too little to maintain diversity after SP-1 and Proposition 209. They charge that Boalt Hall was too strictly interpreting and over-enforcing the provisions prohibiting affirmative action.\textsuperscript{259}

Boalt Hall did take some diversity-minded action, trying to factor in applicants' economic backgrounds and ability to overcome obstacles during the admissions process for the 1997 entering class.\textsuperscript{260} It allowed a longer personal statement than in previous years.\textsuperscript{261} But students believe that printing the text of Resolution SP-1 near the instructions for the personal statement made applicants believe they could not discuss race even in the context of overcoming obstacles.\textsuperscript{262} Moreover, they considered Boalt Hall's research into alternatives and new ideas for admissions weak and pointed to other University of California law schools that were under the same restrictions as doing more and achieving better results.\textsuperscript{263} For example, UCLA managed to convince half of the 21 African-Americans and 79 Latinos it admitted to enroll;\textsuperscript{264} in contrast, Boalt Hall convinced none of the 14 African Americans and only 7 of the 48 Latinos it admitted to come.\textsuperscript{265} Even National Public Radio commented that these dismal results could not be explained away by Regents Resolution SP-1 and Proposition 209:

\textsuperscript{257} Additionally, Boalt Hall students took umbrage that Boalt Hall stopped publicizing even outside-source financial aid and scholarships targeted toward minorities.


\textsuperscript{261} Id.

\textsuperscript{262} See HBTV, \textit{Demands for Diversity} (visited Oct. 18, 1997) <http://www.hotbed.com/press.htm> (demanding the removal of "the text of SP-1 from Our Admissions Application.").

\textsuperscript{263} See Freedburg, \textit{supra} note 262, at A1 (reporting how UCLA went further than Boalt "to soften the effect of the regents' action" and discussing changes implemented by University of California at Davis).


\textsuperscript{265} Id. This article incorrectly includes the 1 African American and 7 Latinos who deferred admission from the year before among the successful recruits of the 1997 entering class at Boalt Hall.
"a far more complex dynamic" was at work. The 14 Black students who rejected Boalt were sought by other top-10 law schools that offered financial assistance Boalt did not. Latino students who also rejected Boalt said that they went elsewhere because Boalt expressed no interest in them... the Dean, fearful of violating the new affirmative action rules, turned minority recruitment over to minority students and delayed releasing names until student recruiters were caught up with exams.266

Likewise, the newly matriculated students of the Class of 2000—who felt the drop in minorities most directly—criticized Boalt’s lackluster efforts. An open letter to the faculty and administration of Boalt Hall and the Regents of the University of California signed by one hundred and ninety-four members of the class wrote:

As a public institution which relies on public funds, the University of California at Berkeley has an even greater obligation than its private counterparts to ensure the presence of a student body which reflects the state’s heterogeneous population, and to provide lawyers who will serve all facets of our complex society. Even under the new limitations [of SP-1 and Proposition 209], other UC professional schools have fulfilled this duty with greater success than we have by enacting creative admissions criteria and outreach strategies. Boalt must do the same and more, particularly considering its competitive status.267

In sum, students had ample and even plentiful reasons to feel Boalt Hall was slow to undertake useful research or study and even slower to take concrete action. In fact, students had to take it upon themselves to research legal alternatives to affirmative action and published a report entitled New Directions in Diversity: Charting Law School Admissions Policy in a Post-Affirmative Action Era in May 1997.268 Dean Kay did not even appoint a task force to undertake serious study until June 1997.269

While Dean Kay called the report of that task force "a great deal of forward movement... in our efforts to increase enrollment of underrepresented minorities


267. Letter from 194 Members of the Class of 2000 to the Faculty and Administration of Boalt Hall and the University of California Regents (Sept. 12, 1997)(on file with author); see also Nakao, supra note 70.

268. NEW DIRECTIONS IN DIVERSITY: CHARTING LAW SCHOOL ADMISSIONS POLICY IN A POST-AFFIRMATIVE ACTION POLICY (1996) (on reserve at the Boalt Hall law library).

for the next class at Boalt,"270 students continue to be "concerned that another year or more will pass without the faculty implementing any substantive changes to the current admissions policy that will increase the racial, ethnic and socio-economic diversity of successive entering classes."271 These concerns appear to be real, as Dean Kay later wrote in her BBB column, "These policy questions [about certain changed to admissions] will be considered by the faculty as early as possible next semester and will be decided in time to be used in the admission of the class that will enter in 1999."272

VII.
WHAT PROMISES WILL THE LAW ENFORCE?

For organizational purposes, the areas in which law schools may have failed to meet law students' reasonable expectations can be delineated as follows: (1) diversity in the student body; (2) diversity in the faculty; (3) inclusion of issues pertaining to facets of diversity in the classroom; (4) availability of classes concentrating on issues related to facets of diversity; and (5) environment supportive of diversity. Of course, in any particular case, a student or group of students would be limited to the representations and promises made to them, and the consequent results which affected them.

Two obstacles in particular will stand in the way of breach-of-contract actions. First, a plaintiff must establish the reasonable expectations with some certainty, to allow the courts to fashion a remedy.273 Second, a plaintiff must convince a court not to engage in judicial deference. In some ways, overcoming the first obstacle will be helpful in overcoming the second; as mentioned previously, if the court merely has to match the established reasonable expectation against the school's behavior, it does not have to review the academic decisions or educational policies it is loath to second-guess.274 Even so, a full discussion of remedies and the inherent complications of quantifying damages for a lack of diversity or seeking specific performance in the school context is beyond the scope of this article; and we shall only touch upon such issues.


271. Letter from Coalition for a Diversified Faculty and Student Body to Boalt Hall Faculty (Sept. 18, 1997), *printed in*, E-mail from Cecilia Estolano to Boalt 2000 Mailing List (Sept. 23, 1997) (on file with author).


273. See Mcjessy, *supra* note 10, at 1792.

274. See *supra* discussion Pt. I.
A. Diversity of the Student Body

Boalt Hall has made specific representations regarding the diversity of the student body. It has listed the student body's overall percentage of minorities as being in the mid to high 30% range in the four Announcements from 1991-92 to 1995-96 and on their Web site. A court may be disinclined to see these numbers as firm guarantees. However, a trier of fact may find that they hold an implied guarantee that future numbers will be somewhat similar, if not exactly similar or better. The many statements affirming Boalt Hall's commitments and beliefs in diversity and the role of diversity in education support this inference, as well as implying Boalt Hall's good-faith efforts to achieve diversity.

Boalt Hall's student-body diversity had been quite good for years, but the 1997-98 entering class changes the case significantly. The dramatic drop-off in racial and ethnic diversity in that class—with no African Americans or Native Americans admitted in the previous Spring or Summer attending—probably violates the reasonable expectations of both the members of the entering class and the students who were already attending Boalt Hall and breaching the student-school contract. Analogizing the law school to the undergraduate student body at the University of California at Berkeley, which underwent drop-offs much like Boalt, it is interesting to note the comments of one undergraduate: "One of the reasons I chose to come to Berkeley is its reputation for diversity. But look around Sproul Plaza [a central place on campus]; the reality is totally different."

Alternatively, the liability could include a breach of the implied covenant of good faith and fair dealing. Students could argue that Boalt Hall's efforts to maintain diversity for the 1997 entering class were so lackluster and out of line with the efforts of similarly situated schools that Boalt Hall failed to make good-faith efforts to carry out its promised commitments to diversity. The school has been slow to investigate or implement innovative admissions policies (and by and large has instilled little or no innovation even to date), been slow or altogether unwilling to recruit minorities it had admitted, and been less than cooperative in allowing students to recruit minorities admitted themselves. These facts make out breach of the implied contract.

Should student plaintiffs win here, a court could feasibly order specific performance to maintain percentages or numbers (although it could not order the admission of specific people). This remedy would be nightmarish to implement and a court would likely be reluctant to take this step. On the other hand, a defendant agreeing to a consent decree mandating specific steps aimed at maintaining percentages or numbers might avoid some of these problems. Finally, a tempered verdict might be along the lines of ordering a school to make better "good-faith"

275. See supra notes 110-14.

276. See supra note 116.

277. Cf. discussion supra note 43.

efforts at investigating and implementing methods of achieving diversity—or at the least to stop making untrue representations of its faithfulness to diversity.

B. Diversity of the Faculty

Boalt Hall has spoken in vague platitudes regarding diversity of the faculty, using descriptions like “diverse in every sense” and vastly overrepresenting faculty diversity in the selection and presentation of photographs of faculty. Even so, the actual percentages—Caucasians comprise in the mid to high 90% of the faculty—are rather striking; and student impressions and finishing near the bottom in a national-magazine survey make out an interesting case of breach.

The survey data addressing the diversity of the law school faculty at Boalt Hall was the strongest and most convincing yielded by the survey. An astonishing 43.35-45.87% of responding students felt that the diversity of the faculty was much less than what they expect; 75.67-80.59% felt that the diversity of the faculty was at least somewhat less than what they expect.

Unfortunately, even this convincing evidence of breach runs into problems of establishing a definite or reasonably certain contract term. That is, even though the faculty and student body may be less diverse than the terms of an implied contract, this begs the question of how diverse they are supposed to be. Is there a magic percentage of minorities? Even if a “magic percentage” could be found, the selection of law school faculty at a top-tier law school such as Boalt Hall is even more laden with academic decisions than student admissions, since the amount of hiring and the available pools of applicants are small. So a court might be even more hesitant to impose specific performance or a consent decree. It might, however, require a “good faith” effort to perform. Another possibility would be to require better disclosure, such as scaling back its vague platitudes or printing statistics about the faculty in the announcements just as it does for the student body.

C. Inclusion of Issues Relating to Diversity

The important role of diversity in law-school education and the promise of preparing future lawyers for a multicultural society trumpet themselves prominently in various Boalt Hall materials. Anecdotal data indicates the inclusion of issues of race and ethnicity in the classroom is weak, and the survey results indicate students’ reasonable expectations are not being met here.

However, the classroom context means an academic decision by the professor of how much to cover a particular topic. Courts have consistently and almost universally declined to involve themselves in clearly academic decisions, so the case for breach here almost certainly fails.

D. Availability of Classes Concentrating on Issues Relating to Diversity

Course offerings are all listed clearly, in a document provided to students before they ever matriculate or make their first tuition payment, thus creating definite, certain and easily enforceable contract terms. While there is a disclaimer in
the Announcement that not every course is available each year, a course that is never available should not be listed, and a concentration on Traditionally Disadvantaged Groups should not leave students "scrambling for units," as one student put it.

The official Boalt Hall schedule listings reveal exactly to what degree particular courses were available; and the survey results regarding course offerings are fairly strong as well. Among the various areas of possible breach, this may be the easiest for which to produce evidence. This situation is more like the unavailability of promised programs of study that courts have considered in other student-university contracts cases, and a plaintiff has a good chance of success here.

Moreover, the successful plaintiff may, in forcing the school to offer courses more in line with what it promised, have also forced the school to diversify its faculty to be able to offer the courses it promised.

E. Environment Supportive of Diversity

The many statements of commitment to diversity and puffing statements such as "warmth" all infer promises that Boalt Hall will provide an environment supportive of diversity. At the least, a student of color could infer an implied promise to provide an environment reasonably conducive to learning. Many narratives all point toward environments failing these promises. The drop-offs in minority numbers in the student bodies themselves send certain messages; by analogy, one undergraduate reacting to the drop-offs said, "The message to me is that I am not really wanted around here."

The survey results in this area, supported by considerable anecdotal evidence, is fairly strong in making a case of breach. However, the promises of a supportive environment are couched in terms even fuzzier and more amorphous than the representations of a diverse faculty. The promises are literally words like "support" and "commitment." Most likely, a court will not be able to find the definite terms necessary to create a binding promise.

279. Where a school reserves the right to rescind completely a particular promise, the courts generally find that the promise is not binding. See, e.g., Bets v. Rectors and Visitors of the Univ. of Va., 939 F. Supp. 461, 470 (1996); cf. also, Guckenberger v. Boston Univ., 974 F. Supp. 106, 151 (1997) (noting that school brochures upon which plaintiff relied did not contain a disclaimer). However, this disclaimer that not all courses are offered every year cannot reasonably be interpreted as being broad enough to cover courses that are never offered or courses that are offered so rarely students do not have any meaningful opportunity to take them.

280. See discussion supra notes 30-46 & accompanying text.


282. Cf. discussion supra note 107 (discussing promise of imparting "wisdom.").
CONCLUSION

Breach-of-contract actions based on law-school promises relating to diversity still face uphill battles. Our legal system is still more concerned with redressing wrongs than expediting rights. Consequently, the achievement of diversity and diversity-minded goals requires tackling the unenviable task of gaining the sympathies and ears of the courts to the point where they are willing to impose consent decrees and specific performance as they do in discrimination and segregation cases.

Thus, this article is and only could be just a starting point. Further study and documentation of law school promises of diversity and the reasonable expectations they generate in law students will greatly bolster the strength of legal action—or threat of legal action. In particular, studies should attempt to establish not simply that reasonable expectations were violated but what those expectations were, in precise fashion; this is the certainty courts will want to enforce promises. Then, "[t]he threat of liability will serve as a deterrent. . . . [S]chools will be more careful of the representations that they make to prospective enrollees and they will be more likely to abide by the representations they do make." 283

However, liability or threat of liability alone is insufficient to address the real concern—the actual achievement of diversity and an environment supportive of diversity. Rather, liability or threat of liability is likely to serve only to reinforce the lawyer's role in reviewing representations promulgated by a school, that is, making every representation a little more vague and a little less legally binding, or removing certain promises altogether.

Boalt Hall's 1997-98 Announcement does not list the percentage of minorities in the student body 284—something every Announcement in the previous five years did list. 285 The language that "[i]t is often said that the diverse Boalt Hall student body is one of the School's greatest strengths" 286 has been changed to, "It is often said that the intellectual excellence and broadly varied interests and backgrounds of the Boalt Hall student body is one of the School's greatest strengths." 287

Thus, this article's primary goal is not and never was to create liability for Boalt Hall or other law schools, or to thrust legal action into the hands of current students and potential plaintiffs. Instead, it seeks to focus the purpose of that

283. See McJessy, supra note 10, at 1815.

284. See BOALT HALL 1997-98 ANNOUNCEMENT.


287. BOALT HALL 1997-98 ANNOUNCEMENT.
liability for the lesson the schools might learn. The fact that you made promises and did not live up to them should not be fuel for your fear of legal liability so much as fodder for your consciences. The answers lie not in what you must do, under the law, but in what you should do.
APPENDIX I:
THE SURVEY

THE FREE CANDY SURVEY

Please take a few minutes to fill out this questionnaire. It may look long, but most of it entails checking boxes. All responses will be kept confidential and effectively anonymous. Your candy should appear within a week or two (sorry, no guarantees on timing or candy preference!).

The survey is for a project and paper I am doing for a class here at Boalt. I am trying to discern information about students’ expectations regarding certain issues pertaining to racial and ethnic diversity. I recognize that “diversity” encompasses many more facets than race and ethnicity, but for this particular project, I am only interested in race and ethnicity.

- Please read all directions carefully.

- Please answer every question. If you can’t remember or aren’t sure, do the best you can.

- Most questions can be answered by checking one box or by writing in a word or phrase. Never check more than one box for a question.

- If you think that checking a box will be misleading, please check the answer that comes closest. Then add a note, explaining whatever you think I should know. You may use the back of these sheets if you like.

- When you finish filling out the questionnaire, please return it to the labeled “Free Candy Survey” box near/over the student mailboxes as soon as possible.

- Please do NOT write your name anywhere on the questionnaire. For the purposes of delivering candy and preventing duplicate responses, please write your box number in the response space for Question 1.B. This cover sheet will be removed before the questionnaire is examined. Thus, I will be unable to determine who said what (other than what box number gave what candy preference).

THANK YOU VERY MUCH FOR YOUR COOPERATION.
1. IMPORTANT STUFF (CANDY)

A. What is your candy preference?

☐ Reese’s Peanut Butter Cups  ☐ Hershey’s Miniatures
☐ Skittles  ☐ Blow Pops or hard candy
☐ Other (please specify): __________________________

B. What is your Boalt student mailbox number? ____________

2. COMPOSITION OF STUDENT BODY

Think back to when you first became a Boalt student and about the time you have spent at Boalt as a student since then. “Expect” means “to await; to look forward to something intended, promised, or likely to happen.”

How does the racial and ethnic diversity of the student body compare to what you expect?

☐ it is much more than I expect
☐ it is somewhat more than I expect
☐ it is exactly the same as I expect
☐ it is somewhat less than I expect
☐ it is much less than I expect

3. COMPOSITION OF FACULTY

Think back to when you first became a Boalt student and about the time you have spent at Boalt as a student since then. “Expect” means “to await; to look forward to something intended, promised, or likely to happen.”

How does the racial and ethnic diversity of the faculty compare to what you expect?

☐ it is much more than I expect
☐ it is somewhat more than I expect
☐ it is exactly the same as I expect
☐ it is somewhat less than I expect
☐ it is much less than I expect
4. INCLUSION OF RACIAL/ETHNIC ISSUES IN THE CLASSROOM

Think back to when you first started attending classes at Boalt and the classes you have taken since then. "Expect" means "to await; to look forward to something intended, promised, or likely to happen."

How does the inclusion of (and amount of time spent on) issues pertaining to race or ethnicity in most of your classes compare to what you expect?

☐ it is much more than I expect
☐ it is somewhat more than I expect
☐ it is exactly the same as I expect
☐ it is somewhat less than I expect
☐ it is much less than I expect

5. COURSE OFFERINGS

Think back to when you first started attending classes at Boalt and the classes you have taken since then. "Expect" means "to await; to look forward to something intended, promised, or likely to happen."

Boalt currently offers courses in an area of study denoted "Traditionally Disadvantaged Groups" (formerly "Family, Gender, and Underrepresented Groups"). Such courses now include, e.g.: Asian Americans and the Law; Bilingualism and the Law; Children and the Law; Civil Liberties, Civil Rights, and Human Rights; Civil Rights Law; Community Law Practice at BCLC; Critical Race Theory; Disability Rights; Domestic Violence Law; Education and Law; Employment Discrimination; Environmental Justice; Equality; Estates and Trusts; Family Law; Feminist and Critical Race Theory; Housing Law; Immigration and Asylum; Immigration Law; Indigenous Americans and U.S. Law; Interviewing, Counseling & Negotiation; International Human Rights; Law and Innovation; Legal Issues in Biomedical Ethics; Negotiations; Pluralism; Public Interest and Legal Services Practice; Race and American Law; Race, Gender, and the Law; Refugee Law; Sex-based Discrimination; Sexual Harassment Law; Sexual Orientation and the Law; Street Law; Voting Rights; Welfare, Social Security, and the Law; and Work and Gender.
Consider a class “available” if it is offered frequently enough or in class sizes large enough so that you feel that you could take it during your time at Boalt if you so desired. How does the availability of classes on “Traditionally Disadvantaged Groups” compare to what you expect?

- [ ] it is *much more* than I expect
- [ ] it is *somewhat more* than I expect
- [ ] it is *exactly the same* as I expect
- [ ] it is *somewhat less* than I expect
- [ ] it is *much less* than I expect

6. ENVIRONMENT AND SUPPORT BY FACULTY AND ADMINISTRATION

Think back to when you first became a Boalt student and about the time you have spent at Boalt as a student since then. “Expect” means “to await; to look forward to something intended, promised, or likely to happen.”

How does the environment for issues of race and ethnicity, and the support of issues of race and ethnicity by the Boalt faculty and administration, compare to what you expect?

- [ ] they are *much more* supportive than I expect
- [ ] they are *somewhat more* supportive than I expect
- [ ] they are *exactly the same* as I expect
- [ ] they are *somewhat less* supportive than I expect
- [ ] they are *much less* supportive than I expect

7. SOURCES OF EXPECTATIONS

Think back to when you first became a Boalt student and about the time you have spent at Boalt as a student since then. “Expect” means “to await; to look forward to something intended, promised, or likely to happen.”

There are numerous ways people might develop certain ideas or expectations. These may be grouped in the categories below. For each category, please check the box showing the extent to which that factor influenced your expectations about issues of racial and ethnic diversity.
A. BOALT-AFFILIATED SOURCES BEFORE YOU ENTERED BOALT AS A STUDENT
(E.g.: Boalt Hall Announcement and Application for Admission; letter offering admission; Spring Visit Day or Recruitment Day; visits to Boalt arranged through the Admissions Office; unsolicited phone calls from Boalt students)

☐ these were a major factor in influencing my expectations
☐ these were a somewhat major factor in influencing my expectations
☐ these were a medium factor in influencing my expectations
☐ these were a somewhat minor factor in influencing my expectations
☐ these were a minor factor in influencing my expectations
☐ these factors did not influence my expectations

B. NON-BOALT-AFFILIATED SOURCES BEFORE YOU ENTERED BOALT
(E.g.: self-arranged visits to Boalt; self-initiated contact with Boalt students or alumni; commercial books or magazines reviewing law schools)

☐ these were a major factor in influencing my expectations
☐ these were a somewhat major factor in influencing my expectations
☐ these were a medium factor in influencing my expectations
☐ these were a somewhat minor factor in influencing my expectations
☐ these were a minor factor in influencing my expectations
☐ these factors did not influence my expectations

C. BOALT-AFFILIATED SOURCES SINCE YOU ENTERED BOALT AS A STUDENT
(E.g.: official statements of Boalt policy; statements of the administration in the BBB; open letters to the Boalt community by the faculty or administration; formal oral or written statements by the faculty or administration; handling of incidents revolving around issues of racial and ethnic diversity by the faculty or administration)

☐ these were a major factor in influencing my expectations
☐ these were a somewhat major factor in influencing my expectations
☐ these were a medium factor in influencing my expectations
☐ these were a somewhat minor factor in influencing my expectations
☐ these were a minor factor in influencing my expectations
☐ these factors did not influence my expectations
D. NON-BOALT-AFFILIATED SOURCES SINCE YOU ENTERED BOALT
(E.g.: informal conversations with faculty or administration; interactions with fellow students or alumni; articles or editorials in student newspapers; national media and news)

☐ these were a major factor in influencing my expectations
☐ these were a somewhat major factor in influencing my expectations
☐ these were a medium factor in influencing my expectations
☐ these were a somewhat minor factor in influencing my expectations
☐ these were a minor factor in influencing my expectations
☐ these factors did not influence my expectations

8. PERSONAL INFORMATION

A. What is your year in Boalt?

☐ 1L  ☐ 2L  ☐ 3L  ☐ JSP  ☐ LLM
Other:_________

B. Are you a transfer student or an exchange student from Harvard or another law school?

☐ Yes  ☐ No

C. What is your gender?

☐ Male  ☐ Female

D. What is your race/ethnicity?

☐ White/Caucasian  ☐ Japanese/Japanese American
☐ Chicano/Mexican American  ☐ Viet/Thai/other Asian
☐ Latino  ☐ Pilipino/Pilipino American
☐ Puerto Rican  ☐ Korean/Korean American
☐ Native American  ☐ Polynesian/Pacific Islander
☐ Black/African American  ☐ East Indian/Pakistani
☐ Chinese/Chinese American  ☐ Other (please specify):_________

E. If you had to give an answer, are you generally in favor of increasing diversity in Boalt and/or of giving greater attention to issues of racial/ethnic diversity?

☐ Yes  ☐ No
F. If you had to guess, would you say your expectations about diversity and diversity-related issues are more hopeful (or more cynical) than most of your classmates?

- [ ] much more hopeful (much less cynical) than most of your classmates
- [ ] somewhat more hopeful (somewhat less cynical) than most of your classmates
- [ ] exactly the same as most of your classmates
- [ ] somewhat less hopeful (somewhat more cynical) than most of your classmates
- [ ] much less hopeful (much more cynical) than most of your classmates

END OF SURVEY! COMMENTS OR REACTIONS—USE BACKS OF THESE SHEETS! THANKS!
APPENDIX II:
ADDITIONAL DISCUSSION OF THE SURVEY

As seen, the survey is reproduced verbatim in Appendix I. However, porting the survey to the law-journal page-size and format restrictions means that the original pagination is gone, as well as headers and footers, which put the label, "CONFIDENTIAL," on each page of the survey.

A. Survey Design

The initial drafts of this survey were helped considerably by consultations with Professor Marjorie M. Shultz and a visit to the Survey Research Center at the University of California, at Berkeley. Additionally, I pre-tested my first draft on my classmates in Race as a Perspective on Current Legal Doctrine on April 2, 1996. Subsequent changes and some ill-advised additions are my responsibility alone.

The greatest difficulty with designing the survey (and accordingly, the greatest weakness of the survey results) was the amorphous nature of the word "expectation." Expectation includes both (1) what a person believes she has a right to, for example, according to a contract, and (2) what a person believing will actually come to pass, for example, whether or not a person believes another will really fulfill a promise or contract. The second meaning of expectation also ran into the possible problem of a cynic or pessimist marking an extreme answer based on cynicism or pessimism rather than on their reasonable expectations.

In fact, I was interested in both. However, designing questions to elicit each separately would have become even more cumbersome than the end result. Instead, I provided the definition of "expect" from Black's Law Dictionary (4th ed. 1968) and allowed both meanings to be incorporated into the responses as they would.

The list of courses in Question 5 was straight out of the 1995-96 Announcement. Similarly, the categories of race/ethnicity listed in Question 8.D. were also lifted out of the 1995-96 Announcement.

I also tried to put in some "control" questions, such as Question 8.E. and 8.F., but these failed miserably. Most people disliked the simplicity of 8.E., although I tried to couch it in terms such as "If you had to answer," and many people found 8.F. confusing.

B. Distribution and Collection

As detailed previously, I stuffed Boalt student mailboxes with the survey questionnaire. I placed two boxes atop the mailboxes to receive the responses. Most Boalt surveys are conducted similarly. However, I, along with most Boalt survey distributors, erred in failing to consider the access of persons with disabilities to the box. When someone pointed this out to me, I rushed to put a third box out, which I placed on the floor near the mailboxes.

C. Compiling Data

As noted on the cover sheet and instructions, I first removed the cover sheet from each survey before examining the response. The respondents were supposed to
write their box number on the cover sheet, among other things, to guard against multiple responses from a single party. After removing the cover sheet, I marked the rest of the questionnaire with a symbol to indicate whether the cover sheet was “valid,” that is, bore a box number, before discarding the cover. Twenty-three responses did not have a box number. A brief survey of the responses indicated they were a decently representative cross-section, so for the time being, those responses are included in the survey results herein.

I entered all the responses into my computer via a database program and thus have all the data at my fingertips, so to speak, and ran the analyses reported herein. Interestingly, I reran the breakdowns reported in Part 5 to analyze racial subgroups, but this did not yield significantly different results than those for the entire sample.