

Criticizing the Image of the Student as Consumer: Examining Legal Trends and Administrative Responses

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Twenty-sixth National Conference on Law & Higher Education
Clearwater, Florida
February, 2005



PART 1: CONSUMERISM, COMMODIFICATION AND THE LIBERAL ARTS TRADITION

What Is a University?

Standard American dictionaries define a university as faculty, students and administrators as a collective body, and describe the university as being an educational institution of the highest order, offering undergraduate and graduate programs, and conferring degrees. A student is defined as a person who studies or investigates; and faculty are described as related to a branch of learning or the learned professions. In the ancient universities in the U.K., this meant that the responsibility of faculty was to give personal attention to the student, and the tutorial was the preferred model of instruction – allowing the student the freedom to engage in research of a topic, and the teacher to listen to the student’s defense of his research or inquiry and engage the student by refutation, correction, or explanation.¹ The gradual trend toward mass higher education in the U.K. has significantly compromised the ideal, but the ‘ancients’ at least attempt to preserve small group teaching, if not the true tutorial. By contrast, the trend toward mass higher education in the U.S. has produced a virtual abandonment of the classic relationship between professor and student at large universities, and the cost of education at small private colleges has limited the opportunity for small group learning to those students who are from well endowed families, or students who are willing to take on significant debt to pay for a liberal arts education.²

To the reality of mass education, and the high cost of higher education, has been added the emerging image of higher education as job – rather than life – related. At the turn of the Century in America, social philosophers and civil rights activists like Dr. W.E.B. DuBois championed the ideal of a true liberal arts education as essential to full participation in a

¹ D. Palfreyman, ‘The Oxford Tutorial: Sacred Cow or Pedagogical Gem?’ in D. Palfreyman (ed.), *The Oxford Tutorial* (Oxford Center for Higher Education Policy Studies, 2002).

² Education based on the incurring of debt is similarly criticized as socially unacceptable and less than sufficient to pay for the cost of the student’s education in the UK higher education system. See D. Palfreyman, *op. cit.*, n. 1, pp. 14-15.

democratic society. Indeed, Dr. DuBois raised up this image of higher education in direct rebuttal to the suggestion by Booker T. Washington that an industrial education would elevate black Americans to a position of relative equality in American society. Modern American higher education however, has emphasized the 'market value' of a college or university degree; we have blurred the distinction between education and training, and lost the vision (outlined below) of a liberal arts education as essential in its own right, and a sound vocational preparation.³

The result of all of this is a growing tendency of students to challenge the university's curriculum and its evaluation of their academic performance. Judicial intervention has been sought in conflicts over course offerings, degree requirements, examination criteria, grading, accreditation and licensing. In response, the courts have created an educational contract doctrine under which students can enforce basic entitlements and expectations, but which at the same time seeks to preserve the unique student-institution relationship that makes education distinctive in its purpose, and responsibility to a democratic society.

Consumerism

The image of the student as a consumer derives, of course, from the prevalence of what has come to be known as consumerism in modern Western society. Unfortunately, 'consumerism' is a somewhat slippery concept, likely to slide between different meanings according to the context in which it is used. In the context of this paper, it is used to denote the belief that individuals obtain gratification and social standing primarily through their purchase of commodities and consumption of tangible products. So far as higher education is concerned, consumerism implies that students will want to see obvious, tangible benefits from their studies, whether in terms of an inherently-valuable qualification, or as a route to a particular form of employment. Students of a consumerist bent are unlikely to be interested in studying or working at anything which has no clear connection with their grades or future employment prospects, but are increasingly ready to challenge as inaccurate any grades that are not as high as they feel they require for their chosen career path.

Palfreyman and Warner have described the current era of higher education in the United Kingdom as one characterized by increasing consumerism, influenced by the fact that students (and their families) pay an increasing percentage of the cost of the students' education. They have further observed that, as "paying customers", students are more willing to resort to the law if they feel that the university has not provided "value-for-money."⁴ Although Palfreyman and Warner apparently feel that the "grapevine" suggests that this development has been influenced by the attitudes of international students, especially those from the United States, the 'hard' evidence does not really support this contention. Although some international students have been involved in litigation, none has come from the U.S., and the first disputes brought to the courts were instigated by British students. The really distinctive feature of these claims has actually been that they have tended to emanate from students taking more vocational courses, such as

³ See also A. Ryan, 'A Liberal Education: And that Includes the Sciences' in D. Palfreyman (ed), *The Oxford Tutorial* (*op. cit.*, n. 1).

⁴ D. Palfreyman and D. Warner, *Higher Education and the Law: A Guide for Managers* (Buckingham: The Society for Research into Higher Education & Open University Press, 1998) p. 4.

physiotherapy, teaching, dentistry and - especially - law,⁵ which is perhaps not surprising since the ‘degree dividend’ is so great in the U.K.⁶ But there can be no doubt that the very notion of bringing claims to court for alleged educational negligence or breach of contract appears more legitimate than it did in the past, and seems based on the image of education as a service, or as a commodity to be bought and sold.

It is easy to argue that it is this ‘commodification’ of education - and particularly of higher education - in the modern, consumerist society of the U.K. and U.S. which has led inevitably to its being treated as a consumer product like any other.⁷ In fact, however, this explanation is both simplistic and somewhat misleading. The truth is that education has always been a commodity: it has always been possible for those with money to purchase education or instruction for themselves, their children or their protégés. For centuries, royalty and other landed families have regularly employed tutors to educate their children, as did wealthy Ancients before them.⁸ Moreover, charging for tuition did not stop at what we would now consider to be high school or secondary level. Payment for a university education is not new. Plato founded his Academy for adult students in 387 BC, while the archetype for the oldest universities still in existence in the West⁹ was created by the Palace School of the Emperor Charlemagne as long ago as AD 782. The Palace School - sited in Aachen, Germany - was intended simply to provide instruction to the nobility so as to enable them effectively to manage the sprawling agglomeration of lands that eventually became the Holy Roman Empire. But, far from stifling cultural development, the influence of the Palace School was such that education and the arts flourished under Charlemagne. For this reason the period is sometimes referred to as the Carolingian¹⁰ Renaissance.

In other words, it seems that education - even higher education - has always been ‘commodified.’ Yet there is little or no evidence that, whether in the Ancient world or during the Middle Ages, such commodification was accompanied by a consumerist culture. Indeed, the very

⁵ See e.g. *Moran v University College Salford (No 2)* [1994] ELR 187; *R v Manchester Metropolitan University ex parte Nolan* [1994] ELR 380 (QBD); *R v University Funding Council ex parte Institute of Dental Surgery* [1994] 1 All ER 651; *Thirunayam v London Guildhall University* (unreported) Court of Appeal, 14th March 1997; *Madekwe v London Guildhall University* [1998] E.L.R. 149; *Svojanovsky v London Guildhall University* (unreported) Court of Appeal, 20th May 1998; *R v University of Nottingham ex parte K* [1998] ELR 184 (CA); *Pospischil v University of Bristol* (unreported) Court of Appeal, 24th July 2001; *Ahilathrunayagam v Chair and Members of the Board of Governors of London Guildhall University* (unreported) Court of Appeal, 8th March 2001.

⁶ ‘Degree dividends biggest in Britain’, *Times Higher Education Supplement* 1st November 2002.

⁷ See e.g. D. Farrington, *The Law of Higher Education* (London: Butterworths, 1994) p. 5.

⁸ See also T. Kaye, “‘Education, Education, Education’: Commodity for Sale or Property Right?” in F. Meisel and P. Cook, *Property and Protection* (Oxford and Portland: Hart Publishing, 2000).

⁹ For example, Bologna (Italy) - founded 1088; Oxford (UK) - founded by 1096; Sorbonne (Paris, France) - founded in 1150; Cambridge (UK) - founded 1209; Montpellier (France) - founded 1220; Coimbra (Portugal) - founded 1290.

¹⁰ Charlemagne was known by many names, depending on the language used. The word ‘Charlemagne’ was used by subsequent generations of Frankish-speaking peoples to mean ‘Charles the Great’. In German this was rendered as Karl der Grosse and, in Latin, as Carolus Magnus, from which the adjectival form ‘Carolingian’ derives.

opposite is true: those seeking education did not feel in a position to know whether they were being taught well or badly. Charlemagne himself, for example, learnt to read but not to write. Yet he did not 'sack' his private tutor, the monk Alcuin of York. On the contrary, he put Alcuin in charge of the Palace School, and Alcuin's abilities as a teacher became so well known that he attracted the best students in Europe. As a result, Alcuin's ideas about education - including, ironically, handwriting¹¹ - had such great influence throughout Europe that we continue to benefit from their effects even today.¹² But while this suggests that commodification of education does not *per se* imply a consumerist culture, neither does it imply that education has always been valued. On the contrary, the impact of Charlemagne, Alcuin and the Palace School stands out precisely because they lived during the period which Petrarch¹³ - who, along with Dante, is credited with being a father of the Renaissance - called the 'Dark Ages' because of what he perceived to be its general lack of cultural development. In sum, the modern rise of consumerism in relation to higher education has more complex origins than might initially be imagined.

The History and Philosophy of Education: The Liberal Arts Tradition

The Palace School can be said to have been the forerunner of the modern university because it was there that the importance of a curriculum based on the so-called 'liberal arts' (*artes liberales*) first became established. Unfortunately, the terminology of 'liberal arts' is often misunderstood today. In fact, the key to this phrase is the word 'liberal': the 'liberal arts' comprised the subjects thought appropriate for study by *free* men, rather than by individuals who needed to learn a skill or trade in order to make a living. (*It is from this distinction that we have come to differentiate higher education provided by universities from vocational training provided at a place of work, or at a 'technical' college*). Liberated from the need to labour, free men (and occasionally women) had both the time and desire to occupy their minds instead. Education and scholarship were therefore predicated not only upon the student's or scholar's own wealth or economic independence, but also upon the belief that the pursuit of learning would not impart any particular economic utility, improvement or advantage. A consumerist approach to education would therefore have been seen as a contradiction in terms, and clearly indicative of an ill-educated person.

Drawing heavily on the works of philosophers and mathematicians from Ancient Greece and Rome, the original liberal arts curriculum comprised two levels. As St. Thomas Aquinas explained, "The liberal arts are divided into the *trivium* and *quadrivium*, since by these, as by certain paths, the lively mind enters in to the secrets of philosophy."¹⁴ The *trivium* (from which

¹¹ Alcuin encouraged the use of what became known as 'Carolingian minuscule', a small style of handwriting that became the basis of our modern lower-case letters.

¹² The works of many of the mathematicians of ancient Greece are known to us largely because, under Alcuin's influence, they were copied into the Carolingian minuscule script in the ninth century. It is these copies rather than the originals which have survived to the present day.

¹³ Petrarch studied at two of the universities mentioned in footnote 2 above, namely Montpellier and Bologna. Though known chiefly as a poet and philosopher, the object of his studies at Bologna was actually Law.

¹⁴ Students at Thomas Aquinas College in Santa Paula, California still follow a program based on the *trivium* and *quadrivium* even to this day.

we derive the word ‘trivial’) represented the basic level of education and involved the study of three aspects of language, namely grammar, dialectic and rhetoric. Grammar (mainly the learning of Latin) was designed to impart the craft of reading and writing, while dialectic was concerned with logic and reasoning skills, and rhetoric demanded persuasive public speaking. Today these would probably be termed ‘transferable skills’ not associated with any particular tasks or occupations. But what is particularly noteworthy about the *trivium* is that these skills were not simply expected to be acquired by students while they studied particular ‘subjects’. On the contrary, the acquisition of these skills was itself the very object of the curriculum. It may be significant that institutions of higher education situated within civil law jurisdictions, including those in Eastern European countries who have regained their independence from Soviet rule, still typically demand that students take courses in logic and rhetoric - though rarely in grammar - as part of the first year or two of their curriculum. Conversely, courses on logic are not compulsory in North America and are simply not available in the U.K. (except to philosophy students), while rhetoric is no longer taught systematically at universities in any common law jurisdiction.

The *quadrivium* was more advanced and comprised four subjects related to mathematics and science: arithmetic, geometry, music,¹⁵ and astronomy (which included astrology). Thus language was seen as the foundation for a good education, but mathematics was seen as superior because, with less direct connection to occupational skills, it was considered rather more pure. But the purest and therefore highest form of learning was philosophy, which brought everything together. The ‘liberal arts’ served originally as the curriculum of poets, mathematicians, philosophers and priests. Indeed, it was the very degree of ‘impracticality’ of a particular discipline that originally distinguished it as particularly worthy of study. Today, of course, such ‘impracticality’ is considered to signify a ‘soft option’ which is barely worthwhile and studied only by those incapable of grappling with the more rigorous vocational disciplines such as business, medicine, engineering and law.

Approximately one year was allotted for the study of each stage of this liberal arts curriculum, so that the whole curriculum took seven years to complete. (Indeed, although degree courses have now typically been shortened to last three or four years, at the end of which a BA is awarded, the universities of Oxford and Cambridge in England and of Dublin in Ireland still follow the medieval tradition of awarding to successful students the degree of MA seven years after they initially enrolled. There is no further assessment before the MA is awarded, although the universities do levy a small charge!) Having been inculcated in the ‘lower’ Faculty of Arts during this seven year period with necessary intellectual skills and rigour, students could then embark on a further program of study in a ‘higher’ Faculty of a more specialist nature such as law, medicine, or theology. The first medieval institutions in continental Europe to be clearly identifiable as universities, namely Bologna in Italy and the Sorbonne in Paris, thus had Faculties of Law, Medicine and Theology as well as a Faculty of Arts. But while instruction in medicine and theology was also provided at the English universities of Oxford and Cambridge, law (other than canon law) was not taught in English universities until much later, probably because the unsystematic nature of the common law - unlike the codified structure of civil law jurisdictions -

¹⁵ The study of music or harmony was considered to involve the study of ‘number in time’ or ‘number in motion’.

did not lend itself easily to academic study, at least until the publication in the 1760s of Sir William Blackstone's *Commentaries on the Laws of England*.¹⁶

The Current Curriculum

It is, perhaps, somewhat ironic that the higher education system which nowadays most closely resembles the structure of the medieval European universities is to be found not in Europe but in North America. Polemicists in the U.S. who criticise American education on the grounds that it has moved away from the classical model based on the liberal arts - often citing a lecture of Dorothy L. Sayers, which is now widely available on the internet¹⁷ - betray a disappointing ignorance of the forms of education practiced in Europe (let alone the Far East, where many countries have adopted an entirely different model with often considerable success). Moreover, many colleges and universities in the U.S., and Canada, continue to see at least some - albeit limited - form of 'liberal arts' education as the basis of a Bachelor's degree, and both countries still consider law and medicine, for example, to be disciplines appropriate only for graduate study.

The sustaining of the value of a liberal arts education in the U.S. is identified, not with the history of higher education only, but with the history of public secular education in the largest sense. In Chapter 2 of his just published work on "Education Law, Policy and Practice," Michael Kaufman reminds us that Jefferson's philosophy of public education derived from the Aristotelian view that education should, above all, prepare one for the rights and responsibilities of democratic citizenship. (Indeed, this had been the defining aspect of Marshall's argument in *Brown v. Board of Education*, in support of the overturning of the "separate but equal" doctrine, and the desegregation of America's public schools). Citing contemporary works on the history of American education, Kaufman summarizes the identification of this philosophy in the writings of Locke and Montesquieu, emphasizing the significance of reason and civic virtue in a regime characterized by political freedom and self governance, and in the arguments of Benjamin Rush, Horace Mann, and John Dewey that a free public education was ultimately a benefit to society as a whole - bringing a diverse people together in appreciation of their common interests. The public universities which were pre-vised by Jefferson, and which evolved from his seminal proposal to the Virginia legislature, maintained a liberal arts focus which until recently was pre-requisite to specialized education or training.

This noted, it must be said that the liberal arts orientation is not universally sustained in America's public schools or state universities. As Kaufman points out, "authoritarian" views of education have become politically popular, and advance a singular dimension of Aristotelian notions of education. Moreover, current "authoritarian" views advance learning which can be measured by objective, standardized tests, and attach politically-motivated limitations to the public funding of schools. As Kaufman emphasizes, while such views are justified as promoting cost effectiveness and assessment, they ignore the argument that the view of education advanced by John Dewey promotes the public welfare and lowers social welfare costs to government.

¹⁶ Oxford: Clarendon Press, 1765-69.

¹⁷ 'The Lost Tools of Learning', presented in Oxford in 1947.

At the same time, the liberal arts orientation of the modern American university is, in many instances, also compromised by an acceptance of minimal exposure to a comprehensive education beyond high school. Although entering students may be required to demonstrate some basic study of the liberal arts and sciences (or General Studies), many are permitted to quickly enter specialized fields of study or training, as early as one year beyond secondary school graduation, whether or not they have been exposed to an International Baccalaureate curriculum in the secondary years.

Throughout Europe, students can enroll for degrees in law or medicine immediately on leaving secondary or high school, a position that holds true both in Western Europe and in countries which have only recently emerged from the former Eastern bloc. The real distinction within Europe is between England (and Wales and Northern Ireland) on the one hand and the rest of Europe on the other. The vast majority of Europe (including Scotland and the Republic of Ireland) require secondary or high school students to study a broad curriculum right up until graduation.¹⁸ They have then been expected to enrol in a degree program which typically lasts at least four or five years, although this is likely to change as a result of the Bologna Declaration,¹⁹ according to which the typical length of a Bachelor's degree is likely to become three years, (even though the Declaration itself talks only of a "minimum of three years"). During the first year or two the students again follow a very broad curriculum, which typically includes the study of logic and rhetoric, before going on to specialise in a particular area for the last two or three years of their degree.

In England, Wales and Northern Ireland, however, the pattern of education is very different. Students follow a broad secondary curriculum only until sixteen, which is the point at which attendance ceases to be compulsory. Those seeking further qualifications, or wishing to obtain a place at a university, then embark on a further two years' study which culminates in the award of so-called 'A-Levels'.²⁰ The striking thing about A-Levels is their incredibly narrow focus: the norm is for students to study just three, closely-related, subjects. Although reforms introduced in 2000 mean that they now have to study a fourth subject, they do so only for the first of these two years. Moreover, the official schools inspection agency, the Office for Standards in Education (Ofsted), found that: "For most young people, the added breadth resulting from the new arrangements has been, at best, modest."²¹ Even more ominously, David Bell, Ofsted's head, commented that the reforms had been, to some extent, counter-productive: "The range of subjects taken has not broadened significantly, and the scope of teaching within

¹⁸ This is to use the American term, which would not be used by any European since there is no award of a university degree. There is, however, no universal term to describe the award made to students leaving secondary school in Europe, since each country has developed its own national system and thus its own terminology. The only term in common usage across more than one country in Europe is 'Baccalaureate', which may be confusing for American readers, since Americans often use this term to describe the Bachelor's degree awarded by a university.

¹⁹ Officially known as the Joint Declaration of the European Ministers of Education Convened in Bologna on the 19th of June, 1999.

²⁰ The 'A' stands for 'Advanced', to distinguish these qualifications from the 'Ordinary' or 'O-Levels' which used to be awarded at sixteen (but which have now been replaced by the General Certificates in Secondary Education, or GCSEs).

²¹ *Curriculum 2000: Implementation* (London: Ofsted, 2003) at p. 5.

subjects has narrowed.”²² It is true that a significant number of students take four A-Levels, but the most common fourth A-Level - called General Studies - is seen as a bit of a joke in many circles (not least by the students themselves) and is rarely considered to be of any academic merit by the leading universities.²³ Since General Studies has been, until this year - when new, untried courses in Critical Thinking have been introduced - really the only subject at A-Level to attempt to provide the skills of the *trivium* and *quadrivium*, it is very clear that English pragmatism has caused the greatest departure from the classical liberal arts program in the Western world. Sayers - who was, after all, English²⁴ - asserted passionately, in defense of the classical liberal arts tradition, that: “Too much specialization is not a good thing.”²⁵ An increasing number of English schools are coming to a similar view, resulting in a significant shift by some away from A-Levels towards the International Baccalaureate, which requires students to study not just a greater number, but also a more varied *range* of subjects, as well as a module on Theory of Knowledge, which involves elements of logic and rhetoric. It may seem somewhat ironic, therefore, that enthusiasts for a classical education in the U.K. - primarily to be found in the public schools (which are in fact private, independent schools)²⁶ and in selective ‘grammar’ schools (whose very name is taken from one of the subjects in the *trivium*) - considered for many years after the Second World War that they had, in fact, simply brought the liberal arts tradition up to date. However, it is doubtful if many current champions of a classical education - whether in these same schools or elsewhere in the U.K. - would take that view today. Many would, in particular, argue that increasing government interference has brought about changes to the structure of the education system - even in the independent sector - which have led to an increasing emphasis on ‘value for money’ pragmatism at the expense of liberal arts scholarship.

The Changing Status of Education in Society

The changes in the curriculum since the Middle Ages are bound up, of course, with changes of wider social significance. Perhaps most obvious is the fact that pre-university

²² Quoted in *The Guardian*, 21st March, 2003.

²³ A small number of students take five or even six A-Levels, but those who do are almost always at private, independent schools. For this reason, the top universities will normally take account only of a student’s best three results (excluding General Studies).

²⁴ Describing the nationality of someone from the U.K. is tricky. Under the British Nationality Act 1981, people born in the U.K. and of relevant parentage are British citizens (and not ‘subjects’, as some people still erroneously believe). This status is reflected in the passports of U.K. nationals. However, British anti-discrimination laws recognize the categories of English, Scottish, Welsh and Northern Irish as ‘national origins’ and each group boasts its own ‘national’ teams in various sports including association football (soccer). Even more confusingly, in the sport of rugby union, there is a team representing the non-existent ‘nation’ of Ireland, and which comprises players drawn from both the Republic and Northern Ireland, even though legally this means that the players are drawn from two different countries.

²⁵ *Op. cit.*, n. 17.

²⁶ The reason for the apparently strange terminology in the U.K. is that the ‘public schools’ were originally so-called because they admitted pupils from any background - so long, of course, as the fees were paid - rather than restricting entry only to those from specific religious denominations. The existence of both the ‘public’ schools and the church schools significantly predates the creation of the universal publicly-funded state school system, which did not begin to get established until the passage of the Elementary Education Act in 1870.

education now lasts significantly longer than it did centuries ago, so that students entering a university are much older than they would have been in medieval times. This means that much, if not all, of the original liberal arts curriculum is meant to be provided in primary and secondary school rather than in higher education. The current entry for ‘classical education’ in the online encyclopaedia Wikipedia summarises this attitude perfectly:

“Classical education developed many of the terms now used to describe modern education. Western classical education has three phases, each with a different purpose. The phases are roughly coordinated with human development, and should be exactly coordinated with each student’s development. ‘Primary education’ teaches students how to learn. ‘Secondary education’ then teaches a conceptual framework that can hold all human knowledge (history), and then fills in basic facts and practices of the major fields of knowledge, and develops the skills (perhaps in a simplified form) of every major human activity. ‘Tertiary [or higher] education’ then prepares a person to pursue an educated profession, such as law, theology, war, medicine or science.”²⁷

Society has also become increasingly complex since the Middle Ages and it is generally considered that there is simply much more to learn. In particular, the division of labor brought about by industrialization has produced a much greater demand for the learning and teaching of specialist skills which are not seen as being universally relevant. Subjects have sub-divided to reflect this. As the connections between wealth and political power have become less clear-cut, for example, political economy has become the two separate disciplines of politics and economics. Increasing scientific research has led to a multitude of new sub-disciplines in biology and chemistry. Construction techniques have developed to the extent that there are now several different types of engineering.

Moreover, education is not seen just as the vehicle for imparting knowledge, but also as a principal means of holding society together now that the citizenry is no longer a homogeneous mass but performs a whole variety of different jobs. Education has become, the French sociologist Emile Durkheim explained (as had John Dewey), one of the methods for ensuring social ‘solidarity’.²⁸ The usage of the term ‘liberal arts’ has accordingly broadened to encompass study in the humanities more generally. It now tends to denote any subject or study designed to impart general knowledge and intellectual skills, rather than occupational or professional ones. At the same time, the nuances implied by the word ‘liberal’ have themselves changed so that, rather than ‘liberal arts’ being studies intended for the free man, they are now considered to be studies to free the mind, *i.e.* the term has come to signify a form of instruction which has the elimination of prejudice and the broadening of intellectual horizons as being among its principal objectives.

Education and rights

But perhaps the most important change is that education - including higher education - is no longer seen as the privilege of an élite. Regardless of social status, everyone is now expected to be offered the opportunity of an education. Indeed, the conventional wisdom has gone

²⁷ See http://en.wikipedia.org/wiki/Classical_education.

²⁸ E. Durkheim, *The Division of Labor in Society* trans. G. Simpson (New York: Free Press, 1933).

significantly further: everyone is now seen as having a *right* to education. In other words, the provision of education has been translated into the language of law. This fact is reflected in three major international treaties. The first is the Universal Declaration of Human Rights, which was adopted in 1948. Article 26 asserts:

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory....
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms....
3. Parents shall have a prior right to choose the kind of education that shall be given to their children.”

While this Article cannot be enforced in any court of law and is therefore principally symbolic, its very existence reveals the prevailing attitudes towards education in the Western world.²⁹ In fact, the three sub-paragraphs of Article 26 can be translated as specifying three distinct matters, namely:

- (i) The fundamental importance of primary education;
- (ii) The purpose of education; and
- (iii) The relevance of parental choice in education.

Symbolism is something that should never be under-estimated. While Article 26 may have provided some moral leverage in persuading governments to provide public education systems, these three elements also contain the seeds of modern-day consumerist attitudes towards education. In any event, it was not long before the first and third of these elements were ‘upgraded’ into enforceable legal rights. In 1953, individuals in countries belonging to the Council of Europe³⁰ were effectively given the legal means by which they could seek to enforce in a court of law³¹ their rights to education and to parental choice of the kind of education. This was done by means of the addition of the First Protocol to the main body of the European Convention of Human Rights.³² Article 2 of the First Protocol proclaims:

“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”

Thus, for the first time in the Western world, two legally-enforceable rights were created. The second sentence of Article 2 makes it obligatory for public education authorities in countries belonging to the Council of Europe to take account of the views of parents before placing children in particular schools or colleges (although the U.K. entered a reservation to this provision which states that: “the principle affirmed in the second sentence of Article 2 is

²⁹ Western countries dominated the United Nations in 1948.

³⁰ This is an entirely different body from the European Union, and its membership is much broader. It currently has 46 member states. For further information see the Council’s web site at <http://www.coe.int>.

³¹ Although this usually necessitated taking a case to the European Court on Human Rights rather than seeking a remedy in national courts.

³² The Protocol was actually drawn up and signed in 1952 but came into force with the rest of the Convention in 1953.

accepted by the United Kingdom only so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure”).

Of even more significance, in what is commonly known as the *Belgian Linguistic Case* (No. 2),³³ the European Court of Human Rights held that the first sentence of Article 2 grants a legally-enforceable right to education. It further held that the meaning of ‘education’ in this context was to be determined according to “economic and social circumstances” and that, since Belgium was a “highly developed country”, the right to education included “entry to nursery, primary, secondary and higher education”. National courts in the U.K. have been permitted to adjudicate on interpretations of the Convention only since October 2, 2000,³⁴ but already the Court of Appeal has confirmed that this interpretation also represents the legal position in the U.K.³⁵ The extension of the fundamental human right to education so as to encompass higher education is further reflected by the much more recent United Nations Convention on the Rights of the Child. This was ratified by the U.K. in 1991 but, although the U.S. has signed the Convention as a preliminary indication of its endorsement of the Convention’s principles, it remains one of only two countries yet to ratify it.³⁶ Again its significance lies in its symbolism because it does not create rights which are enforceable in a court of law but, as has already been argued, symbolism is not to be under-estimated. Article 28 of this Convention says:

“1. States Parties recognize the right of the child to education and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- (a) Make primary education compulsory and available free to all;
- (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
- (c) Make higher education accessible to all on the basis of capacity by every appropriate means ...”

Although education was not explicitly a matter of right, the first and third elements of Article 26 of the Universal Declaration of Human Rights are reflected in the seminal U.S. Supreme Court cases of the 1920’s – *Meyer v. Nebraska*³⁷ and *Pierce v. Society of Sisters*.³⁸ Noting that education is clearly a matter of state interest, and essential to the public welfare, these decisions supported the power of the states to compel the education of children up to a point, but rejected state laws which required compulsory *public* school attendance, holding that such laws infringed the liberty interests of parents under the federal Constitution’s Fourteenth Amendment. The Court reaffirmed the duty of parents to provide for their children’s education, but recognized the parental right to direct the upbringing and education of their children, thus giving Constitutional protection to the parental decision to permit that instruction to take place in

³³ (1968) 1 EHRR 252.

³⁴ Human Rights Act 1998.

³⁵ *R (Douglas) v North Tyneside Metropolitan Borough Council* [2003] EWCA Civ. 1847, [2004] 1 All ER 709, [2004] 1 WLR 2363, [2004] ELR 117.

³⁶ The other is Somalia, which has no functioning government capable of doing so.

³⁷ 262 U.S. 390 (1923).

³⁸ 268 U.S. 510 (1925).

a private, rather than public school – including a religious- affiliated school. The Court’s decisions in *Meyer* and *Pierce* also held that state law should not unreasonably impair the interests of private elementary and secondary schools as profitable endeavours.

These decisions have been cited and debated in cases over the last 30 years which have extended limited religious protections from compulsory school attendance laws to parents whose fundamental religious beliefs include the upbringing and education of their children outside the traditional public or private community;³⁹ and permitted the home-schooling of children, with limited state regulation. The charter school movement is also linked directly to the recognition of the parents’ right to control the education of their children, as are recent controversial attempts to extend publicly-funded “vouchers” to parents who desire to remove their children from “inadequate” public schools. Federal protections have also been extended to disabled children and their parents, remedying their historic exclusion from public school classrooms.⁴⁰

The right to education: the fallacies of displacement and reification

It is therefore clear that, just as higher education is no longer restricted to the privileged, the experience of higher education is no longer seen as a privilege by those who benefit from it. It is now perceived from the international treaties as their *right*. It is this paradigm shift towards a ‘rights culture’, sparked off by what André Skeet has called the ‘Declarationism’ implicit in the three international treaties discussed above,⁴¹ which has led to the problem of consumerism in higher education today.

U.S. Constitutional history offers a somewhat different basis for this paradigm shift. Into the 1960’s American federal courts made it clear that the right to attend a public college or university was not *ab initio*, a Constitutional right. However, in *Dixon v. Alabama State Board of Education*,⁴² the Court of Appeals held that the Due Process Clause of the federal Constitution extended protections to a student enrolled in good standing at a state college or university – even though the student had no explicit constitutional right to attendance at a state university. Attendance at any public college or university was “on the basis of a mutual decision of the student’s parents and the [college or university]”, and was, in this sense, “different from attendance at a public school where the [student] may be required to attend a particular school...located in the neighborhood or district in which the [student’s] family may live.” Once this decision was made, however, the right to remain in good standing at a public institution of higher learning became a private interest “of extremely great value”- because education *per se* is “vital and indeed basic to a civilized society.”

The right to “higher education” defined by the *Dixon* decision extended – in the context of the facts of the case – only to attendance *per se*, in good standing, absent valid cause for

³⁹ *Wisconsin v. Yoder*, 406 U.S. 205 (1972), upholding the right of Amish parents to terminate the public schooling of their children following their completion of the eighth grade.

⁴⁰ The Rehabilitation Act of 1973, and the Individuals with Disabilities Education Act (formerly the Education for All Handicapped Children Act of 1975).

⁴¹ ‘Education as a Human Right’, paper presented at the World Conference on the Right to and Rights in Education, Amsterdam, 2004.

⁴² 294 F.2d 150 (5th Cir., 1961).

expulsion and a hearing offering the student notice of – and an opportunity to contest – the grounds for his or her expulsion. Indeed, the facts of the case focused on the racially motivated use of state power to arbitrarily expel black students, without legitimate determination of misconduct justifying expulsion. Nonetheless, the decision established some fundamental right – based upon important private interests – to maintain one’s good standing at a public college or university.

These developments established – albeit on different authoritative grounds – that education should not be restricted to an élite group, and that there exists indeed, some “right” to higher education. Each of the authors of this paper recognize the importance of such a principle, as each of us was, after all, part of the first generation in his family to go to a university. We all hold strongly to the view that anyone with the ability to benefit from education should have that opportunity made available to him or her. The difficulty lies in the conception of education in terms of rights. This, it is submitted, has led to two problems which together provide the basis for consumerism. Those problems are the twin fallacies of displacement and reification. The fallacy of displacement occurs because usage of the language of rights has shifted the focus from the provision of education to the existence of a right to education. Let us consider again, for example, the first sentence of Article 2 of the First Protocol to the European Convention on Human Rights which, it will be remembered, declares: “No person shall be denied the right to education.” Strangely, it does not say that no-one shall be denied an education. It says instead that no-one shall be denied *the right to* an education. The paradigm is thus shifted: no longer is it apparently the provision of education itself which is important but the existence of some legal right to it.

This might be acceptable if the existence of a right to something automatically meant that that ‘thing’ was provided, but everyone knows that having a right and being able to exercise that right are two very different things. A ‘right’ means an entitlement; it does not mean the fulfilment of that entitlement. Nor does it necessarily imply any ability actually to exercise that right in a court. Conversely, the legal definition of what constitutes education may be so limited as to be fulfilled by a level of instruction which most educationalists or policy-makers would normally consider to be grossly inadequate. For example, the Court of Appeal in the U.K. has recently reaffirmed the oft-stated view in European jurisprudence that the right to education is not a right to a particular form or quality of education.⁴³ Thus those in the U.K. who are educated at home because certain disabilities or special needs militate against their regular attendance at school are generally considered to be entitled to just five hours’ tuition per week in order for their legal right to education to be met.⁴⁴ This is less than the standard school *day* for other pupils, which makes a mockery of the very concept of children with ‘special needs’. Similarly, the Court of Appeal has decided that a pupil who is unlawfully expelled from secondary school will not normally have any grounds for complaint that his right to education has been breached, provided that some work is regularly sent home for him to do.⁴⁵ However, the Court specified

⁴³ *Ali v Head Teacher and Governors of Lord Grey School* [2004] EWCA Civ 382, [2004] QB 1231, [2004] 2 WLR 1442, [2004] 4 All ER 628, [2004] ELR 169.

⁴⁴ *R v East Sussex County Council ex parte Tandy* [1998] ELR 251 (HL), a case in which the local education authority actually sought - unsuccessfully - to reduce this to a maximum of three hours’ tuition per week.

⁴⁵ *Ali v Head Teacher and Governors of Lord Grey School, supra*, n.38.

neither the quantity of work nor the frequency with which it is to be sent. By contrast, few Europeans fortunate enough to have been able to progress to higher education would be able to substantiate a claim that they had done so because of some 'right' to it. Rather, most have simply benefited from the fact that they come from sufficiently affluent backgrounds and have reasonably enlightened parents. In other words, there is absolutely no correlation between having the right to education and the type or quality of education actually received. Yet the focus of attention has been fallaciously displaced from educational to legal provision.

At the same time, as part of a wider development in Western legal culture, rights have become reified. Formerly the idea of a legal right was that it represented a type of relationship between individuals - a personal right or right *in personam* - or between an individual and society at large - a property right or right *in rem*.⁴⁶ Now, however, a right has come to be seen as an object or thing to be possessed. 'Having' the right to an education is thus becoming more important than being educated. Moreover, since it is generally assumed that one party's right is another party's obligation, it apparently follows that a student with the right to an education can demand that teachers ensure that he or she learns. According to this view, the student is not obliged to take responsibility for his or her own learning because he or she has the *right* to an education - something that entails no obligations on his or her part. It is simply the responsibility of the teacher or instructor to make sure that the student is educated. The classical view is, of course, somewhat different. As Dr. Dennis Farrington has argued:

"the relationship between university and student is not as straightforward as that between provider and consumer.... There are obligations on the institution to provide certain things, but there are also obligations on the student to participate fully: to attend lectures, to participate in seminars, to hand in essays on time."⁴⁷

This observation by Dr. Farrington becomes very important in our discussion, *infra*, of the perspective of courts in the U.S. and the U.K. regarding the rights and responsibilities of the university and students, in academic settings. Farrington has also pointed out that: "In the medieval universities, scholars had particular obligations to fulfill if they were to remain matriculated".⁴⁸ But the reification of rights not only implies the denial of such obligations, it also emphasises the student's rights in a much more conspicuous manner. Since a right cannot be worthwhile unless it can truly be represented by some tangible 'thing', students demand paper qualifications. To have any intrinsic value, these qualifications need to provide a record of good grades. So the right to education becomes the right to demand a good degree with good grades.⁴⁹

It may be objected that higher education suffers from the fallacies of displacement and reification to no greater extent than do primary and secondary education. The growth of

⁴⁶ For a fuller discussion of property rights in the context of education law, see T. Kaye, *op. cit.*, n. 8.

⁴⁷ Quoted by D. Palfreyman and D. Warner, *op. cit.*, n. 4, p. 6.

⁴⁸ *The Law of Higher Education* (London: Butterworths, 1994) p. 355.

⁴⁹ This was precisely what was demanded by the claimant in the following cases: *Thirunayam v London Guildhall University* (unreported) Court of Appeal, 14th March 1997; *Madekwe v London Guildhall University* [1998] E.L.R. 149; *Svojanovsky v London Guildhall University* (unreported) Court of Appeal, 20th May 1998; *Ahilathrunayagam v Chair and Members of the Board of Governors of London Guildhall University* (unreported) Court of Appeal, 8th March 2001.

consumerism in relation to the U.K. primary and secondary education system has been highlighted, for example, by Neville Harris.⁵⁰ But the problem is more acute in higher education in several respects. First, as will be explored in more detail in both Parts 2 and 3 below, the fallacy of reification reaches new heights in higher education because all university students are admitted on the basis of a contract. Yet in 1896, Mr. Justice Wills could think of “nothing more fatal to [academic] discipline” than having the student-university relationship governed by the law of contract.⁵¹ As Atiyah has written:

“Of all the examples of legal reification, none is surely more powerful than [contract]. A contract is a thing which is ‘made’, is broken, is ‘discharged’. So powerful is this reification that most lawyers see nothing odd about the notion of anticipatory repudiation, that is, the idea that a promise can be treated as broken even before its performance is due. The tendency to reify legal concepts is, in the case of contract, given powerful impetus by the fact that so many contractual arrangements are in written form. Even today, lawyers constantly use the words ‘the contract’ to signify both the legal relations created by the law and the piece of paper in which those relations (or some of them) are expressed.”⁵²

Education at private elementary and high schools is also, of course, based on a contract. But it remains the case throughout the Western world that most pupils are educated in the publicly-funded system, where the relationship is governed by public or administrative law and not by the private law of contract. Accordingly the terminology of rights does not have quite the same symbolic impact. But in higher education *everyone* enters into a contract. Every student thus has a ‘right’ to an education which, since the process of reification means that this must be translated into some sort of paper qualification, means that students increasingly come to see themselves as having the right to a good degree.

Practical matters exacerbate the problem. Those able to enroll at a higher education institution are self-evidently the better-educated half⁵³ of society which, statistics tell us, means in practice that they come overwhelmingly from the wealthier half of society. The right to higher education is thus a right enjoyed by those with the wherewithal to make use of it (unlike the typical U.K. parents of the disabled child with special needs who struggle to ensure that she receives five hours’ tuition per week). The right to higher education is thus by no means a mere rhetorical device: this is a right with teeth. Moreover, it is a right backed up by the power of real choice. For while it is of course possible for wealthy and middle class families to exercise some degree of choice as to where their children go for a primary and/or secondary education - and while there is a right of European parents under Article 2 of the First Protocol to the European Convention on Human Rights to have their views taken into account as to where their children

⁵⁰ *Law and Education: Regulation, Consumerism and the Education System* (London: Sweet and Maxwell, 1993).

⁵¹ Quoted by D. Farrington, *op. cit.* n. 7, p. 327.

⁵² P.S. Atiyah, *Essays on Contract* (Oxford University Press, 1988) p. 14.

⁵³ In practice, most developed countries do not yet have quite 50% of their school-leaving population going on to higher education. But many of their governments have publicly stated that it is an objective of public policy to achieve that figure, a policy known in the U.K. as ‘widening participation’. See e.g. Higher Education Funding Council for England, *Successful student diversity: case studies of practice in learning and teaching and widening participation* Good practice guidance for senior managers and practitioners No. 48 (Bristol, HEFCE: 2002).

should be schooled - such choice is inevitably severely restricted by the age and consequent relative lack of mobility of the children. Schoolchildren need specific transportation to take them to and from school (or else they need to attend a boarding school), and they need some form of adult care at the end of the school day; yet they are, at the same time, generally too young to work to contribute to the costs of their upkeep and education. University students, on the other hand, require no adult supervision outside class and, although they often live away from home, they frequently work to help keep themselves. They also have independent access to student loans and, sometimes, grants or scholarships. All this makes them considerably more mobile: a large number of potential higher education students in both Britain and the U.S. can effectively choose between college places throughout the English-speaking world, and they have been provided with the education to realize this.

The Commodification of the Right to Higher Education

So admission to higher education involves rights, contracts and choice: all the trappings of the market-place. The point of a market, of course, is to enable individuals to trade commodities: things of monetary value which they have no intention of using themselves, so it should come as little surprise to learn that, in the international arena, education is subject to the General Agreement on Trade in Services (GATS)⁵⁴ following the Uruguay Round of the World Trade Organization 1995. The European Union has included higher education in the context of “consumption abroad” in its ratification of GATS. Indeed, the nature of education as a commodity is confirmed by the United Nations Provisional Central Product Classification (CPC), in which class 92390 is ‘Higher Education and related services’.⁵⁵

It may be argued at this point that it was made clear at the beginning of this paper that education has always been bought and sold: it has thus always been a commodity. But the higher education market is different. Since what students seek is the fulfilment of their ‘right’ to a degree, it is this ‘right’ that is being bought and sold. Consumerism in higher education has thus come about through the commodification of the right to higher education. Unfortunately, universities themselves must also take some of the blame for this. A market requires not just willing buyers, but also complicit sellers. Yet universities frequently advertise their ‘wares’ as though brands on offer in a sort of educational Wal-Mart. In the current era in the United States, for example, it is submitted that all too many college presidents ‘wrongly’ describe students as customers, and so assist unwittingly a commodified image of higher education.

The picture is not, however, one of total doom and gloom. Ironically, the major obstacle to the full realization of the commodification of the right to higher education is the very legal device which is invoked to support it. Real contract law - as opposed to contractual imagery - simply does not mix well with higher education. Two issues in particular militate against a straightforward application of contract law doctrine within the sphere of higher education. First, many universities in the U.S. - and all but one in the U.K. - are publicly-funded institutions, which means that their conduct is governed at least as much by administrative law as it is by the law of contract. The courts on both sides of the Atlantic are reluctant to allow the latter to

⁵⁴ See http://www.wto.org/english/tratop_e/serv_e/1-scedf_e.htm for GATS scope and definition.

⁵⁵ See <http://unstats.un.org/unsd/cr/family2.asp?Cl=9>.

undermine the former. In the United States, administrative law generally has *constitutional* implications.⁵⁶ Whereas a historical peculiarity in the United Kingdom - whereby almost all universities established before 1992 were founded by Royal Charter - has meant it has still not been formally accepted that students studying at these institutions are entitled even to argue their case before a court of law.⁵⁷

Secondly, even when putative ‘contract rights’ may be established, higher education does not fit easily into the conceptual framework which the law of contract has developed. Thus the exact implications of the contractual relationship between student and institution are frequently hard to identify with any precision. For while it may be relatively straightforward to identify an offer and an acceptance between student and institution - and, indeed, the typical student’s consideration - it is often extremely unclear what the specific terms of this relationship are, or indeed exactly what it is that constitutes the university’s consideration. The difficulty of translating contractual imagery into a legally-meaningful contract capable of being recognized, understood and enforced in a court of law has meant that the obvious tension between the classical and consumerist views of higher education has been played out in legal form in a number of cases on both sides of the Atlantic.

PART 2: THE AMERICAN EXPERIENCE

Contract Law and Student Academic Status

Although the fundamental right to remain enrolled in good standing at a public university is of Constitutional origin, contract law is clearly at the center of the student-institution relationship in the U.S., whether the institution is public or private – when the further dimensions of the voluntary choice to attend the university, *i.e.*, the fulfillment of the student’s interest in obtaining a degree, are at stake. One of the earliest statements to this effect is reported in *Zumbrun v University of Southern California*:⁵⁸

“The basic legal relation between a student and a private university or college is contractual in nature. The catalogues, bulletins, circulars, and regulations of the institution made available to the matriculant become a part of the contract.”⁵⁹

The *Zumbrun* case was based on unusual, but illuminating, facts. The plaintiff, a 63 year-old female student enrolled at USC to complete her college degree and enter the emerging field of

⁵⁶ See *infra.*, Part 2.

⁵⁷ See *infra.*, Part 3. Students studying at universities established in or after 1992 can bring an action to court.

⁵⁸ 25 Cal. App.3d 1 (1972).

⁵⁹ Citing, *inter alia*, *Carr v St. Johns University*, 231 N.Y.S.2d 410 (1962); *University of Miami v Militana*, 184 So.2d 701 (Fla. App., 1966); *Searle v University of California*, 23 Cal. App.3d 448 (Cal. App., 1972); and see *Wickstrom v North Idaho College*, 725 P.2d 155 (Idaho, 1986). *Zumbrun* and *Wickstrom* have been frequently cited by other courts for the basic principle that catalogs, bulletins, and regulations of the institution are incorporated into the “educational contract” relationship. See, e.g., *Johnson v Schmitz*, 119 F.Supp. 90 (D. Conn., 2000).

Gerontology. Her semester coursework included Sociology 200, an entry level course in her major and a prerequisite to advanced coursework in her field. During the semester, a number of university faculty engaged in a *de facto* ‘strike’ in protest at the United States’ involvement in Cambodia, and Zumbrun’s professor refused to teach the remainder of his classes in Sociology, or administer the final examination. Although Zumbrun was awarded a grade of ‘B’ she sued, alleging breach of contract, negligence, fraud and breach of fiduciary duty. The court dismissed her allegations except for the breach of contract claim, which it upheld in principle. More specifically, the court held that plaintiff should be afforded the opportunity to prove that the university substantially breached its contractual duty to teach the classes and conduct the examinations which were specifically scheduled as a part of Sociology 200. The court suggested that, while departures from the university’s scheduled course offerings would not routinely be considered a breach of contract, a significant failure to offer classes and examinations that are specifically scheduled – and for which students have been enrolled – may support a claim for at least a refund of tuition payments.

With this basic point of reference, the institution’s academic requirements and standards become subject to a judicial oversight that must strike a proper balance between the fundamental contractual right to rely on the university’s program of instruction, and the necessary protection of institutional academic freedom regarding its curriculum and degree programs. The seminal modern case on the nature of this balance is *Mahavongsanan v Hall*,⁶⁰ (hereafter *Hall*), a decision of the ‘original’ Fifth Circuit Court of Appeals. Srisuda Mahavongsanan was academically dismissed from Georgia State University (GSU) when she twice failed to complete a comprehensive examination which became a requirement for the Master’s Degree in Education at GSU following her enrollment. Declining the University’s offer to substitute additional coursework in lieu of further re-takes of the examination, she filed a civil action against GSU, alleging deprivation of due process and breach of contract. The U.S. District Court ordered the University to confer the Degree, but the Court of Appeals reversed as a matter of law. The appellate court – which had a renowned record for upholding civil rights – rejected the plaintiff’s Constitutional due process claim, holding that there was a fundamental distinction between, on the one hand, the dismissal of a student because of alleged misconduct and, on the other, academic dismissal because of the student’s failure to meet course or degree requirements.⁶¹

Turning to contract law, the court explained in clear and concise language that imagery of contract law as it applies to traditional business relationships is inappropriate in defining the student-institution relationship where the institution’s academic standards are at issue. The court suggested first that there is “a wide latitude and discretion afforded by the courts to educational institutions in framing their academic degree requirements.” This said, the court held that the university “...clearly is entitled to modify [its academic degree requirements] so as to properly exercise its educational responsibility.” The Court reasoned that any view of the student’s “contract” with the university that precludes the university from amending its academic requirements throughout the period of matriculation would unreasonably compromise the integrity of its academic program. With the understanding that a currently enrolled student would be entitled to reasonable notice of modifications in her academic program requirements, so that

⁶⁰ 529 F.2d 448 (5th Cir., 1976).

⁶¹ The due process issue in misconduct cases is discussed in detail, *infra*.

she would have sufficient time to complete these requirements and graduate as scheduled, the Court's language clearly rejected, for important social policy reasons, an image of the student as a customer where degree requirements and entry into the learned disciplines and professions are concerned. Any right to the degree, based on contract, is conditioned upon the student's demonstration of academic competency.

These seminal cases are important legal history. It is important that trustees, board members, and institutional presidents recognize the legitimate concern of faculty that the contractual relationship between the student and the institution, where related to the academic requirements of a discipline or college, should not be seen as the purchase of a right to a commodity or service. The *Hall* case has been cited in more than 65 subsequent decisions throughout the country, and by the United States Supreme Court in its seminal academic due process cases, discussed *infra*. It has been followed, cited positively, questioned, and interpreted, but its fundamental view of the uniqueness of the student-university contract relationship – relating to curriculum and degree programs – has been sustained by a significant number of state and federal courts. A brief and rough categorizing of the cases may serve to define what we will call – for the sake of convenience – the *Zumbrun-Hall* 'balance':

- Students duly enrolled at a post-secondary institution of education or training appear to have a claim for breach of contract, when the institution makes written representations in its catalogs, or similar documents, that the institution is appropriately accredited, and/or that students who graduate from the institution will be eligible to take state licensing examinations. See *Craig v Forest Institute of Professional Psychology*,⁶² *Peretti v State of Montana*,⁶³ and *Cuesnongle v Ramos*.⁶⁴ An important recent application of the rule is in *Doe v Board of*

⁶² 713 So.2d 967 (5th Cir., 1997). Plaintiffs sued Forest, when it was placed on probation by its regional accrediting commission, and later closed because of financial and accreditation issues related to its Huntsville, Alabama program. Various institutional documents relied upon by plaintiffs when they enrolled stated that the Huntsville program was designed to meet all requirements of the Alabama State licensing board, and that students should expect to be eligible for licensure. Despite disclaimer language in one institutional brochure stating that the institution could modify its program, the court held that summary judgment should be denied where the students presented material evidence of the institution's representation of accreditation.

⁶³ 464 F. Supp. 784 (D. Mon., 1979). In *Peretti*, a federal trial court held that students at a state postsecondary vocational school, who had completed approximately three-fourths of the school's program in aviation technology, would be entitled to damages from the State for breach of contract, where the State cancelled the program for lack of funding and offered no viable way for the students to complete their training. In at least one other case, a breach of contract claim was sustained when students at a newly established state medical school were informed, following their admission, that appropriations for the school had been withdrawn, and that the program would not, in fact, open. In *Eden v Board of Trustees of the State University of New York*, 374 N.Y.S.2d 686 (App. Div., 1975); on appeal, 426 N.Y.S.2d 197 (1980), the court held that the State incurred a contractual obligation to enroll the student claimants in its newly established School of Podiatric Medicine for the academic year 1975-1976, and that the State acted arbitrarily and capriciously in failing to conduct the program for the 1975-76 academic year. The court's decision was based on the finding that expenditures for the first year had already been made, and that the students who enrolled had no viable opportunity to seek admission to another program. On appeal, the Court of Claims declined to award damages against the State.

⁶⁴ 835 F.2d 1486 (1st Cir., 1987).

NBPME,⁶⁵ holding that students of the New York School of Podiatric Medicine were entitled to a hearing, when the scores of students at four schools of podiatric medicine on the national podiatric medicine examination were withheld, pending investigation and resolution of an alleged breach of examination security. The court based the student's entitlement to a hearing on the Examination Bulletin's language, which explicitly granted any candidate a hearing (appeal) on the question whether he engaged in improper conduct that would justify the withholding or invalidation of his score.

- Contract based claims challenging the overall quality of a college or university's educational program will generally be rejected, on policy grounds which also support the judicial refusal to recognize a tort (negligence) based theory of educational malpractice. However, a court may apply contract law to support a student's claim of enforcement of a specific contractual promise, *e.g.*, to protect a graduate student's individual and original research from academic misconduct or misappropriation by faculty who have access to that research and supervisory authority over the student. See, *e.g.*, *Johnson v Schmitz*.⁶⁶
- A court will generally not interfere with the professional academic judgment of faculty, and thus will reject, as a matter of law, a claim which asks the court to evaluate the appropriateness of grading or other academic evaluation of the student's work, course, examination, dissertation or seminar presentation requirements. The cases build on the basic principle of the *Mahavongsanan* case and have come generally from graduate student claims about comprehensive examination requirements following coursework, or the evaluation of research. See, *e.g.*, *Haberle v University of Alabama at Birmingham*,⁶⁷ discussed more fully, *infra*, on the subject of due process.⁶⁸

Student Academic Status and Due Process

Courts continue to consider cases arising out of the academic dismissal, or disciplinary dismissal, of students enrolled in undergraduate and graduate level coursework at public and

⁶⁵ 2004 U.S. Dist. LEXIS 7409 (2004).

⁶⁶ 119 F. Supp. 2d 90 (D. Conn., 2000). The court was also willing to consider plaintiff's claims as based on theories of breach of fiduciary duty and negligence.

⁶⁷ 803 So.2d 1536 (11th Cir., 1986).

⁶⁸ *Nuttelman v Case Western Reserve University*, 506 F.Supp. 1 (D. Ohio, 1981), affirmed 708 F.2d 726 (6th Cir., 1982), is an early example of judicial restraint in the application of contract theory. Plaintiff challenged the decision to deny her admission to the University's Nursing program, based on her failure of the research portion of the Nursing candidacy examination. She relied singularly on a theory of breach of contract to question the area faculty's grading techniques and evaluation procedures when evaluating her performance on the examination. The court entered Summary Judgment for the University as a matter of law, reasoning that the plaintiff's allegations improperly sought judicial review of purely academic standards that were within "the peculiar knowledge, experience and expertise of academicians." The court's brief opinion is enlightening because it uses language almost identical to that employed in the academic due process cases to reject Ms. Nuttelman's contract law claim.

private colleges and universities. Cases arising at *public* universities are, as always, influenced by the *constitutional* relationship between the student and the university; but while at *private* colleges and universities, *contract* law prevails. However, it must be noted that the public university-student relationship is also contractual and, in the private sector, the contract relationship may include a form of ‘private due process’ governing student discipline. Finally, it must be said that legal doctrine and judicial decisions continue to illustrate significant judicial deference in matters purely or largely academic – respecting those who are responsible for the academic preparation of students seeking degrees at the college level. All this being said, courts remain active in the field, and several of their decisions are worthy of further discussion.

The basic doctrine continues to be defined by the United States Supreme Court’s seminal decisions in *Regents of the University of Michigan v Ewing*⁶⁹ and *Board of Curators, Univ. of Mo. v Horowitz*.⁷⁰ In *Horowitz*, the Court assumed, without deciding explicitly, that federal courts can review an academic decision of a public educational institution under a *substantive* due process standard. In both cases, the Court treated the student’s interest in continued enrollment as a Fourteenth Amendment property interest for Constitutional purposes. Accepting this argument, the *Ewing* Court held that, in matters related to the student’s academic performance, due process guarantees apply to preclude *arbitrary* dismissal.⁷¹

The *Ewing* case remains noteworthy in serving as the basis for guiding the academic decision-making process regarding student academic performance. Let us consider its facts. Upon enrollment, Ewing encountered immediate difficulty in his medical school studies. He received marginally passing grades, several incompletes, and took an apparently significant number of makeup examinations; these academic difficulties persisted throughout a six-year period in which he was enrolled in the Inteflex program, a substantial portion of which included a reduced load enrollment. When he failed the National Board of Medical Examiners Exam, Part I, the nine members of the Medical School’s Promotion and Review Board individually reviewed his academic record and voted unanimously to drop him from the program. At Ewing’s request, the Board reconsidered its decision, and allowed him to appear personally and present his explanation for his deficiencies. He suggested that his failure was attributable to several personal events, and his examination schedule, emphasizing that:

“...his mother had suffered a heart attack 18 months before the examination; his girlfriend broke up with him about six months before the examination; his work on an essay for a contest had taken too much time; his makeup examination in Pharmacology was administered just before the NBME Part I; and his inadequate preparation caused him to panic during the examination.”

The Board considered his explanations, but again voted to dismiss him from the program on the basis of his overall record, notwithstanding that the school had frequently allowed students to repeat the NBME. Ewing then appealed his dismissal, on three occasions, to the Executive Committee of the Medical School, which denied him leave status or re-admission.

⁶⁹ 474 U.S. 214 (1985).

⁷⁰ 435 U.S. 78 (1978).

⁷¹ In *Horowitz*, the Court had observed that, where a medical student had been “fully informed of the faculty’s dissatisfaction with her clinical progress,” and “the ultimate decision to dismiss [her] was careful and deliberate,” any entitlement to fundamental fairness was satisfied.

Both the trial court and the court of appeals agreed that Ewing had no viable claim for breach of contract, but they disagreed whether he had a viable Constitutional claim. The Supreme Court resolved the conflict in the lower courts, holding that the record “unmistakably” demonstrated that the faculty’s decision to dismiss Ewing was made “*conscientiously and with careful deliberation, based on an evaluation of the entirety of Ewing’s academic career.*” (Emphasis supplied) The Court reasoned that judicial review of “genuinely academic decisions” should be limited by “great respect for the faculty’s professional judgment,” and that courts “may not override [faculty judgment regarding a student’s academic performance] unless the faculty’s decision shows “*such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.*” (Emphasis added). Citing Justice Powell’s opinion in *Horowitz*, the Court reaffirmed that: “University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation.” The fundamental rationale of *Horowitz* and *Ewing* was that judicial decision-making is not suited to question the professional judgment of experts in the academic disciplines about academic matters.⁷² Thus, unless the decision to dismiss a student on academic grounds is made outside the professional judgment of his academic mentors, the Constitution’s Due Process protections are not violated.

*Trotter v Regents of the University of New Mexico*⁷³ reaffirms the continued adherence to the *Horowitz* standard of judicial review, holding that there is a “significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct.”⁷⁴ The Court explained that, in cases of dismissal on genuinely academic grounds, ‘due process’ in the constitutional sense does not require a formal hearing. More specifically, the Constitution requires only that the student receive “prior notice of faculty dissatisfaction with his or her performance and...the possibility of dismissal, and [that] the decision to dismiss the student [be] careful and deliberate.” *Trotter* also holds that a university’s failure to follow its own rules, or a faculty member’s failure to expressly comply with university procedures does not, in itself, suggest the absence of due process. The ‘due process’ inquiry seeks a determination whether the student has been treated in a fundamentally fair way – and that inquiry may be satisfied even where university rules governing the dismissal process have not been literally followed.⁷⁵ Thus, while the university’s failure to follow its own rules may support a student’s

⁷² Such decisions, the Court reasoned (Citing *Keyishian v Board of Regents*, 385 U.S., at 603; *Sweezy v New Hampshire*, 354 U.S. 234, 250 (1957) and *University of California Regents v Bakke*, 438 U.S. 265, 312 (1978), invoke both collegial and institutional academic freedom.

⁷³ 219 F.3d 1179 (10th Cir., 2000).

⁷⁴ Sharon Trotter was dismissed three times from the University of New Mexico Medical School (UNMS) for poor academic performance. Her initial challenges to her dismissal were heard by an “Education Council” of the Medical School, and were the subject of a state court lawsuit. Her third dismissal was upheld by the University President, and the U.S. Department of Education Office of Civil Rights – which held that she had been afforded due process.

⁷⁵ Citing also *Hill v Trustees of Indiana Univ.*, 537 F.2d 248 (7th Cir. 1976); see also *Haberle v University of Alabama at Birmingham*, 803 F.2d 1536 (11th Cir., 1986). In *Haberle*, a Ph.D. candidate at UAB was academically dismissed following his failure (on two occasions) of the oral portion of a comprehensive examination, administered in the third year of his matriculation. He filed a grievance with the Deans of the

claim based on breach of contract, constitutional rights are not automatically implicated.⁷⁶

There is judicial commentary suggesting that the fundamental rule of judicial deference announced in *Horowitz* and *Ewing* will be applied in cases arising from academic dismissals at private colleges and universities – where the focus is not process, but the legitimacy of the evaluation of the student’s academic performance *per se*. Citing *Horowitz*, the Federal District Court for the Southern District of New York has recently re-affirmed this standard of review in *Ward v New York University*.⁷⁷ Ward suggests that, in a civil action against a private university based on alleged breach of contract, judicial review is limited to the question whether the defendants “...abided by their own rules, and...acted in good faith, or [whether] their action was arbitrary or irrational.”⁷⁸

Academic Misconduct and Ethics

Where student misconduct is the issue – rather than academic judgment about the quality of the student’s academic work – the case of *Carboni v Meldrum*⁷⁹ illustrates that the due process

Colleges overseeing his candidacy, and they appointed two impartial faculty reviewers, who approved the graduate committee’s supervision of Haberle’s academic program. Citing *Horowitz*, the Circuit Court held that the opportunity afforded Haberle to discuss his candidacy with the Deans, re-take the comprehensive examination, and obtain a review of his situation by his graduate committee and an *ad hoc* faculty panel satisfied the substantive due process concerns addressed by the Supreme Court. The circuit court reaffirmed that they would not override an academic decision of a graduate faculty committee unless it was such a substantial departure from accepted academic norms as to demonstrate that the committee did not exercise professional judgment.

⁷⁶ The conclusion to be drawn is not that the university is encouraged to be casual about its own rules governing academic dismissal – for poor performance *or* misconduct. Indeed, such rules should be known to faculty, and there should be substantial compliance. The point is, simply, that constitutional entitlements deal with fundamental fairness in academic matters – and federal courts will not (under the *Horowitz* doctrine) interfere with the professional judgment of faculty on the question of the student’s academic performance. See also *Hines v Rinker*, 667 699 (8th Cir., 1981), summarily rejecting a medical student’s claim that the University of South Dakota School of Medicine acted arbitrarily when it refused to change certain of his failing grades to “incomplete.” The court held that, where the school had legitimate policies relating to grades, and the circumstances under which a grade of incomplete could be awarded, the court would not interfere with the decision to dismiss plaintiff when he failed examinations, failed to present patient work-ups, and failed to submit chart audits on time. The court stated that “...respect for the discretion of those best qualified to make such judgments dictates that the Medical School and not the federal courts should determine the qualifications of appellant to continue his medical studies.” In accord, *Schuler v University of Minnesota*, 788 F.2d 510 (8th Cir., 1986), upholding dismissal based on student’s failing grades, and rejecting her argument that she had a right to challenge the structure of an oral examination – where she was on notice of her failure and the department’s informal consideration of her grievance in two meetings (at which she was present) satisfied constitutional due process requirements in academic matters.

⁷⁷ 2000 U.S. Dist. LEXIS 14067 (S.D.N.Y., 2000).

⁷⁸ The Court held that the University’s professional judgment about Ward’s academic performance is not questionable, as a matter of law, based upon the student’s general allegation that the faculty member serving as her area preceptor had a personal bias, and wanted her to be dismissed from the program. How a particular faculty member’s assessment of a student would be received, and the weight it would be accorded, is an aspect of the evaluation process committed to the University’s discretion.

⁷⁹ 1996 U.S. App. LEXIS 31321 (4th Cir., 1996).

issue is more straightforward (assuming the student's interest in continued enrolment). Carboni was dismissed from the graduate program in Veterinary Medicine at the Virginia-Maryland Regional College of Veterinary Medicine, on the basis of a finding that she cheated on a "special, course comprehensive make-up examination" in Urology. The professor's intervention was based on information provided to him by his secretary, who told him that, during the exam, she had seen someone in a women's bathroom stall, with papers around her feet, and that, shortly thereafter, she heard papers rustling under Carboni's clothes as Carboni left the bathroom. When subsequently questioned by the Associate Dean of Academic Affairs, Carboni denied that she had cheated, whereupon the Associate Dean instructed two female staff assistants to take Carboni to the women's bathroom to search her. At the request of the assistants, Carboni partially disrobed, and no notes or other evidence of cheating was found. However, notes were found inside a credenza in the exam room, and, afterwards Carboni apparently admitted that she had placed other notes in a sanitary napkin disposal in the bathroom stall, but denied that she had looked at any of these notes during the exam. Carboni was not permitted to finish the exam, and was subsequently brought before the Honor Board, which found her guilty of cheating and placed her on a six-week academic suspension.

The central issue in Carboni's lawsuit arose when her professor refused to allow Carboni to take another make-up examination, which caused her original failing grade to be reinstated. As a result, Carboni was dismissed not for cheating, but for receiving an "F" in the Urology class. In the lawsuit, Carboni alleged that the University conducted an unreasonable search of her person in violation of her Fourth Amendment rights, and violated her right to Due Process of Law when it administratively increased her "academic" punishment from suspension to dismissal from the program. The Fourth Circuit Court of Appeals upheld the trial court's dismissal of Carboni's Fourth Amendment claim, on the ground that the professor and dean had "every justified reason to suspect that [Carboni] was cheating" and that they could therefore authorize [an administrative] search of her person – especially when her conduct indicated her consent to the search. The Court of Appeals also upheld Carboni's dismissal, holding that her professor had discretion, independent of the Honor Board, to refuse to allow Carboni to take a make-up examination.

Judge Hall's dissent in *Carboni* reveals the lack of agreement among judges about both the law and best practices in cases where concerns of faculty about student academic performance raise issues which are both disciplinary and academic in nature. Although concurring in the dismissal of Carboni's Fourth Amendment claim, Judge Hall described the university's actions as "[bordering] on the outrageous," and agreed with the result only because Carboni had not objected to the partial strip search of her person. In language redolent of the fallacies of both displacement and reification discussed earlier, he dissented from the majority's dismissal of Carboni's due process claim, arguing that – under *Ewing* – she had a "*colorable claim of a liberty or property interest in obtaining her degree*." In his view of the facts supporting this claim, there was evidence that the professor and the Associate Dean had exerted "improper influence and control" over the school's disciplinary process.

Judge Hall's interpretation of *Ewing* and his view of the facts, while not affecting the outcome in the case (because the majority's finding for the university controls), nonetheless suggests that some courts (or some judges) might view the search of the student as violating her

Constitutional rights if the search were conducted over her objection. They might also view the professor's action, and Carboni's dismissal from the program, as being carried out in a manner which denied her a meaningful opportunity to address or respond to charges of misconduct. Judge Hall is suggesting that the professor's discretion is linked to his *academic* decisions about a student's performance, *not misconduct*, and that if Carboni was dismissed for misconduct – not academic failure – she was entitled to a hearing. His view of the situation is in direct conflict with the majority, which saw Carboni's dismissal as based on her failing grade in the course – something they viewed as an academic matter. This fundamental disagreement directly implicates the distinction in *Ewing* – on the issue of due process – between academic dismissals on the one hand and disciplinary dismissals on the other.

This distinction may be raised directly where a student claims that an 'academic' (performance-based) decision has been tainted by accusations of academic dishonesty or unethical conduct. *Wheeler v Texas Woman's University*⁸⁰ is such a case. Wheeler was denied an internship and dismissed from the University's Ph.D. program in Psychology following his receipt of unsatisfactory grades in both coursework and comprehensive examinations. More specifically, Wheeler demonstrated unsatisfactory and inappropriate administration of the Wechsler Intelligence Scales to test subjects, as well as in two oral comprehensive examinations administered by members of his Department's faculty.⁸¹ Various faculty members were also concerned about possible unethical conduct by Wheeler. In particular, concerns were expressed that he may have falsified or fabricated the identification of field subjects and represented sample answers from his text to be actual responses of field subjects. Despite these concerns, he was twice retained in the program, subject to stringent conditions of academic probation. When he failed to enroll in a course required by his second academic retention plan, he was dismissed on the recommendation of his faculty.

In his lawsuit alleging denial of due process, the Court held that, by *Horowitz* and *Ewing* standards, Wheeler was afforded basic due process. Viewing the decision to dismiss Wheeler as based ultimately on his substandard academic performance in classes, field experiments and his two oral comprehensive examinations, the Court held that these evaluations of his performance had been "careful and deliberate" and had included providing him with a specially tailored remedial plan. The Court concluded that, although certain members of Wheeler's faculty were aware of, and concerned about, possible unethical behavior, their vote in favor of his dismissal was based upon their professional judgment regarding his unsatisfactory classroom performance and unsatisfactory grades in courses and the oral comprehensive exams.⁸²

⁸⁰ 168 F.3d 241 (5th Cir., 1999).

⁸¹ Both aspects of Wheeler's performance were evaluated by assigned faculty as the worst, or among the worst, that they had ever seen. Some faculty also observed that Wheeler had fallen asleep in class and exhibited other unsatisfactory classroom performance.

⁸² In fact, the Court observed, the faculty members administering the second oral comprehensive examination were unaware of any allegation of unethical behavior. The mere allegation of cheating, the Court held, did not require a hearing, where there was no proof that Wheeler was dismissed for misconduct. The fact that 'cheating' could have been a basis *per se* for dismissal does not raise due process inquiries, unless Wheeler was in fact dismissed for misconduct. Indeed, the Court explained further that an academic decision may include university concerns about a student's "lack of judgment and an inability to set priorities" and noted that, in *Ewing*, the Supreme Court had held that the university promotion and review board "was uniquely

Immunity Doctrine Regarding State Institutions and Suits for Damages

The question whether a student subjected to academic dismissal by a state university may seek monetary damages in a federal lawsuit alleging deprivation of due process was addressed in the 1980s by cases such as *Akins v Board of Governors*.⁸³ In *Akins*, senior nursing students enrolled in Chicago State University's Advanced Medical Surgical Nursing program alleged that program officials administered an invalid final examination, manipulated final examination questions and scores, and intentionally falsified or manipulated their test or clinical evaluations. The student's federal complaint alleged that these actions were in furtherance of a policy to reduce the number of nursing school graduates, in response to the school's poor success rate on the Illinois state licensing examinations. Claiming that their ability to obtain professional employment was hindered, and that they were caused humiliation, embarrassment and mental anguish, the students sought temporary and permanent injunctive relief, including reinstatement in the nursing program – as well as compensatory and punitive damages. The Federal Court of Appeals held that the State (and therefore the institution) was constitutionally immune from a federal claim for monetary damages, but that prospective injunctive and declaratory relief against the named state officials was available, regardless of whether they were sued in their official or individual capacities – and that monetary damages could be sought against the named officials in their individual capacities.⁸⁴ This qualified application of the Eleventh Amendment is important to public institutions and administrators. Equitable relief, such as reinstatement in an academic program, may be sought against program officials individually, or in their official capacity – and the institution may be subject to such claims. However, the court suggests that, in the rare instance that an academic official might intentionally violate a student's entitlement to a professional evaluation of his work, a claim for damages might be recognized against the official in his individual capacity.⁸⁵

'Due Process' in Cases of Academic Misconduct

Occasionally, the simple situation of an exam proctor's⁸⁶ observation of 'copying' is actually litigated. Such 'classic' situations raise the fundamental question of the scope of the

positioned to observe [the student's] judgment, self-discipline, and ability to handle stress, and was thus especially well situated to make the necessarily subjective judgment of [his] prospects for success in the medical profession.”

The Court dismissed Wheeler's constitutional and tort claims of harm to his reputation, holding that there was no evidence that statements of concern about unethical behavior were knowingly false, or damaging to his reputation – and that such communications among faculty responsible for evaluating him were privileged under the law of defamation.

⁸³ 840 F.2d 1371 (7th Cir., 1988).

⁸⁴ The claim was remanded on its merits.

⁸⁵ The court suggests that such a claim should be dismissed, on grounds of qualified immunity, where the official acts in good faith, and exercises professional judgment. *Vacated and remanded* on the question of the adequacy of the Notice of Appeal, 488 U.S. 920 (1988). *Appeal dismissed* as to all individuals other than Plaintiff Akins; original decision re-instated as to Plaintiff Akins in *Akins v Board of Governors*, 867 F.2d 972 (7th Cir., 1988).

⁸⁶ In the U.K., such a person would be known as an 'invigilator'.

process which should be followed where a student is subject to dismissal for academic-related misconduct. In *Than v University of Texas Medical Center*,⁸⁷ two exam proctors observed a third year medical student “repeatedly looking at another student’s paper during a National Board of Medical Examiners surgery examination.” A comparison of their examinations revealed identical answers to 88% of incorrectly answered questions. Following a state court proceeding challenging his expulsion, Than received notice of the charges, a disclosure of the evidence of his misconduct, and a hearing conducted by a professor from another medical school. Than was represented by counsel, and was allowed to call witness in his own behalf and to cross-examine adverse witnesses – including the proctors of the exam. In a brief opinion, the Federal Court of Appeals held that such a hearing more than satisfied Than’s Federal entitlement to due process, and resulted in a finding of cheating amply supported by the evidence presented.

The case is worth mentioning for two reasons. First, there is a tendency – particularly in state courts – to favor quasi-judicial hearings in matters of student discipline, whenever the student is subject to expulsion for *misconduct*. More noteworthy is that, in this context, educational institutions and courts disagree about the appropriateness of the involvement of counsel, and the right to confront and cross-examine witnesses. The *Than* case could certainly be read as encouraging such elaborate proceedings ‘to be safe’ in a litigation culture; however, universities have successfully argued in several high profile cases (including in the Fifth Circuit) that *Than*’s ‘trial type’ proceedings are not required to ensure fundamental fairness in matters of student conduct and discipline or employment. The university’s choice in the matter is important, because it affects students and faculty, and their rights and responsibilities when situations of academic misconduct arise.

Private Institutions: Contract and ‘Due Process’ in Academic Misconduct Cases

In the private sector, because the student-university relationship is entirely contractual and does not contain constitutional elements, cases such as *Ewing* and *Than* regarding due process in the public sector are not, of course, controlling. Instead a university’s fundamental obligation is to follow its own rules.⁸⁸ This means that two issues arise in cases like *Carboni* which occur at private colleges. First, the student’s claim that s/he is entitled to a hearing prior to dismissal is grounded in contract – that is, that the college has chosen to provide in its own policies a kind of hearing as a condition precedent to the disciplinary dismissal of a student. Second, the entitlement to this ‘private’ due process will be pegged – as it is in the public setting – to the basis for dismissal – academic failure, versus misconduct in an academic setting.

*Corso v Creighton University*⁸⁹ illustrates these points. Corso was expelled from Creighton’s medical school based upon the school’s finding that he and other students collaborated on their first year exams. He was notified by a letter from the Associate Dean for Students, following the results of an investigation by a special committee appointed by the Acting Dean of the Medical School (at the request of the School’s Committee on Freshman Advancement). Corso was afforded the opportunity to participate in the proceedings leading to

⁸⁷ 188 F.3d 633 (5th Cir., 1999).

⁸⁸ *Schaer v Brandeis University* 735 N.E.2d 373 (Mass., 2000).

⁸⁹ 731 F.2d 529 (8th Cir., 1984).

his dismissal and chose to respond by letter. He denied any involvement in the alleged cheating, and requested reconsideration of his case and the opportunity to appear in person. He was given copies of the evidence supporting the allegation of cheating, but his request to appear before the school's Executive Committee was denied. Subsequently, the Acting Dean conducted his own investigation, which included interviews with 20-25 medical students, including Corso. Unknown to Corso, who again denied involvement, other students admitted involvement and implicated him. Despite the apparently similar involvement of all the students who admitted guilt, only Corso was expelled.⁹⁰

The legal issue raised by the *Corso* case was not whether Corso cheated and lied about his involvement. The issue concerned process – *i.e.* whether the University followed its own procedures in misconduct cases imposing the sanction of expulsion. The Court of Appeals reaffirmed that the relationship between a private university and its students is contractual. In this case, the University's Student Handbook – a part of that contractual relationship – created two procedural formats for student discipline: one for 'academic and academic-related' offenses, and the other for 'non-academic' offenses. The Dean and staff of the particular schools (*e.g.* the Medical School) had authority regarding "academic and academic-related disciplinary matters," while the Division of Student Affairs and the University Committee on Student Discipline had authority in all "non-academic student discipline." Under the 'University' disciplinary proceedings, a student was entitled to:

- (a) advance notice of charges of misconduct;
- (b) the names of accusers, and access to supporting documents;
- (c) a preliminary hearing for serious violations;
- (d) the assistance of an advisor; and
- (e) a hearing before the University Committee on Student Discipline, at which he could make an oral presentation.⁹¹

The Medical School regarded the cheating incident as an academic disciplinary matter and thus handled the matter internally, according to their own procedures, at the direction of the Acting Dean of the Medical School. However, when Corso sued, the federal trial court determined that he had been expelled for lying – not the cheating itself, on the grounds that Corso had been being the only student expelled.

Since Corso's offense was non-academic in the view of the trial court, he was entitled to the benefits of the University disciplinary process. The appellate court disagreed, and held that cheating on exams may be considered by the University to be an academic offense.⁹² However, the court also noted that the University's Student Handbook provided *inter alia* that:

⁹⁰ Three students were suspended; one was given the option of resigning in lieu of expulsion; and one was placed on probation.

⁹¹ The committee is made up of the Dean of Students, two faculty members, and three students. Four votes are necessary for expulsion.

⁹² Citing *Horowitz*, which might well be less than solid authority for the appellate court's conclusion. Horowitz was dismissed for her lack of clinical skills and competencies, *not academic misconduct*.

“[in] all cases where *misconduct* may result in *serious penalties*, all *procedural safeguards* are observed and the student has the *privilege of a hearing* before the *University Committee on Student Discipline*.” (Emphasis added).

This meant that the Medical School’s procedures - although appearing to authorize the School to handle the matter internally and without a hearing - were subject to the unqualified provisions of the Handbook as a matter of contract law. Accordingly, Corso was entitled to a hearing in the matter of his expulsion, *because the University had provided him with this right*.

The court’s holding in *Corso* is not based on constitutional demands for due process, but rather represents the court’s interpretation of the University’s own policies regarding suspension or expulsion in both academic-related and non-academic misconduct cases. The court’s clear guidance is that a private university may provide as it wishes, not only so far as the distinction between academic and non-academic misconduct is concerned, but also as to the process by which decisions will be made regarding suspension or expulsion. However, once a policy is established, the University may not disregard it on the grounds of ‘academic freedom’. This is the essence of contract law.

Fitness, and Physical or Psychiatric Disability

Overshadowing the issue of the academic ability of students is the question of fitness to practice. Fitness became a troublesome issue in higher education litigation in ‘extreme’ cases – *e.g.* cases which presented the need for subjecting a student to involuntary psychiatric withdrawal from an academic program. *Doe v New York University*⁹³ is such a case. It is a remarkable early case study both on the question of a student’s fitness for study and practice and on the decision-making process in situations presenting questions that suggest dismissal in spite of academic ability. The case remains important because it suggests a nexus between psychiatric disability on the one hand and professional misconduct or incompetence on the other, which is a matter of continuing concern to medical and bar associations.

‘Jane Doe,’ a California resident, was accepted to NYU’s Medical School after falsely representing in her application that she did not have any chronic or recurrent illnesses or emotional problems. In truth, while academically talented, Ms. Doe suffered from serious psychiatric disorders, which had manifested themselves in the form of numerous self-destructive acts and attacks upon others, followed by periodic treatments by psychologists and psychiatrists, as well as admission to several psychiatric hospitals. Following post-admission episodes of self-destructive behaviour and unsuccessful treatment, Doe was dismissed and was subsequently denied re-admission. She sued in federal court, under the authority of Section 504 of the Rehabilitation Act. Citing *Southeastern Community College v Davis*,⁹⁴ the Court of Appeal held that a medical school is entitled to insist upon “reasonable precautions or requirements which it would normally impose for safe participation by students, doctors and patients in its activities.”⁹⁵

⁹³ 666 F.2d 761 (2nd Cir., 1981).

⁹⁴ 442 U.S. 397 (1979).

⁹⁵ *Davis* is the seminal decision on this issue in disability law and education law, and established the basic rule that a university is not required to waive the fundamental curriculum requirements of a medical degree

Thus, even though Doe was protected by §504, if her disability “could reasonably be viewed as posing a substantial risk that [she] would be unable to meet [the School’s] reasonable standards,” NYU would not be required to alter or waive such requirements in order to accommodate her disability.⁹⁶ On the standards question, the Court cited *Board of Curators of University of Missouri v Horowitz*,⁹⁷ cautioning that “considerable judicial deference must be paid to the evaluation made by the institution itself,” so long as its decision is a matter of professional judgment and is not motivated solely by the desire to exclude the applicant because of her disability.⁹⁸ In the instant case, therefore, NYU was entitled to consider Doe’s mental impairment, as “directly relevant to her qualifications and...her ability to function as a student and doctor”⁹⁹ – and to deny her re-admission if she presented “any appreciable risk of harm” to herself, other students, physicians, or patients.

The Court of Appeals found substantial expert opinion diagnosing Doe as having ‘Borderline Personality’ disorder “requiring sustained treatment by well-trained therapists over a long period of time,” and “alteration of her lifestyle” to deal with the “unusual stress” of medical training and practice. However, because Doe had submitted to the Federal trial court the opinions of other treating psychiatrists that she was fit to pursue a medical career, the Court held that summary judgment for the University was not appropriate on the merits. Even though Doe’s experts did not rule out recurrence of ‘Passive-Aggressive Personality’ or ‘Borderline Personality’, their opinions were sufficient to establish an issue of fact regarding her fitness for re-admission. The Court’s opinion could send mixed signals regarding the issues of disability and fitness as factors in the admission or re-admission of students. On its facts, *Doe* simply enforces that aspect of the Federal judicial process which precludes entry of summary judgment where a genuine dispute exists about the central facts of a case – the facts which favor a ruling in favor of one party or the other. However, the larger message of the case seems to be that, ultimately, where a medical school has received substantial expert opinion that an applicant or student is medically unfit for the study or practice of medicine, or the medical specialty to which s/he aspires, a court will defer to that opinion so long as it supports the University’s professional determination that the student is unqualified, or less qualified than other applicants for admission, or unqualified for re-admission.

Doe is consistent with *Doherty v Southern College of Optometry*,¹⁰⁰ which addressed the disqualification of a student, where a *physical* disability affecting his eyesight, motor skills,

program as a means of accommodating the disability of an applicant who asserts that s/he is ‘otherwise qualified’ for admission to the program.

⁹⁶ Operative terminology would be different under the Americans with Disabilities Act, but the analytical approach would be the same, and *Davis* would remain intact on the issues of fundamental curriculum requirements and fitness to practice.

⁹⁷ 435 U.S. 78 (1978).

⁹⁸ This judgment may, indeed, include an evaluation of the applicant’s academic and experience-related qualifications, compared to other applicants, in a selective admissions process.

⁹⁹ The Court explained that NYU’s concerns would legitimately include the safety of Doe herself, other students, physicians, and patients, as well as the potential civil liability of the University for negligently exposing such persons to unreasonable risks in a medical environment.

¹⁰⁰ 659 F. Supp. 662 (W.D. Tenn., 1987).

sense of touch and manual coordination prevented the performance of limited, but essential clinical functions conducted by a practicing Optometrist.¹⁰¹ Such physical disability cases may present questions of academic judgment in the context of the question whether a student is ‘otherwise qualified’ for admission or study, or whether she has been afforded reasonable accommodation of her disability. In this context, courts will sustain the legitimate academic judgment of faculty and the legitimate academic evaluation of the student’s ability. In *Falcone v University of Minnesota*,¹⁰² for example, the court upheld the evaluation of medical faculty that a student could not synthesize data obtained in a clinical setting to perform clinical reasoning, which is an essential element of functioning as a medical student and ultimately as a physician.

Summary of the Current Posture of American Law

It is clear that the courts remain respectful of the judgment of faculty in disputes arising from the dismissal of students on genuinely academic grounds. Neither constitutional law nor contract law demand quasi-judicial hearings where students challenge the academic judgment of faculty responsible for evaluating their performance. Professional judgment will be upheld, and judicial inquiry will generally be limited to a determination whether faculty, or university administrators have acted arbitrarily, or outside the scope of their professional role. Just as clear is the judicial view that, where the college or university has established procedures governing academic dismissal, it has discretion to treat academic and academic-related matters differently from other misconduct, and to give faculty a larger role in the former. However, courts do view the university’s process, once defined, as having legal effect – and the institution is well advised to make sure that faculty and academic administrators understand the process and abide by it. Such compliance is suggested, not because the failure to do so will always be seen as a denial of ‘due process’ but because contract law and judicial concern for fairness require that serious regard be taken of the institution’s established process in academic dismissal cases.

PART 3: THE BRITISH EXPERIENCE

The Nature of the Student-University Relationship

Just as in the United States, the nature of the relationship between a student and a university is regarded in the United Kingdom as being primarily contractual. The requirement for British students to pay tuition fees - albeit that those fees are still subsidized by the state - which

¹⁰¹ Affirmed in part, reversed in part, *Doherty v Southern College of Optometry*, 862 F.2d 570 (6th Cir., 1988), *certiorari denied*, 493 U.S. 810. On appeal, the 6th Circuit also held in favor of the College on Doherty’s claim that the College’s modification of clinical proficiency requirements breached its contractual obligation to him regarding requirements for graduation from the program. *Doherty* remains important for its interpretation of *Davis* to hold that a college is not required to waive what it determines, in its professional judgment, to be an essential function subsumed by clinical study and practice – even if the function plays a limited role in the practice area in question, and might not be characteristic of all practices. See also *Alexander v Choate*, 469 U.S. 287 (1985), qualifying *Davis* by suggesting that ‘reasonable accommodation’ principles do apply to the institution’s academic program.

¹⁰² 388 F.3d 656 (8th Cir., 2004).

was controversially introduced by the Teaching and Higher Education Act 1998,¹⁰³ has accelerated the recognition of the shift to a “consumer contract”.¹⁰⁴ Even before this requirement was introduced, the courts had still come to the view that the relationship was contractual, holding that the student’s consideration was his or her opportunity cost in foregoing the possibility of studying at an alternative institution.¹⁰⁵ This presumably continues to be true for those students who are, even now, exempted from the requirement to contribute towards course fees, either because of low income, or because they are studying on an exempted course such as teacher training. The position will also remain unchanged when the contribution to fees becomes retrospective, so that students will pay only when their income has reached a designated level after graduation.¹⁰⁶

However, the courts have not been slow to recognize the tension, outlined in the first part of this paper, between contractual imagery and enforceable contractual rights. This was highlighted most recently by the Court of Appeal in *Clark v University of Lincolnshire and Humberside*,¹⁰⁷ which followed previous decisions such as that in *Moran v University College Salford (No 2)*.¹⁰⁸ In *Clark* Lord Justice Sedley said:

“The arrangement between ULH and the student is contractual ... Like many other contracts it contains its own binding regulations for dispute resolution ... Unlike other contracts disputes suitable for adjudication under its regulations ... may be unsuitable for adjudication in the courts. This is because there are issues of academic or pastoral judgment which the university is equipped to consider”.¹⁰⁹

Moreover, it is rare for there to be in place the “single document containing the full terms” that Samuels¹¹⁰ called for in 1973. The collection of regulations, ordinances, rules, codes of practice and representations made on university web sites or in hard-copy prospectuses serve rather to obscure the parties’ relative positions than to make them clear. Indeed, in *Assi v Leeds Metropolitan University*,¹¹¹ a case of admittedly unusual facts where both parties maintained that there was a contract (but could not agree as to its terms), both the trial and appellate courts found that there was actually no contract at all.

¹⁰³ See further T. Birtwistle and M. Askew, ‘The Teaching and Higher Education Act 1998 - Impact on the Student Contract’ (1999) 11 *Education and the Law* 89.

¹⁰⁴ D. Farrington, *The Law of Higher Education* 2nd ed. (London: Butterworths, 1998) at p. 307.

¹⁰⁵ See e.g. *Moran v University College Salford (No 2)* [1994] ELR 187.

¹⁰⁶ Higher Education Act 2004, Part 3.

¹⁰⁷ [2000] 3 All ER 752, CA: “... it is now accepted that a student starts in a contractual relationship with a university....” As quoted in *Halsbury’s Laws of England* vol. 15(2), para. 838.

¹⁰⁸ [1994] ELR 187 at 194.

¹⁰⁹ [2000] 3 All ER 194 at p. 212.

¹¹⁰ A. Samuels, ‘The Student and the Law’, (1973) 12 *Journal of the Society of Public Teachers of Law* pp. 252-265.

¹¹¹ Unreported, Court of Appeal, 16th February 2001.

The Legal Status of the Institution

Complicating the position even further are the different types of constitution of British higher education institutions (HEIs). It is clear that the constitutional position of American universities is determined by whether or not they are public or private institutions. The picture in the U.K., on the other hand, is more arcane.¹¹² While all British universities except for the University of Buckingham are publicly-funded,¹¹³ this does not mean that they all enjoy the same status in law. In fact, such status is primarily determined by whether or not the university was founded before or after 1992. All British universities founded before 1992 - including the Oxbridge colleges but excluding the universities of Oxford and Cambridge themselves - were established by Royal Charter.¹¹⁴ Normally the Charter would *inter alia* identify the person with final responsibility for settling disputes regarding the rules, ordinances and regulations of the institution. This person came to be known as the Visitor. Often the Queen, Lord Chancellor or Archbishop of Canterbury would be named as the University Visitor. Some charters failed to specify the identity of the Visitor but, since the issuing of a Royal Charter signifies some act of beneficence by the monarch, s/he was deemed to have reserved the power of visitation for him- or herself, which meant in practice that intra-university disputes would usually be settled through the offices of the Lord Chancellor.

The granting of a Royal Charter is one of the very few 'prerogative powers' still exercised by the monarch after the constitutional settlement following what is generally known as the Glorious Revolution in 1688. A prerogative power is similar to a presidential decree in many civil law countries and is not subject to the scrutiny of the courts unless and until Parliament passes an Act to limit or abolish it. (Other such powers include the conferring of honors, and international matters such as the recognition of foreign states, the conclusion of treaties and the declaration of war.) The creation of the visitorial jurisdiction by the prerogative power of Royal Charter therefore meant that no dispute within a university or college founded before 1992 - with the exceptions of the universities of Oxford and Cambridge - was justiciable in a court of law,¹¹⁵ (although employment issues were removed from the Visitor's jurisdiction by the Education Reform Act 1988). Not only did this non-justiciability mean that any dispute that could not be settled informally by the parties had to be taken before the Visitor for a formal adjudication, it also meant that the courts would refuse to hear any applications to have them review a Visitor's decision, even if it were alleged that s/he had made an error of law. Thus Mr Justice (now Lord) Hoffmann held in *Hines v Birkbeck College* that the jurisdiction of the courts

¹¹² For a fuller account of the case law emanating from the distinctions between the types of universities, see T. Kaye, 'Academic Judgement, the University Visitor and the Human Rights Act 1998' (1999) 11 *Education and the Law* 165.

¹¹³ All publicly-funded institutions receive some private funding, typically in the form of sponsorships or endowments. But only one, the University of Warwick (which has many American donors), comes close to receiving half its income from private sources.

¹¹⁴ Bodies such as the Royal College of Art and the Royal College of Music also have a Charter, but they are not universities.

¹¹⁵ *Thorne v University of London* [1966] 2 QB 237 (CA).

and of university Visitors is mutually exclusive.¹¹⁶ Although this was originally taken to imply that the university could not have entered into contractual arrangements with either its faculty or students,¹¹⁷ this view changed during the twentieth century so that the courts recognized the existence of a contractual relationship but insisted that it was a relationship over which the visitor had exclusive jurisdiction.¹¹⁸ It accordingly follows that visitors can and do make decisions regarding allegations of breach of contract, and are prepared to make awards of damages in appropriate cases (see *infra*), a practice that is easier to accept when it is realized that it is now the norm for a practicing judge to be appointed to adjudicate the dispute. Whether that decision can now be challenged in a court of law is a topic for further examination.

HEIs created in or after 1992, coupled with the universities of Oxford and Cambridge, have a different legal status because they have all been established or recognized not by Royal Charter but by Act of Parliament. The current legal foundation of the universities of both Oxford and Cambridge, for example, was established by legislation in the sixteenth century.¹¹⁹ The other statutory HEIs are of much more recent vintage, having been set up by or under the Further and Higher Education Act 1992. They include the private University of Buckingham but are predominantly former polytechnics ‘upgraded’ according to the policy of the then Thatcher government, which was determined to abolish the so-called ‘binary divide’ between higher education and vocational instruction. None of these institutions have a Visitor and, like any other creature of statute, they are subject to judicial scrutiny just like any other organization.¹²⁰

Academic Misconduct¹²¹

The seminal case so far as judicial intervention regarding a matter of academic judgment is concerned involves a ‘post-1992’ university. In *R v Manchester Metropolitan University ex parte Nolan*¹²² a disciplinary committee had found the applicant guilty of attempting to secure an unfair academic advantage during the course of two law examinations, but not guilty of cheating. The committee, however, declined to make a recommendation as to the course to be adopted by the Board of Examiners. The latter took it upon itself to treat the applicant as having cheated, and thus deemed him to have failed all six of his examinations without the possibility of his being allowed to re-sit them. He applied for judicial review on the grounds that:

- (a) he had not been given a fair and impartial hearing;
- (b) the Examination Board had not taken account of all relevant material; and
- (c) the penalty was out of all proportion to the offense committed.

¹¹⁶ [1985] 3 All ER 156.

¹¹⁷ See D. Farrington, *op. cit.*, n. 7, para 7.21.

¹¹⁸ *Thomas v University of Bradford* [1987] 1 All ER 834 (HL); *R v Lord President of the Privy Council ex parte Page* [1992] 3 WLR 1112 (HL).

¹¹⁹ Oxford and Cambridge Act 1571.

¹²⁰ *R v Manchester Metropolitan University ex parte Nolan* [1994] ELR 380 (QBD); *R v University of Cambridge ex parte Evans* [1998] ELR 515 (QBD).

¹²¹ This section draws heavily from T. Kaye, *op. cit.*, n. 108.

¹²² [1994] ELR 380 (QBD).

The court did not accept (a) and (c) *per se* but found that, since crucial evidence considered by the committee had not been considered by the Board and that the Board had not permitted the applicant to be present or represented while it assessed his case (in which case the missing evidence could have been drawn to the Board's attention), there were good grounds for granting the application for judicial review. Accordingly, orders were issued to quash the decision of the Examination Board and to compel the Board to consider the matter afresh in the light of all the relevant evidence.

Mr Justice Sedley - now Lord Justice Sedley, and known as the leading expert on matters of educational law among the senior judiciary - made the following damning comments, which underline the fact that the courts are becoming increasingly ready to look into the process by which academic judgments are reached:

“It is, with respect, not easy to understand how a board of law examiners was able to conclude that where the written procedure allocated fact-finding to a separate body which heard and evaluated evidence and then gave to the examiners the task of deciding on penalty, it was open to the latter body not only to substitute a different finding but to consider penalty under a different set of rules... The key point is that it is the disciplinary committee and not the board of examiners which determines whether or not Mr. Nolan had cheated... it is not for the ... board to reconsider the facts of the case and to substitute its own conclusion for that of the disciplinary committee.”¹²³

The same judge was even prepared to flex a little judicial muscle so far as the pre-1992 institutions with Royal Charters were concerned. In *R v University Funding Council ex parte Institute of Dental Surgery*, for example, he said:

“We would hold that where what is sought to be impugned is on the evidence no more than an exercise of academic judgement, fairness alone will not require reasons to be given. This is not to say for a moment that academic decisions are beyond challenge. A mark, for example, awarded at an examiners' meeting where irrelevant and damaging personal factors have been allowed to enter into the evaluation of a candidate's written paper is something more than an informed exercise of academic judgment. Where evidence shows that something extraneous has entered into the process of academic judgement, one of two results may follow depending on the nature of the fault: either the decision will fall without more, or the court may require reasons to be given, so that the decision can be seen to be sound or can be seen or (absent reasons) be inferred to be flawed.”¹²⁴

Indeed, although this commentary seemed to swim against the prevailing tide of judicial opinion that disputes within chartered universities were beyond the reach of the courts, there had, in fact, already been one example of judicial preparedness to intervene where such “irrelevant and damaging personal factors” had been allowed to enter into the process of academic judgment. That was the case of *R v University of Aston Senate ex parte Roffey*,¹²⁵ where the Court of Appeal said that, notwithstanding the existence of a power to appoint a Visitor reserved in the university's charter, it would have been prepared to intervene on the students' behalf had they not delayed so long in seeking redress.

¹²³ [1994] ELR 380 at pp. 388-9.

¹²⁴ [1994] 1 All ER 651 at pp. 669-670.

¹²⁵ [1969] 2 QB 538.

‘Due Process’: Substantive and Procedural Fairness

The cases of *Nolan, Institute of Dental Surgery* and *Roffey* illustrate what might be called, in American terminology, a developing law of ‘due process’ within higher education institutions. The English judiciary have preferred simply to talk in terms of fairness, and this nomenclature has received parliamentary support in the form of three significant pieces of legislation. The first two apply to all HEIs and are the Unfair Contract Terms Act (UCTA) 1977 and the Unfair Terms in Consumer Contracts (UTCC) Regulations 1999,¹²⁶ which repealed and replaced regulations of the same name issued in 1994. The third, whose application to private bodies is unclear but which undoubtedly applies to all universities in the U.K. - except, perhaps, the University of Buckingham because it is privately-funded - is the Human Rights Act (HRA) of 1998. The standardization of the terminology does, however, mask the fact that ‘fairness’ (just as ‘due process’ in the U.S.) has two elements: substantive and procedural. As their titles imply, UCTA 1977 and the UTCC Regulations 1999 are applicable to a much wider range of contracts than just those involving students and universities. They are designed to address different, but related, issues of perceived substantive unfairness in contracts. The main impact of HRA 1998 on the university sector, on the other hand, is procedural. Through its incorporation into English law of Article 6 of the European Convention on Human Rights, it grants the right to a fair hearing to anyone whose ‘civil rights’ are affected by the actions of a public body.

Procedural Fairness: The Right to a Fair Hearing

The problem for chartered universities after the passage of HRA is that, as one of the current authors has written before:

“the determination of disputes by a University Visitor simply does not pass muster. Hearings are frequently delayed for long periods until such time as the Visitor is available: in such cases they will fall foul of Article 6 by reason of unreasonable delay. Indeed, Visitors sometimes choose not to hold a hearing at all. This too would be a clear breach of article 6(1) unless the student voluntarily agreed to waive his or her right to a hearing.. Moreover, Visitorial hearings rarely allow for each party to question the other’s evidence in any systematic manner: they are simply conducted according to procedures decided upon by the Visitor.... Indeed, there may even be doubts as to whether the Visitor is a truly ‘independent and impartial tribunal’ within the meaning of Article 6 since not only is he appointed under the HEI’s charter by the university’s founder (or the Queen), the Visitor may then himself appoint someone else to deputise for him in fulfilling that role. This is certainly not the manner in which impartial tribunals are normally expected to be set up: some sort of legislative framework or constitutional structure identifying the tribunal’s personnel would seem much more appropriate.”¹²⁷

Mr Justice Collins has recently alluded to the same issue when remarking in court, albeit *obiter*, that “it is at least arguable that the Visitor is not an independent tribunal since he is directly involved in the university”.¹²⁸ The substance of the complaint before Mr Justice Collins was, however, that the Visitor - the Duke of Kent - had unlawfully delegated his power to make

¹²⁶ SI 1999 No. 2083, giving effect to the European Council Directive 93/13/EEC (as amended).

¹²⁷ T. Kaye, *op. cit.*, n. 108 at pp. 178-179.

¹²⁸ *R (on application of Varma) v HRH The Duke of Kent* [2004] EWHC 1705 (ADMIN), [2004] All ER (D) 293 (Jul) para. 26.

adjudications on disputes within Cranfield University. On the facts, the judge held that, although the Visitor had asked someone else to conduct the investigation, the Visitor had nevertheless reached his own decision after reviewing both the report of the investigation and the author's recommendation. Interestingly, however, he also concluded that, if the Visitor had not made his own decision, then the courts would indeed have been prepared to consider the matter: a view which echoes the approach of Mr Justice Sedley a decade ago.

After considerable lobbying both from students and academics, the government eventually became alive to the likelihood that the jurisdiction of the Visitor will not stand scrutiny under HRA 1998 or Article 6 of the European Convention and reacted by creating a new, independent body with the power to investigate student complaints.¹²⁹ The Office of the Independent Adjudicator has already been active - initially, until the legislation came into force on November 1, 2004,¹³⁰ on an informal basis - and has issued statements about not only the case work in this first pilot phase, but also the fact that damages have been awarded in appropriate cases.¹³¹ The level of damages will surely have been a disappointment to all claimants given the small amounts involved (hundreds of pounds rather than thousands).

Substantive Fairness and the Student as Consumer

It is difficult to quarrel with any attempt to ensure that individuals are treated in a substantively fair manner. But the language of both UCTA 1977 and the UTCC Regulations 1999 unfortunately binds this laudable goal to the world of commerce and the market-place. The application of these pieces of legislation to the student-university relationship can therefore be said to exemplify the commodification of the right to higher education discussed in the first part of this paper. UCTA 1977, for example, applies to contracts where one party is a "business". Yet this is defined in section 14 as including "a profession and the activities of any government department or local or public authority", so that it applies to all HEIs, whether funded privately or from the public purse. The inappropriate use of the language of the market-place in an educational context is continued in section 12, where a student is defined as "dealing as consumer" (*sic.*) simply because "he neither makes the contract in the course of a business nor holds himself out as doing so".¹³² Under section 3(2) the party which is a business cannot rely on any contractual term to seek to "limit, exclude or restrict any liability" for breach of contract; nor can it "claim to be entitled ... to render a contractual performance substantially different from that which was reasonably expected ... or to render no performance at all ... except in so far as ... the contract term satisfies the requirement of reasonableness."

This means, for example, that withdrawing a degree program to which a student has already been admitted will be deemed to violate UCTA 1977 unless suitable compensation is paid or an appropriate alternative is made available (whether within that particular university or

¹²⁹ Higher Education Act 2004, Part 2.

¹³⁰ Higher Education Act 2004 (Commencement No. 1 and Transitional Provisions) Order 2004, SI No. 2781.

¹³¹ P. Curtis, 'Ombudsman reveals secret world of student complaints', *The Guardian* 25th November 2004.

¹³² Section 12(1)(a). Other provisions deal with contracts formed between two businesses and with contracts involving the sale of goods or hire-purchase, which are obviously not relevant to the student-university relationship.

at another institution which is at least as convenient from the student's point of view). With universities increasingly 'rationalizing' their provision as demand for certain courses diminishes - particularly in the sciences and modern foreign languages - this has proved to be a very powerful tool in the hands of students: so powerful, in fact, that no disputes about its effect have been taken all the way to the courtroom.

The UTCC Regulations 1999 are arguably of even more significance. Their ambit is slightly different from UCTA 1977 in that they affect only standard-form contracts between a "seller or supplier" and a "consumer"¹³³ but again, applied to the world of academia, that terminology has the effect of commodifying the right to higher education. The substantive impact of the Regulations is wider than UCTA 1977, however, because the former are not limited to exclusion or limitation clauses. In fact, under the UTCC Regulations 1999, *any* unfair terms - other than those relating to "the definition of the main subject-matter of the contract [and] the adequacy of the price"¹³⁴ are unenforceable against the consumer.¹³⁵ An 'unfair term' is one which "causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer".¹³⁶ The wide-ranging nature of this definition is sufficiently extensive to capture anything from the failure to provide a specific course or instruction of the type promised to the refusal of a university to withhold the conferment of a degree until it has received payment for a library fine. The Regulations have thus effectively superseded UCTA 1977 so far as the university-student relationship is concerned.

Compensation Awards or Agreements

The effect of the UTCC Regulations 1999 - and, to a lesser extent, UCTA 1977 - has been two-fold. First, they effectively deny HEIs any ability to use contractual terms to provide a defense to a claim other than one relating solely to matters of academic judgment. This means that any allegation of malpractice - which must be dealt with as a case of alleged negligence when brought against publicly-funded schools, because no contract exists¹³⁷ - can always be framed in terms of an action for breach of an express or implied term in a breach of contract. Thus in *Buckingham v Rycotewood College*,¹³⁸ for example, students who had enrolled on a sub-degree course on historic vehicle restoration were held entitled to damages because the substance of the course did not live up to the claims in the prospectus, the teaching was poor and provided by inexperienced instructors, and there were inadequate facilities in which to undertake practical work. The level of damages awarded in that case to each student was £10,000, but this should on no account be treated as a real benchmark. There is little doubt that the judge arrived at the figure as a matter of virtual discretion and, since it was heard only in the county court - the absolute

¹³³ Regulations 3(1), 4(1).

¹³⁴ Regulation 6(2).

¹³⁵ Regulation 8. The rest of the contract continues to bind the parties if it is capable of continuing in existence without the offending term.

¹³⁶ Regulation 5(1).

¹³⁷ *Phelps v London Borough of Hillingdon* [2000] 3 WLR 776. See also T. Birtwistle, 'Liability for Educational Malpractice' (2002) 3 *Education Law Journal* 95.

¹³⁸ Unreported, 2003.

lowest tier of the English civil legal system - the case sets no precedent whatever and is likely soon to be quietly forgotten. This would not be the first time an obvious but serious error had been made in the county court in a case involving a university¹³⁹ and, unfortunately, it is unlikely to be the last.

But the fact that universities know that the contract will not afford them a defense to conduct which falls short of what could reasonably have been expected has led to a number of out-of-court settlements of disputes, often incorporating confidentiality clauses which prevent the parties discussing the details in public. Perhaps the most widely-publicized case (in which one of the current authors had indirect but, as it turned out, significant involvement) concerned the case of a mature student who had given up his employment to enroll in a law degree program at Wolverhampton University. The program apparently turned out to be unsatisfactory in a number of respects and the university, with remarkable speed, agreed to settle his complaints with a payment of £30,000.

The clearest indication of the way in which compensation for breach of contract should be calculated comes, in fact, from a decision of the Lord Chancellor, albeit acting not in his judicial capacity in the House of Lords but as the Visitor of the University of Exeter. A Ph.D. student, Russell Ogden, complained that his research at the university was damaged by the latter's actions to the point where it could not be completed, whether at Exeter or any other university. The University Ethics Committees had approved Ogden's proposal that he give to his data subjects certain assurances regarding confidentiality, but the University had subsequently refused to recognize this approval and claimed not to be bound by it (even when its own Grievance Committee then found in Ogden's favor). The Lord Chancellor found this to be a clear breach of contract by the University and awarded Ogden damages of £62,827.73. This sum comprised:

a)	Costs of undertaking a further Ph.D.	£37,400.00
	Interest	£11,025.32
b)	Loss of opportunity to earn a higher income over 2 years	£13,200.00
c)	Cost of attendance at Committee of Enquiry	£928.65
	Interest	£273.76

Claims for the expenses of living in Exeter and for loss of income from the employment given up while undertaking his Ph.D. research were disallowed (since Ogden would have to have met his living costs in any event, and would have had to renounce his previous employment in order to embark on a Ph.D. whether at Exeter or elsewhere). Claims for compensation for a sullied reputation and for his withdrawal of monies from a pension fund in order to meet various expenses were dismissed for want of proof of causation.

The Office of Fair Trading

The second point of impact of the UTCC Regulations 1999 has been through regulation 13, which empowers the Office of Fair Trading (OFT) - again, note the terminology - to

¹³⁹ See, for example, *University of East Anglia v Hanuman* (unreported) 17th August 1999, where the Court of Appeal quashed the award of a sum *against* a student which a county court had made without foundation.

investigate allegations of the use of unfair terms in contracts. To this end the Director General has the power to demand that the OFT be supplied with copies of documents and information about the actual and/or recommended use of such documents.¹⁴⁰ The OFT can then issue reports which effectively ‘name and shame’ any bodies found to be using unfair terms and which also indicate what changes have been made to the documentation following investigation. Although the Director General cannot demand that changes to contracts be made without taking action in court, the fact that the OFT can bring such action against anyone who does not comply¹⁴¹ has in practice proved a powerful motivational force. As a result many institutions have voluntarily rewritten their standard terms in order to withstand the scrutiny of the OFT. This power runs alongside a longer-standing power, granted by the Trade Descriptions Act 1968, which enables the OFT to bring a prosecution in the *criminal* courts against any business - which again includes an HEI - which makes any misrepresentation (whether knowingly or not) as to the courses or facilities available.¹⁴² One of the first organizations to be investigated by the OFT under the Regulations was a university.¹⁴³ In 1999 the OFT declared “training and education institutions” to be a “problem sector”¹⁴⁴ and it has since obtained numerous changes to terms in the student-university contract.¹⁴⁵

PART 4: CONCLUSION

Comparing the U.S. and U.K. Experiences

It is clear that the history of public law, and contemporary imagery of contract law has contributed to a perceived ‘rights’ culture in higher education and to the commodification of learning. However, in neither the United States nor the United Kingdom has it proved straightforward to translate that imagery into legally-meaningful contractual terms. There are nevertheless clear differences in the approaches taken in the two countries. The experience in the U.S. shows a far greater readiness on the part of the courts to defer to the decisions of university authorities, even when matters extend beyond issues of ‘pure’ academic judgement. In the U.K., by contrast, the traditional mechanism for protecting higher education from the demands of the market-place - namely the Visitor - is being understandably swept away as an unjustifiable anachronism from a bygone age. Judicial deference shows signs of going with it. Backed by domestic legislation the British courts have indicated a new readiness to read some aspects of the university-student contract along lines more familiar in the world of commerce. Indeed, once out-of-court settlements and adjudications of the Office of Independent Adjudication are taken

¹⁴⁰ Section 13(3).

¹⁴¹ Section 13(6).

¹⁴² Section 14.

¹⁴³ In fact, Anglia Polytechnic University: see OFT, *Unfair Contract Terms*, Bulletin No. 5 (London: OFT, 1998) p. 20.

¹⁴⁴ OFT, *Unfair Contract Terms*, Bulletin No. 6 (London: OFT, 1998) paras 1.14-1.15.

¹⁴⁵ The regular OFT *Unfair Contract Terms* Bulletins may be downloaded from the OFT web site at <http://www.of.gov.uk/News/Publications/Leaflet+Ordering.htm>.

into account, it might even be said that settlements for monetary compensation are almost routine, even if the sums involved are usually very small.

This movement towards commodification of the ‘right’ to higher education in the U.K. has been strongly influenced by Europe. The UTCC Regulations 1999, for instance, put into practice a Directive from the European Union, while the developing jurisprudence on procedural fairness leans increasingly on the interpretation of the right to a fair hearing in Article 6 of the European Convention on Human Rights. Nowhere is this reified ‘right’ more clearly demonstrated than in the call by the National Union of Students in Europe for the abolition of “explicit selection mechanisms [for higher education courses] such as *numeri clausi* and entrance exams”.¹⁴⁶ In the light of the fact that the overwhelming majority of HEIs throughout Europe are funded from the public purse, it is ironic that the focus of European politicians on the creation of a single market and a ‘level playing-field’ for all has been more of a factor in the commercialization of the student-university relationship than any entrepreneurial American thinking.

Academic Judgment: A Lesson to Learn

But there is one aspect of the story which remains the same on both sides of the Atlantic. Wherever an issue of ‘pure’ academic judgement arises, such as the grading of a paper or the awarding of a degree, the courts in both jurisdictions are still unequivocal in upholding the principle that the courts do “not act as a Court of Appeal from university examiners.”¹⁴⁷ While the ability to apply traditional contract law doctrine to the world of academe has thus far been a mainstay in the struggle to uphold the university as a community of scholars rather than as a place where rights to qualifications are traded, recent U.K. experience in particular suggests that the problematical nature of the student-university contract may yet prove to be a major tool in the undoing of that ideal. Where questions of true academic judgment become entangled with other matters such as incompetent teaching or postgraduate supervision, or misrepresentation of facilities, the melding of the issues acts virtually as an invitation to the courts to start thinking about extending their jurisdiction.¹⁴⁸ If HEIs cannot put their own houses in order, then the courts may feel obliged to act. The lesson for all HEIs to learn on both sides of the Atlantic is surely to draft and implement contracts, policies and procedures which delineate very clearly the dividing lines between matters of academic judgement on the one hand and disciplinary or administrative issues on the other.

¹⁴⁶ ESIB, Brussels, 18th November 2001.

¹⁴⁷ *Thomas v University of Bradford* [1966] 2 QB 237 *per* Lord Diplock at p. 243.

¹⁴⁸ See e.g. *R v Manchester Metropolitan University ex parte Nolan* [1994] ELR 380 (QBD); *Carboni v Meldrum* 1996 U.S. App. LEXIS 31321 (4th Cir., 1996).