

# NO MORE “BUSINESS AS USUAL” IN HIGHER EDUCATION: IMPLICATIONS FOR U.S. AND U.K. FACULTY

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INTRODUCTION .....	500
I. STRUCTURAL CHANGES.....	502
A. Funding.....	502
B. Productivity and Accountability.....	503
C. Challenges to Faculty Unionization .....	505
D. Rise of the For-Profit Sector.....	506
E. Changes in Student Preparation and Attitudes .....	508
II. THE STUDENT-AS-CONSUMER TREND IN THE U.K.....	514
III. INSTITUTIONAL RESPONSES AND IMPLICATIONS FOR FACULTY.....	519
A. Increase in Non-Tenure-Track Faculty.....	520
B. The U.S. Supreme Court and Academic Freedom .....	526
C. Increasing Governance Disputes in the U.S. ....	528
D. Challenges to Academic Judgments in the U.S. ....	529
IV. QUALITY AUDIT–STUDENT ENGAGEMENT .....	533
V. IMPLICATIONS FOR FACULTY WORK-LIFE AND RIGHTS .....	535
CONCLUSION.....	539

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## INTRODUCTION

Higher education in both the United Kingdom and the United States has undergone substantial change in the past several years.<sup>1</sup> The rapid spread of technology has supported a “viral” emergence of online courses, including massive open online courses, also known as “MOOCs.”<sup>2</sup> Funding of higher education in both countries has undergone shifts as public support has declined, a fee structure has been implemented in the United Kingdom, and for-profit institutions have increased in number and reach in both nations.<sup>3</sup> Employment patterns of college faculty have shifted in both countries as well, to the dismay of many “traditional” academics.<sup>4</sup> A chorus of critics is questioning the value of a college degree as the global recession continues, stubbornly unabated.<sup>5</sup> What do these changes mean for higher education, and for the faculty who serve these institutions?

An article in the *Chronicle of Higher Education* quoted the following statement from a representative from a conservative think-tank: “students and parents can no longer afford business as usual from our state’s higher-education institutions.”<sup>6</sup> Although the statement referred to public colleges and universities in Texas, similar sentiments and statements have also been directed at public and private higher education throughout the U.S. and the U.K. The higher education communities of both nations are facing challenges to “business as usual” that were unimaginable a decade or more ago. In the U.S., influential scholars are claiming that college students graduate knowing no more, or little more, than they did when they entered.<sup>7</sup> Pundits claim that postsecondary education costs too much and that students do not

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1. See, e.g., Eliza Anyangwe, *The Biggest Challenges in Higher Education: What You Said*, GUARDIAN (Feb. 9, 2012), <http://www.theguardian.com/higher-education-network/blog/2012/feb/09/challenges-for-higher-education>.

2. For a discussion addressing the efficacy of massive open online courses (MOOCs), see Dan Berrett, *Debate Over MOOCs Reaches Harvard*, CHRON. HIGHER EDUC. (May 10, 2013), <http://chronicle.com/article/Debate-Over-MOOCs-Reaches/139179/>. It is also worth noting that the current debate regarding MOOCs represents the latest in an ongoing discussion about the potential impact of the Internet on higher education. See, e.g., D.J. Farrington, *Borderless Higher Education: Challenges to Regulation, Accreditation and Intellectual Property Rights*, 39 MINERVA 63 (2001).

3. For a discussion of shifts in funding of public higher education, see *infra* Part I.A.

4. For a discussion of changes in faculty employment patterns in both countries, see *infra* Part III.A.

5. This trend is discussed in the next paragraph of this article.

6. Katherine Mangan, *U. of Texas Adopts Plan to Publish Performance Data on Professors and Campuses*, CHRON. HIGHER EDUC. (Aug. 25, 2011), <http://chronicle.com/article/U-of-Texas-Adopts-Plan-to/128800/>.

7. RICHARD ARUM & JOSIPA ROKSA, *ACADEMICALLY ADRIFT: LIMITED LEARNING ON COLLEGE CAMPUSES* (1st ed. 2010).

obtain value for the dollars they spend.<sup>8</sup> Violence on U.S. campuses has led to additional federal regulation of institutions<sup>9</sup> and has spawned hundreds of lawsuits by victims and their families.<sup>10</sup> Finally, funding for public higher education is in a downward spiral.<sup>11</sup>

Similar trends can be observed in the U.K.<sup>12</sup> Although the U.S. and the U.K. approach certain matters—such as funding for postsecondary education and faculty employment issues—differently, the social and cultural trends affecting postsecondary education in both nations are strikingly similar.<sup>13</sup> What are the implications of these trends for the working conditions and employment rights of the faculty and staff in both nations? How are faculty members responding to the market forces and increased consumerism that are forcing change on their institutions? Is a career as a faculty member even an appealing option, or should bright young college and university graduates focus on nonacademic careers?

This article traces briefly some of the numerous changes and pressures facing higher education today in both the U.S. and the U.K., and then turns to recent legal developments that affect faculty work and rights. After re-

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8. Amy Phillips, *Is College Worth the Money?*, WASH. TIMES (Dec. 14, 2011), <http://communities.washingtontimes.com/neighborhood/60-second-attention-span/2011/dec/14/college-worth-money/>.

9. See generally, Ashley R. Wood & Steven M. Janosik, *The Clery Act: Crime Reporting Concerns*, 2012 U. RISK MGMT. & INSURANCE ASS'N J. 9-20 (ANNUAL ISSUE), available at <http://www.soe.vt.edu/highered/faculty/janosik/CleryCrimeReporting2012.pdf>. In the UK context, crime statistics tend to be collected by locality and do not differentiate between crimes committed against students and those against the population as a whole. In recent years, along with a general proliferation of league tables, information has appeared which demonstrates the relative crime risks at different institutional locations. The picture in general is that UK universities are not particularly vulnerable to violent or other crime, but that relative levels depend very much upon location. So, as might be expected, lower crime rates are usually associated with institutions located in rural settings or smaller towns. See, e.g., Oliver Mower, *Best and Worst University Locations for Crime*, WHICH? U. (July 22, 2013), <http://university.which.co.uk/advice/best-and-worst-universities-for-crime-and-safety>; *Crime in University Cities*, COMPLETE U. GUIDE, <http://www.thecompleteuniversityguide.co.uk/crime-in-university-cities/> (last visited Aug. 27, 2014).

10. For an example of one such lawsuit, see Sara Lipka, *Jury Holds Virginia Tech Responsible for Students' Deaths, Raising Expectations of Colleges*, CHRON. HIGHER EDUC. (Mar. 14, 2012), <http://chronicle.com/article/Verdict-Against-Virginia-Tech/131176/>. The Virginia Supreme Court reversed the jury verdict. *Commonwealth v. Peterson*, 749 S.E.2d 307 (Va. 2013).

11. See *infra* Part I.A.

12. Peta Lee, *European Higher Education Faces a Widening Budget Gap Between Regions*, CHRON. HIGHER EDUC. (June 19, 2013), <http://chronicle.com/article/article-content/139907/>.

13. See, e.g., John H. Bishop, *Which Secondary Education Systems Work Best? The United States or Northern Europe*, CORNELL U. ILR COLLECTION (Jan. 1, 2011), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1104&context=workingpapers>.

viewing numerous structural changes that have altered the ways that many institutions operate, and examining several legal trends that are bringing changes to faculty work, the article concludes with observations about how faculty in both nations—both individually and collectively—may wish to respond to the changes swirling around them.

## I. STRUCTURAL CHANGES

### A. Funding

Although both public and private U.S. colleges and universities have been negatively affected by the various recessions since the 1970s, the recession that began in 2008 hit the public sector more harshly. Between 1990 and 2010, public funding for higher education, adjusted for inflation, declined by 26.1 percent.<sup>14</sup> During that time period, tuition and fees at public four-year colleges and universities increased by 112.5 percent.<sup>15</sup> The proportion of their revenues that public colleges and universities received from state appropriations dropped from 38.3 percent in 1991–1992 to 24.4 percent in 2008–2009.<sup>16</sup> In fiscal year 2011–12, average state support declined by 7.6 percent, although in some states the declines were between 10 and 41 percent,<sup>17</sup> and in 2012, state support declined by an average of another 8.9 percent.<sup>18</sup> At the same time, income from tuition and fees constitutes an ever-larger proportion of public college and university revenues.<sup>19</sup>

In England, university fees increased substantially in 2012 as a result of major policy changes whereby the government shifted the cost of tuition from the state to individual students.<sup>20</sup> This increase reflects a funding model in which colleges and universities will be permitted to charge students between £6,000 and £9,000 per annum for undergraduate courses, in-

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14. JOHN QUINTERNO, DĒMOS, *THE GREAT COST SHIFT: HOW HIGHER EDUCATION CUTS UNDERMINE THE FUTURE MIDDLE CLASS 2* (2012), available at <http://www.demos.org/sites/default/files/publications/thegreatcostshift.pdf>.

15. *Id.*

16. *Id.* at 17.

17. Eric Kelderman, *State Support Falls by 7.6 % in 2012 Fiscal Year*, CHRON. HIGHER EDUC. (Jan. 23, 2012), <http://chronicle.com/article/State-Support-for-Higher/130414/>. Nineteen states saw declines in higher education funding of 10 percent or more in FY 2012. *Id.*

18. STATE HIGHER EDUCATION EXECUTIVE OFFICERS (SHEEO), *PUBLIC HIGHER EDUCATION FINANCE FY 2012* (2013), available at <http://www.sheeo.org/sites/default/files/publications/SHEF%20FY%2012-20130322rev.pdf>.

19. Eric Kelderman, *Students and States Near a 50-50 Split on the Cost of Public Higher Education*, CHRON. HIGHER EDUC. (Mar. 6, 2013) <http://chronicle.com/article/StudentsStates-Near-a/137709/>.

20. See Haroon Chowdry et al., *Fees and Student Support Under the New Education Funding Regime: What are Different Universities Doing?* (Institute for Fiscal Studies, Briefing Note BN134, 2012), available at <http://www.ifs.org.uk/bns/bn134.pdf> (discussing the higher education finance regime introduced in 2012).

stead of a previous blanket fee contribution of around £3,000.<sup>21</sup> Most universities are charging at or towards the top of the new fee range, making the average fee increase well over 200 percent.<sup>22</sup>

In the U.S., changes in funding patterns and tuition increases have reduced out-of-state enrollment at many public colleges and universities, persuaded some students to select public rather than private colleges or universities,<sup>23</sup> swelled enrollments at public community colleges just as their state or local funding was declining,<sup>24</sup> and induced private colleges and universities to return a larger proportion of their tuition revenue to students in the form of additional financial aid.<sup>25</sup>

### B. Productivity and Accountability

At the same time that state legislatures in the U.S. are cutting funding to higher education, they are demanding greater “productivity” from faculty at public institutions. For example, the Board of Regents of the University of Texas approved a plan to report “faculty productivity” metrics such as research productivity and “efficiency,”<sup>26</sup> while the governor of Florida has expressed interest in a similar accountability mechanism for that state’s public colleges and universities.<sup>27</sup> Ohio’s legislature enacted a law requiring a 10 percent increase in statewide undergraduate teaching activity.<sup>28</sup>

Several states, or state higher education systems, require post-tenure review in their public colleges and universities. In some states, post-tenure

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21. *Id.*

22. See Jack Grove, *Nine Out of 10 Universities Opt to Charge Maximum Fee*, TIMES HIGHER EDUC. (July 1, 2013), <http://www.timeshighereducation.co.uk/news/nine-out-of-10-universities-opt-to-charge-maximum-fee/2005624.article> (“Only 10 institutions out of 120 charging undergraduates more than £6,000 will impose the maximum annual tuition cost of £9,000, according to Office for Fair Access data published on 11 July.”).

23. Austin Wright, *Public Colleges Brace for Expected Drop in Out-of-State Students and the Revenue They Provide*, CHRON. HIGHER EDUC. (Aug. 10, 2009), <http://chronicle.com/article/Where-Have-All-the/47967/>.

24. Lacey Johnson, *Community College Enrollments Slow After Years of Growth*, CHRON. HIGHER EDUC. (Oct. 18, 2011), <http://chronicle.com/article/Community-College-Enrollments/129462/>.

25. Goldie Blumenstyk, *Private Colleges Increased Aid as Economy Sank, Tuition-Discounting Survey Finds*, CHRON. HIGHER EDUC. (May 19, 2011), <http://chronicle.com/article/Private-Colleges-Increased-Aid/127599/>.

26. See Mangan, *supra* note 6.

27. In late 2013, a judge upheld new rules enacted by the Florida Department of Education that ties the receipt of “continuing contracts” (that state’s version of tenure) to demonstrated student success in learning gains, course completion rates, graduation rates, and job placement. Colleen Flaherty & Scott Jaschik, *Raising the Bar on Faculty*, INSIDE HIGHER EDUC. (Jan. 2, 2014), <http://www.insidehighered.com/news/2014/01/02/judge-upholds-new-florida-rules-tenure-and-student-success>.

28. Ohio Rev. Code Ann. § 3345.45.

review programs are mandated by statute or administrative regulation;<sup>29</sup> in others, by regulations or policies approved by state systems of higher education.<sup>30</sup> By 2000, thirty-seven states had some form of post-tenure review, either by statute or statewide policy.<sup>31</sup> Additionally, many institutions have adopted post-tenure review policies voluntarily.<sup>32</sup> Legal challenges to the outcomes of post-tenure review have generally been unsuccessful.<sup>33</sup>

Academic tenure in England was eliminated over two decades ago under the Education Reform Act of 1988.<sup>34</sup> When it did exist, the idea of tenure was best understood as protection from dismissal in the absence of good cause—typically gross incompetence or gross moral turpitude—and has been described by some commentators as generally taking hard form, compared with a softer form in the U.S.<sup>35</sup> Contrary to the prediction that the weakening of tenure would lead to insecurity amongst older, established

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29. See, e.g., Ark. Code Ann. § 6-63-104(a) (2001) (explicitly including post-tenure review in statutory language regarding review of faculty performance generally); S.C. Code Ann. § 59-103-30 (2001) (same).

30. Donna R. Euben, *Post-Tenure Review: Some Case Law*, AMER. ASS'N OF U. PROFESSORS (2005), <http://www.aaup.org/issues/post-tenure-review/some-case-law> (noting that post-tenure review programs have been required by the state systems of higher education in Arizona, Oregon, Florida and Wisconsin).

31. CHRISTINE M. LICATA & JOSEPH C. MORREALE, *POST-TENURE FACULTY REVIEW AND RENEWAL: EXPERIENCED VOICES* (2002).

32. Euben, *supra* note 30.

33. *Id.*

34. Stephen Court, *Memories of Jobs for Life*, TIMES HIGHER EDUC. (Dec. 8, 1997), <http://www.timeshighereducation.co.uk/104896.article>.

35. The 'soft' description arises from the capacity in the U.S. to close down whole departments and thereby dismiss academics, a power denied English universities when tenure prevailed. See, e.g., Antony W. Dnes & Jonathan S. Seaton, *The Reform of Academic Tenure in the United Kingdom*, 18 INT'L REV. L. & ECON. 491 (1998) (noting that specific detail regarding tenure differed between universities, dependent upon the content of their charter and statutes). Prior to the 1988 Act, thirty-one universities were identified as having "hard" tenure and sixteen as having "soft" tenure. These numbers reflect a period prior to the significant expansion in U.K. university numbers with the renaming of polytechnics and some other higher education institutions starting in 1992. Dnes and Seaton also highlight the slowness of the process if a tenure dispute arose, with case examples such as *Hines v. Birkbeck College*, a case which took almost eight years to reach a conclusion. In such an environment academics were protected by both the premise of tenure and likely institutional reluctance to become embroiled in lengthy and expensive litigation even if grounds for dismissal were considered to exist. Although, by way of counterbalance, in *Thomas v. University of Bradford* (No.2) application by the university council of a subjective interpretation of good cause for dismissal was permitted. (1992) 1 All ER 964. Prior to the 1988 changes, dismissal of a tenured academic would have required the buying out by the university at a cost equivalent to "the expected difference between their academic remuneration and their earnings in their next best occupation." Dnes, *supra*, at 497). Post the 1988 Act, more usual principles for redundancy apply, typically making dismissal on grounds of redundancy cheaper for universities. For further discussion of the nature and varieties of tenure in U.K. universities and the position since the removal of tenure, see Dennis Farrington & David Palfreyman, *THE LAW OF HIGHER EDUCATION* (2d ed. 2012).

academics and discourage promotion of the most able junior colleagues who might then pose a threat,<sup>36</sup> statistical evidence collected by Antony W. Dnes and Jonathan S. Seaton suggests that this has not been the case; rather, younger academics prospered following the 1988 reforms.<sup>37</sup> It is suggested that this result may have resulted from governmental changes in the 1980s, which linked research funding with measured outputs: younger academics that produced potentially high value outputs were able to gain promotion to fulltime professorial positions.<sup>38</sup> Nevertheless, the effect of the removal of tenure has been felt in recent years with the economic downturn in the economy and the decision by some universities to seek to reduce faculty numbers or to reconfigure the structure of their faculty.<sup>39</sup>

### C. Challenges to Faculty Unionization

In the U.S., faculty members are unionized at approximately one-third of all four-year public colleges and universities; the numbers are lower at private colleges and universities.<sup>40</sup> A study found that “unionization greatly increases faculty influence over decision-making in areas such as setting faculty salary scales, individual faculty salaries, appointing department chairs, and appointments to institution-wide committees.”<sup>41</sup> Perhaps as a result of this apparent success, conservative politicians in at least two states—Ohio and Wisconsin—have attempted to sharply limit or eliminate public faculty’s ability to engage in collective bargaining.<sup>42</sup> In Ohio, the legislature passed a law that would have disqualified faculty at public institutions from bargaining collectively, but voters rejected the law in November of 2011.<sup>43</sup> A similar law was passed in Wisconsin in 2011 and upheld by the state supreme court against a challenge by public sector unions.<sup>44</sup> Ever since the U.S. Supreme Court’s decision in *NLRB v. Yeshiva University*,<sup>45</sup> it has been difficult for faculty at many private colleges and universi-

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36. H. Lorne Carmichael, *Incentives in Academics: Why Is There Tenure?*, 96 J. POL. ECON. 453 (1998).

37. See, e.g., Dnes & Seaton, *supra* note 35.

38. *Id.*

39. See, e.g., Paul Jump, *Near-Unanimity on Strike Ballot*, TIMES HIGHER EDUC. (July 7, 2012), <http://www.timeshighereducation.co.uk/story.asp?sectioncode=26&storycode=420196&c=1>.

40. Stephen R. Porter & Clinton M. Stephens, *The Causal Effect of Faculty Unions on Institutional Decision-Making* (Dept. Educ. Leadership & Policy Studies, Iowa State Univ., Working Paper No. 1705713), available at <http://ssrn.com/abstract=1705713>.

41. *Id.*

42. Collin Eaton, *Ohio Voters Reject Law to Curtail Public-College Faculty Bargaining Rights*, CHRON. HIGHER EDUC. (Nov. 9, 2011), <http://chronicle.com/article/Ohio-Voters-Reject-Law-to/129693/>.

43. *Id.*

44. *Ozanne v. Fitzgerald*, 822 N.W.2d 67 (Wis. 2012).

45. 444 U.S. 672 (1980).

ties to unionize unless they have very little governance power.<sup>46</sup> Therefore, it appears that one mechanism for faculty influence over their working conditions and employment rights may be weakening or, in some states, disappearing altogether.

#### D. Rise of the For-Profit Sector

In the last decade, the for-profit postsecondary education sector in the U.S. has expanded substantially, in large part a result of virtually universal access to the Internet and the expansion of the federal student aid program. Although the traditional image of a proprietary college or university in the past was that of a locally-owned, small school offering primarily vocational programs, the for-profit higher education sector now includes large—sometimes publicly-traded—corporations that offer degree programs to students throughout the U.S. and around the world, including certificates, undergraduate degrees, and master's and doctoral degrees.<sup>47</sup> The courses and programs offered by these for-profit colleges and universities have become more diverse and expansive: many offer career preparation, but an increasing number are offering baccalaureate and even graduate degrees.<sup>48</sup> Typically, faculty at these colleges and universities lack tenure and many are part-time. As for the student populations that they serve, a study found that in 2008, low-income and minority students were overrepresented in for-profit institutions relative to their enrollment in nonprofit institutions.<sup>49</sup>

The for-profit sector has been criticized for not meeting the educational or employment needs of the many low-income and minority students that they enroll. Students who attend for-profit colleges and universities are eligible for federal student aid, but their students' default rates on federally-subsidized student loans are substantially higher than the default rates of students who attended public or nonprofit private institutions.<sup>50</sup> According to the U.S. Department of Education, "students at for-profit institutions represent 12 percent of all higher education students, 26 percent of all student

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46. WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* 568–574 (5th ed. 2013).

47. Robin Wilson, *For-Profit Colleges Change Higher Education's Landscape*, CHRON. HIGHER EDUC. (Feb. 7, 2010), <http://chronicle.com/article/For-Profit-Colleges-Change/64012/>.

48. Suevon Lee, *The For-Profit Higher Education Industry, By the Numbers*, PROPUBLICA (Aug. 9, 2012), <http://www.propublica.org/article/the-for-profit-higher-education-industry-by-the-numbers>.

49. INST. FOR HIGHER EDUC. POLICY, INITIAL COLLEGE ATTENDANCE OF LOW-INCOME YOUNG ADULTS (2011), available at [http://www.ihep.org/assets/files/publications/m-r/Portraits-LowIncome\\_Young\\_Adults\\_Attendance\\_Brief\\_FINAL\\_June\\_2011.pdf](http://www.ihep.org/assets/files/publications/m-r/Portraits-LowIncome_Young_Adults_Attendance_Brief_FINAL_June_2011.pdf).

50. Goldie Blumenstyk, *Loan-Default Rate at For-Profit Colleges Would Double Under New Formula*, CHRON. HIGHER EDUC. (Feb. 4, 2011), <http://chronicle.com/article/Loan-Default-Rate-at/126250/>.



loans and 46 percent of all student loan dollars in default.”<sup>51</sup> A 2011 report by the U.S. Government Accounting Office shows that nearly \$32 billion in federal grants and loans were awarded to students attending for-profit colleges and universities during the 2009–10 academic year.<sup>52</sup> The U.S. Department of Education further reported that in 2009–10, 92 percent of students enrolled in these institutions received some form of federal student aid—in most cases, federally-subsidized student loans.<sup>53</sup>

U.S. government’s attempts to rein in deceptive recruitment and enrollment practices at for-profit institutions have saddled the entire higher education system, including public and nonprofit private institutions, with expensive reporting and accountability requirements. Measures requiring certification that students are prepared for “gainful employment”<sup>54</sup> and prior state approval of online course offerings<sup>55</sup> add to the “administrative bloat” that has received much criticism as the proportion of administrators on campuses increases compared to the proportion of faculty.<sup>56</sup>

In comparison with the U.S., moves in the U.K. towards for-profit institutions of higher education are relatively new. In 2007, Brierly Price Prior (“BPP”) became the first publicly owned private company to obtain degree-awarding powers in the U.K.<sup>57</sup> It became a university college in 2010 and, subsequently, in 2013, achieved full university status.<sup>58</sup> In 2012, the

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51. Press Release, U.S. Dept. Educ., Obama Administration Announces New Steps to Protect Students from Ineffective Career College Programs (June 2, 2011), available at <http://www.ed.gov/news/press-releases/gainful-employment-regulations>.

52. NAT’L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2012 100 (2012), available at [http://nces.ed.gov/pubs2012/2012045\\_5.pdf](http://nces.ed.gov/pubs2012/2012045_5.pdf).

53. *Id.*

54. 34 C.F.R. § 668 (2011). Most of the gainful employment regulation was declared void because it had been improperly promulgated; it is likely that the U.S. Department of Education will re-enact similar regulation in the near future. See *Ass’n of Private Coll. & Univ. v. Duncan*, 870 F. Supp. 2d 133 (D.D.C. 2012). The disclosure portion of the regulation, however, was upheld by the court. *Id.* at 155–56.

55. W. INTERSTATE CMM’N FOR HIGHER EDUC., STATE APPROVAL REGULATIONS FOR DISTANCE EDUCATION: A “STARTER” LIST WITH ADDENDUM (2011), available at <http://www.wiche.edu/pub/14831>.

56. BENJAMIN GINSBERG, THE FALL OF THE FACULTY: THE RISE OF THE ALL-ADMINISTRATIVE UNIVERSITY AND WHY IT MATTERS (2011). Ginsberg, using data compiled by the U.S. Department of Education, states that between 1975 and 2005, the number of full time faculty in the U.S. increased by 51 percent, while the number of administrators increased by 85 percent and the number of professional staff increased by 240 percent. *Id.* at 25.

57. See *University Governance*, BPP.COM, <http://www.bpp.com/about-bpp/aboutBPP/governance> (last visited Aug. 27, 2014).

58. BPP was founded in 1976, initially to provide accountancy training, but has been part of the international educational investment company, Apollo Global, since 2009. *Our History*, BPP.COM, <http://www.bpp.com/about-bpp/about-BPP/history> (last visited Aug. 27, 2014). The University College is made up of the BPP Law School, the BPP Business School, the BPP School of Health and the School of Foundation and English Language Studies. *Id.* In August 2013, *Times Higher Education* reported that the U.K. Department for Business, Innovation and Skills had delayed approval of the

private but charitable College of Law became a for-profit private provider of higher education after being sold to Montagu Private Equity.<sup>59</sup> The College of Law was awarded university status in 2012 and became the University of Law.<sup>60</sup> These events set the stage for the expansion of proprietary education in the U.K.

#### E. Changes in Student Preparation and Attitudes

A survey of U.S. college and university faculty conducted in 2008 found that nearly half of the faculty believed that students were significantly less prepared for college-level work than students were ten years earlier.<sup>61</sup> The importance of prior academic preparation was demonstrated by a recent study on student performance on the College Learning Assessment (CLA), which revealed that poor and minority students performed as well as higher-income students on the examination when their performance was controlled for level of pre-college academic preparation.<sup>62</sup> Unfortunately,

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award of full university status whilst it investigated the record of the Apollo parent group. John Morgan, *Coalition Confers University Title on Second For-Profit*, TIMES HIGHER EDUC. (Aug. 8, 2013), <http://www.timeshighereducation.co.uk/news/coalition-confers-university-title-on-second-for-profit/2006342.article>.

59. See UNIVERSITY OF LAW, <http://www.law.ac.uk/home/> (last visited Apr. 20, 2014).

60. The College of Law, now the University of Law, historically provided post-graduate professional training for those intending to practice law as solicitors and later as barristers and as such only competed with a relatively small number of college and university law schools who were also engaged in this market. The recent grant of degree awarding powers to the newly rebadged University of Law will enable it to compete directly with the majority of college and university law schools, whose core provision is the academic undergraduate law degree. Whilst more expensive than public sector college and university law degrees, the University of Law is promoting its undergraduate degree on employability, with marketing literature claiming it as the ‘first truly professional undergraduate law course’ with emphasis on ‘the law in a practical, professional context’. See UNIVERSITY OF LAW, <http://www.law.ac.uk/undergraduate/llb-hons-law-degree-3-year/> (last visited Aug. 27, 2014). In addition to offering a three-year program, the University of Law offers an accelerated two year program. See *LLB (Hons) Law Degree—Accelerated*, UNIVERSITY OF LAW, <http://www.law.ac.uk/undergraduate/llb-hons-law-degree-2-year/> (last visited Aug. 27, 2014). Concentrated study over two, rather than the usual three, years will, the University asserts, save students money in the longer run – higher fees being offset by one year less of study and its associated living costs and the potential to earn being brought forwards by a year. *Id.*

61. *How Well are Students Prepared for College?*, MAGUIRE ASSOCIATES (Jan. 5, 2008), available at [http://www.maguireassoc.com/resource/maguire\\_network\\_february2008/College\\_Preparation\\_Linda\\_Maguire\\_CIC2008.pdf](http://www.maguireassoc.com/resource/maguire_network_february2008/College_Preparation_Linda_Maguire_CIC2008.pdf). Anecdotal evidence from the U.K. suggests that similar concerns are held by some academics in universities there. See, e.g., Martin Paul Eve, *Secondary Schools Are Not Adequately Preparing Students for Higher Education*, GUARDIAN (Dec. 22, 2011), <http://www.theguardian.com/higher-education-network/blog/2011/dec/22/humanities-in-secondary-schools>.

62. Josipa Roksa, *An Analysis of Learning Outcomes of Underrepresented Students at Urban Institutions*, COUNCIL INDEP. C. (2012), available at <http://www.cic.edu/News-and-Publications/CIC-Books-and-Reports/Documents/>

many of these students may not be learning as much as their prospective employers expect them to learn. A survey of corporate executives in 2012 concluded that less than half of the college and university graduates they hire are prepared for entry-level positions, and less than one quarter have the knowledge and skills to advance beyond entry-level positions.<sup>63</sup>

Much has been made of the "student consumer" movement in the U.S. and the issue is not new.<sup>64</sup> Ranking systems, such as those published by the *U.S. News and World Report*, have led to attempts to "game the system" and have even resulted in false reporting of student test scores or post-college employment rates and earnings.<sup>65</sup> In some cases, concerns over rankings have triggered a shift in resource allocation, causing scarce resources to be diverted toward particular programs in the hope of attaining higher program or institutional rankings.<sup>66</sup> The rise of the student consumer can also be seen through increasing demands by students and policy makers that institutions devote more resources to teaching and fewer to research. Additionally, student course evaluation results have begun to weigh more heavily at many institutions on the outcome of promotion and tenure decisions, a move that some believe elevates the influence of the student consumer to the detriment of academic freedom.<sup>67</sup> Some researchers also believe that the use of student course evaluation scores in academic personnel decisions is responsible for both grade inflation and lowered expectations for student achievement.<sup>68</sup>

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CLA2012\_report.pdf.

63. John Minners, *Survey Says College Grads Not Prepared for Workforce*, LEXISNEXIS LEGAL NEWSROOM (Feb. 1, 2012, 9:23 AM), <http://www.lexisnexis.com/legalnewsroom/lexis-hub/b/career-news-and-trends/archive/2012/02/01/survey-says-college-graduates-not-prepared-for-the-workforce.aspx>. In the U.K. many graduates have themselves raised concerns about the extent to which higher education has prepared them for the world of work. See Graham Snowdon, *Almost Half of Graduates 'Ill-equipped for World of Work'*, GUARDIAN (Jan. 28, 2011), <http://www.theguardian.com/money/2011/jan/28/half-graduates-ill-equipped-for-work>.

64. See, e.g., Joan S. Stark, *The Emerging Student Consumer Movement in Education*, 13 NEW DIRECTIONS FOR HIGHER EDUC. 1 (1976).

65. Eric Hoover, *Claremont McKenna Official Resigns After Falsely Reporting SAT Scores*, CHRON. HIGHER EDUC. (Jan. 31, 2012), <http://chronicle.com/blogs/headcount/claremont-mckenna-official-resigns-after-falsely-reporting-sat-scores/29556>; Katherine Mangan, *Law Schools Would Face Stricter Reporting Requirements Under New Proposal*, CHRON. HIGHER EDUC. (Jan. 20, 2011), <http://chronicle.com/article/Law-Schools-Would-Face/130401/>.

66. For further discussion of the impact of rankings systems on higher education in the U.S., see MARGUERITE CLARKE, INST. FOR HIGHER EDUC. POL'Y, *THE IMPACT OF HIGHER EDUCATION RANKINGS ON STUDENT ACCESS, CHOICE AND OPPORTUNITY, COLLEGE AND UNIVERSITY RANKING SYSTEMS: GLOBAL PERSPECTIVES AND AMERICAN CHALLENGES* 35-47 (2007), available at <http://www.ihep.org/%5Cassets%5Cfiles%5Cpublications/A-F/CollegeRankingSystems.pdf>.

67. See, e.g., Jordan J. Titus, *Pedagogy on Trial: When Academic Freedom and Education Consumerism Collide*, 38 J.C. & U.L. 107 (2011).

68. See Charles F. Eiszler, *College Students' Evaluations of Teaching and Grade*

Challenges by students to once nearly impregnable academic judgments are increasing in the U.S. Notably, religiously conservative students have challenged course assignments or clinical practice requirements as being contrary to their religious beliefs and thus a violation of their religious freedom. For example, a student who was dismissed from a theater program for refusing to use profanity while participating in a dramatic production, brought suit against her university claiming that her Mormon faith did not permit her to use such words.<sup>69</sup> In two other cases, federal courts addressed similar claims by students at Augusta State University<sup>70</sup> and Eastern Michigan University<sup>71</sup> that the curricular requirements of the institutions' master's programs in counseling, which required students to counsel gay clients, violated the students' rights to freedom of speech and religious freedom under the First Amendment. In both cases, all students enrolled in the institutions' master's programs in counseling were required to adhere to the code of ethics of the American Counseling Association, a professional body that accredits graduate programs in counseling. The code of ethics, according to the faculty, required counselors to set aside their personal values or beliefs and work constructively with the client. In the case involving Augusta State, *Keeton v. Anderson-Wiley*, the student plaintiff had announced that she would attempt to "cure" her gay clients of their homosexuality through conversion therapy.<sup>72</sup> Both the trial<sup>73</sup> and appellate<sup>74</sup> courts ruled that the requirement that students follow the code of ethics was a neutral pedagogical requirement and not a suppression of speech or religious freedom. In the case against Eastern Michigan, the student plaintiff refused to counsel clients who she believed or knew were homosexual.<sup>75</sup> There, although the trial court had awarded summary judgment to the university, the appellate court reversed, noting that material facts relating to the motivation of the faculty who dismissed the plaintiff from the program were at issue.<sup>76</sup>

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*Inflation*, 43 RES. HIGHER EDUC. 483 (2002).

69. *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004). The case was later settled; the university implemented a religious accommodation policy, refunded a year of tuition and fees, paid the student's attorney fees, and readmitted her to the university. Angie Welling, *U., Axson-Flynn Settle Civil Rights Suit*, *Deseret News* (July 15, 2004, 6:35 AM), [http://www.deseretnews.com/article/59507\\_7344/U-Axson-Flynn-settle-civil-rights-suit.html?pg=all](http://www.deseretnews.com/article/59507_7344/U-Axson-Flynn-settle-civil-rights-suit.html?pg=all).

70. *Keeton v. Anderson-Wiley*, 733 F. Supp. 2d 1368 (S.D. Ga. 2010), *aff'd*, 664 F.3d 865(11th Cir. 2011).

71. *Ward v. Wilbanks*, 2010 U.S. Dist. LEXIS 127038 (E.D. Mich. July 26, 2010), *rev'd and remanded sub nom*, *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012).

72. *Keeton*, 733 F. Supp. 2d at 1372.

73. *Id.* at 1379.

74. *Keeton v. Anderson-Wiley*, 664 F.3d 865, 876 (11th Cir. 2011).

75. *Ward v. Wilbanks*, 2010 U.S. Dist. LEXIS 127038 (E.D. Mich. July 26, 2010), *rev'd and remanded sub nom*, *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012).

76. *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012). The university and student subsequently settled the litigation for \$75,000 and a notation stating that she had left the

Conflicts between students and faculty, as well as the alleged “liberal bias” of faculty at U.S. colleges and universities, led to attempts by conservative politicians and activists to impose an “Academic Bill of Rights” upon public colleges and universities.<sup>77</sup> Although such legislation was introduced into the U.S. House of Representatives and the legislatures of twenty-eight states, no such legislation has been enacted.<sup>78</sup> However, these initiatives, coupled with the courts’ increasing willingness to entertain student claims of unfair academic evaluation, may lead to reluctance among faculty members to challenge students’ beliefs or assertions out of fear of the unpleasant consequences, such as grievances, negative publicity, and possibly even litigation that may follow.<sup>79</sup> One scholar states unequivocally:

The traditional role of the professoriate in guarding academic integrity is increasingly being challenged, as what students think of their professors and of their teaching gains greater importance to college and university administrators. Students exercise their influence constantly by their responsiveness or boredom in the classroom, and then by attributing a level of tedium or their inattentiveness to failure on the part of the professor to hold their interest. Today’s student culture is often described as one of disengagement and entitlement, so it should come as no surprise if students who enter colleges and universities with a consumer mentality are not comfortable accepting a professor’s pedagogical authority and choose to file legal complaints in order to have their demands satisfied.

The imposition of a market logic into higher education has been facilitated by the power of a marketing discourse to frame the public conversation, by substituting the vocabulary of a market transaction (such as the student as consumer metaphor) for a pedagogical relationship. Institutionalization of the student consumer metaphor has been accompanied by a shift in the ways in which people think about education, transformed from a process of becoming (more learned) to a product for purchase (a grade, or a degree). The public has expressed concern about the value of postsecondary education as a personal investment, and higher education institutions have responded with structures designed “to engage citizens in determining how public higher education can

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graduate program voluntarily. Neal Hutchins, *Student and University Settle Over Her Dismissal From Counselor Education Program*, HIGHER EDUC. L. (Dec. 13, 2012), <http://www.highereducationlaw.org/url/2012/12/13/student-and-university-settle-over-her-dismissal-from-counsel.html>.

77. Cheryl A. Cameron, Laura E. Myers, & Steven G. Olswang, *Academic Bill of Rights: Conflict in the Classroom*, 31 J.C. & U.L. 243 (2005).

78. Titus, *supra* note 67, at 156.

79. BRUCE L.R. SMITH ET AL., *CLOSED MINDS? POLITICS AND IDEOLOGY IN AMERICAN UNIVERSITIES* (2008).

serve them” with the aim of “providing world-class service and value to students.”<sup>80</sup>

In the U.K., the courts have generally maintained their unwillingness to interfere with academic decisions, but other developments may still threaten academic autonomy.<sup>81</sup> Notable amongst these is the creation of the Office of the Independent Adjudicator (“OIA”).<sup>82</sup> Section 13 of the Higher Education Act of 2004 empowered the relevant Secretary of State to create an entity to address student complaints—a so-called “designated operator.”<sup>83</sup> The OIA was so designated and displaced the existing complaints jurisdictions, notably visitors appointed to individual universities or other mechanisms for determining disputes.<sup>84</sup>

Since 2005, the number of complaints received by the OIA has increased by 200 percent, suggesting at least some shift toward the mentality of the “student consumer” amongst the student population.<sup>85</sup> In absolute terms, numbers of complaints remain small—1,605 in 2011 and 2,012 in 2012—and the proportions upheld significantly less than 50 percent in each year since 2005.<sup>86</sup> At the moment, therefore, there is little evidence to suggest that the work of the OIA is interfering significantly with academic autonomy, although the figures cited represent only those complaints that reach the OIA. As the OIA expressly requires prospective complainants to have exhausted their university’s internal complaints handling procedures first, it seems reasonable to speculate that far more complaints are resolved internally, with the threat of subsequent OIA involvement providing some incentive to settle or reach a compromise. Also, as a relatively new complaint-handling body, there is ample room for the number of complaints to continue to increase in future. The OIA is already predicting increases in number of complaints as students’ expectations rise with higher fee levels, having already seen an increase in the number of complaints regarding issues at the core of academic decision making.<sup>87</sup>

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80. Titus, *supra* note 67, at 162.

81. See, e.g., Higher Education Act, 2004.

82. *Id.* at § 13.

83. *Id.*

84. For an overview discussion of previous approaches, see David Palfreyman, *Proper Governance in the English Chartered University*, (Oxford Ctr. for Higher Educ. Policy Studies, Working Paper No. 2, 2002), available at [http://oxcheps.new.ox.ac.uk/MainSite%20pages/Resources/OxCHEPS\\_OP2r%20doc.pdf](http://oxcheps.new.ox.ac.uk/MainSite%20pages/Resources/OxCHEPS_OP2r%20doc.pdf).

85. See OFF. OF THE INDEP. ADJUDICATOR, OIA ANNUAL REPORT 2012 (2012), available at <http://www.oiahe.org.uk/media/88650/oia-annual-report-2012.pdf> [hereinafter OIA, 2012 ANNUAL REPORT]; OFF. OF THE INDEP. ADJUDICATOR, OIA ANNUAL REPORT 2011 (2011), available at [http://www.oiahe.org.uk/media/57882/oia\\_annual\\_report\\_2011.pdf](http://www.oiahe.org.uk/media/57882/oia_annual_report_2011.pdf) [hereinafter OIA, 2011 ANNUAL REPORT].

86. See OIA, 2012 ANNUAL REPORT, *supra* note 85; OIA, 2011 ANNUAL REPORT, *supra* note 85.

87. For example, in its 2011 Annual Report, the OIA noted a significant increase

Perhaps most telling is the contrast between the current student complaints environment and the picture in the past. As William P. Hoye and David Palfreyman observe,

Historically, the very idea that a mere student would have the temerity to pursue a legal claim against one of his instructors, his college or his university would have been unthinkable. After all, students were the minions of their academic institutions: they were the Junior Members in the *studium generale*.

...

Higher education was viewed as a privilege, not a right, by the courts, and the relationship between students and their colleges was perceived as a paternalistic, if not a dictatorial, one. Suffice it to say, student legal claims were not a major problem for colleges and universities during the first 700 years or so of formal higher education.<sup>88</sup>

Even the weakening of stricter forms of hierarchy in the latter part of the twentieth century did not see a major shift in the core elements of academic authority and control.<sup>89</sup> In this context, the twenty-first century move towards student as consumer presents as a fascinating, if risky, experiment.

Other legal developments in the U.K. may potentially interfere with traditional understanding of academic autonomy. For example, efforts by colleges and universities to comply with disability discrimination legislation may err on the side of caution, notwithstanding concerns on the part of some faculty that such measures may be at the expense of academic standards.<sup>90</sup> Even recent developments in immigration policy in the U.K. have given rise to concerns that academics are being required to act as informal immigration officers with, for example, supervisory meetings with research students being recorded not merely for traditional purposes of educational development, but also to provide a record that a student is complying with their immigration status criteria.<sup>91</sup>

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in claims associated with allegations of academic misconduct, such as plagiarism, leading to loss of marks or even expulsion from a course. OIA, 2011 ANNUAL REPORT, *supra* note 85.

88. William P. Hoye & David Palfreyman, *Plato vs. Socrates: The Devolving Relationship Between Higher Education Institutions and Their Students* 1–2 (Oxford Ctr. for Higher Educ. Policy Studies, Working Paper No. 17), available at [http://oxcheps.new.ox.ac.uk/MainSite%20pages/Resources/OxCHEPS\\_OP17.pdf](http://oxcheps.new.ox.ac.uk/MainSite%20pages/Resources/OxCHEPS_OP17.pdf) (last visited Apr. 21, 2014).

89. *See id.*

90. *See, e.g., Education: Disability and Discrimination in Schools (England and Wales)*, NAT'L AUTISTIC SOC'Y, <http://www.autism.org.uk/living-with-autism/education-and-transition/primary-and-secondary-school/education-legislation/education-disability-discrimination-england-and-wales.aspx> (last updated May 14, 2013).

91. Failure to comply on the part of a college or university can have serious implications for its future capacity to recruit international students. *See, e.g., David Matthews, Teesside Licence Suspended as UKBA Cracks Whip*, TIMES HIGHER EDUC.

Clearly, the escalation of the “student consumer movement” has substantial implications for the quality of faculty work-life, as well as faculty members’ employment rights. Those implications will be explored in the next section of this article.

## II. THE STUDENT-AS-CONSUMER TREND IN THE U.K.

Arguably, a significantly distorting influence on the work and professional autonomy of academics in the U.K. has been the introduction of the National Student Survey (“NSS”). The traditional model sees universities not merely as providers of services but as standard setters and regulators of quality.<sup>92</sup> If consumer power finds academics being drawn into what Michael Bayles describes as the agency model of professionalism,<sup>93</sup> academics become “hired guns” undertaking the wishes of the student client.<sup>94</sup> Introduced in 2005, the NSS surveys final-year undergraduate students regarding their perceptions of the quality of their academic programs.<sup>95</sup> The survey was intended to follow a proposal in the 2003 White Paper, *The Future of Higher Education*, to “explicitly cover teaching quality” and ensure that students were treated as “intelligent customers.”<sup>96</sup> Government support for the survey has continued with, for example, the expressed view that student expectations should continue to play an important role in shaping

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(Mar. 22, 2012), <http://www.timeshighereducation.co.uk/419401.article>. For an overview discussion, see Geoffrey Alderman, *Educational Oversight? The Incursion of the UK Border Agency into the Quality Assurance of Higher-Education Programmes* (Oxford Ctr. for Higher Educ. Policy Studies, Working Paper No. 43), available at [http://oxcheps.new.ox.ac.uk/MainSite%20pages/Resources/Ox\\_CHEPS\\_OP43.pdf](http://oxcheps.new.ox.ac.uk/MainSite%20pages/Resources/Ox_CHEPS_OP43.pdf) (last visited Apr. 21, 2014). In August 2012, the U.K. Border Agency revoked the sponsor license of London Metropolitan University; the license was reinstated in April of 2013, but subject to a period of probation and a limit upon the number of international students who could be admitted. See Hannah Richardson, *London Met Wins Back Foreign Student License*, BBC.COM (Apr. 9, 2013), <http://www.bbc.com/news/education-22080301>.

92. MICHAEL BAYLES, PROFESSIONAL ETHICS (1981).

93. *Id.*

94. See G. Sharrock, *Why Students are not (Just) Customers (and other reflections on Life after George)*, 22 J. HIGHER EDUC. POL. & MGMT. 149 (2000); Ken Mackinnon, *The Academic as Fiduciary: More than a Metaphor?*, 1 CANADIAN LEGAL EDUC. ANN. REV. 115, 121 (2007).

95. The survey contains 23 core items, addressing experiences of teaching, assessment, academic support, course organisation, learning resources, personal development and overall course satisfaction and two open response questions. See generally NAT. STUD. SURVEY 2014, <http://www.thestudentsurvey.com/> (last visited Aug. 27, 2014). There are also a number of optional question banks allowing institutions to further tailor the survey to their needs. See *id.*

96. DEP’T FOR EDUC. AND SKILLS, THE FUTURE OF HIGHER EDUCATION 47 (2003), available at <http://www.architecture.com/Files/RIBAHoldings/PolicyAndInternationalRelations/Policy/PublicAffairs/HigerEducationWhitePaper.pdf> [hereinafter THE FUTURE OF HIGHER EDUCATION].



university provision.<sup>97</sup>

Criticisms of the survey focus not only upon its increasingly time consuming nature,<sup>98</sup> as colleges and universities compete for higher position in the league table created from the results,<sup>99</sup> but also, and more fundamentally, on its questionable methodology<sup>100</sup> and the damaging effect it can have on key aspects of a higher education.<sup>101</sup> One vocal critic has described the survey as “a canker that is eating away at the academic profession,” with “its target the modification of everyday academic life.” Distinct from other audit mechanisms, critics argue that the survey goes beyond the mere seeking of accountability, “but directly challenges the identity of a scholar” and “encourages the subordination of education” and scholarship to the arbitrary imperative of student satisfaction.<sup>102</sup> Risk aversion and defensiveness become the hallmarks of academic practice such that the damage to academic identity is not outweighed by the benefits to students but rather risks “infantilizing” them by focusing not on what they need, but what they

97. DEP’T FOR BUS. INNOVATION & SKILLS, HIGHER AMBITIONS: THE FUTURE OF UNIVERSITIES IN A KNOWLEDGE ECONOMY (2009), available at <http://bis.gov.uk/assets/biscore/corporate/docs/h/09-1447-higher-ambitions.pdf>.

98. This issue is compounded by the observation that the variation between institutions, even those towards the top and bottom ends of the ranking, is so low as to make the findings highly questionable as a means to distinguish one institution from another. CTR. FOR HIGHER EDUC. STUDIES, ENHANCING AND DEVELOPING THE NATIONAL STUDENT SURVEY (2010) [hereinafter C.H.E.S., ENHANCING AND DEVELOPING THE NATIONAL STUDENT SURVEY], available at [http://www.hefce.ac.uk/media/hefce/content/pubs/2010/rd1210/rd12\\_10a.pdf](http://www.hefce.ac.uk/media/hefce/content/pubs/2010/rd1210/rd12_10a.pdf).

99. *But see* C.H.E.S., *supra* note 98, at 39, 47 (casting doubt on propriety of using NSS results to create league tables). Other inappropriate uses include: comparing subject areas without appropriate adjustments and comparing institutions without factoring in variations, such as characteristics and mix of students. *Id.* at 48.

100. Harriet Swain, *A Hotchpotch of Subjectivity*, GUARDIAN (May 18, 2009), <http://www.guardian.co.uk/education/2009/may/19/national-student-survey-university-guide>. Similar criticisms levelled at the Australian Course Experience Questionnaire (CEQ), the survey on which the NSS is modelled, might also be made here: that it is inadequate to detect important nuances of higher education. *See* Kerri-Lee Harris & Richard James, *The Course Experience Questionnaire, Graduate Destinations Survey and Learning and Teaching Performance Fund in Australian higher education*, PUBLIC POLICY FOR ACADEMIC QUALITY (2006) (cited by C.H.E.S., *supra* note 98, at 8, 14, 18, 21, 26, 36), available at [http://www.unc.edu/ppaq/CEQ\\_final.html](http://www.unc.edu/ppaq/CEQ_final.html).

101. In contrast, a 2010 report to the HEFCE asserts the NSS proved itself to be a successful component of the Quality Assurance Framework (QAF) for higher education, a performance indicator of teaching quality. C.H.E.S., *supra* note 98, at 7. This report also highlights general senior management approval of the NSS, suggesting that, in crude business terms, some senior managers may favour giving students what they *want*, as a means to improve league table rankings, subsequent student recruitment and so the financial health of the institution. *Id.* In contrast, individual academics, as guardians of the academic integrity of their discipline, may be much more attuned to identifying what they think students *need*. *See id.* at 21.

102. *See* John Gill, *Leader: Exit the Comfort Zone*, TIMES HIGHER EDUC. (Mar. 8, 2012), <http://www.timeshighereducation.co.uk/comment/leader/leader-exit-the-comfort-zone/419271.article>.

want.<sup>103</sup> Some (perhaps many) students are buying into the assumption that the education they receive can be measured as easily as the functionality of a new laptop or iPad. For instance, a student engagement coordinator at a leading English university's student union said, "[students] are the people who know how they can best be taught, and it's institutions' job to give them the knowledge and experience they have come to university for."<sup>104</sup> This reflects government thinking, as does a 2011 white paper, *Students at the Heart of the System*, in which the Department for Education & Skills talks about "putting students in the driving seat."<sup>105</sup> But, as some observers have commented, this thinking may permit students to "drive" before they have a license.<sup>106</sup> Experienced academics, all themselves students once-upon-a-time, may recognize over-simplicity in this type of thinking. Experience allows for re-evaluation. Teachers who are entertaining and cater more to students' wishes may be favored at the time of assessment, but what they teach their students may become outdated. Furthermore, their teaching styles may have necessitated little self-managed engagement with the subject. In contrast, the lecturer who gave less and demanded more may have been less popular at the time, but now is recalled more fondly as the genuine "teacher" who facilitated in his or her students lifelong skills of learning how to learn. As Jacquelin Mackinnon observes:

[A]t least in some areas of knowledge and skills, the student cannot know in advance what it is that they need to learn in order to understand a particular topic. If education is transformative, the student has the knowledge to evaluate the teaching process only after it has occurred. Until then he or she may have to take on trust that the methodology and content of the teaching are beneficial."<sup>107</sup>

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103. Frank Furedi, *Satisfaction and its Discontents*, TIMES HIGHER EDUC. (Mar. 8, 2012), <http://www.timeshighereducation.co.uk/419238.article>. See also Duna Sabri, *Absence of the Academic From Higher Education Policy*, 25 J. EDUC. POL'Y 191 (2010); Gill, *supra* note 102. Furedi also observes that different constituencies of student tend to view their experience differently—for example female and mature students tend to be more positive about their experience and different results are obtained from different ethnic groups.

104. Harriet Swain, *Should Students be Given the Power to Decide How Universities are Run?*, GUARDIAN (June 11, 2012), <http://www.theguardian.com/education/2012/jun/11/universities-giving-students-more-power>.

105. DEP'T FOR BUS. INNOVATION & SKILLS, STUDENTS AT THE HEART OF THE SYSTEM (2011), available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/32409/11-944-higher-education-students-at-heart-of-system.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32409/11-944-higher-education-students-at-heart-of-system.pdf).

106. See, e.g., *Students at the heart of the system? White Papers and Taking Control*, UNIV. BLOG, <http://theuniversityblog.co.uk/2011/06/28/students-heart-of-the-system-white-paper/> (last visited Aug. 27, 2014).

107. Jacquelin Mackinnon, *Academic Supervision: Seeking Metaphors and Models for Quality*, 28 J. FURTHER & HIGHER EDUC. 395 (2004). An interesting observation in this regard comes from Michael Moritz, a graduate of Christ Church, Oxford and "billionaire financier" who in July 2012 announced plans to donate £75 million to Oxford

For today’s students, the demanding, perhaps idiosyncratic, but ultimately effective tutor may be a dying breed—pushed to the brink of extinction by students who “know how they can best be taught” and who are encouraged frequently to express this.<sup>108</sup>

The U.K. government’s goal of measuring teacher quality<sup>109</sup> has missed its target, instead risking the move towards a consumer generated “junk food” version of higher education. However, while the government is well aware that market drivers for food have resulted in unhealthy eating and rising levels of obesity—trends which then have to be countered by government spending on initiatives seeking to persuade the public to adopt healthier alternatives—similar considerations are absent with regard to government plans with respect to the “consumption” of higher education. At no stage prior to entering an institution of higher education is a typical U.K. student likely to have been introduced to core ideas about what such an education might or should entail. Thus, just as an unbridled free market for food places customer choice ahead of decades of scientific research regarding the effects of unhealthy food on the human body, the NSS prioritizes the views of young men and women (who have yet to experience the long term benefits of their educations and have no bases for comparison) ahead of centuries of experience, trial and error within the academy itself. Intellectual pressure, whether or not this gives rise immediately to a happy experience, is necessary for academic benefit, something which traditional U.K. higher education has long understood.<sup>110</sup> In contrast, the NSS risks

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University to fund scholarships for financially disadvantaged students. Margarette Driscoll, *Putting Poor Kids on the Path to Billions*, SUNDAY TIMES (July 15, 2012), <http://www.thesundaytimes.co.uk/sto/newsreview/features/article1080953.ece>. In an interview given to the Sunday Times, Moritz said

My experience at Oxford has proved surprisingly useful in dealing with the unconventional . . . . If you ask what I learnt it was the approach to a topic rather than the topic itself . . . . How it helped with what I did subsequently was in being given a topic I knew little about and being able to develop opinions and come up with conclusions based on imperfect information. That proved to be a wonderful skill.

*Id.* at 5. This sentiment is likely to resonate with most academics and most successful students of higher education. What can be most valuable is not what one learns, but the learning how to learn, evidenced by Moritz’s reading history at Oxford and subsequently achieving great financial success in spotting promising entrepreneurs and financing new internet businesses. What is particular telling are the use of “surprisingly” and “proved” (“to be a wonderful skill”). *Id.* These words, it would seem, support the argument that, at the time they are immersed in the learning process, students are often not in the best position to evaluate its deeper qualities or potential future value.

108. Admittedly, this argument has subtle layers. The most entertaining and engaging faculty may inspire lifelong interest in a subject, whilst some less engaging faculty are simply not very good teachers. However, between these extremes is ample scope for variety, which, without the benefit of hindsight, can be very difficult to assess and rank.

109. See THE FUTURE OF HIGHER EDUCATION, *supra* note 96.

110. See, e.g., STEFAN COLLINI, WHAT ARE UNIVERSITIES FOR? (2012).

responses, whether from individual academics or institutions as a whole, which seek to make less challenging key aspects of higher education from the teaching itself to the assessment processes.<sup>111</sup>

The damaging effect of this trend is likely only to be experienced in the medium-to-long term. Unlike generations of graduates before them, who have been able to draw upon challenges faced in the “safe” environment of the college or university to enhance their capacity to address challenges in the world of work, tomorrow’s graduates may be deprived of this. A simple example is the law student refining drafting skills via the traditional experience of writing an essay without direct help from tutors, learning what is good and bad about the writing from feedback and then seeking to utilize these lessons in the next drafts. If law schools succumb to student demands for help during the drafting process, for instance, by seeking comments on drafts, the final mark achieved may be higher and the student may be happier, but the learning experience is severely diminished. As Furedi puts it, “[t]he model of teaching that is slowly creeping into university life is one in which undergraduates are perceived as biologically mature [school] pupils who require constant direction and guidance.”<sup>112</sup>

Another subtle example, discussed later in a different context, is the recording and uploading of lectures to web based learning platforms. Historically, a lecture has been a one-off event that not only conveys information but typically can also facilitate the refinement of listening and note-taking skills. A recorded lecture available “on demand” changes this nature. Faced with the ready availability of technology for recording, as well as student-demand that the additional “service” be provided, university managers have little reason to resist. Only time will tell whether, for instance, future lawyers are missing an important skill set as a result of this move.<sup>113</sup> Just as sugary treats are popular because of the instant satisfaction they provide, so might intellectually innutritious courses or course delivery be favored by some students who crave the high grades and an easier academic life.

It has been suggested that student surveys can be designed to avoid the detrimental effects that have resulted from the NSS in the U.K. For example, other jurisdictions that make use of such surveys include questions relating to matters such as number and length of essays and how hard the

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111. Furedi, *supra* note 103.

112. *Id.*

113. Many lawyers in the U.K. will still likely encounter situations where the ability to take an accurate contemporaneous note is an important skill. Most lawyers currently in practice will have encountered, depending upon individual attendance rates, 500 hours or more of live lectures, typically spread over a four year period, as part of their academic and professional study. This can provide an important skill resource, although one which may easily have been overlooked given the extent to which it was imbedded into traditional university teaching. As with the impact of the ready availability of electronic calculators upon basic numerical skills, only time will tell whether the downgrading of traditional teaching models has an equivalent effect on other skills sets.

student has worked to meet tutors’ expectations—questions that reinforce rather than undermine values towards which higher education should be directed.<sup>114</sup>

It has been argued that the National Survey of Student Engagement (NSSE) used in North America is better methodologically than the NSS because it focuses upon learning rather than satisfaction.<sup>115</sup> Its theoretical underpinning is based upon the idea of reciprocal transactions. For instance, students are asked about their input into the learning process—how hard they have worked, the nature of outputs they have produced, and their levels of engagement with staff.<sup>116</sup>

In addition to the NSS, many U.K. colleges and universities have moved or are moving towards centralized internal student feedback questionnaires. Instead of student feedback being an aspect of the close intellectual relationship between students and academics, being restricted to individual or departmental level and serving to inform the professional development of courses, they become tools of central oversight with the potential to be used bluntly and with undue regard for the subtleties of the process needed to aid students in their development to become autonomous learners. The potential for a form of bullying to emerge from centralized student questionnaires also appears to have been largely ignored within colleges and universities.<sup>117</sup> Some student responses in free text aspects of questionnaires can be blunt, even brutal, in their criticism. The anonymity of feedback can further reduce inhibitions on the part of the writers, who vent their spleen, free from self-censorship. While a certain fortitude might reasonably be expected from academics, an employment environment that regularly invites potential criticism of employees may wear on even the hardest professors.<sup>118</sup>

### III. INSTITUTIONAL RESPONSES AND IMPLICATIONS FOR FACULTY

Particularly at public colleges and universities in the U.S., the trends discussed above have altered the work environment and employment rights of faculty. Departing tenure-track faculty are quite likely to be replaced (if

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114. Gill, *supra* note 102.

115. See, e.g., HIGHER EDUC. ACAD., COMPARATIVE REVIEW OF BRITISH, AMERICAN AND AUSTRALIAN NATIONAL SURVEYS OF UNDERGRADUATE STUDENTS (2007).

116. *Id.* See also C.H.E.S., *supra* note 98.

117. At present, Anglo-Welsh case law on work-related psychiatric illness and the potential defamatory impact of negative review comments has not extended specifically into the academic field. For examples of the existing state of case law, see Walker v Northumberland [1995] I.C.R. 702; Sutherland v Hatton [2002] I.C.R. 613; Barber v Somerset CC [2004] UKHL 13, [2004] 1 W.L.R. 1089; Daw v Intel Corp (UK) Ltd [2007] EWCA Civ 70, [2007] I.R.L.R. 355. See also Jon Swaine, *Man Sued for Libel over Comments on eBay*, TELEGRAPH (Oct. 23, 2008), <http://www.telegraph.co.uk/news/uknews/3247683/Man-sued-for-libel-over-comments-on-eBay.html>.

118. *Id.*

they are replaced at all) with non-tenure-track faculty, working either part-time or full time, but with no prospect for tenure.<sup>119</sup> This trend reduces the number of tenure-track faculty available for governance responsibilities, advising, and other non-teaching work that is expected of faculty members. Also, an important decision by the U.S. Supreme Court appears to have limited the ability of faculty members at public institutions to enjoy the free speech protections of the First Amendment if they speak on matters related to their work.<sup>120</sup> And courts are showing less deference to the pedagogical judgments of faculty with respect to student claims of alleged discrimination or contractual breaches.<sup>121</sup> Each of these trends has elicited responses from institutions that raise questions about the scope of academic freedom and the quality of a faculty member's work-life.

#### A. Increase in Non-Tenure-Track Faculty

Declining financial support and multiple demands on institutional resources have persuaded many colleges and universities to rely more heavily on non-tenure-track faculty, whether part-time adjuncts or full-time employees. According to a survey conducted by the American Federation of Teachers, part-time and adjunct faculty teach "the majority of undergraduate courses" in U.S. colleges and universities.<sup>122</sup> The use of part-time and adjunct faculty differs, however, by type and control of institutions. In 2009, 32 percent of faculty at four-year colleges and universities were part-time; in the same year, 53 percent of the faculty at public two-year colleges and universities were employed part-time.<sup>123</sup> Between 1999 and 2009, the number of part-time faculty overall increased by 63 percent.<sup>124</sup> Also, according to the American Association of University Professors, which used U.S. Department of Education data, the proportion of full-time tenured and tenure-track faculty in U.S. colleges and universities overall declined from 45.1 percent in 1975 to 24.4 percent in 2009, while the proportion of full and part-time non-tenure-track faculty at U.S. institutions increased from 34.3 percent in 1975 to 56.2 percent in 2009.<sup>125</sup>

The decline in hiring of tenure-track faculty has depressed the labor market for recent PhD graduates, and the propensity for older faculty to de-

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119. *Id.*

120. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

121. *See, e.g., Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012).

122. AM. FED'N TEACHERS, AMERICAN ACADEMIC: A NATIONAL SURVEY OF PART-TIME/ADJUNCT FACULTY (2010), available at [http://www.aft.org/pdfs/highered/aa\\_partimefaculty0310.pdf](http://www.aft.org/pdfs/highered/aa_partimefaculty0310.pdf).

123. U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS 374, tbl.255 (2010), available at [http://nces.ed.gov/pubs2011/2011015\\_3a.pdf](http://nces.ed.gov/pubs2011/2011015_3a.pdf).

124. *Id.*

125. AMER. ASS'N UNIV. PROFESSORS, TRENDS IN INSTRUCTIONAL STAFF EMPLOYMENT STATUS, 1975-2009 (2009), available at <http://www.aaup.org/NR/rdonlyres/7C3039DD-EF79-4E75-A20D-6F75BA01BE84/0/Trends.pdf>.

lay retirement, in part due to the lingering effects of the recession that began in 2008,<sup>126</sup> has exacerbated this problem. These trends have created two tiers of faculty and have motivated non-tenure-track faculty at many institutions to seek the right to bargain collectively over pay, job security, and other employment matters. Nearly one-fifth of all non-tenure track faculty are represented by unions—a figure not much lower than that for full-time tenure-track faculty.<sup>127</sup> Although tenure-track and non-tenure-track faculty are in the same bargaining unit at a very small number of institutions, they are usually in separate bargaining units, thus widening the gap between tenure-track faculty and their less fortunate colleagues.

Although tenure-track faculty have far superior working conditions, job security, and pay than their non-tenure-track colleagues, the sharp increase in the use of non-tenure-track faculty will likely change the way that tenure-track faculty work. For example, tenure-track faculty may have less time to conduct research because they must devote more time to governance-related matters, advising, and other nonteaching activities. Additionally, new accountability requirements handed down by accrediting associations may require review and revision of curricula or program content. Institutions facing financial difficulties may limit or eliminate once unquestioned perks, such as sabbaticals or lighter teaching loads for faculty with heavy research loads or those holding positions with additional responsibilities. Class sizes and teaching loads may increase as institutions seek ways to minimize the need to hire additional faculty. All of these developments have made academic work quite different from even a decade ago on many campuses.

The last half-century has witnessed a move in U.K. higher education, from an elite system to a mass system<sup>128</sup> as result of a tenfold increase in student numbers and a rise in the total number of colleges and universities.<sup>129</sup> There are approximately 180,000 academic staff,<sup>130</sup> 10 percent of

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126. Audrey Williams June, *Aging Professors Create a Faculty Bottleneck*, CHRON. HIGHER EDUC. (March 18, 2012), <http://chronicle.com/article/Professors-Are-Graying-and/131226/>.

127. Peter Schmidt, *Part-Time Faculty Are Catching Up to Full-Timers in Union Representation*, CHRON. HIGHER EDUC. (Nov. 18, 2011), <http://chronicle.com/article/Part-Time-Faculty-Are-Catching/129819/>.

128. Ideas regarding "McDonaldization" have even been used by some commentators. See D. Hartley, *McDonaldization of Higher Education: Food for Thought*, 21 OXFORD REV. EDUC. 409 (1995); M. Parker & D. Jary, *The McUniversity—Organization, Management and Academic Subjectivity*, 2 ORGANIZATION 319 (1995); C. Prichard & H. Willmott, *Just How Managed is the McUniversity?*, 18 ORGANISATION STUD. 287 (1997).

129. In 2012, the Guardian newspaper ranked 120 institutions in its "Good University Guide," with some of these institutions being university colleges rather than fully fledged universities. See *University Guide 2012*, GUARDIAN (May 16, 2011), <http://www.theguardian.com/education/table/2011/may/17/university-league-table-2012>. Combining this total with other providers of higher education brings the total number of institutions to over 150.

whom are full professors.<sup>131</sup> At least one-third of academic employees are on fixed term contracts, although some commentators suggest that the real figure is much higher.<sup>132</sup> Workforce casualization (or, in the words of some commentators, the creation of an “underclass”) allows for greater management flexibility but at the expense of traditional ideas of collegiality.<sup>133</sup> Such developments may also eat into the precious research time of experienced, full-time permanent academics who find themselves having to devote more of their energies to training, supporting and monitoring temporary, possibly transient, junior colleagues.<sup>134</sup> This phenomenon compares unfavorably with earlier academic employment models whereby a stable and predominantly permanent workforce would have worked largely autonomously, at least in the humanities and social sciences. However, increased casualization may provide some benefits to established academics—the provision of a buffer against the effects of the move to a mass education model<sup>135</sup> and, in a post-tenure environment, some protection against redundancy for staff on permanent contracts. Increased casualization has also been accompanied by an increasing delegation of tasks previously undertaken by academics to non-academic staff.<sup>136</sup> Recent examples

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130. *Free Online Statistics—Staff*, HIGHER EDUC. STAT. AGENCY, [http://www.hesa.ac.uk/index.php?option=com\\_content&task=view&id=1898](http://www.hesa.ac.uk/index.php?option=com_content&task=view&id=1898) (last visited Aug. 22, 2014) (listing total academic staff for 2010-2011 at 181,185).

131. In the U.K. context, the title “professor” is generally restricted to those who have reached the top echelons of the academic hierarchy. Most academics in the U.K. are either “lecturers,” “senior lecturers,” or “principal lecturers” (in former polytechnics, which were granted university status from 1992). Some are called “readers.”

132. Earlier research has estimated that around half of academic staff in U.K. higher education institutions are paid hourly, are otherwise not salaried full-time, or are fractional part-time. See Colin Bryson et al, *HESA 2005-6 Part-Time Teaching Staff Statistics: An Analysis and Commentary*, (2007), available at [http://www.new1.heacademy.ac.uk/assets/bmaf/documents/projects/HES\\_final\\_report.pdf](http://www.new1.heacademy.ac.uk/assets/bmaf/documents/projects/HES_final_report.pdf). Changes in U.K. employment legislation may explain the changed description and statistical breakdown in more recent years, although the authors of the latter report do question the accuracy of some HESA data.

133. See Hugh Willmott, *Managing the Academics—Commodification and Control in the Development of University Education in the UK*, 48 HUM. REL. 993 (1995); Clyde W. Barrow, *Beyond the Multiversity: Fiscal Crisis and the Changing Structure of Academic Labour*, in ACADEMIC WORK: THE CHANGING LABOUR PROCESSES IN HIGHER EDUCATION 159 (John Smyth ed., 1995) (cited by Colin Bryson, *What About the Workers? The Expansion of Higher Education and the Transformation of Academic Work*, 35 INDUS. REL. J. 38, 41 (2004)).

134. This comes on top of observations that self-directed academic activities, such as research, have already been squeezed to the edges, such that much of it can only be undertaken in an academic’s own time outside of formal working hours. Bernard Casey, *Academic Staff in Higher Education: Their Experiences and Expectations*, NAT’L COMMITTEE INQUIRY INTO HIGHER EDUC. (1997), <http://www.leeds.ac.uk/educol/ncihe/> (follow “Reports 1-14” hyperlink; then follow “Report 3” hyperlink) (cited by Bryson, *supra* note 133, at 46).

135. Willmott, *supra* note 133.

136. See, e.g., Tom Wilson, *The Proletarianisation of Academic Labour*, 22 INDUS.



have included the creation in some universities of student advisor roles to take charge of advice relating to mitigating evidence for assessments and the provision of reasonable adjustments to meet disability discrimination requirements. On the one hand, such moves may be seen as positive because they concentrate expertise around an increasingly complex legal and regulatory framework, relieving academics of the need to maintain their own expertise in these areas and better ensuring that students receive accurate and up to date advice from specialists. On the other hand there may be displacement and a less desirable disaggregation of activities, especially if such sources of advice are centralized and so removed from the frontline academic activity to which they relate.<sup>137</sup>

Funding in the U.K. has not kept pace with student numbers and, as a result, staff-to-student ratios have worsened and academic pay has lagged behind that of comparable professions and occupations. For example, between 1980 and 1998, the average real terms increase across all employment sectors was 44 percent compared to only 5 percent for academics.<sup>138</sup> A more recent comparative survey found that average academic salaries in the U.K. were the seventh highest<sup>139</sup> amongst twenty-eight countries considered, but that once salaries were compared with other professions they fared relatively poorly.<sup>140</sup> In recent years, the requirement to teach more students for less money has been accompanied by greater external oversight through both the NSS and, most recently, the removal of most state subsidies, which had led to an increase in undergraduate fees and exposed universities to greater market forces.

The impact of the new fee regime, following its imposition on 2012–13 entry students, is still emerging. One indication of the effects of the regime is the number of first-year undergraduate applicants and attendees. For example, from the 2002–03 school year to the 2011–12 school year, the number of first-year undergraduate students at English colleges and universities increased from 344,235<sup>141</sup> to over 480,000.<sup>142</sup> After the introduction of

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REL. J. 250 (1991).

137. A simple example would be student advisors in disciplinary departments and schools who can work closely with academics, sit on exam boards where decisions are implemented, etc., as compared to advisors who are centralized and removed from the core of academic activity and decision making.

138. See MICHAEL BETT, INDEPENDENT REVIEW OF HIGHER EDUCATION PAY AND CONDITIONS (1999) (cited by Bryson, *supra* note 133, at 46–47); Dnes & Seaton, *supra* note 35.

139. The U.K. placed only behind Canada, Italy, South Africa, India, the U.S., and Saudi Arabia.

140. *International Comparison of Academic Salaries in 28 Countries*, ACAREM.HSE.RU, <http://acarem.hse.ru/> (last visited Aug. 27, 2014). See also Jack Grove, *Academic Salaries No Longer Attract Top Talent, Survey Finds*, TIMES HIGHER EDUC. (Mar. 22, 2012), <http://www.timeshighereducation.co.uk/419399.article>.

141. *Students in Higher Education Institutions 2003/4, Table 1b*, HIGHER EDUC. STAT. AGENCY, <https://www.hesa.ac.uk/content/view/1554/251/> (last visited Aug. 27,

higher fees, total enrollment of undergraduate students fell by 17 percent between the 2011-12 and 2012-13 school years.<sup>143</sup> The picture for 2013-14 initially continued to show hesitancy amongst prospective students to commit themselves to college or university study after the imposition of higher fees, but new data indicates that undergraduate enrollment has gradually begun to bounce back.<sup>144</sup> By June 2013, the number of applicants from England was 3 percent greater than at the same time in 2012, suggesting that the initial negativity surrounding higher fees is subsiding.<sup>145</sup>

Another useful indicator is the number of international student applicants. According to a statistical release compiled by UCAS summarizing the number of applicants in the 2012 cycle at the June deadline, applications from other EU countries fell by 12.9 percent between 2011 and 2012.<sup>146</sup> The change from 2012-13 shows a reversal of this trend; according to UCAS, applications from other EU countries increased by 4.3 percent.<sup>147</sup>

Finally, in the wake of the fee regime change, some leading colleges and universities are taking advantage of the opportunity to recruit uncapped numbers of students with at least grades ABB at "A" Level.<sup>148</sup> This use of the August clearing system represents a new pattern of behavior. Historically, clearing was dominated by lower status institutions seeking to recruit students who were rejected by their initial choice of institution because of poorer than predicted grades. The use by some of the more prestigious colleges and universities of the clearing process to tempt applicants who had performed better than expected away from their initial lower status choice is a new tactic, and it presents a further risk to the future viability of some lower-status institutions. This is an unfolding picture in what are still early days of a novel environment for post-1945 English higher education.

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2014).

142. *Students, Qualifiers, and Staff data tables 2011/12, Table 17*, HIGHER EDUC. STAT. AGENCY, <https://www.hesa.ac.uk/content/view/1973/239/> (last visited Aug. 27, 2014).

143. *General Student Numbers, Table 2*, HIGHER EDUC. STAT. AGENCY, <https://www.hesa.ac.uk/stats> (last visited Aug. 27, 2014).

144. Jack Grove, *Student Recruitment Hits Record Numbers*, TIMES HIGHER EDUC. (Dec. 19, 2013), <http://www.timeshighereducation.co.uk/news/student-recruitment-hits-record-levels/2010000.article>.

145. UNIV. & C. ADMISS'N SERV., 2013 CYCLE APPLICANT FIGURES – JUNE DEADLINE POSTED (2013), available at [http://www.ucas.com/system/files/2013-applicant-figures-june-deadline\\_2.pdf](http://www.ucas.com/system/files/2013-applicant-figures-june-deadline_2.pdf).

146. *Id.*

147. *Id.*

148. See, e.g., *Universities U.K.—Clearing 2013*, UNIVERSITIES U.K., <http://www.universitiesuk.ac.uk/aboutus/whatwedo/PolicyAnalysis/Team/Pages/Clearing2013.aspx> (last visited Aug. 27, 2014). See also Jack Grove, *In fight to fill places, all bets are off*, TIMES HIGHER EDUC. (Aug. 8, 2013), <http://www.timeshighereducation.co.uk/news/in-fight-to-fill-places-all-bets-are-off/2006345.article>.

While applicant numbers appear to be holding up better than some commentators predicted, application patterns are still in a state of flux. A so-called “flight to quality” towards high status colleges and universities and towards career-orientated courses continues to put some lower status institutions at risk.<sup>149</sup> In terms of course choice, certain subjects—such as economics, chemistry and physics—were reported to have attracted higher numbers of applicants, while applications for other subjects—such as media studies, performing arts, and communication studies—were significantly decreased.<sup>150</sup>

Academics in the U.K. complain about deteriorating autonomy, declining collegiality and the rise of managerialism. The latter has tended to seek to standardize academic work practices and to measure compliance by the centralized student feedback systems discussed above. Managerialism may also favor academic subjects for which there is a buoyant market, rather than traditional models of colleges and universities as repositories of knowledge, ideas and research—whether mainstream and in current demand or relatively obscure.<sup>151</sup> These developments have undermined traditional ideas that poorer working conditions could be traded for autonomous and intrinsically rewarding academic activity.<sup>152</sup> A “commodification” of the labor process is not unique to academia; other professions and highly skilled occupations have experienced similar developments.<sup>153</sup> Practicing lawyers in England and Wales, for example, have in recent years seen aspects of their work become subject to similar developments.<sup>154</sup> However, a key difference is that legal practitioners work in a genuine market environment where creative business practices can produce surplus value. Historically, U.K. colleges and universities have been non-profit driven organizations with charitable aims, and academic work thus does not generate surplus value in the same manner. Managerial pressure may push academics into acting as though it did.<sup>155</sup>

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149. See Martin Freedman, *University Applications: Have Your Numbers Plummeted?*, GUARDIAN (Feb. 8, 2012), <http://www.theguardian.com/higher-education-network/blog/2012/feb/08/university-applications-in-the-uk>.

150. See *University Applications: Where did People Apply and for What Subjects?*, Data Blog, GUARDIAN, <http://www.theguardian.com/news/datablog/2012/jan/30/university-applications-subjects-age-poverty#subject> (last visited Aug. 27, 2014).

151. See Bryson, *supra* note 133, at 40; Parker & Jary, *supra* note 128; Willmott, *supra* note 133.

152. See Craig McInnis, *Towards New Balance or New Divides? The Changing Work Roles of Academics in Australia*, in *ACADEMIC WORK AND LIFE* 117 (Malcolm Tight ed., 2000).

153. See, e.g., Hugh Levinson, *Call Centre Justice Criticised*, BBC (Oct. 9, 2007), [http://news.bbc.co.uk/2/hi/uk\\_news/7035533.stm](http://news.bbc.co.uk/2/hi/uk_news/7035533.stm).

154. *Id.*

155. Willmott, *supra* note 133. See also by Bryson, *supra* note 133, at 41. There is a legitimate argument to be made that to remain viable, especially in uncertain economic times, colleges and universities must work to a suitable balance sheet surplus. How-

## B. The U.S. Supreme Court and Academic Freedom

In 2006, the U.S. Supreme Court issued an opinion in *Garcetti v. Ceballos*<sup>156</sup> that has the potential to sharply limit the free speech protections for faculty at public colleges and universities. In a case involving a non-academic workplace, the Court ruled 5–4 that employee speech made as part of the employee’s job duties is not protected by the First Amendment.<sup>157</sup> An employee may accordingly be disciplined or dismissed as a result of that speech.<sup>158</sup> Although the dissenters, led by Justice Souter, expressed dismay that such a bright line rule might “imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write ‘pursuant to official duties,’”<sup>159</sup> the majority dismissed such concerns. Justice Kennedy, writing for the court, admitted that “[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence.”<sup>160</sup> But, he added, “[w]e need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.”<sup>161</sup>

The Court’s disinclination to either apply *Garcetti* wholesale to academia or to carve out an exception for faculty, has led to predictable inconsistency in the lower federal courts. Federal courts in the Ninth,<sup>162</sup> Seventh,<sup>163</sup> Sixth,<sup>164</sup> Second,<sup>165</sup> and Third<sup>166</sup> Circuits have applied *Garcetti* to uphold discipline or dismissal of faculty who claim that these actions were a result of otherwise protected speech. On the other hand, the Idaho Supreme Court<sup>167</sup> and the Fourth Circuit<sup>168</sup> concluded that “letters to the edi-

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ever, the risk remains present that institutions lose sight of this charitable aim and that the profit motive creeps into everyday managerial thinking.

156. 547 U.S. 410 (2006).

157. *Id.*

158. *Id.*

159. *Id.* at 438.

160. Bryson, *supra* note 133, at 46. *See also Garcetti*, 547 U.S. at 425 (2006).

161. *Id.*

162. *Hong v. Grant*, 516 F. Supp. 2d 1158 (C.D. Cal. 2007), *aff’d on other grounds*, 403 F. App’x 236 (9th Cir. 2007).

163. *Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008).

164. *Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332 (6th Cir. 2010).

165. *Ezuma v. CUNY*, 367 F. App’x 178 (2d Cir. 2010); *see also Alberti v. Univ. of P.R.*, 818 F. Supp. 2d 452 (D.P.R. 2011).

166. *Gorum v. Sessoms*, 561 F.3d 179 (3d Cir. 2009).

167. *Sadid v. Idaho State Univ.*, 265 P.3d 1144 (Idaho 2011) (finding that although speech was protected by First Amendment, plaintiff was not retaliated against; affirming summary judgment for university).

168. *Adams v. Trustees of Univ. of N.C.—Wilmington*, 640 F.3d 550 (4th Cir. 2011). *See also VanHeerden v. La. State Univ.*, 2011 U.S. Dist. LEXIS 121414 (M.D.

tor” and other communications directed to the public by university faculty were not made “pursuant to official duties” and thus *Garcetti* did not apply. A federal district court rejected a college’s motion to dismiss an adjunct professor’s constitutional claims that she was impermissibly dismissed because of statements she made in a biology course that she taught.<sup>169</sup> That court called the college defendant’s reliance on *Garcetti* “misplaced” because *Garcetti* “expressly reserved the question of whether its holding extends to scholarship or teaching-related speech,” and thus the court applied “existing circuit law” and rejected the *Garcetti* claim.<sup>170</sup>

The disarray that has occurred in the wake of *Garcetti* is troubling for several reasons. First, institutional defendants are attempting to take advantage of *Garcetti* to insulate negative actions against faculty members that may very well be justified by the facts—and by pre-*Garcetti* First Amendment jurisprudence. Using *Garcetti* as a convenient defense to nearly any negative employment action in which a plaintiff alleges a First Amendment or academic freedom violation chips away at vital protections for both the institution and its faculty. Second, plaintiffs are claiming academic freedom or First Amendment protections for some behavior that could be characterized as misconduct or insubordination—particularly speech related to non-teaching or non-research duties. Prior to *Garcetti*, courts did not hesitate to reject such claims on their merits, rather than labeling them “work-related” and thus undeserving of free speech or academic freedom protection.<sup>171</sup> Third, lower courts have not yet developed a thoughtful analysis of the interplay between faculty academic freedom and the institutions’ need to operate effectively. It is unlikely that the parties in any of these cases gave these courts much help in this regard. It appears that some of these faculty plaintiffs misused the doctrines of academic freedom and free speech to attempt to reverse legitimate disciplinary actions for unprofessional conduct or refusal to comply with a reasonable administrative request. The post-*Garcetti* cases involved either poor performance (*Hong*),<sup>172</sup> outright violation of institutional regulations (*Gorum*),<sup>173</sup> or a choice between complying with an administrative request

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La. Oct. 20, 2011) (denying summary judgment on breach of contract claim brought by untenured faculty member who criticized Army Corps of Engineers and others after levees failed as a result of Hurricane Katrina, and ruling that his statements were made as a private citizen and were not part of his official duties).

169. *Sheldon v. Dhillon*, 2009 U.S. Dist. LEXIS 110275 (N.D. Cal. Nov. 25, 2009).

170. *Id.* at \*10.

171. *See, e.g., de Llano v. Berglund*, 282 F.3d 1031 (8th Cir. 2002) (upholding dismissal of a tenured faculty member on grounds of unprofessional conduct and insubordination).

172. *Hong v. Grant*, 516 F. Supp. 2d 1158 (C.D. Cal. 2007), *aff’d on other grounds*, 403 F. App’x 236 (9th Cir. 2007).

173. *Gorum v. Sessoms*, 561 F.3d 179 (3d Cir. 2009).

or losing a grant (*Renken*).<sup>174</sup> On the other hand, it appears that the institutions defending against these claims focused on *Garcetti* as their primary defense rather than emphasizing that the negative actions—at least in some of these cases—were ratifying faculty recommendations or were legitimate requirements with which the faculty member at issue refused to comply. No party in any of these cases spoke up for the integrity of the original definition of academic freedom—which balances rights with responsibilities and demands that faculty behave in a temperate and restrained manner. Further, *Garcetti*'s potential to eviscerate the faculty role in governance, analyzed so ably by Professor Judith Areen,<sup>175</sup> has been virtually ignored by the courts.

### C. Increasing Governance Disputes in the U.S.

Over the past decade, there have been a number of reported disputes on several campuses over the role of faculty in institutional governance. For example, in 2007, the governing board of the Rensselaer Polytechnic Institute suspended the faculty senate after a dispute about voting rights for non-tenure track faculty, although a new senate was created four years later.<sup>176</sup> Faculty senates have been disbanded at other institutions over the past decade as well—in some cases by the administration, in others by institution-level or state-level boards of trustees.<sup>177</sup> At Idaho State University, the State Board of Education suspended the faculty senate after conflict arose between the administration and the faculty regarding planned reorganization of the university.<sup>178</sup> In some cases, faculty senates have been disbanded or threatened with suspension after votes of no-confidence in presidents or provosts.<sup>179</sup> Many of these disputes appear to be closely related to layoff plans, restructuring of programs or departments, or other responses to financial problems faced by these institutions.

The respective roles of trustees and faculty in governing the institution is

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174. *Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008).

175. Judith C. Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945 (2009). See also, Leonard M. Niehoff, *Peculiar Marketplace: Applying Garcetti v. Ceballos in the Public Higher Education Context*, 35 J.C. & U.L. 75 (2008).

176. Andrew Mytelka, *4 Years After Suspension, Faculty Senate Will Return to Rensselaer Polytechnic*, CHRON. HIGHER EDUC. (Dec. 19, 2011), <http://chronicle.com/blogs/ticker/4-years-after-suspension-faculty-senate-will-return-to-rensselaer-polytechnic/39260>.

177. Gary A. Olson, *When to Dissolve a Faculty Senate*, CHRON. HIGHER EDUC. (Mar. 22, 2011), <http://chronicle.com/article/article-content/126827/>.

178. Peter Schmidt, *AAUP Report Denounces Suspension of Idaho State U. Faculty Senate*, CHRON. HIGHER EDUC. (May 26, 2011), <http://chronicle.com/article/AAUP-Report-Denounces/127642/>.

179. See, e.g., Peter Schmidt, *At Fort Valley State U., Faculty Senate is Besieged After Clashing with President*, CHRON. HIGHER EDUC. (Apr. 30, 2012), <http://chronicle.com/article/Faculty-Senate-Is-Besieged/131745/>.

an issue at many colleges and universities. One dramatic example is the sudden dismissal in June 2012 of the president of the University of Virginia, who had served for just two years, and who was popular with the faculty.<sup>180</sup> According to media accounts, the board wanted rapid change, including the elimination of departments and majors, while the president, Teresa Sullivan, preferred working through faculty governance channels to achieve financial savings and to improve quality.<sup>181</sup> The dispute between Sullivan and the board, according to a statement that she released, was “not whether change in and of itself was necessary, but rather at what pace and to what degree.”<sup>182</sup> Faculty members were not consulted about Sullivan’s performance, and the trustees’ decision was widely unpopular with them.<sup>183</sup> The trustees apparently favored speedy decisions over shared governance.

Conflict has also occurred between faculty and administrators over personnel decisions—particularly those involving faculty who have made controversial statements or whose publications have attracted unfavorable attention from the community, alumni, donors, or state policymakers. For example, the uproar over the University of Colorado’s decision to dismiss Ward Churchill led to criticism by the American Association of University Professors (“AAUP”) and a lawsuit by Professor Churchill, in which he was awarded \$1 in nominal damages but not reinstated to his tenured faculty position.<sup>184</sup> Another example is the dismissal of an adjunct faculty member for using controversial language in a communications course; the instructor prevailed on his free speech claim, but did not get his job back.<sup>185</sup>

#### D. Challenges to Academic Judgments in the U.S.

As noted earlier in this article, student claims challenging academic judgments by faculty have increased and some scholars argue that judicial deference to academic judgments is weakening or disappearing.<sup>186</sup> Although not all scholars agree, it does appear that, at least in selected cases, courts are more willing to scrutinize the rationale for academic judgments

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180. Jack Stripling, *Departing President Defends Her ‘Incremental’ Approach to Change at U. of Virginia*, CHRON. HIGHER EDUC. (June 18, 2012), <http://chronicle.com/article/Sullivan-Defends-Her/132379/>.

181. *Id.*

182. *Id.*

183. After the faculty, alumni, the governor, and others came to her defense, the Board of Visitors voted to reinstate Sullivan as president. Sara Hebel et al, *U. of Virginia Board Votes to Reinstate Sullivan*, CHRON. HIGHER EDUC. (June 26, 2012), <http://chronicle.com/article/U-of-Virginia-Board-Votes-to/132603/>.

184. *Churchill v. Univ. of Colo.*, 293 P.3d 16, (Colo. Ct. App. 2010), *aff’d*, 285 P.3d 986 (Colo. 2012).

185. *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671 (6th Cir. 2001).

186. *See, e.g.*, AMY GADJA, *THE TRIALS OF ACADEME: THE NEW ERA OF CAMPUS LITIGATION* (2009).

than they were in the past.<sup>187</sup> For example, although student claims of educational malpractice continue to be unavailing, student breach of contract claims, particularly those brought by graduate students unhappy with the outcome of dissertation committee deliberations, have made some headway.<sup>188</sup> In *Johnson v. Schmitz*, a graduate student sued Yale University and his faculty advisors for breach of contract when the student claimed that his professors had appropriated his ideas and used them in publications without his consent and without acknowledgement.<sup>189</sup> Explaining that Johnson's claims did not allege that he was provided a poor-quality education, but that the university breached express and implied contractual duties that it had assumed, the court stated that its review would be limited to "whether or not Yale had a contractual duty to safeguard its students from faculty misconduct, and, if so, whether that duty was breached in Johnson's case."<sup>190</sup> Students have had mixed success attempting to sue their graduate advisors or other faculty for breach of fiduciary duty; one court was willing to entertain the theory,<sup>191</sup> while a second court rejected the rationale, saying that faculty have an independent duty to the institution to represent its interests in making judgments about the quality of student work.<sup>192</sup>

In another recent U.S. case, *Emeldi v. University of Oregon*,<sup>193</sup> a student sued her university and her dissertation chair after he resigned from her dissertation committee. In that case, Emeldi, a graduate student, had complained to university officials about alleged inequitable treatment of female students, including her, by her dissertation committee chair.<sup>194</sup> The committee chair resigned as chair, and Emeldi could not find another faculty member to chair her dissertation committee.<sup>195</sup> She filed a Title IX claim, asserting that the chair's resignation was in retaliation for her complaints about his behavior.<sup>196</sup> The appellate court reversed a summary judgment award for the university, noting that, although the university claimed that the chair resigned because the plaintiff would not listen to, or take, his suggestions for improving her research, the close time proximity between the student's complaints and the professor's resignation suggested that the resignation was in retaliation for her complaints, and thus the case must be tried.<sup>197</sup>

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187. Robert M. O'Neill, *Judicial Deference to Academic Decisions: An Outmoded Concept?*, 36 J.C. & U.L. 729 (2010).

188. *Moore v. Vanderloo*, 386 N.W.2d 108 (Iowa 1986).

189. 119 F. Supp. 2d 90 (D. Conn. 2000).

190. *Id.* at 96.

191. *Id.*

192. *See Swenson v. Bender*, 764 N.W.2d 596 (Minn. Ct. App. 2009).

193. 673 F.3d 1218 (9th Cir. 2012).

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* After two days of trial, a federal judge dismissed the lawsuit, stating that



The increasing propensity for students to file legal challenges to a faculty member’s academic judgments concerning the quality of the student’s work suggests that faculty members may have less discretion to refuse to work with certain students, particularly if those students have filed complaints about the faculty member that could be linked to discrimination or whistleblower laws. Given the substantial investment of time that many faculty members make in mentoring graduate students, particularly at the dissertation stage, these cases have the potential to alter the way that faculty work with students.<sup>198</sup>

Students are increasingly suing faculty, claiming rights to intellectual property that allegedly accrued while the student worked with the faculty member. While most of these lawsuits have been unsuccessful,<sup>199</sup> some students have won the right to have their cases heard. For example, in *Chou v. University of Chicago*, a former graduate student and subsequent post-doctoral researcher claimed that her faculty supervisor had fraudulently concealed from her the patentability of a formula on which she had done considerable research, and that she should share the patent with him.<sup>200</sup> The court allowed her claim to proceed and also ruled that the plaintiff had stated a claim for breach of fiduciary duty against the professor and the university.<sup>201</sup> Faculty members may themselves be plaintiffs, particularly when their employing institution either changes its intellectual property policy to retain more of the royalties for the institution, or claims ownership of faculty discoveries.<sup>202</sup>

In the U.K., the application of fiduciary obligations to the academic–student relationship remains undeveloped. As with other professional fiduciary relationships (such as those between lawyer and client) academics possess special skills and knowledge and are able to exercise significant power, which they can wield with high levels of autonomy.<sup>203</sup> Students

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the plaintiff, Emeldi, had not provided sufficient evidence to support her claims of discrimination and retaliation. Stacy Patton, *Former Graduate Student’s Discrimination Case is Dismissed*, CHRON. HIGHER EDUC. (Dec. 6, 2013), <http://chronicle.com/article/Former-Graduate-Students/143463/>.

198. For another case involving a claim of retaliation by a former doctoral student against her dissertation committee chair, see *Kovacevich v. Vanderbilt Univ.*, No. 3:09–0068, 2010 WL 1492581 (M.D. Tenn. Apr. 12, 2010). For a review of litigation brought by students challenging academic judgments of faculty members, see Barbara A. Lee, *Student-Faculty Academic Conflicts: Emerging Legal Theories and Judicial Review*, 83 MISS. L.J. 837 (2014).

199. See, e.g., *Stern v. Columbia Univ.*, 434 F.3d 1375 (Fed. Cir. 2006).

200. 254 F.3d 1347 (Fed. Cir. 2001).

201. *Id.* at 1363.

202. See, e.g., *Rutgers Council of AAUP Chaps. v. Rutgers*, 884 A.2d 821 (N.J. Super. Ct. App. Div. 2005).

203. Relevant forms of academic power include “reward power”—awarding high grades, writing good references, etc.—and “coercive power”—withholding the latter. See Alan Stone, *Legal Education on the Couch*, 85 HARV L. REV. 392, 411–12 (1971). It is suggested that these and other forms of academic power present “enormous poten-

have to trust academics to use this power fairly and responsibly and certain fiduciary obligations could offer a useful means to underpin this trust.<sup>204</sup> Ken Mackinnon acknowledges that defining the academic-student relationship as fiduciary in more than a metaphorical sense is problematic, given the lack of a universally agreed-upon definition.<sup>205</sup> Jacquelin Mackinnon views the fiduciary metaphor as one that focuses on an ethical relationship that promotes the welfare of the client, a type of professional altruism depending on trust, in which variations of knowledge and power are not exploited.<sup>206</sup> The academic, possessing the greater knowledge and power, has the greater obligations. The dominant linguistic model is that of “mutual responsibilities and obligations rather than rights.”<sup>207</sup> The nature of the academic-student relationship is such that the power balance shifts as the student develops academically, but this should not undermine arguments for fiduciary obligations, any more than lawyers’ fiduciary obligations are diminished when certain clients, for example corporate clients, are more knowledgeable than others.<sup>208</sup>

Persuading English courts to apply fiduciary principles to academic-student relationships is unlikely to be easy given their resistance to take this approach to other professional relationships that involve a high degree of trust, notably those between doctor and patient.<sup>209</sup>

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tial” for the infliction of harm on the student. *See* Mackinnon, *supra* note 94, at 129.

204. *See* Mackinnon, *supra* note 94, at 118–29.

205. The definitions which most closely map onto the academic-student relationship are the broader ones, such as those which focus upon the situation where “some-one . . . has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence.” JOHN MCGHEE, *SNELL’S EQUITY* (2006); *London and Sinclair Investment Holdings SA v. Versailles Trade Finance Limited* (2005) EWCA Civ 722 (Eng.). Ken Mackinnon draws upon Burrow’s definition. *See* A. Burrows, *We Do This At Common Law But That In Equity* 22 OXFORD J. LEGAL STUDS. 1, 8 (2002) (defining as a duty to look after another’s interests). A Canadian definition has particular resonance with academic decision-making roles. *See* *Guerin v. R* (1984) 2 S.C.R.SCR 335 (Can.) (“[A] hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other’s discretion.”). Mackinnon, *supra* note 94, at 131. Potential academic fiduciary duties identified by Ken Mackinnon include: a duty not to use students’ research as one’s own or to inappropriately claim joint authorship; a duty not to improperly profit from the relationship (for example, by recommending own texts when not the most appropriate); a duty to treat students equally (for example, by not providing extra tuition to some only); writing references fairly and honestly. Mackinnon, *supra* note 94.

206. Jacquelin Mackinnon, *Academic Supervision: Seeking Metaphors and Models for Quality*, 28 J. FURTHER & HIGHER EDUC. 395 (2004).

207. *Id.* Drawing from the Canadian case *Canson Enter. v. Boughton & Co.*, 3 S.C.R. 534, 85 (1991), Ken Mackinnon observes that this differentiates fiduciary obligations from those in contract and tort, where the parties are generally presumed to be on an equal footing. *See* Mackinnon, *supra* note 94, at 143.

208. Mackinnon, *supra* note 94, at 129.

209. *Id.* at 132. In *Sidaway v. Governors of Bethlem Royal Hospital*, Lord Scarman rejected the applicability of a fiduciary relationship to the medical profession. [1985] UKHL 1 (Eng.), 871, at 886. Jackson & Powell consider the relationship of doc-

## IV. QUALITY AUDIT–STUDENT ENGAGEMENT

Recent developments by the U.K. Quality Assurance Agency for Higher Education (“QAA”)<sup>210</sup> have seen the publication of a Quality Code for Higher Education (“Quality Code”).<sup>211</sup> Part B5 of the Quality Code is of particular relevance to this article as it sets out provisions for ‘student engagement’ in the quality assurance process.<sup>212</sup> This was a new provision introduced in June 2012 and became a reference point for the purposes of institutional reviews carried out by QAA from June 2013.<sup>213</sup> The provision expressly states that student input can offer insight into numerous aspects of the educational experience, including:

- induction and transition into higher education
- programme and curriculum design, delivery and organisation
- curriculum content
- teaching delivery
- learning opportunities
- learning resources
- student support and guidance
- assessment.<sup>214</sup>

Beginning with a devil’s advocate argument, student input into arrangements for transition into higher education, learning opportunities and certain aspects of learning resources is potentially very different from student input into curriculum content or assessment. In the context of the latter two, and sticking with the driving analogy adopted earlier in this article, those without a driving license risk not only being permitted to drive the car, but also to be invited into the factory to influence how it should be designed,

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tor and patient to be capable of being categorized as fiduciary in situations of undue influence relating to dispositions of property or finance in favor of a doctor (citing Lord Browne-Wilkinson in *Barclays Bank Plc v O’Brien* [1994] 1 A.C. 180 at 189G) but acknowledge, in light of *Sidaway*, that fiduciary obligations on the part of doctors will not be extended beyond this. JACKSON & POWELL ON PROFESSIONAL LIABILITY (John Powell et al., 7th ed. 2012).

210. The stated mission of the QAA is to safeguard standards and improve the quality of UK higher education by publishing “reference points and guidance” and conducting reviews of institutions, including the publishing of reports detailing the findings. For further discussion of the nature and role of the QAA, see DENNIS FARRINGTON & DAVID PALFREYMAN, *THE LAW OF HIGHER EDUCATION* (2d Ed, 2012).

211. See QUALITY ASSURANCE AGENCY FOR HIGHER EDUC., <http://www.qaa.ac.uk/Pages/default.aspx> (last visited Aug. 23, 2014), for what has been described by some as a definitive reference point for all U.K. higher education providers.

212. QUALITY ASSURANCE AGENCY FOR HIGHER EDUC., U.K. QUALITY CODE FOR HIGHER EDUCATION—CHAPTER B5: STUDENT ENGAGEMENT (2012), available at <http://www.qaa.ac.uk/Publications/InformationAndGuidance/Documents/B5.pdf>.

213. *Id.*

214. *Id.* at 2–3.

engineered and built.

Some aspects of the Quality Code appear to give higher education providers flexibility in the extent to which students might influence the factors listed, but these have to be contrasted with other aspects that appear to be more prescriptive. For example, the Quality Code talks about higher education providers working with the student body “to develop solutions that address issues arising from that feedback. Subsequently students are informed of the actions that have taken place to encourage further future engagement.”<sup>215</sup> This terminology appears to leave little room for responses to the effect that particular feedback suggestions are inappropriate and the appropriate “solution” is inaction.<sup>216</sup> This observation is reinforced when the Quality Code discusses closing the feedback loop, stating that “where change is not possible” students should be informed of the reasons why.<sup>217</sup> “Possible” is an interesting choice of word; arguably, a more neutral phrase, such as “where change is not to be implemented,” would have more clearly respected the experience and professional expertise that academics bring to their role. In essence, many changes are “possible” but equally many of these are undesirable when viewed from the perspective of academic expertise. Similarly, the wording, “[s]tudents appreciate engagement opportunities timed so that they experience a direct benefit as a result of their input,”<sup>218</sup> risks kneejerk reactivity by colleges and universities rather than appropriate reflection regarding what is best in the medium to long term. There is little evidence to suggest that a longstanding, generally very high quality higher education system—which has developed in the U.K. over decades, or centuries in the case of some institutions, and at a pace which has allowed for reflection in the interests of rigor and quality—will benefit from being pushed in the direction of rapid kneejerk responsiveness to different cohorts of relatively short term student participants in the system.

Part 5B of the Quality Code recognizes the transformative aspect of higher education when it states: “Higher education is not a passive process - it is transformational for the individual as well as having transactional elements. Higher education providers promote active involvement by students in all aspects of their learning and provide opportunities for students to influence their individual and collective learning journey.”<sup>219</sup> However, the latter part of this statement risks falling into the trap identified by Jacquelin Mackinnon, discussed earlier.<sup>220</sup> The student undergoing the process of transformation, undertaking the “learning journey,” is an active par-

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215. *Id.* at 6.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* at 4.

220. Mackinnon, *supra* note 107.

ticipant in that journey but, continuing the transport metaphors, is a map reader not yet a cartographer.

It is instructive to contrast the above provisions with the approach of private business operating in a free market. Successful businesses generally seek all the information they can get from customers and prospective customers to maximize their competitive edge. Information gained is considered and acted upon or rejected, as the business deems appropriate. Few, if any, examples exist of private businesses inviting customers into the factory or boardroom to interfere directly in the running of the enterprise. The latter would likely inhibit free and open discussion, shift actual decision-making to other fora in order to sidestep this, and compel businesses to spend significant time fending off well meaning, but poorly informed, input from those not sufficiently expert to contribute. As discussed elsewhere in this article, there are various objections to the marketization of higher education. The observations in this section point out that even within the parameters of a market driven model, institutions of higher education are being pushed in directions and being subjected to levels of interference that private businesses would not willingly tolerate.

The Quality Code also notes that “[i]n fostering effective partnership working, higher education providers encourage frequent and meaningful professional conversations between students and staff.”<sup>221</sup> However, the Quality Code leaves open important questions, such as: (a) the degree of equality that the QAA expects in the “partnership,” and (b) the extent to which highly experienced academics may find themselves being required to defer to student views, often drawn from little or no experience. Use of the term “partnership” is equally curious and arguably inappropriate when the academic partners are paid a significant proportion of their salary from the fees of the student partners. A professional–client model would be a more accurate descriptor, a model in which ideas of partnership are rarely found.

As alluded to above, the Quality Code is carefully crafted to offer interpretive flexibility regarding its practical application. Accordingly, much will depend upon the interpretation of individual education providers and the steer, if any, given by the QAA at audit visits. If a reasonable balance is encouraged by the QAA then there is the prospect that greater student engagement will be constructive rather than destructive to long-term developments in U.K. higher education. But the risks are significant if such a balance is not achieved.

#### V. IMPLICATIONS FOR FACULTY WORK-LIFE AND RIGHTS

The structural, political, and legal trends traced in this article demonstrate that, on all but perhaps the most elite and financially secure campuses, faculty work is changing, and faculty “rights,” whether contractual or

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221. QUALITY ASSURANCE AGENCY FOR HIGHER EDUC., *supra* note 212, at 6.

based on academic custom and usage, are diminishing, particularly in public institutions. What do these changes mean for the way that faculty go about their work? What do they mean for long-enjoyed “rights” such as academic freedom and tenure?

To begin with, at most U.S. institutions, there are pressures on faculty to be more “productive,” but there are various ways to define or measure productivity. In some departments, the faculty is evaluated on the number of publications in “top” journals or books published by “top” academic presses. In others, faculty are expected to teach larger classes, to adopt new technology to supplement traditional teaching methods, and, often, to move their courses to an online format. Calls from accrediting associations and others for enhanced accountability for student learning have pressured faculty to be more specific about learning goals and to achieve consensus about how higher level courses build upon basic principles from lower level courses. All of these pressures suggest a diminution of individual control—over one’s time, over one’s method of teaching, and even over one’s choice of subjects about which to conduct research. Many would welcome this result—particularly those paying the bills for higher education.

Similar pressures can be observed in the U.K. For instance, colleges and universities are moving in the direction of digitally recorded lectures, often in response to students’ demands to “enhance” the learning experience.<sup>222</sup> Some academics have argued that this may undermine the intimate experience of the traditional higher learning process, especially if it reduces student attendance at live lectures, and it may turn courses not designed for distance learning into distance courses by default, thereby harming the education which the initiative was intended to advance.<sup>223</sup> Academic trades unions in the U.K. have also largely been silent about these developments and the implications for the future employability of their members. For subjects in which lecture content changes little from year-to-year, colleges and universities may be acquiring, with little or no opposition from staff or their unions, intellectual property which could dispense with the need to employ those staff to deliver the same lecture live in the future. Just as the rise of movies at the expense of live performance spurred actors, and their unions and agents, to negotiate arrangements for the payment of repeat fees, academic unions should foresee a move from live lectures to digital lectures, giving rise to the need to put into place such protective arrangements for their members.<sup>224</sup>

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222. See, e.g., Tara Brabazon, *Socrates in Earpods?: The iPodification of Education*, FAST CAPITALISM (Feb. 1, 2006), [http://www.uta.edu/huma/agger/fastcapitalism/2\\_1/brabazon.htm](http://www.uta.edu/huma/agger/fastcapitalism/2_1/brabazon.htm).

223. For a detailed critique of the lecture-recording trend, see *id.*

224. Determining intellectual property rights with respect to recordings of faculty lectures in UK institutions is potentially complex. For a helpful account, see JCIS LEGAL INFO., RECORDING LECTURES: LEGAL CONSIDERATIONS (2010), available at <http://www.jisclegal.ac.uk/Portals/12/Documents/PDFs/Recording%20Lectures.pdf>.

Workloads for some U.K. academics, generated by bureaucratic processes such as Research and Teaching Quality Assessments, have become disproportionate to the financial rewards associated with such assessments.<sup>225</sup> Colin Bryson cites the head of a social sciences department who made this observation in relation to his or her own workload.<sup>226</sup> However, it may be argued that the same symptoms are also prevalent amongst academics not holding such managerial responsibility, but who still find both their teaching and research activity overshadowed by these external, distorting influences. As another respondent to Bryson’s study, a senior lecturer in the social sciences, stated: “With the pressures on university staff my job has doubled during the time that I have been here. It has become impossible to teach and research to what I consider a satisfactory level. . . . The increased work load has turned an essentially satisfying job into a nightmare.”<sup>227</sup>

Bryson summarizes the position as follows: “Scholarship and research, beloved of so many academic staff have been distorted by subversion into research outputs suitable for assessment mechanisms, and this has contributed to disillusionment.”<sup>228</sup> Work intensification and associated loss of autonomy have reduced the time available for research such that academics perceive it as problematic to maintain levels of quality they perceive to be desirable. In this regard, what constitutes “quality” to external oversight bodies differs from how academics themselves categorize it.<sup>229</sup>

In addition to greater pressure on faculty members, another change that has developed is the blurring of the distinction between institutions of higher learning and other businesses. In the U.S., the *Garcetti* ruling is simply another example of judicial inclination to treat U.S. higher education much like any other business—with faculty as employees who are subject to the directives of their “supervisors”—who may be faculty colleagues or administrators. The culture of many colleges and universities may still be more collegial than hierarchical, but financial pressures and widespread lack of sympathy for the “special” nature of academia continue to pigeon-hole faculty as employees, whether or not they regard themselves that way.

A third development, at least in the U.S., is that colleges and universities

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225. Peter Scott, *Why Research Assessment is Out of Control*, GUARDIAN (Nov. 4, 2013), <http://www.theguardian.com/education/2013/nov/04/peter-scott-research-excellence-framework>. Some individual college and university preparations for the 2014 Research Excellence Framework have also set the foundations for considerable division and internal strife within institutions. See, e.g., Paul Jump, *Lancaster Historian Appeals Against His REF Inclusion*, TIMES HIGHER EDUC., (Oct. 31, 2013) <http://www.timeshighereducation.co.uk/news/lancaster-historian-appeals-against-his-inclusion-in-ref/2008570.article>.

226. Bryson, *supra* note 133, at 46.

227. *Id.*

228. *Id.* at 53.

229. *Id.*

in the U.S. are facing increased pressure from both ends of the political spectrum, which in turn has implications for a faculty member's choice of subject matter and methods of teaching. Some advocates decry the lack of "balance" in biology or political science courses, arguing that "creation theory" and conservative political viewpoints should be provided to "balance" other types of curricular material. References to race, sex, or sexuality in social science courses may result in complaints to an administrator and suspension of one's access to students and faculty colleagues.<sup>230</sup> On-campus artistic exhibits and dramatic performances may draw outrage from various community members and demands for their removal or cancellation.<sup>231</sup>

And whither academic freedom? As noted earlier in this article, there is widespread misunderstanding among faculty about the boundaries of academic freedom—in that many faculty members believe that there are no boundaries. Stanley Fish, a frequent (and controversial) commentator on U.S. academic life, has a different view:

When all is said and done, academic freedom is just a fancy name for being allowed to do your job, and it is only because that job has the peculiar feature of not having a pre-stipulated goal that those who do it must be granted a degree of latitude and flexibility not granted to the practitioners of other professions, who must be responsive to the customer or to the bottom line or to the electorate or to the global economy. . . . The problem with the term "academic freedom" is that the emphasis almost always falls on the "freedom" part rather than the "academic" part, with the result that the concept is made to seem much grander than it is. . . . Invoking academic *freedom* carries with it the danger of thinking that we are doing something noble and even vaguely religious, when in fact what we are doing, or should be interested in doing, is no more—or less—than our academic jobs.<sup>232</sup>

Put succinctly, faculty at most institutions in the U.S. will see, if they have not seen already, the following:

- Increases in teaching loads—either larger class sizes or more class

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230. Peter Schmidt, *Provost Upholds U. of Denver's Handling of Professor Who Discussed Sex in Class*, CHRON. HIGHER EDUC. (Oct. 24, 2011), <http://chronicle.com/article/Provost-Upholds-U-of-Denvers/129524/>. For a more recent example at the University of Colorado, see Charles Huckabee, *U. of Colorado Professor Reportedly is Forced to Retire After Prostitution Skit*, CHRON. HIGHER EDUC. (Dec. 16, 2013), <http://chronicle.com/blogs/ticker/u-of-colorado-professor-reportedly-is-forced-to-retire-after-lecture-on-prostitution/70525>.

231. *Linnemeir v. Indiana Univ. Purdue Univ. Ft. Wayne*, 155 F. Supp. 2d 1034 (N.D. Ind. 2001).

232. Stanley Fish, *Academic Freedom is Not a Divine Right*, CHRON. HIGHER EDUC. (Sept. 5, 2008) (emphasis added), <http://chronicle.com/article/Academic-Freedom-Is-Not-a/10461/>.



sections to teach;

- Additional requirements for specific office hours and heavier student advising loads;
- More focus on merit pay that is tied to research productivity, teaching productivity, student learning and employment outcomes, or all of the above;
- More demands for compliance with conflict of commitment policies, which may reduce faculty members’ time spent on consulting or community activities;
- More demands from administrators for revenue-generating activities, such as noncredit programs, adult education, short-term certificate and credentialing programs;
- For public institutions in particular, more pressure to work with community groups or other external constituencies to provide services (such as programming for at-risk youth, relationships with local employers, etc.) to demonstrate the institution’s “value” to the community, state, or nation;
- Pressures on academic units and their faculty to justify the revenues they receive, for example, by citing employment figures and salaries for recent graduates;
- Diminished influence on important decisions, such as the creation or abolition of programs or departments, the selection of institutional leaders, and the evaluation of administrators.

#### CONCLUSION

A constellation of trends in both the U.K. and the U.S. is changing the way that faculty at many institutions do their jobs, spend their work time, and participate in institutional governance. For public institutions, despite declining funding from public sources, there are greater government-imposed accountability demands. In some cases, these measures are implemented without careful consideration of what is being measured or how it might best be measured. Faculty decisions—even on matters involving the exercise of academic judgment—are being challenged in courts in both nations by both students and faculty colleagues (or former colleagues). Limitations on academic freedom for individual faculty have resulted in more clashes between faculty and institutional representatives, such as chairs and deans.

How should faculty respond to these changes? Clearly, it is not “business as usual”—if it ever was. Faculty decisions are no longer inviolate. Admissions decisions, particularly at the graduate level, need to be made carefully, with attention to whether the student’s educational preparation is sufficient for the level of academic performance expected by the college. Relationships with students need to be considered carefully, and students need to be advised, early and often, whether their work is below the level

of quality expected, particularly for students in graduate or professional programs, as these students tend to be the ones filing lawsuits for breach of contract or discrimination. Faculty need to recognize that, whether they like it or not, higher education is regarded as a business by their students, by the trustees, and, for public colleges, by the taxpayers, and they need to ensure that they spend their time in ways that benefit the institution, not just their own careers. Accountability demands will not disappear; they will increase, and resistance just wastes time and energy. Faculty should certainly attempt to influence *what* is measured and *how* it is measured, but they certainly cannot expect not to be held accountable for the work for which they are compensated, nor should they.

Despite all of these structural, political, and legal trends affecting college faculty, a tenure-track faculty position is still coveted, as well it should be. An academic career, for most faculty, is rewarding and absorbing. While the “gap” between the quality of faculty work-life in the twentieth century and in the twenty-first century may be widening, the career is still worth pursuing.

Much of the discussion in this article relating to the U.K. appears, at first glance, to be negative. Perhaps the discussion may be viewed as reflecting Luddite attitudes that reject the need for or inevitability of change, whether brought about by new technologies or changes to societal expectations. However, this is not the intended conclusion. Inevitably, technology will change the nature of some teaching delivery and students, as consumers holding the purse strings, will expect a greater say with regard to the services they receive. Academics cannot ignore this and should not seek to. However, identifying problems is the first step in creating solutions. The earlier mention of the shift from live performance to movie making is a relevant analogy. Film and its technological successors revolutionized entertainment and enhanced opportunities for actors. What might have originally been seen as a *threat* became an *opportunity*. Digitized teaching materials coupled with modern communications offer similar opportunities, but also pose a threat to academics until they successfully negotiate a new employment paradigm that protects their interests.

Similarly, increased emphasis on listening to students as paying customers is not, in itself, undesirable. However, the key is balance. A race to the bottom amongst universities striving to only please their students is only likely to damage higher education in the long run. In this respect, higher education is not like the provision of many other goods and services—the customer is not always right. It is unfair and patronizing to label all students as valuing easy courses with low-stress assessment, but anecdotally at least it seems that moves in this direction can be triggered even by a minority if their views are expressed frequently or forcefully enough. Safeguarding standards can only work if academics collectively strive to resist pressures to dumb down.

It is in this regard that the time may be ripe for greater professionaliza-

tion within the academic community. Instead of the tendency for many academics to see themselves as lone scholars, plowing the narrow furrow of their individual research and teaching interests and directing what little collective loyalty they may have to their academic subject group, now may be the time when they *need* a professional body encompassing the academic community as a whole, akin to the bodies created long ago by lawyers, medics and other powerful professional groups. Such organizations can undertake numerous functions, including influencing government policy and, perhaps most importantly in the context of this discussion, setting and enforcing standards in the form of codes relating to professional conduct and ethics.<sup>233</sup> If codes can be devised which effectively outlaw practices that may undermine the quality and rigor of higher education, a neutralizing effect should arise to counter temptations to race to the bottom.

What is being proposed in theory here is not easy to achieve in practice. In the century and a half since the creation of key professional bodies for medical practitioners and lawyers in England & Wales, for example, much has been written, both by academics and members of the professions themselves, critiquing both theory and practice of the models adopted.<sup>234</sup> Likewise, the professional bodies for law and medicine have put much thought and effort into reforming, often repeatedly, key aspects of their structure and provision.<sup>235</sup> Nevertheless, few commentators would argue that the creation of professional bodies for lawyers and medics was misplaced. However imperfect they have proven to be, there are strong arguments that the existence of such professional bodies has led to far higher standards in legal and medical practice than would have been the case if these occupations had not adopted more formal professional statuses. Perhaps what was seen as necessary for lawyers and doctors in the mid-nineteenth century has finally become necessary for academics in the early twenty-first century.<sup>236</sup>

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233. Even if codes are initially only repetitive of the general law, they may be worded and presented in a way that is more accessible to the client group. Mackinnon, *supra* note 94, at 143. Over time professional codes can be expanded and developed significantly beyond core legal principles. One possible example is the American Association of University Professors (AAUP), founded in 1915, which has promulgated a variety of statements on academic freedom, institutional governance, and due process in employment matters. See *generally About the AAUP*, AAUP.ORG, <http://www.aaup.org/about-aaup> (last visited Aug. 23, 2014). The AAUP functions as a watchdog for faculty rights; it has been less active as an enforcer of professional conduct and ethics. See *generally id.*

234. See, for example, the discussion in MARK DAVIES, *MEDICAL SELF-REGULATION, CRISIS AND CHANGE* (2007).

235. *Id.*

236. So far, attempts in the UK to enhance the status of teaching in higher education and, as part of this, to create a professional style body have had limited success. The Institute of Learning and Teaching in HE ("ILTHE"), created in 2000, proved largely ineffective in this regard and its successor, the Higher Education Academy ("HEA"), founded in 2004, seems to be experiencing similar difficulties. Also, whilst the HEA uses terms such as "professional recognition" it is questionable whether this

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can really be taken to be its core goal in terms of use of the term “profession” by sociological theorists and established professions such as medicine and law. Whilst the HEA Strategic Plan for 2012-2016 has at its core the enhancement of the quality and impact of learning and teaching, its current ambitions do not appear to extend to becoming a fully-fledged professional body for academics. It is also open to question whether a body which engages only with teaching will be sufficient, given that academics also face potential ethical issues in their research and managerial roles. Also, even if the HEA proves itself up to this task, there has been a general lack of enthusiasm amongst academics, especially those in the more powerful research led universities, to enroll, let alone become actively involved, in advancing the aims of the Academy. In this respect, academics themselves may be their own worst enemies in failing to recognize and react to the threats facing them.