

AIM HIGHER: CHALLENGING FARRINGTON AND PALFREYMAN'S *THE LAW OF HIGHER EDUCATION*

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DESCRIPTION OR ARGUMENT?

By their own admission, Dennis Farrington and David Palfreyman's *The Law of Higher Education*¹ represents an attempt to do for higher education law in the United Kingdom what Professors Kaplin and Lee have so admirably accomplished by their treatise of the same name with respect to higher education law in the United States. Kaplin and Lee's work, now in its fourth edition, runs to two volumes, and has become a classic in the field.² A glance through the list of contents of Farrington and Palfreyman's book suggests a work of comparable breadth, because the topics range from the legal status of higher education institutions (HEIs) to the impact of European Union (EU) law, governance and management, student unions, the student-HEI relationship, academic freedom, property management, health and safety, and risk assessment. There is even a section on comparative studies which includes a brief look at issues in the United States. Nevertheless, readers familiar with Kaplin and Lee's work will find that Farrington and Palfreyman's *The Law of Higher Education* is actually very different both in style and in substance.

Kaplin and Lee's book is, first and foremost, essentially a reference work which provides in painstaking detail a description of the law of higher education throughout the United States. Thus, the discussion of each new issue commences with a summary of the relevant case law, often accompanied with significant quotations from court judgments. Only then do the authors offer some commentary of their own. Yet, given the context which they themselves have provided, Kaplin and Lee make it possible for readers to form their own independent views (and to see where and why they differ—if they do differ—from those of Kaplin and Lee). By contrast, Farrington and Palfreyman hardly ever provide the factual context for any case they cite, and they rarely quote the judgments given in court. Their work is thus less of a description of the law of higher education than an extended argument as to what they think the law should be.

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1. DENNIS J. FARRINGTON & DAVID PALFREYMAN, *THE LAW OF HIGHER EDUCATION* (2006).

2. WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* (4th ed. 2006).

There is, of course, nothing wrong with writing such a book, provided that it is clear that that is the authors' intention. However, such methodology does dramatically reduce the book's usefulness since, unless the reader is already very familiar with the material, s/he is often left unable either to follow the argument being made or to judge the extent to which it has any merit. Additionally, the approach does create a temptation for the authors to skew their analysis of the law to suit their own views. Unfortunately, it is this reviewer's opinion that the authors frequently succumb—sometimes stretching their analysis too far and as a result providing a somewhat misleading account of the true legal position. In the end, while there is a considerable amount of useful information contained in their book, any reader not already familiar with the law in this area will struggle to know when s/he is being presented with a reliable, objective account, and when what is being written is effectively a form of pleading of a case on behalf of certain types of institutions.

An instance on point is the analysis of *Phelps v. Hillingdon London Borough Council*,³ in which for the first time the House of Lords—the highest court in the United Kingdom—formally recognized a tort of educational malpractice. Yet the discussion of this case (between paras. 13.48 and 13.55 inclusive) fails to quote or paraphrase any of the speeches given by their Lordships. The analysis (at para. 13.55) is simply in the form of quotations from three other books. Ironically, however, there is (at para. 13.54) a long quote from the American case of *Ross v. Creighton University*⁴ and an even longer one from an article on the American approach to educational malpractice which was published in this very law journal.⁵ There is much to be gained by a comparative approach—otherwise this very review article would itself be redundant—but a comparative approach requires something with which to compare. The lack of real analysis of *Phelps* makes this impossible. Similarly, subsequent English cases, which explain and refine the House of Lords' ruling in *Phelps*, are ignored.⁶ Just as importantly, the opportunity to explain how *Phelps* fits in with pre-existing education case law, such as *X (minors) v. Bedfordshire County Council*,⁷ or with the general law on breach of statutory duty in an educational context, is missed. This means that the implications for an institution's significant obligations under disability discrimination law⁸ are overlooked, as are the ramifications regarding extra safeguards which HEIs are expected to put in place when they admit (as they increasingly do) students who are under the age of eighteen.

Phelps is a seminal case by anyone's standards. It was decided very recently by

3. [2001] 2 A.C. 619 (H.L.).

4. 740 F. Supp. 1319 (N.D. Ill. 1982).

5. Cheryl A. Cameron et al., *Academic Bills of Rights: Conflict in the Classroom*, 31 J.C. & U.L. 243 (2005).

6. See, e.g., *Robinson v. St. Helen's Metro. Borough Council*, [2002] EWCA (Civ) 1099; *DN v. London Borough of Greenwich*, [2004] EWCA (Civ) 1659.

7. [1995] 2 A.C. 633 (H.L.). See also *Osman v. United Kingdom*, 29 Eur. H.R. Rep. (1998), [1999] 1 F.L.R. 193, [1999] Fam. Law 86.

8. See Disability Discrimination Act, 1995, as amended by the Special Educational Needs and Disability Act, 2001.

the highest court in the United Kingdom and created a novel doctrine that is almost unique in the common law world. The problem is that Farrington and Palfreyman do not like it, and so give it short shrift. Yet within the same chapter, they allocate to *Buckingham v. Rycotewood College*⁹—a case decided in the lowest court in the land and so unimportant under the doctrine of *stare decisis* as not even to be accorded a conventional or online law report—a full three and a half pages. Indeed, were it not for the fact that *Buckingham* was decided in a court situated in the same town as the authors, it is unlikely that it would ever have been plucked from the legal obscurity in which it arguably belongs. As was explained earlier, hardly any other case in the book is discussed at such length.

THE SPECTRE OF CONSUMERISM

Farrington and Palfreyman's dislike of *Phelps* is a good example of the argument which underlies so much of this book. They seem to view the fledgling tort of educational malpractice as inviting courts to engage in unwarranted interferences in the autonomy of HEIs. Their more general perception is that the increased readiness both of central government and of the courts to involve themselves in higher education implies a "consumerist" mentality¹⁰ which has led to an unwarranted interference in institutional autonomy. While I have myself warned of the "spectre of consumerism" haunting higher education,¹¹ I believe that Farrington and Palfreyman have misidentified the source of the problem. In our paper, Professors Bickel, Birtwistle, and I argued that consumerism in higher education is gaining ground not because of the courts, but because of attitudes and expectations of students which HEIs have themselves been guilty of fostering.¹² Unfortunately, much of Farrington and Palfreyman's book seems to be symptomatic of what, in my view, many HEIs have been doing wrong.

A clue appears on the very first page. Farrington and Palfreyman argue that there is a "tendency to switch the burden of financing post-secondary education onto its 'consumers.'"¹³ Two pages later they talk of the "aims of the principal 'customers' of higher education."¹⁴ Another two pages on and they have dropped the quotation marks: "Higher education is increasingly seen as a commodity which is supplied to the State by a group of contractors, the higher education providers which are established as legally separate corporations in a variety of ways."¹⁵

9. OX004741/OX 004342 (Oxford County Ct. Mar. 2, 2002).

10. See Tim Kaye et al., *Criticizing the Image of the Student as Consumer: Examining Legal Trends and Administrative Responses in the US and UK*, 18 EDUC. & L. 85 (2006).

11. See TIM KAYE, CTR. FOR EXCELLENCE IN HIGHER EDUC. LAW AND POLICY, COMMENTARY: EDUCATION, RIGHTS AND THE SPECTRE OF CONSUMERISM, <http://www.law.stetson.edu/excellence/HigherEd/CommentariesKaye1.pdf> (last visited Apr. 22, 2007).

12. Kaye et al., *supra* note 10.

13. FARRINGTON & PALFREYMAN, *supra* note 1, para. 1.01.

14. *Id.* para. 1.06.

15. *Id.* para. 1.09.

To which the only reaction is to ask by whom it is “increasingly” seen as a commodity. It seems to this reviewer that it is certainly seen that way by Farrington and Palfreyman. Any possibility otherwise is abandoned by page 28, where (at para. 2.18) they openly refer to higher education as a product. In chapter 5, they go so far as to say that, “[g]overnance in the higher education sector is essentially the process whereby *independent corporate enterprises* which conduct teaching and research take collective decisions.”¹⁶

Because this “consumerist” approach does not reflect that of the courts (or of legislation), it tends to distort the analysis of the law. The authors thus split the relationship between an HEI and a student into two contracts: an initial contract to admit, followed by a subsequent contract to educate. This device allows the obligations of either party to be reduced more easily to the form of a commodity. In the contract to admit, the emphasis is on the student’s right to be admitted; in the contract to educate, the emphasis is on the student’s right to a qualification or diploma. Yet, such a contrivance actually makes little sense in terms of the law of contract because it entirely fails to explain in a manner consistent with standard legal doctrine how the fulfillment of the first contract automatically creates the second contract. At the same time, it strips out of the relationship the “non-commodifiable” elements that make higher education such a unique and co-operative learning experience. No conceptual space is allotted, for example, to the pastoral side of the student-HEI relationship, yet it is clear that students expect to receive (and institutions expect to give) a wide range of advice both before and after admission. That is why students in the United Kingdom are allotted personal tutors, and why HEIs employ student counselors and careers advisers. A depiction of the legal relationship between student and institution which cannot easily account for such an important aspect of the student-HEI relationship is almost certainly flawed.

A more plausible view is that expressed by Simon Arrowsmith and Nicola Hart (ironically in a book part-edited by David Palfreyman), which sees the student-institution relationship as being somewhat analogous to the contract of employment because, “[It takes] the form of a rolling contract which matures and changes shape in the course of its life, with both parties apprehending from the start the prospect of the introduction of new terms as the contractual relationship develops.”¹⁷ Such complexity is anathema to a view of higher education as a “product” to be “consumed.” But it does provide an accurate picture of the law.

THE VIEWS OF COURTS AND LEGISLATORS

Farrington and Palfreyman are, of course, right to seek out some explanation for the greater preparedness of the courts—and indeed, of legislators—to get involved in higher education. But, so far as this reviewer can see, consumerism is not the

16. *Id.* para. 5.03 (emphasis added).

17. Simon Arrowsmith & Nicola Hart, *Higher Education Institution-Student Contract*, in *HIGHER EDUCATION AND THE LAW: A GUIDE FOR MANAGERS* 68, 80 (David Palfreyman & David Warner eds., 1998).

motivation. For example, although the Unfair Terms in Consumer Contracts Regulations 1999¹⁸ (discussed at paras. 14.10–14.12 inclusive) undoubtedly apply to higher education, and although their name might seem to give weight to a theory of creeping consumerism in higher education law, a closer look at the substance of the Regulations shows otherwise. For while they are designed to regulate any unfair term in a standard-form contract between a supplier and an individual who is not engaged in his or her profession or business,¹⁹ they expressly do not apply to “the definition of the main subject matter of the contract”—or to the price—unless those terms are drafted in an unintelligible form.²⁰ The Regulations are thus not about consumerism at all, for else there would be some strictures as to the quality of the final “product” or as to its utility or fitness for purpose.²¹ Instead, the Regulations are evidently designed to prevent *abuses of power*. That is a very different enemy. So too with the (admittedly misleadingly titled) Unfair Contract Terms Act 1977²² (discussed at para. 14.09), which actually deals only with disclaimers and whose applicability to the student-HEI relationship is largely restricted to ensuring that HEIs cannot make misleading claims about themselves or their programs. In no way does it attempt to lay down what an HEI or a program should look like (as a consumerist view would imply); it simply holds an HEI to whatever claims it chooses of its own volition to make—and thus prevents an abuse of power.

The problem with HEIs—especially the pre-1992 chartered institutions²³—is that for many years they remained divorced from the communities which they claimed to serve, aloof in practice and—as we shall shortly see—immune in law from the consequences of many of their decisions, even if those decisions went well beyond matters of academic judgment.²⁴ Now, however, they are being increasingly obliged to justify what they do, whether in relation to admissions procedures, quality of teaching and research, or propriety in managing public funds. This is not about consumerism; it is about accountability. In fact, as Professors Bickel, Birtwistle, and I have shown, the courts—just like the legislators—have been keen to avoid becoming embroiled in matters within the sole expertise of the academy.²⁵ We suggested that the reality of the commodification of the right to higher education—on both sides of the Atlantic—has been largely a vision imposed by HEIs on themselves. The danger is that, with extensive repetition, it may become a self-fulfilling prophecy. This review will therefore challenge some of the arguments which Farrington and Palfreyman make, while attempting to provide some additional background information which

18. Unfair Terms in Consumer Contracts Regulations, 1999, S.I. 1999/2083.

19. *Id.* art. 4, ¶ 1.

20. *Id.* art. 6, ¶ 2.

21. *Cf., e.g.*, the language of the Sale of Goods Act, 1979, § 12–15 (as amended), which is not applicable to the student-HEI relationship.

22. Unfair Contract Terms Act, 1977.

23. *See infra* notes 32–40 and accompanying text.

24. *See* Tim Kaye, *Academic Judgment, the University Visitor and the Human Rights Act 1998*, 11 *EDUC. & L.* 165 (1999).

25. *See* Kaye et al., *supra* note 10.

will enable the reader both to understand the nature of my disagreement with Farrington and Palfreyman, and to form his or her own views.

LACK OF LITIGATION

One difference between higher education law in the United Kingdom as opposed to that in the United States is reflected in the fact that Farrington and Palfreyman's book is less than half the length of that of Kaplin and Lee. There has been much less case law on higher education in the United Kingdom than in the United States. Leaving aside the alleged greater propensity of Americans to sue, several explanations are worth exploring. First, as readers will know, primary responsibility for education in the United States rests with the states rather than with the federal government or local governments. This means that American HEIs are essentially subject to state law unless the Federal Constitution or a specific federal statute, such as the Clery Act,²⁶ is implicated. But since there are fifty states, it follows that there are fifty different legal jurisdictions, and so fifty different bodies of case law. The United Kingdom, by contrast, does not have a federal system of law. This means that the whole of England, Wales, and Northern Ireland is essentially subject to one body of national (i.e., English) law, albeit that there are sometimes some refinements which apply only in Wales (e.g., concerning use of the Welsh language) or Northern Ireland (e.g., concerning religion). It is only Scotland which has a different legal system and, even there, if the law reflects a requirement of the European Union or of the European Convention on Human Rights, it will actually be much the same as in England. (For ease of understanding, the rest of this article will refer only to English law unless otherwise indicated.) A national body of law means a unified system of precedent or *stare decisis* and so, once a doctrine has been established by an appellate court, it applies to trial courts throughout the country. Thus, any book on English higher education law really has to take account only of one body of law, and even though Farrington and Palfreyman do make some observations of the position in Scotland, that is a far cry from having to address fifty systems of law.

Secondly, although jury trials originated in England, they have now largely been abolished there except where a serious criminal offence is alleged. Almost every civil case—whether for breach of contract or a tort (such as negligence, malpractice, or premises liability)²⁷—is thus heard before a judge sitting alone.²⁸ Most commentators would agree that judges are likely to make lower awards of compensation than juries, thereby reducing the incentive to bring suit. But another effect of the abolition of juries is that a trial judge's decision-making powers are more closely circumscribed than would be the case with an American jury, since *stare decisis* applies to almost everything s/he does.²⁹ In a typical American

26. 20 U.S.C. 1092(f) (2000).

27. Premises liability is called occupiers' liability in English law. See Occupiers' Liability Act, 1957 and Occupiers' Liability Act, 1984.

28. Cases of alleged defamation are still sometimes heard by juries, but it is becoming more common even for these cases to be heard by a judge sitting alone.

29. See Jane Stapleton, *Controlling the Future of the Common Law by Restatement*, in

negligence suit, for example, it is for the judge to determine whether the defendant owed a duty, but the questions of whether any such duty was breached and whether, if so, it caused harm for which compensation is payable are essentially matters for the jury,³⁰ which is not bound by precedent. Under English law, *all* these questions are for the judge. The fact that precedent applies to every element makes the outcome of cases in England much easier to predict than in the United States. As a result, there is less incentive to sue, since both plaintiff³¹ and defendant will have a much clearer idea of the likely outcome of any case, whether that implies that the plaintiff should drop the action altogether, or that the defendant should make an offer of settlement.

Thirdly, until very recently, a large number of British institutions were effectively immune from legal challenge in the courts. This was because of their status as corporations created by Royal Charter. They comprised virtually all the HEIs founded before 1992, including the individual colleges at Oxford and Cambridge but excluding the universities of Oxford and Cambridge themselves, whose corporate status was established by statute.³² Incorporation by Royal Charter instituted an arcane process whereby the final resolution of any internal dispute was within the exclusive jurisdiction of an officer called a Visitor,³³ whose decisions were also almost completely immune from legal challenge.³⁴ It was therefore impossible for aggrieved students or faculty to sue such an institution.³⁵ Essentially, only HEIs created from 1992 onwards, together with the universities of Oxford and Cambridge themselves (as distinguished from the individual colleges therein),³⁶ ran such a risk because they were not created by charter.³⁷ Oxford, Cambridge, and the post-1992 HEIs were created by statute;³⁸ smaller HEIs were formed either as limited companies or as charitable associations and were thus also subject to the normal law. The exclusive jurisdiction of the Visitor over matters of employment in chartered HEIs was, however, removed by the Education Reform Act 1988,³⁹ so that faculty and staff can now seek remedies in the ordinary courts (or in specialist employment tribunals) in the same way as employees of any other employer.⁴⁰

EXPLORING TORT LAW 262 (M. Stuart Madden ed., 2005).

30. Unless decided on summary judgment as a matter of law.

31. A plaintiff in England is now officially called a "claimant".

32. Universities of Oxford and Cambridge Act, 1571.

33. *See Thorne v. Univ. of London*, [1966] 2 Q.B. 237 (C.A.).

34. *R v. Lord President of the Privy Council*, *ex parte Page* [1993] 3 W.L.R. 1112.

35. *Thorne*, [1966] 2 Q.B. 237; *Thomas v. Univ. of Bradford*, [1987] 1 A.C. 795 (H.L.).

36. *R v. Univ. of Cambridge ex parte Evans*, [1998] E.L.R. 515.

37. *See, e.g., R v. Manchester Metro. Univ. ex parte Nolan*, [1994] E.L.R. 380.

38. In the case of the universities of Oxford and Cambridge, by the Universities of Oxford and Cambridge Act, 1571; in the case of most of the rest, by the Further and Higher Education Act, 1992.

39. Education Reform Act, 1988, § 206.

40. The ordinary civil courts have jurisdiction over employment matters in the same way as American courts, but the common law offers little protection for most employees. Like the rest of the members of the European Union, however, the United Kingdom has enacted a number of statutory measures which grant employees significantly more rights. Employment tribunals have

So far as the Visitor's remaining functions were concerned, the decision effectively to incorporate the European Convention on Human Rights and Fundamental Freedoms into domestic U.K. law by means of the Human Rights Act 1998 (HRA) made the status of the Visitor untenable for reasons that would take too long to recite here.⁴¹ As a result, while the position of the Visitor has still not been formally abolished, the Higher Education Act 2004 (HEA)⁴² made two substantive changes to this area of the law. It removed from the Visitor's jurisdiction any dispute concerning an application for admission by a prospective student, so that such matters can now be adjudicated in court.⁴³ In addition, HEA requires all other disputes with current or former students⁴⁴ (except those relating to matters of academic judgment)⁴⁵ to be handled by a new, independent body called the Office of Independent Adjudication (OIA).⁴⁶ Since the OIA is a creature of statute, there is no doubt that its decisions can be challenged in court. But its very existence continues to reduce significantly the chance of cases coming to court, especially since it has the power to award compensation. The fact that, like the Local Government Ombudsman—who has jurisdiction over the English equivalent of K-12 matters in the public sector—the OIA can only make recommendations and does not have the power to compel HEIs to comply with its decisions⁴⁷ does mean, however, that some students will prefer to go straight to the courts, especially where the matter involved is urgent, such as an impending closure of a department. Nevertheless, it continues to be unlikely that there will be anything like the same volume of litigation in the English courts on matters relating to higher education as there is in the United States.

PUBLIC-PRIVATE DISTINCTION

This anachronistic history of the chartered HEIs is essential to an understanding of the distinction between public and private HEIs, which is itself an important issue since—as in the United States—public HEIs in England and Wales operate within a much more restrictive set of rules than do private HEIs. In chapter 1, Farrington and Palfreyman provide a “Historical Note and Definitions,” and then go on in chapter 2 to discuss the “Legal Status of Higher Education Institutions.” Unfortunately, however, these chapters are insufficient in themselves to enable the reader to appreciate either the nature of the public-private distinction in England and Wales or its practical ramifications. This reviewer therefore recommends that

exclusive jurisdiction over claims deriving from these statutes (in particular over claims of “unfair dismissal”). An appeal from an employment tribunal will be heard by another specialist body, the Employment Appeal Tribunal, which is headed by a High Court judge. From there, appeal lies (as with ordinary civil claims) to the Court of Appeal and, finally, the House of Lords.

41. For a fuller account, see Kaye, *supra* note 24.

42. Higher Education Act, 2004.

43. *Id.* § 20.

44. *Id.* § 12(1).

45. *Id.* § 12(2).

46. *Id.* § 15 (where the OIA is referred to as “the designated operator”).

47. *Id.* sch. 2, § 6-7.

the reader turn next to chapter 15, which tackles “The Role of Judicial Review in the Statutory HEIs.” This is made even more desirable because Farrington and Palfreyman refer to a number of cases of “judicial review” in chapters 3 to 14 inclusive and, without reading chapter 15 first, the reader is liable to misunderstand the legal significance of the cases with which s/he is being presented. This is especially so when it is remembered that in chapter 5 they go so far as to say that “[g]overnance in the higher education sector is essentially the process whereby *independent corporate enterprises* which conduct teaching and research take collective decisions.”⁴⁸

The problem is that Farrington and Palfreyman are so keen to limit the extent to which the law can impinge on institutional autonomy that they either seek to draw the public-private distinction at a point for which there is virtually no legal authority, or else blur the distinction as if it is of little or no importance. Thus chapter 5 (on “Governance Structures”) glosses over this issue by prefacing its remarks on financial accountability by declaring: “Whatever the strict legal position”⁴⁹ And in chapter 2 the reader is plunged into the complexities of EU law without any explanation of the underlying concepts or their practical ramifications: “The question of whether HEIs are ‘emanations of the state’ for the purpose of the direct applicability of European Directives has been discussed . . . by the European Court of Justice (ECJ) in the sex discrimination case *Foster v British Gas plc*”⁵⁰

Only a specialist is likely to know what this means. The phrases “emanation of the state” and “direct applicability of European Directives” are legal terms of art, but are not explained. The problem is compounded by paragraph 2.03, where it is stated that “[t]he European Commission had suggested various criteria that might bring a public body within the concept of ‘the state.’”⁵¹ But this is to put things backwards: in actual fact, EU law will only treat a body as public if it is an “emanation of the state.” Indeed, the very significance of *Foster v. British Gas plc* is that the ECJ held that an ostensibly *private* company was nevertheless an “emanation of the state” and thus subject to challenge under European public law.⁵² It is therefore worth taking some time here to explain how courts in England draw the line between a public and a private institution.

“EMANATIONS OF THE STATE”

As Farrington and Palfreyman themselves recognize (at para. 2.02), the approach to the public-private distinction differs according to whether the law involved is domestic English law, EU law, or (it might be added) is derived from the jurisprudence of the European Court of Human Rights.⁵³ Thus *Foster* only

48. FARRINGTON & PALFREYMAN, *supra* note 1, para. 5.03 (emphasis added).

49. *Id.* para. 5.06.

50. *Id.* para. 2.02.

51. *Id.* para. 2.03.

52. Case C-188/89, *Foster v. British Gas plc*, 1990 E.C.R. I-3313, 2 C.M.L.R. 833 (1990), [1990] 3 All E.R. 897.

53. This is quite distinct from the law of the European Union, with which it is often

addresses the question of what is a public body for the purposes of EU law. So let us start there. In that case, the ECJ, whose decisions create binding precedent throughout the European Union, strove to identify what made an organization a public body. However, it also had to bear in mind a technical issue, which is that when a law is agreed upon within the European Union, it cannot be passed into law directly. The European Parliament, for example, has no legislative power. Instead, Directives are issued which direct the governments of Member States to implement within a certain timeframe the rules indicated. Each government must then choose how to do this effectively in a manner which sits well with its country's own legal traditions. The problem for the courts is what remedy can there be for a person who suffers some loss because a Member State fails to make such a law within the given time limit. To hold a private individual or organization liable for breaching a Directive which had not been implemented in that person's own country would be contrary to the rule of law, since that person would have been acting in accordance with his or her country's own domestic law. But to provide no remedy at all would encourage widespread disregard of EU Directives among the governments of Member States. Yet, to provide a remedy only if the potential defendant is a government department or other obviously public body would simply encourage outsourcing of government functions, making both governments and the private contractors judgment-proof and thwarting the very purpose underlying the Directive.

The ECJ thus developed a more creative solution. Mindful of the need to ensure that Member States should not profit from their own failure to implement EU Directives, it developed the concept of an "emanation of the state." Any body which is such an "emanation" is treated as a public body against which an EU Directive is directly enforceable, whether the Member State has failed to implement a Directive or failed to implement it effectively. The test for an "emanation of the state" was held by the ECJ in *Foster v. British Gas plc* to be a:

body, *whatever its legal form*, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals.⁵⁴

Thus, as Lord Justice Schiemann has since noted in the Court of Appeal: "the undoubted fact [is] that the . . . case law indicates that a body may be an emanation of the State although it is not under the control of central government."⁵⁵ Indeed, according to the ECJ's test, both chartered and statutory HEIs must be emanations of the state for the purposes of EU law. They have special powers granted to them by their charters or by legislation; they provide a public service; and they discharge certain public functions, such as the charging of student fees,⁵⁶ under the

confused.

54. *Foster*, 2 C.M.L.R. at 857, [1990] 3 All E.R. at 922 (emphasis added).

55. *Nat'l Union of Teachers v. Governing Body of St. Mary's Church of Eng. (Aided) Junior Sch.*, [1997] I.R.L.R. 242, 248 (C.A.).

56. Teaching and Higher Education Act, 1998, § 26.

supervision of the Higher Education Funding Councils. The precise legal form of the HEIs is immaterial. They meet every element of the ECJ's test. Despite Farrington and Palfreyman's evident reluctance to accept the inevitable, HEIs in the United Kingdom are undoubtedly public bodies so far as EU law is concerned.

STATE FUNCTIONS

As was explained above, there are three methods by which the courts in the United Kingdom can determine whether a body is public or private, depending on the type of law which they are seeking to uphold. Standing distinct from EU law but operating within a very similar tradition is European human rights law, which is concerned with the application of the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁵⁷ Article 2 of the First Protocol to this Convention states, albeit in a somewhat circuitous fashion, that everyone has a right to education.⁵⁸ By signing the Convention, the United Kingdom took it upon itself to ensure that no such right is denied within its jurisdiction. On this basis the European Court of Human Rights (ECtHR) held in *Costello-Roberts v. United Kingdom*⁵⁹ that an ostensibly private school, which charged tuition fees to every pupil, was nevertheless carrying out a State function bringing it within the ambit of the Convention because it constituted part of the means whereby the United Kingdom discharged its Convention obligation to fulfil every child's right to education under Article 2 of the First Protocol.⁶⁰

The European Convention has become even more important in the United Kingdom quite recently because the Convention and its Protocols were effectively incorporated into domestic U.K. law by the Human Rights Act 1998 to the extent that, under section 6(1): "It is unlawful for a public authority to act in a way which is incompatible with a Convention right."⁶¹ It is therefore a legal requirement that no public authority act in a way which denies (among other rights) the right to education. Under *Costello-Roberts v. United Kingdom* it clearly follows that an HEI—no matter what its legal form or from where it receives its funding—is also carrying out a public function when it provides education. The fact that an HEI supplies higher education rather than primary or secondary education is irrelevant: the ECtHR has held that the meaning of "education" in Article 2 is to be determined according to "economic and social circumstances" and that, in a "highly developed country" (which presumably includes the United Kingdom), the right to education includes "entry to nursery, primary, secondary and higher education" (although access to higher education could properly be restricted to

57. Nov. 4, 1950, CETS No.: 005, available at <http://conventions.coe.int/Treaty/en/Treaties/Word/005.doc>.

58. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Mar. 3, 1952, CETS No.: 009, available at <http://conventions.coe.int/Treaty/en/Treaties/Word/009.doc>.

59. 19 Eur. H.R. Rep. 112 (1993).

60. *Id.* at 132.

61. Human Rights Act, 1998, § 6(1).

those sufficiently able or qualified to benefit from it).⁶²

Farrington and Palfreyman would agree with this analysis of the “state functions” approach under the European Convention on Human Rights. The contentious issue revolves around section 6(3)(b) and section 6(5) of the Human Rights Act 1998, which together state that: “‘public authority’ includes . . . any person certain of whose functions are functions of a public nature,” but that “a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.”⁶³ The significance of this is as follows. If the only “function of a public nature” (or “State function”) which is performed by an HEI is the provision of education, then it is essentially private and will be subject to the Convention only with respect to the one or more State or public functions that it carries out from time to time. It will then be what has come to be referred to as a “hybrid” institution, whose private functions are beyond the scope of the Convention. However, if an HEI is deemed to be a “true” public authority, then all aspects of its conduct will be subject to the Convention, even when they have little or nothing to do with the provision of education (such as a matter of employment law). This will oblige it to respect, for example, the right to privacy,⁶⁴ freedom of expression,⁶⁵ freedom of assembly,⁶⁶ and freedom of religion.⁶⁷ So a student or employee would then be able to bring suit against an HEI which unjustifiably tapped telephone calls or intercepted emails, since it has clearly been held that a person has a right to a certain degree of privacy even when at work.⁶⁸ By contrast, if an HEI is held only to be a hybrid body, then no right to privacy could be enforced against it except in the unlikely instance that a specific term was inserted into the contract with the individual involved.

Unfortunately, although it is clearly a matter of the greatest significance on which there has yet to be a definitive ruling, this issue is never discussed by Farrington and Palfreyman. Instead, they just assert that “[i]n terms of the Human Rights Act (HRA) [HEIs] are considered as ‘hybrid’ institutions in that only in the exercise of their public functions are they subject to it.”⁶⁹ This highly contentious assertion is supported by the citation of absolutely no authority, and no further discussion is forthcoming anywhere in the book. It can therefore clearly be seen that this is an expression of the authors’ opinion, not an authoritative statement of legal fact. Indeed, since HEIs are—contrary to what Farrington and Palfreyman

62. Belgian Linguistic Case (No. 2), 1 Eur. H.R. Rep. 252, 271–72 (1968).

63. Human Rights Act, 1998, §§ 6(3)(b) & 6(5).

64. Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, CETS No.: 005, available at <http://conventions.coe.int/Treaty/en/Treaties/Word/005.doc>.

65. *Id.* art. 10.

66. *Id.* art. 11.

67. *Id.* art. 9.

68. *Halford v. United Kingdom*, 24 Eur. H.R. Rep. 523 (1997), where the European Court of Human Rights found that: “In the Court’s view, it is clear from its case law that telephone calls made from business premises as well as from the home may be covered by the notions of ‘private life’ and ‘correspondence’ within the meaning of Article 8(1).” *Id.* at 543.

69. FARRINGTON & PALFREYMAN, *supra* note 1, para. 2.01.

assert—undoubtedly public bodies under both EU law (discussed above) and domestic English law (discussed below) there would seem to be good reason for holding them to be true public authorities for the purposes of the Human Rights Act too.

THE “JUDICIAL REVIEW” APPROACH

The “judicial review” approach is the only one of the three tests for demarcating the public-private divide which is originally “home-grown.” It was developed by the English courts as they developed a coherent body of administrative law, under which the form of legal action is known as “judicial review.” It is commonly acknowledged that it was Lord Chief Justice Parker in *R v. Criminal Injuries Compensation Board, ex parte Lain*⁷⁰ who originally laid down the essential criterion for deciding whether or not an institution is a “public body” amenable to judicial review. He said that a body which gains its authority through a private contract with another party cannot be subject to administrative law.⁷¹ Thus, private clubs, like the Football Association of Wales,⁷² have been held to act outside administrative law. Farrington and Palfreyman clearly wish to see chartered HEIs at least held to be equivalent to private clubs. But their approach is simply out of date. The more modern approach, arguably strongly influenced by the functionalist approach of both European Union and European Convention law, was summarized by Lord Justice Lloyd in *R v. Panel on Take-Overs and Mergers, ex parte Datafin Plc.*:

[I]t is helpful to look not just at the source of power but at the nature of the power. If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may . . . be sufficient to bring the body within the reach of [administrative law]. It may be said that to refer to “public law” in this context is to beg the question. But I do not think it does. The essential distinction, which runs through all the cases to which we referred, is between a domestic or private tribunal on the one hand and a body of persons who are under some public duty on the other.⁷³

Indeed, Lord Donaldson said explicitly in the Court of Appeal that: “There is no serious dispute, but that the universities of this country have a sufficiently public character to bring decisions by them within the scope of [judicial review].”⁷⁴ Similarly, Mr Justice Sedley (as he then was) held in *R v. University College London ex parte Riniker*⁷⁵ that “a justiciable abuse of power by the public body, which University College London undoubtedly is” would form the basis of

70. [1967] 2 Q.B. 864.

71. *Id.* at 882.

72. *R v. Football Ass’n of Wales ex parte Flint Town United Football Club*, CO/1033/90 (July 11, 1990).

73. [1987] 1 Q.B. 815, 847 (C.A.).

74. *R v. Hull Univ. Visitor, ex parte Page*, [1991] 4 All E.R. 747, 751 (C.A.).

75. [1995] E.L.R. 213.

an administrative law case.⁷⁶ (University College London is a chartered HEI not entirely dissimilar from New College, Oxford at which both Farrington and Palfreyman are based.) Since deciding *Riniker*, Mr Justice Sedley has been promoted to a Lord Justice of Appeal (sitting in the Court of Appeal) and is now widely acknowledged as the leading judge on education law in the United Kingdom. Ironically, Farrington and Palfreyman actually cite his judgment (at para. 2.24) but apparently wish to ignore it by talking of institutions performing private functions which cannot be susceptible to review under administrative law. But this completely overlooks the point that *Riniker* was actually concerned with an employment matter which, as Mr Justice Sedley himself acknowledged, is normally a matter of private contract law. His reasons for rejecting the argument that University College London is a private body are simple. No one denies that public bodies perform private functions alongside their public ones. Every institution of government must employ staff, for example, and many control real estate. These are clearly matters of private law. But to suggest that this moves an institution from the public into the private sector is to completely misunderstand that distinction, for it would mean that there could then never be true public bodies.

Take, for example, the (chartered) University of Birmingham: it is situated in the second-largest city in the United Kingdom, where the only organization with more employees is Birmingham City Council. In fact, the City Council is the largest organ of local government anywhere in Western Europe. Like the University, the City Council is constituted not by legislation, but by Royal Charter. Yet, no one would seriously suggest that it is a private organization except when it performs a public function, for it is self-evidently public. It is difficult to see why the University of Birmingham should be treated any differently. Indeed, Professor Fridman, who was both a British QC and Professor of Law at the University of Western Ontario in Canada, argued over twenty years ago that, since HEIs were almost completely financed by the public purse and provide a public service (just like local authorities), they must be *de facto* public bodies.⁷⁷

Farrington and Palfreyman essentially base their view of the legal status of chartered HEIs on the form of their incorporation. Chapter 5 on “Governance Structures” is thus largely an argument that the different means of incorporation of chartered, as opposed to statutory, HEIs puts them on different sides of the public-private distinction. They attempt to buttress their views with an exegesis on the venerable law of corporations, going back to the writings of Baron Coke in 1612. Insofar as they discuss the legal status of an HEI’s relationship with the outside world, they are prepared to accept that much of what they mention “arose before the modern approach to issues of public law”⁷⁸ which, as we have seen, looks more at substance than at form. Strangely, though, they seem unable to countenance the same “new-fangled” approach when considering whether a chartered HEI is open to a challenge under administrative law from one of its members. They argue

76. *Id.* at 216.

77. G.H.L. Fridman, *Judicial Intervention into University Affairs*, 21 CHITTY’S L.J. 181, 181–82 (1973).

78. FARRINGTON & PALFREYMAN, *supra* note 1, para. 5.16.

instead that incorporation by charter is a process which creates a private legal person rather than a “governmental authority.”⁷⁹ But even on its own terms their argument fails. As company law expert Professor Len Sealy has explained:

the City of Birmingham or the University of Cambridge—or my own ancient institution, Gonville and Caius College⁸⁰ . . . would have come to his [Coke’s] mind as the typical corporation Even the great trading corporations operating under Royal Charter, like the Hudson Bay Company and the East India Company, which we might regard in some ways as forerunners of the modern commercial company, were not at all numerous But, more significantly, they bore very little resemblance to their modern counterparts. In many respects these large corporations were instruments of government as much as vehicles for trade. Some of them had powers to annex and cede territory, to conclude treaties, make war and peace, exact reprisals, create municipal corporations, establish mints, and erect courts having powers of arrest and punishment, even the power of life and death. They had the power to enact legislation, in the form of by-laws, which were binding on strangers coming within the jurisdiction conferred by their charters.⁸¹

So, contrary to the assertion of Farrington and Palfreyman, a chartered institution was indeed an “instrument of government” or “governmental authority.” Indeed, a chartered HEI could—and did—enact its own bylaws which were binding on members and strangers alike⁸² and set up its own courts (which sometimes did order barbaric punishments). No wonder then that they were immune from review by the courts. As instruments of government, chartered HEIs had effectively been delegated many of the powers of the Crown. Under the doctrine of sovereign immunity, it would have made no sense for the courts to get involved. But there was never any doubt as to whether or not they were public bodies with public powers. The only issue was whether they could be held legally

79. See *id.* para. 13.72. For their argument, Farrington and Palfreyman rely on a student textbook by Wade and Forsyth. See WILLIAM WADE & C.F. FORSYTH, *ADMINISTRATIVE LAW* (9th ed. 2004). Yet this contradicts not only the views of Mr Justice Sedley in *Riniker*, but also those of Oliver Hyams (chair of the English Education Law Association and, ironically, a member of Farrington and Palfreyman’s advisory panel), Richard McManus (author of the leading work on judicial review in education cases, *EDUCATION LAW AND THE COURTS* (1998)) and Clive Lewis, a leading barrister in the area who was formerly a professor of administrative law. See FARRINGTON & PALFREYMAN, *supra* note 1, at 292 n.96.

80. Which enjoys exactly the same legal status as New College, except that it is thirty-one years older and is a constituent college of the University of Cambridge, instead of the University of Oxford.

81. L. Sealy, *Perception and Policy in Company Law Reform*, in *CORPORATE AND COMMERCIAL LAW: MODERN DEVELOPMENTS 15* (Robert R. Pennington, David Feldman & Franklin Meisel eds., 1995).

82. As late as 1995, the courts were still prepared to hold that a complaint from a student applicant (who could not be a member of the chartered HEI in question because he had not yet passed the relevant examinations) was held to be within the exclusive province of the Visitor whose decision could not be subjected to judicial review. See *Bankole v. Chartered Ass’n of Chartered Accountants* (Transcript: John Larkin) (C.A. Nov. 15, 1995).

accountable for their actions in the courts. Today it is obvious that they can, especially since sovereign immunity was effectively abolished in 1947.⁸³ As public bodies, such accountability will often be effected according to the principles of administrative law, even if the fact that the institutions' powers have slowly been reduced means that the opportunities for abusing them have already been significantly curtailed.

JUDICIAL REVIEW

Thus far this discussion of the public-private distinction has talked in fairly general terms about the more stringent legal regime imposed on public institutions as compared to their private counterparts. It is now time to explain the ramifications of the distinction with much greater specificity. In fact, the public-private distinction dictates whether any legal action must be brought under public (administrative) law or under private law. A suit in contract or tort (such as negligence) is—as in the United States—a private law action which enables a person who claims to have suffered some loss or injury to seek monetary compensation against the person or organization responsible. An application for judicial review, by contrast, is an administrative (or public) law action which enables a person to challenge the decisions or actions of a public body or organization. This is the practical reason why it is so important to understand English law's variant of the public-private distinction.

But such a summary overlooks the fact that judicial review has a number of advantages—and commensurate disadvantages—over actions in contract and tort. The advantages start with the fact that the initial application can be filed at very little cost—certainly, at a fraction of what it might take to bring an action to court for a tort or breach of contract—and, moreover, a court hearing can be expedited so that it may be possible for an applicant to go before a judge within a week of filing the application. In some cases it will even be possible to have an initial hearing on the very same day that the application is filed, whereas it may take two years or more for many private law cases to come before a court. This speed is part of the essence of judicial review, since it enables an applicant to challenge a decision before it is put into effect. For the same reason, failure to bring an application for judicial review expeditiously—and within a maximum of three months in any event—is fatal to any chance of an applicant's success. Other restrictions include the fact that courts do not award damages in such cases; the only remedies available are orders quashing a decision,⁸⁴ prohibiting a form of conduct,⁸⁵ or ordering that a decision be taken or action carried out.⁸⁶ Of course, the most obvious point—bearing in mind that an application for judicial review is a public law action—is that it can be brought only against a public body.

The distinction between judicial review and private law actions is therefore not

83. Crown Proceedings Act, 1947.

84. Called a "quashing order": Civil Procedure Rule (CPR) 54.1(d).

85. "Prohibiting order": CPR 54.1(c).

86. "Mandatory order": CPR 54.1(b).

a matter of legal technicalities. Indeed, it has two other enormously significant practical ramifications. First, an application for judicial review is essentially a *proactive* challenge to a decision which, if successful, will lead to the quashing of the decision taken and so *prevent* the occurrence of harm. Often it will also effectively mean that the institution in question will have to reconvene to reconsider the matter afresh so as to decide on a new course of action. By contrast, a suit for breach of contract or a tort (say, negligence) is a *reactive* measure which often has to treat the institution's decision as a *fait accompli*, so that any remedy will normally lie only in damages for any harm already sustained.

Secondly, judicial review is not a forum for challenging the substance of any decision taken. Instead, it focuses on the *process* by which the decision came to be made, requiring that: (a) the decision was not motivated by bias or the consideration of irrelevant factors, but did take into account all relevant factors; and (b) the decision-making procedure tracked that which the organization is supposed to follow. Traditionally, there has also been a third requirement that the decision must not be perverse—sometimes referred to as the “taken leave of one’s senses” test—although it is arguable that this is now being displaced by a stricter “disproportionality” test imported from European law, whereby the effects of any decision taken must be proportionate to the goal which it is intended to achieve. Actions in contract and tort, on the other hand, allow a plaintiff to challenge the *substance* of any decision, which effectively subjects it to a standard of reasonableness. This has always been a stricter standard than the “perversity” test and, even now, allows the merits of alternative policies to be led in evidence in a manner which even the “disproportionality” test does not permit.

Bearing all this in mind, it is clear that Farrington and Palfreyman are again putting forward their own point of view rather than describing the current legal position when they suggest that “the student-chartered HEI dispute under the contract to educate is a private law matter for which adequate remedies exist within the law of contract and hence judicial review is not an appropriate way forward.”⁸⁷

Many other commentators—including this reviewer—would not agree. Since the balance of legal authority weighs heavily in favor of chartered HEIs being public bodies, let us imagine the scenario of a final-year chemistry student—let us call him George—at such an institution who discovers that the school’s Vice-Chancellor (the equivalent of the President at a U.S. institution) has decided to close the chemistry department at the end of the current academic year. However, the institution’s own rules preclude the Vice-Chancellor from making any such decision without the approval of certain other school bodies which have not been informed. (This is, unfortunately, an example which is not wholly hypothetical.) George will have no remedy in a breach of contract action since the department will continue in existence for the remainder of his student days, and he will therefore receive the instruction for which he has contracted. But George will almost certainly have standing, on the grounds that his degree will be devalued by the closure of the department, to bring an application for judicial review of the

87. FARRINGTON & PALFREYMAN, *supra* note 1, para. 13.06.

Vice-Chancellor's decision on the grounds that the decision-making process was flawed.

Now let us vary the scenario a little to consider the position of a first or second-year chemistry student—let us call her Anita—who discovers that the department will be closed immediately after she graduates. She is concerned not so much about the effect on the *cachet* of her degree, but more as to whether high-quality faculty will leave before she completes her course, so that she will be left with an ever-dwindling number of electives from which to choose, taught by the weakest faculty. It is possible that she might have an action for breach of contract, but that will require some speculative assessment as to both: (a) which faculty will leave and which will stay; and (b) the effect that any such changes in personnel might have on the quality of educational provision. This will almost certainly require the calling of expert evidence from other academics and interested bodies such as the Royal Academy. The outcome of the case would be a judgment call for the court and thus would be exceedingly difficult to predict in advance. On this basis it is difficult to see how Anita could expect to obtain an injunction to stop the closure, so contract law would leave her only with the possibility of seeking compensation after graduation for any loss of education she experienced during her degree program. If she did experience such a loss, the law's subsequent intervention would be very much a case of "too little, too late." Moreover, the amount of compensation to be awarded in such a situation is notoriously difficult to assess. On the other hand, an application for judicial review would enable Anita to have the case expedited at little expense (and certainly without the need for expert evidence), and the breach of the institution's own procedures would mean that the decision to close the department would be quashed before any harm is done.

Not only are Farrington and Palfreyman too dogmatic in their assertion that "adequate remedies exist within the law of contract," Anita's case ironically illustrates that it is also in the interests of the HEI to have the case dealt with under judicial review rather than as an action for breach of contract. An application for judicial review involves a two-part procedure, whose first stage is simply an application for permission to proceed based purely on the filed paperwork. Where such permission is granted, the HEI is immediately put on notice that the applicant has an arguable case, and so it may very well take the opportunity to reconsider its decision before a full court hearing is scheduled. Yet at this stage, court proceedings have cost the HEI little or nothing at all, since it does not have to file a defense to an application for permission (and any defense that it does file can be—and often is—quite cursory). Moreover, because the application for permission does not involve a hearing, it is effectively private and so minimizes any prospect of bad publicity for the institution. Finally, should the application get as far as a full hearing, it is surely in everyone's interest—student and institution alike—to have the matter resolved as quickly as possible rather than to have the prospect of litigation lingering over several years, as might well be the case with an action for breach of contract. Even if the HEI is unlikely to be required to pay a large sum in compensation to any one individual, the total compensation payable if the number of students in the program is relatively large, would be considerable—as would be the expense of defending any such lawsuits. Although some of these expenses

would probably be met through insurance, the HEI would still find its future premiums increasing dramatically as a result. A judicial review hearing, by contrast, is not about compensation at all and is much cheaper to defend. Moreover, if the HEI actually wins a judicial review hearing, it will in practice have significantly strengthened its chances of having any subsequent student lawsuit for breach of contract struck out by the courts as a breach of process. Ironically, therefore, the approach of Farrington and Palfreyman, which seeks to limit the degree to which courts will involve themselves in the affairs of HEIs, would—if implemented—run the risk of doing such institutions more harm than good.

STUDENT ADMISSIONS

A little public accountability at an early stage can facilitate good governance rather than impede it. It certainly does not imply a descent into consumerism. Yet, insisting that students should always seek to remedy any grievances through the law of contract rather than by means of an application for judicial review does indeed imply a consumerist mindset. Sometimes this can create a tendency to see problems where none exist. Thus, Farrington and Palfreyman seek to warn of the problems in which HEIs may find themselves embroiled if they seek to recruit students from outside the United Kingdom. They suggest that this may lead to “doubts both about the applicable law and about which courts would have jurisdiction over any dispute about the contract of admission.”⁸⁸ This may lead, they say, to questions of “private international law or conflict of laws.”⁸⁹ It is difficult to see how this could do anything other than strike fear into senior administrators and, in particular, into those responsible for admissions. But then it becomes clear that the authors have made a fundamental mistake about basic contract law. They assert, “[a]n offer of admission by an HEI domiciled in England made to and accepted by a student domiciled in Scotland constitutes a contract formed on acceptance and is prima facie subject to the jurisdiction of the Scottish courts.”⁹⁰

In almost every case this assertion is simply wrong. As every 1L law student knows, an acceptance is effective *not* when the offeree decides to agree to the terms of the offer but when his or her acceptance is actually *communicated* to the offeror. This means that the domicile of any student to whom an offer of admission is made is irrelevant; what matters is the location of the HEI itself. In the authors’ own example, therefore, a contract will only exist when a student’s acceptance is communicated to the HEI, whereupon the relevant jurisdiction will be England. So the anxiety caused to administrators and admissions tutors by mention of “private international law or conflict of laws” turns out to be utterly groundless.

Now some readers may object that the authors may have had in mind the one

88. *Id.* para. 13.13.

89. *Id.* para. 13.14.

90. *Id.*

exception to the “effective only upon communication” rule, namely the postal acceptance or “mailbox” rule. The authors do not mention it but, in any event, it is irrelevant here in virtually every case. The mailbox rule states that an acceptance is effective when posted rather than when received, but it is nowadays of increasingly limited application. First, it applies only when the public postal service is used, not when a private carrier like FedEx or UPS is used.⁹¹ Secondly, it must be reasonable in the circumstances to send the acceptance by public post.⁹² Thirdly, and rather logically, the postal rule does not apply to so-called “instantaneous methods of communication” (which have been held by the courts to include what today might actually be seen to be rather slow modes of communication, such as telex).⁹³ Finally, the postal rule cannot apply, even where use of the public post is reasonable, if its application has been explicitly or implicitly ousted by the terms of the offer.⁹⁴

If the authors had clearly explained the process by which British HEIs admit their students, they would have seen that the postal acceptance rule could almost never be applicable. The system for admitting undergraduates is very different from that in the United States since it is highly centralized and allows a student to apply initially to no more than six institutions. This much Farrington and Palfreyman do explain (at para. 13.12). What they do not say is that, for the vast majority of students, the entire process—including initial application, and the making and giving of offers (or rejections) and acceptances—is now carried out online, through a process known as UCAS Apply.⁹⁵ The possible application of the postal acceptance rule is thus immediately eliminated.⁹⁶ Moreover, even where the post is still used, students are bound under the terms of the centralized agency which handles the application process (UCAS) to ensure that they *communicate* any acceptance of an offer of admission by a stipulated date in May. The fact that actual communication is required implicitly ousts the postal rule.⁹⁷ Thus the only students who might feasibly be able to accept the offer of a place outside the United Kingdom in a legally effective manner will be students not admitted to a first degree program (principally postgraduates) who received the offer by means of a letter, which did not specify a date by which the student had to communicate his or her decision. So the authors’ warning turns out to be almost completely unwarranted. Yet if Farrington and Palfreyman had provided an account of the admissions process, they would have been forced to confront an issue where a major legal problem really does reside.

Apart from its centralized nature, one of the distinctive—and most

91. *In re London & N. Bank. Ex parte Jones*, [1900] 1 Ch. 220.

92. *Henthorn v. Fraser*, [1892] 2 Ch. 27; *Manchester Diocesan Council for Educ. v. Commercial & Gen. Inv., Ltd.*, [1970] 1 W.L.R. 241.

93. *Entores Ltd. v. Miles Far E. Corp.*, [1955] 2 Q.B. 327 (C.A.).

94. *Holwell Sec., Ltd. v. Hughes*, [1974] 1 W.L.R. 155 (C.A.).

95. See UCAS.com Apply, <http://www.ucas.ac.uk/apply/index.html#> (last visited Apr. 22, 2007).

96. See *Entores*, [1955] 2 Q.B. 327.

97. *Holwell Sec., Ltd.*, [1970] 1 W.L.R. 155.

controversial—features of the undergraduate recruitment process in the United Kingdom is that students typically apply well before (actually, up to a year before) they obtain the equivalent of a GPA from high school. This means that the system depends significantly on schools' predicting the grades of their students. Since these grades are awarded not by the schools themselves as in the United States, but by independent bodies who set national examinations and projects,⁹⁸ these predictions are frequently inaccurate. So HEIs typically make what are called "conditional offers" to applicants. Unfortunately, all Farrington and Palfreyman have to say on the matter is this: "It is established that the legal relationship between an individual prospective student, or applicant, and an HEI is formed when a contract is entered into between legally competent parties (the HEI and the applicant) for the admission of the applicant either unconditionally or on satisfaction of certain conditions"⁹⁹ But this glosses over two fundamental issues.

Let us first take the case of a student who has, in accordance with UCAS rules, decided to reject all but two offers of admission. UCAS requires that she now rank these choices as Firm (first choice) and Insurance (second choice). Merely explaining the exact legal status of the relationship between the student and the Insurance institution presents something of a conundrum. It appears to be a contract with two conditions precedent: one that the student will obtain the grades specified by the Insurance HEI, another that the student will *not* obtain the grades specified by the Firm HEI (for otherwise she would have a binding contract with the latter in which the condition precedent has been fulfilled). The practical difficulties that this arrangement presents are numerous. What if, for example, a student is asked to obtain grades of BBB¹⁰⁰ by the HEI she chooses as Firm, and of BBC by the HEI she chooses as Insurance, and subsequently the student actually obtains grades of BBC? It may be thought that the answer is obvious: she has a binding contract with the Insurance HEI. However, in practice the Firm institution is likely to have some spare capacity on its courses and may not wish to lose this student, so it may decide to offer her a place notwithstanding that she has dropped a grade. What is the legal position then? On the other hand, what if the student did obtain grades of BBB but has changed her mind and now wishes to attend her Insurance, rather than Firm, institution? Or what if the student actually obtained grades of AAD or ABD: are such grades better than, equivalent to, or worse than either BBB or BBC?¹⁰¹ These questions crop up literally thousands of times in every application round and cause no end of heartache and soul-searching among

98. These are typically essay-based. So-called "standardized tests" using multiple-choice or "short answer" formats are relatively uncommon in the United Kingdom.

99. FARRINGTON & PALFREYMAN, *supra* note 1, para. 13.07.

100. Students applying for admission to a HEI typically study three subjects at so-called "Advanced Level" (normally referred to as A-Levels). Each of these subjects is graded on a national seven-point scale where the highest grade is an "A". A student will be required to obtain specified grades in each of his or her three subjects, so that conditional offers may be made anywhere between AAA and EE (where failure in the third subject will be deemed immaterial).

101. Some HEIs have changed to a points-scoring system which avoids the equivalence issue but, again, Farrington and Palfreyman do not mention it.

students, staff, and faculty alike. It would have been helpful if Farrington and Palfreyman had addressed them.

DIVERSITY IN ADMISSIONS

The second issue I wish to address here is of even greater consequence. It concerns the weight to be given to schools' predictions of high school grades.¹⁰² The problem is that a relatively low prediction for an applicant will effectively deny him a chance of being made a conditional offer by the most prestigious HEIs. Yet as explained above, such predictions are often inaccurate.¹⁰³ This can have the effect that someone who actually achieves grades of AAA (for most students the highest possible) might have received no offers from top HEIs because his high school predicted grades of (say) BBC. He will now be faced with the choice of waiting an extra year before attending an HEI or, more likely, will decide to cut his losses and go to a lower-ranked institution.

Yet someone who actually obtained grades of BBB might well be holding Firm and Insurance offers from more prestigious HEIs because her high school over-inflated her predicted grades, so that she was made a conditional offer. She will now find herself in one of two positions. She may be able to enter a good HEI because she has fulfilled the conditions of an offer (or has come sufficiently close for the HEI to decide to admit her anyway), which creates the perverse effect that a student with grades of BBB has been treated better than a student with grades of AAA. Or she may find that her grades are good enough for neither her Firm nor her Insurance institution, in which case the over-inflation of her predicted grades will have had the effect of denying her a place at an HEI unless she can be "rescued" by UCAS's "safety-net" system known as Clearing. This scandal has hardly been out of the news in the United Kingdom for the last five years, and the government even appointed a university Vice-Chancellor, Professor Steven Schwartz from Brunel University, to head a Steering Group on Admissions to Higher Education to inquire into the problem. Its final report was published in September 2004.¹⁰⁴ Its apparently simple recommendation that the admissions process should be changed so that all offers of admission should be based on grades already obtained (known as post-qualification applications or PQA) was, however, greeted with skepticism by admissions tutors,¹⁰⁵ whose warning that the recommendation was naïve and simplistic seems to have been borne out by further

102. Technically, these are actually called Advanced Level qualifications or, more normally, A-Levels. They typically involve two year courses, the first of which leads to an "AS" assessment, and the second to an "A2" assessment.

103. It has been estimated that only around half of all predictions are accurate "although the accuracy of predictions varies by school/college and by subject." See ADMISSIONS TO HIGHER EDUC., FAIR ADMISSIONS TO HIGHER EDUCATION: RECOMMENDATIONS FOR GOOD PRACTICE para. B25 (2004), <http://www.admissions-review.org.uk/downloads/finalreport.pdf>.

104. See *id.*

105. See, e.g., Katherine Sellgren, *Changes Worry Admissions Tutors*, BBC ONLINE, Sept. 14, 2004, <http://news.bbc.co.uk/1/hi/education/3651660.stm>.

investigation. As yet however, no other viable solution has been proposed.¹⁰⁶ Again, it would have been helpful if Farrington and Palfreyman had addressed this issue.

Although it may not appear so at first glance, in many ways the problems involved in the UCAS application system involving reliance on predicted grades raise issues not dissimilar from those in the seminal U.S. cases of *Grutter v. Bollinger*¹⁰⁷ and *Gratz v. Bollinger*.¹⁰⁸ The issue with admissions to HEIs in the United Kingdom has been that it is the private and selective public high schools¹⁰⁹ with a history of sending their students to prestigious HEIs which have been particularly prone to over-inflating predicted grades. On the other hand, schools in poorer areas of the country are more likely to lack such self-confidence in prediction, and so may well under-predict their students' grades. Students from wealthier backgrounds are therefore more likely to be admitted to the prestigious HEIs irrespective of merit or grades actually obtained. This is potentially a form of discrimination constituting a breach of Article 14 of the European Convention on Human Rights, actionable under the Human Rights Act 1988. Indeed, so-called "disparate impact"¹¹⁰ cases are normally just as actionable in the United Kingdom as "disparate treatment"¹¹¹ cases (and are far more common). Thus, as might be expected, while the United States' main pre-occupation in terms of trying to admit a more diverse range of students is predominantly about race, in the United Kingdom what is known as "widening participation" revolves mainly around social class.

Any discussion of widening participation in British HEIs would undoubtedly benefit from a consideration of *Grutter* and *Gratz* because so many of the relevant debates are really much the same. A comparative perspective on the desirability, effectiveness, and legality of so-called affirmative action policies would be particularly useful to scholars, practitioners, and administrators on both sides of the Atlantic. In fact, the final part of Farrington and Palfreyman's book¹¹² comprises three chapters which purport to take a comparative approach. Indeed, they state that "[w]e concentrate on areas in which the experience of other countries can assist the development of good practice in UK."¹¹³ In reality, however, these studies are not comparative at all, but simply give an exceptionally brief summary of certain aspects of the law in the United States and elsewhere. Thus, both *Grutter* and *Gratz* do receive mention on a couple of occasions, but the first time is as authority for continued judicial deference to academic freedom, and the second is simply in order to support the assertion that there are "increasing challenges

106. See, e.g., *Plans to Change University Entry*, BBC ONLINE, May 22, 2006, <http://news.bbc.co.uk/1/hi/education/5003366.stm>.

107. 539 U.S. 306 (2003).

108. 539 U.S. 244 (2003).

109. Known in the United Kingdom as "grammar schools".

110. Known in the United Kingdom as "indirect discrimination".

111. Known in the United Kingdom as "direct discrimination".

112. FARRINGTON & PALFREYMAN, *supra* note 1, Part VIII.

113. *Id.* para. 28.01.

from white applicants to . . . admissions policies.”¹¹⁴ The fact that petitioners were successful in *Gratz* but unsuccessful in *Grutter* is never mentioned, let alone explained. Suffice it to say that such a truncated account of these two seminal U.S. cases provides no meaningful basis for any sort of comparative study. Like so much of this book, it means that a big opportunity is wasted.¹¹⁵

114. *Id.* para. 29.09.

115. The paucity of in-house counsel in the United Kingdom as compared to the United States is also never remarked upon.