

A RESPONSE TO TIMOTHY KAYE'S *AIM HIGHER: CHALLENGING FARRINGTON & PALFREYMAN'S THE LAW OF HIGHER EDUCATION*

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As the joint authors of *The Law of Higher Education*¹ we greatly appreciate Professor Timothy S. Kaye's book review *Aim Higher: Challenging Farrington and Palfreyman*² and are grateful for the opportunity to respond.

Unlike our respected colleagues and friends Professors Bill Kaplin and Barbara Lee, joint authors of *The Law of Higher Education*,³ which runs to 1,726 pages, we do not have the advantage of a publisher willing to allow us more than 637 pages to fit the Oxford Legal Practitioner series of which our text forms part. So, some of the discussion is relatively abbreviated. However, our accompanying website updates,⁴ which already extend to many thousands of words, allow us to expand the material to an appropriate level in length and breadth and to keep it up to date. Professors Kaplin and Lee utilize a similar concept on the web pages of the National Association of College and University Attorneys (NACUA).⁵ For our part, again like Professors Kaplin and Lee, we have had the welcome assistance of

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1. D.J. FARRINGTON & DAVID PALFREYMAN, THE LAW OF HIGHER EDUCATION (2006).
2. Timothy S. Kaye, *Aim Higher: Challenging Farrington and Palfreyman's The Law of Higher Education*, 33 J.C. & U.L. 559 (2007).
3. WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION: A COMPREHENSIVE GUIDE TO LEGAL IMPLICATIONS OF ADMINISTRATIVE DECISION MAKING (4th ed. 2006).
4. D.J. Farrington & David Palfreyman, Online Updating for *The Law of Higher Education*, <http://www.oxcheps.org.uk/law/ilaw.php> (last visited Oct. 3, 2007).
5. See National Association of College and University Attorneys, <http://www.nacua.org> (last visited Oct. 3, 2007).

consultant editors drawn from both academia and practicing lawyers specializing in the law of higher education in the United Kingdom and Europe. We have corresponded with leading academics in controversial areas, so we are as reasonably confident in our coverage of the relevant law in all areas as anyone can be in this field. We also made it as plain as we could that there are certain unresolved issues in the United Kingdom's higher education law and, hence, it was implicit, if not actually explicit, that we were giving our own view, not claiming to set out an authoritative line.

As Professor Kaye remarks, there are far fewer decided court cases in higher education in the United Kingdom than in the United States.⁶ In large part, this is due to the fact that for the majority of its history all disputes with the older colleges and universities in England, Wales, and Northern Ireland were referred to the Visitorial procedure, of medieval origin, often technically before the Queen, a member of the Royal Family, an Archbishop or Bishop of the Church of England, or a hereditary peer. Indeed, it was not until 1988 for academic staff and 2004 for students that courts began resolving disputes. In recent Decision Notices of the Information Commissioner, it has been held that a Visitor (in these cases the Lord President of the Privy Council), which remains in existence for other issues, is not a public body or exercising a public function for the purposes of the Freedom of Information Act 2000.⁷ It has proved, therefore, impossible to obtain information about Visitorial decisions, other than in the very few reported cases during the period from the 13th century to the present. This, of course, impedes our understanding of the legal principles on which the Visitors' decisions were based. So we have to rely on the relatively small number of cases concerning students that have reached the courts from those colleges and universities without a Visitor, almost all of which have been created since 1992. From those, we have a reasonable understanding of the attitude of the higher courts, one which is broadly similar to that of the United States' courts, notably in relation to deference to academic judgment.

While there could be room for considerable debate and doubt about Professor Kaye's interpretation of the United Kingdom's higher courts' attitudes to the tort of educational malpractice, and we have already received comment from one other leading expert to this effect, this response is not the place to enter into it nor can we discuss all the points raised in what we consider to be a thorough and challenging review. Suffice it to say that we do not think the situation is as clear-cut as Professor Kaye suggests, and this is certainly an area on which we have expanded in the relevant updates.

Professor Kaye's principal points of criticism concerned the discussion of the legal status of higher education institutions in English law (incorporating all relevant European Union (EU) and European Convention on Human Rights

6. Kaye, *supra* note 2, at 564.

7. Decision Notice, Information Commissioner's Office, Freedom of Information Act 2000 (Sec. 50), FS50125731, April 23, 2007, http://www.ico.gov.uk/upload/documents/decision_notices/2007/fs_50125731001.pdf. See also Decision Notice, Information Commissioner's Office, Freedom of Information Act 2000 (Sec. 50), FS50084354, April 23, 2007, http://www.ico.gov.uk/upload/documents/decisionnotices/2007/fs_50084354.pdf.

(ECHR) law), a short discussion on consumerism, and what he calls a wasted opportunity to discuss the U.K. equivalent of the issues raised in the 2003 U.S. Supreme Court decisions *Grutter v. Bollinger*⁸ and *Gratz v. Bollinger*^{9,10}. Dealing swiftly with the latter criticism, we do not doubt Professor Kaye's expertise in the area of diversity in admission to Higher Education Institutions (HEIs). In fact, we welcome his comments and will address them in our updates so far as they concern the law. However, nothing remotely resembling *Grutter* or *Gratz* has reached the United Kingdom's courts; much of the discussion is media-led and there is very little for us to comment on from a legal perspective beyond what we have already offered. In the past, attempts to show that college and university admissions policies are racially biased have uniformly failed. The introduction of the Office of Fair Access procedures was a political response to a suggestion that children from lower socioeconomic groups might not be getting a fair opportunity to access higher education, not one based on any successful legal challenge. Further discussion of this appears in Palfreyman's OxCHEPS Occasional Paper Number 16.¹¹

Turning to the vexed issue of whether students are to be considered as "customers," "clients," "consumers," "partial employees," or just simply students, it was a coincidence that in the same week in which we received our copy of *The Journal of College and University Law*, H.M. Government announced the portfolio of Lord Triesman, Minister in the new Department for Innovation, Universities and Skills, as including "students as 'customers'"!¹² Whether it is right or wrong or politically desirable to treat students in this way is the cause of much debate in the United Kingdom. This culminated in June 2007 with senior college and university managers (not faculty) releasing a draft of a formal college- or university-student contract that sought to maximize the institution's ability to eliminate or limit liability.¹³ The draft was immediately rejected by ourselves, the National Union of Students, and other commentators.¹⁴ Professor Kaye may be correct in his view that neither current English law nor any leading court case justifies a rigid consumerist approach. Only *Buckingham v. Rycotewood College*¹⁵ provides valuable insights by academic commentators and by the Office of the Independent Adjudicator in terms of its award of damages for inconvenience and distress.¹⁶ In

8. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

9. *Gratz v. Bollinger*, 539 U.S. 244 (2003).

10. Kaye, *supra* note 2, at 582.

11. David Palfreyman, *Does OFFA Have Teeth?*, 2004, <http://oxcheps.new.ox.ac.uk> (follow "Papers" hyperlink; then follow "OxCHEPS Occasional Paper No. 16" hyperlink).

12. Department for Innovation, Universities & Skills, Lord Triesman, Parliamentary Under Secretary of State for Intellectual Property and Quality, <http://www.dius.gov.uk/ministerialteam/triesman-responsibilities.htm> (last visited Aug. 16, 2007).

13. Melanie Newman, *Move to Curb Student Rights*, *TIMES HIGHER EDUC. SUPPLEMENT* (London), July 13, 2007, at 1.

14. *Lesson in Law for Students*, *TIMES* (London), July 17, 2007, at 6.

15. OX004741/OX004342 (Oxford County Court, March 26, 2002). We discuss this case at length because it is the only one to discuss—not because, as Kaye suggests, it occurred near Oxford.

16. *Rycotewood*, OX004341/42 (Warwick Crown Court, February 28, 2003).

fact, we generally agree with Professor Kaye, appreciate the efforts he and others have made to address the deficiencies in this approach, and hope to work with him to develop his ideas as they are relevant to the United Kingdom. Many of us feel it is important to set out in reasonably comprehensive terms the nature of the institution-student relationship as far as it can be reduced to writing or as a series of web pages. That goal is a long way from advocating a legalistic student contract, and very much echoes the view taken in the United States.

Coincidentally, during the same week in a statement to the *Times Higher Education Supplement* the Minister of State, Lifelong Learning, Further and Higher Education also made it clear, yet again, that, in H.M. Government's view, colleges and universities are definitively not public bodies, but are private bodies operating in the public interest.¹⁷ The 2006 text has developed further the conceptual discussions to this effect in Farrington¹⁸ and Palfreyman and Warner¹⁹ and in other United Kingdom authored works on the law of education, two of the authors of which were part of our team of consultant editors. We have also been influenced by discussions in leading texts on the public-private dichotomy. Professor Kaye is a relatively recent entrant to this debate, and his views are both interesting and welcome. It is, however, clear to us that, contrary to Professor Kaye's assertion, it is not established that all colleges and universities are public bodies for the purposes of EU law and it is our view that our analysis of their functions in terms of compliance with Directives and other legislation of the EU and the U.K. Human Rights Act (HRA) (and therefore with the relevant Articles and Protocols of the European Convention on Human Rights (ECHR)) is soundly arguable. It is widely acknowledged that classifying higher education in the EU context is increasingly complex.²⁰ As a sign of the continuing problem of the core-hybrid/functional issue in the HRA/ECHR and the overlap with judicial review, we address in the Updates not only the views expressed by Wadham²¹ but also the decision of the House of Lords in *YL v. Birmingham City Council and Others*,²² both of which suggest that matters are not as clearly settled as Professor Kaye asserts (even if they *may* be moving in the direction he would like). Moreover, that uncertainty still prevails, especially after *YL*, which gave the United Kingdom's equivalent of the United States' Supreme Court the chance to consider the public bodies issue, is duly noted—at least in relation to independent schools—by Professor Neville Harris, Editor of the *Education Law Journal*.²³ However, unlike in the United States, where no doubt the issue would be litigated, no non-statutory higher education institution in England has any interest in arguing the

17. Newman, *supra* note 13, at 1.

18. D. J. FARRINGTON, *THE LAW OF HIGHER EDUCATION* (2d ed. 1998).

19. DAVID PALFREYMAN & DAVID WARNER, *HIGHER EDUCATION LAW* (2d ed. 2002). *See also* DAVID PALFREYMAN & DAVID WARNER, *HIGHER EDUCATION AND THE LAW: A GUIDE FOR MANAGERS* (1998).

20. *See* T. Birtwistle & H. Davies, *How Will the EU Directive on Trade in Services Affect Higher Education?*, 8 *EDUC. & L.* 177 (2007).

21. JOHN WADHAM ET AL., *BLACKSTONE'S GUIDE TO THE HUMAN RIGHTS ACT 1998* (4th ed. 2007).

22. *YL v. Birmingham City Council*, [2007] UKHL 27, [2007] 3 W.L.R. 112 (U.K.).

23. *See* Neville Harris, Editorial, *A Judicial Gap*, 8 *EDUC. & L.* 153 (2007).

issue.

In summary, we believe that we can aim “even higher” and we would welcome the opportunity to publicly debate with Professor Kaye.