

REVIEW OF WILLIAM A. KAPLIN AND
BARBARA A. LEE'S
THE LAW OF HIGHER EDUCATION

MARTIN MICHAELSON*

The first edition of the Encyclopedia Britannica (1768–71),¹ consisting of three volumes, declared California to be “a large country of the West Indies. It is uncertain whether it be a peninsula or an island.”² Over ensuing editions and centuries, the Britannica’s accuracy, reputation, and size—now 32 volumes³—grew and improved, such that today it is generally regarded as the most reliable and useful reference work of its kind in the English language.⁴

If there were analogous flaws in the first edition of Professor William Kaplin’s *The Law of Higher Education*,⁵ they appear to have been neither contemporaneously nor subsequently identified; and given the large number of serious users of the work, a safe assumption is that there were not. This Journal’s reviewer of the first edition, D. Brock Hornby (now a federal district court judge), called Professor Kaplin’s book “the best treatment I have seen of the internal legal structure of colleges and universities, moving logically into liability questions. . . . I expect Kaplin will receive an enthusiastic reception in the academic market.”⁶

A second edition came out in 1985,⁷ and a third, co-authored by Professor Barbara Lee, appeared in 1995.⁸ Now we have the fourth edition.⁹ Judge

* Martin Michaelson is a partner in the higher education practice of Hogan & Hartson LLP.

1. ENCYCLOPEDIA BRITANNICA (1st ed. 1768).

2. See ENCYCLOPEDIA BRITANNICA (1st ed. 1768), available at <http://store.britannica.com/jump.jsp?itemType=PRODUCT&itemID=529> (last visited Apr. 15, 2007).

3. See The Britannica Store, 2007 Encyclopedia Britannica Print Set Suite, <http://store.britannica.com/jump.jsp?itemID=822&itemType=PRODUCT> (last visited Apr. 15, 2007).

4. See, e.g., THE OPEN SOURCE DEVELOPMENT AND DOCUMENTATION PROJECT, ENCYCLOPEDIAS: THE NEW WAY TO RESEARCH 3 (2005), http://osddp.org/files/issues/H_pu.data_Desktop_Wikipedia_first%20draft%20of%20dreamweaver.pdf.

5. WILLIAM A. KAPLIN, THE LAW OF HIGHER EDUCATION: LEGAL IMPLICATIONS OF ADMINISTRATIVE DECISION MAKING (1st ed. 1978).

6. D. Brock Hornby, *Book Review*, 7 J.C. & U.L. 181, 183–84 (1980) (reviewing WILLIAM A. KAPLIN, THE LAW OF HIGHER EDUCATION: LEGAL IMPLICATIONS OF ADMINISTRATIVE DECISION MAKING (1st ed. 1978)).

7. WILLIAM A. KAPLIN, THE LAW OF HIGHER EDUCATION (2d ed. 1985).

8. WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION (3d ed. 1995).

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

Hornby's appraisal has been validated and then some. This standard treatise is regularly consulted by, among others, college and university lawyers throughout the country. Likely few university law offices lack a well-thumbed copy of *The Law of Higher Education*. Indeed, the college or university lawyer must be hermitic or dense who does not immediately know what is denoted by these unmistakable catchwords in our increasingly trespassed corner of the legal world: "Kaplin and Lee."

The first edition of *The Law of Higher Education* was a big work—twenty-seven pages of prefatory material followed by 500 pages of text.¹⁰ The fourth edition is a huge work—thirty-nine pages of prefatory material followed by 1,726 pages of text.¹¹ The Statute Index alone is twenty-one pages of tiny print. The Case Index is twenty-four pages of about ninety cases per page. The two volumes of this treatise together weigh as much as a holiday-size roast beef. Professors Kaplin and Lee have been at hard labor. *Res ipsa loquitur*.

Historians, pundits, and members of the National Association of College and University Attorneys may, with sound basis, shudder when they reflect on the apparently interminable thunderstorm of law—represented by the more than three-fold expansion of this treatise—that has poured down on higher education institutions over the past quarter-century. Whether on balance the consequences of this law storm have been bad or good—a catastrophic flood or benign irrigation—for colleges, universities, their constituents, and the nation is a question meaty enough to warrant more than one major study. Let us hope such studies are forthcoming, for they are needed. Pending publication of such studies, most practitioners in the field would agree that this legal inundation, which sometimes destabilizes the institutions and costs them a ton, has been a daunting mix of bad and good.

Appraisal of a scholarly product as influential and relied upon as is this treatise entails large questions. Of these, perhaps the largest is, does *The Law of Higher Education* fulfill its purpose? The purpose is encapsulated by the work's subtitle, "A Comprehensive Guide to Legal Implications of Administrative Decision Making" at colleges and universities. The promise of that subtitle is larger than that made by the subtitle of the first edition of the treatise, "Legal Implications of Administrative Decision Making." Some readers will quibble and contend, but "comprehensive" and "guide" describe at the least a claim that, although self-congratulatory, could withstand a well-crafted Rule 12(b)(6) motion. For one thing, "guide" is a concept that tolerates considerable latitude. And "comprehensive" is a term that permits some tailoring. A treatise on this subject would not fail, for instance, to be comprehensive merely because a lawyer who advises a college or university on novel sophisticated alternative investments, or a lawyer who needs to learn legal mores of the United Arab Emirates to give advice on an American university's initiative there, will not find a citation in Kaplin and Lee to the arcane pertinent official pronouncements.

A claim of comprehensiveness in this field is not to be compared to, say, a

10. KAPLIN, *supra* note 5.

11. KAPLIN & LEE, *supra* note 9.

claim that the telephone book is comprehensive. To articulate, especially with such clear prose and impressive concision, even close to a comprehensive legal guidance in today's higher education field is an admirable achievement, verging on stupefying. To expect a law treatise to do more—such as provide *every* answer to the college or university administrator's or lawyer's question, "What, dear God, should I do about THIS?"—would be unreasonable.

Insightful, accessible organization is a *sine qua non* of usefulness in a law treatise. The organization of this treatise is commendable if necessarily imperfect. The platonic form of organization of the messy hodgepodge of current law that bears on today's colleges and universities is inconceivable.

Efficient organization of the legal questions that occupy a field as diffuse as contemporary higher education must be evaluated in context. With more than fifteen million students now enrolled, many billions of dollars in tuition, endowments and research funds, an elaborate array of several thousand private (not-for-profit or for-profit), government-run, and hybrid institutions, massive facilities, a staggering web of relations throughout society, and an unsurpassed burden of expectations to bear, twenty-first century American higher education confronts an unprecedented range of legal risks and claims. Traditional cozy conceptions of the higher education institution in this country have been superseded by a clamorous cacophony of demands upon it. The good old days of collegiate education—which were good for the lucky few who could attend—are no more. Whereas Daniel Webster is said to have brought Chief Justice John Marshall to tears in the oral argument of *Trustees of Dartmouth College v. Woodward*¹² by describing the College as small but beloved, today's Supreme Court would take the point with unsentimental emotion and skepticism. Overall, higher education, although its tug on the hearts of alumni (such as at football home games) remains strong, now is more seen as utilitarian, along the lines of prescription medicine. Higher education is now thought to be prophylaxis against socioeconomic shortfall, and therapy for much of what ails America and the world. No satisfying taxonomy of its resulting legal problems is obvious.

The Law of Higher Education is composed of six main parts, each of them consisting of chapters and followed by an excellent annotated bibliography. Part One, "Perspectives and Foundations," is an overview of the scope and sources of higher education law, internal and external: the nature and types of liability, litigation, and alternative dispute resolution; provision of legal services; and institutional management of legal risk. Part One will be of greatest interest to non-lawyers and lawyers new to the field.

Part Two, "The College and its Governing Board, Personnel, and Agents," treats such matters as trustees' and administrators' liability, institutional tort liability, exposures of captive organizations, types of employment contracts, collective bargaining, the sundry federal statutory rights of employees (most extensively, the rights against invidious discrimination), performance-management reviews, and affirmative action in employment.

12. 17 U.S. (4 Wheat.) 518 (1819).

In Part Three, Kaplin and Lee dissect “The College and Its Faculty.” Here they treat many of the touchiest issues that regularly pertain to faculty employment contracts, nondiscrimination laws that apply to faculty employment decisions, processes for making those decisions (as, for instance, decisions related to non-renewal and tenure denial), closure and merger of programs, reductions in the academic workforce, and academic freedom in teaching, research, and publication.

Parts One through Three consume 722 pages and would, if untethered to the rest of the treatise, be in themselves a valuable published analysis of these vexing areas of law.

“The Student-Institution Relationship” is the subject of Part Four, where the treatise addresses students’ legal status, admissions, financial aid, housing, campus computer networks, campus security, and such other student support services as health care, disability accommodation, and foreign student assistance. Also treated are student discipline, speech codes, student organizations’ rights, and issues germane to fraternities, sororities, student publications, and athletics.

In Part Five, “The College and Local, State, and Federal Government,” another host of sensitive questions figures having to do with, for instance, zoning and land use, community access to campuses, local taxation, state licensure, open-meeting and public-records laws, the constitutional roots of federal authority over institutions, and the robust assertion of that authority in various complex legal spheres, including immigration, research regulation, national security investigations, intellectual property, antitrust, environmental, computer use, tax, and civil rights.

The sixth and concluding part of the treatise, titled “The College and External Private Entities,” discusses the roles and major aims of the principal higher education associations, as well as many of the legal issues connected to accreditation, athletics groups, vendors to and purchasers from the institutions, and research collaborations.

Undoubtedly the authors considered various alternative ways of organizing this gigantic load of knowledge. One organizational method they might have considered would have been to track the subject headings set out in a general legal encyclopedia, and to address those headings that pertain to higher education. Whether, had they adopted that approach, they would have been irresistibly tempted to cover even more subjects, and whether Kaplin and Lee would have been thereby required to delve less into some of the topics their treatise considers, we do not know for sure. Likely, they would have had to limit their depth of treatment. Almost certainly any approach to material as far-ranging and unwieldy as this would have involved a certain irreducible amount of overlap. To note, for instance, that discrimination law is significantly addressed in Parts Two, Three, Four, and Five of *The Law of Higher Education* is not to fault the organization of the treatise.

In adopting a thematic, rather than, say, merely alphabetical approach to the arrangement of their work, Kaplin and Lee are implicitly asserting that the title, *The Law of Higher Education*, represents a sound claim, to wit, that there is such a thing as higher education law. Other experienced lawyers or law professors might agree or disagree with that claim. The claim is consequential and warrants

consideration.

If higher education law is a field—a specialized field—some propositions seem to follow. For one, legal services should be arrayed that are specific to that field. Also, presumably, colleges and universities' chief legal officers should be experts in that field. Law school curricula should respond to that field. And, at least, a critical mass of issues in that field should differ from issues in other fields.

Whether those conditions, except for the last, are met is questionable. For instance, most private practitioners who are engaged by colleges and universities do not exclusively, or in many cases even primarily, represent such institutions. Some of the most impressive general counsel of universities had no or almost no experience in the higher education legal field before assuming that post. A large part of the law the treatise addresses is taught in law school courses neither specific to, nor even nominally aimed at, issues in the higher education sector. And no law firm that is capable of representing higher education institutions in all of the areas here addressed—of which very few, at most, law firms are—does so through a group of lawyers who serve only higher education clients. Of course the same may be said of service to oil companies or broadcasters, and there is undoubted consensus that oil and gas law, as well as communications law, are legal fields.

The issue, then, is one of extent. Whether the trend of events in higher education and their legal sequelae signify that higher education law is a more or less coherent and homogeneous field than it was when the first edition of *The Law of Higher Education* came out is to this reviewer uncertain. Probably both sides of the question have merit.

One factor on the less-coherent side of the ledger is that the legal issues higher education organizations face vary enormously among the organizations, and likely more now than ever before. This treatise is said to cover

all of postsecondary education—from the large state university to the small private liberal arts college, from the graduate and professional school to the community college and vocational and technical institutions, and from the traditional campus-based program to the innovative off-campus or multi-state program, and now to distance learning as well.¹³

Surely Columbia University or the University of California must face certain legal questions also faced by the Georgia-based International Academy of Pet Design (IAPD), whose mission is to prepare students for a career in pet grooming. However, with respect to legal exposures, might Columbia have more in common with hospitals, foundations, and big New York-based companies than with the IAPD? And might the public University of California have more law-issue congruence with the city government of Dubuque, Iowa, or with a laundromat in Berkeley, than with the IAPD?

In addition, no small amount of learning in *The Law of Higher Education* would be usefully instructive to a hospital lawyer or a city government lawyer or even a lawyer for the laundromat. That is not a defect in the work. And even though

13. KAPLIN & LEE, *supra* note 9, at xxv.

college and university lawyers must often dig into legal topics far afield from what is generally claimed to be higher education law that does not render this treatise less of a resource for them.

There is, however, some risk for the non-lawyers in higher education organizations to whom Professors Kaplin and Lee also aim this publication. The treatise states that it is intended for, among others,

deans and department chairs; risk managers; business managers and grants and contracts managers; technology transfer, intellectual property, and sponsored research administrators; athletics directors . . . directors of campus security . . . officers and staff at higher education associations, [and] executives and project officers of foundations serving academia, education policy officers in state and federal governments.¹⁴

Such persons can benefit greatly from the treatise, to the extent they comprehend the legal context of certain recurrent problems. They will not, however, be readied by it to perform the legal function, nor does the treatise claim otherwise. Non-lawyers who use the treatise to act when they should consult a lawyer are likely to cause trouble.

A lawyer who day-in and day-out handles legal matters for a college or university and who has done so for many years may ask himself, “How does this treatise help me do my work?” Undoubtedly, when the lawyer encounters many questions of law or legal process with which he is unfamiliar, recourse to this treatise can often give him his bearings and enable him to avoid making a fool of himself in initial discussions with the client. But, as with even the Old Testament, he will not find in Kaplin and Lee a developed answer to every question that arises in the practice. That reflects the nature of law practice, and not a failure by Kaplin and Lee. Many questions with which we grapple have no indisputably correct answer, and many of the questions we must address have no clearly or even highly probable correct answer. Indeed, many of the questions put to us are unsusceptible of substantial illumination in positive law or decisional precedent. Many of the questions we face in representation of higher education institutions—sometimes, it seems, nearly all of the most consequential questions college and university lawyers confront these days—oblige the practitioner to analyze and prioritize multiple risk-management considerations that are in fraught tension with each other.

So, yes, there are definitely limits to the usefulness of *The Law of Higher Education* or of any other treatise that might be written about law that affects higher education. On the other hand, to read this extraordinarily rich work—and in doing so to have the luxury of voicing to oneself time and again along the way that the law for higher education is a ponderous, overly complicated, commonly frustrating, sometimes liberating, too unresolved, flawed, unduly expensive, inexorably evolving, and endlessly engrossing thing—was one of the best educational experiences this practitioner has had. Kaplin and Lee’s treatise whets

14. *Id.*

and does not sate the appetite for the work.

