

HIGHER EDUCATION LAW SCHOLARSHIP AND THE KEY TO ALL MYTHOLOGIES

MICHAEL A. OLIVAS*

William A. Kaplin and Barbara A. Lee's *The Law of Higher Education* is now in its fourth edition,¹ and, like John Updike's *Rabbit* novel series,² is too big to contain itself in one actual book. Kaplin and Lee's two-volume work delights and educates, and is an indispensable work to anyone who is serious about the field of higher education law. Like the field itself, Kaplin and Lee's work has expanded and developed into a sprawling resource. However, unlike Updike's fourth novel in the series,³ which none of us anticipated or waited for, Kaplin and Lee's enterprise raises serious questions about the efficacy of such treatise projects and their place in the traditional marketplace of today. Their users, once hooked, need to be able to rely upon a timely and reasonable service. The only question I have is whether or not this series can live up to this expectation in its current format. I will return to this question, after commenting upon the treatise itself.

When reviewing the third edition in *The Journal of Higher Education*, I wrote of the whole project, "Kaplin's work stands out because it represents an extraordinary undertaking of sheer hard work, enormous synthetic power, and an obvious love of his subject matter. No one of these traits suffices, and we are grateful to Kaplin for this important labor."⁴ I still believe this, perhaps even more so now that the material is so vast and so complex. My own institution had one lawyer on staff in 1982, when I joined the faculty, and now we have about a dozen, not counting the various outside counsel who advise us on superconductivity licensing overseas and other technical specializations, and the staff of the Texas Attorney General's office, who undertake the first chair in most of our litigation. Of course, the field has grown, especially in the evident commercialization of campuses, so of course, its resources have grown. The listservs, publications, and convening activities of the National Association of College and University Attorneys (NACUA) have grown exponentially, and other national and regional groups vie for the same college and university customers. Kaplin and Lee's book has grown accordingly (and accordion-ally), reflecting the field's many facets. It

* Michael A. Olivas, a JCUL Editorial Board Member, is the William B. Bates Distinguished Chair in Law at the University of Houston Law Center.

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

2. JOHN UPDIKE, *RABBIT REMEMBERED* (2001); JOHN UPDIKE, *RABBIT AT REST* (1990); JOHN UPDIKE, *RABBIT IS RICH* (1981); JOHN UPDIKE, *RABBIT REDUX* (1971); JOHN UPDIKE, *RABBIT, RUN* (1960).

3. UPDIKE, *RABBIT REMEMBERED*, *supra* note 2.

4. Michael A. Olivas, *Review: The Law of Higher Education*, 67 J. HIGHER EDUC. 365 (1996) (reviewing WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* (3d ed. 1995)).

could hardly be otherwise.

I will use a few examples to show just how good this resource is. First, I would point to the extraordinarily-detailed table of contents to show the detail and embedded nature of their material. Readers (especially students) often overlook the value of a good table of contents, but for authors, it is the spine of the book—any such book. Not only does their table indicate the broad range of subjects, it also shows how deeply they go into each topic. And this arithmetic formula of how broad and how deep to go is really the measure of the edition's coverage, as each is well written, superbly annotated, and useful. For such a valuable treatise, one would expect no less.

But apart from the sheer size issues, this is great stuff. Pick a section and dig in, and a reader can be assured of a number of carefully-selected cases summarized for their core meaning, very fair and unbiased summaries, with huge doses of statutory, regulatory, and scholarly references. I dipped into some of the large rivers (faculty litigation and student rights), and fished in some of the smaller rivulets and streams (undocumented college students, residency requirements, and accreditation). If I had to make one editing suggestion, it would be to trim the number of references overall, some of which are old and probably not helpful. I also think that some of the areas could usefully be reduced and probably relegated to more practice manuals. Chapter Thirteen—The College and the Federal Government—would be my first candidate, as it covers over 200 pages, and is both too much (some of the statutes are just not essential reading for most college counsel) and too little (the copyright part is very good, but the overall intellectual property coverage will likely not suffice for research institution counsel).

But once the book exploded beyond its one volume to two volumes with over 1,700 pages, it has become clear that there were almost no tradeoffs for length consideration. Here, it is useful to recall how this enterprise has experienced enormous growth. The original, with Kaplin as sole author, appeared in a single 1978 volume,⁵ with 500 pages. In 1980, he added a single 184-page supplement, entitled *The Law of Higher Education 1980*.⁶ The 1985 second edition⁷ totaled 621 pages, fewer than the first edition and its supplement. By this time, he had added the estimable Lee as his collaborator, and they produced a 1985–1990 update,⁸ including 364 pages, which was actually published as a paperback. When I reviewed the update project, I described it as an “error” and a “failure,” both for its format and for its unevenness.⁹ Their excellent 1995 third edition¹⁰ was up to 1,023 pages. Two years later, to reach instructional and practice markets for student affairs graduate students and professionals, they carved out a 642-page

5. WILLIAM A. KAPLIN, *THE LAW OF HIGHER EDUCATION* (1st ed. 1978).

6. WILLIAM A. KAPLIN, *THE LAW OF HIGHER EDUCATION 1980* (Jossey-Bass 1980).

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

8. WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* (2d ed. Supp. 1990).

9. Olivas, *supra* note 4, at 366.

10. WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* (Jossey-Bass 3d ed. 1995).

hardback version entitled *A Legal Guide for Student Affairs Professionals*,¹¹ which was intended to stand on its own and re-package the parts of the 1995 third edition. The same year, they also published the 1997 Supplement, at 378 pages, with NACUA.¹² In 2000, they published a 725-page paperback entitled *Year 2000 Cumulative Supplement*¹³ to the third edition. Along the way, they prepared instructional supplements, with edited cases and instructional materials, maintained by NACUA for purchase by students and teachers, predominantly in education school markets. At some points, the volumes or reprints were out-of-print during the interim periods—an unsatisfactory state of affairs. I had almost forgotten just how many permutations have appeared, all of them quite useful and valuable in their own way, even with the large gaps and stutter-steps.

This enterprise has been truly enterprising, with Jossey-Bass—who published the first three editions—being acquired by John Wiley & Sons, and the newest version is a “Wiley Imprint.” The volumes under review retail for \$250, and there was an early-bird special for 20% if they were ordered by October 15, 2006—approximately the first two months of their availability. And there is a separate, NACUA-maintained electronic-version of “Cases, Problems, and Materials” for teachers who wish to use either the two volume version or a planned student edition; it is a little confusing, but there appears to be a site license for teachers who adopt either of these texts, with some materials that are assignable to students and some of which are not. A printed version is available for \$150, and the electronic-version has the qualities of a teacher’s manual as well.¹⁴

When evaluating the materials for their instructional, classroom value, I confess a clear conflict of interest with the existence of my own *The Law and Higher Education: Cases and Materials on Colleges in Court*,¹⁵ now in a 2006 third edition. Rather than emphasize the cost differential (the Wiley 20% discount is no longer available, but presumably there are multi-purchase discounts for bookstores who stock the volumes), I only note that teaching materials keyed to a two-volume treatise, and printing costs, will render such materials quite expensive and hard to use as a teaching resource. The prospects of hundreds of education graduate students schlepping the 1,700 pages as well as printouts of cases and additional materials to class will certainly draw the attraction of lawyers who practice carpal tunnel syndrome law.

In my preparation, I noted some of the differences between Kaplin’s first volume of almost thirty years ago and the most recent version by Kaplin and Lee. These differences capture the way the field has changed, and how life as a college

11. WILLIAM A. KAPLIN & BARBARA A. LEE, *A LEGAL GUIDE FOR STUDENT AFFAIRS PROFESSIONALS* (1997).

12. WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* (3d ed. Supp. 1997).

13. WILLIAM A. KAPLIN & BARBARA A. LEE, *YEAR 2000 CUMULATIVE SUPPLEMENT TO THE LAW OF HIGHER EDUCATION* (NACUA 2000).

14. All of these purchase details are spelled out with accompanying links on the NACUA website at <http://www.nacua.org/publications/lohe/index.asp> (last visited Mar. 1, 2007).

15. MICHAEL A. OLIVAS, *THE LAW OF HIGHER EDUCATION: CASES AND MATERIALS ON COLLEGES IN COURT* (Carolina Academic Press 3d ed. 2006).

attorney has changed. Virtually no college or university can get along with one attorney, the way the University of Houston did only twenty-five years ago. Such is the rise of the industrial state and today's regulated institution. The different versions themselves accurately represent the history of higher education, unknowingly and unwittingly. I urge a doctoral student to mine the history of these volumes for a wonderful dissertation project, to offer their insight into the field and into the efficacy of an intellectual project whose provenance and pedigree are so endowed. Now that Lawrence Tribe has given up his own unfinished American Constitutional Law treatise series after only volume one of the third edition,¹⁶ I wonder the extent to which any single author or even talented co-authors can get their arms around a single comprehensive field. Middlemarch's Rev. Causabon and his "Key to All Mythologies" comes to mind.¹⁷

After giving such praise, and after professing my respect and awe at their achievement, I now ask the difficult question: can this enterprise continue as it has, with periodic updates, long delays, and an uneven history of spinoffs and versions? My difficult conclusion is that it cannot do so, at least not on this uneven trajectory. Readers and users today require more regularly updated and more readily available texts than this project has become. Even the typesetting is probably rendering it late and impossible to update. In my view, no treatise can afford to go so long without revisions, and the shelf-life of the Jossey-Bass/Wiley version is questionable. No counsel can afford to wait almost a dozen years between editions, and over six years between supplements, at least not one who wants to have the most updated entries and references.

In addition, internal references and my own queries show that this volume was delayed for some time during the editing and final negotiations stage, so that it aged while waiting to see the light of day; some of this is undoubtedly due to the corporate acquisition of Jossey-Bass by John Wiley, but some was also due to the sheer size of the project and authors' commitments to a variety of publishing projects. One wonders whether Jossey-Bass or Wiley is the best home for such a project, as such a treatise is not within the usual range of legal or editorial projects for either publisher. And it is extremely unusual for a professional organization to maintain, publish, and distribute supplements and corollary materials for a commercially-published book. Indeed, it is without precedent in my experience.

Thus: whither Kaplin and Lee, or more properly, their magnificent treatise project? I believe that in the world where this project resides, one needs either a mainstream legal publisher (Lexis/Nexis/Bender comes to mind, with its *Immigration Law and Procedure: Desk Edition* by Stanley Mailman, with regular updates one can insert into a multi-ring binder), or other legal reporter services, such as BNA, CCH, Thomson/West, and others. Of course, this genre is often inordinately expensive, similarly-slow to revise, and difficult to update adequately

16. Joshua Glenn, *No Time for Treatises*, BOSTON GLOBE, May 29, 2005, § IDEAS, at D.

17. In *Middlemarch*, George Eliot's 1871 work, the author portrays nineteenth-century intellectuals as victims of enormous ambitions, including a character named Reverend Causabon, a theologian striving to codify the "Key to All Mythologies." See GEORGE ELIOT, *MIDDLEMARCH* (Oxford Univ. 1998) (1871).

(and immigration law or, say, tax law, change even more rapidly than does college and university law), and the publishers are the poster boys for why there should be fewer mergers and acquisitions in publishing. NACUA, for all its excellent membership services to college and university lawyers and institutional loyalty to Kaplin over the years, is just not situated to undertake a project of this sort, and I cannot believe that over the long haul, Wiley will accede to letting someone else publish the lucrative supplements and add-ons.

I believe that the time has come for Kaplin and Lee to sit down and decide what they can do for the fifth edition, for it may be—and I say this very carefully—that they presently have the worst of all worlds: too much time between editions and supplements, and a slow, traditional print publisher that inherited the project from the book's original slow, traditional print publisher after a merger. On the sidelines, it has a loyal and supportive national association of users, but NACUA is not the right venue either. I do not have the right answer, but after all these efforts, it is time to discuss the various print and electronic options available to the authors. I can say this, as I am a longtime user, cheerleader, and even flack for the book, and both Kaplin and Lee are friends and colleagues, so I do not believe that I must establish my bona fides. I actually love both these authors, and believe we are all lucky to have found such excellent scholars devoted to the project. All of us who read the *Journal of College and University Law* (with which Kaplin and Lee have been involved over the years, with Kaplin having been a faculty editor at the *Journal's* important early stages) have been beneficiaries. I also question the instructional adaptation plans, both on efficacy and cost grounds, having conceded my own interests in this regard. Whatever the authors and their various advisors do, they should begin by shrinking the thickness of the paper. When my own casebook went from the second edition (with a supplement) to its recent third edition, my publisher actually produced a slimmer version by shrinking the thickness of the paper, rendering the 1,056-page version smaller than the earlier ones. No one has complained, and no one is the wiser.

But it is time to look hard at this wonderful project, so that it does not bog down in its overweight new look and format. Having been overweight virtually all my life, let me just employ the perfect metaphor: it needs a diet or a skillful surgeon, or it will find itself with unacceptably high blood sugar and lipid levels. Like so many others with adult-onset diabetes or flabbiness, it needs an intervention from those who love it.

I will end by circling back to my own earlier take, and hope to hit the right note: “As with our favorite novelists, they never seem to produce their next work soon enough. I, for one, await Kaplin’s [and Lee’s] next masterpiece.’ Well, I am pleased to announce that it is here, in fine bookstores everywhere.”¹⁸

18. Olivas, *supra* note 4, at 366.