

A CASEBOOK, YET MORE THAN A BOOK OF CASES—JUDITH AREEN’S *HIGHER EDUCATION AND THE LAW*

MARTIN MICHAELSON*

Reader, beware: Your reviewer has apparent conflict of interest in respect of this book. He teaches a class annually in the author’s course, is outside counsel to the university that employs the author, and, albeit for reasons he does not know, is listed among some thirty persons the author acknowledges in her Preface. Whether, reader, these circumstances are in your estimation fatal to the reviewer’s objectivity, whether this review informs and is useful to you, whether on reading this book you will rush to rebut, you, dear reader, must be, in the memorable usage of a former head of state, the decider.

Professor Areen, former dean of Georgetown University Law Center, has produced a work that is bound to engross any serious student of its subject. *Higher Education and the Law*¹ traverses monumental themes, themes of enduring consequence that pulsate like green-yellow-red lights at the intersection of the American academy and American jurisprudence. These themes embed questions so vexing that notwithstanding the sometimes torrential address the questions have attracted over decades and centuries, they remain the subject of continuing dissection, experimentation, and often fevered argument. For instance:

- Given that public and private colleges and universities are linked in so many ways to government and deem themselves publicly accountable, what should be the limits of government control of them?
- To what extent should college and university boards of trustees, in whom ultimate corporate authority over the institutions is vested, be permitted to influence academic decision-making?
- What *is* academic decision-making?
- Whatever academic decision-making is, when in principle is judicial overriding of it wise?
- How should the law mediate collisions between invoked religious

* Partner, Hogan & Hartson, LLP, Washington, D.C. (Hogan-Hartson).

1. *Higher Education and the Law* is published by Foundation Press, and first appeared in 2008.

doctrine and conventional academic mores?

- To what extent does the United States Constitution cabin, or liberate, the academic life?
- What should be the rights, *vis-à-vis* each other, of students, faculty, and the corporate institution?

Those and like conundrums Professor Areen's casebook implicitly and explicitly challenges us to confront anew.

The book is in six parts and 18 sub-parts, thusly: Section I focuses on higher education in the United States (formation; distinguishing private from public institutions; religion and higher education; state and local government regulation; financing higher education); Section II, faculty matters (academic freedom and tenure; teaching, research, and shared governance; denying and terminating tenure; the college or university as employer—academic freedom or unlawful discrimination?); Section III, student access (admissions; financial aid); Section IV, students and the law (student rights and responsibilities; student First Amendment rights; obligations of the institutions to students); Section V, college and university governance (governing boards and presidents; managing the academic corporation); finally, Section VI—the promise and peril of regulation (licensure and accreditation; federal regulation).

This is not a do-it-yourself handbook for college or university counsel. It is a casebook, not a treatise. It does not attempt to face most of, let alone exhaust, the arcane particulars and peculiarities that daily congest NACUANET, the non-public listserv in which college and university lawyers scratch their heads in full view of their peers (except, that is, for the participants who send up anonymous questions). Do not look here for how to structure or document a study-abroad program, or how to lessen potential liability from a clinical trial gone awry. Do not expect from this book self-executing guidance on what should and should not be said in a staff member's exit interview, or whether the expense of maintaining the president's study at his home is allocable to indirect-cost recovery under federal grants and contracts.

In other words, if you are a college or university lawyer who seeks hand-holding on exactly how to navigate your everyday work, this book isn't for you—except, that is, in possibly the most useful way of all, to wit, to remind and often inform you of the principles and concepts that underlie many of the professional judgments you are called upon to make.

A canon of higher education court opinions exists in the minds of most of us in this field, although there will of course, as with all literary canons, be disagreement among us on what some of that canon should be or is. Almost no one would dispute that such offerings as these are in the higher education law canon: *Trustees of Dartmouth College v. Woodard* (p. 42 of this book), *Sweatt v. Painter* (p. 92), *Healy v. James* (p. 119), *Sweezy v. New Hampshire* (p. 314), *Regents of the University of Michigan v. Ewing*

(p. 341), and *Perry v. Sindermann* (p. 542). If among the dozens of important decisions in this casebook any of canonical standing are omitted, your reviewer, notwithstanding some effort, failed to identify them.

As casebooks these days seem to do to a greater extent than in years gone by, this one sets out (1) after the included opinion, questions that dig into the student's mind and prompt discussion of the issues; and (2) after the respective chapter heads, narrative by the casebook author, here including a remarkable number and variety of citations to and quotations from cognate sources, judicial and other. The case-related questions are hard and generously studded with citations to other texts that can entice a reader farther into the matter at hand. These rich chapter- and case-specific "intellectual brackets" reflect the author's curiosity and disciplined research. The arc from these pages to inflamed dialectic requires but the spark of willingness to think, engage, and contest.

Possibly the best merit of the work, and its most attractive and distinguishing feature, lies elsewhere than in laying out the canonical decisions and other court rulings, the introductory remarks, and the supplementary questions. What sets apart *Higher Education and the Law* for this reader is its inclusion of eye-opening writings by persons other than judges, many of them not otherwise readily accessible, that depict in higher education what Mortimer Adler, the Aristotelian moving force behind the series Great Books of the Western World, styled in that yet broader context *The Great Conversation*. Those writings, which are a considerable part of this book, help us to appreciate why the cases in it are so resonant today.

What a conversation on higher education it has been and is! In these pages we are treated to essays and other writings on the higher education enterprise by Michael Oakeshott, Edward Said, Henry Rosovsky, Benjamin Franklin, George Washington, Thomas Jefferson, Henry Tappan, Andrew Dickson White, Andrew Carnegie, Clark Kerr, Mario Savio, Stanley Katz, the American Association of University Professors, Michael McConnell, A. Bartlett Giamatti, and Derek Bok, among others. Taken *en masse*, these essays—which are placed hard-by the related cases—do not and cannot be intended to simplify higher education's Great Conversation. Instead they serve to tether the life of higher education law—in this respect, mainly what judges and legislatures have had to say—to the academy's puzzles, aims, impediments, hopes, frustrations, and resources, as conceived and as lived by some of the most original and dauntless thinkers in this field. Sleep through this and you will sleep through a thunder and lightning storm.

Above, the framework of the book is described. Let us now turn to the candy-store side of the work—the sometimes delightful, often surprising, and occasionally obscure, but still arresting facts that are lavishly sprinkled throughout it. The reader can choose favorites among them. Some of these thousands of tidbits might even make for banter at

what used to be called the water cooler and now is known as e-mail.

We learn at page 14, for example, that although Harvard's charter was drafted for compliance with a fund Parliament set up to pay for conversion of "Indian youth" to Christianity, only one Native American was enrolled at Harvard in the University's first forty years. At pages 36–37 we read Jefferson's epistolary argument with John Adams over whether professors should be imported from Europe (Jefferson), or home-grown (Adams). A quote at page 54 from Laurence R. Veysey's *The Emergence of the American University* (1965) tells us that while in the 1870's the U.S. population soared 23 percent, attendance at twenty of the oldest leading colleges in that decade rose only 3.5 percent.

By way of dramatic contrast with that last point, we see at page 85 that the 1.2 million U.S. veterans who attended colleges and universities in 1947—exceeding by more than a million the number Congress expected to attend when it passed the G.I. Bill—were 49 percent of all students enrolled, and that at least ten of the G.I. Bill vets went on to win a Nobel Prize.

Inevitably, some of the aforementioned "candy" in this book makes for indigestion. For instance, at page 136, in a 2002 account quoted at length from *The Economist* ("Meritocracy in America"), we find reference to an Economic Policy Institute study that shows a marked decline in social mobility in this country. Thus, while in the 1970's 28 percent of Americans in the second-poorest group remained stuck there, in the 1990's 36 percent did. So much, it would appear, for the ballyhooed belief that the nation's higher education institutions, which enormously expanded enrollment during those years, are an automatic engine for national socioeconomic gain. And we see at page 139, that by 2005 the United States, hitherto internationally preeminent in higher education demographics, had sunk to fifteenth among the countries of the world in educational attainment of young adults. Too many young people are not going to college; many too many are not graduating. We see a citation, at page 289, to a 2007 *New York Times* account which reports that the nation's largest university, the for-profit University of Phoenix, had a paltry 16 percent graduation rate, measured by the number of first-time undergraduates who receive the degree within six years (the University, we are told, considers that measure inapposite to its population of older students.)

In a more upbeat vein, we read at pages 81–82 excerpts from *Science—The Endless Frontier*, the seminal report by Vannevar Bush that laid a broad and broadly adopted groundwork for the enormous infusions of federal research dollars into colleges and universities, beginning after World War II. Where would America be today had Congress not adopted that policy? Far-reaching ramifications of Vannevar Bush's analysis are most recently manifest by the astonishing addition, in the Obama

Administration's stimulus law, of more than \$10 billion in research dollars to be awarded by the National Institutes of Health, plus billions more new funding from such agencies as the National Science Foundation.² Vannevar Bush's general recipe is well known. Unknown to many of us, however, is that, as quoted here, he recommended that the federal government's science-funding agency "should not operate any laboratories of its own."³ Can we imagine what the effects would have been on science had that advice been taken?

In short, if reading court decisions is not your cup of tea, the rest of this book is still likely to fascinate the student of higher education in America.

Yet even a reader whose idea of a good time is not reading judicial decisions or who might read an opinion or two as therapy for insomnia is likely to be startled awake by some of the judicial pronouncements in this book. When first exposed to casebooks at law school, most of us were probably so distracted and confused by the unfamiliar doctrines they mapped that we focused little if at all on the underlying drama and melodrama the cases often depicted. How to compare the dramatics of higher education court decisions to those of decisions in other fields such as torts and contracts is neither obvious nor attempted here; all comparisons, it is said, are invidious. But such comparison is not required for a judgment that some of the yarns these cases relate are right up there with John Mortimer's *Rumpole of the Bailey* and other classics of the genre. In this casebook we find entertaining proof of the thesis that hard cases make bad law.

Take for example the unforgettable yet widely forgotten lawsuit involving the renowned British philosopher Bertrand Russell, *Kay v. Board of Education of the City of New York*, a 1940 New York court of general trial jurisdiction ruling reported here beginning at page 300. While serving on UCLA's faculty and after having been invited by Harvard to give its William James Lectures on philosophy, Russell was offered a professorial appointment by City University of New York. The offer seemed to CUNY a great idea at the time. But the institution failed to foresee local political ramifications of Russell's written work. Fearless to a fault, in his far-ranging essays Russell had advocated no few provocative opinions—indeed, provocation in the Socratic tradition is a motif of his published work—such as these he advanced in *Marriage and Morals*:

I think that all sex relations that do not involve children should be regarded as a purely private affair, and that if a man and woman choose to live together without having children, that should be no one's business but their own. I should not hold it desirable that

2. Gardiner Harris & Kenneth Chang, *Beaker-Ready Projects? Colleges Have Quite a Few*, N.Y. TIMES, Feb 29, 2009, at D1.

3. JUDITH AREEN, HIGHER EDUCATION AND THE LAW 82.

either a man or a woman should enter upon the serious business of marriage intended to lead to children without having had previous sexual experience.⁴

Those and like utterances by Russell, as Professor Areen documents at page 304, n.3, prompted the head of New York's Episcopal Diocese to send the city's major newspapers a denunciatory letter in which he described Russell as a "propagandist against religion and morality... who specifically defends adultery."⁵ Two weeks of public protests against the appointment erupted; the City Council passed a resolution calling for the appointment to be rescinded; and the Board of Higher Education, although more divided than when it initially extended the offer, voted not to renege on it. In the seemingly legally attenuated capacity of mother of two New York schoolchildren, Mrs. Kay then sued to block the appointment. A week later the court heard the case.

On the preposterous ground that although the subject of the lawsuit, Russell had no legally cognizable interest in it, the judge denied the learned scholar's motion to intervene in the case.

Proceeding speedily to opine that "it is contended that Bertrand Russell is extraordinary. That makes him the more dangerous", and "[a]cademic freedom . . . cannot teach that adultery is attractive and good for the community," the trial court, McGeehan, J., concluded that "appointment of Dr. Russell is an insult to the people of the City of New York," Russell's appointment would be to a "chair of indecency", and Mrs. Kay would have an order revoking the appointment.⁶ New York's appellate courts upheld both the denial of intervention by Russell and the trial court merits ruling. Thus was Bertrand Russell barred by operation of law from CUNY's faculty.

Harsh and fitting irony was sequel to the case. As Professor Areen informs us at 305, "[i]n 1944 Russell returned to England. In 1950 he was awarded the Nobel Prize for literature, in part for the writings that had been so controversial in New York."

Professor Areen observes, at 304, that *Kay* is the first court opinion in the United States to use the term "academic freedom." She asks the student, "Do you agree with the court's assertion that academic freedom is the 'freedom to do good and not to teach evil'?" Well, do we? Where shall we look for an answer to that one? The American Association of University Professors' landmark 1915 and 1940 statements shed scant light on it, or, more exactly, shed hazy, pale light. Is the issue in *Kay* in the category once addressed by a University of Chicago philosophy professor to his impressionable student, when the professor said that some questions are best unasked? Can higher education institutions and judges continue to

4. *Id.* at 301.

5. *Id.* at 304.

6. *Id.* at 302-03.

duck announcement of a principle that corresponds comprehensively to this question? Should they? Is higher education relegated to—perhaps “saved by” is more apt—ad hoc decision-making? What would Plato do with the issue in *Kay*? (More accurately: What *did* Plato do with the issue in *Kay*?) Come to think of it, what would Bentham or Mill or Justice Frankfurter or Judge Posner or Chief Justice Roberts do with it? If Cardinal Newman held with the New York courts’ decision, could he look himself in the mirror without wincing? Would Harvard’s President Nathan Pusey, who bravely stood up to Senator Joseph McCarthy, have faced down the Episcopal bishop who agitated against Bertrand Russell? What would a public poll of state flagship university presidents today conclude on the issue in *Kay*?

Comparably intriguing questions, if in some cases less basic than those *Kay* stimulates, abound in *Higher Education and the Law*. When is a college’s financial trouble so acute that the institution can break tenure (e.g., *American Association of University Professors v. Bloomfield College*, at page 527 of the casebook)? What standard is a court to apply in gauging whether a college or university treated a student unfairly (e.g., *Board of Curators of the University of Missouri v. Horowitz*, at 685)? Do alumni have rights against the institution, such as the right to use its name over its objection (e.g., *Ad Hoc Committee of the Baruch Black and Hispanic Alumni Association v. Baruch College*, at 931)? What authority over student grades is the institution’s rather than the professor’s (e.g., *Lovelace v. Southeastern Massachusetts University*, at 405)? When should the law find the relations of board to president so cozy as to entail a breach of fiduciary duty by both (e.g., *In the Matter of Adelphi University v. Board of Regents of the State of New York*, at 892)? When it commands colleges and universities to do this or that to stay eligible for federal money, must Congress expressly foreclose a private right of action for breach of the commanded conduct (e.g., *Gonzaga University v. Doe*, at 973)? What extent of institutional entanglement with state government causes a private university’s action to be state action (e.g., *Hack v. President and Fellows of Yale College*, at 149)? Here, few answers are easy.

A review of a casebook would be incomplete if it failed to address what is in the book that shouldn’t be and what isn’t in it that should. Those questions are not meaningfully answerable except by reference to such factors as the publisher’s permissible length of the book (let us assume that at about one thousand pages, *Higher Education and the Law* approaches that limit), the presumed intended use as a course syllabus (surely students cannot be expected to absorb in one semester all that is in *Higher Education and the Law*, much less more), and the audience.

Although this book in a better world, a world in which time had not shrunk and the Internet had not overtaken books, might justly attract several major audiences, each in large numbers—practitioners, public-

policy makers, college administrators, and scholars of higher education among them—law students and the faculty who teach them will almost certainly be its main audience. The higher education legal field has grown much in size and quality in recent years. Colleges and universities today need exceedingly able lawyers. To that end, higher education law courses that attract and inspire highly talented law students to this practice and to higher education administration are valuable. A considerable attention by this book to student issues, which are likely to attract student interest, is thus not to be gainsaid.

Although common sense might suggest that higher education law, taken as a whole, is student-centric, as practiced it generally is not. Although most students in American higher education (including community colleges and for-profit colleges) study at institutions that are not research oriented, research-related legal issues account for a larger part of the academy's legal agenda than the allocation to them in *Higher Education and the Law* might imply.

A practitioner would probably like to see more here on law of the workplace, too. Employment, labor-management, related tax and benefits, and other legal matters that connect to the employment status generally account for at least half of a college's or university's legal work.

Your reviewer would have liked to have more included on the interplay of federal, state, and local law in matters that affect institutional life, such as connected to privacy rights and the role of the Higher Education Act (now, the Higher Education Opportunity Act) *vis-à-vis* accountability of state higher education institutions, which answer directly to state government as well as federal government masters. More on technology transfer, town-gown relations (such as in land-use matters), and faculty grievance proceedings would have been welcomed.

Yet, if a signal purpose of a higher education law course is to ignite students' curiosity and attract them to the field, to have devoted as much space to student issues as this book does—several hundred pages, approximately—seems well warranted even at the price of less extensive treatment of such matters as those identified above.

Indeed, the observations in the preceding few paragraphs have the aspect of criticism of a mouthwatering smorgasbord on the ground that it includes neither melon nor figs and perhaps slightly too few kinds of smoked fish. One can eat only so much. Had your reviewer been offered *Higher Education and the Law* as a law student, he might not have spun his wheels for 15 years in other, less absorbing precincts of the profession before with relief he luckily found his way to this one.