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Book Reviews

Edward McGlynn Gaffney

BOOK REVIEWS

THE LAW OF HIGHER EDUCATION: LEGAL IMPLICATIONS OF ADMINISTRATIVE DECISION MAKING. By William A. Kaplin.* San Francisco: Jossey-Bass Publishers. 1978. Pp. xxvii, 500. $18.95.

THE LAW OF HIGHER EDUCATION 1980. By William A. Kaplin.* San Francisco: Jossey-Bass Publishers. 1980. Pp. xxii, 184. $13.95.

Reviewed by Edward McGlynn Gaffney, Jr. **

There was a time not so long ago when administrators of colleges and universities would not need books like those under review. Students could count it a privilege to attend college, but had few, if any, enforceable rights.[1] College administrators could dismiss students at will, even at whim,[2] without answering to a court for their actions. Judges frequently deferred to these decisions by holding that the power of administrators to sanction students was similar to, if not identical with, that of parents over their children.[3] By now, however, the law has arrived on the campus, even if, like "a blanket of ground fog" (p. vii).[4] After a flurry of cases in the past two decades expanding the due process rights of students, at least in public institutions,[5] this trend may have been halted by the Burger Court in *Board*

* Professor of Law, Catholic University of America School of Law.

** Director, Center for Constitutional Studies; Associate Professor of Law, Notre Dame Law School. The reviewer wishes to disclose that he took a course in education law from Professor Kaplin at Catholic Unversity of America School of Law and that Professor Kaplin serves on the Advisory Board of the Center for Constitutional Studies.

1 *See, e.g.*, Hamilton v. Regents of the Univ. of Calif., 293 U.S. 245 (1934) (upholding mandatory military training, even for conscientious objectors, as a condition of attending a public university).

2 *See, e.g.*, Anthony v. Syracuse Univ., 224 App. Div. 487, 231 N.Y.S. 435 (1928) (upholding dismissal of student solely on the ground that she was not a "typical Syracuse girl").

3 Gott v. Berea College, 156 Ky. 376, 161 S.W. 204 (1913) (affirming authority of college officials to enforce rules of student discipline issued by college acting *in loco parentis*). *But see* Berea College v. Kentucky, 211 U.S. 45 (1908) (state statute prohibiting a private college from teaching black and white students together held not to violate equal protection).

4 Professors of law should probably not complain too loudly about lack of clarity in judicial opinions such as *Horowitz*, for when courts cannot make up their collegial minds and communicate their decisions clearly to people who have an interest in these decisions there is a correspondingly higher demand for law professors to rush into the breach to offer their explanations and comments on the court's performance.

5 *See, e.g.*, Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961) (mandat-

of Curators v. Horowitz,[6] which signalled that procedural due process rights for academic dismissals may be significantly less than in sanctions for misconduct.

Horowitz graphically illustrates the need for thoughtful commentary on higher education law: endless expansion of constitutional rights has gone the way of the *in loco parentis* doctrine. After the demise of the various immunities that colleges, like other charitable institutions, used to enjoy, and with the dramatic proliferation of federal, state, and local regulation of higher education over the past two decades, college and university administrators need to be aware of the complex and even conflicting demands of the law in their decisionmaking.

In *The Law of Higher Education: Legal Implications of Administrative Decision Making* and its 1980 supplement, *The Law of Higher Education 1980*,[7] Professor Kaplin provides helpful comment on a wide variety of legal matters ranging from contracts to student athletics.[8] Some legal issues that may concern college administrators are dealt with summarily. For example, the new copyright law receives less than a half page of comment (p. 143). In addition, Professor Kaplin does not discuss a few issues such as patent law and regulations governing human subject research. These issues may well be omitted because they arise almost exclusively at large research universities which are typically well served by in-house counsel. The comprehensive list of topics that Kaplin does treat, however, makes this work a valuable guide to almost every aspect of higher education law for lawyers, administrators, and students.

I. A Reference Work for College Counsel

First, Kaplin attempts to reach "legal counsel who deal with the

ing adequate notice and fair hearing before expulsion of public college students for misconduct).

6 435 U.S. 78 (1978).

7 References to the main volume will be by page number only, while those to the supplement will be preceded by "Supp."

8 The full list of topics covered includes: tort, contract and civil rights liability of college trustees, administrators and their agents; collective bargaining on campus; non-discrimination in employment and affirmative action; procedural requirements in faculty termination and student discipline; academic freedom and tenure in an era of retrenchment; student admissions and financial aid; general principles relating to student demonstrations, student organizations, student press, student housing, student athletics, student files and records and student voting; zoning and land use regulation; taxation and exempt status; access of the public to the campus; state licensing, chartering and other forms of regulation; and accreditation.

multitude of new challenges and complexities that arise from the law's presence on campus" (p. vii). Kaplin is well equipped for this task, having served for several years as editor of the *Journal of College and University Law*, published by the National Association of College and University Attorneys. The only practitioner I am aware of who has reviewed the first volume, Brock Hornby, has expressed generous praise for Kaplin's work: "[T]he literature on higher education undoubtedly achieves a new level of maturity with the publication of [this] volume."[9] Hornby, however, has expressed doubt that Kaplin has succeeded in providing college counsel with the kind of tool they need:

> The Kaplin text is too generalized a treatment for a practitioner's ready use. Higher Education law is subject to so many statutes and regulations and covers so wide a universe that it is not amenable to a Prosser or Restatement-type treatment to which a lawyer may respond confidently. Moreover, . . . even with the promise of annual supplements [this book cannot] keep pace with the fastmoving developments.[10]

According to Hornby, what practitioners need is a new reporting service on higher education law that would focus "on the practical details a lawyer needs."[11] Hornby does not specify those details in his review, and in fairness to Kaplin it should be noted that many of the practical suggestions for college and university administrators referred to later in this review[12] are equally useful for college counsel. Moreover, Kaplin is careful to point out that his suggestions are necessarily general in character and that more specific guidance should be sought from competent counsel:

> The legal analyses and suggestions, of necessity, are general: they are not adapted to the law of any particular state or to the circumstances prevailing to any particular postsecondary institution. Thus the book is not a substitute for the advice of legal counsel, for further research into primary legal resources, or for individualized study of each legal problem's specific circumstances. Nor is the book necessarily the latest word on the law. There is a saying among lawyers that "the law must be stable but it cannot stand still," and the law is moving especially fast in its applications to postsecondary education. Thus administrators and counsel will

9 Hornby, Book Review, 7 J. C. & U.L. 181, 184 (1980).

10 *Id.*

11 *Id.* at p. 185. Hornby suggests that "the market of lawyers' law firms who counsel institutions of higher education has . . . finally grown large enough to justify economically a treatment of the subject avowedly for lawyers." *Id.* at 185 n.7.

12 *See* text accompanying notes 23-26 *infra*.

> want to keep abreast of ongoing developments concerning the issues in this book (p. ix).

Kaplin repeats this caution throughout the first volume (pp. 26, 43, 66, 95, 128, 161) and in the introduction to the supplement (*Supp.*, p. xi).

Although Hornby may be right in urging the creation of a new reporting service on higher education law, in the meantime Kaplin's supplemental volume is useful. The supplement follows the organization of the 1978 volume and uses the same designations for chapters, sections and subsections, for easy cross reference.[13] If a critical note is to be sounded on the supplement process, it is that Kaplin does not always make good on his promise that the discussions in the supplement "do not just collect and explain recent developments; they also identify relationships between them, analyze the impact of recent developments on existing law, and identify emerging issues and trends that deserve the attention of postsecondary administrators and legal counsel in the near future" (*Supp.*, p. xi). The very nature of the supplement process — to include a comment on each major development up to press time — may make this promise extremely difficult, if not impossible, to fulfill. If so, as Kaplin advises college administrators concerning promises to students (p. 187), such a promise ought not be made.

The treatment of the major developments reported in the supplement is not as helpful as the more suggestive commentary on parallel material in the first volume. For example, Kaplin's treatment of *Bakke*,[14] although obviously written under the pressure of meeting the publisher's deadline,[15] masterfully explains a confusing decision[16] and presents clear guidelines for college administrators to follow in fashioning student admission policies (pp. 202-211). By contrast,

13 I am puzzled by Kaplin's suggestion that the supplement is "sufficiently self-contained to be used independently" (Supp., p. xi). Although the later volume can be read from cover to cover as an update on higher education law, the format presumes almost constant reference to the earlier volume, and the contents of the supplement (covering legal developments from mid-1978 to the end of 1979) limit its utility as an independent source of higher education law. Because the supplement is valuable only as a companion to the main volume, the publishers ought to contemplate producing a cheaper paper edition that could be discarded when the original volume is thoroughly edited to include the developments reported in the supplement and in subsequent supplemental volumes. Kaplin's textbook on education law (*see* note 27 *infra*) uses a loose-leaf format that presumably makes subsequent editing less costly. A similar format might be contemplated for future editions of the volumes under review here.

14 Bakke v. Board of Regents of Univ. of Calif., 438 U.S. 265 (1978).

15 Kaplin referred to the Supreme Court decision in the U.S. Law Week edition.

16 Kaplin notes that "The justices wrote six opinions, none of which commanded a majority of the court" (p. 205).

Kaplin's treatment of *Weber*[17] consists mainly of lengthy excerpts from Justice Brennen's opinion (*Supp.*, pp. 41-49) and brief reports of the concurring opinion of Justice Blackmun and the dissents of Chief Justice Burger and Justice Rehnquist (*Supp.*, p. 49). The most valuable part of Kaplin's discussion of *Weber*, his application of that decision to the context of higher education, is all too brief (*Supp.*, pp. 51-52).

Hornby's observation about the rapidly changing character of higher education law is borne out by Kaplin's treatment of the controversial *Yeshiva* decision,[18] which is limited to excerpts from the opinion of the Second Circuit Court of Appeals (*Supp.*, pp. 11-19). College administrators and college counsel will have to await the next supplement before getting Professor Kaplin's practical suggestions on the tension between faculty collective bargaining and collegiality. Kaplin's treatment of *Catholic Bishop of Chicago*[19] follows his pattern of reprinting generous portions of the Supreme Court's opinion (*Supp.*, pp. 20-24), but also contains a valuable discussion of the limited impact that Kaplin thinks this case will have on postsecondary education (*Supp.*, pp. 25-26).

A similar disproportion between text (*Supp.*, pp. 87-96) and commentary (*Supp.*, pp. 35-37, 96-98 and 146-148) characterizes Kaplin's treatment of *Davis*,[20] in which the Supreme Court dealt inconclusively with the requirement that institutions receiving federal funds refrain from discriminating against qualified handicapped individuals. Kaplin's treatment of *Krotkoff*,[21] dealing with termination of employment of tenured professors because of financial exigency, consists of twelve pages of the opinion of the appellate court (*Supp.*, pp. 63-75) and one scant paragraph of commentary, in which administrators and counsel are told laconically to be "sensitive to *Krotkoff*'s many possibile applications" (*Supp.*, p. 75).

On the positive side, the supplement carefully reports the major developments in federal regulation of higher education that occurred during the Carter Administration: the Equal Employment Opportunity Commission regulations concerning discrimination on the basis of pregnancy (*Supp.*, p. 33); HEW's regulations concerning age discriminaton (*Supp.*, pp. 98-100), affirmative action programs (*Supp.*, pp. 100-04), sex discriminaton in collegiate athletic programs (*Supp.*,

17 United Steelworkers of America, AFL-CIO v. Weber, 443 U.S. 193 (1979).
18 NLRB v. Yeshiva Univ., 444 U.S. 672 (1980).
19 NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979).
20 Southeastern Community College v. Davis, 442 U.S. 397 (1979).
21 Krotkoff v. Goucher College, 585 F.2d 675 (4th Cir. 1978).

pp. 150-58); and the Veterans Administration rules concerning benefits for veteran students (*Supp.*, p. 107). Kaplin refers briefly to an article exploring the limits of federal regulatory authority over higher education (*Supp.*, p. 142). The Reagan Administration's change in attitude about this matter will undoubtedly be reported in subsequent supplements, and one might expect Kaplin to refer his readers to more of the scholarly literature on this theme as well.[22]

In my judgment, *The Law of Higher Education* and its supplement provide college and university administrators with a clear and readable guide through the complex maze of regulations governing the institutions they serve. Although Hornby may be correct in suggesting that Kaplin has not met all the needs of attorneys advising college and university administrators on legal problems, no author should be faulted for failing to write a book someone else has in mind. Moreover, this treatise is an excellent starting place for college counsel researching legal problems facing colleges or universities. The carefully selected bibliography at the end of each chapter, for example, contains enough resources to enable these attorneys to carry out their research well.

II. Tool For Preventive Legal Planning

College and university administrators need not be overawed by the range of issues addressed in the Kaplin volumes, for the treatment of these issues is, for the most part, not so technical as to be of use only to lawyers. Indeed, the author indicates in the preface to the first volume that his principal goal is to provide administrators with a clear picture of the requirements of the law, so that they may plan effectively to avoid needless litigation or respond deftly to specific legal problems when they arise (p. xii).

In my judgment, Kaplin succeeds admirably in achieving this goal. He provides a top-quality guide for those who need guidance through the maze of federal, state, and local regulation of nearly

22 *See, e.g.*, E. GAFFNEY & P. MOOTS, GOVERNMENT AND CAMPUS: FEDERAL REGULATION OF RELIGIOUSLY AFFILIATED HIGHER EDUCATION (1982); SLOAN COMMISSION ON GOVERNMENT AND HIGHER EDUCATION, A PROGRAM FOR RENEWED PARTNERSHIP (1980); H. EDWARDS, HIGHER EDUCATION AND THE UNHOLY CRUSADE AGAINST GOVERNMENTAL REGULATION (1980); Shils, *Government and Universities in the United States*, 17 MINERVA 129-77 (1979); Gaffney, *The Constitution and the Campus: The Case for Institutional Integrity and the Need for Critical Self-Evaluation*, in CHURCH AND COLLEGE: A VITAL PARTNERSHIP (J. MOSELY ed. 1980); Durham & Oaks, *Constitutional Protections for Independent Higher Education: Limited Powers and Institutional Rights*, *Id.*; Oaks, *A Private University Looks at Government Regulation*, 4 J. C. & U. L. 1 (1976); O'Neil, *God and Government at Yale; The Limits of Federal Regulation of Higher Education*, 44 U. CIN. L. REV. 525 (1975).

every aspect of higher education. Because he does not assume that his readers have formal legal training, he explains complex legal doctrines in clear language. For example, he states succinctly the principal elements of the law on contracts, negligence, and defamation (pp. 57-67). Complicated areas of federal regulation such as the regulations concerning nondiscrimination on the basis of handicap (pp. 192-93) are similarly well-handled. Kaplin deserves special commendation for his ability to translate the confusing rules of affirmative action into crisp, understandable suggestions for evaluating an institution's student admission and financial aid policies (pp. 202-11, 219-20).

Just as medical patients should see a doctor not simply when they are ill, so also colleges and universities should practice preventive law. On this model, a college or university would not wait until it is sued, but would comprehensively review its policies to ensure that, to the best of its knowledge, it complied with the law. Kaplin's work, as well as that of Kent M. Weeks,[23] would serve college administrators well in accomplishing this task.

The Kaplin volumes are replete with useful suggestions addressed to college and university administrators. In an early chapter of the first volume, for example, these administrators are given advice concerning the scope of their authority and that of the officers, employees and organizations with whom they deal:

> They should understand where their authority comes from and which higher-level administrators may review or modify their acts and decisions. They should attempt to resolve unnecessary gaps or ambiguities in their authority. They should consider what part of their authority may and should be subdelegated to lower-level administrators and what checks or limitations should be placed on those delegations. And they should attempt to assure that their authority is adequately understood by those members of the campus community with whom they deal (p. 43).

In the introductory chapter setting forth an overview of post-secondary education law, Kaplin suggests that since the law governing the constitutionality of federal and state support of church-

23 In 1981 the Center for Constitutional Studies at the Notre Dame Law School published a LEGAL INVENTORY FOR INDEPENDENT COLLEGES AND UNIVERSITIES (1981), edited by Kent M. Weeks; and followed in 1982 with LEGAL DESKBOOK FOR ADMINISTRATORS OF INDEPENDENT COLLEGES AND UNIVERSITIES, also edited by Weeks. Although these publications may not be precisely what Hornby had in mind for practitioners, they provide new tools both for preventive planning and for responding directly to litigation or administrative proceedings as they arise. The LEGAL DESKBOOK will be supplemented regularly to keep up to date with changes in statutes, regulations, and applicable case law.

related education remains somewhat unsettled, administrators of church-related colleges and universities should exercise great care in using government funds (p. 33). To urge caution and prudence is, of course, commendable, but in my judgment the example Kaplin offers is not very helpful. None of my research on federal regulation of church-related colleges[24] suggests that administrators there think that they can use federal funds "to build a chapel or purchase religious texts for a divinity school" (p. 33). Kaplin rightly observes that "state constitutions or the statutes creating the funding programs may contain clauses which restrict government support for church-related institutions more vigorously than the establishment clause does" (p. 33).

Kaplin tells administrators that the surest way to limit an institution's contractual liability is by careful advance planning of lines of authority (pp. 66-67). He also advises them on the avoidance, control, and transfer of liability (pp. 79-84).

Kaplin insists that "there is no magic machete which postsecondary administrators can use to cut through the equal employment thicket" and that the challenge presented by this area of the law is "not one for amateurs" (p. 128). He recommends that colleges and universities have equal employment officers who are qualified specialists on the subject and that legal counsel work with these specialists in formulating general policies on this matter, to assure "not merely that some nondiscriminatory reason can be given for each employment decision but that discrimination played no part in any decision" (p. 128).

Colleges and universities often have written standards to guide the judgment of administrators in faculty personnel decisions. If these standards are not meant to bind the institution legally, Kaplin urges administrators to include language clarifying that limitation within the standards (p. 129). Kaplin likewise urges administrators to review carefully the procedural safeguards afforded personnel before terminating or suspending job benefits (p. 141).

Since courts often look to classic statements on academic freedom and tenure, such as the 1940 Statement of Principles issued by the Association of American Colleges and the American Association of University Professors, Kaplin cautions administrators to determine whether similar documents have been incorporated into faculty contracts (p. 141).

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24 *See* E. GAFFNEY & P. MOOTS, GOVERNMENT AND CAMPUS: FEDERAL REGULATION OF RELIGIOUSLY AFFILIATED HIGHER EDUCATION 101-122 (1982).

Kaplin urges college administrators facing the financial troubles of retrenchment to plan ahead to avoid, where possible, legal difficulties that could arise if financial pressures require staff reductions. Although Kaplin's comments on financial exigency are necessarily general, they are not so vague as to leave administrators wondering what he means by "planning ahead". Kaplin suggests that administrators establish concrete standards for determining when a financial exigency exists and for identifying which faculty positions will be terminated. To avoid possible lawsuits, writes Kaplin, administrators should keep complete records of their standards and decisions in this sensitive area (pp. 168-69).

In an era of increased sensitivity to consumer protection, Kaplin advises college administrators to review all bulletins and catalogues that may contain institutional rules and policies affecting students. Kaplin urges college administrators to consider adopting a code of fair dealing with students, but advises administrators to use language suggesting a promise to students only when the institution is prepared to live up to the promise (pp. 181-82).

Some institutions disclose their standards and criteria governing student admissions. Kaplin observes that some courts have adopted a contract theory that binds institutions to honor their published policies in deciding whom to accept or reject. Without advising administrators whether to publish institutional criteria for student admissions, Kaplin notes that published policies should state only what the institution is willing to abide by (pp. 186-87).

Kaplin notes a judicial trend towards upholding most rules governing student conduct,[25] but cautions that such rules, at private as well as at public institutions, should convey a "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." Kaplin suggests that student involvement in drafting such regulations may be valuable to ensure an expression of their common understanding, but adds that a lawyer should review drafts of student discipline regulations (pp. 232-33).

Kaplin writes that the distinction between private and public institutions of higher education does not necessarily mean that a "student stands procedurally naked before the authority of the [private] school" (p. 249); instead, he suggests that courts are tending to

25 Jenkins v. Louisiana State Bd. of Educ., 506 F.2d 992 (5th Cir. 1975); Sword v. Fox, 446 F.2d 1091 (4th Cir. 1971); Esteban v. Central Mo. State College, 415 F.2d 1077 (8th Cir. 1969). *But see* Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969).

give increased protection to students at private institutions.[26] If, however, a private college decides not to provide the procedural safeguards constitutionally required of public institutions, Kaplin suggests that the private college administrators reflect this choice clearly in the college rules "so as to inhibit a court from finding such procedures implicit in the rules or in the student-institution relationship" (p. 251).

If college and university administrators follow the practical suggestions Kaplin makes throughout his volume, they would be going a long way toward ensuring that their institutions comply with the requirements of the law and would thereby prevent a great deal of needless and costly litigation.

III. A Supplement For Courses on Law and Education

As the above comments suggest, the legal rules governing education are now so dense and complicated that these materials are studied by both law students and graduate education students. Kaplin co-authored a leading casebook on education law[27] and teaches such a course at the law school at Catholic University of America. Understandably, then, he intended *Law of Higher Education* to reach not only college and university administrators, but also "students and observers of higher education and law who desire to explore the intersection of these two disciplines" (p. vii).

Anyone who teaches a law and education course, whether in law school or in a school of education, should own a copy of Kaplin's book and refer to it often throughout the course. Students with a special interest in higher education law might also find these volumes worth purchasing. I doubt, however, whether many professors of education law would find *Law of Higher Education* suitable for use as a textbook. It probably would make a better supplement to courses on law and education. Nonetheless, Kaplin has provided a valuable supplement for all who teach and study education law. In 1978, *The Law of Higher Education* won the Borden Award from the American Council on Education for the year's most valuable book concerning higher education. I think Kaplin richly deserved this award.

26 *See* Slaughter v. Brigham Young Univ., 514 F.2d 622 (10th Cir. 1975).

27 W. KAPLIN, M. SORGEN, P. DUFFY & E. MARGOLIN, STATE, SCHOOL AND FAMILY: CASES AND MATERIALS ON LAW AND EDUCATION (2d ed. 1979).