Higher Education Law

The Faculty

Steven G. Poskanzer

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George Keller, Consulting Editor

To Janie—for teaching me what really matters and endures

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Acknowledgments

It turns out that it's really hard to write a book. Like a student submitting a late term paper, I always had a plausible excuse for the extra time this effort was taking: my son was born; I was teaching; I'd moved and started a new job; the case law kept changing. Eventually, however, the overriding need to bring this effort to conclusion prevailed. Suffice it to say that you hold in your hands the product of countless late evenings, lost weekends, and forgone vacations since 1994.

It is, of course, customary for authors to take responsibility for any errors or omissions in their work (which I freely do here) while sharing credit with peers and friends who helped bring a project to fruition. Since this book has undergone such a long gestational period, I now have a great many persons to thank.

That list must begin with two former colleagues at the University of Pennsylvania. George Keller, then head of the Higher Education Program in Penn's Graduate School of Education, would have earned my lifetime gratitude for giving me my first opportunity to teach. But he went much further by suggesting that I write a book on college and university law and putting me in contact with the Johns Hopkins University Press. George's inspiration and kindness reinforced an earlier conversation with Bob Zemsky, the Director of Penn's Institute on Research on Higher Education, who urged a certain lawyer-turned-academic-administrator to write an "important book" on colleges and universities. Only time and the critics will tell whether I have succeeded in crafting a volume of genuine significance, but I have certainly tried to follow Bob's injunction by pouring my soul into this manuscript.

My career peregrinations from Penn to Princeton to Penn to Chicago to SUNY have left me with a wide trail of individuals to acknowledge. Hugo Sonnenschein, with whom I took several of those career steps, has been the finest personal and professional mentor I could ever have wished for, and he continues to be my role model. Geof Stone, Provost at the Univer-

sity of Chicago, has unflaggingly supported my teaching and scholarship and showed incredible generosity of time and spirit (not to mention a searing intellect) in reviewing this book. Douglas Baird, as Dean of Chicago's Law School, gave me a chance to test my ideas with first-rate students.

I also owe much to colleagues and friends among the ranks of university attorneys. My former boss at Penn, Shelley Green, lived up to her reputation as a spectacular editor, kindly tearing my manuscript apart and putting it back together in tighter and sharper form. Two other Penn colleagues, Frank Roth and Neil Hamburg, regularly answered questions about disparate topics and offered guidance—and specific case cites. Frank's assistance also included commenting on the finished manuscript—a task undertaken as well by Richard Zansitis at Rice, whose trenchant insights particularly strengthened the sections on employment discrimination and labor law.

More specific gaps were filled with the help of colleagues across the academic landscape, including Joe DeFilippo, Joyce Villa, and Martianne Ellerman at SUNY System Administration; Bob Spitzer of SUNY Cortland; Shirley Egan and Pat McClary at Cornell; and David Foster. Beth Bringsjord, Georgianne Crabill, and Ginette Chambers provided key support (the latter two were even pressed into service to produce printed versions); Marianna O'Dwyer was a source of constant encouragement (at one point loaning me her house in which to write!); and my current boss, SUNY Provost Peter Salins, has been deeply supportive of my scholarship and an excellent model of an intellectually engaged administrator. Indeed, all my SUNY colleagues deserve thanks for indulgently bearing with me through each stage of the book-writing process.

That process, of course, has been brilliantly shepherded by Jackie Wehmueller, my editor at the Johns Hopkins University Press. I shall always be indebted to Jackie for her extraordinary patience in dealing with a first-time (and perhaps despairingly slow) author, for never losing faith in this project, and for repeatedly offering sound advice on critical subjects and their presentation. Indeed, if not for Jackie's idea to focus my initially envisioned (and much longer) volume covering all of higher education law into a book on the law pertaining to faculty, I might still be at work on this manuscript. Now, thanks to her, I have a second book to look forward to! Thanks are also owed to the readers who critiqued—and improved—the book, and to the copyediting and production staff at Hopkins, especially Lois Crum and Carol Zimmerman.

Finally, I owe what are obviously my deepest thanks to my family: my father, Charles Poskanzer, whose teaching, research, and service at SUNY Cortland epitomize faculty at their best; my mother, Joan Poskanzer, whose college service is equally an exemplar; my in-laws, George and Anne Nofer, for letting me do research and write in seclusion at their home; my wife, Jane, who let me devote to a book massive chunks of time that I could have spent with her—and who, on countless occasions, endured my requests to read "just one more section"; and Jill and Craig, the best kids I'll ever know—who will now see a lot more of their dad.

Higher Education Law

Introduction

"Do we need to talk to our lawyers about this?"

"What do the attorneys say?"

"Why didn't you get the lawyers involved before now?"

Just about every department chair and dean, certainly every president and provost, and an ever-increasing number of faculty find themselves asking—or being asked—such questions. Lawyers, legal requirements, and lawsuits have become established parts of the apparatus of American higher education. In many respects this is a positive development. Most faculty would agree, for example, that laws mandating safer laboratories and judicial opinions articulating stronger protection for the academic freedom (and job security) of scholars have considerable value. At the same time, in some respects the growth of college and university law has been an unwelcome, if not downright unfortunate, occurrence. One thinks here of governmental or administrative efforts to chill scholarly discussion of legitimate academic topics, of cumbersome and ineffective procedural requirements for faculty discipline cases, and of faculty who are hesitant to offer candid evaluations of students or colleagues for fear of being drawn into legal disputes.[1]

Boon, bane, or something in between, legal considerations now exert an enormous impact on the day-to-day work of colleges and universities.[2] And this impact is likely to grow. Thus, it is essential that faculty and administrators have a solid understanding of the most important legal concepts and rules applicable to American higher education. Hence this book.

This book describes the central legal principles governing the activities of faculty and the regular academic affairs of colleges and universities. It explains, in general terms and in an accessible manner, the range of legal action available to such individuals and their institutions (i.e., both the constraints imposed by the law and the protections and rights that it affords), the kinds of legal traps to watch for, and how best to ensure that the academic, disciplinary, and employment decisions involving faculty that

are made by college and university representatives are proper and legally defensible. In providing a guide to this area of higher education law, this volume also attempts to identify areas of heightened legal tension (e.g., between claims of individual and institutional academic freedom) and areas where the law is particularly unsettled.

Faculty sometimes find it necessary to remind administrators that the institution's ultimate strength and distinction derives from the quality of its faculty. They are right to stress this point. More than any other factor, it is the presence of an outstanding faculty that enables a college or university to attract the most talented undergraduate, graduate, and professional students and to recruit the new faculty who are the key to its future.

The words and actions of faculty—in performing their regular duties of scholarship, teaching, and service; in their sometime capacity as institutional representatives; and in their everyday role as private citizens—give rise to a host of legal questions, which are the focus of this volume. We live in a litigious age, one in which faculty conduct (or misconduct) is increasingly likely to be challenged by students or colleagues, perhaps to become the subject of institutional discipline. Extra-institutional actors, such as the press, the government, and interested citizens, also subject faculty behavior to heightened scrutiny. At the same time, faculty themselves are more willing to turn to the courts to assert claims and zealously to protect their rights. All of this means that there is a special urgency to understanding how the law both limits and facilitates the efforts of college and university faculty.

The chapters of this book address in turn the legal aspects of the various facets of a faculty member's work and life: conducting research in the library or the laboratory, preparing to teach and then providing instruction in the classroom, attending committee meetings, and participating in public events both on and off campus.[3] This will, of course, also involve discussion of a faculty member's status as an institutional employee.

One recurrent theme of the book must also be identified and drawn out a bit at the start. If our colleges and universities are to fulfill the great tasks we set for them, such as discovering and sharing knowledge, equipping students with the information and skills needed to lead meaningful lives, and (at institutions whose mission includes public service) bringing knowledge to bear on pressing issues, the college and university faculty who will take the lead in accomplishing these tasks will require enormous intellectual and didactic latitude—what is commonly termed *academic freedom.*

The justifications for and proper scope of academic freedom are considered in more detail throughout this volume. But even at the beginning of our discussion of the law pertaining to faculty, it is essential to stress that, as a general rule, externally imposed law or internal rules with the force of law that restrict the faculty's range of intellectual action harm not only the faculty members in question but also the institution itself and society at large. Judges, legislators, regulators—and above all college and university administrators—who deal with faculty must always keep this in mind.

This book is aimed at faculty and administrators who do not have formal legal training but who periodically confront issues with legal implications: department chairs and deans making renewal and promotion decisions, researchers concerned about the financial and intellectual consequences of corporate sponsorship, faculty concerned about teaching controversial subjects, administrators charged with disciplining professors for nonperformance of assigned duties. It should help administrators and faculty to understand better when they need to seek legal advice (in my experience, quite often at an earlier point in the decision-making process than actually occurs) and to assist them in evaluating it. Furthermore, by educating these key users of legal advice about the basic legal environment in which their institutions operate, it may also be possible to avoid some fundamental substantive or procedural errors that could result in disputes and litigation. In other words, this is a book that will help avoid legal land mines.

My hope is that readers will use the information and analysis contained in this volume to act in legally thoughtful and appropriate ways as a matter of course (this being preventive law) and to be sophisticated consumers of legal services. Knowledge of the law pertaining to faculty and its underlying rationale should also result in better and fairer academic and administrative decisions, not just more easily defensible ones. Furthermore, because this book examines currently operative legal principles and extant patterns in the case law, points out inconsistencies and gaps in the law, and identifies emerging issues and possible new directions for courts to follow or commentators to pursue, it is likely to hold genuine interest for scholars, students, and practitioners of higher education law.

In explaining what this book seeks to be and to achieve, it may also be helpful to speak briefly about what it is not. This volume is not intended as a digest or encyclopedia of college and university law for use by practicing attorneys. It does not comprehensively describe all of the legal principles and rules applicable to higher education. Rather, it self-consciously selects

particular topics—those that are likely to be of greatest interest and importance to faculty and administrators—and describes the status of the law in those areas, with special emphasis on the law's practical effect on such individuals and their institutions.

Nor should this book be viewed as a substitute for formal legal advice on particular factual questions. Putting completely aside the author's desire to maintain the goodwill of his fellow university attorneys, this is not a reference volume to consult instead of your institution's lawyer (nor does any such magical tome exist). However, it is my hope that the information and analysis contained herein will make the reader a considerably more discriminating user of legal advice.

Two final caveats. First, American colleges and universities are a diverse multitude,[4] and different types of institutions—public and private, proprietary and nonprofit—face markedly different legal requirements. For example, a critical distinction is made throughout this book between institutions that are state-supported and those that are not. When geography is thrown into the mix, our ability to make broad generalizations about what "the law" requires is reduced even further. Federal law is a constant, but state and local codes vary widely. And as we shall see, state law, which governs contracts and property rights, is particularly important for colleges and universities. One therefore cannot assume that the legal result obtained by another institution in similar (or even identical) circumstances would follow at one's own college or university. However, there are enough nationwide laws and regulations, common statutory language, similar case law, and judicial reliance upon precedent from other jurisdictions to allow us to speak with reasonable certainty and authority about what the law requires of faculty, administrators, and institutions in important situations.

Last, it is crucial to remember that the law is not static. Legislatures and public officials continually promulgate new statutes and regulations, and judicial opinions relevant to colleges and universities are issued almost daily. Attempting to fix definitively the meaning and import of "the law of higher education" is rather like, in the memorable phrase, "trying to nail gelatin to the wall." However, the basic doctrines of higher education law are by now relatively well established and enduring. College and university law will continue to evolve, mostly by accretion, but its central concepts—which are the focus of this book—are unlikely to change dramatically. In any event, this volume is certainly an accurate depiction of the state of law affecting faculty and institutions as of early 2001.

1 The Lay of the Land

Our discussion and analysis of higher education law must start with a brief overview of the various sources of law applicable to colleges and universities, including some mention of how these sources relate to and affect one another, and a few observations on the structure and operation of our judicial system.

Constitutional, Statutory, and Regulatory Requirements

Colleges and universities face a thicket of constitutional, statutory, regulatory, judicial, and quasi-judicial directives that, depending on your perspective, either limit institutional behavior or establish and safeguard individual and group rights.[1] The ultimate source of law applicable to American higher education is, of course, the U.S. Constitution. The Constitution is primarily concerned with the organization and operation of the federal government, the relationship between the federal government and state governments, dealings among the various states, and the relationship between both the federal and state governments and the general populace. While the Constitution does not apply to or limit the actions of private educational institutions (a central theme of this book),[2] it *is* directly applicable to the actions of public colleges and universities and their authorized representatives. For constitutional purposes, public institutions are *state actors* analogous to the federal, state, or municipal government. Thus, just as FBI agents and local police must comply with constitutional limits in conducting searches or detaining citizens, so too must law enforcement officials at public colleges and universities meet constitutional requirements when investigating charges of misconduct by faculty or students.

The Constitution has a broad impact on public higher education. The First Amendment guarantees of freedom of speech, freedom of the press, and the right to assemble protect (for the most part) from institutional censorship or punishment the scholarly investigations of faculty, the in-

class remarks of professors and students, and the extracurricular orations of faculty or student firebrands/gadflies and campus newspapers.[3] The Fifth and Fourteenth Amendments ensure that the state—in this case, the state university—may not take away your property (which includes intangible but essential rights such as continued employment) without prior notice, an opportunity to present your side of the story, and the other procedural and substantive safeguards that constitute "due process of law." The Fourteenth Amendment's command that states may not deny any person the "equal protection of the laws" has resulted in lawsuits alleging unlawful discrimination on the basis of race, sex, and other characteristics as well as comprehensive efforts to desegregate state systems of higher education.[4]

Using the powers vested in it by the Constitution, the Congress has passed numerous statutes that directly and indirectly affect American higher education. Such statutes may regulate the activities of both public and private colleges and universities. Much of this legislation has been enacted in the last fifty years, beginning with the G.I. Bill and government sponsorship of research after World War II. Prominent examples of federal laws applicable to colleges and universities today include civil rights statutes banning various forms of discrimination in employment, antitrust laws (which have been used to investigate allegedly collusive admissions and financial aid practices), and workplace legislation such as the Occupational Safety and Health Act. Again, it is important to understand that these statues may be crafted in ways that allow the federal government to direct the conduct of private, as well publicly owned, institutions. Sometimes this is accomplished through the Congress's broad power to regulate "interstate commerce" (a term that has been read in a sweeping fashion by the courts); more frequently, it is achieved by linking statutory compliance with the receipt of federal funds. The "dollar hook" has enabled the federal government to exercise considerable influence over the internal affairs of colleges and universities. Thus, the provisions of Title IX of the Education Amendments of 1972 outlawing discrimination on the basis of sex—which have caused much upheaval in the realm of intercollegiate athletics—apply to any public or private educational institution that receives federal funds, including funds (such as student aid moneys) that are used for purposes far afield from the locus of the alleged discrimination.

In order to implement and enforce congressional statutes, federal agencies have promulgated many volumes of regulations that are applicable to colleges and universities. As long as these regulations are consistent with

the language and intent of the underlying statutes, they are equally binding on institutions. Continuing with our Title IX example, while the wording of the actual statute is quite general ("No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance"),[5] the Title IX regulations issued by the Department of Education specify in great detail what constitutes unlawful discrimination and how enforcement proceedings will be conducted.[6] These regulations address everything from admissions to housing to course registration to student services and medical benefits. In the area of athletics, the regulations enumerate criteria for evaluating whether an institution is providing equal opportunities for men and women (e.g., are the interests of both sexes being effectively accommodated? are locker rooms and practice facilities equivalent?).[7] Notwithstanding politicians' rhetoric about reducing regulatory burdens, new regulations are constantly being issued and colleges and universities must spend enormous amounts of time reviewing such rules and ensuring compliance.[8]

Because the federal Constitution and the statutes enacted pursuant to it are the "supreme law of the land,"[9] superseding all other sources of law, federal statutes must be consistent with the dictates of the Constitution, federal regulations must be consistent with the Constitution *and* the provisions of the statute they are intended to implement, and so on down through the various levels of state and local law.

Even with the deepening federal involvement in higher education described above, the states remain the primary shapers of higher education law. This reflects the historical and cultural fact that in America, education is viewed as a matter of state, if not local, concern—and thus control. It is no coincidence that the United States has no national university.

The federal constitutional, statutory, and regulatory apparatus applicable to the activities of colleges and universities is mirrored at the state level. Each state has its own constitution, which defines the rights of its citizens and establishes governmental structures (including, in many instances, state universities).[10] State constitutions may be quite comprehensive, delving into areas and extending protections well beyond those of the U.S. Constitution. For instance, the California constitution grants citizens an express right to privacy, which has no federal counterpart.[11]

State statutes are the most significant source of college and university law. A few examples quickly demonstrate their ubiquitous nature. Each

year, state legislatures pass appropriations bills providing operating funds to public (and sometimes private) educational institutions.[12] State legislation creates higher education coordinating boards, and state nonprofit corporation law typically sets the organization framework of private colleges and universities, including the actions of their boards of trustees. State civil service laws apply to the personnel decisions of many public institutions, state antihazing laws protect fraternity pledges, state drug and alcohol laws apply to student behavior within the jurisdiction, and state law may even seek to ensure the free exchange of ideas on campus or to dictate the number of hours professors must spend in classroom instruction.[13]

Like federal laws, state statutes are given effect through detailed regulations. These regulations, promulgated by state agencies, cover an equally wide gamut of college and university activities. Examples would include environmental regulations for the transport and disposal of hazardous wastes generated in laboratories or teaching hospitals, rules establishing (or permitting an institution to challenge) the eligibility of former employees for unemployment compensation, and licensure requirements for academic programs or graduates entering certain professions such as pharmacy or psychology.[14] As is apparent from several of these examples, some state regulations that are not specifically directed at colleges and universities nonetheless cover them along with other industries or activities.

Below this layer of state law lies a dense thatch of local (county and municipal) law directly applicable to institutions of higher education.[15] Among the central concerns of local law are property taxation and land use. Thus, decisions about whether real estate taxes are payable on a particular piece of college or university land—say, the president's house or an athletic/events center—are typically made by local authorities interpreting local tax codes. Local zoning ordinances determine what use institutions may make of their lands, and building and fire safety codes greatly influence the shape and scope of campus development. This legal aspect of town-gown relations can generate real controversy—witness Ithaca, New York, where city officials, citing Cornell University's noncompliance with an applicable (but clearly outdated) zoning ordinance, refused to issue building permits to Cornell in an attempt to gain leverage in a long-running dispute over payments in lieu of taxes.[16] Localities also frequently establish legal rights or obligations that extend beyond the sweep of federal and state law. Many large cities, for example, have banned discrimination on the basis of

sexual orientation, even though this is not a protected classification under federal law.[17]

Case Law

The preceding sketch of the formal, written legal standards (constitutional, statutory, and regulatory) applicable to colleges and universities at the federal, state, and local levels covers only part of the relevant legal landscape. These formal rules are interpreted, supplemented—and occasionally supplanted—by the decisions of adjudicatory, especially judicial, entities at each level, forming a body of law known as case law.

Much case law involves the application of formal legal rules in various contexts. For example, does Title IX's prohibition against discrimination on the basis of sex require the Virginia Military Institute, a state institution, to admit women applicants? Case law also involves the interpretation (and perhaps the development) of legal principles formulated in the first instance by judges or courts themselves. These "common law" principles include hoary doctrines of contract and tort (personal injury) law, such as what constitutes an offer to make a legally binding contract or whether you are liable if your guests are injured on your property, as well as modern theories of product liability law and the use of economic analyses to determine legal responsibilities and damages.

The final judgment in any dispute is, of course, directly binding on the litigants. For them, it becomes a legal requirement with the same force as a statute. In addition, the holding in the case serves as a precedent available to the same or other decision makers in subsequent cases. It thus becomes a potential source of law for present and future actors. The body of case law is massive, and it grows each day, in courtrooms and offices of adjudicatory authorities across the nation. It is worth emphasizing here that federal, state, and local judges are by no means the sole or even the largest source of case law. Quasi-judicial officials and bodies, such as hearing examiners, zoning boards, arbitrators, and Equal Employment Opportunity Commission investigators regularly make findings of fact and determinations that have the full force of law (even if they may be appealed in a formal judicial setting) and which merit that appellation.

A few brief words on the organization and operation of federal and state judicial systems. Jurisdictions across the United States (almost) uniformly