

Law, Policy, and Higher Education

Law, Policy, and Higher Education

SECOND EDITION

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*To my brothers and sisters: Thomas, Esther, Henry, Fannie, Jesse,
Alice, Charlotte, James, Joan, David and John*

— Philip T.K. Daniel

*To my identical twin granddaughters, Eva and Elizabeth Patron, who have
provided needed energy to my daily life as a university president*

— E. Gordon Gee

*To my parents, Ruth and Gary Sun, who continuously inspire me
to pursue and share knowledge for the greater good*

— Jeffrey C. Sun

*To my niece Ryan and my nephew Jordan
and their paths unwinding*

— Patrick D. Pauken

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Preface

The second edition of this textbook, *LAW, POLICY, AND HIGHER EDUCATION*, is more than just an update. The types of content have remained the same. For instance, the research for this textbook not only presents primary materials such as cases, statutes, and regulations, but it also incorporates secondary sources addressing legal issues that colleges and universities, students, faculty, accreditors, and other related entities face. In addition, the discourse has remained the same. We examine the interchange between policy and the law, such as how cases impact the treatment of students' rights and responsibilities or how statutes alter university research activities. In our discussions, we adopted an intentional and carefully delineated approach weighing considerations of societal forces (i.e., political, economic, cultural, and technological) balanced against the institutional core mission of a college or university. For instance, how do technological innovations, such as artificial intelligence, alter the ownership rights of faculty inventions? To what extent does a state's expectation that public colleges and universities serve as the region's economic engines alter the contractual relationships for faculty and students in university-business partnerships? How are student-athletes afforded rights, options, and financial incentives that present an even greater degree of athletic commercialism?

However, this new edition offers a deeper dive through a coordinated framework. Throughout this casebook, we adopted a framework that incorporated law, policy, and higher education as the principal pillars for our discussion. Those areas reflect broad buckets of information. To hone-in on the learning within each chapter, we infused a systems-based analysis that examined how the cases and materials informed:

- **our mission to society and respective campuses**, including our organizational identity within a variegated collection of institutional types (e.g., 2-year/4-year, public/state-related/private nonprofit/private for-profit, single/multi-campus, religiously affiliated, professional programs-focused, minority-serving institutions);
- **our role in examining effects onto public policy**, which at times included a social analysis, but more significantly, we placed a greater emphasis on the learner's consciousness around equity and inclusion with the hopes

that future lawyers, campus leaders, and policymakers will reflect and lead changes that effectuate principles of fairness more systemically and meaningfully;

- **our commitment to lead with sound organizational-level decisions** around risk, strategic impacts, resources, and operational sustainability as higher education is challenged to balance the external environment (including its image) and take responsibility for many people’s lives as a major player in education as its primary focus. In doing so, we cannot forget our role with related impacts to employment and economic development (to name a few); and
- **our obligation to plan for the future and connect to broader systems**, including systems of social institutions such as other educational institutions, government entities, families, and more. We are constructing the experience in ways that will help learners recognize and appreciate the interconnectedness of higher education and its future beyond online learning, social media, funding models, and state-level oversight. We want learners to imagine the impacts of artificial intelligence with an active voice, block chain for data retention, restructured financial aid, reorganized accreditation, equity in college policies and practices, innovative learning models, and reimagined capital and investments.

Drawing on our systems-based framework, we present a series of topics to ensure breadth and depth from multiple perspectives. Accordingly, the topics chosen, which are broken down into eleven designated chapters, raise current issues for faculty, students, attorneys, higher education administrators, policymakers, and other learning participants in the higher education enterprise. The cases, which have been selected and highlighted, present questions that can be examined from several perspectives. For example, consider a case involving a student assault on campus. As an administrator, how would a court’s holding affect the way you craft official institutional policy in regards to on-campus criminal activity? As an attorney for a student-plaintiff who was attacked in a university residence hall, with what causes of action would you proceed? As a faculty member sitting on the university senate’s “Student Safety” committee, how would this case’s decision impact your recommendations to the committee? Each chapter has been drafted to educate students in a variety of ways, regardless of whether their ultimate desired career is in administration, in-house university counsel, policy-making, general law practice, or a professorship at a higher education institution.

Indeed, the chapters examine the law and policy issues that are on the forefront of higher education, ranging from academic integrity considerations in light of artificial intelligence, commercialization of research, disability—including mental health, free speech on campuses, governmental roles, race-conscious admissions, student conduct, tenure, and workforce development. For instance, the topic of Title IX sexual harassment reflects an area that has grown substantially in the past decade. In 2001, the number of campus-based incidents of forcible sex offenses across higher

education was 2,201, yet the reported number of incidents by 2021 grew by 473% to 10,400, and more than half of these reports took place in campus residence halls (Nat'l Ctr. for Educ. Stats., *Criminal Incidents at Postsecondary Institutions*, 2024, https://nces.ed.gov/programs/coe/pdf/2024/A21_508c.pdf). Further, based on the Fall 2023 American College Health Association's National College Health Assessment, almost 78% of respondents reported moderate or serious psychological distress (2024). The pandemic, which led to various degrees of isolation, high degrees of disengagement, and college students struggling in isolation, has not made this process of socialization and development of support networks easier for this population. Nevertheless, these topics lend themselves to examination and consideration in terms of the laws and policies associated with helping students succeed in college. Similar examples also exist for matters addressing intercollegiate athletics (e.g., the financial commitment of college athletics and its alleged treatment of athletes as commodities); academic integrity measures (e.g., academic standards required to compete in a global society and the legal boundaries in which policymakers have to legislate those mandates); and intellectual property (e.g., commercially valued products and services that spur academic innovation but require university resources). All of these issues have evolved over the past few decades and will continue to do so. Often there is a lag between the pronouncement of new legal standards and the adaptation of policymakers to the newly articulated mandates. Thus, students will find themselves in the midst of two discussions: First, as regards clearly established doctrine, how has higher education changed for the better or worse in response to the confines of the law? Second, in terms of new, progressive legal initiatives, how will university and college administrators make adjustments in today's world? What correlating policy changes may ensue as a result of not only the changes in legal standards but also the changes in the economic environment?

Along with groundbreaking case law and research, the textbook also provides students with basic, foundational knowledge that is imperative to succeeding as a professional in the world of higher education. For instance, students will be introduced to the elements of a negligence cause of action, along with a detailed analysis of the different duties often imposed on university administrators and faculty. Students will be exposed to the workings of Institutional Review Boards and the purposes they serve within the university's research protocols. Further, students will be able to confidently articulate the requirements a college or university must meet in order to be granted tax-exempt status as a charitable institution. These legal foundations are just a sampling of the important groundwork set forth in this textbook.

In sum, this compilation fills a gap in the market for casebooks on higher education law, as the materials presented lend themselves to timely and important discussions of both law and policy issues. Chapters 1 and 2 provide an overview of higher education with respect to the laws and policies that shape its roles and responsibilities in society. Chapters 3, 4, and 5 explore the college's relationship with students, free speech, and the rights and responsibilities of students. Chapter 6 shifts its focus toward academics and the formal learning environment. Chapter 7 addresses how the

university affects and is affected by the intercollegiate athletic enterprise—including the legal parameters around athlete’s name, image, and likeness. Chapters 8 and 9 examine the college’s employment relationship with faculty and staff. Chapter 10 presents the influence and impact of government regulations as well as higher education’s efforts to shape policies that further institutional aims and manage university resources. Finally, Chapter 11 addresses issues of intellectual property, especially involving faculty, but with an eye on public/private partnerships, ownership, and commercialization of research.

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We believe that this book will continue to serve as a foundational text in the field for the examination of Law, Policy, and Higher Education.

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