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The National Association of College and University Attorneys (NACUA), established in 1961, is the primary professional association serving the needs of attorneys representing institutions of higher education. NACUA now serves over 5,100 attorneys who represent 1,580 campuses and over 800 institutions.

The Association's purpose is to enhance legal assistance to colleges and universities by educating attorneys and administrators as to the nature of campus legal issues. It has an equally important role to play in the continuing legal education of university counsel. In addition, NACUA produces legal resources, offers continuing legal education programming, maintains a listserv (NACUANET) and a variety of member-only web-based resources pages, and operates a clearinghouse through which attorneys on campuses are able to share resources, knowledge, and work products on current legal concerns and interests.

Accredited, non-profit, degree-granting institutions of higher education in the United States and Canada are the primary constituents of NACUA. Each member institution may be represented by several attorneys, any of whom may attend NACUA meetings, perform work on committees, and serve on the Board of Directors.

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ABOUT THE JOURNAL AND ITS EDITORS

The Journal of College and University Law is the only law review entirely devoted to the concerns of higher education in the United States. Contributors include active college and university counsel, attorneys who represent those institutions, and education law specialists in the academic community. The Journal has been published annually since 1973. In addition to scholarly articles on current topics, the Journal of College and University Law regularly publishes case comments, scholarly commentary, book reviews, recent developments, and other features.

In August 2020, NACUA assumed full responsibility for the journal under the editorship of Dr. Barbara A. Lee. From 2016-2020 Rutgers Law School published the Journal. Prior to Rutgers, the Journal was published by Notre Dame Law School from 1986 to 2016, and the West Virginia University College of Law from 1980-1986. Correspondence regarding publication should be sent to the Journal of College and University Law, National Association of College and University Attorneys, Suite 620, One Dupont Circle, N.W., Washington, DC 20036, or by email to barbaraa.lee@gmail.com.

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College and University Law is a publication of the National Association of College and University Attorneys (NACUA). It is a refereed, professional journal specializing in contemporary legal issues and developments important to postsecondary education.

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Upon deeming the manuscript appropriate for the journal, the student author is paired with a mentor reviewer who is an expert in higher education law. The reviewer will read the manuscript and offer comments and suggestions for improvement. Upon receiving the review, the editorial team will determine whether the note should be accepted for publication (as is or upon the meeting of certain conditions), should be revised and resubmitted for another formal round of expert review, or should be rejected. Some mentors offer to work with students directly on revising and resubmitting or on meeting the conditions for acceptance. The decision is left to the reviewer and the author on whether to work together in this way.

If you have any questions about our process (before or after submission) please feel free to contact the editorial team at barbaraa.lee@gmail.com.

SPECIAL ISSUE:
Honoring the Life & Legacy of William A. Kaplin

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TABLE OF CONTENTS

WILLIAM A. KAPLIN AND *THE LAW OF HIGHER EDUCATION*: A Personal Reflection and Editorial Introduction

JACOB H. ROOKSBY[*]

In the realm of academic scholarship, special tribute issues like this one serve as an important opportunity to honor the life's work of scholars of transgenerational importance. Such luminaries do not come around often. In our field of higher education law, no one looms larger than William A. Kaplin.

As this special issue reflects, Bill was more than a scholar: he was a mentor, friend, catalyst, architect, colleague, and all-around exceptional human being who touched countless lives, improved innumerable institutions through his work, and left a lasting imprint not just on higher education law, but on the entire sector of higher education itself.

Occasions such as this present the chance to share stories that help contextualize and humanize the person being lauded. It has been my honor to work with the contributors to this special issue—individuals who served as Bill's colleagues, co-authors, and mentees. The collective impact of Bill's professional life is richly rendered here. Ona Alston Dosunmu, writing from the standpoint of NACUA, offers a Biographical Sketch of Bill's exceptional career. A series of Tributes—one by a former student, Sandra Mulay Casey; two by colleagues and fellow legends in higher education law, Peter F. Lake and Laura Rothstein; and one by his longtime co-author, whose name has become nearly inseparable from his in the field, Barbara A. Lee—add personal reflections on Bill's life and impact.

This issue also features two excellent Essays and two substantial Articles. Neal H. Hutchens considers Bill's scholarly legacy and provides valuable historical context. Craig W. Parker reflects on Bill's preventive law philosophy, the seeds of which began at his home institution, The Catholic University of America, and quickly spread across higher education. The issue's two Articles, by William E. Thro and Lawrence White, take stock of developments in the broader world of university general counsel offices and the field of higher education law, and of how Bill's work helped shape both.

For my part, I want simply to convey how much I admired Bill. I first met him not as a person, but as a voice on the page—during law school, when I encountered

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* [*]Smithmoore P. Myers Dean and Professor of Law and Leadership Studies, Gonzaga University School of Law. J.D., M.Ed., and Ph.D., the University of Virginia; A.B., the College of William & Mary. Co-author, with William A. Kaplin, Barbara A. Lee, and Neal H. Hutchens, of *The Law of Higher Education*.

the treatise that still, and always will, bear his name. That work became a kind of guidebook to me in my early years on the higher education practice team at McGuireWoods LLP, where I had the good fortune to work after graduation. When I later set off to pursue a career in academia, with particular interest in the legal dilemmas facing colleges and universities, Bill was never far from my reading and research. Still, I never expected to meet him.

That changed in 2013, when I was accepted to participate in the biannual Higher Education Law Roundtable organized by the late, great Professor Michael Olivas at the University of Houston Law Center.[1] The design of the roundtable was for junior scholars to present their works in progress in a seminar-style environment led by Professor Olivas, ably assisted by another senior scholar. Bill Kaplin was a frequent participant—and, as it happened, he was there that year.

The first day of the roundtable ended on a note of shared trepidation. For those who knew Professor Olivas, "tough love" was not a euphemism—it was a method.[2] His feedback never minced words. And if he found your piece less than engaging, it was not out of the question that you might see him resting his eyes during your presentation.[3] Those of us who had yet to present were, to put it mildly, nervous at dinner that night. For us, dinner conversation had the frenetic energy of people awaiting their turn in the arena.

It was at that dinner that I first met Bill Kaplin. Though unmistakably a celebrity in that setting, what struck me most was his humility and self-effacing manner. His comments during the day had been careful and probing, always aimed at the heart of an argument rather than its margins. In conversation, he was encouraging and gracious—a calm and steady complement to Professor Olivas's more exacting style of critique.

The next day, I presented my work—an empirical piece on the accretion of trademark rights by colleges and universities.[4] At the time, as a junior professor newly on the tenure track, I had no idea whether it was any good. I only knew that I had nearly been disinvited for submitting it late. When the session ended,

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1 Michael was a friend and mentor to many, and I was privileged to learn from him. His ability to command "rockstar" status in two distinct disciplines—law and education—placed him in a league of his own. The *Houston Law Review* published a superb tribute issue to his life and legacy in 2024, two years after his death. *See* Houston L. Rev., Vol. 61, Issue 5 (2024) (available at https://houstonlawreview.org/issue/10480-vol-61-issue-5-2024).

2 As one of his former mentees so accurately put it: "Michael's critiques of written work could be withering, but his praise—when offered—was effusive." Michael W. Klein, *Afflicting the Comfortable*, Inside Higher Educ. (Apr. 25, 2022), https://www.insidehighered.com/views/2022/04/26/remembrance-michael-olivas-opinion.

3 *Id.*

4 Michael flattered me by publishing the piece in the monograph series for the Institute for Higher Education Law and Governance that he founded and ran at the University of Houston Law Center. The article was later published in a specialty law review, and a related derivative piece received attention in the *Chronicle of Higher Education*. *See* Jacob H. Rooksby, *UniversityTM: Trademark Rights Accretion in Higher Education*, 27 Harvard J. L. & Tech. 349 (2014); Jacob H. Rooksby, *Colleges Need Free Speech More Than Trademarks*, Chron. Higher Educ. (Feb. 24, 2014), https://www.chronicle.com/article/colleges-need-free-speech-more-than-trademarks/.

I exhaled for the first time in what felt like hours. A friend later quipped, "I don't think he hated it," referring, of course, to Professor Olivas. But what I remember most is what happened afterward: Bill approached me quietly and asked if I would meet with him once the roundtable concluded.

That conversation marked the beginning of one of the most meaningful professional relationships of my life. Bill spoke to me with the same patience, curiosity, and generosity that characterized his scholarship. He wanted to know what I hoped to do next—and whether I might consider joining him and Barbara on the treatise.

I could hardly believe what I was hearing. My answer, of course, was yes—though I added that the project might benefit from a fourth co-author, my friend whose work and approach to work I deeply respected, Neal Hutchens. Once Bill and Barbara got to know Neal, their answer, too, was an obvious yes.

Our work together, as a foursome, was intense yet all too brief. The consummate professional, Bill was always available—to review drafts, answer questions, or provide feedback. In collaborating with him, one sensed that the treatise was not merely work for Bill; it was a calling, the living expression of his scholarly purpose. How fortunate I was to be in the right place at the right time—to receive his invitation to join a project decades in the making, one that can fairly be called a cornerstone of our field. My career was forever changed as a result.

This special issue of the *Journal of College and University Law* honors Bill's spirit, his vision, and his enduring impact. It gathers contributions from those who studied with Bill, worked alongside him, and were shaped by his scholarship and kindness—representative of the many whose lives he touched. Together, these Tributes, Essays, and Articles trace the contours of a legacy that continues to inform and inspire the field he helped to build. My hope is that readers will be reminded, as they read these pages, of what so many of us cherished in Bill himself: his integrity, his intellectual generosity, and his enduring curiosity about the world of higher education.

WILLIAM A. KAPLIN:
A Biographical Sketch

ONA ALSTON DOSUNMU[*]

The National Association of College and University Attorneys (NACUA) is pleased to memorialize William A. Kaplin's extraordinary contributions to NACUA and to the field of higher education law for this Special Issue of the *Journal of College and University Law* (JCUL).

Professor Kaplin's deep and extensive engagement with NACUA culminated in his being awarded Life Membership in 2018. This award, one of the highest honors the Association can bestow, was made in recognition of his outstanding service and his sustained and substantial contributions to NACUA and the field of higher education law. He also was selected as a NACUA Fellow in 1990.

Among the many accomplishments for which he was honored are his work as an author—with Barbara Lee, and later Neal Hutchens and Jacob Rooksby—on the text *The Law of Higher Education* (now in its 7th edition) and his work as an editor of and author for JCUL. As one of his NACUA colleagues said, when describing the importance of *The Law of Higher Education*, "There are probably very few higher education attorneys who have not opened his great treatise."[1] He was also the author of *Constitutional Law: An Overview, Analysis, and Integration* (Carolina Academic Press 2004).

He served as Editor of JCUL from 1976 to 1979 and was a fixture on its editorial board until his retirement in 2013. His articles for JCUL included:

- William A. Kaplin, *Law on Campus 1960-1985: Years of Growth and Challenge* 12 J.C. & U.L. 269 (1985).
- William A. Kaplin, *A Typology and Critique of the Title IX Sexual Harassment Law After Gebser and Davis,* 26 J.C. & U.L. 615 (2000).

In the words of a person who nominated Professor Kaplin for Life Membership in NACUA:

Bill Kaplin essentially invented the field of higher education law (with his esteemed colleague Barbara Lee), and his book is the iconic guiding work in our field of practice. His impact on higher education practice, on us as practitioners, and on generations of law students who used the book in their course on higher education law (and hopefully got interested in higher education legal practice), has been incalculable. Bill has been an extraordinary mentor in this field, and friend to many.[2]

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* President & CEO, National Association of College and University Attorneys.

1 Margaret O'Donnell, *Life Member Award Nomination*, Nat'l Ass'n Coll. Univ. Att'ys (2017) (on file with NACUA).

Another nominator described his contributions to NACUA as follows:

> Bill Kaplin has performed important service to NACUA members through his writing and speaking at NACUA conferences. Most significantly, his book, *The Law of Higher Education*, is required reading for all university attorneys.[3]

Professor Kaplin, as he was known to the NACUA community, received his A.B. degree in political science from the University of Rochester and his J.D. degree with distinction from Cornell University, where he was Editor-in-Chief of the *Cornell Law Review*. He then worked with a Washington, D.C., law firm; served as a judicial clerk at the U.S. Court of Appeals for the D.C. Circuit; and was an attorney in the education division of the U.S. Department of Health, Education and Welfare, after which he joined the faculty at The Catholic University of America Columbus School of Law. While on the faculty full-time, Professor Kaplin taught courses in Education Law, Constitutional Law, and Civil Rights, moving through the tenure-stream ranks and ultimately becoming a tenured Full Professor, before transitioning to the role of Research Professor, a title he held from 2007 to 2013.

Professor Kaplin was a visiting professor at Cornell Law School and at Wake Forest University School of Law; a distinguished professorial lecturer at Stetson University College of Law; a distinguished visiting scholar at the Institute for Higher Education Law and Governance, University of Houston; and a visiting scholar at the Institute for Educational Leadership, George Washington University. He was a former member of the Education Appeal Board, U.S. Department of Education; the former editor of JCUL; a member of the U.S./U.K. Higher Education Law Roundtable; a mentor/leader for the biannual Higher Education Law Roundtable at the University of Houston Law Center; and a past chair of the Education Law Section at the American Association of Law Schools. He also served for many years as Special Counsel to the Office of General Counsel and was the Founding Director of the Law and Public Policy Program at Catholic University.

Professor Kaplin received the American Council on Education's Borden Award, recognizing his authorship of *The Law of Higher Education* (1st ed. 1978). He also has been honored through the establishment, by Stetson University College of Law, of the William A. Kaplin Award for Excellence in Higher Education Law and Policy Scholarship, a national award presented annually to a leading scholar in the field.[4]

As a friend, mentor, scholar, and stalwart contributor to NACUA's mission to advance the practice of higher education attorneys for the benefit of the institutions they serve, Professor Kaplin led a life that exemplifies NACUA's core values of quality, service, civility, collegiality, diversity, inclusiveness, and respect. The field of higher education law and NACUA are demonstrably better because of the life he lived. While he will be missed, his legacy shall endure.

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2 Madelyn Wessel, *Life Member Award Nomination*, Nat'l Ass'n Coll. Univ. Att'ys (2017) (on file with NACUA).

3 Barbara Lee, *Life Member Award Nomination*, Nat'l Ass'n Coll. Univ. Att'ys (2017) (on file with NACUA).

4 *See William A. Kaplin Award – National Conference on Law and Higher Education*, Stetson L., *https*://www.stetson.edu/law/conferences/highered/home/william-a-kaplin-award-national-conference.php (last visited Sept. 7, 2025).

PROFESSOR KAPLIN:
His Impact on One Lawyer's Life and Career

SANDRA MULAY CASEY[*]

As I reflect upon my career in higher education law, I am struck by the role Professor William A. Kaplin played in shaping it. There were other teachers and professors who influenced and motivated me—my eighth-grade teacher who required us to read a book of our choice once a week, sparking in me a passion for reading I had never had before; my Latin professor, who encouraged me to go to law school—but no one had the same impact upon my career as Professor Kaplin. He not only opened up the world of higher education law for me but also supported me in my efforts to secure employment after law school, mentored me in my early years practicing law, and has inspired my work to this day, almost forty years after I took his course.

My first professional job was in the Washington, D.C. office of the New York State Education Department where I monitored federal education legislation and wrote legislative updates to the New York State Board of Regents for its monthly meetings. While working, I attended law school at night with the goal of attaining a juris doctorate. I had no intention of taking a bar exam, since I did not need a license to practice law to continue in my field.

In my third year of law school at Catholic University, I took a course in higher education law, which interested me because at the time I was actively analyzing federal legislation to amend the Higher Education Act of 1965. This is when I first met Professor Kaplin, who was the course instructor and the author of our textbook, *The Law of Higher Education*. The course was a seminar with just a handful of students; therefore, everyone actively participated. It was one of the most lively and interesting courses I took in law school, and I thoroughly enjoyed it. What I did not expect from the course was how connected I would feel to the subject matter: legal issues on college campuses. I was able to glean how the laws I was monitoring in Congress played out on campus, and I became hooked on the practice of higher education law. Upon completing the course, my new dream was to be an in-house counsel to a college or university, which took me down an entirely different career path, and required me to take a bar exam. I chose New York's. I am grateful for that change in plans, because I have loved my career as a higher education attorney.

After graduating from law school and serving in a federal judicial clerkship, I applied for an attorney position in the Office of General Counsel at the State University of New York (SUNY) in 1990. Professor Kaplin was a reference for me

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* Compliance Officer, Division of Finance, Rensselaer Polytechnic Institute. Former Deputy General Counsel, State University of New York; former College Counsel, Siena College; and former Senior Counsel, Bond, Schoeneck & King.

and wrote a strong letter of recommendation on my behalf. Given Professor Kaplin's stature in the higher education law arena, I am convinced his letter and support put me in the top pool of candidates and eventually landed me the position. That search was extremely competitive, with well over 100 people applying for the job.

During my early years at SUNY, Professor Kaplin was always available to take my calls for advice, and I relied heavily on his book, *The Law of Higher Education*. One of my first cases involved a student protest that disrupted a commencement after which the students were disciplined by the institution. The students brought an action against SUNY in which they claimed the school had no jurisdiction to discipline them because they completed all their degree requirements. The legal question was whether the institution could discipline students after completing all academic requirements but before receiving their degrees. A case I found in Professor Kaplin's book supported the school's position that it did have jurisdiction to discipline the students, and SUNY was able to obtain a favorable court ruling as a result. In its unpublished decision, the court cited that case I had found as a basis for its ruling.[1]

Professor Kaplin invited me to review chapters in one of the versions of *The Law of Higher Education*, and he credited my contributions in his Acknowledgements.[2] This pleased my supervisor at the time because it not only recognized my work but also highlighted our Office of General Counsel at SUNY. And when it was time for me to leave my job to stay home with my young children, Professor Kaplin was supportive of my decision to pause my career. He understood the tug of my children but encouraged me to keep abreast of higher education legal issues, which I did, and that helped me get back into my career a few years later.

Nowhere was Professor Kaplin's presence felt more than at Siena College, a small Franciscan institution outside of Albany, New York, where I was College Counsel. I was the college's first in-house counsel, and I built my office upon Professor Kaplin's teaching. I literally used the Table of Contents from *The Law of Higher Education* to set up my filing system. When analyzing the many legal issues that crossed my desk, I always started with Professor Kaplin's rubric in mind:

PUBLIC EDUCATION	PRIVATE EDUCATION	
	Secular	***Nonsecular***
Public Colleges, Universities, and Community Colleges	Private Secular Colleges and Universities	Private Religious Colleges and Universities

Starting with this analysis allowed me to streamline my legal research and provide thoughtful legal advice.

My years of in-house counsel experience provided me the opportunity to move back to SUNY's Office of General Counsel in leadership positions. I became Deputy General Counsel for over eight years and Acting General Counsel for two,

1 Merhige v. Grebstein, No. 5768/90, (N.Y. App. Div. Jul. 23, 1990) (unpublished).

2 William A. Kaplin & Barbara A. Lee, The Law of Higher Education, at xxvii (3d ed. 1995).

most notably during the beginning of the COVID-19 pandemic. Professor Kaplin's analysis of the interplay between law and policy and his philosophy of how attorneys must work through legal issues in partnership with administrators, who develop and enforce policy, influenced me greatly in my work and drove me to form strong relationships with those at the leadership helm. Those strong bonds helped me tremendously through the beginning days of the pandemic, when it was all hands-on deck, and allowed us to respond quickly and nimbly to crisis situations and external edicts.

Professor Kaplin routinely emphasized the importance of preventative lawyering, which is key to keeping institutional legal risks low. This is a lesson I embraced early in my career, motivating me to stay informed of emerging risks and new case law, statutes, and regulations to assist administrators in developing legally-sound policy, practices, and pronouncements. I recently learned that language I had crafted with administrators at Siena College regarding emergency closings that was placed in the college's academic handbook more than a dozen years ago thwarted a class action lawsuit served against the college in 2024.[3] In that lawsuit, the plaintiffs demanded a refund of tuition dollars paid during the COVID-19 pandemic when the college had to physically close and pivot to on-line instruction. After reviewing the language in the handbook, which allowed the college to deliver instruction remotely in the event of an emergency closing due to such circumstances as a pandemic flu outbreak, the plaintiffs' attorneys discontinued the lawsuit.

When I became an instructor of a legal course in a graduate-level program in higher education administration, I used Professor Kaplin's book as the textbook and employed his use of simulations as a tool for instruction. I created real-life scenarios for students to role play in different higher education settings, such as a board of trustees meeting in which a policy was being reviewed and adopted, an employee termination meeting, and a student disciplinary hearing. Those simulations were widely popular with my students. And one of my students contacted me after passing the New York State bar exam to let me know that my course helped her study for the exam, since it covered so many areas of the law.

My tribute is just a small representation of the contributions and impact Professor Kaplin has made in the field of higher education law. His textbook, which has been co-authored by Barbara Lee for several years, and now with additional coauthors, is a ready reference for all higher education attorneys and administrators. Its prose is accessible and understandable. His participation in the National Association of College and University Attorneys, especially in its early years, laid the foundation for the great institution it has become in supporting the higher education legal community nationwide.

In sum, Professor Kaplin was a tremendous mentor, a good friend, and, of course, a giant in the field of higher education law. I will be forever grateful to him, and his shining star will continue to light the way for countless attorneys and administrators who strive to serve their institutions with thoughtful advice, care, and compassion. May he rest in peace.

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3 Navarra v. Siena Coll., No. 909016/2024 (N.Y. Sup. Ct. Sept. 9, 2024) (notice of voluntary continuance).

WILLIAM A. KAPLIN:
The Master Cartographer of Higher Education Law

*PETER F. LAKE**

I am one of the second generation of higher education law scholars and, as such, was privileged to have interacted with the titans of the first generation who launched the field and created its foundations.

No figure in the founding first generation was larger than William (Bill) Kaplin.

My shepherd into the field was one of Bill's longtime collaborators—Robert (Bob) Bickel, founder of Stetson University College of Law's Annual National Conference on Law and Higher Education (which will celebrate its 47th year in March 2026[1]). Bill was a fixture at the conference over the years, often leading multiple sessions in the course of several days—to packed rooms. Bill could barely move about the conference facilities in peace after a session—there was crowd around him everywhere he went that included old friends and practitioners from all walks of higher education life who had learned the law of higher education from Bill.

Bob Bickel and I both taught Torts at Stetson University College of Law. One day Bob invited me to speak at the conference, which he chaired, regarding my work on the liability of psychotherapists for their failure to warn third persons of a patient's dangerous intentions. The root case, *Tarasoff v. Regents of the University of California*,[2] had taken place on a college campus but I had not thought of my work as higher education law scholarship *per se.* Bob told me I would meet some exciting thought leaders and scholars, and the field would welcome me. I was a bit trepidatious and had little sense at the time about how fortunate I would be to have a chance to meet the foundational scholars and practitioners in the field.

At first, I was only somewhat familiar with Bill's work (Bill's masterwork on the *Law of Higher Education*[3] sat prominently in Bob's office), but it was through the conference that I met Bill and his long-time master-work collaborator Barbara

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* Professor of Law, Stetson University College of Law, and Charles A. Dana Chair and Director, Center for Excellence in Higher Education Law and Policy.

1 *See 47th Annual National Conference on Higher Education Law & Policy*, Stetson L., *https*://www.stetson.edu/law/conferences/highered/home/william-a-kaplin-award-national-conference.php (last visited Sept. 7, 2025).217 Cal.3d 425, 551 P.2d 334 (Cal. 1976).

2 17 Cal.3d 425, 551 P.2d 334 (Cal. 1976).

3 Bill wrote the first edition of The Law of Higher Education: Legal Implications of Administrative Decision-Making in 1978; Barbara Lee joined the third edition in 1995.

Lee (I cannot count the number of times that I had to clarify that there were two Barbara's in Bill's life, the other his lovely wife who routinely accompanied him on his visits to the Stetson Conference). I was also introduced to Edward Stoner and Gary Pavela, authors of codes of conduct and honor codes that are still foundational in the field today. I met Donald Gehring, who ran what was widely regarded as a, if not *the,* premier graduate program in higher education and the founder of then ASJA (Association for Student Judicial Affairs), later ASCA (Association for Student Conduct Administration). I met Professor Michael Olivas, a leading figure in American legal education and author of a widely adopted law school classroom casebook on higher education law.

In retrospect, attending the Stetson conference was like going to Woodstock to see all the legends, each of whom had a role in building the foundations of our field. Bob ran the signature law and policy conference; Edward Stoner wrote the thought-leading modern conduct code; Gary Pavela authored the parallel honor code and led the creation of the leading academic integrity group in the field; Donald Gehring taught the prominent non-law graduates in higher education, and organized a critical group of practitioner-disciplinarians and gave them identity, training and mission in formation of a membership group (and yes—it is no myth—the idea was born out of conversations Bob had with Donald Gehring at the Stetson conference[4]); Michael Olivas led law school training on higher education law and authored *the* law school classroom casebook of its time. What I remember most is how each of the titans knew and worked well with all the others—like some superhero movie ensemble cast. But in the convocation of legends, Bill Kaplin was King. There was always an air of reverence projected around Bill when he came to the Stetson conference; hushed whispers would attempt to conceal fandom as people would remark, "That is *the* Bill Kaplin! Should I introduce myself?"

Remarkably, Bill created a map of the *entire* known world of higher education, which was, and is, a platform for all the work of others in the field. You could see the impact in the way colleagues gravitated to him, and newcomers were in awe. Bill never courted fame and was charmingly self-effacing when adulations were directed his way. I saw him blush occasionally and I would surmise that if he read this *In Memoriam* he would do so again, and in perfect form deflect praise to his "two Barbara's."

As our Master Cartographer, Bill Kaplin set out first alone, and later with co-author Barbara Lee, to do what no one ever had done before, or even would have *dared* to do—lay out the whole world of higher education law, corner to corner, in one massive treatise—that has been ever evolving. The scale and ambition of the project was on the order of compiling Blackstone's Commentaries.[5] Very few scholars could even attempt such a project, let alone bring it to fruition in brilliant fashion and then *sustain and nurture it*. I am still awestruck at the academic commitment Bill made. Books are a heavy lift, but a treatise of this ambition involves a level of dedication and persistence to task that is Herculean. The commitment

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4 *See History*, Assoc. Student Conduct Administration, https://www.theasca.org/history/ (last visited Aug. 8, 2025) (synopsis of the history of ASCA).

5 William Blackstone, 1723-1780 Commentaries on the Laws of England (1962).

Bill made was to lifetime(s)—not just his—of effort in building out the map as the field evolved. Bill's masterwork in various editions is a living monument, not just a treatise.

The first edition of Bill's famous treatise was the product of an incredible effort to organize the Phrygian stables of higher education law into a coherent, usable map of the field *and* point of entry for practitioners, scholars and students alike. Readers should reflect on the fact that there were no such maps of higher education law prior to this. Cartography is a special art and takes unique skills—particularly when one is *the first* cartographer. Many of us visit favorite locations in higher education law regularly—employment law, college athletics, accreditation, etc.—but it is altogether different to see *all* of world of higher education law—and make sense of how the various spaces and places connect and intersect. Bill's masterwork updates and subsequent editions required a super-human level of scholarly attention and dedication to task that humbles even the most prolific scholars. Bill even had the vision to plan for sustaining and nurturing his work after his time by attracting outstanding younger scholars to collaborate with him and eventually take the helm of the work.[6] It is so rare in the legal scholarship field to have created scholarship that is truly heritable, ever evolving, and utterly foundational. Bill stands among greats like Dean William Prosser;[7] it is obvious that his name will continue to appear in higher education law dialogue for decades—even *centuries*—to come.

After Bill passed, leaving us to plow forward without him, I invited his wife, Barbara, and family to a special dedication for him at the 46th Annual National Conference on Law & Higher Education in March 2025 (I became chair of the conference in the 2000s). If there were such a thing as "Higher Education Scholar of the Century," Bill would rightfully own that throne. I will venture to guess that over an even longer period he will be regarded as the greatest name in the field of all time—the way no one will ever surpass Raphael Nadal's achievements at the French Open,[8] for example.

I was fortunate to know Bill beyond his masterworks and his dedication to the Stetson Conference. I also direct the Center for Excellence in Higher Education Law and Policy, which Bill dedicated significant time and effort to support while he was in residence as a visiting scholar at Stetson. When I lose someone to the passage of time I tend to focus on the human interactions over scholarly achievements. Let it be known that Bill was *tirelessly* dedicated to students. He was a wonderful and beloved teacher at his home institution and also as a visiting scholar at Stetson Law. Many people did not realize this, but Bill was a master of K-12 education

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6 Bill's treatise is now in its seventh edition and includes Dean Jacob Rooksby (Gonzaga Univ.) and Professor Neal Hutchens (Univ. of Kentucky) as co-authors. William A. Kaplin, Barbara A. Lee, Neal H. Hutchens, & Jacob H. Rooksby, The Law of Higher Education: Legal Implications of Administrative Decision-Making (2019).

7 *See* Wikipedia, *William Lloyd Prosser*, https://en.wikipedia.org/wiki/William_Lloyd_Prosser (last visited Sept. 8, 2025).

8 *See* Wikipedia, *List of French Open men's singles champions*, https://en.wikipedia.org/wiki/List_of_French_Open_men%27s_singles_champions (last visited Sept. 8, 2025).

law also and taught a course covering education law focused on K-12 at Stetson. Bill also graciously and regularly made guest appearances in my higher education law class, where it is safe to say the students were awestruck. It was a rare treat to have known the Master Cartographer also as a colleague. In the Stetson Law faculty meeting immediately following Bill's passing, I shared the sad news—to an audible gasp among colleagues. Several colleagues shared with me how much they admired Bill and remembered him fondly, even though some years had passed since he was last in residence. Bill left an impression on everyone he encountered. He was quietly charismatic and eternally charming. If you knew him, you would always remember his smile—I know my colleagues did.

In my own work, Bill's foundational treatises were essential in research and thematic development. I cannot count how many times I started research with his work—and advised others to do so. Any academic trip in higher education law began with consulting the "WAZE"[9] of the field. What many of us have treasured the most has been not only gaining point of entry on a topic but having the guidance in his work to see overlapping or intersecting topics—and to be exposed to thought leaders and foundational materials on literally every topic in higher education law and policy. When I came to direct the Center for Excellence in Higher Education Law and Policy, I was peppered with questions about all aspects of American higher education law and policy. Newly minted general counsels will resonate with this: Bill's treatises were always on my desk and gave insight into topics that were new to me. I would have been lost—we all would have been—without having the resources he created. Bill understood that practitioners in higher education law—especially general counsels—are among the last true generalists in the law. For much of one's career in higher education law, every day is a new day—with novel issues or issues new to you. The comfort of having a comprehensive resource to navigate one's way is incalculable.

In recognition of Bill's monumental contributions to the field, Stetson Law created the William A. Kaplin Award for Excellence in Higher Education Law and Policy Scholarship in 2008. The award is given annually to an outstanding scholar in the higher education law and policy field.[10] The award is an ongoing testament to supporting and recognizing the work of others, including practitioner-scholars.

Perhaps the greatest gift of our Master Cartographer has been that subsequent generations of scholars have been able to pursue in-depth research and scholarship related to specific topics with confidence that we know where we are on the map, and how it relates to the work of others. Our field might have become a scattering of works without Bill.

As fate would have it, Bill passed away on the cusp of what I have been referring to as "Edupocalypse"—the polycrises facing higher education today. In a sense, Bill left us when we needed his steady hand and field vision the most. It seems that so many of the foundational beliefs, legal rules and policies of the 20th

9 *See* Wikipedia, *Waze*, https://en.wikipedia.org/wiki/Waze (last visited Sept. 8, 2025).

10 *See William A. Kaplin Award – National Conference on Law and Higher Education*, Stetson L., *https*://www.stetson.edu/law/conferences/highered/home/william-a-kaplin-award-national-conference.php (last visited Sept. 8, 2025).

Century have been revised, rejected and/or fundamentally reconceived. I have a thousand conversations in my head with Bill about all sorts of higher education law and policy topics: I am sure I am not alone asking myself, "What would Bill think?" I suppose he was spared to some extent from redrafting the map of higher education law and policy in the current juridical climate, but thank goodness we have the foundational work he created to help us better understand how to map out the 21st Century. It is hard to say goodbye to Bill, but I realize that none of us in the field will ever truly do so because his work and influence permeate our collective work.

My final reflection relates to Bill's special place in history that I have alluded to. Bill Kaplin was born in 1942 when, in a very real sense, there was little to no law of higher education at all; the concept of general counsels and higher education law scholarship was only a future dream. Higher education was largely a pre-juridical field in which law played only minor role in managing day to day affairs. Bill understood the ever-growing presence of law in our field and shepherded us to a time today when legal compliance now dominates every activity in higher education. These are difficult times in higher education but they are made easier by Bill's vision and foresight—and heroic dedication to all of us as our Master Cartographer.

WILLIAM A. KAPLIN:
Scholar, Mentor, and Friend

*BARBARA A. LEE**

Bill Kaplin was a gentle, self-effacing individual who, as far as I know, never sought attention or praise for his work, yet left a legacy to those of us who practice higher education law, who teach higher education law, or who work in colleges and universities that are influenced by the law and by Bill's ground-breaking work. I was lucky enough to be his coauthor, his colleague, and his friend for over forty years.

I first met Bill when I was attending Georgetown Law School and working first for the U.S. Department of Education, and then for the Carnegie Foundation for the Advancement of Teaching. Bill's first edition of *The Law of Higher Education* was published a year after I finished my Ph.D. in higher education administration at The Ohio State University. My Ph.D. program offered one course in higher education law, taught by a wonderful professor who had no legal training but whose enthusiasm for higher education law was infectious. I decided to attend law school based, in large part, on the interest his course sparked in me, even though, in those days, law schools didn't offer courses in higher education law.

There had been a few books about legal issues related to colleges and universities published in the 1970s, but the first edition of *The Law of Higher Education* was published in 1978, and was far more comprehensive than the earlier books, which had been intended primarily for administrators. The American Council of Education recognized the first edition of Bill's book as the most outstanding book on higher education published that year.[1]

Bill and I participated in the same national scholarly conferences in the late 1970s and early 1980s. I attended the sessions at which he spoke and apparently he attended those at which I spoke, although I do not recall exactly when I met him. Just as I was finishing my J.D. and preparing to move to New Jersey and take a faculty position at Rutgers University, Bill invited me to lunch. After a pleasant conversation about our families and our research interests, he asked me if I would consider working with him on future editions of *The Law of Higher Education*, saying the scope of higher education law had grown so quickly and so broadly that it was beyond the ability of one individual to write about in any comprehensive way. I was enormously flattered, of course, and quickly agreed.

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* Distinguished University Professor and former Senior Vice President for Academic Affairs, Rutgers University. Ph.D., The Ohio State University; J.D., Georgetown University Law Center. Co-author, with William A. Kaplin, Neal H. Hutchens, and Jacob H. Rooksby, of several editions of *The Law of Higher Education*.

1 *See William A. Kaplin*, Columbus Sch. L., https://www.law.edu/about-us/faculty-and-staff/directory/expert-faculty/kaplin-william/index.html (last visited Sept. 5, 2025).

From then on, we communicated frequently (this was before email became routinely available and several years before I owned a personal computer). Bill was well along on the second edition of *The Law of Higher Education*, and he proposed that we prepare both an instructor's manual and a book of *Cases, Problems and Materials* to be used in teaching higher education law, whether or not the instructor used *The Law of Higher Education* as a text. We have revised and updated those publications with each new edition of *The Law of Higher Education.* Bill loved teaching higher education law. A former student, Sandra Casey, has written a tribute to Bill that is part of this special issue of the *Journal of College and University Law* ("JCUL"), and her memories of Bill as an instructor and mentor are strong evidence of his devotion and kindness to his students.

We were fortunate that the National Association of College and University Attorneys (NACUA) agreed to publish supplements to several editions of what we came to call "the treatise." After the publication of the fourth edition in 2006, Bill suggested that we prepare a Student Version of "the treatise" for use as a text, since the main volume (soon to be two volumes) kept expanding with each edition and was far too lengthy for law or education students to absorb. So, with each edition of "the treatise," we also prepared a freestanding *Student Version*.

Bill's writing was clear and precise, and on occasions when mine was not, he was an excellent editor. He was particularly interested in, and grounded in, Constitutional law, and he wrote a well-received book on the topic in the middle of our preparing the fourth edition of *The Law of Higher Education*, which delayed our publication a bit, and which he said he was chagrined to confess to me—after it was finished!

Bill always treated me as an equal scholar rather than as a junior faculty member or coauthor. We were both invited twice to a conference on higher education law at New College, Oxford University and encouraged to partner with a scholar from the United Kingdom to write about some higher education law topic using a comparative approach. Bob Bickel, a higher education law faculty member at Stetson University, and David Palfreyman, the Bursar of New College, organized these scholarly experiences, and Bill (and his wife Barbara) were very popular with the participants, who were pleased to have such an eminent scholar as part of the program.

I was so pleased on Bill's behalf when Stetson University College of Law created the William A. Kaplin Award for Excellence in Higher Education Law and Policy Scholarship. He clearly was, and still is, in my opinion, viewed as the most distinguished scholar of higher education law in the United States, as other writers in this special issue attest.

It also is important to note that Bill served as editor of JCUL, which NACUA created in 1973. JCUL is still the only refereed law journal devoted exclusively to higher education law. Bill became editor in 1976 and remained as editor through 1979. He introduced innovations that served both legal scholars and practitioners. In the year between Bill's completion of his editorship and the journal's transfer to West Virginia University, Jeff Orleans and Claire Guthrie, both active NACUA members (and both employed full-time) served as interim co-editors. JCUL then

moved to West Virginia University, where Laura Rothstein became editor between 1980 and 1986. When Laura moved to the University of Houston in 1986, JCUL moved to the University of Notre Dame, edited first by Tex Dutile, and then by John Robinson and William Hoy. In 2016 JCUL moved to Rutgers University under the editorship of Ray Solomon. JCUL is now published by NACUA, and I have the privilege of editorship. JCUL's fiftieth volume is published this year—another legacy of Bill Kaplin.

By around 2014, Bill and I realized that, given the unceasing expansion and complexity of higher education law, we needed to add a couple of co-authors in order to produce subsequent editions and still attend to our other responsibilities. We were very fortunate to identify two future winners of the Kaplin award—Neal Hutchens and Jacob Rooksby—who were willing to join the team and contribute several chapters to the next editions. Both are Ph.D. and J.D. recipients and both are prolific scholars. In addition, both have significant academic administrative experience—Jacob as Dean of the Gonzaga University School of Law and Neal as department chair at the University of Mississippi and more recently as interim department chair at the University of Kentucky. I am grateful that there is a new generation of higher education law scholars who are so well prepared and eminently qualified to take over what Bill began nearly fifty years ago.

I am very fortunate to have had the privilege of working with Bill on the books and teaching materials that we produced over the past forty years. He has been an important influence in my life, and I am grateful for his friendship, support, and the confidence he placed in me as we worked together to address the fascinating and challenging—and occasionally frustrating—field of higher education law.

WILLIAM A. KAPLIN:
Formidable, Foundational, Forward-Looking, Funny, and Friendly

LAURA ROTHSTEIN[*]

In the world of education, an "F" generally means a failing grade. But for William (Bill) Kaplin, adjectives beginning with F are appropriate, and because of those descriptors Bill receives an A+ for his work and his life.

He was **formidable**, but not daunting, because he was so knowledgeable about legal issues, primarily higher education law. Higher education law requires an appreciation for how a wide range of legal issues fits into the unique context of the institution of American higher education. These include common law torts and contracts; constitutional law issues of free speech, nondiscrimination, and due process; federal statutory requirements involving privacy, Title IX, and disability discrimination; and federal regulatory issues including accreditation, sexual harassment, finance, and governance.

He became interested in the field of education law due to his own student higher education experiences in the 1960s when student rights were at the forefront. His perspectives and expertise also were enriched by serving at the Department of Health, Education, and Welfare as an attorney in the general counsel's office. As a scholar, he was the **foundational** (first) author on the first book on higher education law in 1978, a comprehensive textbook for law students (and related treatises for lawyers) on higher education law.[1] These works highlight

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* Distinguished University Scholar and Professor Emerita, University of Louisville, Louis D. Brandeis School of Law.

1 *The Law of Higher Education, 6th Edition: The Two-Volume Treatise,* by William A. Kaplin, Barbara A. Lee, Neal H. Hutchens, and Jacob H. Rooksby was published by Jossey-Bass, Inc. in April 2019. This two-volume work updates and expands the topics and analyses that were included in the Fifth Edition. It also incorporates the latest major developments in higher education law and is current through June 2018, although many sections are current through December 2018. The treatise is available online at https://www.wiley.com/The+Law+of+Higher+Education%2C+2+Volume+Set%2C+6th+Edition-p-9781119551188 (last visited Aug. 8, 2025). More recently, a student edition was published by Jossey-Bass in 2024. WILLIAM A. KAPLIN, ET AL., ESSENTIALS FOR LEGAL AND ADMINISTRATIVE PRACTICE (2024). This student edition is described by the NACUA as:

> [A] new and expanded edition of the previous Student Version is intended for both practicing attorneys and use in higher education law courses. Updated information is included on Title IX, DACA, affirmative action, and numerous other recent legal developments that affect how colleges and universities function. Information for students is retained from earlier texts while broadening the coverage of significant legal issues with which institutions deal on a daily basis. *The Law of Higher Education*, NACUA, https://www.nacua.org/resource-library/resources-by-type/the-law-of-higher-education (last visited Sept. 8, 2025).

his depth and breadth of knowledge, and his appreciation for making the material understandable and useful to an array of audiences, including policymakers; advocates for students, faculty, and other parties; university attorneys, and outside counsel for universities.[2] This work always was forward looking, as demonstrated by its evolution through subsequent editions, later coauthored with Barbara Lee, and then with Barbara Lee, Neal Hutchens, and Jacob Rooksby.

He also was **foundational** as the third editor of the *Journal of College & University Law* ("JCUL"), the official law journal for the National Association of College and University Attorneys (NACUA), which he made useful and accessible to university attorneys, other practicing lawyers, and scholars of higher education law. It was my privilege to build on his three years of service as editor when I stepped into the role when JCUL became affiliated for the first time with a law school (West Virginia University College of Law, from 1980 to 1986). I tried to continue his example of having articles and commentary that were useful, insightful, and thought-provoking.

His foundational works have been recognized by diverse organizations and institutions, including the American Council on Education, NACUA,[3] and Catholic University of America,[4] to name just a few. Leaders of Tonawanda High School in Tonawanda, New York, in its 2014 High School Hall of Fame presentation (which highlighted his work *The Law of Higher Education: A Comprehensive Guide to Legal Implications of Administrative Decision Making*), noted as follows:

> Professor Kaplin's publication was recognized by the American Council on Education when they presented him with the "Borden Award for the year's outstanding book about higher education." Although others have authored books in these topics, none has supplanted Kaplin's which is often referred to as "The bible of higher-education law." His books have become standards in law libraries and classrooms across the country. Teaching, publishing and speaking engagements have given him national recognition.[5]

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2 In 1986 and 1987, I team-taught higher education law with the late Professor Michael Olivas at the University of Houston Law Center. Although Michael later wrote his own casebook on higher education law, the two of us used Bill Kaplin's textbook when we taught the course. That first-hand experience demonstrated to me Bill's skill at shaping an area of law in a way that was approachable for law students.

3 *See CUA Law Professor Emeritus William A. Kaplin was honored at the recent conference of the National Association of College and University Attorneys (NACUA)*, Columbus Sch. L. https://www.law.edu/news-and-events/2018/09/2018-0913-williamkaplin.html (last visited Sept. 7, 2025).

4 *See Remembering Professor Emeritus William Kaplin*, Columbus Sch. L., https://www.law.edu/news-and-events/2024/11/2024-1105-Kaplin.html (last visited Sept. 9, 2025). During his 40-year tenure at Catholic University, Kaplin also served as the Founding Director of the Law and Public Policy program. *Id.* He was known for his wisdom, humor, and generosity, earning the respect and admiration of his colleagues and students. Professor Roger Hartley remembered Kaplin as a "gentle soul with firm views, a good and generous friend, and a true leader." *Id.* Kaplin's legacy is marked by his commitment to promoting justice through legal education and instilling the principles of Catholic Social Teaching in his students. *Id.*

5 *See 2014 Induction*, Tonawanda City Sch. Dist., https://www.tonawandacsd.org/page/2014-induction (last visited Sept. 7, 2025).

Those writing in his memory upon his passing in October 2024 noted his sense of humor. When our paths crossed at conferences or events—for example, ones held by the Association of American Law Schools, Stetson University College of Law, and NACUA —I enjoyed his wit and humor in conversations and his comments in presentations. He was **funny**.

He also was very **friendly**. My work on the intersection of disability law and higher education began in 1980. Because of that work I was a regular presenter on that topic at Stetson Law's National Conference on Higher Education Law and Policy. Stetson Law honored Bill by creating an award in his name, which it describes as follows:

> The Center for Excellence in Higher Education Law and Policy is proud to have established the Award for Excellence in Higher Education Law and Policy Scholarship, named for our esteemed friend and colleague, Professor William A. Kaplin. This award recognizes scholars who have published works on education law that embrace the intersection of law and policy.[6]

It was one of my greatest honors of my professional life to receive the William A. Kaplin Award in the third year that Stetson awarded it (i.e., 2011). Part of the award experience was having lunch with Bill at the Stetson conference, during which his constant broad smile, positive attitude, and gentle intellect made the honor even more special.

I often reference Mitch Albom's novel, *The Five People You Meet in Heaven*, when highlighting how people are influenced by ideas and interventions of others that they may not even know.[7] Bill Kaplin's foundational and far-ranging influence will make him one of the "five people" who have had an impact on countless higher education leaders, policymakers, scholars, students, and legal counsel who learned from his work. He made a difference while living a good life that should be a model for all of us.

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6 *See William A. Kaplin Award – National Conference on Law and Higher Education*, Stetson L., *https://www.stetson.edu/law/conferences/highered/home/william-a-kaplin-award-national-conference.php* (last visited Sept. 7, 2025). The late Michael Olivas and the late Robert O'Neil, both iconic scholars of higher education law, were the first recipients of this award in 2009. Barbara Lee, Bill Kaplin's co-author on many of his works, received the recognition in 2010, as did his coauthors Neal Hutchens in 2015 and Jacob Rooksby in 2023.

7 *See generally* Mitch Albom, The Five People You Meet in Heaven (2003).

LOOKING BACK, LOOKING AHEAD:
Honoring the Scholarly Legacy of William A. Kaplin

NEAL H. HUTCHENS[*]

INTRODUCTION

For the first edition of the formative *The Law of Higher Education* (*LHE*), William A. Kaplin, writing almost fifty years ago, opened the book's Preface with the following depiction of law's increasing influence on higher education:

> The law has arrived on the campus—sometimes it has been a beacon, other times a blanket of ground fog. But even in its murkiness the law has not come "on little cat feet," like Carl Sandburg's "Fog"; nor has it sat silently on its haunches; nor will it soon move on. It has come noisily and sometimes stumbled. And even in its imperfections the law has spoken forcefully and meaningfully to the higher education community and will continue to do so.[1]

In the intervening years since Kaplin's observation, law has not just "arrived" on campus; it has "thrived," becoming an increasingly prominent force in institutional life and operations.

This essay considers the legacy of Kaplin's contributions to higher education law, with a special emphasis on the early editions of *LHE*. Besides looking to the past in celebration of Kaplin's scholarly achievements, the essay considers ongoing lessons for higher education to take from his work. Namely, one of Kaplin's enduring contributions is pushing us to grapple with the impact of law on colleges and universities from a holistic perspective that values the underlying purposes of higher education. As he observed:

> The challenge is to make law more a beacon and less a fog. The challenge is for law and higher education to accommodate one another, preserving the best values of each for the mutual benefit of both. Just as academia benefits from the understanding and respect of the legal community, so law benefits from the understanding and respect of academia.[2]

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* Neal H. Hutchens is University Research Professor at the University of Kentucky, where he serves as a faculty member in the Department of Educational Policy Studies and Evaluation. He holds a J.D. from the University of Alabama School of Law and a Ph.D. from the University of Maryland.

1 William A. Kaplin, The Law of Higher Education: Legal Implications of Administrative Decision Making viii (1st ed. 1978).

2 *Id*.

Another lesson to draw from Kaplin's scholarly legacy connects to the growing administrative leadership role of senior college and university attorneys in higher education. As a result of the importance attached to legal issues in higher education, lead institutional attorneys are now indispensable senior administrators with portfolios that extend beyond providing legal advice.[3] Given the expanding role of college and university attorneys in campus life, it is an opportune time to reconsider Kaplin's charge in 1978 about the place of law in upholding the "best values" of higher education. Along with strides in integrating the role of law on campus (reflecting "respect" for the law by higher education institutions), how do we advance a corollary "respect" of higher education by the law, especially with the continued legalization (and lawyerization)[4] of higher education? More specifically, akin to Kaplin's focus on enhancing the legal literacy for higher education administrators, it is helpful to consider how individuals in legal or law-adjacent roles on campus, especially chief legal counsels, can become more knowledgeable and discerning about the "best values" of higher education in ways that transcend law and legal standards.

I. LOOKING BACK: EARLY EDITIONS OF *THE LAW OF HIGHER EDUCATION*

While not the first book on higher education law,[5] and with legal issues long relevant for colleges and universities,[6] the first edition of *LHE* was published in a period of marked transition and expansion of legal and regulatory issues in higher education. The fall of the legal doctrine of *in loco parentis* during the 1960s resulted in a fundamental change, including, in a legal sense, in the relationship between students and colleges and universities.[7] Federal interest in the oversight of higher education expanded in the 1970s due to a combination of factors, including an increased emphasis on civil rights enforcement and the expansion of federal financial aid programs.[8] State governments, facing budgetary struggles in the 1970s, became more focused on scrutinizing outcomes in higher education.[9] Kaplin authored the first edition of *LHE* at a moment when colleges and universities were

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3 *See, e.g.*, David Jesse, *Your College's Top Attorney Has Never Been More Powerful*, Chron. Higher Educ. (Feb. 26, 2024), https://www.chronicle.com/article/your-colleges-top-lawyer-has-never-been-more-powerful (discussing the implications of attorneys in higher education having a significantly broader role than a legal counselor or advocate).

4 *See* Louis H. Guard & Joyce P. Jacobsen, *The Lawyerization of Higher Education*, Chron. Higher Educ. (May 9, 2024), https://www.chronicle.com/article/the-lawyerization-of-higher-education; *infra* notes 17-21.

5 *See generally* Edward C. Elliot & M. M. Chambers, The Colleges and the Courts: Judicial Decisions regarding Institutions of Higher Education in the United States (1936). Elliot and Chambers, and then Chambers as a solo author, would offer later editions of this work.

6 *See generally* Scott Gelber, Courtrooms and Classrooms: A Legal History of College Access, 1860-1960 (2016).

7 *See* Peter F. Lake, *The Rise of Duty and the Fall of In Loco Parentis and Other Protective Tort Doctrines in Higher Education Law,* 64 Mo. L. Rev. 1 (1999).

8 *See generally* John. R. Thelin, History of American Higher Education 317-362 (3d ed. 2019).

9 *Id*.

coming to terms with the increasing legalization of higher education on multiple fronts.

Reviewers for the 1978 edition of *LHE* agreed that Kaplin had produced a work to match this new legal and policy environment. One reviewer for the 1978 edition, and an update of cases for the work published in 1980, described the conditions that had previously existed at many colleges and universities in relation to legal concerns:

> 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. College administrators could dismiss students at will, even at whim, without answering to a court for their actions. Judges frequently deferred to those decisions by holding that the power of administrators to sanction students was similar to, if not identical with, that of parents over their children. By now, however, the law has arrived on the campus, even if, like "a blanket of ground fog"… .[10]

This and other reviews would applaud Kaplin for providing a well-written, comprehensive work of value to attorneys and higher education administrators, one that provided a "clear and readable guide through the complex maze of regulations governing the institutions they serve."[11]

Reviewing the second edition of *LHE*, published in 1985, well-known higher education legal scholar Michael Olivas provided the following assessment:

> This extraordinary volume stands out not merely because no one else has tried to produce such a volume. The estimable and sorely missed M. M. Chambers, after all, performed this service for many years, and most books in the field of higher education law trace their ancestry to those early Chambers volumes. . . . 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 alone suffices, and we are all grateful to Kaplin for this important labor.[12]

Indicative of the increasing role of law in higher education when Kaplin wrote these early editions of *LHE*, an issue considered by reviewers in a pre-Internet age was the challenge for attorneys and administrators to keep up with the fast-moving pace of legal changes in multiple areas that affected higher education.[13] Reviewers' comments about timeliness help to capture how points of legal compliance and risk management were rapidly expanding when *LHE* was first published. Now, multiple organizations provide legal information and services, including through

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10 Edward McGlynn Gaffney, Jr., *Book Reviews*, 57 Notre Dame L. Rev. 882, 882 (1982) (reviewing The Law of Higher Education: Legal Implications of Administrative Decision Making (1978) and The Law of Higher Education (1980)).

11 *Id*. at 887

12 Michael A. Olivas, *The Law of Higher Education*, 58 J. Higher Educ.113, 114 (1987).

13 *See id*. at 115; Gaffney, *supra* note 10, at 884-85.

the provision of online resources and training. The publisher of the *Journal of College and University Law*, the National Association of College and University Attorneys, is an exemplar of a professional organization serving higher education attorneys and helping them stay current with legal developments affecting colleges and universities.

While multiple sources, including online ones, are now plentiful for locating the latest information on specific legal topics in higher education, a key attribute of Kaplin's endeavor in *LHE* with ongoing significance was to tackle legal issues in higher education from a holistic perspective. A legacy of Kaplin's work worthy of continuing dedication and reflection is to wrestle with the impact of legal issues impacting higher education from a global perspective.

A characteristic of the approach Kaplin brought to *LHE*, one noted in reviews, was to take an explanatory or descriptive stance with legal standards rather than a normative approach.[14] While Kaplin adhered to a descriptive stance for specific topics,[15] I suggest that, in taking a universal or holistic approach to understanding law's presence in higher education, he did follow, at least implicitly, something of a normative approach regarding how law should, ideally, "respect" the special roles and missions of colleges and universities. As Kaplin stated in the Preface to *LHE*'s first edition, respect for the law by colleges and universities should be accompanied by a corresponding "understanding and respect of academia" by the law.[16] In the next section, I reflect on how to honor and build on Kaplin's legacy of a holistic approach to law in higher education. Namely, how can those internal and external to colleges and universities take seriously the task of how to carry out an "understanding and respect of academia" in terms of how law should function in higher education? In considering taking such a holistic perspective of legal issues on campus, the section pays particular attention to the expanding administrative leadership roles of senior college and university attorneys.

II. LOOKING AHEAD: ONGOING LESSONS FROM KAPLIN

Since 1978 and the first *LHE* edition, the presence of legal issues on campus has continued to grow. An outcome of the increasing influence of law in higher education institutions is the evolving role of senior college and university attorneys as key campus leaders, with responsibilities that transcend providing legal advice. Frederick Lawrence, in a book review for the *Journal of College and University Law*, succinctly captured how the contemporary role of senior institutional attorneys has evolved to positions integral to institutional leadership and administration:

> There are certain special relationships that have historically been central to the administration and governance of institutions of higher education. Some are well known. The relationship between the president or chancellor and

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14 *See* D. Brock Hornby, *Book Reviews*, 7 J.C. & U.L. 181 (1980-1981).

15 As someone who joined as a co-author for later editions of *LHE*, I can attest to Kaplin's focus on an explanatory or descriptive emphasis for the work, an approach that has contributed to the work's durability and relevance through multiple editions.

16 Kaplin, *supra* note 1, at xiii.

> the chair of the governing board is one such relationship, and, although the specifics will vary from one campus to another, so is the relationship between the president and the chief academic officer and the chief administrative or operating officer. Until relatively recently, most university leaders would not have included the university's lawyer to be among these partnerships; today nearly all would.[17]

The work under review, *All the Campus Lawyers: Litigation, Regulation, and the New Era of Higher Education*, published in 2024, highlights, among the topics covered, how college and university attorneys increasingly serve as key administrative partners at institutions. The authors consider how "[c]olleges and universities today are in a distinctly new era of regulatory oversight and litigation pressures, facing increased public scrutiny from regulators, legislators, and the public at large, and decreased deference from courts."[18] These increasing legal and regulatory pressures have meant the "ways and extent to which institutions of higher education . . . use legal counsel have expanded significantly,"[19] resulting in what they characterize as the "lawyerization" of higher education.[20]

The administrative importance of lead higher education attorneys provided the focus of a recent research study on the roles of chief university attorneys (CUA).[21] In a case study of six lead institutional attorneys, the researcher found that CUAs assumed administrative leadership duties that went beyond providing legal advice.[22] These attorneys help institutions navigate complex issues, ones often crossing institutional silos and entailing more than legal analysis. As characterized in the study, CUAs are now called on to fulfill "executive" leadership functions that encompass both legal and "extralegal" considerations.[23]

With college and university attorneys, especially those in senior-level positions, assuming an increasingly pivotal place in institutional leadership structures, it is fitting to consider Kaplin's call for a two-way exchange in which higher education must not only "respect" law, but also where law should show "respect

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17 Frederick M. Lawrence, *Review of Louis H. Guard and Joyce P. Jacobsen's All the Campus Lawyers: Litigation, Regulation, and the New Era of Higher Education*, 49 J.C. & U.L. 113, 113 (2024), https://www.nacua.org/docs/default-source/jcul-articles/volume49/lawrence-to-nacua-11-14-24.pdf?sfvrsn=68014abe_4.

18 Louis H. Guard and Joyce P. Jacobsen, All the Campus Lawyers: Litigation, Regulation, and the New Era of Higher Education 3-4 (2024).

19 *Id*. at 8.

20 *Id*. ("In our view, the 'lawyerization' of higher education is simply a shorthand way of describing the increased regulatory and litigations pressures facing IHEs [institutions of higher education] and the increasing public scrutiny, politicization, and legislative interference with higher education and its campuses.").

21 Blake C. Billings, *The Role of Chief University Attorney as Lawyer, Manager, and Higher Education Executive: A Qualitative Multiple Case Study*, 50 J.C. & U.L. 41, 78 (2025), https://www.nacua.org/docs/default-source/jcul-articles/volume50/billings-final-to-nacua.pdf?sfvrsn=fd7755be_2.

22 *Id*. at 52-56, 72-75, 77-79.

23 *See id*.

of academia."[24] A key impetus for Kaplin's authorship of *LHE* was to expand legal literacy for higher education administrators who were increasingly having to take legal considerations into account as part of their administrative decision-making.

Lead campus lawyers are regularly called upon to exercise administrative leadership roles for institutions in ways that transcend providing legal analysis and advice. In doing so, higher education leaders and scholars might reflect on how college and university attorneys can deepen their understanding of higher education in ways that extend beyond the law. Professional and disciplinary sources about higher education beyond law could include insights, for example, from the history of higher education, business, higher education studies as an academic field, sociology, philosophy, labor studies, and non-profit studies. Just as *LHE* responded to a need for administrators to strengthen their understanding of legal standards, a future-looking lesson from Kaplin's legacy is to consider what college and university attorneys need to know and understand about higher education as they take on institutional leadership roles that go beyond the law.

III. CONCLUSION

As the number of legal and compliance issues facing colleges and universities continues to proliferate, an ongoing lesson from William Kaplin's scholarly legacy is to keep the "big picture" in mind when it comes to law and higher education. Such a holistic view of the law's impact on higher education is vital in the ongoing challenge for colleges and universities to carry out their unique missions in meaningful and impactful ways. In a time of silos and specialization, including when it comes to parsing the myriad legal standards affecting institutions, Kaplin reminds us of the need to stay focused on the core goals and purposes of higher education.

A related lesson to draw from Kaplin's legacy is about the evolving role of lead college and university attorneys. Senior legal counsel in higher education increasingly hold key leadership roles in institutions not confined to providing legal advice. Just as Kaplin sought to aid non-attorney administrators in grappling with the increasing presence of law on campus, his scholarly legacy prompts reflection about the knowledge and skills beyond the law that are vital for senior college and university attorneys to be able to carry out the appreciation of higher education espoused by Kaplin in ways that help to bring out the best in colleges and universities.

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24 KAPLIN, *supra* note 1, at xiii.

WILLIAM A. KAPLIN:
Building a Legacy of Preventive Law at The Catholic University of America and Beyond

CRAIG W. PARKER[*]

The purpose of this Essay is to describe how Professor William Kaplin's thinking about preventive law practice in higher education institutions substantially impacted one university—especially its General Counsel—and how that impact perhaps contributed a small bit to a part of Bill's legacy: the notion of preventive law.

Let me set the stage for how I knew Professor Kaplin. Bill came to the faculty of the law school at the Catholic University of America ("CUA" or "University") in 1970 and was a tenured full professor by 1978. At the later end of roughly the same period, I was a night law student, working in the law library by day, then after graduation in 1978 working as Assistant Dean of the law school and part-time Assistant General Counsel of the University. I thus had the unique advantage of interacting with Bill as his reference librarian, as the Assistant Dean responsible for his faculty support needs, and as a new lawyer working with him on some "special counsel" projects for the University including preventive law activities. In all those settings, he was always well-organized, humble, and very good-humored. He was well-liked by his faculty colleagues and the law school support staff.

For about 20 years beginning in 1987, I worked with him as a colleague when I became full-time General Counsel at CUA and Bill agreed to continue as occasional "special counsel" to the University. Inspired by Bill's writing and thinking about preventive law, CUA's legal office eventually served as an informal laboratory to test the success of implementing those preventive law theories in real campus practice.

It was working with Bill in the early 1980s that first exposed me to his theories of preventive law activities for a general counsel's office. From time to time, we did some workshops together, with encouragement from the University's president, gathering perhaps two dozen senior administrators and academic deans for a half-day workshop on how to identify and resolve potential legal problems in their areas of management responsibility. Bill wrote up the case study problems the attendees would discuss in small groups among themselves then report on and discuss with the whole group. His humor was always on display, as was his thoughtful analysis and his respect for his academic colleagues. Looking back on it, whether consciously intended, he was helping to start a "teamwork relationship" between senior managers at the University and the legal counsel's office.

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* Former General Counsel, The Catholic University of America, 1987-2009.

By 1985, in the second edition of his book *The Law of Higher Education*, he added an entirely new "Section 1.6, Organizing the Postsecondary Institution's Legal Affairs."[1] As far as I can determine, this is the book where he first described in detail the models of "treatment law" versus "preventive law," contrasting an institution responding only when facing an actual legal threat, versus focusing on "initiatives the institution can take before actual legal disputes arise. Preventive law involves administrator and counsel in a continual process of setting the legal parameters within which the institution will operate to avoid litigation or other legal disputes."[2] His discussions with me of such initiatives in the context of workshops with our University colleagues made me aware of my responsibility to work towards implementing the preventive steps he identified in his book. He asked me to review the draft of that section of his book, which I am quite sure did not result in any terribly useful additions to his ideas, but along with his workshop participation, did impress on me that Bill was committed to seeing preventive law strategies implemented in a real campus setting.

In later editions of *The Law of Higher Education*, Bill's co-author became Barbara A. Lee, and in the 5th edition, they wrote, "Today preventive law [within postsecondary education] is as indispensable as treatment law and provides the more constructive posture from which to conduct institutional legal affairs."[3]

In that earlier 1985 edition of his book, he identified six steps for counsel to implement a preventive law system. In summary, they were: (1) determine whether university arrangements for use of counsel facilitate preventive lawyering; (2) develop a teamwork relationship between administrators and counsel; (3) institute periodic legal audits, a checkup to determine the university's "legal health;" (4) have an early-warning system to spot legal problems in their early stages; (5) plan measures to maintain the legal health of the university, balancing the relationship of law and policy; and (6) establish internal grievance mechanisms.[4]

In my mind the key actions needed from those six steps were: working on a regular basis to develop a teamwork relationship with university administrators (both academic and non-academic), legal counsel and administrators together performing those periodic "legal audits" to assure compliance with all applicable legal constraints, and development of "an early-warning system" to identify and avoid potential legal problems.

While I had good exposure to Bill's preventive law theories by the late 1980s, like many in-house university counsels at that time, I was a solo practitioner starting full-time in 1987. Within a few years, I hired a brilliant associate, Kathryn Bender, but with a young family her availability then was limited to part-time. In the meantime, CUA was swamped with litigation, much of it related to allegations

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2 William A. Kaplin, The Law of Higher Education: A Comprehensive Guide to Legal Implications of Administrative Decision Making 31 (2d ed. 1985).

2 *Id.* at 32.

3 William A. Kaplin & Barbara A. Lee, The Law of Higher Education: A Comprehensive Guide to Legal Implications of Administrative Decision Making 163 (5th ed. 2013).

4 Kaplin, *supra* note 1, at 32-33.

of non-compliance with federal regulations regarding gender, race, and disability discrimination. While I was occasionally able to draw on Bill's time, his limited availability unfortunately had to be used in the "treatment" mode, handling some specific legal problem flaring up in the University rather than working on preventive law practices.

I recall one such case which Bill handled for us. A Ph.D. student in one of the graduate schools at CUA discovered during his dissertation research that an earlier graduate of that program had in fact copied a full chapter of their dissertation from someone else's publication. That former student had gone on to become a tenured full professor at a prestigious national institution. When confronted with the facts, the former student immediately lawyered up. Bill came into that embarrassing situation, potentially reflecting very publicly and very badly on both the University and its graduate, and mediated what the parties agreed was a good solution: the former student/tenured professor quietly but completely re-wrote the plagiarized chapter of their dissertation, doing their own research, which then replaced the chapter in the original version of the dissertation in our University archives. I always thought that was a fair and creative resolution to a difficult situation, essentially turning back the clock to achieve what should have happened in the first place.

Back to the challenges of implementing Bill's preventive law theories into practice. In my first decade as full-time general counsel, I was constantly on the run managing the resolution of litigation and agency complaints against the University. As someone who was not a litigator, I relied heavily on outside trial counsel but never seemed to have the time to do much preventive law work. Here is a glance at the volume of legal complaints against CUA—requiring a response in the "treatment mode"—in my first decade or so on the job. From 1987-2004, we averaged having more than eight ongoing local District of Columbia agency or federal agency complaints a year, representing 63 individual matters over that period. In the same period, in the local and federal courts of the District of Columbia, we averaged having seven ongoing lawsuits a year, representing 51 individual court cases over that 1987-2004 period.

Meanwhile, in about the same time period, the 1980s into the early 2000s, new federal higher education regulations were booming, including some big ones like the Americans With Disabilities Act of 1990,[5] the Sarbanes Oxley Act of 2002,[6] the Campus Sex Crimes Prevention Act of 2000,[7] the Drug Free School and Communities Act of 1989,[8] the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act of 1990,[9] the Immigration Reform and Control

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5 42 U.S.C. §§ 12101-12213.

6 15 U.S.C. §§ 7201-7266.

7 22 U.S.C. §§ 7101-7110.

8 20 U.S.C. §1011i.

9 20 U.S.C. §1092(f).

Act of 1986,[10] the 1997 Copyright Act,[11] the Digital Millennium Copyright Act of 1998,[12] the Family and Medical Leave Act of 1993,[13] and many more, including regular amendments to the Federal Higher Education Act.[14]

As I told someone at the time, I would wake up in a cold sweat at night, afraid I was so swamped that I did not even know what I did not know. I struggled to keep track of the burgeoning federal rules and their amendments, never mind assuring compliance with them on our campus.

By 1996, ten years into my job, I was getting desperate. Then two things happened that changed my professional life and our way of doing business in the legal office at CUA. First, the internet really took off on our campus (as it did nationwide) at about that time. Second, I convinced our executive vice president to let me hire an attorney full-time to focus solely on helping to identify and comply with applicable federal laws and regulations.

With the birth of the internet and webpages, our computer center was looking to have a strategic partnership with an administrative office on campus to serve as a model to other non-academic offices on how to use this emerging technology to help their office mission. We signed on to that effort. The second thing that happened was that in early 1996 I hired Margaret "Peg" O'Donnell to make that complete and ever-growing list of all the federal regulations that applied to a university. A former attorney in a county government where a key task was federal regulatory compliance, she used Bill Kaplin's and Barbara Lee's most current edition, supplemented with a few other lists from higher education lawyers, and began her list.

Peg's work was terrific, identifying and summarizing more than 200 federal laws applicable to higher education. More than that, she is a gifted writer and researcher and developed her summaries in language that was reader-friendly for non-lawyers. By 1997, we had worked with our University information technology ("IT") staff to create our first webpage with a list of those laws we called "Fedlaw." We used it just to keep track of applicable law for ourselves but also began to use the webpage to communicate with our University colleagues, sharing information about federal regulations applicable to them. Similarly, we freely shared our information with other higher education lawyers around the country, and they responded by sharing their expertise with us. Over the years, we got great support from scores of higher education lawyers nationwide.

By 1998, we began to produce some internal brochures and short print publications aimed at making managers familiar with legal issues and posted those on our website.

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10 8 U.S.C. §§ 1101-1537.

11 The heart of the law resides within Title 17 of the United States Code. The 1997 significant amendment to the Copyright Act was the No Electronic Theft (NET) Act, aimed at preventing copyright infringement on the Internet. 17 U.S.C. §§101-1511.

12 17 U.S.C. §§ 512, 1201-05, 1301-22; 28 U.S.C. § 4001.

13 29 U.S.C. §§ 2601-2654.

14 Enacted in 1965 as Pub. L. 89-329, the often-amended law is codified in Title 20 U.S.C., Chapter 28.

As we began to develop closer relationships with campus managers, we worked with our strategic partners in IT to use developing web technology to reach our target audience of University employees, and eventually students. We developed online web short courses for faculty and administrators on topics like FERPA, the ADA and copyright. We had several iterations of occasional online newsletters, the first one called *CUA Counsel Online*, which included "What's New" in higher education law reports in each issue.[15] We always got positive feedback from Bill when he was a faculty recipient of one of these online postings. We published interviews with key employees in areas more and more heavily regulated by the government, such as student disability services, student records, and campus security.

As time went on, we realized these efforts were paying dividends in closer relationships with campus administrators, who we of course also discovered usually had more expertise than we did in their area of responsibility—for example, the registrar with student records, the public safety director with campus security—but we could now share their expertise with others on campus. We also organized social events around our campus compliance efforts, allowing us to know key managers better. Bill was invited to those events and often participated. I always remember him coming into an event, his wiry stature looking like nothing if not a mischievous Irish leprechaun, with his infectious smile and laugh, a twinkle in his eyes.

Over the next decade or so, from 1998 to 2008, our preventive law efforts exploded. We created a "Compliance Watchdog" program, providing highly prized and publicized swag of coffee cups (with a picture of a bulldog wearing a CUA sweatshirt), beach towels, and the like to selected managers and employees who had demonstrated that they understood our message about communicating with the legal office to identify legal issues and avoid serious legal problems. Employees working in the facilities area, for example, were given training by the legal office about the need for campus buildings and grounds to be ADA compliant, and then given cash prizes if they discovered and reported ADA access problems that needed to be addressed.

We re-tooled and vastly expanded our website in 2002 as The Campus Legal Information Clearinghouse, or "CLIC," in cooperation with the American Council on Education ("ACE"). ACE Vice President and General Counsel Sheldon Steinbach supported ACE's sponsorship. He called it "an extraordinary resource. It is the only non-proprietary website available to college administrators dealing with the full range of federal regulations, and Catholic University has done a masterful job in making the website comprehensive."[16] In the spirit of the clearinghouse concept,

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15 Parts of the old CUA general counsel website are archived and accessible via the Wayback Machine of the Internet Archive. *See, e.g.,* Archive of Catholic University of America, *General Counsel* (Jan. 18, 2008 11:32 AM), https://web.archive.org/web/20080120203037/http://counsel.cua.edu/ (depicting the scope of Campus Legal Information Clearinghouse in 2008). A display of new items posted on the website highlights federal regulations. On the far right, an arrow can be clicked to get to an issue of *CUA Counsel Online*. The issue linked is a bit narrower than the newsletter usually was, but then clicking again under "Departments" on the far left and on "Archives" leads to a collection of all the newsletter articles produced over the years.

16 Brock Read, *Catholic U. Web Site Aims to Help Colleges Comply with Federal Regulations*, CHRON.

many other universities contributed their best online resource on a specific higher education legal topic, and we posted them to be shared nationwide. Examples include an online workshop on copyright from North Carolina State University and a video tutorial by lawyers from the University of Arizona.

In those years, Bill was teaching a sequence of education law courses at the CUA law school and encouraged many of his students to come work as law clerks or interns in our office. There were semesters when we had four or five law students working on projects for us, most of them with a preventive law goal. Law student clerks drafted brochures, created PowerPoint training programs for staff, performed "legal audits" in campus offices, and wrote articles for our online newsletters. In about 2002, we had an undergraduate media studies student at CUA make a video for us, "What's Wrong With Ripping?," aimed at students to make them aware that the then-new trend of copying materials off of CDs and DVDs was copyright infringement, against the law and University policy. When CUA distributed a revised sexual harassment policy to students drafted in part by law clerks, to incentivize students to read the policy Kathryn Bender created an online quiz about the policy, and students who took the quiz were entered into a raffle for prizes of gift cards at the campus bookstore. About a quarter of CUA's students, something approaching 2,000 in number, participated in the quiz.

Clearly, preventive law concepts were becoming more well known and widely publicized by 2003, and CUA's legal office was a strong advocate. Along the way, Peg O'Donnell enhanced her database of federal laws and integrated a compliance calendar into the description of each regulation, so an administrator could more easily find out when reports, notices, or other actions were required by law.

In a *Chronicle of Higher Education* piece in 2005,[17] Peg and I gave examples of steps administrators could take to avoid legal problems. We focused on the need to improve collaboration between disparate administrative departments; to develop clear procedures on handling requests for university records and documents; and to have training programs to teach employees about preventing discrimination and harassment. In a *Legal Times* newspaper interview in that time period, I described how Bill Kaplin had been the inspiration for our preventive law efforts, saying about his emphasis on relationships, "He talks about the importance of trying to develop a preventive law approach, to do things that raise the awareness of legal issues with key managers."[18]

In early 2006, another *Chronicle* article detailed CUA's efforts at preventive law.[19]

HIGHER EDUC. (June 6, 2003), https://www.chronicle.com/article/catholic-u-web-site-helps-colleges-comply-with-federal-regulations/.

17 Margaret L. O'Donnell & Craig W. Parker, *Federal Regulation in Higher Education:Resources*, CHRON. HIGHER EDUC. (May 27, 2005), https://www.chronicle.com/article/federal-regulation-in-higher-education-resources/.

18 *On the Record: Craig Parker; In House Monthly; Catholic University; In House Counsel*, LEGAL TIMES (May 21, 2007) (archive available at https://plus.lexis.com/api/permalink/73db7c24-97de-41a3-a248-54f52120bbe7/?context=1530671).

19 Alvin P. Sanoff, *Catholic U. Preaches, and Practices, Preventive Law*, CHRON. HIGHER EDUC. (Jan. 26, 2007), https://www-chronicle-com.gonzaga.idm.oclc.org/article/catholic-u-preaches-and-practices-preventive-law/.

That article noted that those open lawsuits and administrative agency complaints mentioned above—averaging seven lawsuits and eight agency complaints a year—had both decreased to zero by 2005. At that point, we had no open lawsuits or agency complaints. Our general liability insurance costs, according to a study by the University's insurance broker, dropped to being one-third of the average cost for educational institutions, and other insurance costs dropped likewise. Catholic's outside legal fees declined by about a quarter. Our longtime principal outside trial lawyer left practice to go on the bench in 2006, and said only half-kidding, "I've got to go, you put me out of a job."[20]

Bill Kaplin and Barbara Lee and their preventive law ideas got all the credit in that 2006 *Chronicle* article, with the *Chronicle* writing:

> The idea of practicing preventive law in higher education was developed more than two decades ago by William Kaplin, a professor at Catholic's law school. It has become a mantra among university attorneys. Many institutions say they embrace the strategy, which is designed to nip potential legal problems in the bud and keep them from blossoming into costly lawsuits, but Catholic has had more tangible success than others. … Placing comprehensive information online enables Catholic's administrators and faculty members to get quick answers to questions about legal issues. 'It keeps us out of trouble by telling us things to watch out for' said the dean of library science.[21]

Later in 2006, the U.S. Commission on the Future of Higher Education (known as the Spellings Commission, established in 2005 by the U.S. Secretary of Education Margaret Spellings) published an issue paper written by Peg O'Donnell and me, focused in large part on creating a "culture of compliance" on campus and why educating university employees about their responsibilities under federal regulations was the key to preserving the core values underlying those regulations, including the values of privacy and confidentiality, academic freedom, safety and dignity of students and equal opportunity.[22] I know from working with Bill and watching him speak over the decades at higher education law conferences that his appreciation of these values was an important part of what drove his efforts to develop preventive law practices. He was particularly passionate about equal opportunity as well as about academic freedom.

By 2008, with such a steep drop in litigation and complaints against the University, we had more time to fine-tune CUA's preventive law program, supported by occasional conversations with and observations from Bill. At the request of and with encouragement from our very supportive President Rev. David M. O'Connell,

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20 The Honorable James B. Sarsfield was an Associate Judge in the District Court of Maryland for Montgomery County, Maryland from 2006 to 2019. He was Catholic University's principal outside counsel from 1980 to 2006.

21 *See* Sanoff, *supra* note 19.

22 *See* Chester E. Finn, Jr., The Secretary of Education's Commission on the Future of Higher Education, Thomas Fordham Inst. (June 22, 2006), https://fordhaminstitute.org/national/commentary/national-dialogue-commission-report-draft (discussing the series of issue papers released at the request of Chairman Charles Miller).

C.M. (now the Bishop of Trenton, N.J.), Peg O'Donnell developed CUA's first "University Policy" webpage as well as CUA's first "Compliance" webpage, and very cleverly interlinked those two with our existing legal office website, effectively extending the reach of preventive law possibilities.

We branded it as our "Compliance Partners" program and trained University employees on how to use it. Anyone—staff, faculty, student, or parent—could look online at any of the three websites and be cross-linked to the relevant portions of the other two. For example, a parent concerned about campus safety at the University could look at the relevant policy on the policy page, find a link to the employee responsible for compliance with that policy in the campus safety office, and find a link to the underlying federal law and explanatory materials. In September 2009, the Compliance Partners program received the annual NACUBO Innovation Award "for process improvement and resource enhancement" from the National Association of College and University Business Officers.[23]

Bill's constant encouragement, participation in our preventive law events, and ready accessibility to our legal staff were extremely helpful to the successful development of the preventive law program at CUA. His favorite campus event by our office was the annual "Pie Day," in which the legal staff baked dozens of pies, invited about 100 of our best preventive law practitioners from among mostly senior academic and non-academic administrators, and treated them to pie while entertaining them, in appropriate costume, with song parodies aimed at top University administrators. Bill said of Pie Day, "It is a great example of [your office's] ability to make work fun."[24] He believed, as we did, that developing friendly personal relationships with campus managers was a key to getting them to pay attention to the issues important to the legal office.

Nationally, campus preventive law efforts today are supported by the Higher Education Compliance Alliance (HECA) website, created and maintained by the National Association of College and University Attorneys (NACUA).[25] This resource is supported by nearly 30 higher education associations. At the time the HECA website was created, Peg O'Donnell made the full CUA spreadsheet of federal laws and regulations, including the compliance calendar, available to HECA and that became the foundation for what today is updated and maintained by NACUA as the Compliance Matrix.[26] I think of that national resource for preventive law information as one part of Bill's legacy, sprung from seeds he planted in the 1980s, at Catholic University as well as at hundreds of other schools nationwide, and nurtured by him—in CUA's case, through three decades of patient, occasional, but supportive attention to the preventive law efforts of the school's legal office.

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23 *Innovation Award Honors the Catholic University of America*, NACUBO Bus. Officer, Sept. 2009, at 63.

24 This comment by Bill was in personal correspondence, comments he made on the occasion of my departure from Catholic University in 2009.

25 *See generally Higher Education Compliance Alliance*, https://www.higheredcompliance.org/ (last visited Oct. 18, 2025).

26 *Compliance Matrix*: *Higher Education Compliance Alliance*, https://www.higheredcompliance.org/compliance-matrix/ (last visited Oct. 18, 2025).

At the time of my departure from CUA in 2009, Bill wrote about our office's efforts to implement his preventive law theories: "Long ago I began writing about preventive law practices for colleges and universities. Craig liked the ideas; we discussed them; we did preventive law workshops for CUA staff; and Craig institutionalized preventive law practices in the CUA General Counsel's office [including] … developing an extensive Web site accessible to the entire country. [The General Counsel's office] clearly has been a national leader in the forefront of the preventive law movement."[27] I would say today that if we in the General Counsel's office had been taking a three decades-long course in preventive law from Professor Kaplin, those comments were his final grade.

I am happy with and grateful for that. It was the best course I ever took.

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27 *See supra* note 24.

BE A FOX:
What a University General Counsel Should Learn from William A. Kaplin to Thrive in the Time of Trump

WILLIAM E. THRO[*]

INTRODUCTION

A fox knows many things, but the hedgehog knows one thing.[1]

This special issue of the *Journal of College and University Law* (JCUL) honors Professor William A. Kaplin ("Bill"), who was the intellectual architect of higher education law.[2] At a time few institutions had an in-house general counsel,[3] Bill had a simple, but profound insight—virtually every aspect of the law applies differently in higher education than it does outside of academe.[4] In other words, the unique

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* B.A. (1986), Hanover College; M.A. (1988), the University of Melbourne; J.D. (1990), the University of Virginia. Mr. Thro is General Counsel of the University of Kentucky and previously served as the second Solicitor General of Virginia, the first University Counsel of Christopher Newport University, and as President of the Education Law Association and the National Education Finance Academy. He is the recipient of Stetson University's Kaplin Award for Higher Education Law & Policy Scholarship and the Education Law Association's McGhehey Award for contributions to education law. He also is a Fellow of the National Association of College and University Attorneys and the National Education Finance Academy. Mr. Thro writes in his personal capacity, and his views do not necessarily represent the views of the University of Kentucky. He also thanks Elizabeth Kaufer Busch, a frequent co-author, who jointly developed many of the ideas in Part IV. Mr. Thro thanks Linda Speakman for her editorial assistance.

1 The quote comes from a fragment attributed to the ancient Greek poet Archilochus (c. 680-c. 645 B.C) which was the inspiration for Isaiah Berlin's THE HEDGEHOG AND THE FOX: AN ESSAY ON TOLSTOY'S VIEW OF HISTORY (1953). James McPherson asserted that Abraham Lincoln was a hedgehog in his essay, *The Hedgehog and the Foxes*, in JAMES M. MCPHERSON, ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION 113 (1991).

2 Bill taught at the Catholic University of America's Columbus School of Law for more than forty years. *Remembering Professor Emeritus William Kaplin*, CATH. UNIV. COLUMBUS SCH. L. (November 5, 2024) https://www.law.edu/news-and-events/2024/11/2024-1105-Kaplin.html [hereinafter *Remembering Professor Emeritus William Kaplin*].

3 Louis H. Guard & Joyce P. Jacobson, ALL THE CAMPUS LAWYERS: LITIGATION, REGULATION, AND THE NEW ERA OF HIGHER EDUCATION 219-21 (2024). Having an in-house counsel is a relatively new development. One of my mentors, Brian A. Snow, became the first General Counsel for Colorado State University in 1989. Although the University of Kentucky had designated a lawyer as "General Counsel" back in the 1970s, the attorney maintained an extensive private practice in addition to his duties for the University. It was not until 1994, following the advocate's sudden death, that the University hired a full-time in-house counsel. Other large state universities have a similar experience.

4 The judiciary was beginning to treat higher education differently. For example, in *Regents of the*

circumstances of a campus lead to outcomes that are subtly, if not dramatically, different.[5] Bill's insight was inspiration for his treatise,[6] which became the "bible"[7] for higher education practitioners.[8] By systematically cataloging how the law was different when applied to campus, he ensured that every attorney—both in-house and external—recognized academia's unique environment. His treatise details why and how constitutional law, employment law, contracts, tax, intellectual property, and, in some instances, even civil litigation are subtlety different in the higher education context. Unlike the scholars who developed the fields of federal courts,[9] law & economics,[10] or critical race theory,[11] all of whom advocated a different analytical framework, Bill demonstrated that when colleges or universities were involved, there are unique considerations and, often, different outcomes.[12]

Bill's contributions extend far beyond his treatise. In an era when law reviews rarely published scholarly articles with a higher education orientation, Bill was an early editor of JCUL. At a time when there was no serious discussion of the intersection of the law and policy in higher education,[13] Bill played a major role in the development of Stetson University's Center for Excellence in Higher Education Law and Policy and the annual National Conference for Law & Higher Education.[14]

University of California v. Bakke, Justice Powell, in a portion of his opinion that was not joined by any other Justice, suggested that colleges and universities may consider race as one factor in the admission process as a means of obtaining the educational benefits of a diverse student body. 438 U.S. 265 (1978). Outside of higher education, consideration of race was limited to remedying the present-day effects of past intentional discrimination by the governmental entity.

5 *See* William E. Thro, *No Angels in Academe: Ending the Constitutional Deference to Public Higher Education*, 5 Belmont L. Rev. 27 (2018) (discussing equal protection, religious liberty, and due process outcomes in higher education).

6 William A. Kaplin, The Law of Higher Education (1st ed. 1978). Judge D. Brock Hornby, in a review in these pages, called it "the best treatment I have seen of the internal legal structure of colleges and universities, moving logically into liability questions." D. Brock Hornby, *Book Review*, 7 J.C. & U.L. 181, 183-84 (1980) (reviewing Kaplin's first edition of the treatise).

7 Martin Michaelson, *Review of William A. Kaplin and Barbara A. Lee's The Law of Higher Education*, 33 J.C. & U.L. 583, 584 (2006) (reviewing the fourth edition of the treatise).

8 The second edition of his treatise appeared in 1985. Barbara Lee joined him as a co-author for the third edition in 1995. The fourth edition appeared in 2006 and the fifth edition in 2013. The sixth edition, which included Neal Hutchens and Jacob Rooksby as co-authors, arrived in 2019. The seventh edition, which is smaller than the previous two volume set, appeared in 2024.

9 *See generally* Henry M. Hart, Jr. & Herbert Weschler, The Federal Courts and the Federal System (1st ed. 1953).

10 Richard Posner, Economic Analysis of the Law (1972); *The Problem of Social Cost*, 3 J. L. & Econ. 1 (1960).

11 Derek A. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518 (1980).

12 The closest analogy to Bill's work is the recognition that state supreme courts were relying on state constitutional provisions to reach results different from those in the federal courts. *See* A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 Va. L. Rev. 873 (1976); William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977).

13 Indeed, the only real discussion of how the law operated on campus was confined to lawyers attending at the National Association of College & University annual conferences.

14 During this annual conference, Stetson University presents an award named after Bill to someone

Bill's teaching focus was the "field of constitutional law, and in particular, those parts of the field concerning constitutional analysis and decision making,"[15] and he also was the founder of Catholic University's Law & Public Policy Program.[16] However, his legal scholarship was largely confined[17] to writing and then updating his monumental treatise.[18]

Yet, for all his significant accomplishments as a scholar, teacher, journal editor, academic center director, or conference founder, Bill's greatest legacy is the lesson that every university general counsel should, and indeed must, learn from him.[19] That lesson comes not from something he explicitly said or wrote, but by inference from his treatise, the scope of articles published in JCUL, and the myriad of topics discussed and debated at the center and conference he helped to establish. Bill's treatise demonstrates that almost every aspect of the law applies differently on campus, and the university general counsel *must know something about all facets of the law*.[20] Because JCUL is publishing articles on a variety of topics from a higher education perspective, the institution's chief legal officer should be familiar with those subjects. If centers and conferences are exploring how legal principles influence and inform educational policy, then the higher education general counsel must also understand the connection. Bill's lesson for a university general counsel is simple—be a Fox, not a Hedgehog.

This article examines the complex implications of the university general counsel being a Fox, counsel who knows many things, rather than a Hedgehog, counsel who knows one thing. First, it explains the importance, if not necessity, of a university general counsel being a Fox. This was particularly true when institutions first began to hire.[21] Second, it illustrates why a large contemporary university

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who has made significant contributions to law and higher education policy scholarship. Previous winners include Barbara Lee, Neal Hutchens, and Jacob Rooksby, all of whom were co-authors on subsequent editions of his treatise, as well as such giants in the field of higher education law as Judith Areen, Jay Dolmage, Amy Gajda, Gordon Gee, Oren Griffin, Richard Kahlenberg, Peter Lake, Michael Olivas, Robert O'Neil, Gary Pavela, Laura Rothstein, Patricia Salkin, and Leland Ware. It was one of the greatest honors of my life when I received the Kaplin Award at this conference from Bill himself in 2014.

15 William A. Kaplin, *Problem Solving and Storytelling in Constitutional Law Courses Constitutional Law: Themes for the Constitution's Third Century, by Daniel A. Farber, William N. Eskridge, Jr., and Philip P. Frickey. St. Paul, Minnesota: West Publishing*, 21 Seattle U. L. Rev. 885, 885 (1998).

16 *Remembering Professor Emeritus William Kaplin*, *supra* note 2.

17 Kaplin, *supra* note 15 (Bill's book review for *Seattle University Law Review*); William A. Kaplin, *A Typology and Critique of Title IX Sexual Harassment Law After Gebser and Davis*, 26 J.C. & U.L. 615 (2000) (Bill's article in JCUL).

18 *See* list of subsequent editions, *supra* note 8.

19 While the lesson is applicable to all university general counsel, it is particularly applicable to those who work at large state universities or private institutions with significant national presence.

20 *See, e.g.*, William E. Thro & Charles J. Russo, The Constitution on Campus: A Guide to Liberty and Equality in Public Higher Education (2022) (discussing the ramifications of federal constitutional law as applied to college campuses).

21 Guard & Jacobson, *supra* note 3, at 221 (documenting the growth in the number of members of the National Association of College & University Attorneys). Interestingly, when I became an Assistant Attorney General in Virginia in late 1997, Christopher Newport University, the College

needs a variety of Hedgehogs in the office of general counsel but must still have a Fox as the university general counsel. Third and most importantly, it explores the seven new paradigms that characterize the Time of Trump. These seven new paradigms demand new innovative solutions. Only a Fox, albeit one supported by numerous Hedgehogs, can guide higher education administrators through these turbulent times.

I. THE UNIVERSITY GENERAL COUNSEL MUST BE A FOX

The university general counsel, the person who serves as chief legal officer of the institution, must be a Fox. An expertise in constitutional law, employment law, corporate law, intellectual property, or civil litigation might make one a distinguished professor or a well-respected senior partner in a large law firm, but it does not make one an excellent general counsel for an institution of higher education.[22] Instead, to be an excellent general counsel for a college or university, one must have basic knowledge about almost every facet of law.[23] A higher education general counsel must be able to focus on the entire forest, rather than just one clump of trees. In other words, general counsel in this context must be able to focus on all the issues confronting the institution instead of a discrete set of issues that, while important, impact only a small part of the institution. The institution's general counsel must have a rudimentary understanding of virtually every legal issue.

Foundationally, all corporate in-house general counsel must be generalists, but it is particularly important for the higher education general counsel to be a Fox.[24] This is so for two reasons. First, the typical corporation focuses on one or two business activities, but institutions of higher education engage in a diverse range of different activities. The corporate general counsel knows many things about one big thing, the corporation's major activity. In contrast, the higher education general counsel must know many things about many things. For example, the general counsel of a health system knows about all aspects of healthcare, but has no reason to know about providing education, operating an apartment complex, running a chain of restaurants, or directing a professional sports team. Conversely, if the institution is a large research institution with an integrated health system and Power 4 athletics program, the chief legal officer must know many things about teaching undergraduates and graduates, student housing, dining services,

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of William & Mary, Longwood University, Norfolk State University, the University of Mary Washington, Virginia Military Institute, and Virginia State University did not have in-house legal counsel. Rather, each of those institutions was represented by a lawyer in the Education Section of the Virginia Attorney General's Office.

22 This does not mean that a general counsel cannot be an expert in one or more fields. For example, much of my scholarship, appellate advocacy, and teaching experience has focused on constitutional issues. However, as general counsel of a public land-grant university with an integrated health system and a Power 4 athletics program, I must be a Fox.

23 Guard & Jacobson, *supra* note 3, at 223.

24 Although there are significant differences between a private corporation and a large university, there are similarities. Indeed, some universities have revenues that are greater than corporations in the Fortune 500.

law enforcement, research administration, health care delivery, academic freedom, shared governance, and an athletic program that is analogous to the NBA or NFL.[25] In many States, the flagship public land-grant institution is the largest employer, the largest landlord, largest restaurant in terms of meals served, largest health care system, and the largest land owner. Indeed, if large universities were stand-alone communities, they would often be the size of small cities with 50,000 or more people on any given day.[26] Their annual budgets are often in the billions of dollars.

Second, as Bill taught us, higher education is different and higher education law reflects those differences. Consider the almost universal institutional practice of tenure. Except for the federal judiciary, higher education is the only part of American society where an individual can achieve a lifetime appointment, often at a six-figure salary, and maintain it for decades despite clear declines in productivity or demand for their classes. Although the private sector and military immediately terminate those who fail to meet performance standards for promotion, higher education gives a grace year to those who fail to achieve tenure. In other words, after telling someone that their performance is inadequate and their services are not needed, institutions continue to employ them in the same role for another year.

Similarly, consider higher education's practice of shared governance which allows faculty, who cannot be removed by the Board, to decide policy decisions or make recommendations that are often rubber stamped by administrators or boards.[27] A good leader will *always* seek input from a diversity of persons and viewpoints before deciding, but a good leader will *never* let a narrowly focused group actually make a decision. Certainly, faculty have expertise in their fields and that expertise should receive significant deference in curriculum matters, but being the leading expert on a particular subject does not qualify one to make decisions on the complex issues facing the university. There was a time when even state flagship institutions were small enterprises which could be run in a collaborative manner. With universities becoming multi-billion-dollar enterprises that are highly regulated by the state and federal governments, those days are long gone.

Moreover, there are laws that apply to higher education, but do not apply to other segments of society. For example, one could be an employment lawyer for years and be an expert on Title VII but be completely unaware of Title VI or Title IX. However, a university general counsel will need to know how Title VI applies to admissions and scholarships[28] and how Title IX applies to athletics and sexual

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25 Moreover, for private institutions subject to the National Labor Relations Act and for public institutions where the State has permitted collective bargaining among public university employees, the university general counsel must be familiar with labor relations.

26 Not surprisingly, they have their own police forces, who are often better trained than the local police force. Moreover, because there are unique challenges in policing a community with a substantial number of young adults, university police officers must be even better than their non-higher education counterparts.

27 Furthermore, in the case of public institutions, faculty are public employees who are not accountable to elected officials.

28 *See generally* Students for Fair Admissions v. President & Fellows of Harv. Coll., 600 U.S. 181 (2023).

assault.[29] The private sector does not worry about the federal or state constitutions, freedom of information acts, open meetings statutes, or public procurement codes, but the chief legal officer will have to grapple with these restrictions on a daily basis.

II. IN THE TWENTY-FIRST CENTURY, THE FOX NEEDS HEDGEHOGS

This Article focuses on the university general counsel or chief legal officer and *not* on those numerous attorneys who work in an office of the general counsel at a college or university and who regularly provide legal advice to the institution's administrators.[30] The reason for this narrow focus is simple: there is a fundamental difference between the role of higher education general counsel and the role of their subordinates. While attorneys within an office of general counsel certainly provide advice on what the law requires or prohibits, provide counsel on the development of policy, and seek to be problem solvers within the confines of the law,[31] more often than not, these individuals concentrate on a narrow, discrete area of the law such as health care, business transactions, employment law, student affairs, athletics, or intellectual property. They focus on a tree or a clump of trees rather than the whole forest. In a sense, they are not higher education lawyers, but lawyers with a particular area of expertise who work at a college or a university. With their narrow expertise, they are very much Hedgehogs—they know one thing well. [32]

For large universities in the third decade of the twenty-first century, the presence of Hedgehogs is essential. A public flagship land-grant institution with an integrated medical center and a Power 4 Conference athletics program likely will have tens of thousands of students (and almost as many employees), receive several hundred million dollars in research funding, provide health care to much of the State, develop numerous patents, and conduct sporting events that resemble NFL or NBA games. The institution must comply with a myriad of laws and regulations including

29 In the half century since its enactment, Title IX has become particularly complex. *See generally* Elizabeth Kaufer Busch & William E. Thro, Title IX: The Transformation of Sex Discrimination In Education (2018).

30 Similarly, in addition to faculty members, a college or university may employ persons who have a law degree, but who never actually represent the institution. Examples include Title IX coordinators, compliance officers, and those who develop commercial applications of intellectual property.

31 As I have said many times, including on the website of the University of Kentucky's Office of Legal Counsel, a lawyer who represents an institution of higher education has three roles. First, the lawyer is an "attorney" who tells the institutional administrators what the law requires and what it prohibits. The lawyer can never tell an administrator to fail to do what is required or do what is prohibited. Second, the lawyer is "counselor" who offers advice on the policy choices facing the institution. In the space between what the law prohibits and what it requires, an institution always acts legally or constitutionally, but that does not mean that the policy choice is wise. Third, the lawyer is a "problem solver" who seeks to find a way to achieve the institution's objectives within the parameters of the law. Often, there will be legal barriers that prevent the institution's objective from being achieved directly or in the manner originally contemplated, but a creative lawyer may be able to find a way to achieve the objective indirectly or in a different manner.

When a lawyer gives both legal and policy advice, the lawyer must be clear which is legal, and which is policy. It is a disservice to the institution to pretend that the lawyer's policy advice is an instruction as to what is legally prohibited or required.

32 Of course, many Hedgehogs join a general counsel's office and eventually acquire a broad expertise and become Foxes who go on to serve as university general counsel.

discrimination laws for both students and employees, health care compliance, research misconduct, immigration, export controls for national security purposes, and NCAA and College Sports Commission. Without the attorneys who focus on narrow areas of the law, the institution cannot function.

Moreover, as Martin Michaelson noted in his review of the fourth edition of Bill's treatise in 2007, there was "interminable thunderstorm of law—represented by the more than three-fold expansion of this treatise—that has poured down on higher education institutions in the past quarter century."[33] In the nearly two decades since Michaelson wrote those words, his "thunderstorm of law" has become a flash flood. For example, since 2007, higher education attorneys have dealt with the Title IX Dear Colleague Letter,[34] the ensuing litigation over due process in sexual assault cases,[35] the challenges to racial preferences in higher education,[36] the end of the NCAA's amateurism model,[37] and, of course, the challenges of Covid. [38] This does not include special challenges presented in the Time of Trump, as discussed below.

Yet, the complex legal realities of the contemporary university do not diminish the need for the chief legal officer to be a Fox. While the university general counsel in the year 2025 may spend more time managing the Hedgehogs than practicing law, it is still essential that the Fox is focused on the institution as a whole rather than a particular division or department. If the Fox is wise, the Fox will listen to the Hedgehogs' recommendations and seriously consider their advice. Still, it is the Fox, not some consensus of the Hedgehogs, who must make the determination as to what legal advice to give the President or Chancellor.[39]

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33 Michaelson, *supra* note 7, at 584.

34 *See* Rosyln Ali, *Dear Colleague Letter: Sexual Violence* (Apr. 4, 2011). In 2014, the Office of Civil Rights issued additional guidance. *See* Catherine E. Lhamon, *Questions and Answers on Title IX and Sexual Violence* (Apr. 24, 2014). Proposed regulations pursuant to the Violence Against Women Act were issued June 20, 2014, and final regulations were issued on October 20, 2014. Violence Against Women Act, 34 C.F.R. § 668 (2014).

35 *See* Samantha Harris & KC Johnson, *Campus Courts in Court: The Rise in Judicial Involvement in Campus Sexual Misconduct Adjudications*, 22 N.Y.U. J. L. & Pub. Pol'y, 49 (2019). For a discussion of the constitutional obligations to both the complainant and the respondent, *see* William E. Thro, *No Clash of Constitutional Values: Respecting Freedom & Equality in Public University Sexual Assault Cases*, 28 Regent U. L. Rev. 197 (2016).

36 *See* Students for Fair Admissions v. Fellows of Harv. Coll., 600 U.S. 181; Fisher v. Univ. of Tex., 579 U.S. 365 (2016) (*Fisher II*); Fisher v. Univ. of Tex., 570 U.S. 297 (2013) (*Fisher I*).

37 Nat'l Collegiate Athletic Ass'n v. Alston, 594 U.S. 69 (2021).

38 During the Covid pandemic, institutions had to figure out how to protect the campus community, continue to provide instruction, maintain all non-instructional operations, and, ultimately, remain financially viable, but there was an expectation that things would eventually return to the pre-Covid norms. While the Covid pandemic still echoes, particularly in terms of educational delays and our general acceptance of virtual meetings, normalcy generally has returned. That expectation does not apply to the Time of Trump. Instead, there is a sense that things will change fundamentally. While things might swing back from certain extremes, the pre-2025 status quo is not likely.

39 Although there is a tendency to find some reasonable compromise in the middle, a middle ground can often be wrong. We often forget that Solomon did not split the baby but used the suggestion to reach the correct choice. *See 1 Kings* 3:16-28 (telling the story of King Solomon settling a dispute involving custody of a child by offering to split the child in two).

Moreover, as institutions have become more complex, the role of the university general counsel has evolved. There was a time, particularly in the days before in-house counsel became common, when lawyers were not involved in decision-making, but simply engaged after a decision had been made. The attorney's job was to fit a decision that had already been made into the confines of what the law requires and what it prohibits. Today, the general counsel's role is more of a strategic partner for the institution.[40] The institution's senior leader will be part of the President or Chancellor's cabinet and play an active role in providing policy advice before the decision is made.

III. A FOX IS ESSENTIAL IN THE TIME OF TRUMP

When institutions decided that they needed an in-house counsel in the last decades of the twentieth century, the natural response was to hire a Fox or perhaps a Fox and a few younger Foxes to staff a small general counsel's office.[41] As higher education became more regulated and there was a need for more specialists, the university general counsel offices had to hire Hedgehogs. The model was a Fox serves as chief legal officer and supervises a group of Hedgehogs. Until recently, it seemed that this model would continue to be the norm. Then, everything changed—America entered the Time of Trump. The Time of Trump poses unprecedented and, in some instances, existential challenges for higher education.[42] The Time of Trump does not just represent a new paradigm—it represents *seven* new paradigms.

Many of these seven new paradigms are a direct result of the forty-seventh President, but others are the result of Supreme Court decisions, the transformation of intercollegiate athletics over the last four years, and a broad-based loss of confidence in higher education. To fully understand the implications of these paradigms and why a Fox as university general counsel is a necessity, one must briefly explore each of these paradigms.

First, the Supreme Court's decision in *Students for Fair Admissions v. President & Fellows of Harvard College*[43] removes race as a factor in higher education decision-making.[44] To explain, *any* consideration of race—even if designed to help racial

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40 Guard & Jacobson, *supra* note 3, at 197-202.

41 *Id.* at 224-25.

42 I litigated cases on behalf of higher education institutions from 1991 to 2000, served as in-house counsel at a public liberal arts university from 2000 to 2004 and again from 2008 to 2012, and as chief legal officer of a public land-grant research institution with an integrated medical center from 2012 to the present. From my perspective, the first months of the second Trump Administration were, by far, the most challenging.

43 600 U.S. 181 (2023).

44 Because the Equal Protection Clause and Title VI are co-extensive, *Students for Fair Admissions* is applicable to both public institutions and private institutions that receive federal funds. 600 U.S. 181 (2023); Gratz v. Bollinger, 539 U.S. 244, 276 n. 23 (2003).

minorities[45]—is subject to strict scrutiny.[46] To survive strict scrutiny, the institution must articulate a compelling governmental interest.[47] Historically, the Court has recognized three compelling governmental interests: (1) remedying the present-day effects of past intentional discrimination by the institution;[48] (2) in higher education, obtaining the educational benefits of a diverse student body; [49] and (3) preventing prison riots.[50] Just as significantly, the Supreme Court has explicitly rejected many other proposed compelling governmental interests, including remedying past societal discrimination;[51] maintaining racial balance;[52] correcting underrepresentation of minorities;[53] providing faculty role models for students;[54] increasing the number of physicians in underserved areas;[55] and making "the

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45 "[T]he analysis and level of scrutiny applied to determine the validity of [a racial] classification do not vary simply because the objective appears acceptable… . While the validity and importance of the objective may affect the outcome of the analysis, the analysis itself does not change." Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 n. 9 (1982). As the Supreme Court declared, "the mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight. Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice." City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989). "Therefore, the Court has "insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications, such as race-conscious university admissions or hiring policies, race-based preferences in government contracts, and race-based districting intended to improve minority representation." Johnson v. California, 543 U.S. 499, 505 (2005).

As Justice Thomas explained, the fact "these programs may be motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race." Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part). From a constitutional standpoint, "it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged." *Id.* In other words, "the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution." *Id.*

46 Adarand Constructors, Inc. v. Pena, 515 U.S. at 227; City of Richmond v. J.A. Croson Co., 488 U.S. at 505 (recognizing that "racial characteristics so seldom provide a relevant basis for disparate treatment" and racial classifications "are constitutional only if they are narrowly tailored to further compelling governmental interests."). Grutter v. Bollinger, 539 U.S. 306, 326 (2003). This is a very demanding standard, which few programs can survive. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007). As Chief Justice Roberts observed, "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Id.* at 748 (Roberts, C.J., joined by Scalia, Thomas, & Alito, JJ., announcing the judgment of the Court).

47 601 U.S. at 206-07.

48 *City of Richmond*, 488 U.S. at 504-05.

49 Grutter v. Bolinger, 539 U.S. at 328-30.

50 Johnson v. California, 543 U.S at 512-13.

51 Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., 551 U.S. at 731.

52 *Id.*; Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986).

53 488 U.S. at 507 (quoting Sheet Metal Workers v. EEOC, 478 U.S. 421, 494 (1986) (O'Connor, J., concurring in part and dissenting in part).

54 *Grutter*, 539 U.S. at 323-24; Wygant v. Jackson Bd. Educ., 476 U.S. at 267; Regents of the Univ. of Cal. v. Bakke, 438 U.S. at 307-10.

55 *Regents of the Univ. of Cal.*, 438 U.S. at 310-11.

objective of supplier diversity a reality."[56] Because most higher education institutions do not have present day effects of past intentional racial discrimination, they have relied on diversity.[57] Moreover, while the Court recognized diversity *only* in the context of a student body, college and universities extended the diversity rationale to faculty and staff hiring and even procurement.[58] Although the Court had rejected underrepresentation as a compelling governmental interest,[59] institutions frequently focused on the underrepresentation of women and minorities.[60]

Yet, in *Students for Fair Admissions* the Court emphatically rejected diversity as a compelling governmental interest.[61] Consequently, the sole justification for considering race in decisions regarding admissions, scholarships, faculty and staff hiring, and procurement disappeared. As most institutions cannot rely on present day effects of past racial discrimination by the institutions, higher education may not consider race. Moreover, by explicitly holding that federal anti-discrimination laws apply to individuals rather than groups, and that litigation procedures are the same for everyone, *Ames v. Ohio Department of Youth Services* reinforced *Students for Fair Admissions*.[62]

Second and relatedly, the Trump Administration has relied on *Students for Fair Admissions* to justify an aggressive campaign to change the culture of higher education.[63] After the murder of George Floyd, universities rushed to issue statements

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56 488 U.S. at 505-506.

57 Past discrimination is not enough to justify race-based decision making. Rather, there must still be present day effects of that discrimination. For example, the fact a university did not admit African Americans until the 1970s does not necessarily mean there are present day effects of that discrimination in the 2020s. Similarly, the fact one university engaged in intentional discrimination and there are lingering effects of this unconstitutional conduct does not justify the use of race by another institution.

58 The Supreme Court has never held "an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students" is a compelling governmental interest. 438 U.S. at 315. "A university is not permitted to define diversity as 'some specified percentage of a particular group merely because of its race or ethnic origin.'" Fisher v. Univ. of Tex., 570 U.S. at 311. "That would amount to outright racial balancing, which is patently unconstitutional." 539 U.S, at 330. "Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'" *Parents Involved in Cmty. Schs.*, 551 U.S. at 732.

59 488 U.S. at 507.

60 For example, higher education leaders rarely worried about the underrepresentation of men among nursing or elementary education majors.

61 600 U.S. at 214-15, 230.

62 Ames v. Ohio Dep't of Youth Servs., 605 U.S. 303 (2025).

63 *See* Pam Bondi, *Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination* (July 29, 2025) (available at https://www.justice.gov/ag/media/1409486/dl?inline=&utm_medium=email&utm_source=gov delivery); Craig Trainor, U.S. Department of Education, Office for Civil, Right, *Dear Colleague Letter: Title VI of the Civil Rights Act in Light of Students for Fair Admissions v. Harvard*, (Feb. 14, 2025) (available at https://www.ed.gov/media/document/dear-colleague-letter-sffa-v-harvard-109506.pdf); U.S. Department of Education, Office for Civil Rights, *Frequently Asked Questions About Racial References and Stereotypes under Title VI of the Civil Rights Act* (Feb. 28, 2025) [hereinafter *Frequently Asked Questions*] (available at https://

of solidarity and to embrace programs[64] promoting an ideology[65] that Yaschia Mounk calls the "identity synthesis."[66] Yet, after the October 7 Massacre in Israel, many university presidents remained silent or muted[67] as their campuses engaged in increasingly threatening activity, including calling for genocide of the Jewish population, bombarding Jewish students in university buildings,[68] or turning campuses into pro-Palestinian encampments.[69]

The President has responded to these developments by seeking to end so-called Diversity, Equity & Inclusion or "DEI"[70] programs. Although the Department of Education's guidance documents[71] have been enjoined in the courts,[72] the Administration continues to utilize the same broad interpretations of the Equal Protection Clause and Title VI theories.[73] Similarly, the Executive Branch has insisted that Title IX's prohibition on sex discrimination does not extend to gender identity.[74] Moreover, it has taken actions to ensure that transgender women do not play women's sports,[75] and initiated litigation against States that permit transgender women to play in women's sports at the high school level.[76]

Third and relatedly, the Executive Branch has sought to remake federal funding of research. Perhaps most significantly for higher education budgets in the long term, the agencies have tried to reduce the administrative overhead rate paid on federal grants.[77] Historically, institutions have received an administrative overhead

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www.ed.gov/media/document/frequently-asked-questions-about-racial-preferences-and-stereotypes-under-title-vi-of-civil-rights-act-109530.pdf).

A federal trial court enjoined the Department of Education from implanting or enforcing the *Dear Colleague Letter—Title VI* or the *Frequently Asked Questions*. *See* Nat'l Educ. Ass'n v. United States Dep't of Educ., 779 F. Supp. 3d 149 (D.N.H. 2025).

64 Elizabeth Kaufer Busch & William E. Thro, *The American Proposition on Campus: Academic Freedom and Academic Responsibility*, 49 J.C. & U.L. 143, 145 (2024).

65 *Id.*

66 Yascha Mounk, The Identity Trap 9 (2023) (describing a "body of ideas" that "draws on a broad variety of intellectual traditions and is centrally concerned with the role that identity categories like race, gender, and sexual orientation play in the world.").

67 Busch & Thro, *supra* note 64, at 146.

68 *Id*. at 146.

69 *Id.*

70 *See* Bondi, *supra* note 62; Exec. Order No. 14151, 90 C.F.R. § 8339 (Jan. 20, 2025) ("Ending Radical and Wasteful Government DEI Programs and Preferencing").

71 *See* Trainor, *supra* note 62*; Frequently Asked Questions*, *supra* note 62.

72 *See Nat'l Educ. Ass'n*, 779 F. Supp. 3d 149.

73 *See* Bondi, *supra* note 62.

74 Exec. Order No. 14168, 90 C.F.R. § 8615 (Jan. 20, 2025) ("Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government").

75 Exec. Order No. 14201, 90 C.F.R. § 9279 (Feb. 5, 2025) ("Keeping Men Out of Women's Sports").

76 United States v. Cal. Interscholastic Fed'n, No. 8:25-cv-1485 (C.D. Cal 2025).

77 Ailia Zehra, *NIH Cuts Overhead Fundings for Research*, The Hill (Feb 8, 2025) (available at https://thehill.com/policy/healthcare/5134501-nih-cuts-billions-from-research-overhead-funding/).

rate in excess of fifty percent, but the agencies intend to lower that rate to fifteen percent.[78] While federal trial courts have blocked these measures,[79] higher education associations have offered a compromise that is still substantially below what institutions received before 2025.[80] Moreover, to the extent that previous grants conflict with the President Trump's priorities, agencies have attempted to cancel grants.[81] The courts have blocked these efforts,[82] but, in the long term, grants may be simply denied or the new regulations may permit cancelations.[83]

Fourth, President Trump has embraced the theory of the unitary executive.[84] Defying long-standing tradition, he has fired members of the National Labor Relations Board and other independent agencies,[85] significantly restructured the Department of Education without congressional approval,[86] and enforced the federal statute[87] prohibiting in-state tuition for persons who are not lawfully present.[88] While the lower federal courts often enjoined these initiatives, the Supreme Court—at least so far—has allowed them to proceed.[89] Most significantly, the Court has curtailed the ability of federal trial courts to enter universal injunctions.[90]

Fifth and conversely, in a development that may slow the President's initiatives and those of future administrations, the Supreme Court has declared that the views of the Executive Branch concerning the meaning of statutes and regulations shall no longer receive judicial deference. To explain, the Constitution assumes that the final "interpretation of the laws" would be "the proper and peculiar province of the courts,"[91] but, in *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*,

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78 *See* 2 C.F.R. § 200.402.

79 Ass'n of Am. Univs. v. Nat'l Sci. Found., WL 1725857 (D. Mass. 2025); Massachusetts v. Nat'l Insts. of Health, 770 F. Supp.3d 277 (D. Mass. 2025).

80 *See Summary of Executive Orders*, COGR, https://www.cogr.edu/cogr-summary-executive-orders (last visited Oct. 9, 2025).

81 *See Tracking Trumps Higher Education Agenda Government Applies Ideological Standards for Research and Scholars*, Chron. Higher Educ. (2025) (available at https://www.chronicle.com/article/tracking-trumps-higher-ed-agenda).

82 Am. Pub. Health Ass'n v. Nat'l Inst. for Health, 2025 WL 1822487 (D. Mass. 2025).

83 *See HHS Suggests It Will Provide Less Notice and Opportunity for Grant and Contract Rules*, Crowell (March 3, 2025) (available at https://www.crowell.com/en/insights/client-alerts/hhs-suggests-it-will-provide-less-notice-and-opportunity-for-comment-on-grant-and-contract-rules).

84 *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L. J. 541, 597 (1994).

85 *See* Trump v. Wilcox, 145 S. Ct. 1415 (2025).

86 McMahon v. New York, 139 F.4th 63 (1st Cir. 2025) *cert. pending motion to stay*, 145 S. Ct. 2643 (2025).

87 8 U.S.C. § 1623(a).

88 United States v. Walz, 0:25-cv-2668 (D. Minn. 2025); United States v. Beshear, No. 3:25-cv-026 (E.D. Ky. 2025); United States v. Texas, No. 7:25-CV-55 (N.D. Tex. 2025).

89 *See* McMahon v. New York, 139 F.4th 63; Trump v. CASA, Inc., 606 U.S. 831 (2025); Off. of Pers. Mgmt. v. Am. Fed'n of Gov't Emps., 145 S. Ct. 1914 (2025); Trump v. Wilcox, 145 S. Ct. 1415; Dep't of Educ. v. California, 145 S. Ct. 966 (2025).

90 *See* Trump v. CASA, Inc., 606 U.S. 831.

91 The Federalist No. 78 (Alexander Hamilton). When a statute is ambiguous, the judiciary applies

the Court created an exception to the principles.[92] Under *Chevron* deference, if a statute administered by the Executive Branch was ambiguous, the judiciary must defer to any reasonable interpretation of the Executive Branch.[93]

Last year, in *Loper Bright Enterprises v. Raimondo*, the Court overruled *Chevron*.[94] As the Court observed, "*Chevron*'s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do."[95] *Chevron's* grave error was to assume "the inquiry is fundamentally different just because an administrative interpretation is in play. The very point of the traditional tools of statutory construction—the tools courts use every day—is to resolve statutory ambiguities."[96] Moreover, because properly promulgated regulations have the force and effect of a statute,[97] *Loper Bright* is equally applicable to an agency's interpretation of a regulation.[98]

For higher education, the consequences are clear—it is much easier to successfully challenge the often novel and expansive interpretations of the Executive Branch.[99]

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various canons of statutory interpretation. Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts (2012). But the judicial interpretation is binding on both the legislative and executive branches. Stern v. Marshall, 564 U.S. 462, 484 (2011). While "the longstanding practice of the government—like any other interpretive aid—can inform [a court's] determination of 'what the law is," the interpretation of the meaning of statutes, as "applied to justiciable controversies," is "exclusively a judicial function." NLRB v. Noel Canning, 573 U.S. 513, 525 (2014) (internal quotation marks omitted); United States v. American Trucking Ass'ns, Inc., 310 U.S. 534, 544, (1940).

92 467 U.S. 837 (1984).

93 *Id.*; Loper Bright Enters. v. Raimondo, 603 U.S. 369, 337 (2024) ("*Chevron* rested on 'a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.'") (internal citations omitted). It did not matter that the agency's interpretation was not the best interpretation, it simply mattered whether the agency's interpretation was reasonable. *See* Raymond M. Kethledge, *Hayek and the Rule of Law: Implications for Unenumerated Rights and the Administrative State*, 12 N.Y.U. J. L. & Liberty, 193, 213 (2020); 907 Whitehead Street, Inc. v. Secretary of Agriculture, 701 F.3d 1345, 1350 (11th Cir. 2012). Indeed, courts deferred to the agency's interpretation even when the agency *changed* its interpretation. Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981-82 (2005).

94 Loper Bright Enters. v. Raimondo, 603 U.S. at 400.

95 *Id*.

96 *Id.* Indeed, the Supreme Court recently said courts "are not obligated to accept administrative guidance that conflicts with the statutory language it purports to implement." City & Cnty. of San Francisco, Cal. v. Env't Prot. Agency, 145 S. Ct. 704, 720 (2025). Thus, it is the courts—not an executive agency—that should say what the law is. While an agency's views are entitled to "respect," the same is true of "any litigant's reasoning." Dayton Power & Light Co. v. Fed. Energy Regul. Comm'n, 126 F.4th 1107, 1136 (Nalbandian, J., concurring). The Court's "job is to interpret statues and exercise independent judgment." *Id*. at 1138.

97 Chrysler Corp. v. Brown, 441 U.S. 281, 295-96 (1979).

98 Before *Loper Bright*, the Court curtailed deference to agency interpretations of regulations. 603 U.S. at 400; Kisor v. Wilkie, 588 U.S. 558 (2019).

99 For example, many aspects of Title IX, including the three-part test for athletics, the requirement to adjudicate sexual assault claims between students, and the idea that Title IX applies to gender identity, are the result of guidance documents. Those interpretations no longer receive deference.

For example, the Trump Administration has taken an extraordinarily broad view of Title VI, Title VII, and Title IX.[100] Prior to *Loper Bright*, the judiciary would defer to those interpretations of the statutes, even though the federal government is stretching precedents.[101] After *Loper Bright*, federal officials must convince the judiciary that their interpretation is the best interpretation.[102] Instead of the unquestioning acceptance that higher education once applied to pronouncements from the U.S. Department of Education, institutions must be skeptical of any novel interpretation from any administration. [103]

Sixth, the Supreme Court's decision in *National Collegiate Athletic Association v. Alston*,[104] which prompted the lawsuit and settlement in *House v. NCAA*,[105] led to a transformation of college athletics. Student-athletes, who once received tuition, room, board, and cost of attendance and could transfer only if they sat out a year, now can receive a portion of a school's athletics revenues, pursue additional funds for their name, image, and likeness, and enjoy effective "unlimited free agency" with respect to transferring. Moreover, litigation regarding the implementation of the *House* settlement on antitrust and Title IX grounds seems inevitable. Congress is considering legislation[106] and President Trump has issued an executive order.[107] The only certainty regarding the future of intercollegiate athletics is that the realities of 2030 will be fundamentally different from the realities in 2025.

Seventh, there is a loss of confidence in higher education.[108] As Elizabeth Busch

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Elizabeth Kaufer Busch & William E. Thro, *Aligning Title IX with the American Proposition: The Implications of the Supreme Court's Limitations on Executive Power*, 427 Educ. L. Rep. 1 (2024); Elizabeth Kaufer Busch & William E. Thro, *Restoring Title IX's Constitutional Integrity,* 33 Marq. Sports L. Rev. 507 (2022).

100 *See* Bondi, *supra* note 63.

101 *Compare Students for Fair Admissions*, 601 U.S. at 230 ("nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration or otherwise), *with* Bondi, *supra* note 63, at 5 ("A federal funding program requires applicants to describe 'obstacles they have overcome' or submit a 'diversity statement' in a manner that advantages those experiences intrinsically tied to protected characteristics, using the narrative as a proxy for advantaging that protected characteristic in providing benefits.").

102 603 U.S. 369 at 400.

103 For example, during the Obama Administration, the federal government interpreted Title IX as requiring colleges and universities to set up a parallel justice system to deal with alleged sexual assaults. *See* Ali, *supra* note 34; Universities immediately set about hiring Title IX coordinators and setting up such a system. However, as Elizabeth Busch and I have argued, the Obama Administration's interpretation was dubious. *See* Elizabeth Kaufer Busch & William E. Thro, *Restoring Title IX's Constitutional Integrity,* 33 Marquette Sports L. Rev. 507 (2022); Busch & Thro, *Title IX: Transformation*, *supra* note 29.

104 594 U.S. 69 (2021).

105 In re: Coll. Athlete NIL Litig., 2025 WL 1675820 (N.D. Cal. 2025) (slip copy) (appeal filed).

106 H.R. 4312, 119th Cong. (2025-26).

107 Exec. Order No. 14322, 90 C.F.R. § 35281 (July 24, 2025) ("Saving College Sports").

108 For public institutions, this loss of confidence means more state legislative scrutiny. This has taken the form of bans on DEI, changes to governance structure, and increased regulation and accountability measures. Busch & Thro, *supra* note 64, at 145-46.

and I previously demonstrated in these pages,[109] there is an increased awareness that higher education has failed to cultivate a campus culture conducive to the pursuit of knowledge and the preservation of our Constitutional Republic.[110] Our institutions of higher learning have abandoned the search for truth to promote the prevailing popular opinion of the day and have failed to promulgate the legally required constitutional practices.[111] In other words, the Nation's colleges and universities increasingly fail to protect academic freedom of individuals by not equipping students, faculty, and staff with the skills to practice what John Inazu calls "confident pluralism."[112]

In the Time of Trump, every university general counsel must deal with all aspects of these new paradigms. The general counsel must tell the institution that, after *Students for Fair Admissions*, race cannot be a consideration and must develop new "race-neutral" strategies to achieve the institution's objectives. The chief legal officer must cope with the Trump Administration's aggressive efforts to transform higher education, retrench federal research funding, and test the limits of the unitary executive. The top attorney must adjust to a time when—for better or worse—there is no deference to a federal agency's interpretations and the only certainty in athletics is uncertainty. Looming over all these challenges is the public's sense that higher education has failed.

With the new paradigm of the Time of Trump, colleges and universities need a Fox as general counsel. The Hedgehogs are as essential as they ever have been, but the chief legal officer must have a basic knowledge about constitutional law, administrative law, antitrust, immigration, research financing, and seemingly dozens of other subjects. Moreover, while the university counsel will continue to tell administrators what the law requires and prohibits, and will provide policy advice, their primary focus is problem-solving. The new paradigm requires innovative solutions. Indeed, those institutions that fail to develop novel solutions might not survive. Those that develop the fresh solutions are likely to thrive.

IV. CONCLUSION

A half-century ago, Bill Kaplin had a eureka moment. He realized that the law applied differently in the higher education context. Special considerations applied when giving advice to an institution or its officers. That was the inspiration for his treatise and formed the basis for the lesson that every general counsel should

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109 *Id.*

110 Johns Hopkins University President Ronald Daniels has suggested that universities have a broad obligation to democratic society. Specifically, institutions must (1) promote access, mobility, and fairness; (2) educate students to participate in democracy; (3) create knowledge to check power; and (4) encourage dialogue among people with different perspectives, values, backgrounds, and experiences. Ronald J. Daniels, What Universities Owe Democracies (2021).

111 Instead, some faculty, administrators and students already assume they know answers to life's most difficult questions and lack tolerance for those who fail to recognize the "correct" momentary viewpoint.

112 *See generally* John D. Inazu, Confident Pluralism: Surviving And Thriving Through Deep Difference (2016).

learn—be a Fox who knows many things, not a Hedgehog who knows one big thing.

That lesson was especially applicable to those early in-house general counsels who were often solo or maybe had an assistant or two. It was equally applicable, albeit in a different way, as college and universities became more complex, and it was necessary to hire Hedgehogs who knew one big thing. If one is going to supervise a group of attorneys who have expertise in a variety of fields, one needs to have a basic knowledge of each of those fields. Now, in the Time of Trump, the lesson is essential. The new paradigms bring new challenges. If an institution is going to thrive or even just survive among all the legal, political, and financial uncertainties, it is essential that its general counsel is a Fox who knows many things. As he looks down from Heaven, Bill surely agrees.

WILLIAM A. KAPLIN AND WHAT HE BEGAT: The Law of Higher Education and the Codification and Development of Higher Education Law in the United States

*LAWRENCE WHITE**

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Colleges and universities today are probably the most heavily regulated organizations in the United States in terms of the number and types of statutes and judicial precedents with which they must comply.

— Barbara A. Lee†

I. WILLIAM A. KAPLIN: THE MAN AND THE SCHOLAR

William Albert Kaplin was born May 11, 1942, in Saratoga Springs, New York, and grew up in the Buffalo suburb of Tonawanda, New York. Staying close to home, he attended college at the University of Rochester. Later, he ventured a bit farther, but not much, to Cornell University Law School, where he was editor-in-chief of the *Cornell Law Review* and received his law degree in 1967.

Bill worked briefly for a large Washington law firm, then as law clerk on the United States Court of Appeals for the District of Columbia Circuit. In 1968, he accepted a position as an attorney-adviser in the general counsel's office of HEW, also known by its more formal name, the United States Department of Health, Education, and Welfare. HEW had been created fifteen years earlier in 1953 to consolidate in one Cabinet-level department all the federal government's programs and agencies promoting social welfare. Bill's duties at HEW included serving as special advisor to the Department's Assistant General Counsel for Education and counsel to the Department's education grant programs.

In 1970, at the age of 28, Bill joined the faculty of the Catholic University of America's Columbus School of Law, where he spent the remaining 43 years of his professional career. He wrote the first edition of his treatise *The Law of Higher Education* during the mid-1970s, just as colleges and universities across the nation were embarking in earnest on the process of institutionalizing in-house legal offices. From the appearance of the first edition of his treatise in 1978 until the publication

* Former Vice President and General Counsel, University of Delaware. B.A. *cum laude*, Harvard University; J.D., University of Pennsylvania.

† This is the first sentence in Barbara A. Lee, *Fifty Years of Higher Education Law: Turning the Kaleidoscope*, 36 J.C. & U.L. 649, 649 (2010). I am grateful for the assistance Barbara provided in the preparation of this Article. Barbara met Bill Kaplin at the beginning of their respective professional careers as higher education scholars, and she goes further back in Bill's history than almost anyone else in our field.

of the supplement to the sixth edition in 2024, Bill presided over the metamorphosis of his creation, from the work of one author to a collaborative effort involving a team of four co-authors; from one volume to multiple volumes with supplements; from a single work intended for all higher education administrators to separate works prepared for student affairs professionals, law school professors, and law school students; then, in recent years, into a website for delivering time-sensitive content to lawyers and their higher education clients.

Bill died on October 21, 2024, at the age of 82. He left his wife of 45 years, Barbara Ann, three daughters and a son, and sixteen grandchildren and great-grandchildren to whom he was "Grampa Bill."[1] Bill bestowed two extraordinary legacies on his profession: a collection of encyclopedic reference works charting the expansion and maturation of the field of higher education law, and a sense of identity on the part of its practitioners that theirs is a specialty field with its own subject-matter demands and its own professional and ethical expectations.

The Law of Higher Education has spent almost half a century atop the college lawyer's reading list. It occupies pride of place as the profession's indispensable, authoritative sourcebook on higher education law. "Likely few university law offices lack a well-thumbed copy of The Law of Higher Education," wrote one distinguished practitioner in 2007.[2] "Indeed, the college or university lawyer must be hermitic or dense who does not immediately know what is denoted by these unmistakable catchwords in our increasingly trespassed corner of the legal world: 'Kaplin & Lee.'"[3] Yet while the treatise has been reviewed and analyzed by law school faculty who specialize in higher education law, including some who have written treatises of their own on that topic, now is a propitious moment to reexamine Bill's work in our field. *The Law of Higher Education* was not the first attempt to codify higher education law. It is not the last, nor the longest. This Article endeavors to explore some questions that, while touched upon in other analyses of Bill's work, warrant more attention now that his work as a scholar, author, and colleague is done. These questions include:

How did the treatise come to be? That is not an easy question to answer because the company that published the treatise—Jossey-Bass Publishers, a relatively young company located across the country from the center of the publishing world in New York—underwent a series of corporate mergers and reorganizations and along

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1 I owe special debts of gratitude to Bill's wife, Barbara Ann Kaplin, and eldest daughter Colleen Kapklein, who provided indispensable information about Bill's life. The biographical details and dates in the opening paragraphs of this Article reflect the willingness of Kaplin family members to share personal materials in their possession, including in Barbara Ann's case files and notecards from Bill's treasure trove of reminiscences and memorabilia, and in Colleen's case first editions of the many bound volumes and supplements Bill produced from 1978 to 2024 while working on various editions of his treatise *The Law of Higher Education*. I thank the members of the Kaplin family for their assistance in making this Article possible.

2 Martin Michaelson, *Review of William A. Kaplin and Barbara A. Lee's The Law of Higher Education*, 33 J.C. & U.L. 583, 584 (2007). As described in this Article, the treatise is universally known as "Kaplin & Lee" by dint of the contribution Barbara A. Lee made to every published edition as co-author from the publication of the third edition in 1995 to the publication of the supplement to the sixth edition in 2024.

3 *Id.*

the way appears to have disposed of files that would have shed light on parts of the story. Bill's family preserved some of his correspondence, and from that we can piece together the editorial judgments that resulted in the book that has dominated its field for almost a half-century.

What was happening in higher education in the mid-1970s that made the moment ripe for publication of the first edition of Bill's treatise? With the benefit of hindsight, we can discern changes in the structure and breadth of higher education legal practice in the decades of the 1960s and '70s that matured the field—indeed, *turned it into a field*—and inspired both Bill's work and the work of other treatise authors and publishers who were laboring in that vineyard at the same time.

Why Bill? When Jossey-Bass approached him, Bill was an assistant professor with only a few years of law school teaching experience. He had shared co-authorship with three other people in producing a book-length work of legal scholarship, but that work was only peripherally related to higher education and was not nearly as comprehensive as the work Jossey-Bass envisioned. Why was Bill selected to write the treatise?

Finally, *what legacy did Bill leave for us through his more than four decades of treatise writing and editing?* In ways that were unimaginable two years or even one year ago, higher education is under frontal attack from the very agencies of government that until recently professed to be committed to the sector's long-term health and growth. At many of the nation's colleges and universities, the suddenness of that change and the threat it poses have altered higher education law practice in ways that none of us, Bill Kaplin included, could have anticipated. The practice of higher education law has been changed by the rapid emergence of new electronic technologies and the new ways we access legal materials and perform legal research. Is there still a place in our library for the treatise we have come to call Kaplin & Lee? This Article concludes with some observations on these questions, aided in part by prescient thinking Bill did during his lifetime on the subject of change in higher education and in the legal profession to which he belonged.

II. HIGHER EDUCATION LAW BEFORE THE KAPLIN TREATISE[4]

A. Origins of the "Law" of Higher Education, 1867 to 1944

Bill named his book *The Law of Higher Education*. What constitutes "the law" of higher education, and how has "the law" changed over time? Before Kaplin & Lee, scholars ascribed to the term "higher education law" a fairly narrow meaning: higher

4 That is the last time I will refer to *The Law of Higher Education* as "the Kaplin treatise." My copy is here on my desk. Like the rest of my colleagues in the field of higher education law, I refer to it as "Kaplin & Lee," the names of the co-authors who shepherded the treatise through its third through sixth editions from 1995 to 2020. Barbara Lee served as Dean of the School of Management and Labor Relations at Rutgers University and subsequently as Senior Vice President for Academic Affairs at Rutgers. Starting with the 6th edition, which was published in 2019, the treatise added two additional co-authors: Neal H. Hutchens, who is today Professor in the Department of Educational Policy Studies and Evaluation at the University of Kentucky, and Jacob H. Rooksby, Dean and Professor of Law at Gonzaga University School of Law. In this Article, the treatise will be referred to as "Kaplin & Lee," notwithstanding the fact that Barbara was not there for the early part of the ride and Neal and Jacob hopped aboard later.

education law referred to the forms of law (constitutions, statutes, regulations, and court decisions) promulgated by branches of government (legislatures, regulatory agencies, and courts) insofar as those laws applied to colleges and universities.[5]

As one will quickly discover, the best general starting point for discussion of any subject relating to the law of higher education in the United States is usually Kaplin & Lee. Before Bill Kaplin, scholars used the term "higher education law" to encompass all the forms of government action we now lump together as *government regulation*, forms every lawyer and law student is familiar with and knows how to find—federal and state constitutions, statutes, rules and regulations, and decisions of courts and regulatory bodies. Bill's treatise recognized that the output of legislatures, agencies, and courts represented one important part of higher education law, but he used a different spin to describe it; instead of referring to higher education law as a form of government regulatory law, he used a more interesting descriptive term: "external" law, or, more fulsomely, law "created and enforced by bodies external to the institution."[6] Bill then added a second category of law, which he referred to as "internal law," by which he meant "the law the institution creates for itself in its own exercise of institutional governance."[7] Internal law "delineates the authority of the institution and delegates portions of it to departmental and school faculties, to the student body, and sometimes to captive or affiliated organizations. Equally important, internal law establishes the rights and responsibilities of individual members of the campus community and the processes by which these rights and responsibilities are enforced."[8] Bill perceptively observed that government had already started more intrusively to use external law as a means of "circumscrib[ing] the internal law, thus limiting the institution's options in the creation of internal law."[9] Because of this distinction, Bill was among the first scholars to expand the notion of higher education "law" beyond direct government regulation to encompass an institution's own internal rules, regulations, and policies. He was also among the first to perceive the danger in allowing the government to use its external lawmaking power as a technique for coercing institutions to alter their own internal policies and rules, a power the federal government is exercising in unimagined ways today.

In sum, the "law" of higher education, as codified in Kaplin & Lee, encompasses the government regulations, the institution's own internal policies and rules, and any other legally enforceable standards of procedure or conduct that the institution, its trustees, its officers, its students, and its corps of faculty and staff must honor

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5 *See, e.g.*, Thomas Edward Blackwell, College Law: A Guide for Administrators (1961); 1-2 John S. Brubacher, The Law and Higher Education: A Casebook (1971). These two works, among the first to conceive of higher education law as a coherent field of study, confined themselves to examinations of judicial decisions, statutes, and regulations. A treatise published at almost the same time as the first edition of Kaplin & Lee used the same narrow approach: it plunged directly into substance without offering any definitional guidance as to what it meant by the "law" of higher education. *See generally* Harry T. Edwards & Virginia Davis Norden, Higher Education & The Law (1979).

6 William A. Kaplin & Barbara A. Lee, The Law of Higher Education 35 (6th ed. 2020).

7 *Id.* at 26.

8 *Id.* at 28.

9 *Id.* at 35.

and the violation of which subjects the institution or its agents to legal liability. As government regulation grows and assumes new forms, higher education law becomes more complex. As institutional policies and rules become longer and more difficult to parse, the role of the campus's legal team becomes more visible. As law accretes, so does risk. So, too, do the ways in which government can interfere in the decision-making processes and even dictate the outcomes of those processes.

Bill Kaplin embarked on his life's work at a propitious moment in the history of American postsecondary education, just as higher education law exploded in complexity and the role of campus counsel emerged from the shadows. One cannot appreciate the magnitude of the changes that occurred in American higher education in the 1960s and '70s without understanding the very different state of higher education law in the century and a half before Bill started his teaching career at Catholic University in 1970.

One reason, certainly, for government's hands-off approach to higher education in the early years of the republic was the tiny size of the higher education sector.[10] Historians estimate that, at the time of the American Revolution, there were fewer than ten colleges in the American colonies enrolling a total of fewer than one thousand students.[11] Once the war ended, the number of colleges in the former colonies grew and the aspirations of the founders of those colleges broadened. In his study of higher education's expansion after the end of the Revolutionary War, scholar David Robson observed that most of the young country's new colleges "arose on the edge of settlement" in the undeveloped interior and uninhabited boundary areas: indeed, he wrote, "their location on the frontier was one of the primary determinants of these colleges' character, for it led these colleges to develop functions, commitments, and curricular and atmospheric traits that differed somewhat from those of the established, seaboard colleges."[12] In the view of those colleges' founders, their institutions were founded for civic as well as pedagogic reasons: they were responsible not just for producing clergy but also for "forming the rising generation to virtue, knowledge, and useful literature, and thus, preserving in a community a succession of men qualified for discharging the offices of life with usefulness and reputation."[13]

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10 *See* Roger L. Geiger, *The Embryonic American College*, in The History of American Higher Education: Learning and Culture from the Founding to World War II 25-32 (2016).

11 *See* David W. Robson, *College Founding in the New Republic, 1776-1800*, 23 Hist. Educ. Q. 323-41 (1983); Jurgen Herbst, From Crisis to Crisis: American College Government 1636–1819, 1-4 (1982). Professor Geiger's book states that in the year the American Revolution began there were nine colleges in the colonies enrolling a total of 721 students. Geiger, *supra* note 10, at 76.

I describe these as historical "estimates" because colleges in pre-Revolutionary times were not required by colonial law to be chartered or otherwise approved. Enrollment was difficult to determine because students tended to remain enrolled only until hired as church ministers. "[T]here was little emphasis on completing degrees. Many students matriculated and then left college after a year or two, apparently with none of the stigma we now associate with 'dropouts.'" Jeff Doyle, *Graduating College Not Nearly as Important in Colonial Days*, in Deep Thoughts on Higher Ed, Dec. 17, 2023, https://deepthoughtshed.com/2023/12/17/hed-history-graduating-college-not-nearly-as-important-in-colonial-days/.

12 Robson, *supra* note 11.

13 *Id*. at 323 (quoting Reuben A. Guild, A History of Brown University 122 (1867)). Yale College

As colleges grew in number and assumed new responsibilities for promoting civic virtue, states took upon themselves statutory obligations to "charter" new institutions of postsecondary education. Chartering laws were generally structural, requiring, for example, governing boards and bestowing upon those boards enumerated duties and responsibilities. But they were also operational, assigning statutory obligations to boards and trustees in areas such as governance, curriculum, admission, student residential life, and finances. With new statutes came new oversight responsibilities for state authorities and the primitive start in the late nineteenth century of regional accreditation requirements.[14]

In the Civil War era, Congress enacted the first significant federal higher education laws. The Morrill Act of 1862 provided grants of land to states in the northern and western United States for the operation of so-called "land grant" colleges promoting agricultural and "mechanical" (read: engineering) education. Five years later, in 1867, Congress passed legislation creating the original Office of Education. That legislation, although modest in ambition, marked the first time Congress provided funding for general support of higher education. In the 1867 act, Congress articulated one of the central axioms that long informed this country's governmental policy-making philosophy on education: it was considered to be a local, not a federal, responsibility. The federal government, declared the Congressional sponsors of the 1867 legislation, could not be trusted to make educational policy or substitute its own policy-making authority for the authority of state and local officials.[15] The act explicitly restricted the new agency's powers to data collection and the issuance of assessment reports, prompting one scholar of higher education to decry the new agency as "a glass eye. It has no sight in it. It has no power. It cannot inspect the system of education anywhere in the United States."[16] The first Office of Education had one professional staff member, two

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President Ezra Stiles made the same point in an essay written in 1783 explaining the college's mission in post-revolutionary America: "In every community, while provision is made that all should be taught to read the Scriptures, the very useful parts of common education, a good proportion should be carried through the higher branches of literature … [for they] will form the civilian, the judge, the senator, the patrician, the man of useful eminence in society." Id.

14 *See generally* Martin Trow, *In Praise of Weakness: Chartering, The University of the United States, and Dartmouth College*, Ctr. Stud. Higher Educ. Univ. Cal. Berkeley (2003), https://cshe.berkeley.edu/sites/default/files/publications/2003_in_praise_of_weakness_chartering_the_university_of_the_united_states_and_dartmouth_college.pdf?utm_source=chatgpt.com; Edward C. Elliott & M. M. Chambers, Charters and Basic Laws of Selected American Colleges and Universities (1934).

15 Thomas A. Fretz, *The Morrill Land Grant Act of 1862 and the Changing of American Higher Education in America*, Univ. Md. Coll. Park (2008), https://escop.info/wp-content/uploads/2017/04/Morrill-Land-Grant-Act-and-Impacts.pdf (analyzing the extensive legislative history of the Morrill Act). An initial version of the legislation was passed by both houses of Congress in 1858—when hostilities between northern and southern members of Congress were at their pinnacle—only to be vetoed by President James Buchanan at the insistence of southern members of his party's Congressional delegation, who based their opposition on "the 'states-rights' argument … [that] education was the purview of the States, not the Federal Government." It is one of those ironies of history that, by the time Representative Justin Morrill reintroduced his bill in 1862, civil war had broken out and large numbers of southern senators and representatives had resigned from Congress and were no longer heard in opposition to the bill. *Id*. at 6, 7.

16 Throughline, *The First Department of Education*, Nat'l Pub. Radio, (June 12, 2025), https://www.npr.org/transcripts/1254056488 (quoting Christopher M. Span, Dean and Distinguished Professor

clerks, and an operating budget of $12,000, the mid-nineteen-century equivalent of about $300,000 today.[17] It was, in other words, tiny, even by nineteenth-century standards.[18] Two decades later, with Reconstruction as completed as it would ever be and with formerly rebellious states readmitted to the Union, Congress passed the Second Morrill Act of 1890, which extended the benefits of the first Morrill Act to the hitherto excluded former confederate states in the American South.[19]

As summarized in an early chapter of Kaplin & Lee, the enactment of the two Morrill Acts after the Civil War marked the moments when "[t]he federal government and state governments became heavily involved in postsecondary education, creating many new legal requirements and new forums for raising legal challenges."[20] What started as a trickle of federal legislation with the two Morill Acts and the 1867 law became, at roughly the time of Bill Kaplin's birth in 1942, a flood with a surge of legislation that changed forever the relationship between government and higher education and created much of the foundation of what we refer to now as the law of higher education.

B. Seeds of Modern Higher Education Law, 1944 to 1961

In an article of epic length and insight published in the *Journal of College and University Law* ("JCUL") in 2010, Steve Dunham, then General Counsel at the Johns Hopkins University, tracked the evolution of government regulation of colleges and universities from the earliest years of the pre-revolutionary colonies to the current era. Until America's entry into World War II in 1941, "higher education

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of the Graduate School of Education at Rutgers University New Brunswick).

17 Fretz, *supra* note 15.

18 *Id; see also* W. H. Hoffer, The "Two Great Pillars" of the State: The Supervision and Standardization of Education and Law Enforcement 1865–1876, 89-97 (2007).

19 Roger L. Geiger, *The Morrill Land Grant of 1862*, in The History of American Higher Education: Learning and Culture from the Founding to World War II 281-314 (2016). Although "[h]istorians generally speak of land-grant colleges with praise," the two nineteenth-century land-grant college laws have their darker aspects as well. *Id*. One is the extraordinary quantity of Native American reservation lands that were seized by state governments and rededicated to the construction of land-grant colleges. Margaret A. Nash, *Entangled Pasts: Land-Grant Colleges and American Indian Dispossession*, 59 Hist. Educ. Q. 437, 441-42 (2019) ("What few accounts of land-grant colleges do is place the colleges in the context of federal policy to remove the native inhabitants of the land."). Another is the fact that states, in constructing those colleges, were permitted under the first Morrill Act to exclude people of color from entitlement to enroll in those colleges. *Id*. As the National Archives drily noted in a paper categorizing the two Morrill Acts as "Milestone Documents" in American history:

> The Second Morrill Act of 1890 was aimed at the former Confederate states and sought to rectify this discrimination. It required states to establish separate land-grant institutions for Black students or demonstrate that admission was not restricted by race. The act granted money instead of land and resulted in the establishment of several historically Black universities and colleges, including Alabama A&M, Prairie View A&M University, and Tuskegee University.
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> *Milestone Documents: Morrill Act (1862),* Nat'l Archives, https://www.archives.gov/milestone-documents/morrill-act (last visited Dec. 13, 2025).

20 Kaplin, *supra* note 6, at 12.

institutions thrived largely independent of federal regulation and control."[21] During those days long past in the history of American higher education, what little regulation existed was imposed in the main by state governments.[22] "Between 1945 and today, all of this changed. Institutional autonomy has been limited by requirements of institutional compliance. Deference has been diluted by oversight. Academic freedom has been constrained by a maze of federal regulations."[23] We will see in the concluding sections of this Article how pronounced that change in federal focus—from deference to institutional prerogatives to punitive compliance with federal will—has been in the years since Steve Dunham's article appeared.

When and why did the focus shift to compliance? The federal government's nineteenth-century objectives in establishing the toothless Office of Education and fostering the creation of state agricultural and engineering colleges were policy-neutral, designed to promote higher education as a whole rather than affect its direction. But in the early years of World War II, the federal government needed something in return for its investment. As Steve Dunham observed, World War II federal oversight was different: it was, in a sense and to varying degrees, coercive, designed to "promote a specific federal or public policy agenda separate from the direct purpose of [federal] funding."[24] In its capacity as a purchaser—the nation's largest purchaser, by far—of goods and services, the federal government recognized the capabilities of America's research universities to provide necessary support, first for the war effort and subsequently to supply the nation's laboratories and hospitals with the materials President Johnson needed for the War on Poverty and Great Society legislative agendas. Twentieth-century federal laws came with specifications, regulatory requirements, and compliance processes.[25] They created new federal agencies to issue regulations and enforce compliance requirements. The result of this burst of new law, as Steve Dunham remarked in the opening paragraph of his article, was a 180-degree change in what had once been the federal government's hands-off approach to higher education policymaking:

> [Today the] law and governments touch virtually everything colleges and universities do, frequently with a heavy hand. While other parts of our economy have been affected by sweeping deregulation, the experience of

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21 Stephen S. Dunham, *Government Regulation of Higher Education: The Elephant in the Middle of the Room*, 36 J.C. &. U.L. 749, 750 (2010).

22 *Id*. (discussing how colleges and universities are created and organized under state law as legal entities that are also subject to state and federal constitutional, statutory, and common law and subject to strict regulations).

23 *Id*.

24 *Id*. at 751.

25 *See* National Council of University Research Administrators, Regulation and Compliance: A Compendium of Regulations and Certifications Applicable to Sponsored Programs (2022) (depicting the breadth of federal statutory and regulatory mandates with which colleges and universities must comply today). As that report makes clear, the regulatory era in federal policymaking that started with World War II packs a double whammy. It imposes substantial costs of compliance and it subjects colleges and universities to new legal exposures through the enactment of enforcement tools such as False Claims Act damages, debarment proceedings, qui tam actions, and enhanced forms of punishment under U.S. Sentencing Guidelines. *Id*. at iii-iv; *see also infra* text accompanying notes 37, 38, and 46.

> higher education is just the opposite. Colleges and universities may not yet be public utilities, but the trends are unmistakable.[26]

First chronologically was the sprawling law known as the G.I. Bill of Rights, formally the Servicemen's Readjustment Act of 1944.[27] As World War II entered its final stages, a study by the United States Department of Labor estimated that more than 16 million members of the armed forces—a number equivalent to almost 30 percent of the pre-war workforce—would be decommissioned and would return, unemployed, to the American labor market once the war was over.[28] Before the war, not many high school graduates enrolled in college, and the higher education sector consisted of few campuses, few college students, and few faculty members—certainly not enough to cope with an anticipated flood of college-age veterans when the war ended.

Congress responded by creating in the G.I. Bill a generously subsidized program of benefits and programs designed to make it easier for veterans to go to college. The law provided tuition benefits, subsistence allowances, payments for the costs of college books and supplies, and counseling services to assist veterans in continuing their educations.[29] The law's impact was transformative both for the nation and for the higher education sector. In 1940, the year before American involvement in the war started, the total enrollment of men and women in the nation's colleges and universities was less than 1.5 million students.[30] Those institutions employed a total of 258,000 faculty members and staff.[31] By 1960, after the G.I. Bill was fully implemented, American college and university enrollment had more than doubled, to 3.6 million, and employment at the nation's colleges and universities had almost tripled, to 736,000.[32] Today, according to the most recent federal data available, higher education institutions in the United States enroll 25 million students and employ 4.5 million faculty and staff members.[33] The number of institutions of higher education, which stood at just over 1,700 in 1940, has doubled to more

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26 Dunham, *supra* note 21, at 749-50.

27 58 Stat. 284 *codified* as 38 U.S.C. §§ 3451-3495.

28 *75 Years of the GI Bill: How Transformative It's Been*, U.S. Dep't Defense, (Jan. 9, 2019), https://www.defense.gov/News/Feature-Stories/story/Article/1727086/75-years-of-the-gi-bill-how-transformative-its-been/.

29 In 1944, the Social Security Administration published a lengthy summary of the GI Bill's principal features. *The G.I. Bill of Rights: An Analysis of the Servicemen's Readjustment Act of 1944*, Social Security Bulletin 3-13 (July 1944), https://www.ssa.gov/policy/docs/ssb/v7n7/v7n7p3.pdf. For a more user-friendly and considerably shorter description of the same terrain, see President Franklin D. Roosevelt, "Statement on Signing the G.I. Bill, June 22, 1944," *reprinted in* U.S. Department of Veterans Affairs, *Born of Controversy: The GI Bill of Rights* (undated), https://www.va.gov/opa/publications/celebrate/gi-bill.pdf.

30 *120 Years of American Education: A Statistical Profile*, U.S. Dep't Educ. 65, 75 (Thomas D. Syner, ed., 1993) https://nces.ed.gov/pubs93/93442.pdf.

31 *Id.* at 80.

32 *Id.* at 65, 75.

33 *Employment in colleges and universities*, Am. Ass'n Univ. Professors, https://data.aaup.org/bls-college-and-university-employment/ (last visited Dec. 16, 2025).

than 3,500.[34] Enacting the G.I. Bill was the most consequential decision the federal government ever made in the higher education realm, at least until recently.[35]

The second contributor to the growth of the nation's higher education sector after World War II was the rapid expansion of federal funding for scientific and engineering research. "Before World War II," Steve Dunham observes, "the federal government had supported scientific research but for the most part it had done so directly through federal employees in federal laboratories."[36] After the war, and as the next step in collaborations that grew out of the war, "the government expanded its support of science by awarding grants to university scientists to carry out government projects at the universities themselves. This defense-related work continued and expanded in the late 1940s and 1950s and was expanded further in the early 1950s to include funding for medical research from the National Institutes of Health."[37] With that level of funding came a veritable explosion of compliance, bookkeeping, and spending requirements for colleges and universities:

> Federal funding of research at colleges and universities is based on a contract model. The Government promises to fund the basic science … and scientists [at colleges and universities] promise that the research will be performed well and honestly and will provide a steady stream of discoveries that can be translated into new products, medicines, or weapons. In order to ensure that the colleges and universities perform the work "well and honestly," the government has adopted an increasing array of regulations. … To determine "honesty," for example, the government has adopted a framework to evaluate allegations of research and scientific misconduct and rules for determining conflict of interests. To determine that government money was in fact spent on the purposes for which it was provided, the government requires an effort-reporting system to determine that time is actually spent and properly allocated to each contract and an audit system to judge that expenses are

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34 *120 Years of American Education: A Statistical Profile*, U.S. Dep't Educ. 76, 80 (Thomas D. Syner, ed., 1993) https://nces.ed.gov/pubs93/93442.pdf; *Integrated Post Secondary Data System: 12 Month Enrollment*, Nat'l Center Educ. Stat., https://nces.ed.gov/ipeds/TrendGenerator/app/build-table/2/2?rid=6&ridv=51%7C48%7C42%7C39%7C37%7C36%7C17%7C2%7C4%7C6&cid=2&cidv=1 (last visited Nov. 26, 2025) (depicting that in 2023-24 there were 5,615 institutions of higher education); *Employment in colleges and universities*, Am. Ass'n Univ. Professors, https://data.aaup.org/bls-college-and-university-employment/ (last visited Nov. 26, 2025) (depicting college and university employment trends from January 1958 to February 2025).

35 William A. Kaplin, *Law on the Campus 1960-1985: Years of Growth and Challenge*, 12 J.C. & U.L. 269, 273-74 (1985) ("The G.I. Bill expansions of the late 1940s and early 1950s, and the 'baby-boom' expansion of the 1960s, brought large numbers of new students, faculty members, and administrative personnel into the educational process.").

36 Dunham, *supra* note 21, at 752.

37 *Id*. ("The amount of federal funding of research at colleges and universities has exploded since it began in the late 1940s. Starting from virtually zero, federal funding for research at higher education institutions, in constant year 2000 dollars, increased to approximately $6 billion in 1972, $7.7 billion in 1980, $11.87 billion in 1990, $17.5 billion in 2000, and $26 billion in 2005."). By 2023, the total had almost doubled again, to $49 billion. *InfoBrief: In FY 2023, Federal Science and Engineering Support for Higher Education Totaled $49 Billion; Federal R&D to Nonprofits Totaled $12 Billion*, Nat'l Ctr. Sci. & Eng'g Stat., (June 2, 2025), https://ncses.nsf.gov/pubs/nsf25341.

> properly incurred and attributed. *The contract model thus uses compliance with regulations as a means to ensure that the purposes of the funding are met.*[38]

The breadth of federal grant and contract regulation over the last four decades is nothing short of astounding. Between 1991 and 2018, the federal government imposed 110 new regulatory requirements on university grant recipients, causing universities to reallocate $7 billion of their own dollars to cover added compliance costs associated with new mandates.[39] These new federal regulations are detailed, arcane, and fraught with compliance risk for any university entrusted with the task of accounting for expenditure of federal monies.

C. Beginning of the Era of Explosive Growth in the Provision of Legal Services to Institutions of Higher Education, 1961 to the Vietnam Protest Era of the 1960s and 1970s

Other factors, too, added to the scope and volume of federal compliance mandates on college and university campuses in post-World War II America. Two of them were related. In the early 1960s, as the war in Southeast Asia grew in scale, college campuses erupted in war-related protest, some of which disrupted classroom activities and resulted in large-scale arrests.[40] In a law review article, Peter Ruger, longtime General Counsel at Washington University in Saint Louis, drew a direct connection between calls from campus administrators for legal assistance in dealing with college protests in the 1960s and the simultaneous establishment of in-house legal offices on some of the most severely disrupted campuses:

> A need for legal services to higher education was created by campus disruptions during the Vietnam era. Occasionally, court orders were sought to quell protest. The *Dixon v. Alabama State Board of Education* decision confirmed the existence of due process rights for students involved in disciplinary proceedings at public universities. The unpopularity of the war in Southeast Asia, and the concomitant aversion to strong sanctions against anti-war demonstrators, led to the creation of disciplinary codes, at both public and private institutions, that rivaled criminal codes. The eradication of doctrines of charitable immunity exposed private colleges to tort claims for the first time. … Colleges, faced with significant legal expenses for the first time, began hiring counsel, often from the firms already providing legal services to the institution.[41]

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38 Dunham, *supra* note 21, at 753 (emphasis added).

39 Lisa Mosely et al., *Reducing Administrative Burden in Federal Research Grants to Universities*, IBM Ctr. Bus. Gov't 13 (2020), https://www.businessofgovernment.org/sites/default/files/Reducing%20Administrative%20Burden%20in%20Federal%20Research%20Grants%20to%20Universities.pdf.

40 *Compare* Kenneth J. Heineman, Campus Wars: The Peace Movement At American State Universities in the Vietnam Era (1994) (providing a panoramic, dynamic, and trenchant account of Vietnam-era protests on American college campuses), *with* Joseph R. Gusfield, *Student Protest and University Response*, 395 Annals Am. Acad. Pol. & Soc. Sci. 26, (1971) *and* Kenneth Keniston & Michael Lerner, *Campus Characteristics and Campus Unrest*, 395 Annals Am. Acad. Pol. & Soc. Sci. 39 (1971) (containing a more detached and analytic examination of the same ground).

41 Peter H. Ruger, *The Practice and Profession of Higher Education Law*, 27 Stetson L. Rev. 175, 178

Dixon v. Alabama, the 1961 court decision referenced in that passage from the Ruger article, is generally regarded as one of the most significant judicial decisions in higher education history.[42] As Estelle Fishbein, the distinguished general counsel of the Johns Hopkins University, wrote, "the great assault on the traditional prerogatives of academic institutions began with the courts' willingness to entertain suits by students alleging violations of their constitutional rights by universities exercising inherent disciplinary powers. *Dixon v. Alabama State Board of Education* is the landmark case cited most frequently for the broad proposition that the disciplinary decisions of public universities must be cloaked with fundamental procedural safeguards."[43] *Dixon* "strikingly altered within several years the legal relationship which had existed for decades between the college and its students, and, in the end, quashed the in loco parentis approach to college administration."[44]

At the same time, something of even greater magnitude was feeding the need for legal involvement on campus. Legislatively, the decades of the 1960s and '70s were the most consequential in a generation. The period saw the enactment of the greatest bursts of social legislation since President Franklin Roosevelt's New Deal, first in the form of President Lyndon Johnson's War on Poverty and subsequently as President Johnson's Great Society. The bills and executive orders enacted during the 1960s included major voting rights and civil rights legislation; the birth of affirmative action programs; passage of the nation's first laws prohibiting racial discrimination and other forms of discrimination in hiring and promotion; prohibitions on gender discrimination and later on discrimination against the elderly and the disabled; the nation's first environmental protection laws; workplace safety laws; privacy laws; laws encouraging the unionization of faculty members and other sectors of the college workforce; and laws subjecting intercollegiate athletics to new levels of regulation—to mention but a few. Every law meant the promulgation of detailed implementing regulations and the creation of new agencies to enforce those regulations. On some college campuses, the very first student demonstrations were not against the Vietnam war but against racial discrimination.[45] The two causes—peace and equality—fed on each other and intensified college administrators' reliance on lawyers to assist with drafting campus policies and procedures, interpreting and advising on federal law, and handling the inevitable litigation.

By the mid-1970s, in brief, "forces outside the University, both by happenstance and by design, [had] so intruded upon and changed the structure of our institutions

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(1997) (footnotes omitted).

42 Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1960), *cert. denied*, 368 U.S. 930 (1961), *abrogated by* Walsh v. Hodge, 975 F.3d 475 (5th Cir. 2020).

43 Estelle A. Fishbein, *New Strings on the Ivory Tower: The Growth of Accountability in Colleges and Universities*, 12 J.C. & U.L. 381, 385-86 (1985).

44 Robert D. Bickel, *The Role of College or University Legal Counsel*, 3 J. L. & Ed. 73, 73-74 (1974).

45 *See generally* James L. Wood, The Sources of American Student Activism (1974); *Dartmouth Black Activism, Transforming Dartmouth: Oral Histories of Black Students from the 1960s – 1980s*, Dartmouth Coll. Libraries, https://course-exhibits.library.dartmouth.edu/s/HIST10_04/page/matthias3 (last visited Dec. 13, 2025) (tracing anti-war activism on that campus to student protests on civil rights issues in the 1960s).

that they [had] in effect become actual participants in the management of our colleges and universities."[46] For a mind-altering visual illustration of the burden faced by a college or university in complying with federal laws and regulations, nothing serves better than the "Compliance Matrix" assembled by the Higher Education Compliance Alliance, a project organized by the National Association of College and University Attorneys (NACUA) and supported through contributions from 29 other major national higher education organizations. The matrix takes the form of a 300-row, 20-column Microsoft Excel spreadsheet, updated often, that contains names and citations for hundreds of statutes and regulations listed alphabetically by subject matter.[47] Virtually none of the matrix entries predates the enactment of the G.I. Bill in 1944 (the small number of exceptions I could identify were to a handful of Depression-era laws such as the Social Security Act), and many come from the fifteen-year period between the start of campus anti-war protests in the early 1960s and the passage of major civil rights and environmental protection laws in the 1970s. It staggers the mind to envision the degree of regulatory compliance to which higher education is subjected now, and it is next to impossible to conjure up a vision of the very different higher education sector that existed before passage of the G.I. Bill, in the era when Bill Kaplin was born.

Bill saw early on that the investment of billions of federal dollars to increase the capabilities of higher education's scientific and biomedical infrastructure, while transforming higher education in indispensable and irreversible ways, posed a threat to its independence as well. In 1974, while Bill was hard at work on the first edition of Kaplin & Lee, Harvard President Derek Bok used his annual report to the Harvard Board of Overseers to deliver a pointed warning about the federal government's growing leverage over higher education through its power of appropriation. President Bok described many ways in which the federal government had become shrewder about targeting expenditures to serve explicitly partisan policy goals—for example, by requiring universities to provide various institutional certifications as a precondition for receiving general research support, even when the subject of the certification had little or nothing to do with the supported field of research—for examples, a pledge not to discriminate against minority or female applicants for admission or a pledge not to provide abortion coverage in institutionally-sponsored health care programs. Quoting Yale President Kingman Brewster, President Bok warned that "the government [had] adopted a philosophy best described as 'now that I have bought the button, I have a right to design the coat.'" In words that seem especially prescient today as college leaders grapple with ever more intrusive government efforts to regulate admission, hiring, expression, and instruction on campus, President Bok concluded with a warning for his presidential colleagues:

> It is important to … consider how public officials should employ their powers over our colleges and universities. Federal support has played an indispensable

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46 Estelle A. Fishbein, *New Strings on the Ivory Tower: The Growth of Accountability in Colleges and Universities*, 12 J.C. & U.L. 381, 381, 393 (1985) ("The past twenty-five years have demonstrated that there is no area of academic activity which is secure from federal intrusion.").

47 *Compliance Matrix*, Higher Educ. Compliance All., https://www.higheredcompliance.org/compliance-matrix/ (last updated Aug. 25, 2025).

> role in strengthening higher education. Having given its aid, the government is bound to continue exercising supervision, if only because higher education has become so large and the functions it performs so critical to the society. Yet precisely because these functions are so important, it is vital that the government use its powers wisely to protect the public interest without weakening the institutions it seeks to regulate.[48]

Bill Kaplin was one of the first scholars to see how federal regulation had become more intrusive in the 1970s. He understood how federal financial support, so eagerly sought by educators in the era after World War II, could turn into points of leverage when different federal officials, in a succeeding era, sought to impose different values on the higher education community. He could warn in a thoughtful 1985 law review article that "through the 1970s, a torrent of new regulations has been promulgated by federal and, to a lesser extent, state and local, agencies. Despite recent talk of government deregulation, most of these regulations are still in force, and new regulations are still being issued."[49] He foresaw that with new regulations would come new compliance obligations, new responsibilities for campus lawyers, and new risks of what can only be characterized as federal coercion through executive orders and agency enforcement actions. As Bill put it succinctly in his 1985 article, "the legal sanctions that such agencies may invoke can be substantial"[50]—to which I might add disproportionately so.

D. Growth of the "Lawyerization" of Higher Education in the 1970s [51]

Posterity records that the first university to engage the services of a dedicated in-house lawyer was the University of Alabama in 1895. According to an account written by one of that gentleman's successors, the university's board of trustees in that year appointed a member of the bar as Land Commissioner, Secretary of the Board, and University Attorney, the latter designation encompassing service as legal counsel on a part-time basis. Thirty years later, the part-time University Attorney at the University of Alabama was elevated to a full-time position in

48 Harry T. Edwards, *The Impact of Federal Regulation on Higher Education*, 23 Law Quadrangle (formerly Law Quad Notes) (1979), https://repository.law.umich.edu/lqnotes/vol23/iss3/6 (citing Derek Bok, *Annual Report to the Board of Overseers* (1974-75)).

49 William A. Kaplin, *Law on the Campus 1960-1985: Years of Growth and Challenge*, 12 J.C. & U.L. 269, 271 (1985).

50 *Id*.

51 That phrase—the "lawyerization" of higher education—appears to have been used first in the recently published *All the Campus Lawyers*, a book that attracted much attention in higher education legal circles when it appeared in 2024. "Lawyerization" is referred to in the introduction to that book as "a shorthand way of describing the increased regulatory and litigation pressures facing [institutions of higher education] against the broader backdrop of the increasing operational complexity of [higher education] and the increasing public scrutiny, politicization, and legislative interference with higher education and its campuses." Louis H. Guard & Joyce P. Jacobson, All the Campus Lawyers: Litigation, Regulation, and the New Era of Higher Education 8 (2024). In an essay in the *Chronicle of Higher Education* that accompanied the publication of their book, the authors got to the point more succinctly: by "lawyerization," they meant "wildly expanded legal presence on campuses." Louis H. Guard & Joyce P. Jacobson, *The Lawyerization of Higher Education*, Chron. Higher Educ., May 9, 2024, https://www.chronicle.com/article/the-lawyerization-of-higher-education/.

the first full-time, dedicated legal office on an American campus.[52] Prior to 1960, no more than a dozen institutions had in-house counsel, and there was little perception on the part of college and university administrators that legal issues required more than intermittent attention from volunteer trustees or part-time officials who happened to be lawyers.[53] In a short history of college lawyering in the 1950s and early '60s, one commentator related the story of Jacques Barzun, the eminent Columbia University scholar, dean, and provost who, upon retiring from the last of his administrative positions in 1967 and returning to the faculty, decided to write a book containing everything he knew about university administration. Wrote the commentator:

> [Barzun's] well-indexed book contained not a single reference to a legal issue so identified; and his final table of organization for an ideal university administration, listing forty senior positions and including the manager of the book store and the university staff decorator, did not show a place anywhere for a lawyer.[54]

Starting in the '60s, legal offices were created at an accelerating rate, until by 1994 almost eighty percent of NACUA's member institutions had in-house counsel's offices.[55] Paradigmatically, in-house counsel hired outside counsel and managed the work of attorneys employed at outside firms; performed portfolios of their own work for institutional clients; and made triage decisions about what work would be performed by outside lawyers and what would remain in-house.[56]

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52 A. Rufus Beale, *Delivery of Legal Service to Institutions of Higher Education*, 2 J.C. & U.L. 5, 6 (1974).

53 In a law review article written a decade after Beale's, Roderick K. Daane described what he referred to as the "paradigm" for legal assistance to colleges or universities in the first half of the twentieth century:

> [T]he attorney-trustee constituted the norm in the simpler era [before 1960]. The role of counsel in the Academy was viewed as very limited in those days, and the work was usually done *pro bono:* quick drafting or review of contracts, off-the-cuff guidance, ad hoc interpretations of legislation or corporate by-laws and the like. In-house attorneys were rare; litigation was very rare, and lawyer-trustees were generally glad to be of service to the old school.

Roderick K. Daane, *The Role of University Counsel*, 12 J.C. & U.L. 399, 399 (1985).

54 Thomas H. Wright, *Faculty and the Law Explosion: Assessing the Impact—A Twenty-Five Year Perspective (1960-85) for College and University Lawyers,* 12 J.C. & U.L. 363, 365 (1985). Tom Wright's article was written for a special journal issue commemorating NACUA's 25th anniversary. The seven articles collected in that issue—including one by Bill Kaplin—provide wonderful snapshots of the field of higher education law as it was constituted when it started to crystallize in 1960 and then as it evolved in the 1970s and early 1980s. It was toward the end of this quarter-century of growth in the field of higher education law that Bill wrote the first and second editions of THE LAW OF HIGHER EDUCATION.

55 *See* Ruger, *supra* note 41, at 180-81, nn. 43-48; Daane, *supra* note 53, at 402 ("In today's world [in 1985], many colleges or universities have been able to ignore Judge Norman Epstein's 'first law' for the proper use of counsel: Have one.") (quoting Norman Epstein, *The Use and Misuse of College and University Counsel*, 45 J. HIGHER ED. 635, 636 (1974)).

56 Daane, *supra* note 53, at 402 (discussing the evidence that a mix of inside and outside counsel provides the optimum legal service to college and university administrators, but the exact ratio varies by the specific needs of the institution).

With respect to the attributes of prototypical in-house college lawyers of the late 1950s and early 1960s, they tended to be experienced lawyers who, once employed at the institution, worked in a small office or, more likely, alone. They were hired primarily from general-practice law firms that either provided legal services to the institution or were represented on the institution's governing board. They possessed standard (for the era) notions of themselves as general practitioners conducting wide-ranging corporate practices marked by what one of them characterized as breadth rather than depth—"like the Platte River in Nebraska," he said, "a mile wide and an inch deep."[57]

Twenty-five years later, in-house legal practice had changed considerably. By 1985, NACUA[58] had grown from an organization of a few hundred institutional representatives to more than two thousand.[59] Campus legal offices had become larger on average. New hires tended to come from offices at other colleges and universities instead of law firms, suggesting the maturation of a career track in the field of higher education from entry-level position at one institution to a specialized position there or at a larger one. With the gradual evolution from generalist to specialist (which the entire legal field was experiencing at that time, not just the higher education sector),[60] the nature of the in-house legal office's work on a college or university campus broadened to encompass a wider variety of

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57 *Id.* at 400. For a wonderful evocation of practice in those mid-twentieth-century days, see Marvin E. Wright, *Counselor Gives College Law an A*, 46 THE COMPLEAT LAWYER 29, 29-31 (1985) ("Lawyers who represent banks, hospitals, or city government realize … that about half of the work load involves handling the normal questions that arise in their daily operation, but the other half requires familiarity with narrower legal questions that are unique to the type of client involved. … Similarly, a lawyer for a university or college must be aware that there is some unique law that *occasionally* will affect his or her client.") (emphasis added). That article was paired with one by Phillip M. Grier, NACUA's long-time executive director, who started with this anecdote:

> An in-house counsel for a state university was introduced at a bar meeting to a newly named partner in a law firm. Told that his colleague was house counsel for a university, the partner blurted, "But what do you do?" With a grin, the university lawyer replied, "I represent a corporate client that has 3,000 employees, major real estate holdings, a motor fleet ranging from road scrapers to airplanes, and an annual budget of about $200 million. How many clients like that do you have?"

Philip M. Grier, *Get Into University Law: College Law Provides Degree of Growth*, 2 THE COMPLEAT LAWYER 28, 28 (1985).

58 NACUA is an unusual professional association in that its "members" are institutions, not individuals. *See* Ruger, *supra* note 41, at 185. Each member institution—college, university, or multicampus university governing system—is entitled, through the application of variables such as enrollment and budget, to designate a formulaically determined number of "institutional representatives" who may attend NACUA's conferences and tap into NACUA's rich library of legal resources. *Id.* Small institutional members may have one or two institutional representatives. Large ones may have twenty or more. *See id.*

59 Today NACUA membership includes 1,650 campuses and 5,000 institutional representatives. *NACUA Membership*, NAT'L ASS'N COLL. & UNIV. ATT'YS, https://www.nacua.org/about-nacua/membership. It is by far the largest national organization serving the needs of attorneys who practice higher education law. *Id.*

60 *See* BEN W. HEINEMAN, JR., THE INSIDE COUNSEL REVOLUTION: RESOLVING THE PARTNER-GUARDIAN TENSION (2016); Ben W. Heineman, Jr. et al., *Lawyers as Professionals and Citizens: Key Roles and Responsibilities in the 21st Century*, HARVARD L. SCH. CTR. LEGAL PRO. (2014), https://clp.law.harvard.edu/knowledge-hub/reports/lawyers-as-professionals-and-as-citizens/.

roles. Dick Daane has written about the transformation of the legal office from its limited function before 1960 as one-person or two-person corporate counsel to a richer, more varied, and in some senses more rewarding role as a team of subject-area specialists supplementing deep knowledge of subject-area bodies of law with responsibilities for advising, strategizing, educating, mediating, managing, drafting, negotiating, and coaching for teams of administrative clients.[61]

This, then, was the state of play at the time Bill Kaplin joined the faculty at Catholic University Law School in 1970 and looked for a field of legal scholarship to make his own. He had worked for two years as a practicing higher education lawyer, in his case as attorney-adviser to the top-ranking federal lawyer charged with enforcing higher education laws and regulations at HEW. He joined the ranks of Catholic University's law school faculty with some awareness of changes in the field of higher education law, in particular the burgeoning number of laws and regulations with which colleges and universities were expected to comply. And he knew, like first-year assistant professors everywhere, that the Holy Grail of the quest for promotion and tenure was to get work published.

III. "THE TREATISE"

In his third year of law school at Cornell in 1966, Bill Kaplin co-authored a law review article on what was then an arcane subject: America's decentralized, haphazard, and idiosyncratic approach to the accreditation of colleges and universities, an approach that was markedly different in this country than in other Western democracies with developed higher education sectors.[62] As a higher education law specialist at HEW in 1969 and 1970, Bill wrote several additional articles on the accreditation process and other education-adjacent topics.[63] In his first year as a newly hired tenure-track faculty member, he had a heavy teaching load that included the required first-year course in Constitutional Law, an elective upper-level course in Local Government Law, and a third course that was unusual for law school curricula in 1970: an interdisciplinary course in higher education and the courts.[64] As a newly minted faculty member that year, he was something of an unusual commodity: the published author of several law review articles, an authority in the nascent field of higher education law, and one of the few lawyers on the faculty at any law school who had actually enforced postsecondary educational policy for the federal government.

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61 Daane, *supra* note 53, at 404-08.

62 William A. Kaplin & Hunter J. Phillip, *Legal Status of the Educational Accrediting Agency: Problems in Judicial Supervision and Governmental Regulation*, 52 Cornell L. Rev. 104 (1966-1967). The article was co-authored by Bill, who was then the journal's Editor-in-Chief, and J. Philip Hunter, a journal editor and subsequently a law firm partner for many decades in Elmira, New York.

63 William A. Kaplin, *Judicial Review of Accreditation: The Parsons College Case*, 40 J. Higher Educ. 543 (1969); William A. Kaplin, Review, *Rich Schools Poor Schools: The Promise of Equal Educational Opportunity*, 55 Cornell L. Rev. 152 (1969).

64 William A. Kaplin, *Respective Roles of Federal Government, State Governments, and Private Accrediting Agencies in the Governance of Postsecondary Education* 6 (1975), https://files.eric.ed.gov/fulltext/ED112816.pdf.

As Bill settled in as a law school faculty member, he continued to play a visible national role as an expert on college and university accreditation. One of his assignments as a HEW attorney-advisor had been to serve as HEW's liaison to the court during trial proceedings in the era's most significant litigation over accreditation, an antitrust lawsuit brought by Marjorie Webster Junior College following the decision by the institution's regional accrediting body that proprietary institutions—Marjorie Webster was a commercial, profit-making institution—were ineligible for accreditation.[65] In 1971, Bill published an account of the Marjorie Webster trial and subsequent appellate proceedings, characterizing the litigation as "one of the most historic higher education battles ever waged in the courts" and predicting that the decision in favor of the accreditor would have a "significant effect on the future of the profit motive in education."[66]

In his first few years at Catholic University, Bill provided time and services to the nation's most prominent organizations in the field of accreditation, the Council on Postsecondary Accreditation ("COPA"), as an author and consultant. COPA asked Bill to convert his writings on accreditation into a monograph on what was then a lively topic in higher education policy circles: whether the federal government should expand its regulatory oversight over college and university accreditation, which up until then had been largely the province of private regional accrediting agencies. The result in 1973 was Bill's lengthy monograph bearing a mouthful of a title: *Respective Roles of Federal Government, State Governments, and Private Accrediting Agencies in the Governance of Postsecondary Education*. On a topic of considerable technical and political complexity, Bill's prose was characteristically concise, and his conclusion measured. "The status quo regarding postsecondary educational governance is not acceptable," he wrote.[67] He urged his former employers at HEW to "devise and enforce programmatic requirements which guard against particular consumer abuses arising under particular aid programs; and establish and enforce prohibitions against deceptive and fraudulent practices which are interstate in scope and thus cannot be adequately handled by the states."[68] COPA was pleased with Bill's work, recommended his services to other national higher education organizations, and described him in promotional materials as one of the nation's leading authorities on accreditation and the law.[69]

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65 Marjorie Webster Junior Coll. v. Middle States Ass'n of Coll. and Secondary Schs., 302 F. Supp. 459 (D.D.C. 1969), *rev'd*, 432 F.2d 650 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 965 (1970).

66 William A. Kaplin, *The Marjorie Webster Decisions on Accreditation*, 52 EDUC. REC. 219, 219, 224 (1971).

67 Kaplin, *Respective Roles*, *supra* note 64, at 6.

68 *Id*. at 26, 28.

69 Brief mention should be made of the book Bill co-authored in 1973. *State, School, and Family: Cases and Materials on Law and Education* was published by Matthew Bender and Company, one of the nation's oldest and most prominent publishers of legal casebooks. It appeared in a format that was common at that time but has largely disappeared today: a three-ring-bound looseleaf volume that was meant to be disassembled at regular intervals and supplemented with updates. Bill had three co-authors, two of whom—Michael S. Sorgen & Patrick S. Duffy—were faculty members at University of California campuses and the third, Ephraim Margolin, a practicing attorney in California. The book, as can be discerned from its subtitle, was intended to serve as a casebook for law school faculty members teaching education law courses. Most of its content focused on constitutional issues in public elementary and secondary schools. In many respects it was a bare-bones publication, with only the most rudimentary of introductions and indices and

Across the country in San Francisco, a young entrepreneur was hard at work on a new publishing venture. Allen Jossey-Bass had attended graduate school in Berkeley and worked for nine years as a sales representative and editor at Prentice-Hall before launching his own eponymously named publishing company in 1966 while he was still in his thirties. Four years later in 1970, the company inaugurated a new imprint called the "Jossey-Bass Series in Higher Education." The publisher's higher education books were conceived as practical how-to manuals for targeted segments of the higher education workforce—senior administrators, faculty, student affairs professionals, and others. Between 1970 and 1974, Jossey-Bass published a half-dozen well received books under its higher education imprint, several of which garnered critical praise.[70]

Jossey-Bass was not the first publishing house to explore the market for higher education books. As early as 1936, the Carnegie Foundation for the Advancement of Teaching released *The Colleges and the Courts*, a compendium of judicial decisions on higher education issues.[71] That 600-page volume, co-authored by American Council on Education (ACE) staff member Merritt Madison Chambers and university president Edward C. Elliot (two non-lawyers), was intended for an audience of "educational administrators" and "students not trained in the law," and was organized along "three dimensions—that of the individual, that of the social ideals of the age, and that of the institutional mechanism."[72] For a book of such length and ambition, it had some peculiar imbalances: very little on faculty, only passing references to students, and not a word on academic freedom or the expressional rights of members of the campus community. Those shortcomings notwithstanding, the Chambers-Elliot book proved to be so successful that it was turned into a series (with subsequent volumes authored by Chambers alone), and eight additional volumes were published between 1941 and 1976. By the last, Chambers' work had been converted into two volumes, one on students and the other on faculty and staff; the latter volume added in passing a small selection of legal issues, including the contractual rights of employees and short treatments of

virtually no mention of issues pertinent to higher education. *See generally* MICHAEL S. SORGEN ET AL., STATE, SCHOOL, AND FAMILY: CASES AND MATERIALS ON LAW AND EDUCATION (1973).

70 *See generally Update on a Higher Education Bibliography, 1976*, ASS'N STUDY HIGHER EDUC. (Christine G. Howe and Jan B. Kubik, eds.), https://files.eric.ed.gov/fulltext/ED129139.pdf. Among the initial titles in the series was one that gained particular praise from reviewers and attention from scholars: Professor Arthur W. Chickering's *Education and Identity*, published in 1970 and widely recognized as an influential work in the field of college student development and identity. Tracy Davis, *A Look Back at Influential Books in Student Development*, J. COLL. STUDENT DEV. 629, (2019) (the first edition of Chickering's book and the subsequent second edition by Chickering and Linda Reisser were "seminal" and "stimulated as much follow-up research as any book in the field over the past 25 years") (citing J. H. Schuh, *Review of the book Education and identity, by A. W. Chickering & L. Reisser*, 35 J. Coll. Student Dev. 310-312 (1993)); *Bibliography*, Jossey-Bass, https://cir.nii.ac.jp/crid/1130000796621425024 (detailing the complete bibliography of 200 plus Jossey-Bass books on higher education).

71 EDWARD C. ELLIOTT & M. M. CHAMBERS, THE COLLEGES AND THE COURTS; JUDICIAL DECISIONS REGARDING INSTITUTIONS OF HIGHER EDUCATION IN THE UNITED STATES (1936) (available at https://babel.hathitrust.org/cgi/pt?id=mdp.39015037402487&seq=21).

72 *Id*. at vii, viii.

tax law issues and tort liability.[73] In its organizational structure and its ambition to produce a reference work that would be of interest to both administrators and students of higher education, this series of volumes is considered to be the first attempt at a synthesis of the law of higher education and the precursor to the many books that followed.[74]

In 1951, the academic press at Washington University in Saint Louis published a slim volume by Thomas Edward Blackwell called *Current Legal Problems of Colleges and Universities, 1949-50.* Blackwell was the Vice Chancellor at Washington University in Saint Louis and the author of "Legal Problems of Colleges and Universities," a regular series of columns that were published in the professional journal of the National Association of College and University Business Officers. His book consisted of twelve technical articles on topics such as "The Creation of a Charitable Trust" and "Should Colleges Carry Liability Insurance?"[75] A decade later, Blackwell produced a book of a different sort when ACE published his *College Law: A Guide for Administrators* (1961). That book—350 pages long, written in simple, vernacular prose, well and logically organized—was explicitly written for administrators. Its purpose was explained by Arthur S. Adams, ACE's President, in the introduction:

> This book does not represent an attempt to make every college administrator into a lawyer. Its primary purpose is to give the college administrator an awareness and understanding of basic law and legal concepts as they relate to the colleges. It is intended to assist administrators in planning procedures in order to avoid the possibility of litigation. By calling attention to the importance of reviewing day-by-day procedures to make sure they include sound legal safeguards, it is intended to encourage the recognition of incipient legal difficulties that require the services of an attorney. Although not especially addressed to lawyers themselves, I am sure this book will be a useful guide to those attorneys with colleges as their clients.[76]

In the 1961 ACE publication, we begin to see the antecedents of what would become Bill Kaplin's approach to systematizing and giving content to higher education law a decade and a half later. Blackwell's book begins with simple explanations of legal terminology ("common law," "statute," "regulation," "due process" and the like), establishing at the outset that it is not for a narrow audience of lawyers. It uses an organizational scheme that will be comforting to the 99 percent of higher education administrators who lack legal training. It tracks, more or less, the university's own organization, starting with its governing board and governing

73 Gail Sorenson, *Review Essay: Teaching Higher Education Law,* 7 Rev. Higher Ed. 295 (1984) (relating the history of the Chambers-Elliot series).

74 Barbara Lee, *Fifty Years of Higher Education Law: Turning the Kaleidoscope*, 36 J.C. & U.L. 649, 651, n. 11 (2010) (addressing the importance of the Chambers-Elliot series in development of higher education law).

75 Thomas Edward Blackwell, Current Legal Problems of Colleges and Universities, 1949-1950 (1951) (available at https://babel.hathitrust.org/cgi/pt?id=wu.89097897904&seq=1).

76 *Id*. at 5. I have taken the liberty of editing this passage in minor non-substantive respects to replace language from more than a half-century ago that could strike the contemporary reader as anachronistic.

documents, moving on to lengthy treatments of the university's most important groups of people (faculty and students), delving into subject-matter areas that involve the most interaction between administrators and lawyers (stewardship of university assets, the conduct of research, how university assets are held), and concluding with a final section addressing unique legal issues that surface when the client is a public institution. Like most books addressed to general readers, it makes sparing use of footnotes. The prose is straightforward. Paragraphs are not overly long. While court decisions, statutes, and other legal materials are cited and discussed, their texts are rarely reproduced and never at length.

Blackwell's book reflects the earlier, simpler age in which it was written. It minimizes statutory and regulatory law as components of the law of higher education, for the obvious reason that there was not that much of it when Blackwell's book was published in 1961. But there, in what the ACE commissioned, were the seeds of the approach Bill Kaplin adopted when it was his turn a decade later to try his hand at organizing the corpus of material he called "the law of higher education": make it accessible and pertinent to administrators; take advantage of the university's own organizational chart to structure it; write in straightforward fashion; and keep the hallmarks of old-fashioned legal writing—verbatim reproduction of legal source material and pages covered in footnotes—as far from the text as possible.

After Blackwell's book, others followed. They were not cut from the same cloth, however. Books published in the early 1970s on higher education law were, by and large, textbooks and casebooks prepared for use in law school and graduate school courses. Examples included *The Law and Higher Education: A Casebook*, written by University of Michigan faculty member John S. Brubacher and published by Fairleigh Dickinson University Press in 1971; and *College and University Law,* co-written by Samuel Kern Alexander, Jr., a university president and scholar of educational philosophy, and Erwin S. Solomon, a practicing Virginia lawyer, which was published by the Michie Company, a prominent specialist in legal materials, textbooks, and casebooks, in 1972.[77] Jossey-Bass had already dipped its toes in these waters with the publication of two books as part of its "Series in Higher Education": John Brubacher's *The Courts and Higher Education*, a relatively short book published in 1971, and a book by Professors Paul L. Dressel and Lewis B. Mayhew in 1974 titled *Higher Education as a Field of Study*. The Brubacher book was an account of '60s-era court decisions on student and faculty issues. It contained little analysis or synthesis and contributed nothing new to Chambers's series of books, which were at that point into their seventh edition. The Dressel-Mayhew book, on the other hand, boasted of "[a]n almost new component of the field of higher education" in the form of interpretations and analysis of "legislated and administrative law" to supplement what by then had become the standard diet of copiously reproduced court decisions.[78] The discussion of laws and regulations in the Dressel-Mayhew book was scanty and incomplete, at least in comparison to what Bill Kaplin produced four years later when his treatise appeared. But it was sufficiently novel to catch the attention of one well-informed reviewer—law

77 Sorenson, *supra* note 73, at 297-98 (discussing the evolution of teaching higher education law).

78 Paul Leroy Dressel & Lewis B. Mayhew, Higher Education as a Field of Study 88, 115-16 (1974).

professor and future casebook author, Michael Olivas—who described the book as "a major advance" and a sign that higher education law was at last rounding a corner and evolving into "a maturing field of study."[79]

We do not know when, how, or by whom, but around the time Jossey-Bass published the Dressel-Mayhew book someone in the publishing house contacted Bill Kaplin and asked him whether he would try his hand at writing a comprehensive treatise on higher education law. We know that because, in the autumn of 1975, Bill hand-wrote a letter on lined notebook paper to the acting dean of Catholic University's law school requesting sabbatical leave to work on the book.[80] At that point he had prepared a detailed outline of the book, which was tentatively titled *Law and the Administration of Postsecondary Education*. The dean forwarded Bill's letter to the university provost with a cover memorandum endorsing the sabbatical leave request. The dean described the book as "a comprehensive work covering a great many problem areas affecting colleges and universities," and ventured his opinion that the book "would undoubtedly be the authoritative work in that field."[81] The book would "further enhance Professor Kaplin's stature in the Law and Education field," the dean added, "one in which he teaches an excellent and imaginative course for us."

In 1978, when Bill prepared his application for promotion to the rank of full professor,[82] he included an endorsement letter in his dossier from J.B. Hefferlin, who identified himself as Jossey-Bass's "Editor, Higher Education." The letter, addressed to Catholic University's law school dean, is, to the best of my knowledge, the only existing communication from Jossey-Bass explaining the origin of Bill's book and the publisher's goal in commissioning it:

> I'm pleased to report on Professor Kaplin's major handbook on the law and the administration of higher education that we at Jossey-Bass will be producing later in the year.

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79 Michael A. Olivas, *Introduction to Higher Education Law*, 7 Rev. Higher Ed. 293, 294 (1984).

80 Bill retained the letter and related documents in his personal correspondence files, which were left with his wife in Virginia upon his passing in 2024. I have copies of these documents as well. William A. Kaplin, Note (1975) (unpublished manuscript) (on file with author).

81 *Id.*

82 Forgive me for this delightful digression concerning Bill's faculty rank. The Catholic University of America is the only American university founded by the United States Conference of Catholic Bishops and one of only three American postsecondary institutions granted a charter by the Holy See. Pontifical universities use idiosyncratic terms to designate tenured faculty ranks. After an initial term appointment as assistant professor, a successful applicant for tenure at a pontifical university is promoted to the rank of "Extraordinary Professor," the equivalent of associate professor in the standard American system. Promotion to what would be a full professorship at another American university results at a pontifical university in bestowal of the title "Ordinary Professor," the highest obtainable professorial rank. *See* Holy See, *Teachers: Regulations*, Dicastery Culture Educ., http://www.educatio.va/content/cec/en/ecclesiastical-institutions-of-higher-education/teachers-regulations.html. Catholic University dispensed with the unusual "Extraordinary Professor" substitute for the initial tenured rank but preserved the pontifical "Ordinary Professor" rank in lieu of what would have been professorial or full professorial rank at any other institution. For most of his teaching career, then, Bill served at the rank of "Ordinary Professor"—a title that befits the self-effacing man his colleagues and friends knew.

> Several years ago, when we realized we should commission a definitive volume for college and university administrators about the law as it affects their work, we checked around the country for names of good people in this area of research—and Professor Kaplin's name was first among all.
>
> After working with Professor Kaplin since then, I can see why: his wealth of information and careful scholarship are resulting in a superb reference book for higher education decision-makers. …
>
> [A]t Jossey-Bass, we try to produce only those books for college and university administrators which concern major topics of growing concern for higher education—and which represent the most up-to-date, comprehensive, and expert analysis possible of the topic. Each book that we accept for publication is one that we want to not merely supplement existing literature but instead to supersede it—by becoming the most definitive, authoritative reference possible on the topic: the one volume to which leaders in higher education will turn for the best possible information. I'm delighted that we are producing Professor Kaplin's book because it so clearly fulfills these goals for its area of the law and the administration of higher education.[83]

The first edition of *The Law of Higher Education*, as it was serendipitously rechristened during the editing process, was published in 1978. It was 500 pages long. In the year of its publication, *The Law of Higher Education* won an award from ACE for the year's most important book concerning higher education.[84] Reviews were complimentary. Writing for JCUL, University of Virginia law professor D. Brock Hornby described the book as "what I would call the first full-length treatise on the law of higher education" and added that "[t]he literature on higher education undoubtedly reaches a new level of maturity" with its publication.[85] In a 1981 review that appeared in the *Journal of Law and Education*, Edward R. Hines, an assistant professor at the State University of New York at Albany, praised Bill's book as "an impressive and substantial beginning to a greater understanding of the varied ways in which higher education is affected by the law."[86] The next year, Professor Edward McGlynn Gaffney, a professor of constitutional law at Notre Dame Law School, offered a detailed review in the *Notre Dame Law Review*. Describing Bill's book as "a valuable guide to almost every aspect of higher education law for lawyers, administrators, and students," Professor Gaffney called special attention to two of the book's most distinctive features: its "clear and readable" focus on "the complex maze of regulations" with which university administrators were obliged

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83 Letter from JB Hefferlin, Editor, Higher Education, Jossey-Bass, Inc., Publishers to John Garvey, Dean, School of Law, The Catholic University of America, April 12, 1978 (on file with author).

84 "And now it's time for congratulations! Heard yesterday afternoon that ACE selected your book for the outstanding book award—that is just great! … You've got a good thing going with the original volume and these updates, Bill, and all of us here at Jossey-Bass are proud to be your publisher." Letter from Gracia A. Alkema, Managing Editor, Jossey-Bass, Inc., Publishers to Professor William A. Kaplin, November 2, 1979 (on file with author).

85 D. Brock Hornby, *The Law of Higher Education*, 7 J.C. & U.L. 181, 183, 184 (1980) (book review). In the interest of full disclosure, I should perhaps mention that Bill was that journal's editor-in-chief when Professor Hornby wrote his review.

86 Edward R. Hines, *Higher Education and The* Law, 10 J. L. & Educ. 131, 133 (1981) (book review).

to deal, and the role of the higher education *lawyer* in providing client counseling.[87] "If college and university administrators follow the practical suggestions Kaplin makes throughout his volume," concluded Gaffney, "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."[88]

Bill's treatise was a wonder. It came with a nine-page table of contents, which laid out a logical roadmap to the legal terrain Bill intended to cover. It ended with over thirty pages of indices that provided quick entrée whenever a non-lawyer came across an unfamiliar word. I have already described in this Article some of the strengths of Bill's treatise from the perspective of a college law practitioner, but those strengths are worth reiterating. Bill's writing was comprehensible, lucid, and not without its occasional lightness of tone. It was peppered with colloquialisms—the Supreme Court "nailed this point," employment discrimination law was a "thicket," student disciplinary codes created a "two-way street" enabling students both to assert claims and making them susceptible to the assertion of claims against them.[89] The beginning of the book went 23 pages before the reader encountered the first footnote. Explanations of complicated legal concepts were unhurried and easy to follow.

Between 1978, when the first edition of Kaplin & Lee was published, and 2024, when Bill died, the book went through 22 hard-copy iterations. The 1978 version was supplemented in 1980 by a slender companion volume. Those two volumes were replaced in 1985 by the substantially revised and reedited second edition; according to Bill's preface to that edition, over half the material was new and did not appear in either the first edition or its supplement. The first and second editions were the only ones that attributed authorship to Bill solely. In "Acknowledgments" sections at the beginning of each edition, Bill generously thanked colleagues from many walks of life—faculty colleagues, private practitioners, federal officials, and others—who had contributed time and provided editorial assistance. A new name appeared in the second edition: Barbara A. Lee, who at that time was an assistant professor in the Department of Industrial Relations and Human Resources at Rutgers University in New Brunswick, New Jersey. Barbara had received a law degree from Georgetown University in 1982, and while attending law school had worked as a policy analyst in the U.S. Department of Education's Office of Postsecondary Education. In her own reminiscence published in this journal, Barbara describes how Bill suggested in the early 1980s that she collaborate with him on subsequent editions of the "treatise," as they called it. Starting with the 1985-1990 supplement to the second edition and continuing through the most recent supplemental volume published in 2024, Barbara co-wrote various editions of the

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87 Edward McGlynn Gaffney, Jr., *The Law of Higher Implications* and *The Law of Higher Education*, 57 Notre Dame L. Rev. 882, 883, 887 (1981) (book reviews).

88 *Id.* at 887. Both Professor Hornby's review and Professor Gaffney's review were not uniformly positive. Professor Hornby commented critically—and Professor Gaffney repeated the comment verbatim—that *The Law of Higher Education* was "too generalized a treatment for a practitioner's ready use" and, like any bound volume, ran the risk of becoming outdated due to "fastmoving developments" in the law. *Id.* at 884.

89 *Id.* at 889.

main treatise and was also responsible with Bill for producing a small universe of related volumes: supplements, special editions for student affairs professionals, collections of teaching materials, and materials that were later posted on NACUA's Kaplin & Lee website.

Bill and Barbara were principally responsible for conceiving of and marketing treatise materials, with nothing more than passive marketing support from Jossey-Bass. As Barbara wrote in an email message to me for the preparation of this Article, the members of Jossey-Bass's marketing department "weren't experienced in marketing a law book because ours was the only one they had published, so we did the brainstorming."[90] After publication of the supplement to the first edition in 1980, Jossey-Bass lost interest or the financial wherewithal, or both, to publish additional supplements. Bill and Barbara spoke to Linda Henderson, then director of publications at NACUA, and starting in around 1990, NACUA assumed the responsibility for assembling and editing the materials in those supplements.

Jossey-Bass eventually ceased being an independently owned publishing house during the intense period of media consolidation that reached its crescendo in the last decade of the twentieth century.[91] In 1988, Jossey-Bass was acquired by Macmillan and for five years operated as a subsidiary of that much larger company. In 1993, Macmillan was acquired by a still larger publishing house, Simon & Schuster; five years after that, Simon & Schuster became an operating subsidiary of Pearson PLC, one of the world's largest publishing firms. Today, after more mergers and restructurings, Jossey-Bass is operated as an imprint of John Wiley & Sons, Inc., an independently owned, New-Jersey-based company that specializes in textbooks and academic publishing. The Jossey-Bass logo appears on the spine and copyright page of every edition of Kaplin & Lee up to and including the latest 2024 supplement, with Jossey-Bass identified as "a Wiley brand." Over the last twenty years, there has been little to no communication concerning the substance of the treatise between that company and the quartet of co-authors whose names appear in 2019's sixth edition.

For all intents and purposes, NACUA is now the home of Kaplin & Lee. The NACUA website includes an abbreviated page with links to the most recent editions. As of the time period in mid-2025 in which this Article was prepared, it was not clear whether another hard-copy successor to Kaplin & Lee will be published, or when, or by whom.

IV. WHAT THEY WROUGHT

In 2007, to mark the publication of the fourth edition of Kaplin & Lee, JCUL ran two reviews. One was by Professor Michael Olivas, a long-time JCUL editorial board member, the holder of an endowed chair at the University of Houston Law Center, and the author of *The Law of Higher Education: Cases and Materials on Colleges*

90 Email from Barbara Lee to Larry White, June 12, 2025 (on file with author).

91 John B. Thompson, Merchants of Culture: The Publishing Business in the Twenty-First Century (2010) (telling the fascinating and important story of the evolution of Jossey-Bass).

in Court, which was first published in 1989.[92] The other was by Martin Michaelson, a partner at one of the largest law firms in Washington, D.C., Harvard University's former University Counsel and Deputy General Counsel, and one of the nation's most prominent higher education practitioners.[93] That pair of thoughtful book reviews appeared in the journal almost three decades after Kaplin & Lee's initial publication at an interesting moment of transition in the history of higher education law, just as the Internet was changing how lawyers conducted legal research.[94]

Michael Olivas's initial reaction to Kaplin & Lee in 1987 had been polite but tepid. He called the second edition better than the first and praised it for being more ambitious, more comprehensive, and more "helpful"—a non-effusive word if ever there was one—than its predecessor. The 1987 review then proceeded to its main point: the inherent limits an author faces when writing a hard-bound treatise. Michael wrote:

> The only fear I have is the means by which Jossey-Bass will update the volume. I am hopeful they will not repeat their ill-fated 1980 supplement, as it was a $12.95 hardbound volume that was difficult to use and probably a mistake only one full year after the first volume. Kaplin and the publishers ought to consider regular supplements (perhaps every two years), by employing a paperback format … Kaplin's treatise, although not intended for classroom use, is in fact widely used for higher education law classes, and a regular, feasible update is essential. The two earlier Kaplin volumes were out of print for over a year before this second edition was finally published (too late for Fall Semester, 1985), and internal evidence in citations, references, and footnotes suggests that the volume was "in press" for a long time, at least one year. Lag time such as this is acceptable for many books, but less desirable in treatises and their supplements.[95]

Professor Olivas returned to that point when he reviewed the expanded fourth edition of Kaplin & Lee in 2007. This time, his words of praise for the substance of the treatise were effusive: the book, he wrote, "delights and educates" and rises to the level of "an indispensable work to anyone who is serious about the field of

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92 Michael A. Olivas, *Higher Education Law Scholarship and the Key to All Mythologies*, 33 J.C. & U.L 591-95 (2007). His 2007 review was the second time around for Michael, who in 1987 had reviewed an earlier edition of Kaplin & Lee for a different publication. *See* Michael A. Olivas, *The Law of Higher Education*, 58 J. Higher Educ. 113-15 (1987).

93 Michaelson, *supra* note 2, at 583-89.

94 That same JCUL edition included a third book review that touched upon Kaplin & Lee, although its subject was a different book. That review was by Timothy S. Kaye, a British-educated professor and scholar of comparative law at Stetson University College of Law. He reviewed a British casebook on higher education law in that country; that book—*The Law of Higher Education* by Dennis J. Farrington & David Palfreyman—was, by the authors' own admission, "an attempt to do for higher education law in the United Kingdom what Professors Kaplin & Lee have so admirably accomplished by their treatise of the same name with respect to higher education law in the United States." Timothy S. Kaye, *Aim Higher: Challenging Farrington and Palfreyman's* The Law of Higher Education, 33 J.C. & U.L 559, 559 (2007). Professor Kaye's article made only one substantive reference to Kaplin & Lee, calling it "a classic in the field." *Id.*

95 Olivas, *The Law of Higher Education*, 58 J. Higher Educ. 113, 114-15 (1987).

higher education law."[96] He nevertheless devoted two-thirds of his review to the criticism he had made two decades earlier, this time in more fulsome and more strident detail:

> 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. … 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. …
>
> Thus: whither Kaplin & 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 …), 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 … , and the publishers are the poster boys for why there should be fewer mergers and acquisitions in publishing. …
>
> I believe that the time has come for Kaplin & 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.[97]

I dwell on Professor Olivas's critique, not because I consider it to have been entirely fair when written, but because almost twenty years have passed since then and it illuminates a problem that has become more acute with the passage of time. Professor Olivas appears to have viewed Kaplin & Lee as a law school casebook, like his own. His critique would have applied with equal force to any casebook, perhaps more forcefully in the case of Kaplin & Lee because Kaplin & Lee's publisher (unlike the publisher of Professor Olivas's own casebook and other casebooks in that era) had no track record in law school casebook publication. For editions subsequent to the first edition, Bill Kaplin and Barbara Lee prepared "student versions" that were specially edited and specially formatted to facilitate use by law school and graduate school students and their instructors. As explained

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96 Olivas, *Higher Education Law Scholarship*, *supra* note 92, at 591.

97 *Id*. at 594-95. Michael clearly knew whereof he spoke. His own casebook, first published in 1987 by Carolina Academic Press, went through three succeeding editions between 1987 and 2016, meaning that new editions appeared on average at ten-year intervals—quite a long time given the vitality of the field in the 1990s and 2000s. Although the publisher issued short teachers' editions and updates at irregular intervals, only one formal supplement was prepared during the book's thirty-year lifetime. That supplement appeared in 2006, the same year Carolina Academic Press published the third edition of the Olivas casebook. *See Supplement to The Law and Higher Education: Cases and Materials on Colleges in Court, Third Edition*, Carolina Acad. Press, https://cappress.com/books/isbn/9781594609749/. Supplement-to-The-Law-and-Higher-Education-Cases-and-Materials-on-Colleges-in-Court-Third-Edition (last visited Dec. 13, 2025).

in a *Notice to Instructors* that appeared at the front of the supplement to the sixth edition, that supplement was accompanied by "a compilation of teaching materials for classroom use" that were made available "in electronic format free of charge for instructors who adopt this *Student Version* as a required text." [98] The authors of Kaplin & Lee organized that effort themselves with no editorial or marketing support from what was left of Jossey-Bass and encountered understandable delays in the process.

Professor Olivas's criticism obscures a more important point as well. Professor Olivas's book was a conventional law school casebook. Kaplin & Lee was considerably more. In 1984, Professor Gail Sorenson wrote an article titled *Review Essay: Teaching Higher Education Law*, in which she categorized and reviewed several dozen books that had already been produced by that date in the burgeoning field of higher education law.[99] That article—cited by Professor Olivas in his 1987 review of Kaplin & Lee—drew a distinction between a "casebook" and what Professor Sorenson referred to as a work organized in "expository fashion." A casebook reproduced a "case"—meaning original primary-source material such as a court decision or the text of a law—and prompted the student to read it, knowing full well that comprehension would be elusive on first reading. The student was then invited, through the use of notes and Socratic questions without an answer key, to discern the lesson of the case. Casebooks were lean on connective tissue between cases and made no effort to formulate conclusions or frame generalizations. Expository works, by contrast, were works of synthesis. They were not necessarily prepared with an audience of students in mind, although one of their purposes was to aid student comprehension by providing explanatory through-lines that were missing from casebooks. In parlance familiar to every law school student, a *casebook* provided tools for learning the law through Socratic dialogue while a lengthy *treatise* or shorter *hornbook* provided an organized, high-level view of the subject as a coherent whole.

Kaplin & Lee was both *casebook* and *treatise*; therein lay its novelty and potency. Sorenson contrasted the first edition of Kaplin & Lee to another work published at almost the same time: *Higher Education and the Law*, written by Professors Harry T. Edwards and Virginia Davis Nordin and published by Harvard University's Institute for Educational Management in 1979. The latter Professor Sorenson characterized as a *casebook* because it was formatted in typical casebook fashion with long excerpts from judicial decisions separated by short notes students were asked to ponder in classical Socratic style. Kaplin & Lee, declared Sorenson, "is not" a casebook; rather, "though including relatively short quotations from more than 100 cases, Kaplin has organized the body of law related to higher education in expository fashion."[100]

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98 William A. Kaplin, Barbara A. Lee, Neal H. Hutchens, & Jacob H. Rooksby, The Law of Higher Education: Student Version, at v (6th ed., 2020).

99 Sorenson, *supra* note 73. Professor Olivas wrote a short introduction to the Sorenson article which was published along with that article. Olivas, *Introduction to Higher Education Law*, *supra* note 79, at 293-94.

100 Sorenson, *supra* note 73, at 298, 299.

Later in Kaplin & Lee's life cycle, its authors made the decision to produce *both* treatise and casebook versions by supplementing the leather-bound treatise volumes with paperbound student versions. Those student versions contained more primary source material, more Socratic questions, and less synthesis. Kaplin & Lee, as Bill Kaplin explained in the preface to the first edition, was originally "written for administrators and legal counsel."[101] That was still its primary goal when Michael Olivas reviewed the second edition in 1987 and the fourth edition in 2007. As Sorenson correctly observed, there had never been a book like Kaplin & Lee, one that came in two forms—the first designed to complement the traditional casebook and the second hoping to replace it.

Marty Michaelson's 2007 review of Kaplin & Lee's fourth edition tackled a different subject. After praising the fourth edition for its size—he compared it to the Encyclopedia Britannica and observed tongue in cheek that "[t]he two volumes of this treatise together weigh as much as a holiday-size roast beef"[102]—he posed the practitioner's obvious question: "does *The Law of Higher Education* fulfill its purpose?" He derived the book's purpose from its subtitle—"A Comprehensive Guide to Legal Implications of Administrative Decision Making"—and positing that the authors, by characterizing their book as "comprehensive," had set for themselves a lofty goal. This brought him to the tantalizing epicenter of his review. Is there, he asked, any merit to the book's implicit claim that there is such a thing as "higher education law"? He took that subject on by proposing four indicia for determining when a corpus of law reaches such a level of complexity, coherence, and importance that scholars and practitioners elevate it to a recognized "field" of legal study:

> If higher education law is a field—a specialized field—some propositions seem to follow. For one, legal services should be arrayed that are specific to that field. Also, presumably, colleges and universities' chief legal officers should be experts in that field. Law school curricula should respond to that field. And, at least, a critical mass of issues in that field should differ from issues in other fields.[103]

The inquiry is useful and consequential. It has never, so far as I can determine, been pursued with relation to higher education law by anyone other than Marty Michaelson in this article from two decades ago.

First: Marty asserted that, if higher education law were an acknowledged specialty field with its own "gigantic load of knowledge," law firms would employ lawyers who represent only colleges and universities. To the contrary, he asserted:

> [M]ost private practitioners who are engaged by colleges and universities do not exclusively, or in many cases even primarily, represent such institutions. … And no law firm that is capable of representing higher education institutions

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101 William Kaplin & Barbara Lee, The Law of Higher Education: Student Version (1st ed., 1978) (out of print version) (on file with author).

102 Michaelson, *supra* note 2, at 583-84.

103 *Id.* at 587.

> in all of the areas here addressed—of which very few, at most, law firms are—does so through a group of lawyers who serve only higher education clients.[104]

I wonder if, two decades after he wrote these words, Marty would agree that they are less persuasive now. Today many law firms that represent significant numbers of college and university clients have "Higher Education" practice groups. Those groups contain large numbers of lawyers who spend the lion's share of their time, if not all their time, representing higher education clients.[105] Furthermore, Marty limited his generalization to "private practitioners" ("most *private practitioners* who are engaged by colleges and universities do not exclusively, or in many cases even primarily, represent such institutions").[106] I construe the phrase "private practitioners" to mean lawyers who work in law firms. The majority of NACUA member representatives are employed in-house as college or university lawyers or in higher-education-related divisions of federal or state agencies, and those lawyers all devote one hundred percent of their time to the practice of higher education law.

Second: Marty disputed the contention that chief legal officers of colleges and universities are "experts" in the field of higher education law by pointing out that many people hired to serve in that capacity, including "[s]ome of the most impressive general counsel of universities," had "no or almost no experience in the higher education legal field before assuming that post."[107] Whether the number of people who move directly from fields outside higher education to chief legal officer positions at a college or university is relatively small or relatively large is something I have never seen quantified. I do know, however, that anyone new to the job of general counsel, if not already a higher education expert, seeks to become one by taking a series of well-trod steps: attending NACUA continuing legal education courses, studying the statutes, regulations, and internal institutional policy manuals that constitute the corpus of higher education law, calling colleagues at other institutions who are acknowledged as experts, and—dare I say it?—reading the office copy of Kaplin & Lee. Their goal is to *become* expert in higher education, whether they begin with the necessary expertise or not.

Third: Marty contended that the structure of the standard law school curriculum belies higher education law's stature as a recognized field of law because "a large

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104 *Id*. at 586-87.

105 *See, e.g.*, *Higher Education*, Duane Morris, https://www.duanemorris.com/practices/higher_education.html (last visited Nov. 28, 2025); *Higher Education*, Thompson Coburn, https://www.thompsoncoburn.com/services/higher-education/ (last visited Nov. 28, 2025); *Capabilities: Higher Education*, Husch Blackwell, https://www.huschblackwell.com/industries_services/higher-education (last visited Nov. 28, 2025); *Higher Education & Academic Research Institutions*, Dorsey & Whitney, https://www.dorsey.com/services/higher-education-academic-research-institutions (last visited Nov. 28, 2025); *Higher Education*, Bond, Schoeneck & King, https://www.bsk.com/practices/higher-education (last visited Nov. 28, 2025); *Higher Education*, Ropes and Gray, https://www.ropesgray.com/en/services/industries/higher-education (last visited Nov. 28, 2025); *Higher Education*, Saul Ewing, https://www.saul.com/capabilities/industry/higher-education (last visited Nov. 28, 2025) (examples of Higher Education practice groups).

106 Michaelson, *supra* note 2, at 586-87.

107 *Id*. at 587.

part of [higher education law] is taught in law school courses neither specific to, nor even nominally aimed at, issues in the higher education sector." I wonder whether that is too crabbed a notion of what constitutes a specialty field. In the legal profession, the American Bar Association ("ABA"), through its Standing Committee on Specialization, allows state bar associations to award accreditation certificates in areas of legal specialization. There are nineteen subject-area specialties in which specialization credentials are awarded.[108] They range from fairly general (e.g., trial advocacy, elder law, immigration law) to highly specific (e.g., defense against driving-under-the-influence prosecutions). All these fields of specialization require applicants to demonstrate competence in many areas—civil or criminal procedure, evidence, trial practice, contract law, tort law—that, as taught in law schools, are "neither specific to, nor even nominally aimed at," the particularized skills of applicants who practice in these fields. Marty's standard is too restrictive to be of practical value.

More probative, I believe, would be information to which I have already alluded: the categories of *practice areas* large law firms identify as areas of specialization in which their attorneys practice. The country's largest law firms list dozens of such specialty areas—hundreds, even, if one includes sub-specialty areas. "Higher Education" is included at many of them.[109]

Finally: Marty's last criterion for determining whether an area of legal specialization rises to the level of a "field" is whether "a critical mass of issues in that field … differ from issues in other fields."[110] Even in 2007, Marty acknowledged that that condition was met in the case of higher education law.[111] Many examples come to mind. To take but a few: there are special visa categories that apply only to higher education students, faculty members and staff, making the practice of immigration law in the higher education context more specialized than in other fields.[112] There are complicated rules that apply only to colleges and universities when litigants in employment discrimination cases seek to compel the production of letters of recommendation and other peer review documents contained in university tenure and promotion dossiers. Intercollegiate athletic regulation is the subject of highly detailed rules prescribed by the National Collegiate Athletic Association, athletic conferences and leagues, and increasingly Congress and the federal courts; university athletic departments rely for advice in these arcane fields of regulation on lawyers who are well versed in those rules.

The question Marty poses—whether lawyers who represent college and university clients can be said to be practicing in an area of legal specialization known as

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108 ABA Comm. on Specialization, *Private Organizations with ABA Accredited Lawyer Certification Programs*, https://www.americanbar.org/groups/specialization/organizations-with-aba-accredited-lawyer-certification-programs/ (last visited Nov. 28, 2025).

109 *See supra* note 105 (list of law firms with Higher Education as a practice group).

110 Michaelson, *supra* note 2, at 587.

111 *Id.*

112 Indeed, as many of us who have struggled to find law firms that can provide critical immigration services know full well, firms that specialize in the immigration-law needs of colleges and universities exist in many parts of the country and are more important now than ever before.

"higher education law"—is important, and I applaud him for raising it. There is virtually no scholarly literature on this. No less an authority than Michael Olivas wrote in 1984 that there is pronounced "lack of consensus on what constitutes higher education law."[113] Higher education as a coherent field of legal study, he continued, "is an active, confused field, lacking many of the attributes of a discipline, yet demanding more disciplined effort. Surely the same must be said for the field's subspecialty, higher education law."[114] In a thought-provoking if somewhat oblique treatment of the issue in 1994, law professor Michael Ariens traced the history of efforts by the ABA in the 1960s to promote subject-matter specialization through the adoption of model "plans of specialization" by state bar associations—an effort that "failed miserably," according to Ariens.[115] In 1976, another law review contributor with more of a vested interest in promoting legal specialization—Roderick N. Petrey, the chair of the ABA's Standing Committee on Specialization—offered a nice vernacular counterpoint to Marty Michaelson's four-factor test:

> The specialist is a practicing lawyer who has developed and maintained an expertise in a field of legal doctrine (such as tax), a legal skill or function (such as litigation), or a type of client (such as business corporations, an entire industry, or a government agency) sufficient to ensure that his special competence and the quality of legal services he provides for clients in his specialty are higher than the competence nonspecialists possess and the quality of work they provide in similar circumstances.[116]

I frankly prefer the loosely worded Petrey approach to the four-factor Michaelson test. After all, we are not dealing with something as critical as bar admission rules here. A lawyer will not be disciplined or disbarred for claiming to specialize in "higher education law" or allowing himself or herself to be identified on a law firm website as one of the practitioners who focus their practice on representing colleges and universities. We are really dealing with a matter of self-perception. Under the Petrey approach, I practice higher education law if I am trained in legal principles, laws, and regulations with which college clients must comply, if I have the professional experience and training to satisfy my ethical duty of competence, and if I can perform—or have reason to believe I can perform—higher quality work for a college client than can someone who has never done it before. By those looser and more practical criteria, I believe it is safe to characterize the lawyers who have been designated by institutions of higher education as their NACUA representatives as lawyers who practice in the specialized field of higher education law. I would also assert that nobody has delineated that practice field more authoritatively over the years than William Albert Kaplin.

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113 Olivas, *Introduction to Higher Education Law*, *supra* note 79, at 293-294 (quoting Paul L. Dressel & Lewis B. Mayhew, Higher Education as a Field of Study 88 (1974)).

114 *Id*.

115 Michael S. Ariens, *Know the Law: A History of Legal Specialization*, 45 S.C. L. Rev. 1003, 1009 (1994).

116 Roderick N. Petrey, *Professional Competence and Legal Specialization*, 50 St. John's L. Rev. 561, 568 (1976).

V. EPILOGUE: CHANGE AS A CONSTANT IN HIGHER EDUCATION LAW

In 1978, under Bill's editorship, JCUL published an extraordinary article on legal issues involving computer utilization on campus.[117] The article was long. It covered topics such as how to draft a computer procurement contract, detecting and preventing computer data fraud, protecting patent rights in computer software, safeguarding the confidentiality of computer records, and—my favorite part—how lawyers could be in the vanguard of the upcoming computer revolution by adopting computer usage into the operations of their own offices. In 1978, when this article appeared, few lawyers had touched a computer, much less used one at work. Bill appreciated before the rest of us how computers and computer networks would change both the substance of the work campus lawyers were called upon to do and the way they performed that work.

Today, when higher education lawyers gather—either in person at conferences sponsored by NACUA or virtually using the NACUA online discussion tool "Nacuanet"—they devote considerable attention to electronic resources. Computers and software, particularly web-based software and new generation after new generation of "software as a service" programs, have changed the nature of every attorney's job and the manner in which they perform legal research. The changes are both obvious and more subtle, and the changes are particularly acute for college and university lawyers whose clients are more computer-savvy than most.

On the obvious end of the spectrum, the ubiquity of electronic devices—they are in our purses and pockets, on our desks at home, and in our briefcases when we travel—means that lawyers are constantly at work. When I attended my first NACUA Annual Conference in 1982 and for at least a decade and a half after that, being in the audience in a hermetically sealed conference room meant that nobody on campus could reach us. When sessions ended, lawyers fled into the corridor, lined up at pay telephones, called their offices, and were fed messages and updates, which they addressed at the next break in the same manner. Now, clients reach us on our cellular phones and laptops mid-conference and we are expected to respond before the session ends.

The way we perform legal research is different than it was when Bill Kaplin produced the first edition of his treatise. In those days (and I am painfully aware that more than half of practicing higher education lawyers today were not only not practicing law in 1978 but not even born), we did our legal research in a library. We took notes on yellow legal pads. If we were lucky enough to have access to a photocopying machine, we made copies of critical cases and statutes to take home at night and read. If our law firm library did not have a volume we needed, we took cross-campus or cross-town trips to a law school library with a pocketful of quarters for photocopying. To edit our work, we used scissors and Scotch tape. Today: I performed the research for this Article while seated at the kitchen table of my home in rural New Hampshire using a Mac Mini computer with a 27-inch monitor and a high-speed Internet connection. I logged onto online reference services (most of which came with my bar association memberships) to find cases,

117 John C. Lautsch, *Computers and the University Attorney: An Overview of Computer Law on Campus*, 5 J.C. & U.L. 217 (1978).

statutes, regulations, treatises, and other materials cited in the footnotes. What books I needed I obtained either from full-text libraries online or from online vendors that delivered them to my door overnight. Most of the materials I used to prepare drafts of this Article I saved as PDF files on my Mac, which, thanks to an online file hosting service to which I subscribe, I could access from coffee shops and hotel rooms. There is not a scrap of paper on my kitchen table, other than 22 volumes of Kaplin & Lee in various editions. None of this is news to you. What I did to produce this Article you have been doing for a decade or more from your offices and your own kitchen tables.

The digital revolution affects not just the production of work product but the way campus lawyers organize their offices to handle workflow. In the 1980s, campus lawyers managed documents using filing cabinets and three-ring notebooks. Today, they use, depending on the office's size and resources, one or more enterprise management software tools. Outside law firms blazed that trail, first about fifteen years ago when they digitized and automated the process colleges and universities used to respond to discovery requests in litigation, and more recently by implementing online billing systems and management tracking systems.[118]

Electronics have changed our professional lives in other, more nuanced ways as well. Human beings process information differently when it is presented to them on a screen rather than in a page of print. In law schools, digital modes of presenting pedagogical materials have largely supplanted traditional printed modes.[119] Once law school graduates start practicing law, screen-reading becomes the predominant way to read legal materials and perform legal research. The two learning modes are different:

> With print, text is static. The reader follows the author's intended direction as their eyes navigate across the page, line-by-line, through the entire text. … Most digital text is dynamic. Even e-reading devices designed to replicate print include features such as online dictionaries, find / search functions, and text-to-speech capabilities. Most digital text extends beyond the screen so readers must scroll through content without a sense of where it ends. It may also be embedded with hyperlinks. In contrast to print readers, e-readers

118 At one well-attended session at NACUA's 2025 Annual Conference, a software vendor presented what he called a "Legal Tech Vocab Quiz" to make the point that software systems utilized by campus offices are proliferating, becoming more complex, and growing more indispensable. His typology included document management systems, case management systems, systems to track the life cycle of procurement contracts and other categories of contracts, analytic measuring systems to track office performance, and a panoply of more venerable systems for e-discovery, e-billing, board documents, ethics monitoring, compliance monitoring—the list is endless. David Lancelot, *The Evolution of Legal Technology*, Nat'l Ass'n Coll. & Univ. Att'ys Ann. Conf., 2025, https://cdn.fs.pathlms.com/dGIPEWUFTKelBTVRK83Q?_ga=2.143530421.1494365716.1753284941-2045417928.1753284941&_gl=1*1fehof*_ga*MjA0NTQxNzkyOC4xNzUzMjg0OTQx*_ga_2KEDL6GGQS*czE3NTMzNjYwMjQkbzIkZzEkdDE3NTMzNjYwNTYkajI4JGwwJGgw/.

119 *See, e.g.*, Connie Lenz, *Affordable Content in Legal Education*, 112 Law Libr. J. 301, 313-314 (2020) *and* Amanda L. Sholtis, *Medium Matters in Preparing for Law Practice: Critical e-Reading*, 63 Duq. L. Rev. 361, 370-372 (2025) (discussing the recent body of fascinating scholarly literature on contemporary models of law school education that have replaced bound casebooks and bound library volumes with e-casebooks, course packets, and course home pages with hyperlinks to primary source material).

> may consume text how they want depending upon their scrolls and clicks. While no two e-readers will take identical paths through the digital text, most will skim. When first engaging with digital text, individuals usually scan the text in an "F" pattern or zig-zag style. They may "word spot" through the text, often along the left-hand side to grasp the context. Then, they will dart to the conclusion at the end and may sometimes return to the text for additional details. … The amount of information available to the e-reader can be overwhelming and disorienting. Reading from screens, many of which emit their own light, may cause eye strain and headaches. …
>
> Researchers hypothesize that certain characteristics associated with screen reading make it more challenging for individuals to read deeply in that medium. While digital devices do not force individuals to read quickly, the technology is designed to enable—and entice—us to do so. Certain facets of e-reading, like scrolling, clicking on hyperlinks, and light-emitting screens, likely contribute to individuals reading more quickly and less deeply than they would read in print.[120]

All this, of course, has implications for legal treatises like Kaplin & Lee. As early as 1980, when JCUL ran its review of the treatise's first edition, reviewer D. Brock Hornby wondered whether the treatise would be able to "keep pace with the fastmoving developments" in higher education law without regular supplementation.[121] That same concern was voiced in 1984 when another reviewer remarked on the inherent limitations associated with hard-copy publishing and warned that the first edition of the treatise "will continue to be less up to date and possibly more cumbersome to deal with … unless a different method is adopted to accommodate emerging legal issues."[122] The gloves came off in Michael Olivas's 1987 review of the second edition, in which he tweaked Jossey-Bass's "ill-fated" decision to eschew regular updates and instead go with a lengthy one-off supplement "that was difficult to use and probably a mistake only one full year after the first volume."[123]

Today, a larger question looms. When the first edition of Kaplin & Lee appeared a half-century ago, a campus lawyer's principal responsibility was to conduct legal research. That research required tools for organizing the corpus of primary source materials. Those tools changed little between 1897, when legal publisher John West came up with the "key number system" for indexing court decisions, and the 1970s, when subscriptions to online legal databases like Westlaw and LexisNexis enabled lawyers to access cases instantaneously in searchable, indexed, annotated form.[124] By the 1980s, when the second edition of Kaplin & Lee was published, every law firm had access to a legal database, and so did many in-house legal offices on college campuses, particularly campuses with law schools.

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120 Sholtis, *supra* note 119, at 373-74 (internal quotation marks omitted).

121 Hornby, *supra* note 85 at 184-85.

122 Sorenson, *supra* note 73, at 305.

123 Olivas, *The Law of Higher Education*, *supra* note 92, at 114, 115.

124 *See* David Lat, *How Artificial Intelligence Is Transforming Legal Research*, Above the Law, July 16, 2018, https://abovethelaw.com/law2020/how-artificial-intelligence-is-transforming-legal-research/.

Today, truth be told, campus lawyers do not spend the same proportion of their time performing legal research as they did a generation ago. The automation of routine research-oriented lawyering functions has transformed campus lawyers from *analysts* to *strategists*. I, who retired from the active practice of law ten years ago, am frankly astounded by the range of analytic tasks once performed by lawyers that are now performed by machines:

> Legal analytics powered by [artificial intelligence] allow attorneys to review trends within a case, predict judges' actions, and strategically plan litigation. Legal analytical tools powered by AI can also scan past judgments, the actions of judges, and jurisdictional bias to make strategic suggestions. Predictive tools such as Gavelytics have already been used to predict judges' rulings based on past records.[125]

> [G]enerative AI … [is] capable of drafting contracts, legal memorandums, and replies to requests for proposals. Although review by a human in the loop is unavoidable, the time spent drafting the initial version is shorter, and attorneys can focus their time and attention on higher-level thinking and strategy. …[126]

> A partner at a prominent law firm told me "AI is now doing work that used to be done by 1st to 3rd year associates. AI can generate a motion in an hour that might take an associate a week. And the work is better. Someone should tell the folks applying to law school right now."[127]

In 1985, Bill Kaplin contributed an article to JCUL's commemorative issue marking the 25th anniversary of the founding of NACUA. The article, "Law on the Campus 1960-1985: Years of Growth and Challenge,"[128] traced broad themes in substantive higher education law that had evolved in new directions since 1960. The tone was thoughtful and elevated. In typical Kaplin fashion, Bill found time and space in the article to address changes in *the practice* of higher education law. He devoted the penultimate section of his article to the topic of "preventive legal planning," which he described as one of the "great changes in the way institutions and their attorneys have organized themselves to deal with legal risks."[129] He

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125 Joely Williamson, *The Rise of AI in Legal Practice: Opportunities, Challenges, & Ethical Considerations*, Colorado Tech. L. J., Mar. 21, 2025, https://ctlj.colorado.edu/?p=1297 (footnotes and citations omitted).

126 *Id.*

127 @AndrewYang, X, (July 26, 2025, 10:31 AM) https://x.com/AndrewYang/status/1949160562350522482 (formerly known as Twitter); *see also* Blake C. Billings, *The Role of Chief University Attorney as Lawyer, Manager, and Higher Education Executive: A Qualitative Multiple Case Study*, 50 J.C. & U.L. 41 (2025) (discussing a thoughtful reflection of the changing role played by college counsel today). Dr. Billings, a higher education attorney and scholar who served as a campus lawyer and outside counsel, posits that campus lawyers, whose work formerly consisted predominantly of "traditional lawyering tasks," now find more of their time subsumed by "executive" and "managerial" tasks that provide them with "access to prime seats at the tables of university power." *Id*. at 56, 75.

128 Kaplin, *supra* note 35, at 269.

129 *Id*. at 296.

attributed the widespread adoption of the preventive counseling model to two developments: the crippling increase in the cost of litigation against institutions of higher education following the demise of the *in loco parentis* doctrine and the erosion of other forms of liability protection that contained colleges' legal exposure before 1960; and the wholly unanticipated surge in laws and regulations on campus. "Postsecondary institutions have not stood passively aside watching these events transpire," Bill wrote. "As might be expected, the past twenty-five years have witnessed great changes in the way institutions and their attorneys have organized themselves to deal with legal risk."[130]

Bill never passed up an opportunity to champion preventive lawyering. It was the subject of several articles he selected for inclusion in JCUL when he served on that publication's editorial board. For Bill, preventive lawyering was a point of entrée for reflections on other, related practice issues.[131] In JCUL's early days, and particularly in the period during which Bill edited it, the journal published many articles addressing the *how* of college lawyering. The journal's second volume in 1974 included articles on the scope and mission of in-house counsel's offices, principles of legal service delivery to college administrators, the unique characteristics of universities as legal clients, time management suggestions, how to docket matters, how to organize file systems, and how to incorporate the elements of preventive counseling into the work of the office's lawyers.[132] Bill's focus on the *craft* of higher education legal practice contributed as much to the emergence of higher education law as a specialized field of legal practice as Bill's systematization of the substance of the field. Right up front, in the preface to the first edition of Kaplin & Lee, Bill admonished college and university administrators to "give serious and continuing consideration to the ways they use legal counsel to deal with the law."[133] He then posed a series of practical questions for administrators to consider:

> Which institutional administrators will have direct access to counsel? To whom will counsel report? Will there be any particular procedure to follow in obtaining legal advice? Will counsel be expected to routinely review institutional policy statements, contracts, and major decisions? What kinds of correspondence or documents should be cleared by counsel before they are issued? Will counsel advise only administrators, or perhaps other members of the university community on certain matters?[134]

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130 *Id*.

131 Kathleen Curry Santora & William A. Kaplin, *Preventive Law: How Colleges Can Avoid Legal Problems*, Chron. Higher Educ., Apr. 18, 2003, https://www.chronicle.com/article/preventive-law-how-colleges-can-avoid-legal-problems/.

132 *See* John E. Corbally, Jr., *University Counsel—Scope and Mission*, 2 J.C. & U.L. 1 (1974) (depicting the point of view of a university president); J. Rufus Beale, *Delivery of Legal Services to Institutions of Higher Education*, 2 J.C. & U.L. 5 (1974) (depicting the point of view of general counsel at a large university); Richard J. Sensenbrenner, *University Counselor: Lore, Logic and Logistics*, 2 J.C. & U.L. 13 (1974) (another perspective of general counsel at a large university).

133 William Kaplin, *The Law of Higher Education: Legal Implications of Administrative Decision Making*, at x (1st ed.,1978).

134 *Id*. at 11.

Bill Kaplin's most lasting contribution to the field of higher education law rests here. Bill perceived that representing institutions of higher education as a practicing lawyer was different from other forms of legal practice—different because of the unique characteristics of that particular form of institutional client and different because of the men and women who worked in that field. Bill was the first scholar who devoted attention to the practice area itself. He offered insight into the way a college legal office should be organized. He thought about the personal and professional qualities a higher education lawyer needed to interact effectively with college administrators, faculty members, and students. He even imagined, well before his peers, how those little computer boxes would change the practice of higher education law.

Bill wrote Kaplin & Lee at just about the time my own career as a higher education lawyer was getting off the ground. In 1977, I went to work as a first-year associate at a law firm in Washington, D.C. In my third or fourth year at the firm a partner who served as outside counsel for a small assortment of colleges and universities asked me to handle some regulatory matters for a local college. The college paid for my NACUA membership and bought me a copy of Bill's treatise, which I kept on my desk. My NACUA membership entitled me to a subscription to JCUL and regular mailings of court decisions from NACUA's Legal Reference Service. In 1984 I attended my first NACUA Annual Conference. I met Bill Kaplin there, and I was in the audience for Barbara Lee's first NACUA presentation—she spoke on "Troublesome Tenure."[135]

Today, the young lawyer aspiring to a career in higher education law might not start by pulling a copy of Kaplin & Lee off the shelf. That lawyer might instead fire up ChatGPT and do some screen reading on what the field has to offer.[136] But the career on which that young lawyer subsequently embarked would be shaped in large part by organizing principles Bill Kaplin and Barbara Lee developed over decades of scholarship. Bill and Barbara have been the embodiment of what it takes to practice in the field of higher education law. Bill was, and Barbara is, quiet and direct, wise and experienced, aware of history, sensitive to themes and connections, kind, always helpful, and always wonderful colleagues. They allow us to think of ourselves as practitioners in a distinctive field—"the law of higher education"—that bears their imprimatur.

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135 Barbara Lee, *Curriculum Vitae* 24, https://smlr.rutgers.edu/sites/default/files/Documents/Faculty-CV/Lee_Barbara_CV_2024.pdf.

136 For the fun of it I did just that. I asked ChatGPT what a law firm associate who hopes to specialize in higher education law should read to learn about the field. Here are the opening sentences of the response I received: "Kaplin & Lee—The Law of Higher Education. The gold-standard treatise."