

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

* 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

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

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

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

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.

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