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

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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

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† 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

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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. …
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> 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."