

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

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

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

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

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

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

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

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

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

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

2 WILLIAM A. KAPLIN, *THE LAW OF HIGHER EDUCATION: A COMPREHENSIVE GUIDE TO LEGAL IMPLICATIONS OF ADMINISTRATIVE DECISION MAKING* 31 (2d ed. 1985).

2 *Id.* at 32.

3 WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION: A COMPREHENSIVE GUIDE TO LEGAL IMPLICATIONS OF ADMINISTRATIVE DECISION MAKING* 163 (5th ed. 2013).

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

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

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

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

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

5 42 U.S.C. §§ 12101-12213.

6 15 U.S.C. §§ 7201-7266.

7 22 U.S.C. §§ 7101-7110.

8 20 U.S.C. §1011i.

9 20 U.S.C. §1092(f).

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

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

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

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

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

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

10 8 U.S.C. §§ 1101-1537.

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

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

13 29 U.S.C. §§ 2601-2654.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 See Sanoff, *supra* note 19.

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

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

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

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

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

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

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

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

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

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

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

²⁷ See *supra* note 24.