Higher education and the law(yers)

Review of Louis H. Guard and Joyce P. Jacobsen's

ALL THE CAMPUS LAWYERS: LITIGATION, REGULATION, AND THE NEW ERA OF HIGHER EDUCATION

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There are certain special relationships that have historically been central to the administration and governance of institutions of higher education. Some are well known. The relationship between the president or chancellor and the chair of the governing board is one such relationship, and, although the specifics will vary from one campus to another, so is the relationship between the president and the chief academic officer and the chief administrative or operating officer. Until relatively recently, most university leaders would not have included the university's lawyer to be among these partnerships; today nearly all would. One such team, the former president and general counsel of Hobart and William Smith Colleges, Joyce P. Jacobsen and Louis H. Guard, respectively, have shared their own experiences and knowledge of the field to produce a highly readable and useful discussion of how legal issues have become central to the management of the modern university, and how the campus counsel has become a key member of the president's team.[1]

Guard and Jacobsen seek to explain how it is that legal issues moved from the periphery to a central concern of institutions of higher education. They demonstrate the developments of the past half-century and especially the most recent several decades. The book proceeds in two parts—the first reviews how we got here, and the second suggests how we should proceed going forward. Part I consists of a series of chapters, each of which focuses on an area of the law whose impact on higher education has dramatically increased. Some of this will be familiar terrain to those engaged in the study and practice of higher education law or in the administration of colleges and universities. As their goal is to explain the legal developments affecting higher education "in a way that is as accessible to as many

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

people as possible,"[2] the authors assume minimal background knowledge and provide context that will be welcome to the general reader if sometimes somewhat excessive for the specialist.

The constellation of topics covered in the seven chapters of part I is designed to provide a primer of the ways in which statutes and regulations have come to play a significant role in the life of the university. Perhaps nowhere is this seen more clearly than in the development of civil rights legislation that bears on higher education. Guard and Jacobsen focus on Title IX,[3] Title VII,[4] and the Americans with Disabilities Act of 1990 (ADA).[5] No one will dispute the impact that these statutes have had on our campuses. Enacted initially to address gender inequality in college athletics, Title IX has become the primary source for the governmental response to sexual harassment on campus.[6] Unlike Title IX, the ADA is a law of general applicability, not one addressing only colleges and universities. Nonetheless, the impact of the ADA on institutions of higher education has been profound, leading to the creation of administrative infrastructure for governing the assessment of disability claims and the resulting requirements for accommodations.[7] The review of civil rights statutes and their role in university life is a helpful starting point for approaching this dynamic area of the law. Guard and Jacobsen are only too aware that, particularly in the context of Title IX, they are seeking to describe the location of a moving target. To some extent this is simply unavoidable. Whoever has sought to write about the ever-changing landscape of Title IX over the past decade has faced the risk that the scope of the applicable regulations will have shifted between the final manuscript and the book's publication.[8] What might have been a useful topic to consider in this regard is the role of campus counsel in helping student affairs staff deal with this very problem. The shifting regulatory framework of Title IX

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2 *Id.* at 9.

3 Education Amendments of 1972, 20 U.S.C. §§ 1681–1689.

4 Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17.

5 Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213.

6 *See* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999); U.S. Dep't of Educ., Off. for C.R., Dear Colleague Letter on Sexual Violence (Apr. 4, 2011), https://www.ed.gov/sites/ed/files/about/offices/list/ocr/letters/colleague-201104.pdf.

See also Alvin Powell, *How Title IX Transformed Colleges, Universities over Past 50 Years*, Harv. Gazette (June 22, 2022), https://news.harvard.edu/gazette/story/2022/06/how-title-ix-transformed-colleges-universities-over-past-50-years/#:~:text=A%20half%20century%20after%20its,Watson%20Jr.

7 *See* 42 U.S.C. § 12132 ("No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."). *See, e.g.*, Laura Rothstein, *The Americans with Disabilities Act and Higher Education 25 Years Later: An Update on the History and Current Disability Discrimination Issues for Higher Education*, 41 JCUL 531 (2015) (highlighting history of application of ADA in higher education and predicting future trends and solutions for accommodating students).

8 *See* U.S. Dep't of Educ., Off. for C.R., , *supra* note 6 (providing guidance during the Obama era); 34 C.F.R. § 106 (2020) (promulgating Trump administration regulations); 34 C.F.R. § 106 (2024) (implementing Biden administration Title IX rules). *See also* Katherine Knott & Johanna Alonso, *A New Title IX Era Brings Confusion and Frustration*, Inside Higher Ed. (Aug. 1, 2024), https://www.insidehighered.com/news/students/safety/2024/08/01/enforcement-bidens-title-ix-rule-complicated-lawsuits (detailing lawsuits and court injunctions blocking implementation of Biden Title IX regulations).

over the three most recent presidential administrations has created challenges not only for attorneys but also for those charged directly with the implementation of the regulations, most of whom lack legal training. This may be the prime example of ways in which the law has failed to provide universities with the clarity of settled direction and instead created the frustration of shifting mandates.

Readers of *All the Campus Lawyers* who have observed the challenges faced by many campuses recently will be particularly interested in the discussion of the legal aspects of free expression and academic freedom. Guard and Jacobsen review the legal principles that emerge from the foundational documents of American academic freedom doctrine,[9] and the Supreme Court jurisprudence developed from such seminal cases as *Sweezy v. New Hampshire*[10] and *Regents of the State of New York v. Keyishian*,[11] incorporated ultimately in Justice Powell's pivotal opinion in *Regents of the University of California v. Bakke*.[12] As the authors survey the range of academic freedom and free expression issues that universities face, they take particular care to highlight the ways in which administrators must balance the competing demands of robust free speech and academic freedom, on the one hand, and protections against harassment, hostile environments, and discrimination, on the other. The framing of these issues is surely correct. In many ways, the hard work of the campus lawyer certainly begins with this framing. It is helpful to remind those in charge of universities that "[w]e must embrace nuance and be comfortable with the fallibility of wading in a gray area, always keeping as our compass the educational best interests of our students."[13] In many ways, however, this is the point where the real challenges begin. How does this compass help answer the kind of questions that have preoccupied campuses over the past few semesters, for example, whether students should be permitted to set up a protest encampment on campus in a way that may make other students uncomfortable but that does not otherwise disrupt the operation of the university. Where should the campus attorney look to provide advice on this question? To be sure, the best interests of students will always be a part of this analysis. Here is where university counsel must draw upon a deep knowledge of the academic mission of the institution and provide the kind of advice that refracts legal questions through the lens of this mission.

The balance of the first part of *All the Campus Lawyers* takes us through the range of issues that fill the docket of the campus counsel and situates these issues helpfully in the development of higher education law over the past decades. University liability today, in what Guard and Jacobsen rightly describe as the "caretaker" era, is best understood in the context of the evolution from the early twentieth century *in loco parentis* era[14] through the "bystander" era of the late third and

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9 *See* American Association of University Professors, 1915 Declaration of Principles on Academic Freedom and Academic Tenure (1915); American Association of University Professors, 1940 Statement of Principles of Academic Freedom and Tenure (1940).

10 354 U.S. 234 (1957).

11 85 U.S. 589 (1967).

12 438 U.S. 265 (1978).

13 Guard & Jacobsen, *supra* note 1, at 59.

14 *See* Peter F. Lake, *The Rise of Duty and the Fall of* In Loco Parentis *and Other Protective Tort*

early fourth quarter of the century.[15] A combination of statutory and regulatory provisions, caselaw, and even social custom has created an environment in which the contemporary university has many of the obligations of a caretaker without the immunity provided by the *in loco parentis* doctrine. Dealing with expanding tort liability, whether from Greek life, street crime, or the modern scourge of active shooter cases, now occupies a large share of the university attorney's portfolio. Similarly, admissions decisions now present a context of potential legal liability for the university. In the aftermath of the Supreme Court's rejection of race-conscious admissions policies in *Students for Fair Admissions v. Harvard* and *Students for Fair Admissions v. University of North Carolina*[16] universities are subject to potential further litigation, challenging admissions policies that seek diversity in ways that allegedly run afoul of the Court's ruling. The authors do well to situate this analysis in the half-century of affirmative action jurisprudence starting with the judicial acceptance of such policies in *Regents of the University of California v. Bakke*.[17]

Guard and Jacobsen's practical administrative experience is well demonstrated in what might strike some readers as a surprising chapter on the role of university counsel in the face of current challenges to the business model of higher education. The debate over the cost of higher education and the very value of a college degree poses a serious concern to the vast majority of institutions of higher learning whose business model is largely tuition based.[18] Fewer than 150 of the over 4000 higher education institutions in the United States have endowments above $1 billion, and the median college endowment is roughly $209 million.[19] This median endowment would produce a sustainable draw pursuant to most endowment spending policies of about $10.5 million, which is a fraction of the average university budget. One recent study concluded that the median level of endowment dependence to support the operating budget was 16.3%.[20] In a climate where colleges and universities must look to tuition income to support the major portion of their budget, the sustainability of the financial model that has supported American higher education is being deeply stressed.[21] This discussion of the financial strains on the university business model would not be surprising

Doctrines in Higher Education Law, 64 Mo. L. Rev. 1 (1999); Gott v. Berea College, 161 S.W. 204 (Ky. 1913).

15 *See* Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979).

16 Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll., 600 U.S. 181 (2023); Students for Fair Admissions, Inc. v. Univ. of N.C., 600 U.S. 181 (2023).

17 *See* 438 U.S. 265 (1978).

18 *See* Sarah Wood, *What You Need to Know About College Costs*, U.S. News & World Rep. (Sept. 24, 2024), https://www.usnews.com/education/best-colleges/paying-for-college/articles/what-you-need-to-know-about-college-tuition-costs (reporting that "as everything else increases, so does the cost of running a college or a university").

19 Michael T. Nietzel, *College Endowments Saw an Average 7.7% Gain in Fiscal Year 2023*, Forbes (Feb. 15, 2024), https://www.forbes.com/sites/michaeltnietzel/2024/02/15/college-endowments-saw-an-average-77-gain-in-fiscal-year-2023/.

20 Tracy Abedon Filosa & Cambridge Assocs., Endowment Radar Study 2023 3 (2024).

21 *See* Danielle Douglas-Gabriel, *Colleges Enrolled Fewer Freshmen, First Decline Since the Pandemic,* Wash. Post (Oct. 23, 2024), https://www.washingtonpost.com/education/2024/10/23/freshman-college-enrollment-decline/.

in a work on the economics of higher education. However, *All the Campus Lawyers* reveals that legal questions play a significant role in how a university may navigate its financial strains. This is a perceptive and valuable insight of this book. These questions range from admission decisions and their interrelation with development consideration to the ways in which universities might seek mergers and forms of integrated networks with other institutions. Guard and Jacobsen are right to strike a serious but nonextreme tone. As they put it, "the process [of downsizing and integration] may be more graceful than doomsayers have predicated, with potentially few outright closures … . Such actions can be handled gracefully if managed correctly, with the aid of legal counsel."[22]

This brings us to what may be the most important contribution of *All the Campus Lawyers*. In part II of the book, the authors address how the campus counsel can function as an important, if not indispensable, part of the university administrative team. Drawing on the formative work of Ben Heineman on the role of in-house counsel in the corporate context,[23] Guard and Jacobsen explore the ways in which a university counsel must blend legal knowledge with a profound understanding of the goals of the institution. Those of us in the business know that, regarding all of the issues discussed above, the administration will be well served if the campus counsel is at the table and, on many occasions, the last one in the room with the president before a decision is made.

In some ways universities are very much like other complex organizations—various constituencies both internal and external whose interests must be considered, financial stability and sustainability to be managed, potential growth opportunities to be undertaken, and risks to be managed. But in other ways, universities are very much entities unto themselves. Whereas corporations typically have production metrics that allow for a meaningful comparison of costs and revenue to yield a measure of profit, the "product" of higher education, the discovery and creation of knowledge, and the transmission of that knowledge through teaching and scholarship, eludes the best efforts toward quantification. There may be no better example than the university to illustrate the aphorism that "not everything that can be counted counts, and not everything that counts can be counted"[24] In providing legal advice to the university, the campus counsel will often play an essential translational role among the various constituencies of the university. Ideally, the university attorney will be equally comfortable with faculty, staff, administrators, and trustees, understanding the needs of each and their respective roles in the university structure.

All the Campus Lawyers is well organized and accessibly written, in spite of the occasional clichés, such as "long arm of the law,"[25] "downright alarming,"[26]

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22 Guard & Jacobsen, *supra* note 1, at 172.

23 Ben W. Heineman, Jr., The Inside Counsel Revolution (2016).

24 This quote is often misattributed to Albert Einstein but should actually be attributed to William Bruce Cameron, the author of *Informal Sociology*. William Bruce Cameron, Informal Sociology: A Casual Introduction to Sociological Thinking 13 (1963).

25 Guard & Jacobsen, *supra* note 1, at 1.

26 *Id*. at 9.

or "powder keg of liability issues,"[27] which distract from the otherwise clear and concise prose. Washington-based readers may note that "DOE" is the official governmental acronym for the Department of Energy, not the Education Department, which in Washington-speak goes by "ED." But these are small quibbles in an overall important contribution to the public discussion of higher education generally and higher education especially.

Campus counsel must be acutely aware of the complexities and, we might even say, peculiarities of the university to play their role most effectively. Their role goes beyond advising the university president and other members of the administration. As Guard and Jacobsen explore in a thoughtful and insightful discussion of identifying the university counsel's client,[28] campus attorneys will often be working for the president or board chair—but not always. "In our view," they assert, "when properly engaged, resourced and deployed, general counsel are in fact key stewards of the education mission."[29] This may be the essence of the role to which the university counsel should aspire. *All the Campus Lawyers* will help the wide range of constituents who make up the university community better understand the importance of this aspiration and the ways it may best be achieved.

27 *Id*. at 79.

28 *See* Stephen Dunham, *Who Is the Client?, in* Higher Education and the Law 1093–99 (Judith Areen & Peter F. Lake, eds., 2d ed. 2014).

29 Guard & Jacobsen, *supra* note 1, at 212.