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"Lawyerization" of universities in the USA: Louis H. Guard and Joyce P. Jacobsen on the 'new era of higher education'

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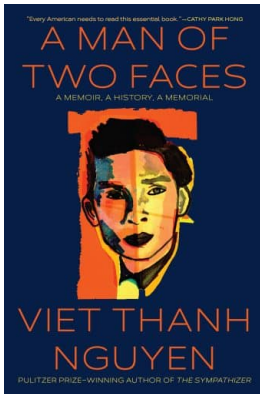
"LAWYERIZATION" OF UNIVERSITIES IN THE USA – LOUIS H. GUARD AND JOYCE P. JACOBSEN ON THE 'NEW ERA OF HIGHER EDUCATION'



Olga Ceran reviews Louis H. Guard and Joyce P. Jacobsen's *All the Campus Lawyers. Litigation, Regulation, and the New Era of Higher Education*, Harvard University Press 2024, 352 pages.

Olga Ceran, PhD (European University Institute, Florence) is a Postdoctoral Researcher (AFITE project) at the Europa Institute of Leiden University. Her research focuses on academic freedom as a fundamental right in European Union law.

Higher education has never been free from controversies, nor from political pressures. 2024 saw a renewed surge in public interest in how universities operate, as students and staff openly took positions on the Gaza war. Thus, alongside heated discussions about geopolitics, stakeholders and the broader public debated the role of universities and how to respond when they are perceived to fall short. In this context, some questions arise: What are the limits of academic freedom? What does it mean for a university to guarantee a space safe from discrimination? Who is to decide or act (and how?) on these issues? While the book *All the Campus Lawyers* is not a direct reply to these questions, it explores how regulatory scrutiny of higher education plays out in a democracy, intersecting with broader social and political issues – and hence emerges as a timely contribution to the discussions on the nature and future of higher education.



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The book asserts that recent years have led to a “lawyerization” of US higher education, defined as ‘simply a shorthand way of describing the increased regulatory and litigation pressures facing institutions of higher education [IHEs] against the broader backdrop of the increasing operational complexity of IHEs and the increasing public scrutiny, politicization, and legislative interference with higher education and its campuses’ (p. 8).

This assertion is at the core of the two main arguments of the book, presented in its Part I and Part II respectively. First, “lawyerization” has had a significant impact on the day-to-day operation of universities and therefore also their ability to fulfil their fundamental mission. Second, as higher education institutions are subjected to an ever-increasing scrutiny of external regulators and decision-makers, they need effective legal advice that recognizes this operational complexity. Such expert advice is crucial to address individual challenges in a way that allows to preserve the university’s essential mission. The arguments reflect the wealth of both scholarly and leadership experience of its authors, Louis H. Guard, Vice President and General Counsel at Hobart and William Smith Colleges, and Joyce P. Jacobsen, a distinguished Professor of Economics and former President of Hobart and William Smith Colleges. This experience allows the authors to complement substantive discussions with practical reflections about the operations of the modern university and the role of law within.

The first part of the book explores the different legal issues that US universities might need to face in their operations, ultimately amounting to their “lawyerization”. It also highlights how the evolving legal environment impacts the fundamental mission of the sector. The analysis is

structured around themes relating to university activities rather than specific legal provisions and touches upon many “hot topics” of contemporary higher education, such as gender discrimination (Chapter 1), free speech on campus (Chapter 2), institutional liability (Chapter 3), affirmative action (Chapter 4), faculty (shared) governance (Chapter 5), university funding (Chapter 6), or challenges resulting from various crises at campuses, e.g. brought by the COVID-19 pandemic (Chapter 7). And so, taking an example that speaks to recent developments, the book discusses how judges, scholars and legal practitioners have attempted to systematize the concept of ‘academic freedom’ and its relationship to the First Amendment of the US Constitution that protects free speech. The concept itself remains elusive, often merges in court judgments with general free speech rights, and the First Amendment binds in principle only state actors while a significant number of US universities remain private. In sum, the authors show that academic freedom might sometimes be protected by the Constitution, sometimes by private contracts, sometimes by other laws, and sometimes might not be legally enforceable at all.



The elusive *legal* concept of ‘academic freedom’ and the contextual nature of its challenges, often involving contradictory claims of different actors that touch upon other civil rights (e.g. non-discrimination), make universities increasingly wary of both legal and public judgments. As institutions are afraid of losing credibility (and funds) in light of the evolving and often contradicting expectations, they might – as the authors suggest – respond differently than they would otherwise, representing ‘one of the most significant ways in which [they] become “lawyerized”’ (p. 45).

Such “lawyerization” requires expertise and resources. The second part of the book is, therefore, dedicated to a discussion of the role of the legal counsel in this ‘new era of higher education’. Chapter 8 illustrates how in-house legal counsels – with their unique knowledge of all the nuances of the sector – can help universities navigate the increasingly complex regulatory landscape *and* preserve their missions. Chapter 9 zooms into the practical side of such a function within university structures: institutional resources, professional ethics, and sector-wide traditions and best practices.



The conclusion is that in-house legal counsels make sense for most institutions – financially and organizationally – and can be perceived as ‘key

stewards of the educational mission' (p. 212). Their work should therefore be seen as inherently related to the core of university governance.

The book ends with a forward-looking discussion on new emerging themes (e.g. raising internationalization of higher education) as well as broader political implications of legal conflicts at universities (Chapter 10). Here, the authors highlight also open questions for consideration for institutional actors and policy makers. For example, what is the impact of external actors and advocacy organizations on academic freedom – both as experienced by the university community and as a legal concept? How much of the debate takes place in a principled manner and how much has simply become part of broader political wars? The authors decisively call for such questions to be asked and answered in a critical way, with consideration given to the universities' ability to deliver on the fundamental mission of higher education.

While none of the issues discussed in Part I of the book is new in itself – a rich literature exists on many of the themes (e.g. Amy Gajda's *The Trials of Academe* and Lara K. Badke's *The Legalization of Higher Education*, among others) – Guard and Jacobsen's conceptualization of "lawyerization" as an analogous phenomenon with a focus on university governance is both comprehensive and convincing.



Developed in reference to an impressive range of different themes and legal fields, the book provides an interesting analytical perspective on various challenges in higher education.

While the analysis covers only the US educational landscape, the conceptualization of the phenomena discussed in the book has a broader appeal. If anything, conflicting reactions to the 2024 pro-Palestinian protests in university campuses showed that some fundamental questions about values and rights in higher education (e.g. what are the limits of free academic speech? who – and how – is to decide about university funding sources or institutional collaborations?) transcend the varying legal frameworks of academia across the world. Similarly, Part II of the book, with focus on the role of the legal counsel will be more relevant to US-based readers, but it can provide some food for thought also for academic leaders and stakeholders outside of the US.

That said, given that the broader questions concerning the impact of "lawyerization" on the mission of higher education institutions underpin the book, it is somewhat surprising how little space—beyond a few brief remarks in the introduction—is dedicated to critically examining this mission itself. Although there is a broad agreement on the core aspects of this mission in

abstract terms, it is far from a settled concept, as demonstrated by works discussing this issue, such as Harold T. Shapiro's *A Larger Sense of Purpose: Higher Education and Society* or Ronald J. Daniels' *What Universities Owe Democracy*. Other related topics, e.g. how the mission translates into the justifications for academic freedom, were equally treated in works such as Stanley Fish's *Versions of Academic Freedom. From Professionalism to Revolution*. In this light, while various policy and legal designs discussed in the book are said to have impact on the higher education's mission, it is simultaneously the different visions of the nature and scope of this mission (also in relationship to other legal objectives) that can be argued to underpin these designs. On the one hand, the authors are clearly aware of this, as the ambiguity lies at the heart of some of the tensions. On the other hand, the book does not always make it fully explicit, with 'the mission' emerging at times as seemingly more fixed than suggested elsewhere. While some of the questions posed in the book can do without such elaboration, others require a clearer (normative) point of reference, eg. whether law is helpful or a hinderance to the sector's core mission more broadly. Further, although the authors focus on raising 'a passionate plea for embracing nuance' in higher education policy debates rather than pointing towards specific solutions (p. 251), they do at times (be it implicit or explicit) evaluate the existing framework too.



Both the authors' plea for nuance and evaluative suggestions would be supported by a more in-depth discussion of the university mission (or what it could be) and the opposing perspectives on this matter.

Even if the reader accepts the book's arguments, they will benefit from making the normative assumptions or tensions even more explicit.

Overall, *All the Campus Lawyers* conceptualizes the "lawyerization" of higher education in a convincing way and interestingly combines theoretical insights about the nature of the phenomenon with practical suggestions on the role of legal counsels in a university. At the same time, some points – such as the different views on the mission of higher education that (should) underpin the legal framework – could be discussed more explicitly and/or in more depth. While readers who are familiar with the US educational context will likely find the book easier to read, it is written in an accessible manner and suitable for the general public beyond the US. It should appeal to a wide audience of scholars, policy makers, and lay readers alike – for example those who wish to understand better the complex intersections of academic freedom and civil rights, frequently covered in the news in the last months.