Book Review

Amy Gajda, *The Trials of Academe: The New Era of Campus Litigation*. Cambridge: Harvard University Press, 2009, pp. 360, $35.00.

Reviewed by Joseph D. Mandel

Amy Gajda's *The Trials of Academe* ought to be required reading for any attorney considering or embarking upon a career as a college or university counsel. Indeed, those currently serving in such a position should find Gajda's chronicle of the events leading to today's era of campus litigation absorbing as well as graphic proof that they are not the only campus counsel facing a growing and increasingly diversified docket of legal disputes.

Gajda, an associate professor at Tulane Law School, persuasively distinguishes between the presence of colleges and universities in the courts before the 1960s and since, arguing that passage of the Civil Rights Act of 1964 and its progeny during the following decade opened the way for the dramatic increase in litigation over the rights of university students, faculty, and administrators since then.

Commencing in the 1960s, courts have largely set aside, not always through gradual evolution, their traditional doctrines of "academic abstention" and "in loco parentis," doctrines that gave broad and unfettered authority to universities to operate largely without judicial interference. This notable change in judicial perspective in large part followed the passage of civil rights litigation in the 1960s and early 1970s. That legislation for the first time delineated explicit statutory rights for individuals and groups who were discriminated against by public or private entities or by individuals on the basis of race, ethnicity, national origin, gender, or other enumerated characteristics.

Gajda reminds the reader on several occasions of Justice Frankfurter's articulation in *Sweezy v. New Hampshire*[1] of the four essential elements of academic freedom: "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." While recognizing the dramatic increase in judicial involvement in disputes arising in the university context, and while recognizing some of the benefits that have accrued to all of the relevant parties as a consequence of that increase, Gajda retreats time and again to a nostalgic perspective, one that laments

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1. 354 U.S. 234 (1957).

how "the growing resort to legal process…threatens to undermine values of academic freedom that have served American society extremely well" (9–10), and how essential it is to "search for ways to…minimize the risks of judicial involvement" (19).

Gajda effectively and absorbingly proceeds through her comprehensive history of academe and the courts, focusing on the recurring subjects of litigation, including anti-discrimination law, First Amendment balancing, intellectual property ownership, and faculty/administration tensions. In so doing, she seems to evolve in her own views toward a recognition that the benefits arising from the dramatic increase in the incidence of litigation must be balanced against the detriments attributable to judicial encroachment upon the values embedded in notions of academic freedom. She states that "[t]he challenge…is to import legal doctrines in a way that is sensitive to the academic context and cognizant of its potential costs" (131). Even more forcefully, Gajda notes that "[t]he challenge is to shun the alternative extremes of wholesale immunity and unbridled oversight and to define terms for court intervention that balance interests in nondiscrimination against legitimate interests in academic freedom and autonomy (80)…. [W]e are realistically left with the unavoidable task of setting a balance point between the value of accountability through the courts and the value of limiting intrusions on the autonomy of academic communities"(248).

When Gajda's theses are dissected with vigor, one may be inexorably drawn to two fundamental conclusions: first, that she demonstrates a degree of concern for academic freedom that appears to downplay the positive influences in the academic environment that have been notable in the reported case law over the last fifty years; and second, that she directs her entreaties to the courts alone for appropriate recognition of the benefits of "academic abstention" and the need to recognize the valuable role that academic freedom plays in American society.

The world of academe before the tumultuous decade that roughly began with passage of the Civil Rights Act of 1964 can be characterized, with considerable and persuasive evidentiary support, as a bastion of white male supremacy. With the introduction and growth of legislation and resulting case law that was directed at breaking down barriers that thwarted the legitimate aspirations of those who theretofore were unwelcome, academic life has admittedly become more complex and litigious but also more open and equitable. What Gajda views throughout her work as a threat to academic freedom and the academic mission can also be viewed as an effort to assure fairness and compliance with legal norms that govern all other facets of society's activities and relationships. Put yet another way, have not the efforts of some to preserve academic freedom and autonomy come at too great a cost? Is "academic freedom" often nothing more than a rubric for preserving the white male dominance of the historical academy? In short, have not the rights vested in racial and ethnic minorities and in women, by way of example, brought benefits to academia and the larger

society that far outweigh whatever disadvantages may be identified as a result of judicial intrusion into the unique aspects of academic life and relationships?

Embracing judicial expansion of the rights of all members of the academic community does not suggest that courts should disregard the values embedded in academic abstention and academic freedom, but by recognizing such values courts should not judge colleges and universities differently with respect to civil rights from other institutions, public and private. When a member of the academic community, for example, asserts unlawful discrimination in hiring, promotion, and tenure; encroachment on his or her First Amendment or privacy rights; misappropriation of his or her intellectual property; or an administrative process that ignores material provisions of the Faculty Code of Conduct, Student Code of Conduct, or staff personnel policies, historical judicial notions of academic abstention and academic freedom need not and should not prevail. Yes, academic life may become less collegial with the increasing incidence of campus-related litigation, and yes, life for campus senior administrators and their counsel may become more complex and law-driven, but this arguably is a small price to pay to enable those who feel aggrieved to pursue their claims within the processes prescribed by relevant campus policies and regulations and, if deemed necessary, thereafter through the courts. In the last two decades or more, campus counsel have become accustomed to confronting such disputes, to helping the parties frame the legal issues, to helping to resolve disputes before they escalate, and to providing advice and counsel to senior administrators that often leads to a softening of once-intractable positions and early resolution. Even in the most contentious of contexts, university lawyers have assisted judicial and external administrative proceedings to the end that the courts are more likely to reach a just conclusion regarding the respective rights and obligations of the parties.

Gajda makes a persuasive case that universities should do a better job of educating the judicial decision maker about what is and is not unique about the academic environment. She states that "[t]he biggest priority for universities, today and going forward, must be to work to educate courts about the importance and social value of higher education to society, and the importance of academic freedom and institutional autonomy to the success of higher education" (252). No one can legitimately argue with Gajda's proposition, provided the education effort does not downplay the admirable improvements in the openness and equality on campuses that have been achieved over the last five-plus decades. At the same time, Gajda's laudable proposition is too narrowly framed. Despite zealous efforts to educate the courts about the uniqueness of American institutions of higher education, individual judges and justices have and will continue to harbor different views about the extent to which courts should defer to academic judgments and behaviors. As Gajda points out, some, such as Justice Stephen Breyer in *Wynne v. Tufts University School of Medicine*[2] (a case in which the court refused to second guess the medical school's decision to dismiss a failing student who claimed he

2. 976 F.2d 791 (1992).

needed relief from multiple-choice exams due to his dyslexia), will defer to the subjective judgment and experience of the professoriate, an attitude perhaps attributable in Justice Breyer's case to his having spent more than a quarter of a century as a member of the faculty of the Harvard Law School. Yet others, such as Justice Clarence Thomas in *Grutter v. Bollinger*[3] (the case addressing the permissibility of employing affirmative action in the context of admissions to the University of Michigan Law School) mock the alleged superiority of higher education decision making and find no rationale for treating colleges and universities differently in the courtroom from any other institution.

With these judicial realities in mind, one might constructively advance Gajda's thesis by expanding its intended audience to include legislators and the public they serve. In today's increasingly polarized and strident political environment, it is not so much the courts that need to understand the critical roles played by today's university, but rather those who choose their elected representatives and the representatives who, once elected, develop and put into effect the laws, policies, and budgets that dramatically impact higher education. When state legislatures and governors make budgetary decisions, particularly in today's fiscally trying times, they must be aware of the costs, present and future, associated with dramatic reductions in higher education funding. Similarly, they must be provided with the relevant data and arguments to surmount the temptation to succumb to the entreaties of vocal but misguided constituents to hold budgetary allocations hostage to efforts to encroach upon the university's right to decide without outside interference who teaches, what is taught, how it is taught, and to whom.

3. 539 U.S. 306 (2003).