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THE ROLE OF LAW IN EDUCATIONAL DECISION MAKING

A SYMPOSIUM

INTRODUCTION

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THIS YEAR, as in the past several years, it has been my privilege and pleasure to serve as moderator for the annual Villanova Law Review Symposium, and to be asked to write a brief introduction to these papers. Somewhat facetiously, I opened this year's discussion with a comment that this was merely a continuation of last year's Symposium which had as its topic, "Prisoners' Rights."¹ The remark was only somewhat facetious because it did not give rise to the expected roars of laughter and because there is indeed a strong thread which ties together this Symposium with that of last year and with other symposia, such as the 1968 Symposium, The Medical, Moral, and Legal Implications of Recent Medical Advances.²

The problems and decisions of educators, correctional officers, and doctors have only recently come within the bright scrutiny of legal review and legal consideration. The process of legalization for good or ill continues, and one of the primary purposes of the Villanova Law Review Symposia has been to explore this process with those who have been and are being affected by it.

Americans have long touted their devotion to and their respect for Law and Education. Yet, Americans for a very long time were sparing in their use of either. Almost all important developments in the protection of civil rights and due process are the product of the last fifty years. Education, at least at the higher level, was, until comparatively recently, the preserve of the few and elite, as it still

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1. *Prisoners' Rights and the Correctional Scheme: The Legal Controversy and Problems of Implementation — A Symposium*, 16 VILL. L. REV. 1029 (1971).

2. 13 VILL. L. REV. 732 (1968).

is in most of the world. The legal and educational structures which were sufficient for the occasional and limited use characteristic of the nineteenth century have become overwhelmed by the vast number of new problems which must be solved and the vast number of new people who are knocking on the courthouse door and the doors of our schools and colleges. Many of our problems of "lawlessness" and "educational confusion" might be attributed to a very bad case of indigestion on the part of both our legal and educational structures, caused by their attempt to ingest increasingly rich and abundant fare. Both systems have been under great strain and yet, rather than being sated, both systems are still voracious in their appetites. The law is steadily extending its standards to education or, as pointed out above, to prisons, hospitals, and other institutions. Education continues to hold itself out, perhaps with less certainty, as a royal road to opportunity and equality.

Law and education meet at several different points and in several different ways. It may be appropriate to outline briefly what I consider to be the most important of these areas of involvement and let the reader proceed to the papers which examine them much more carefully and in greater depth.

Law, in the first instance, is important in determining the structure and character of American education. Constitutional doctrines such as the separation of church and state and the equal protection of the laws have deeply affected the whole educational establishment in America. The legal effect of tax rates, the formation of school districts, the availability of subsidies, and the utilization of schools and universities to accomplish governmental purposes, such as war research or R.O.T.C. programs, have been of the utmost importance in the development and characterization of the American educational system. It is in this area that most of the nuts and bolts binding law and education can be found.

Both historically and philosophically, education, at least at the higher level, has been viewed as independent of the state and, to some extent, independent of the law. The concept of the university as a self contained law making body is as old as the middle ages. The idea of the university as a sanctuary and of the independence of the educational world has roots both in medieval ecclesiastical origins and in the nineteenth century libertarian concept of freedom of speech and freedom of criticism. Many of the problems of law and education arise because of these characteristics of education. How independent can a school be? How independent can its faculty and students be from

popular control? Is there a greater role for self-governance in educational institutions than in other social institutions, such as businesses or unions? What legal walls protect education from the Philistines? On the other hand, what rights within the institutions should be enforceable in the courts or administrative bodies of the land? Has the student or the faculty member legally-protected rights enforceable in court against those who administer educational institutions? Has the administration legal rights against students or faculties for which they should have recourse through the courts? What are these rights and when do they come into play? How closed a society is a university or a school? What rights of citizenship are left at the door when one enters into this process? What rights continue in full force and effect?

The law affects education, not only in determining its structure and financing and in determining the rights and obligations of the students, faculty, and administrators, but also in serving as a model for the administration of the educational institution itself. Increasingly, there has been a tendency to democratize and to introduce concepts of due process into the internal life of the educational institution, not only for purposes of potential review by some outside court or agency, but as an attempt to assist in the operation of the institution itself by making it more fair and more responsive. This development is reflected in student and faculty "bills of rights," hearings, and senates.

Obviously, the papers in this Symposium cannot answer all of the questions raised by these relations between law and education. As Professor Finkin points out, both my invitation to the Symposium and my introduction offer too broad a canvas to expect a complete picture. However, in looking at this canvas, the reader will find that our contributors have painted extraordinarily interesting and suggestive details. It would be presumptuous to attempt to summarize these papers, but I should like to point out that running through them is a remarkable, open-minded awareness of the possibilities and limitations of legal involvement. None are doctrinaire, all recognize the wants of the others. The administrators do not suggest that the educational system as such, without help or hindrance from the law, could best solve its own problems, and civil libertarians do not suggest that the wholesale transfer of decisions from the schools and colleges to the courts would be feasible or advisable. The focus varies, but the approach is the same. A proper sense of inquiry, doubt, and some hope, which should characterize both law and education, is the hallmark of these contributions which we expect to be an important part of the continuing exploration of these basic problems.