

Denver Law Review

Volume 45 | Issue 4

Article 1

April 2021

Introduction

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Recommended Citation

Otis A. Singletary & Robert B. Yegge, Introduction, 45 Denv. L.J. 497 (1968).

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DENVER LAW JOURNAL

VOLUME 45

SPECIAL 1968

NUMBER 4

INTRODUCTION

SINCE the end of World War II, institutions of higher learning in the United States have undergone dramatic changes in size, characteristics of student body, curriculum, research activities, role in the community and so on. This growth and development appears likely to continue. In this process of change, tensions have come into being among the various elements which constitute the educational community. Trustees, faculty, administrators, students—all have been searching for a definition of their responsibilities and their rights. The students have argued for a far more influential role in the educational process, as well as for greater freedom in their personal lives. Faculty members have attempted to build new concepts of the scholar and of their place in the administration of the educational institution. Trustees have found it imperative to clarify their ideas about control of the university and protection of academic freedom. Administrators have found the balancing of competing objectives evermore complex as they attempt to manage what are essentially new types of organizations. The matter of maintaining order, and at the same time freedom, on the American college and university campus is the challenge presented.

There has been much valuable discussion concerning these changing relationships. But one element of the problem has been frequently ignored. The law—the appropriate, formal, legal relationships governing the educational enterprise—has received very little attention, although it is apparent that many of the most fundamental issues on the campus involve questions of legal rights and duties. The precise status of the law, and the appropriate remedies, have not been systematically examined, and even more important, the legal principles and legislation needed for the future have not been explored. In the decades ahead, there will be an even greater demand for a clear and explicit statement of rights and duties in legal terms. It is imperative that thought be given to these problems now so that the law can be developed in light of educational objectives.

One excuse for ignorance of the law is frequently offered: inapplicability to the academic setting. Not everyone concerned concurs in this rationalization, however. There seems to be a "split of au-

thority" over the issue of whether the law should be involved in the educational system. On the one hand, some argue that law courts are a last resort, to be used only when human relations fail, thus insisting that the law should have no standing in the academic setting. Others argue that the legal process is fully applicable to the actions of universities and colleges, thus insisting that the law should be allowed to check power exercised by universities and colleges.

The question of why law should be considered in the problems of the universities at all should be resolved initially (this of course implies a consideration of the alternative — not resolving the issues). Yet, we know that the courts are beginning to intervene more frequently in the educational process, and we cannot turn our backs on that development. Furthermore, we should recognize that the absence of judicial decisions in this area may be one of the factors contributing to the hesitancy in seeking solutions to these problems. This may, however, be a fortunate situation, in that workable legal theories may be imported without also importing some of the unworkable ones. Whatever instruction the law may offer to the colleges and universities, their problems cannot be considered simply in formal legal terms, nor in the traditional view of law as an inflexible set of rules.

Whichever position one takes, the fact of ultimate legal redress exists. And there are some inchoate ideas emerging in the legal arena to which the academy must pay more than passive obedience. Accordingly, at least two matters must be carefully and urgently considered: the present state of law in relation to the process of higher education, and the future nature and content of law applicable in the academic institution.

One of the groups in interest, the students, seem to present claims for priority of attention. In the belief that the role of students in the institutional framework should be examined immediately, the American Council on Education and the University of Denver College of Law, with the generous assistance of The Danforth Foundation, convened a three-day conference in Denver, Colorado, May 16 through 18, 1968. The focus and interest of the conference was: "Legal Aspects of Student-Institutional Relationships."

The conference sessions were divided as follows. Following an overview of "Campus Freedom and Order" by Dr. Logan Wilson, President of the American Council on Education, Professor William M. Beaney, Department of Politics, Princeton University and Visiting Professor of Law, University of Denver College of Law, exposed participants to "Some Applicable Legal Doctrines." Following Beaney's remarks, Edward Schwartz, President, National Student

Association, Christopher H. Munch, Associate Dean, University of Denver College of Law, and Dr. Stephen McClellan, Tulane University, discussed Beaney's observations—amending, expanding, and limiting them. Professor Terry Lunsford, University of California at Berkeley, explored the topic "Who Belongs to the University Community?" The remainder of the conference was organized around three identifiable roles of students in the university.

Robert B. McKay, Dean, New York University Law School, outlined some of the problems of "The Student as Private Citizen." His remarks were discussed by Dr. Stephen Wright, President, United Negro College Fund, Robert Lutz, student at the University of Southern California, and Paul Cashman, Vice President, University of Minnesota.

"The Student as Resident" was discussed by Professor William Van Alstyne, Duke University Law School, to whom comments were directed by Professor C. Peter Magrath, Brown University, Rachel Scott, student, Kansas State University, and Professor Roy Lucas,* University of Alabama. Phillip Monypenny, Professor of Political Science at the University of Illinois, outlined the problems of "The Student as Student"; comments were made to his topic by Neal R. Stamp, University Counsel, Cornell University, Robert Powell, graduate student, Princeton University, and Dean Earle W. Clifford, Rutgers-The State University. A general topic was introduced by Professor William Cohen of the University of California Law School, Los Angeles. He discussed: "Private-Public Legal Aspects of Institutions of Higher Education."

Participants, in addition to those mentioned above, were carefully chosen from among administrators, faculty, and students. Representatives of national educational organizations were also included. Other participants in the conference, limited to a total of 45 persons, were:

Glen E. Barnett, Vice President—Student Affairs, University of Colorado

Henry David, Executive Secretary, National Research Council

Harold L. Enarson, President, Cleveland State University

John W. Gillis, Executive Associate, Association of American Colleges

Winfred Godwin, Director, Southern Regional Education Board

George F. Knerr, Vice President for Student Personnel, Pace College

John Larsen, Assistant to the President, University of Iowa

John H. Myers, of Williams, Myers and Quiggle, Washington, D.C.

Marvin L. Niehuss, Executive Vice President, University of Michigan

* Prepared remarks, but did not attend conference.

Allan Ostar, Executive Director, Association of State Colleges and Universities

Samuel Proctor, President, Institute for Services to Education

Rev. Patrick H. Ratterman, Vice President, Xavier University

William G. Shannon, American Association of Junior Colleges

Paul F. Sharp, President, Drake University

Edward J. Shoben, Director, Commission on Academic Affairs,
American Council on Education

John Silber, Dean of College of Arts and Sciences, University of
Texas

Otis A. Singletary, Vice President, American Council on Education

Joseph R. Smiley, President, University of Colorado

Richard Strichartz, General Counsel, Wayne State University

Gresham M. Sykes, Professor, University of Denver College of
Law

Ray Trammel, University of Arkansas

Marvin Wachman, President, Lincoln University

Honorable James Wilson, Assistant Attorney General of the State
of Washington

Robert B. Yegge, Dean, University of Denver College of Law

W. David Zimmerman, Vice President, The Danforth Foundation

J. L. Zwingle, Executive Vice President, Association of Governing
Boards of Universities and Colleges

All of the remarks to which reference is above made were prepared prior to the conference. Following the conference, taking due account of the stimulating discussion during the conference, each person rewrote his presentation for publication in these pages. That which follows is the product.

Although only 45 persons attended the conference, it is anticipated that at least five audiences will be reached through the medium of this Law Journal: The legal profession (judges, practitioners, lawyer-legislators), academic administrators, trustees, faculty members, and students. We hope and trust that presentation of the issues and alternative legal solutions in these pages is likely to have an important influence on the creation of caselaw in matters reaching the courts, and we hope it will provide a forum for concern, interest, and reexamination by all of the audiences.

The conference herein reported and the papers produced are not intended to provide a kaleidoscope of the divergent views about the role of law in the educational setting. However, the conference was an attempt to expose some of the reasoning of various persons intensely concerned about the nature of law in the academic setting and the relationship of educational goals to constitutional and legal ones. There is no representation that the views here expressed are complete, correct, or decisive. Yet there is the representation that the subject of law dealing with student-institutional relationships needs

constant, continuing examination. It is our hope that these pages will contribute directly to the urgently needed reexamination of the appropriate relationship between the student and the institution.

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Editor-Consultants

Washington, D.C.
Denver, Colorado
October 1, 1968