Denver Law Review

Volume 45 | Issue 4 Article 16

April 2021

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THE PRIVATE-PUBLIC LEGAL ASPECTS OF INSTITUTIONS OF HIGHER EDUCATION

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FOR legal purposes, the distinctions between public and private schools are much less significant than would appear. To understand this, it is necessary to consider the problem of student legal rights in its historical context. Some decades ago, the problem in both public and private institutions was treated largely as that of insuring the student some protection against arbitrary institutional action which affected his justifiable expectations. If the student had completed all the requisites for the degree, and the school had taken his time and money, then it ought to be precluded from arbitrary action denying him his degree. At some point, the actions of institutions could become arbitrary enough that the courts would step in. But it is clear that what was to be protected was the student's justifiable and reasonable expectations based upon what was, to a large extent, an economic investment.

That approach was reflected in the related field of constitutional law. Two cases, for example, now interpreted as milestones of academic freedom, *Meyer v. Nebraska*[1] and *Pierce v. Society of Sisters,*[2] protected the right to maintain private schools and the right of private schools to maintain some control over curriculum free of state interference. Those cases were not decided on the basis of the first amendment, as they might be today. Their rationale was the protection of economic rights of private schools. They were decided as a part of the pattern of cases protecting all kinds of economic rights under the due process and equal protection clauses. Given that view of constitutional law by the United States Supreme Court, it is not surprising that the approach to the rights of students by state courts would be similar — protecting a student's reasonable expectations after he had made an investment and had not received what he had bargained for.

The obvious legal concept to invoke in order to protect economic expectation is contract. For that reason, the cases involving student rights in both public and private institutions talked and thought about the problem in terms of contract concepts. However, courts did not apply the contract concept as they would in other cases.

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[1] 262 U.S. 390 (1923).

[2] 268 U.S. 510 (1925).

They were ready to protect a student's justifiable expectations at some point, but competing considerations made courts reluctant to interfere with institutional decisions.

Obviously, the view of the role of the institution to the student as one of paternalism left little room for legal interference. There was, moreover, a fear of interference with institutional autonomy and institutional judgments in areas where courts doubted their own competence to second-guess supposedly expert school administrators. A third important factor regarding both public and private schools was the concept of privilege. Public education was a privilege that the state could give or withhold on its own terms. In 1934, the Supreme Court decided that a state university could insist that a conscientious objector take military training, because his alternative was not to go to the state university.[3] A similar concept existed at the private level. A private school was an institution with which the student could deal or not as he chose. The legal concept, that education was a privilege that had to be taken on the terms the school imposed, was the same for private and public schools.

The important point to be emphasized is that, until recently, the courts perceived almost no difference in their treatment of public and private schools. In both cases, judicial interference was nearly nonexistent. In both public and private schools, student rights — at least in terms of rights protectable in court — were minimal. While a few cases could be cited of judicial veto of extreme institutional decisions to expel students late in their careers, student rights did not loom large.

What has happened to change all of this? To a large extent, cases from the South, initially involving racial policies of public schools, have been the source of pressure for change. Through the racial cases, the precedent of judicial interference with some decisions by public schools has been established. The result has been increasing recognition of the rights of students in public schools in cases where no racial policy was at stake. Greater judicial involvement with the public school necessarily will mean greater judicial involvement with the private school. The reasons for rejection of the earlier policy of noninterference with reference to public institutions are exactly the reasons why courts will be less reluctant to interfere with similar judgments by private institutions.

Does this mean that there are no differences between public and private schools? It is tempting to say "there is no such thing as a private school," and turn to the hard questions of fairness to students and appropriate school policy. However, that would be an oversimplification. The point is not that there are no differences

[3] Hamilton v. Regents of Univ. of Cal., 293 U.S. 245 (1934).

between public and private schools, but that among the differences between institutions, the public-private distinction is the least important, or one of the least important, distinctions.

Functionally, there is more similarity between the University of California and Harvard than there is between the University of California and a small, residential, state-run teachers college located in a rural area. The same is true of private schools. There is more difference between Harvard and a small theological seminary than there is between Harvard and the University of California. But the content of rules that should be applied, both with reference to student substantive rights and student procedural rights, must take into account institutional differences. That is obviously true in terms of their legal aspects as well as their nonlegal aspects. The content of those rules, however, is not within the scope of this article. But in framing those rules, many of the most important institutional differences will involve only incidentally the private-public distinction. Both private and public schools may be residential or commuter colleges. Both may be either large, general institutions of higher learning or special purpose institutions.

The remainder of this article will be concerned with the legal theories by which private educational institutions' decisions concerning student rights may be subjected to judicial control. These theories fall into two categories. First is the concept of state action, by which a private school may be subjected to some of the same minimal constitutional restrictions as a public school. Second is a group of common law theories by which state courts might subject a private school to legal norms, whether or not those schools are subjected to constitutional limitations. However, a caveat at this point is appropriate. The theories by which public and private institutions are subjected to judicial control may differ. It is easy, however, to overemphasize the importance of the legal theories involved. For example, even if the relevant theory for protecting student rights were contract, it would be possible for a sensitive court to evolve sensible rules about private institutions under a contract theory — particularly if the contract were treated as one of adhesion and the court retained the power to disregard any terms of the contract it determined to be inappropriate. A court which had made appropriate judgments about the extent of judicial involvement could utilize the contract theory and solve most student-institution problems correctly. On the other hand, the contract theory could lead to inappropriate results in the hands of an insensitive court. A substantial number of courts have read general language in university catalogs as a blanket waiver of a student's substantive and procedural rights. Probably, these same courts would not so broadly construe a waiver of rights written on a

ticket that a student received in parking his car in a commercial parking lot.

It is dangerous to assume that the development of legal theories is the major problem, because the *real* problem is determining the extent of legal control that is desirable and appropriate in a particular situation. That question is independent of the legal theory invoked. With this in mind, a brief survey of the legal theories can be considered.

The most obvious theory for developing legal control of private institutions is the theory of state action — that some institutions which are apparently private are actually public, and therefore subject to some restrictions imposed by the Constitution. The large private institutions of learning carry with them most of the indicia of state action for application of constitutional controls that have been found in the cases involving public universities. On the other hand, it should be remembered that no United States Supreme Court decision, except in the racial context, has decided that the Constitution applies significant control over private educational institutions.

The most obvious of the indicia of state action, of course, is public funding of nominally "private" schools. It will be increasingly difficult to draw the distinction between "public" and "private" schools in terms of who is funding them. Further, formal state regulation and involvement varies in intensity and in kind from situation to situation. The developing theory is that institutions which perform a public function become public for some constitutional purposes, without reference to the extent of formal state involvement. The latest case to apply that theory involved a municipal park.[4] Justice Douglas' opinion for the court argued that city maintenance of a segregated park was so much a governmental function that the park might be public for fourteenth amendment purposes, no matter who was in formal control. Justice Douglas distinguished the problem of private schools as perhaps being different,[5] but it is significant that Justice Harlan's dissent argued that, under the Court's view of the public function theory, it would be impossible to say that any school is a private school.[6]

Before examining some common law bases for judicial control of private schools, another disclaimer is in order. One difficulty with the state action theory is that some have viewed it as an oversimplified syllogism which goes something like this — due to state involvement, a private school is the state, and therefore cannot do anything that the state could not do. In my opinion, that view is clearly erro-

[4] Evans v. Newton, 382 U.S. 296 (1966).

[5] *Id.* at 300.

[6] *Id.* at 321-22.

neous. State action may be more of a scalpel than a club. For example, significant state involvement in Catholic schools may give some constitutional rights to students in those schools. If most of the money for student tuition in a Catholic college comes from federal and state funds, some admission policies at that college would come under constitutional scrutiny. It would not follow that the Catholic college would be bound by the establishment principles of the first amendment so as to lose its right to give religious instruction.

In summary, the question of state action is more than the technical issue of sufficient governmental involvement which would treat all decisions of a "private" institution as a governmental decision. The question will be partly determined by the merits of the issues involved. It has not been surprising, given the clear application of the equal protection clause to the arbitrary exclusion of students on racial grounds, that in such cases federal courts have extended the reach of the fourteenth amendment even to institutions lightly involved with government. It would not follow that an institution more heavily involved with government would be precluded from using private funds to construct a chapel on the campus. The nature of the question involved gives different judicial perspectives to the state action question.

The Constitution is not the sole source for legal controls over private educational institutions. State courts, applying state common law doctrines, may set some significant limits on unfair treatment of students by private schools. Thus, in enlightened states, it may not be necessary to invoke the Constitution to provide a legal base for the protection of student rights in private institutions. As mentioned above, it is possible and appropriate for a court to develop some kinds of contract theories which, if expansively handled, could be used to provide significant legal protection for students. Professor Seavey has suggested a theory that the institution is a trustee acting in a fiduciary capacity to the student.[7] While I have some trouble with the concept, it is a legal theory that could be invoked, although no court has used it. Another possible theory that has not been applied to a private school might borrow on tort principles. The rights of people in other private associations have been protected by some courts under the theory of prima facie tort. It has been used, for example, where a member is excluded from a labor union for arbitrary reasons with a loss of his economic rights. Proceeding from the theory that deliberate destruction of valuable economic rights is actionable unless justified, it is possible to work out a theory that the student's separation from the institution, or his loss of substantial rights, represents tortious conduct unless justified. What the institu-

[7] Seavey, *Dismissal of Students: "Due Process,"* 70 HARV. L. REV. 1406 (1957).

tion can and cannot do would then be determined through definition of the scope of the privileges. However, one obstacle to utilization of this theory may be the immunity in some states of charitable institutions from liability in tort.

In conclusion, it is apparent that the court that has decided to impose legal controls upon what an institution may or may not do with reference to its students has an armory of legal theories at its disposal. The theories are interesting arguing points for lawyers. But, as law in this area begins to develop, defining the theories will be much less important than defining the legal restrictions that are appropriate for various kinds of institutions. School administrators should begin to think in functional terms rather than in terms of legal concepts. Rules that have been developed for some institutions are not appropriate for others. If the specialized function, size, or location of a school requires a different kind of approach, the development of sensible rules in advance will make it less likely that the institution will have to live with inappropriate rules imposed by a court.