The Journal of Law and Education

Volume 3 | Issue 3 Article 13

7-1974

BOOK REVIEWS

Book Reviews

THE COLLEGES AND THE COURTS: FACULTY AND STAFF BEFORE THE BENCH. By M. M. Chambers. Danville, Ill.: The Interstate Printers and Publishers, Inc. 1973. Pp. xvii, 260.

Reviewed by Gene S. Jacobsen[1]

Public education and public educators, in this country, have a long history of the legality of their practices being tested in the courts. In the recent past the frequency of such tests has increased. Such cases have generated a great deal of study and discussion by scholars. Ironically, until recently, higher education has remained relatively immune from the encumbrances of legal questioning and suit.

Currently higher education faces new and dramatic challenges to its decisions and actions. The once sacrosanct shield of academic privilege no longer dissuades the vigorous scrutiny and questioning of client, employee, and citizen. Students, formerly docile and unsophisticated in matters of rights and the law, now openly and critically question actions and decisions in every aspect of university life. Professors, individually and collectively, insist on substantive and procedural due process guarantees of the law and on more policy-making powers.

This antagonistic atmosphere in higher education has generated a new area for scholarly activity. M. M. Chambers, respected scholar of law and education for more than thirty years, has in recent years turned his interest to higher education and the law. The work under review here is the second in a series of three by Chambers dealing with that general topic. The first dealt with the student and the college, and the one in 1974 is to be entitled, *The College and The Courts: Entity, Property, and Finance.*

Doubtless, university and college educators, as well as those persons associated with the courts, need at the crucial juncture clear direction as they face the foggy and uneasy days ahead. They may not, I am afraid, anticipate any substantial help from this recent work of M. M. Chambers.

The book lacks the essential precision and scholarly incisiveness that the situation demands. It falls short in the identification and discussion of crucial issues and fails to analyze available data in a fashion that clearly articulates the current state of affairs.

Chapters two, three, and four, which deal with the termination of employees in institutions of higher education, will serve as examples of the reasoning that underlies my criticism.

Chambers begins by confusing the reader. He does not clearly delineate the

[1] Professor & Chairman of the Department of Educational Administration, Graduate School of Education, University of Utah.

various contractual arrangements between employers and employees, and then he fails to identify the issues related to the severance of working relationships between employees and employers. He classifies teachers in universities, colleges, or public school districts in three general groupings as to their conditions of employment:

1. Non-tenured, or simply employed for a specified short term, usually one year, with no stipulations about renewal of the contract or its expiration;
2. Probationary, or employed for a specified short term, usually one year, with the understanding that the contract will be allowed to lapse and not be renewed at its expiration if the services have not been satisfactory or if for any reason the services are not wanted further; but also that after a specified number of years in probationary status the employee will be eligible to be considered for tenure appointment;
3. Tenured, or employed under a "contract of indeterminate duration" which stipulated that it will be automatically renewed year after year as long as the services are satisfactory, or until the employee voluntarily resigns or retires or dies or becomes disabled or runs afoul of one of the specified causes for dismissal and is ordered dismissed by the governing board after the stipulated due process.

These groupings do not serve any useful purpose. More precise groupings, such as follow, are needed in a study of this type:

1. Those employed for a specified temporary period of time with the period of time and the fact that the contract is not to be renewed clearly stated in the contract. (This type of contract is often issued for the replacement of a permanent faculty member on leave or when an institution needs additional or special help for a specified period of time only. Relating tenure or nontenure to this contractual arrangement only tends to further confuse the issue.)
2. Those employed for an unspecified period of time in a nontenure-earning position, generally on a year-to-year basis. (Again, relating tenure or nontenure to this contractual arrangement only tends to confuse the issues. Tenure is not an issue.)
3. Those employed in a tenure-earning position and who are in the probationary period of employment.
4. Those who have earned tenure.

Critical problems arise under each of these four contractual arrangements when the employer fails to meet the demands of both substantive and procedural due process appropriate to contractual arrangements relative to each category.

In addition to the pervasive imprecision throughout the text, other major concerns are as follows:

1. The author attempts too much. A valuable contribution could have been made if the presentation had been limited to a thorough coverage of contracting and termination and, perhaps, other sanctions imposed upon employees.
2. Most of what is presented in chapters five, six, seven, eight, nine, and ten

could legitimately fit into a discussion dealing with contractual arrangements and termination.

3. Chapter four, "Non-Academic Staff Members," is a very cursory treatment of an area broad enough and discrete enough to warrant a separate and serious section.

4. Chapter twelve, The President; Administrative Staff, Board Members, appears to have been "added on" as an afterthought. This area warrants separate treatment.

5. The author does present a usable compilation of cases. If he were to have presented an introductory chapter dealing with both substantive and procedural due process demands of the law as they relate to professional employees at institutions of higher education, and if he were to limit the discussion to issues growing out of contractual arrangements with professional personnel, and if he were to better organize the presentation including the cases, and finally if implications for educators had been identified, then the book would have been helpful.

As presented, the book is valuable primarily for the cases included and could be used as a reference. As a major resource of guidance for educators in higher education, however, it falls far short.

Because law is anything but an exact science, it seems only reasonable to this reviewer that those writing about the law assume the responsibility for treating the material in as precise a manner as possible. This implies the obligation on the part of the writer to state as clearly as possible the purpose of the effort, to organize his presentation in a way that identifies specific issues, to carefully collect data relative to specific issues, to critically analyze the data, and then to state findings in such a way that the reader gets usable information from what he has read. The reader ought not to have to do the writer's work for him.

STUDENTS AND STATE BORDERS. By Robert F. Carbone. Iowa City, Iowa: The American College Testing Program, 1973. Pp. 60, $2.00.

Reviewed by Robert M. Hendrickson[1]

The practice of assigning higher tuition rates to nonresident students is a tradition of long standing in higher education. The rationale for this assessment has been to prevent the states' subsidization of educational costs of non-tax paying students, and to control the influx of students into the states' educational system. Paradoxically, institutions have attempted to attract a geographically mixed student body. The desire for a diversified student body in the past has resulted in a lax attitude toward nonresident regulations and the development of tuition remission programs to attract quality out of state students.

[1] Northwestern University, B.S. North Dakota State University; M.S. in Education, Ed.D. Indiana University.

These two opposing points of view came into direct conflict in the 1960's due to rising costs of education and insufficient physical facilities. These pressures plus the political climate of the late sixties caused nonresident tuition fees and the residency question to become public issues.

Up until the late sixties research by educators into the residency question was negligible. However, legal experts had been writing on the subject for some time. Robert Carbone was one of the first educators to address the residency issue. His work pointed to the fact that this issue has dire financial consequences for higher education. His recommendations and conclusions merit careful consideration.

Carbone has put together a substantial amount of research on the issue. This is a monumental feat, particularly when one examines the variation and confusion over state regulations on residency for tuition purposes. Not only is there great variation among states but also there are vast differences between institutions within some states. Carbone has analysed all the available information and classified the types of regulations and methods of maintaining those requirements. He has brought understanding to an area of confusion.

Carbone's treatment of barriers to migration is excellent. These barriers, "quotas on admission on nonresidents", "differentiated admission standards for nonresident students", and "the use of higher nonresident student fees" are described in terms of how they have been used across the country as are current trends in the use of each one. As a result of these barriers the decline in migration at the less prestigious state institutions is not healthy.

The presentation of current and past migration patterns has added a new perspective to the whole issue. Frenske and Scott reported a decline in migration since World War II. Barriers to migration and the development of the public junior college are certainly plausible factors contributing to this decline, but as the authors stated additional research is needed.

This research on migration patterns, state regulations concerning nonresident students and other barriers to migration is useful. However, the whole nonresident question revolves around the legality of residency requirements in light of the United States Constitution. Therefore, research on nonresidency tuition should involve the disposition of various court cases and a discussion of the legal arguments in light of these court cases. Carbone's monograph does not make the kind of legal presentation which the writer feels is necessary. To give a yes, no, or maybe answer to three legal questions and then present case law briefs in chronological order does not provide the reader with an adequate understanding of the legal issues.

Van Dyne's presentation in terms of all the relevant nonresident tuition cases is certainly comprehensive. However, there is no probing narrative dealing with the disposition of the cases on the important questions. These questions are the waiting period for acquiring residency status, static residency classifications, and employment in the state to acquire residency status. The presentation of a legal treatise could have centered around a discussion of the above

issues and others with relevant cases cited. These discussions could have dealt first with Supreme Court cases affecting the issue, federal court cases, and then state cases that possess viable legal positions.

Shapiro v. Thompson, a welfare case with significant implications, is not even mentioned. It is true that *Starns v. Malkerson* appears to have diminished the viability of the argument that nonresident tuition fees are a deprivation serious enough to infringe upon the student's right to travel as per the fourteenth amendment. However, there are some remaining legal arguments concerning the contention that higher education is a legal necessity and therefore, might result in a ruling along the lines of *Shapiro.*

There are a number of cases in the area of voting rights which help clarify the question of residency and domicile. These cases should have been discussed. Although a brief of *Canington v. Rash* is presented, rulings in *Drueling v. Devlin, Anderson v. Brown* and *Whittington v. Board of Education for Onondaga County* should have been analysed to further outline the implications of the fourteenth amendment on the constitutionality of residency requirements.

The legal presentation falls short of achieving a thorough discussion of the legal questions and rationale for their solution. The reader, whether he be an educator or a legal expert, should be presented the direction legal decisions might take in the next few years. Without this the monograph is less than adequate.

Although the legal discussion previously mentioned is incomplete, the writer feels that this work is valuable because of the topic areas previously mentioned, the discussion in terms of projected income from nonresident tuition, and the recommendations for rules and precedures governing nonresidents. His figures on loss of income by removal of static residency requirements indicate a projected loss of between $125 to $150 million a year. Although this figure certainly is much less than Carbone's original prediction of $300 million, the difference is based on the assumption that institutions would be able to charge tuition for the first year of attendance. These rough figures give educators an idea of the financial implications of court decisions in this area.

Carbone's recommendations for evidence required to prove residency and procedures in the administration of nonresident tuition assessment are most cogent. Of particular importance is the recommendation that institutions provide a mechanism for students to appeal their residency classification thus preventing further court litigation on the issue.

In summary the writer feels this monograph on residency classification for tuition purposes is valuable. The research on state regulations and barriers to migration, migration statistics, and economic consequence is well done and makes this publication valuable reading for all educators involved with the nonresident issue. Had the legal question been adequately presented this would have been the most authoritative work in this field.

FACULTY UNIONS AND COLLECTIVE BARGAINING. By E. D. Duryea, Robert S. Fisk and Associates. San Francisco, Calif.: Jossey-Bass Inc. 1973. Pp. 236.

Reviewed by John H. Metzler[1]

The drama of collective bargaining in public education has unfolded only in the past twelve years. Within this time span more than thirty states have passed legislation establishing a legal basis for the process and several thousand contracts are being negotiated yearly.

What is the state of the art in higher education? As late as June of 1972 there existed but 158 institutions with recognized bargaining units and 119 of these were two-year colleges.

Why then a book, a text, dealing with collective bargaining and college faculties? The answer, as expressed or implied by several of the contributors, is the belief that faculty unionism will increase. The editors apparently believe that the present status represents the forerunner of that which is to follow for they stress that their work is "... an initial survey, a state-of-the-nation overview, one anticipating a growing body of literature. ..." In introducing their Epilogue, they point out that "... to conjecture about the basic nature of collective bargaining (on college and university campuses) certainly strikes us as requiring considerable temerity. ..."

E. D. Duryea and Robert S. Fisk, the editors, have performed their work well. Their choice of associates proved wise for, as woven together and summarized, the book quite successfully performs its stated function. As might be expected among the several associates there is a certain variation in commitment to a belief in the strength of faculty acceptance of collective bargaining and the concept is occasionally handled rather imprecisely.

Joseph W. Garbarino in the introductory chapter centers on the emergence of collective bargaining. He pinpoints as fact that the "... most important single reason ..." for the growth of academic unions is a state law granting the public employee the right to organize. However, in the opinion of this reviewer, he performs a possible disservice if the reader interprets his discussion of the "bargaining" which may occur without formal organization as being the same as that bargaining which takes place in the adversary relationship between legal equals, the cornerstone of collective bargaining.

The extensive experience possessed by Donald Wollett makes his contribution pertaining to the "Issues at Stake" outstanding. If one has the time to read but one chapter, this is the one to select. As he perceptively analyses the characteristics, structure and function of collective bargaining, it is difficult not to agree as he states:

> The system of self-government treasured by many faculty members does not adapt easily to collective bargaining. Indeed, it can probably not survive in this new environment. Managerial decisions, regardless of who makes them, are likely to be the source of complaints and the prime generator of grievances.

[1] Special Assistant for Labor Relations, Newark College of Engineering and President, Metzler Associates.

This theme is stated by several of the contributors. It is rather apparent that with a large segment of the faculty in a collective organization, an organization intent on continuing as an organization, the loosely joined faculty governance adherents must give ground. If faculty governance and unionism are on a collision course, faculty governance is more apt to be mangled than is unionism. It appears improbable that they can exist side by side.

The portion of the chapter, "Bargaining Process", written by David Graham could easily be extracted and transformed into an excellent handbook, a "how-to-do" guide for faculties on the mechanics and procedures of collective bargaining. He emphasizes the need for negotiating team solidarity and discipline and stresses the frequent minus relationship existing between logic and reasonableness on the one hand and the final negotiated, compromised settlement on the other.

In the same chapter Donald Walters presents an administrative viewpoint of the bargaining process. His contribution is best capsuled when he says, "The challenge for those in collective bargaining in higher education is that of effecting a fundamental change in the character and tone of the negotiations process." The solution and change, he believes, is a negotiated system of faculty governance. One reads his arguments, considers his logic and reasonable approach and agrees—but with the sadness of knowing that it cannot prevail.

The impact of formally constituted grievance procedures upon the professional versus employee relationship is developed by Mathew Finken. If a weakness exists in this chapter, it is Finken's equating the need to carefully select arbitrators and the need to develop contractual draftsmanship. Unless the arbitrators listed on any submitted panel are personally known—and well-known—to he who does the selecting, the process of selection is at best a most imprecise, happenstance procedure. Contractual draftsmanship, on the other hand, is a controllable matter. Much assistance is readily available, including models of acceptable contract language and experienced attorneys and consultants to review the language prior to acceptance.

George W. Angell utilized his prior experience of studying faculty collective bargaining in the two year colleges of New York to describe the two year college experience and its implications for the four year institutions. He, quite clearly, exposes a little considered danger arising from the collective bargaining process—the weakening of the faculty-presidential-trustee relationship due to the sometimes powerful intrusion of a fourth body of governmental officials who now no longer look supinely at the campus from a distance. Angell's contribution provides valuable insights for both the administrators and faculties of the four year institutions and contains warnings which one pessimistically feels will not be heeded.

Utilizing contracts from fourteen four year institutions, Mortimer and Lozier discuss the outcomes of negotiations. The range of most of these contracts is wide and the subject matter varied. After carefully itemizing the reasons why their analysis can only speculate upon the impact collective bargaining has on higher education, they make two general points: a) the bargaining units include

a wide range of non-teaching professionals, and b) the contracts codify and specify procedures for faculty-administrative relations in a wide variety of areas.

The remaining three chapters, prior to the summarizing Epilogue, contributed by Fisk and William Puffer, Neil Bucklew, and Frederich Hueppe, present detailed and knowledgeable studies of collective bargaining and the resulting relationships at a large public university, a state college and a private institution. Each inspects the problems, the outcome, and combined, stress both sameness and disparity in structure and conduct.

In the Preface, Duryea and Fisk list almost a dozen critical questions relating to collective bargaining and higher education, followed by the statement, "No analysis written at this time can predict the answers to these questions." The fact is, the authors almost predict, they at least imply, and combined come close to drawing a collective conclusion—one with which it is almost impossible to disagree.

BEYOND THE BEST INTERESTS OF THE CHILD. By Joseph Goldstein, Anna Freud, and Albert Solnit. New York: Macmillan Co., 1973.

Reviewed by A. J. Pappanikou,[1] Ed.D. & Jerome J. Spears,[2] M.A.

This is an enlightening, logical, convincing, and highly relevant text. The authors have produced a truly worthwhile book in which logic, law, and psychology are combined to benefit children. The authors do not attempt to hide their bias. It is their conviction that "the law must make the child's needs paramount" and must always endeavor to "safeguard the right of parents to raise their children as they set fit, free of government intrusion, except in cases of neglect. . . ." From this position the authors examine the principles and practices of child placement.

Historically, laws have existed to order human relations. Laws have, at times, been derived from chance, experience, logic; even intuition and superstition. Regardless of their origins, laws have generally protected the weak and attempted to insure equity among individuals. Those laws relative to children have traditionally placed the child's interests above those of all others when physical well being was an issue. In instances where physical welfare is not a concern of the court in deciding placement for the child, the claim of a biological parent for custody is usually considered superior to all other reasons. For the legal act of assignment at birth this principle is efficient and effectively protects the rights of both parents and children. At other times adherence to this principle is psychologically harmful to children. This is nowhere more evident that in divorce cases, foster home placements that are contested after a long period of time, or adoption placements that are contested.

Relying on a psychoanalytic theory of child development, the authors de-

[1] Professor of Educational Psychology, University of Connecticut.

[2] Doctoral Candidate, University of Connecticut.

velop a legal model to be used by jurists charged with the placement of children. Basic to their arguments are the following principles: (1) every child needs at least one individual who is concerned with his physical and emotional welfare—a "psychological parent"—and one who *wants* the child; (2) for a child, time is quite a different quantity than for adults; often a short time can be an eternity for the very young, and separation from a parent can have a lasting harmful effect; (3) a child should be treated as an *equal person* under the law and should be represented by counsel in all hearings concerning his placement.

The authors view each placement as an "occasion for protecting future generations of children by increasing the number of adults-to-be who are likely to be adequate parents."

To insure an adequate placement the following rules are suggested: (1) every placement should be made in such a way that disruptions to a child's life are minimized; every case should be treated as a pressing emergency which must be dealt with immediately; (2) an existing relationship with a "psychological parent" should be preserved at all costs; (3) all placements should be final in order that both the child and involved adults can begin to build a lasting relationship without fear of court changes in placement; (4) since the court has limited ability to supervise relationships, the designated parent or guardian should be responsible for the raising of the child from the time placement is made without condition. The latter guideline would extend to visitation rights in divorce cases where the person raising the child would make the decision.

The only drawback that the text possesses lies in a lack of input by the child himself in the determination of the correct "psychological parent". While there is implication that this occurs through counsel representation, a procedure for direct child input is not alluded to and thus can lead to selecting *proper* "psychological parents" from court or adult perceptions. However, these "parents" may not be similarly perceived as positive by the child.

In summary, when a court places a child they should select "the least detrimental alternative" (psychologically) from the options available. The variety of legal issues which these principles raise are very effectively dealt with by the authors. They discuss in detail the traditional legal approach and the needed changes and they cite numerous representative cases to illustrate the need for change as well as examples of what the authors consider "enlightened" decisions that are consistent with their proposals.

Perhaps the greatest virtue of this text is the manner in which the rights of children are championed. Often the value of a book is reduced by unnecessary length of complexity, but *Beyond the Best Interests of the Child* is exceptional in this regard. The case for change is presented in a refreshingly organized, logical, and appealing way. Certainly, if one seeks to change the existing system, this type of presentation is most likely to appeal to the diverse population whose support is necessary for success.