

COMMENT

EDUCATION AND THE BILL OF RIGHTS *

WILLIAM J. BRENNAN, JR.†

Hardly a term passes at our Court that we are not confronted with at least one very difficult case involving the relationship between the public school and the law. Whether the issue be racial segregation, religious exercises in the classroom, or loyalty oaths required of teachers, I am continually aware of the importance of the public school as an arena of legal controversy. But while the public school is frequently at center stage in the courtroom, the law and the public school meet in another equally important place—the classroom. It is with the interrelation of law and the public school in this latter arena that I shall concern myself in this Comment.

Of very deep concern to me is the seeming lack of appreciation that far too many high school students and graduates have for the Rule of Law. The more specific concern is that so many Americans simply fail to understand the deeper meaning of our Bill of Rights. I do not suggest that students cannot recite the text of the first ten amendments—on the whole that seems to be done quite smoothly.

What does concern me deeply is that the import of the words in the Bill of Rights very often fails to get off the printed page and into real life. While we have made progress in giving students an appreciation of some of the principles of the Bill of Rights, we have retrogressed with others. Today, for example, representative adolescents are actually more willing to condone unauthorized searches of private dwellings, the suppression of rights of aliens, and the discharge from public employment of persons suspected of subversive activities than were students of the same age ten years ago.

Another trend that upsets me is the uncertain impact of secondary education on some of these undemocratic attitudes. Recent surveys give some indication that high school students may actually be less concerned about certain individual liberties as seniors than they were

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† Associate Justice, United States Supreme Court. B.S. 1928, University of Pennsylvania; LL.B. 1931, Harvard University.

as freshmen. Other studies tell us that college seniors are not likely to have lost the lack of sensitivity or tolerance for the rights and liberties of others that they had as college freshmen.

I don't suggest, of course, that secondary education is not a liberalizing experience—for there is overwhelming evidence that it is. What I do mean to suggest is that for all we have accomplished—much of it in just these four decades since I finished high school—there are some gaps, perhaps tragic gaps, that we are neglecting. I do not mean that all is bleakness, without hope, and complete despair. Stuart Chase only recently sounded an encouraging note when he reported: "On balance, the polls show Americans favoring the principles of the Bill of Rights, often faltering in the specific applications of these principles, but gradually drawing closer to the ideal—significantly so in freedom of religion, reluctantly so in freedom and equality for the races."¹

Perhaps the true test of any system that tries to teach values is how well those values carry over into human behavior. In the summer just ended we have witnessed some extreme tensions in human affairs—tensions of the kind that put values and beliefs to the acid test. The results of this time of testing are cause both for satisfaction and concern about the durability of the values that our system inculcates.

In many respects the summer of 1964 may have proved the values far stronger than most had thought. The tragic death of the three civil rights workers in Mississippi gave, of course, full cause for national mourning. But there was cause for satisfaction in the thousands of other students who worked for civil rights in many parts of the country all summer without physical harm—even if not without fear and anxiety at times.

What has really put our values to the test has been the outbreaks of violence in the streets of several northern cities. A recent report of the Federal Bureau of Investigation on the nature and causes of these outbreaks says that "a common characteristic of the riots was a senseless attack on all constituted authority without purpose or object"²—a rupture of the cords that normally bind people to decent conduct—reflecting on the part of young people particularly "an increasing breakdown across the nation in respect for the law and the rights of other people to be secure in their person and their property."³ This report points up what concerns me particularly about those lawless incidents and what they reveal about the hard and

¹ CHASE, *AMERICAN CREDOS* 167 (1962).

² *New York Times*, Sept. 27, 1964, p. 82, col. 5.

³ *Ibid.*

practical side of the principles of the Bill of Rights. This is, that to the extent that either law enforcement or the quest for civil rights leads to violence and disorder, those institutions whose task it is to inculcate values have somehow failed—and neither law nor education can gainsay its share of the responsibility for this failure.

Perhaps the lesson that has not been fully taught here is the lesson that almost every right has a coordinate responsibility. It is easy, and tempting, to stress the one to the neglect of the other. What has to be taught is that civil rights do not include civil irresponsibility, that civil liberty is no invitation to civil license. The principles are obvious and indisputable, but difficult to apply where they are really needed most.

In looking back across the recent months, though, I am struck by one further gap in our national acceptance of the Rule of Law. Those of us who were not directly concerned with the riots in Harlem, Rochester, Dixmoor, or North Philadelphia have tended to assume that the real issue is to find out who was to blame for the disorder. We have supposed—rather smugly, I would suggest—that if only we could find out who instigated certain acts, we could then invoke the machinery of the law to punish those who were formally at fault, and that would end the matter.

It is in making easy assumptions of this kind about the function of law that we tend to neglect the role of law as an instrument of social justice. I do not mean, of course, that a system of law should not punish those who flout it—for it could hardly survive otherwise. What I do mean is that the function of law, and of lawyers, and of judges, does not stop with the punishment of the man who transgressed, but only begins there. If the Rule of Law is to survive and flourish in our society, then I would suggest we bear a heavy responsibility to look beneath the surface when the Rule of Law breaks down. Prominent among the answers I suspect we will find in almost every case is some failure to inculcate an early and deep respect for the principles of the Bill of Rights—principles which define both rights and responsibilities.

If we are to improve teaching about civil rights and responsibilities, what more can be done? First, I would suggest there is a need to reappraise and perhaps reformulate the basic objectives of liberal education. This task is, I suggest, primarily the responsibility of educators. A recent report indicates that the educators are already undertaking just the kind of reexamination I have in mind.

The contemporary world requires of its educated citizens a breadth of outlook and a degree of sensitivity to other

cultures unlike any required in the previous history of mankind. This requirement coincides with the universality of viewpoint characteristic of the liberally educated individual. The new and still changing role of the United States in world affairs has gradually come to be recognized, though we have not learned how to prepare ourselves adequately for fulfilling our new responsibility. To do so we must, in addition to the more obvious aspects of international relations, become more sensitive to the many diverse cultures which reflect the myriad manifestations of the human spirit. With the multiplication of new nations, these varying sets of beliefs and values and instinctive habits of behavior become more critical, and an understanding of them becomes central to the development of constructive attitudes and wise policy. Indeed, we must go even farther and recognize the interplay of one culture with another. None is static, least of all our own. To understand ourselves we must be able to understand both how we differ in outlook and value system from other peoples, and how our own complex network of social, economic, political, and intellectual factors evolved from the interaction of forces within our society and forces acting on it from without.⁴

This, surely, is a task for educators and not for lawyers. It is the task of which Alfred North Whitehead wrote many years ago: "Any serious fundamental change in the intellectual outlook of human society must necessarily be followed by an educational revolution." Just such a change has occurred in our time, and the educational revolution, I submit, cannot be far behind.

Close beside the general task of reappraisal there is a more specific task that falls much closer to the lawyer's jurisdiction. That is the job of thinking through just what it is we want to inculcate about the Rule of Law and the Bill of Rights. Surely we want to achieve some understanding of the text of the first ten amendments. But we want also to teach the precarious quality of those words—by pointing out, for example, that the bare words of the bill of rights of the Soviet Constitution seem perhaps even more generous to the individual than our own.

We want also to teach something about the conflicts in values that often make the Bill of Rights much harder to apply than to recite. We must recognize, and help students to recognize, that there is no easy solution when the police have plenty of evidence of a man's guilt, but just to "cinch" the case they put in an involuntary confession; or when the Orthodox Jew wishes to open his business on

⁴ HAZEN FOUNDATION, *THE COLLEGE AND WORLD AFFAIRS* 65-66 (1964).

a day that the balance of society have ordained as a day of rest. Indeed, I would suggest that the only way the Bill of Rights comes alive is when it is taught through the hard cases, where the values are in conflict and resolution is difficult and sometimes subjective.

In addition lawyers ought to offer to this joint enterprise a concept of law that is both realistic and compassionate, both durable and flexible. Part of the job is to create as part of the educational process a realization that law is not an end in itself, nor does it provide ends. It is preeminently a means to serve man's ends—both mediate and ultimate. The day is past when the law erected the Constitution into a barrier against social and economic reform, and at the same time watered down the guarantees of human rights and liberties into mere admonitions against government. Today constitutional interpretation leaves the people wide latitude to experiment with social and economic reforms which further social justice, and, in the area of the guarantees of human rights and liberties, courts are giving constitutional restraints on government full sweep to prevent oppression of the human spirit and erosion of human dignity. Perhaps in no period of human history has the Rule of Law loomed larger as the essential stabilizer of the complex organism that society has become. For in but two decades, since the end of World War II, the world and this Nation has witnessed a remarkable transformation. The unity of the human family is becoming more distinct on the horizon of human events. The gradual civilization of all people instead of the former civilization of only the elite, the rise of mass education and mass media of communication, the formation of new thought structures due to scientific advances and social evolution—all these phenomena hasten that day. Our own Nation has shrunk its distances to hours; its population is becoming primarily urban and suburban and religiously pluralistic, its technology has spurred an economy capable of fantastic prodigies of production, and we have become leader of a world with a host of new countries which are ready to follow but also quick to reject the path that we take. Our political, industrial, agricultural, and cultural differences cannot stop the process which is making us a more united Nation.

Our society is committed to the constitutional idea of libertarian dignity protected through law. Crises at hand and in prospect are creating, and will create, more and more threats to the achievement of that ideal. It has become the business of all of us—not just the responsibility of lawyers and judges—to protect fundamental constitutional rights threatened today in ways not possibly envisaged by the Framers. And it is also the business of all of us to teach respect for

the responsibilities without which the rights are meaningless. We are all destined to labor earnestly in the endeavor to reconcile the complex realities of our time with the necessary principles of a free people.

But it is gratifying to see that the legal profession is ever more conscious that the law cannot be isolated from the other social sciences or be understood without them. The developing law, rightly viewed as an increasingly effective tool of social engineering, draws more and more from the other disciplines—each of themselves also achieving greater perfection in the study of the human condition pertinent to its role in mirroring our complex social organism. This is essential if law is to be kept abreast of the changing mores of our society and brought into agreement with society's advancing insights and emerging needs. So lawyers more than ever are turning their minds to the knowledge and experience of the other disciplines and in particular to those disciplines that investigate and report on the functioning and nature of society.

Lawyers and educators together ought then to be able effectively to teach that the genius of our Constitution resides not in any static meaning it may have had in a world that is dead and gone, but in its applicability and adaptability to current needs and problems. We need only remember the rapid changes of our lifetime when alarm is expressed that constitutional change is coming too fast and going too far. For in today's world what our constitutional fundamentals meant to the wisdom of other times cannot be the full measure of their meaning to us and the vision of our time.

If we can reformulate the Rule of Law along these lines, then it offers us something that can and should be taught. With these goals in mind we must now turn from *what* is to be taught to *how* it may be taught. It would seem to me that there is urgent need for restudy of the possible methods and materials that can be employed in teaching the constitutional rights and responsibilities that make up our heritage.

In the matter of teaching methods, I would urge that a teacher need not be a lawyer to teach effectively in this area. The teacher's job is not so much to supply the kind of answer a lawyer would give, but rather to raise the difficult questions—to get his students worrying and thinking about the values and interests at stake. Of course, this task is not easy for the teacher who has never been to law school. But it seems to me a job that can and must be done—and has already been done—effectively if we are to move ahead.

Much could be said about teaching materials. I intend to offer but one suggestion in that regard. It seems to me that the most

useful teaching vehicles would be case studies. These might be either the reports of facts and decisions in real court cases—sometimes far stranger and more challenging than fiction—or they might be hypothetical cases. The case study method should be useful whether the subject is treated in a separate course or as part of a larger course. And if the series of cases begins with those that are most concrete and most familiar in subject matter to the students, then a maximum degree of transfer should be encouraged. That is, if the student first encounters hard civil liberties problems in the context of school regulations, driver's licenses, and athletic contests, he should be more likely to carry over what he learns into the problems of real life outside the classroom. And that kind of transfer is, after all, the ultimate test of whatever job we do in this field.

While these innovations in teaching methods and materials may entail greater effort and higher costs than those currently employed, we should not let these considerations deter us, for the benefits to be derived far outweigh these minor drawbacks. And, in any event, it seems high time that the social studies curriculum received some of the encouragement and financial support that the natural and physical sciences have enjoyed for nearly a decade.

There is one last proposal I should like to make. It is one about which I feel particularly strongly—and one that has not yet, so far as I know, been given the consideration I think today's world demands. What I very much hope can be established in the near future is a permanent center or institute for the teaching of the principles of the Bill of Rights. There has been much cooperation between experts in law and education, but it has been transitory. There has been no lasting bond between the two professions, because there has been no permanent institution that combines and merges the two disciplines.

Ideally such a center should be located at one of our great universities that already has graduate schools both of law and of education. There the raw material for joint action is ready at hand. All that is needed is the catalyst that the formation of such a permanent center might well provide. In such a setting, too, there would be graduate students from both fields who might profitably work together in developing new teaching materials for use in the classroom.

One principle that I should think absolutely essential in the founding of such a permanent center would be absolute equality between law and education. Perhaps I am unduly concerned in this regard, but I should hate to see the center fall under the domination either of lawyers or of educational scholars, for I think to that extent it would forfeit its unique potential.

There is a sense of urgency about this proposal. During the past three years we have observed many meetings and conferences on the Bill of Rights attended by educators and lawyers. Much good work has been done both by lawyers and by educators—and some limited efforts have been made at accommodation and cooperation. But the kind of massive attack on the basic problems of citizenship for which recent events seem to call cannot be launched until lawyers and experts in secondary education can sit down and work together on a daily basis. That kind of cooperation can come only, I believe, at some permanent institution like the kind of center I have in mind.

I only hope that lawyers can be counted on to go at least half way in the joint endeavor. Recently the President of the American Bar Association urged lawyers to take a far more active role in educating our young people in the rights and responsibilities that inhere in the Rule of Law. Another lawyer, writing in a recent issue of the *Illinois State Bar Journal*, has suggested that lawyers should volunteer to go into high school classrooms to help teach about our Constitution and our legal system.⁵ Surely there is much that can be done, even without a permanent center. But it is my firm hope that when next a conference on school law is convened, it will enjoy the sponsorship not only of two independent schools of law and of education, but even more directly of a new institution that is their common offspring. If we can do that much we will have gone far to ensure that the Rule of Law will indeed govern future generations of Americans.

⁵ Rikli, *A Challenge to the Organized Bar*, 52 ILL. B.J. 734 (1964).