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## Introduction to Education Symposium Symposium on Education Law - Introduction.

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## INTRODUCTION TO EDUCATION SYMPOSIUM

MARK G. YUDOF\*

Alexander Meiklejohn, who spent much of his professional life studying the relationship between freedom of expression and democracy,<sup>1</sup> once described teaching as a task of “infinite difficulty.”<sup>2</sup> The task of the teacher is not only to teach the students about particular subjects, but also, “under the authority of the social group,” to initiate students to the social group, to prepare them for citizenship and for productive and satisfying careers.<sup>3</sup> Democracy and education, in his mind, were vitally linked,<sup>4</sup> and so they have been since the founding of the nation.<sup>5</sup>

But encomiums to the importance of education do not resolve the tough policy choices that must be made. As Meiklejohn put it, “what should we teach? For whom do we teach? What is our goal, and what is the source of its authority over us?”<sup>6</sup> In the last thirty years, since the Supreme Court’s landmark decision in *Brown v. Board of Education*,<sup>7</sup> these and other vital questions of educational policy have been increasingly dominated by law and legal institutions.<sup>8</sup> Where previously there were a few legal constraints on public schools, and even fewer legal entitlements for teachers and students, today we are witness to an era of federal statutes governing the treatment of the handicapped,<sup>9</sup> minorities,<sup>10</sup> and women,<sup>11</sup> constitutional decisions

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1. See A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

2. See ALEXANDER MEIKLEJOHN—TEACHER OF FREEDOM 161 (C.S. Brown ed. 1981).

3. See *id.* at 160-62.

4. See *id.* at 160-71.

5. See generally Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. BAR FOUND. RESEARCH J. 521.

6. See ALEXANDER MEIKLEJOHN—TEACHER OF FREEDOM 161 (C.S. Brown ed. 1981).

7. 347 U.S. 483 (1954).

8. See generally M. YUDOF, D. KIRP, T. VAN GEEL & B. LEVIN, *EDUCATIONAL POLICY AND THE LAW* 227, 413 (2d ed. 1982).

9. See Education for All Handicapped Children Act, 20 U.S.C. § 1400 (1982). See gener-

addressing complex issues of school finance<sup>12</sup> and desegregation,<sup>13</sup> state laws defining student and teacher rights,<sup>14</sup> and myriad other enactments designed to shape the goals and operations of public schooling.

The *St. Mary's Law Journal* is to be commended for recognizing the link between law and public education and for assembling a group of scholars who bring insight and wisdom to many of the critical issues facing the State of Texas and the nation. The symbolic importance of this innovative venture should not be lost on any reader. This Symposium is published at a time of rekindled interest in elementary and secondary education, at a time of grave concern that our public educational systems are failing, that our nation is at risk.<sup>15</sup> The Symposium also appears at a propitious moment in terms of the ebbs and flows of educational policy. After many years of federal statutes and federal court decisions, policy interventions tend more often to be initiated at the state level.<sup>16</sup> Most of the articles in this issue address significant issues of state law, not federal law, and properly so. The "action" is in the state legislatures, as William Bednar's fine discussion of House bill 72 demonstrates,<sup>17</sup> and in the interplay between federal and state mandates.

As I perused the various contributions to the Symposium, I was

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ally Yudof, *Education for the Handicapped: Rowley in Perspective*, 92 AM. J. EDUC. 163 (1984); Rothstein, *Educational Rights of Severely and Profoundly Handicapped Children*, 61 NEB. L. REV. 586 (1982); Note, *Enforcing the Right to an "Appropriate" Education: The Education for All Handicapped Children Act of 1975*, 92 HARV. L. REV. 1103 (1979).

10. See Civil Rights Act of 1964, 42 U.S.C. § 2000c, d (1982). See generally Note, *The Courts, HEW, and Southern School Desegregation*, 77 YALE L.J. 321 (1967).

11. See Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1686 (1982). See generally M. YUDOF, D. KIRP, T. VAN GEEL & B. LEVIN, *EDUCATIONAL POLICY AND THE LAW* 746-92 (2d ed. 1982).

12. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 40-44 (1973). See generally J. COONS, W. CLUNE & S. SUGARMAN, *PRIVATE WEALTH AND PUBLIC EDUCATION* (1970).

13. See *Milliken v. Bradley*, 418 U.S. 717, 743-44 (1974). See generally M. YUDOF, D. KIRP, T. VAN GEEL & B. LEVIN, *EDUCATIONAL POLICY AND THE LAW* 413-563 (2d ed. 1982).

14. See TEX. EDUC. CODE ANN. §§ 13.109 (termination of teachers on continuing contracts), 21.301 (suspension of students)(Vernon Supp. 1985). See generally Armstrong & Hollan, *infra* p. 783; Bednar, *infra* p. 813.

15. See National Commission on Excellence in Education, *A Nation at Risk* (Washington, D.C.: U.S. Department of Education, 1983); E. BOYLE, *HIGH SCHOOL* 1-8 (1983).

16. See generally M. YUDOF, D. KIRP, T. VAN GEEL & B. LEVIN, *EDUCATIONAL POLICY AND THE LAW* 332-411 (2d ed. 1982).

17. See Bednar, *infra* p. 813.

struck by the common threads that run through them. One such theme is the increasing legalization of the educational process<sup>18</sup> and the need for accommodation between the rule of law and the informality of discretion in the learning process. For example, Professor Gerald Reamey analyzes the competing concerns for flexibility in preserving the safety of the public schools against the formal claims of students who wish to be treated with respect for their individuality and privacy.<sup>19</sup> Mr. Bednar implicitly questions the ability of any law-making body to specify with precision the characteristics of the outstanding teacher.<sup>20</sup> There must be rules and benchmarks, but the brilliant teacher is not easily classified. So too, there must be general rules that govern interscholastic competitions, otherwise there would be chaos and unfairness.<sup>21</sup> But those rules must also be tempered by individual justice, protecting the student caught in a web of regulations that were not designed for his or her circumstances.

In a similar vein, Mr. Bednar reminds us that the delineation of authority over education between the federal government and the states does not exhaust the relevant universe of questions about the allocation of governing authority. The achievements of the American educational system rest in part on the decentralization of authority to local school districts. We have been blessed by the absence of a national ministry of education, free to impose uniformity and to inculcate students to a common political orientation.<sup>22</sup> A balkanized governing structure in education has been a bulwark against tyranny. In addition, local school districts have had the freedom to tailor their programs to the needs of their children and to the preferences of their parents. Abuses, of course, have occurred, but any reexamination of educational policies should be sensitive to the conflicting currents of state-mandated excellence and local discretion to fashion programs in the light of special circumstances.

The authors of the Symposium articles also remind us that it is a

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18. See generally Kirp, *Proceduralism and Bureaucracy: Due Process in the School Setting*, 28 STAN. L. REV. 841, 870-76 (1976) ("Reconsidering the Allure of the Due Process Hearing"); Yudof, *Legalization of Dispute Resolution, Distrust of Authority, and Organizational Theory: Implementing Due Process for Students in the Public Schools*, 1983 WIS. L. REV. 891, 894-98.

19. See Reamey, *infra* p. 933.

20. See Bednar, *infra* p. 813.

21. See Comment, *infra* p. 979.

22. See generally M. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* 114-16 (1983).

mistake to view public schools in instrumental terms only. Schools are large-scale institutions inhabited by living and breathing human beings—students, teachers, and administrators—who spend years of their lives in classrooms, hallways, and offices. The quality of their lives is not unimportant, though it sometimes must be balanced against the educational mission of the larger enterprise. While we wish to rid the schools of incompetent teachers and to rehabilitate miscreant students, we are also committed to norms of fairness.<sup>23</sup> Many teachers may be dedicated public servants, but they are also employees concerned about arbitrary dismissal, working conditions, and compensation. They seek job security and higher pay, just like the rest of us, and inevitably some of their aspirations conflict with the realities of educational programs and budgets. William Armstrong and Rosemary Hollan ably describe the complexities in devising legal rules that protect teachers as employees while leaving school districts free to pursue their essential educational objectives.<sup>24</sup>

The question of student rights is similarly fraught with difficulties. The idea of free speech for students is a relatively recent development,<sup>25</sup> and, at some level, the core concept of individual rights of expression is inconsistent with the schooling enterprise. Under the compulsory attendance laws, students are required to be in school, and they are there for the purpose of learning. The polity, through its elected and appointed officers, has set the agenda. If students may rearrange the curriculum, if they all have a right to speak at the same time, or if they may comment on the American League pennant race in the geometry class, then there can be no learning. Education and socialization involve a process of editing or selection; decisions must be made as to what is to be taught and how; and those decisions are not generally entrusted to the young.

Yet, despite the necessities of any educational process, we justifiably recoil from the notion that students have none of the speech rights of citizens; for students, hopefully, will mature into autonomous citizens and the school community itself should at least resemble the larger democratic community. It is difficult to teach democratic norms in undemocratic institutions. Thus, as Messieurs Mawdsley

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23. See Armstrong & Hollan, *infra* p. 783; Reamey, *infra* 933.

24. See Armstrong & Hollan, *infra* p. 783.

25. See D. KIRP & M. YUDOF, EDUCATIONAL POLICY AND THE LAW 137-38 (1st ed. 1974).

and Permuth explain, free speech rights are modified to take account of the age of the speakers and the demands of educational institutions.<sup>26</sup> The courts attempt to protect student expression while preserving the educational environment from disruption and diversion.<sup>27</sup> Thus, our courts must honor the authority of adult educators while affording some recognition to the bundles of rights of citizenship possessed by the young.

There are other important themes that emerge from the Symposium issue. One of these, aptly analyzed by Kelly Frels and Jeffrey Horner, is that school officials are frequently held to a good faith standard in the discharge of their responsibilities.<sup>28</sup> It is as if the courts are demanding conscientious teachers and administrators, requiring them to act with cognizance of their constitutional and other legal obligations.<sup>29</sup> School officials may not be held liable for damages for constitutional torts unless they have acted in bad faith, ignoring clear constitutional commands.<sup>30</sup> They may remove books from the school library for sound educational reasons, but not out of a political animus to particular ideas.<sup>31</sup> The teacher's right to academic freedom may be circumscribed by reasonable educational judgments, but not by a bad faith effort to suppress objectionable ideas and information.<sup>32</sup> A teacher may be dismissed for incompetence, but not for protected first amendment activities.<sup>33</sup> In each case, why school officials act is as important as how they act. The clear message is that courts have no monopoly on the interpretation of state and federal mandates.<sup>34</sup> Educators must learn to police themselves; they have a responsibility to know the law, to consult their legal advisors, and to abide by legal norms in good faith.

Finally, Ellen Smith Pryor raises the most profound questions about our educational system in her examination of student compe-

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26. See Mawdsley & Permuth, *infra* p. 873.

27. See *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506-07 (1969).

28. See Frels & Horner, *infra* p. 851.

29. Cf. Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 601 (1975).

30. *Wood v. Strickland*, 420 U.S. 308, 321-22 (1975).

31. *Board of Educ. v. Pico*, 457 U.S. 853, 872-74 (1982).

32. See *Cary v. Board of Educ.*, 598 F.2d 535, 544 (10th Cir. 1979).

33. See Armstrong & Hollan, *infra* p. 783.

34. See Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 587-89 (1975).

tency testing in Texas.<sup>35</sup> How do we measure excellence? What is the relationship between academic excellence and achievement after graduation? Should the goal of education be equal outcomes or a fair process, and what is the relationship between the two? Is there a trade-off between educational excellence and educational equity? What should we do about the unfortunate link between race and socioeconomic status and educational achievement? And even if we can reach some policy consensus on some of these exasperating issues, what role, if any, should the law play? That we should work to instill basic skills in all of our children commands wide support. How we should do it—for example, whether high school diplomas ought to be denied to underachieving students—commands only disagreement.

As the immortal Yogi Berra once said, "You've got to be very careful if you don't know where you are going, because you might not get there."<sup>36</sup> The contributors to this Symposium have not resolved the myriad dilemmas of the relationship between law and educational policy. They have not spun out neat theories linking legal interventions with some idealized vision of public schooling. But they have illuminated our path, bringing into view the obstacles that must be overcome. They have asked insightful questions even as they have avoided the simple answers. In a modest way, they are telling us where we have been and where we might go. Wherever the "there" is for public schooling, they have moved us in the right direction.

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35. See Pryor, *infra* p. 903.

36. K. NELSON, *BASEBALL'S GREATEST QUOTES* 160 (1982).