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FOREWORD

VALUES IN EDUCATION: SPECULATIONS ON THE ROLE OF THE STATE, SCHOOLS AND FAMILIES

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This issue continues a previous discussion in this *Journal* which posed the question of whether parents or the state should have the primary role in educating children.[1] There, the supporters of the state argued that a tolerance of divergent views could only be successfully accomplished in the public school.[2] The voices championing greater parental authority, on the other hand, stressed individual liberty and free choice.[3] Since both tolerance and liberty are values to be cherished, and necessarily difficult to rank order, the discussion yielded something of an intellectual stalemate.

In a particularly rich article,[4] Professor Tyll van Geel moves beneath the previous stalemate to suggest that the tolerance of the public school is actually part of a concerted effort at inculcation or indoctrination in accepted social beliefs. To his dismay, such inculcation frequently dwarfs the occasional, and what he calls "subversive" impulse, to teach in a manner which encourages critical and independent thought.

In this manner, the tolerance heralded as the public school's strength is seen by Professor van Geel as highly limited, or at least, less valuable. Ideas contrary to the " 'correct' version of historical events" or "radical political and economic beliefs" are either excluded from or diluted in the

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1. Symposium on Education, 1 NOTRE DAME J. L. ETHICS & PUB. POL'Y (1985).

2. *See generally* Gutmann, *Democratic Schools and Moral Education*, 1 NOTRE DAME J. L. ETHICS & PUB. POL'Y 461 (1985).

3. *See generally* Coons, *Intellectual Liberty and the Schools*, 1 NOTRE DAME J. L. ETHICS & PUB. POL'Y. 495 (1985).

4. van Geel, *The Prisoner's Dilemma and Education Policy*, 3 NOTRE DAME J. L. ETHICS & PUB. POL'Y 301 (1988).

public classroom. At best, a student is told: understand divergent views well enough to know that you should not embrace or follow them. In short, says van Geel, public education in America is "a tradition that seeks social control and social ends through inculcation of the young."[5] In the language of recent Senate hearings over judicial nominees, it is a process designed to produce thinkers who are not "out of the mainstream."

Now for many, past and present, education in the basic principles of American society, be it tolerance or other forms of republican virtue, would be an unquestioned "public good." It was through this process that diverse ethnic groups were "Americanized," and it is by the same approach that current racial, religious and ethnic tensions are lessened. Van Geel recognizes these inculcative features of education as a public good. Nevertheless, he is deeply disturbed by the loss of freedom entailed when students are not "let in" on subversive views.

Van Geel attempts to strengthen his argument for deliberately incorporating material subversive to mainstream thought by suggesting that, if it is not done, parents and students will "defect" from the portrait of America displayed in the public classroom. Drawing upon the language of economics and the "prisoner's dilemma," van Geel portrays defectors as seeking to avoid being a "prisoner's dilemma sucker." In other words, the defectors will "free ride" on the virtue and patriotic sacrifice of others while being taught, for example, "to question the promises of politicians and the demands of government."[6]

Two present features of American law work against such defection and facilitate the path to critical inquiry: the constitutional recognition of a parental right to control the upbringing of their children[7] and at least limited judicial recognition of academic freedom in the public classroom. Because van Geel perceives the parental right recognized in the 1920s to be contrary to interpretist methods of constitutional construction and because he finds no clear constitutional recognition of a teacher's right to academic freedom, the task he sets out to perform is to strengthen both of these legal supports for introducing independent, evaluative thought of the American experience into the classroom. Employing a

5. van Geel, at 318.
6. *Id.* at 344.
7. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

noninterpretist method, he finds that both rights are morally anchored, and from this, he argues for their more secure constitutional recognition.

The late Justice Frankfurter once wrote that "[o]ur constant preoccupation with the constitutionality of legislation rather than with its wisdom tends to preoccupation of the American mind with a false value."[8] In this sense, a reader can question Professor van Geel's preoccupation or struggle to locate the values he finds normatively significant in a document which was not intended as the oracle of moral wisdom, but as a reasonably straightforward plan of governance.

Putting this objection to one side and admitting to be intrigued by van Geel's analysis, I cannot help but wonder whether a strawman has been erected and then vanquished. The skepticism that present students bring to political and economic questions suggests that there is far less pure inculcation going on in the public school classroom than meets van Geel's eye. In part, this may be attributable to the continued vibrancy of private school alternatives, but its generality suggests that the run of public school teachers are also doing more than introducing students to storybook images of their country. Whatever the stimulus for the existence of evaluative thinking among the present student population, its existence suggests that van Geel may have taken us through the woods and back again to justify that which is already being done. Of course, such intellectual touring is not altogether bad, since there is value in recognizing those elements of the educational status quo which have merit, if for no other reason, to resist pleas to fix them when they aren't broken.

Then again, van Geel may mean more than this. He states at the outset that his use of the term "subversive" is not metaphorical. In that light, he anticipates the objection that what he is really seeking is the transformation of the Constitution into a "suicide pact." Van Geel spends little time answering the concern over the preservation of the social fabric, arguing instead that "the government has ample constitutional means to protect itself."[9] Yet, the difficult question is how far can this be pressed? If the pursuit of subversive teaching greatly aggravates social disharmony and racial and religious tension, at what point does the wisdom of this subversion in the classroom come to be questioned?

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8. West Virginia State Board of Education v. Barnette, 319 U.S. 624, 670 (Frankfurter, J. dissenting) (1943).

9. van Geel at 303.

True, society may have means to protect itself, but many may think that sacrificing the pursuit of common ideals and aspirations as a matter of educational policy forfeits the most rational means of doing so.

The article by well-known sociologist Dr. James S. Coleman[10] builds on his earlier empirical work which found higher verbal and mathematical achievement and lower dropout rates in Catholic high schools, than in either public schools or nonsectarian private schools. Coleman relates these differences to the existence of "social capital" in Catholic schools: that is, the network of relationships among teacher, student and parent. Because of shared religious values and objectives, this relationship is often richer than the occasional parent-teacher conference. Social capital is distinguished from the physical capital of school books and science labs or the human capital of the skills and capabilities of teachers and parents. The importance of social capital is found to be especially great for those with less access to physical and human capital. Moreover, Coleman writes, "[t]he social capital in the religious community surrounding the school appears especially effective for those children lacking strong social capital within the family."[11]

The importance of the social capital of Catholic schools has grown as the social capital of the family has waned. As Coleman points out, " '[m]odern family deficiencies' are growing rather rapidly, as seen in the declining presence of both father and mother in the household, through work in settings outside, and organizationally distant from, the household."[12] Several policy implications flow from this not the least of which is the observation that expenditures on increased physical and human capital, while helpful, may be far less important to educational performance than efforts at strengthening the family and the willingness of family members to interact with each other.

Because "social capital does not arise automatically,"[13] Coleman suggests that it is important to consider whether existing legal arrangements act as an incentive or disincentive to its creation. In this regard, Coleman argues: "[t]he establishment clause and constitutional provision for the separa-

10. Coleman, *The Creation and Destruction of Social Capital: Implications for the Law*, 3 NOTRE DAME J. L. ETHICS & PUB. POL'Y. 375 (1988).

11. *Id.* at 382.

12. *Id.* at 390.

13. *Id.* at 393.

tion of church and state, particularly as interpreted by the courts, has inhibited the employment of that social capital [which flows from a religious community] toward the education of the young. . ."[14] Similarly, the rise of the modern corporate state has drawn attention away from the family, suggesting that "adult family members have less reason to invest resources in their children and more reason to invest those resources in satisfying their own individual interests."[15] Overall, Coleman further posits that "[t]here are other adjustments which reduce the incidence or strength of the parental role (and thus reduce the social capital available to children), including increasing numbers of married couples deciding not to become parents, and the increased use of day care and after-school facilities to accommodate single parents and working parents."[16]

It is interesting to assess Coleman's writing in light of the intensified calls for federally financed child care.[17] This is often portrayed as "pro-family," although Coleman's research would suggest that the description is more Orwellian than true. It is perhaps for this reason that he is pessimistic about the prospects for old forms of family and community being revived. Instead, he speculates that since the adult members of the family have been siphoned off into the corporate state, the law should arrange for children to follow, such that firms above a given size would have to approximate the age distribution of society. The suggestion, of course, is a radical one. Yet, it has a strange attractiveness, if only because we know Coleman is all too right in his portrayal of the decline of the family. There is also a certain horror in thinking that the warehousing of children in child care might some day become the only alternative.

In some ways, the article by Law Dean Bruce Hafen elaborates on Coleman's concept of social capital by stressing the significant "mediating" role both public and private schools occupy between the individual and the state.[18] Mediating institutions help supply meaning and identity in life, and generally, insulate an individual from direct governmental or organizational control. Like van Geel, Dean Hafen recognizes

14. *Id.* at 395.
15. *Id.* at 396.
16. *Id.* at 402.
17. *See* Safire, *Sleeper Issue for the '88 Campaign: Child Care*, New York Times, p. 23 (April 25, 1988).
18. Hafen, *Institutional Autonomy in Public, Private, and Church-Related Schools*, 3 NOTRE DAME J. L. ETHICS & PUB. POL'Y. 405 (1988).

that the kinship and shared devotion within a mediating structure also can be a source of resistance to state-inspired directives. In this regard, authoritarian or totalitarian control is often inversely proportional to the strength of mediating institutions. Hafen and van Geel part company, however, on the importance of institutional, as opposed to individual, subversiveness. Thus, Dean Hafen is critical of first amendment analysis which views academic freedom concerns solely in terms of the individual. He is cheered by recent Supreme Court decisions which reinforce a school's institutional judgment with respect to the content of student newspapers[19] and speech in student assemblies.[20]

Hafen sees other individual and state pressures lessening the influence of mediating institutions "adversely affect[ing] [a school's] capacity to educate their students."[21] He is particularly concerned with the "enforced conformity" which results from "federal policies that can threaten the unique educational mission of a private school."[22] In this regard, he is vexed by Congress' recent overruling of both the Supreme Court and a presidential veto of the previous "program-specific" limitations in Title IX. His concern stems not only from the increased sweep of federal regulation, but also the preclusion of a religious school from "exclud[ing] students involved in extramarital sex" or "counseling students about conflicts between marriage and career choices in ways that affirm role distinctions in family life based on gender."[23]

Like Coleman, Hafen's analysis is disquieting. Nevertheless, his presentation does reveal several indications of greater intellectual, and, on occasion, legal, recognition of the place of mediating structures in our society. While primarily concerned about the role of private schools, he refuses to be drawn into the public/private squabble, recognizing that "schools of both kinds are entitled to their own forms of First Amendment protection. They need increased institutional strength, not only to encourage a stronger private educational sector, but to encourage greater educational quality throughout the American system of education."[24]

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19. Kuhlmeier v. Hazelwood School District, 108 S.Ct. 562 (1988).
20. Bethel School District No. 403 v. Fraser, 106 S.Ct. 562 (1988).
21. Hafen, *supra* note 18, at 405.
22. *Id.* at 409.
23. *Id.* at 417.
24. *Id.* at 423.

This issue also contains three student comments, which focus on three manifestations of the larger dilemmas posed by our contributing scholars. Gene Assaf questions whether the Court has a consistent view of the autonomy or maturity of adolescent students.[25] The occasion for doing so is the invalidation on establishment clause grounds of a federal district court law aimed at teaching sexual responsibility and reducing teenage pregnancy. While the Supreme Court has since found the law to be facially valid,[26] Assaf claims that the Court has employed a double standard: finding adolescents to be impressionable and subject to indoctrination when the objective is the exclusion of religious influence and sufficiently mature and capable of life and death decisionmaking when the objective is the unfettering of access to abortion.

Martha Michael examines an appellate decision which declined to accommodate the free exercise claims of parents and students who objected on religious grounds to being exposed to a reading series designed to stimulate critical thinking.[27] Michael concludes that none of the court's three separate opinions fully coincides with recent Court precedent extending free exercise protection beyond belief to religiously-motivated conduct.

Finally, Gregory Evans confronts the ultimate breakdown in school authority: the dramatic and tragic increase in school violence.[28] Evans suggests expanding school tort liability to include periods where his research has indicated violence is most likely to occur. As well-intentioned as his commentary surely is, it reveals most forcefully the limits of the law. Perhaps, a change in the legal standard of care can "encourage socially desirable behavior."[29] Perhaps not. Either way, as Evans recognizes, and as the articles in this issue demonstrate, the problems go much deeper. Tougher laws and increased financial resources whether for books or security patrols are awfully poor substitutes for the enduring love and genuine interest of one's family.

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25. Assaf, *Autonomous Adolescents, Sexual Responsibility, Religious Organizations, and Congress: An Illicit Church/State Relationship in* Kendrick v. Bowen, 3 NOTRE DAME J. L. ETHICS & PUB. POL'Y 425 (1988).

26. Bowen v. Kendrick, 108 S. Ct. 2562 (1988).

27. Michael, *Free Exercise of Religion Within The Public Schools?* Mozert v. Hawkins County Board of Education, 3 NOTRE DAME J. L. ETHICS & PUB. POL'Y 469 (1988).

28. Evans, *School Crime and Violence: Achieving Deterrence Through Tort Law*, 3 NOTRE DAME J. L. ETHICS & PUB. POL'Y 501 (1988).

29. *Id.* at 507.