

# SEX, SCHOOLS AND THE LAW

A Study of the Legal Implications of Sexual Matters Relating to the Public School Curriculum (With a Separate Chapter on Sex Education), the Public School Library, the Personal Lives of Teachers and Students, and the Student Press

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The author of this treatise juxtaposes the law, public schools, and sex. Professionals and students will gain information from his analysis of specific cases and insight from his exploration of the larger issues raised. The text probes curricular considerations, such as sexually oriented discussions, materials or assignments, and it reviews the controversies surrounding sex education *per se*. It clarifies the status of the law relating to the school library and its selection or removal of books based on sexual content. The author also assesses the power of the school to bar homosexual or unconventionally heterosexual teachers and its position on homosexual, pregnant or married students. Finally, the suppression of or punishment for publication of sexually oriented material in the student press is evaluated.

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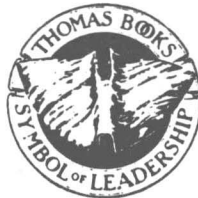
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To my siblings  
Lorraine, Richard, Wilfred, Jr., and David

## INTRODUCTION

This volume explores the interaction of three important matters which generate intense public interest: sex, schools and law. Schools are a microcosm in which almost all the problems of society—problems of race and crime, to name but two—can be felt. It is not surprising, therefore, that the same wide variety of issues, feelings and conflicts which attend sexual concerns in society at large appears as well in the school context.

Chapter 1 (“Sex and the Curriculum”) explores sexual issues arising in connection with the curriculum. Chapter 2 (“Sex Education: A Special Situation”), recognizing that sex education, although part of the curriculum issue, raises legal problems different in scope, intensity and resolution, focuses on these problems. Chapter 3 (“Sex and the School Library”) delves into issues connected with the school library, many of these related to book removal, but some to book selection. Chapter 4 (“The Sexual Orientation or Activity of Teachers”) considers the legitimacy of adverse official treatment of teachers for their sexual conduct or orientation, or for related matters. Chapter 5 (“The Student’s Personal Life”) does the same with regard to students. Finally, Chapter 6 (“The Student Press”) assesses the attempts by school officials to control sexually-oriented articles or language in student publications. Since sex as activity rather than as gender constitutes the topic for this volume, I have not included a chapter on sex discrimination.

I bring to this study several firm beliefs of which the reader should be aware. First, exposing children, consistent with their maturity, to a diversity of ideas provides a more effective and exciting education and produces more creative graduates. Second, teachers are professionals who must be given the discretion necessary to provide such an education. Third, both teachers and students should be endowed with the same Constitutional rights as other citizens, unless the threat of harm is real, significant and direct.

The matters considered in the volume should be of interest to lawyers,

school administrators, educators generally, and anyone else intrigued by the difficulty and sensitivity of apportioning rights and responsibilities among the many and varied constituencies of the public school community. I hope that this book will contribute to the ongoing debate.

Fernand N. Dutile

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**SEX, SCHOOLS AND THE LAW**



## Chapter 1

# SEX AND THE CURRICULUM

## INTRODUCTION

Ouida Dean, in March of 1976, was in her sixth year of teaching at the Timpson High School in Timpson, Texas. Her professional reputation and her teaching record were excellent. She strove to inculcate in her students the habit of critical inquiry, an effort which led to her involvement in a controversy which upset the community.<sup>1</sup>

In connection with the consideration of sex roles in her psychology class and of interviewing techniques in her speech class, Mrs. Dean allowed the use of a sex survey entitled, "Masculinity—What it Means to be a Man?,"<sup>2</sup> originally appearing in *Psychology Today*. Treating of sensitive aspects of sex in an explicit manner, the survey was administered to Mrs. Dean's classes by a student who, needing an opportunity to do make-up work, was charged to do so. Mrs. Dean instructed the student that the exercise was optional, that questions assuming that the respondent was married or sexually active should be omitted and that even students responding to the survey could refuse to answer specific questions felt to be too personal. Although it is not clear how many of the questions were read to either the speech class or the psychology class, two students in the psychology class were given the entire questionnaire, and at least two students saw certain sexually explicit questions. Both classes took the survey without disruption, and no students complained to the teacher.

The Timpson community, however, did discuss the survey, and when the school principal told Mrs. Dean that one student's grandmother had complained about the survey, Mrs. Dean called the complainant, discussed the situation and then felt the matter closed. After a further discussion of the survey with the principal some days later, Mrs. Dean was asked to resign, she refused and, shortly thereafter, she was told by Superintendent Higginbotham that she was "being relieved of duty, effective immediately." Allowed to return to her classroom only to get her purse, she left all

other personal belongings behind.<sup>3</sup> Greatly upset by this abrupt removal, Mrs. Dean remained in bed for several days and did not appear at a special school board meeting called to discuss the situation. Rather, her husband presented to the meeting a letter she had prepared. The board ratified Mrs. Dean's discharge which, the board minutes noted, was due to "a survey that was presented to one of her high school classes."<sup>4</sup> Mrs. Dean sued for reinstatement.

This situation raises dramatically the issue of the use of sexual material in the curriculum,<sup>5</sup> and will be alluded to throughout this chapter to illustrate the many facets of the problem, which, although largely related to the First Amendment's free speech provisions,<sup>6</sup> has significant Fourteenth Amendment due process implications.<sup>7</sup>

## THE PUBLIC SCHOOL'S ROLE

Crucial to any consideration of the issue is the role of the public school in American life. Is the school's mandate (and therefore the teacher's) to transmit the traditional morals and values of the public or is it to provide a so-called "marketplace of ideas"?<sup>8</sup>

### Transmitting the Majoritarian View

There is, to be sure, much to commend the former model of the public school, according to which the majority will control what is taught in the schools and how, through a faculty operating as agents of the school board, which, in turn, is usually<sup>9</sup> made up of elected agents of the community.<sup>10</sup> School boards are therefore "legitimate political authority, as represented by the small groups of people to whom communities large and small delegate away the choice of what values and knowledge their children will experience."<sup>11</sup> As a result, a school board may be able to limit class booklists,<sup>12</sup> for example, even if the decision is a political one and even if influenced by the members' personal views, at least if the limitations do not rule out the study of "entire representative groups of writers."<sup>13</sup> Thus, the school district's curriculum will legitimately reflect the values and educational emphasis collectively willed by the parents who, after all, pay the costs.<sup>14</sup>

Official school authority exists, it is said, in order to remove issues of speech and values from the "central political maelstrom."<sup>15</sup> The "free speech" analysis of public schools, furthermore, fails for its assertion of

the priority of that diversity of views which nurtures a democracy over the democratic process itself.<sup>16</sup>

In *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, the U.S. Supreme Court indicated that the school board's control over classroom matters (as opposed to school library offerings)<sup>17</sup> may be near total.<sup>18</sup> Even Justice Brennan, in his plurality opinion, recognized that local school boards have broad discretion in the management of school business, that they may administer the curriculum so as to transmit community values, and that there is an appropriate and substantial community interest in the promotion of respect for authority and other traditional social, moral,<sup>19</sup> and political values.<sup>20</sup> Although conceding that school board discretion must be exercised in conformity with the "transcendent imperatives" of the first amendment, Brennan, in a surprisingly sweeping dictum, stated that the school board "might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values."<sup>21</sup> Since Justice Marshall joined Brennan's opinion, it is likely that the entire court would support this particular assertion. Since, however, the case involved school library offerings and not an assigned part of the curriculum, the statement does not yet represent binding law.<sup>22</sup>

Board control even over curriculum content, however, should not be total. Perhaps Justice Brennan was referring only to the choice of courses to be taught, rather than to perspectives and ideas within those courses. Indeed, in the same opinion, Brennan, noting that the Court's precedents have for many years acknowledged constitutional limits on the state's power over the curriculum and the classroom,<sup>23</sup> stated that the Constitution does not permit the official suppression of ideas.<sup>24</sup>

Why such suppression cannot occur through the assigned curriculum as well as through optional books in the school library is not vouchsafed us. In fact, textbooks and other required reading present a greater likelihood of a pall of orthodoxy than does optional reading.<sup>25</sup> In any event, Brennan suggested a greater discretion for compulsory courses than for elective ones.<sup>26</sup>

The "majority" model is not flawless. Absent the relatively rare controversial case, such as Mrs. Dean's, the community at large is not likely to be aware of the specifics of day-to-day curriculum content. Moreover, board meetings are often closed to the public and unrecorded; the ballot is thus not as effective as sometimes thought due both to citizen ignorance and the inevitable delay between the parent's objection and the



opportunity to vote a board member out of office.<sup>27</sup> Furthermore, the board itself may not be as cognizant of the schoolday content as we often assume and may operate on hearsay, irrational complaint, incomplete information or personal prejudice.

The situation would be more defensible if the views of all segments of the population were represented proportionately in the curriculum of the schools—but that is not the case and may even be impossible; if a particular use of sexually-oriented material is allowed, *all* are usually exposed to it, absent some excusal system; if the material is not allowed, *none* gets to use it, even though 40 percent of the community might favor its use.

Moreover, exclusion of competing ideas may be unconstitutional to the extent it results in an indoctrinating curriculum or one which imposes “ideological homogeneity.”<sup>28</sup> Even though the U.S. Supreme Court itself has deemed the inculcation of values fundamental to our democratic political system to be one of the essential functions of the public school,<sup>29</sup> those values include the integrity of the person and individual freedom of thought.<sup>30</sup> Fundamental to the American system is respect for a diversity of ideas.<sup>31</sup>

### The “Marketplace of Ideas”

The “marketplace of ideas” approach assumes that the best learning occurs when teachers are free to expose students to a great variety of concepts, approaches and values.<sup>32</sup> Students grow, it is said, not by indoctrination or routine learning of a traditional body of doctrine, but by wrestling with diverse ideas, choosing some, rejecting others and, in the long pull, realizing that most important issues are complex, not given to reflex answers.

One commentator’s observation in the context of discussing science books that might yield physical dangers to children in school is perhaps equally (and unfortunately) true with regard to intellectual school activity: “We trust that school, like home, is a safe environment for our children.”<sup>33</sup> It is not clear, after all, that a safe education is the best education. We should in any event be careful before assuming that children are easily harmed by contact with untraditional or progressive ideas; exposure need not be indoctrination.<sup>34</sup> Also, although courts may have tended to stress the dangers, the teacher’s power in the classroom carries benefits as well.<sup>35</sup> Indeed, there is the reciprocal danger that a policy perceived as