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Protecting Student Rights Promotes Educational Opportunity: A Response to Judge Wilkinson Due Process and Public Education

Nadine Strossen
New York Law School

PROTECTING STUDENT RIGHTS PROMOTES EDUCATIONAL OPPORTUNITY: A RESPONSE TO JUDGE WILKINSON

*Nadine Strossen, Second Panelist**

The conference brochure states the following as the first question for discussion, and I am quoting, "What are the real-world consequences of due process decisions broadly expanding the right to challenge . . . the determinations of local public officials?" I am going to answer that question, but I am going to do so by focusing on its unstated but logically necessary counterpart question, namely, what are the real-world consequences of broadly expanding the power of local public officials to deprive individuals of life, liberty, or property without any procedural protections?

Judge Wilkinson has talked about the dangers of constitutionalization. I would like to focus on the dangers of the lack of constitutionalization, especially when we are considering public institutions, which, by definition, are unconstrained by market forces. Therefore, the only possible constraint on their abuse of power, their deprivation of individual liberty, is constitutional constraint. My points are broadly applicable to all of the specific subjects to be considered during this conference, not only the public schools.

I agree with Judge Wilkinson, of course, that we are witnessing frustrating problems throughout our society, including our schools — notably the distressing levels of violence and crime. But too many government officials and citizens, in their desperation to solve seemingly intractable problems, seek illusory quick fixes that will not, in fact, fix anything at all. And, as usual, the customary scapegoats are brought forward, namely, individual rights and the actions of those of us either practicing before the courts or the courts themselves, who seek to honor and enforce those individual rights.

Interestingly, Judge Wilkinson began his remarks by stating that there are many problems, many complex factors that feed into our current

* President, American Civil Liberties Union; Professor of Law, New York Law School.
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disciplinary problems in the schools and in society at large. He noted that it was probably unfair to single out courts and laws, but then he proceeds to do exactly that.

It reminds me of something that Mark Twain once reportedly said: when the only tool you have available is a hammer, all problems start to look like nails. So, with due respect, I am not surprised that a judge and a lawyer would seek to focus on courts and laws, even though they do not afford the most important solution — if, indeed, any solution at all — to the problem of violence in our schools.

This band-aid approach is doubly flawed. It is both unprincipled and ineffective. That it is unprincipled to deny individual rights for the purported goal of promoting order or discipline, or some other social good, is apparently a fundamental tenet among Federalist Society members as well as among American Civil Liberties Union members. According to the conference brochure, a founding principle of the Federalist Society is "that the State exists to preserve freedom." Accordingly, the purpose of public schools, along with all other government institutions, is to preserve freedom and not to maintain order or anything else. Education is, indeed, an essential prerequisite for all citizens to be able to realize their equal rights under the law. It is "the great equalizer," in the words of the United States Department of Education.[1]

It is the special responsibility of federal courts in our governmental system to guarantee that other government institutions do not unjustly deprive citizens of their rights. This responsibility is particularly important when the victims of government abuses are relatively powerless. In the public schools, the victims of official abuses are among the most powerless members of our society. They are children and teenagers, many of whom are also poor, disabled, or members of racial minorities.

So, number one, denying liberty to these young people is an unprincipled approach to solving problems of discipline in the schools. Second, denying liberty is as ineffective a strategy as it is unprincipled. It reminds me of a sadly prophetic warning that Thomas Jefferson conveyed to James Madison more than 200 years ago:[2] "A society that will trade a little liberty for a little order will deserve neither and lose both." Indeed, this insight has proven painfully true in the context of the public schools.

Let me remind you of the minimal due process guarantees that the Supreme Court set out in *Goss v. Lopez*,[3] because I think they have been

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1. *See* Brief of NAACP and Southern Christian Leadership Conference as Amici Curiae at 10–11, Goss v. Lopez, 419 U.S. 565 (1975) (citing Office of Education report entitled *Equality of Educational Opportunity*) [hereinafter "*Goss* Amicus Brief"].

2. *See* Editorial, *Factoring in Civil Rights*, MASS. LAW. WKLY., July 29, 1991, at 4.

3. 419 U.S. 565 (1975).

somewhat overblown in the paraphrasing we have heard. All that the Supreme Court required was that some notice of the charges against a student be provided. Notice could be given orally either before or after the suspension or discipline took place. Moreover, the only other thing the Court guaranteed was the right to respond to those charges informally. Again, the response could be given after the suspension. These are hardly earth shattering procedural guarantees. Experience shows that denying students even these minimal safeguards not only impairs their vital rights, but also makes no positive contribution to a sound educational environment.

To the contrary, experts agree that punishing students without procedural safeguards will increase any negative attitudes or behavior on the part of those students and will have a detrimental effect both on the school and ultimately on society at large. For example, the Teachers College at Columbia University conducted a study in 1970, at the threshold of the due process revolution.[4] This study demonstrates that before this revolution we had a crisis in our schools related to the absence of due process guarantees. This study, *Civic Education in a Crisis Age*, concluded:

> A large majority of the students feel they are regularly subjected to undemocratic decisions . . . and hence are becoming increasingly frustrated and alienated by school. Students are not forming a reasoned allegiance to a democratic political system, because they receive no meaningful experience with such a democratically oriented system in their daily lives in school. We must teach the viability of democratic modes of conflict-resolution, and win respect for these as just and effective.[5]

I would now like to amplify the core principles I have just outlined by making some specific points about the role of procedural due process in public school discipline. I will state all these points now, and then I will elaborate as much as time permits.

First, procedural safeguards are necessary to reduce unfair, arbitrary, and biased disciplinary measures. These measures have permanent adverse consequences for students. Second, procedural safeguards are necessary to reduce racial discrimination in administering school discipline. Third, even after the Supreme Court's decisions in *Goss* and other

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4. *See Goss* Amicus Brief at 12 (citing DEAN MURPHY, CIVIC EDUCATION IN A CRISIS AGE: AN ALTERNATIVE TO REPRESSION AND REVOLUTION: SUMMARY OF A RESEARCH PROJECT TO DEVELOP OBJECTIVES FOR A NEW CIVIC EDUCATION CURRICULUM FOR AMERICAN SECONDARY SCHOOLS IN THE 1970S (1970)).

5. *Id.*

cases, public schools still often engage in unfair and arbitrary treatment of students, as well as racial discrimination, in meting out discipline. Fourth, it follows that, far from having too many procedural protections and rights, public school students do not have enough safeguards against arbitrary official conduct. Fifth, there is no evidence that harsh penalties do any good, either for the student who is punished or for others in the school community. On the contrary, much evidence suggests that harsh penalties are counterproductive, especially when unaccompanied by procedural safeguards. Sixth, respecting individual rights is even more important in the public schools than in society at large. Seventh, the notion that things would be better if only we could roll the clock back to the good old days before the procedural due process revolution reflects an inaccurate, romanticized notion of pre-due process reality. They were hardly good old days for many who only now have meaningful access to public education.

I will now briefly discuss several of these points. First, procedural safeguards are necessary to reduce arbitrary treatment. Judge Wilkinson asked how great is the risk that discretion will be abused by school officials. I can answer that unqualifiedly. It is not a risk; it is a certainty. The experience of those who worked in the public schools before the due process revolution demonstrated this.

A 1972 article in the *Journal of Law and Education* by two individuals who worked with the New York Civil Liberties Union's Students' Rights Project summed it up well. It explained that the pattern of arbitrary suspensions and expulsions revealed the fundamentally custodial attitude of the public schools toward children who are black or Puerto Rican and poor. It revealed a system of segregation so thoroughly refined that mere physical separation, Southern-style, was not necessary in order to maintain pervasive inequality. And it revealed that what had for years been characterized as a drop-out problem was

> in fact a push-out problem. . . . [A]lmost all [the complaints we received] involved procedural problems; the maze of mechanisms which the schools used to rid themselves of students who present difficult problems the schools are not prepared to meet or who do not fit the mold in which the schools operate.[6]

Second, and clearly related to my first point, procedural safeguards are necessary to reduce racial discrimination in the administration of discipline. In 1975, Mark Yudof, who is now the Provost at the University of

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6. Ira Glasser & Alan H. Levine, *Bringing Student Rights to New York City's School System*, 1 J.L. EDUC. 213, 215–16 (1972).

Texas, wrote an article about the suspension and expulsion of black students from public schools entitled "Suspension and Expulsion of Black Students From the Public Schools: Academic Capital Punishment."[7] Along with nonacademic capital punishment, its academic counterpart has always been disproportionately meted out to members of racial minorities, particularly to young African-American males. It is no coincidence that *Goss* itself involved the sweeping, indiscriminate suspension of black students from Columbus, Ohio public schools for allegedly taking part in demonstrations following Black History Week.

In their amicus brief for *Goss*, the NAACP and the Southern Christian Leadership Conference reminded the Supreme Court that school officials who resisted racial desegregation consistently used suspensions and other disciplinary measures as an important tool of their resistance. Indeed, in prosecuting desegregation cases, the Justice Department sought and obtained court orders expunging students' suspension records and mandating procedural safeguards before any suspension. In short, history has shown that public school discipline without due process violates constitutional guarantees of both liberty and equality.

My third point is that, even after *Goss*, public schools still engage in much unfair and arbitrary treatment of students, and much racial discrimination, in meting out discipline. Recent surveys show that many schools ignore students' procedural protections and impose discipline in situations where it is clearly inappropriate, including where students are simply exercising their free speech rights.

The racially discriminatory pattern of school discipline persists, too. To give just one example from the many, many studies that have documented these patterns, recent surveys indicate that although black students constitute sixteen percent of the school population nationwide, they continue to receive almost twice as many suspensions, roughly thirty percent.[8]

These ongoing problems lead to my fourth point. Far from having too many procedural safeguards, public school students have too few safeguards against arbitrary official conduct. In fact, when the Court decided *Goss*, school officials did not criticize it, as the dissenting Justices predicted they would. On the contrary, the main criticism came from the

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7. Mark G. Yudof, *Suspension and Expulsion of Black Students From the Public Schools: Academic Capital Punishment and the Constitution*, 39 LAW & CONTEMP. PROBS. 374 (Spring 1975).

8. Muriel Cohen, *U.S. Public Schools Suspend Blacks at Twice the Rate of Whites; But Massachusetts Group Reports that State Figures are Consistent with Enrollment*, BOSTON GLOBE, Dec. 12, 1988, at A56 (citing a study by the National Coalition of Advocates for Students).

civil liberties/civil rights community, which maintained that *Goss* did not provide enough protection for students' rights.

Experience since then has shown that criticism to be well-taken. For example, this was the conclusion of a 1993 empirical study of school districts across the country by Donald Stone.[9] In addition to finding that African-American students are suspended at a rate 250% higher than Caucasian students, the Stone study also found that, in general, suspension was overused and abused.[10] Stone therefore urged that suspension be used only as a last resort, only in emergency situations, and that, even then, it should be preceded with more extensive procedural due process guarantees than the Court had required in *Goss*, including an independent hearing officer. Interestingly, some recent studies of school disciplinary problems recommend enforcement of even more stringent limitations on measures such as suspension, reserving them for truly emergency situations.

With all due respect to the questioner during the previous discussion, I do not think that wearing green hair to school happens to present a real threat to the order and discipline of the school.[11] One might ask not why the ACLU was defending that student's right to express his views through green hair, but rather why the school was wasting taxpayers' resources and its energies in suggesting that somehow it was interfering with the educational process for him to do that.

In contrast to the *de minimis* nature of the school's concern, the student's interest was the preeminently important one of free expression on public issues. Green hair has been used to express messages of support for environmental causes and pacifism, as chronicled in the classic movie, *The Boy with Green Hair*. Thus, green hair is the counterpart of the black armbands that the Supreme Court held protected by public school student's First Amendment rights in its landmark ruling in *Tinker v. Des Moines School District*.[12]

Far from depriving school officials of their necessary discretion, as Judge Wilkinson intimated, *Tinker* affirmed school officials' power to suppress expression that constitutes a "material and substantial disruption" of the educational process. But just as the black armbands in *Tinker* constituted no such disruption, neither did the green hair in the more recent case.

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9. Donald H. Stone, *Crime & Punishment in Public Schools: An Empirical Study of Disciplinary Proceedings*, 17 AM. J. TRIAL ADVOC. 351 (1993).

10. *Id.* at 366.

11. *See Panel I: Discussion*, 1 MICH. L. & POL'Y REV. 297, 301 (1996).

12. 393 U.S. 503 (1969). The ACLU also represented the students in the *Tinker* case.

My fifth point is that there is no indication that harsh penalties do any good, either for the student who was penalized or for others in the school community. To the contrary, many experts agree that suspension is counterproductive from both perspectives. For example, a 1994 book by Eric P. Hartwig and Gary M. Ruesch concluded:

> Although it seems that . . . suspension, expulsion, and other exclusionary processes may result in a more orderly school environment, the opposite appears to be more often true. Many students who have been excluded come back to the school environment at some point, and as a result of negative feelings, the school may become a convenient . . . object of revenge. 82% of individuals in prison today are high school dropouts.[13]

Likewise, another recent paper, by the Advocates for Children of New York, indicted all school disciplinary measures, such as suspension, which superficially focus on symptoms, and which alienate students from school:

> Suspensions inherently increase the chances that students will never complete their education. Suspended or expelled high school students often fail to return to school, joining the thousands of . . . public school students who drop out each year. When this occurs, the long-term costs to society far exceed the short-term cost of educating even the most difficult young people in the academic and social skills necessary for productive employment.[14]

Of course, ineffective as measures such as suspension are in any case, they are even more ineffective when meted out unfairly, without procedural safeguards. Any time "law and order" is perceived to be unfair, order breaks down. This point was made by Charles Silberman in his classic book, *Crisis in the Classroom*: "Careless punishment in the schools serves only to breed more defiance and destruction, which breeds more repression . . . especially when accompanied by arbitrariness, racial prejudice, assumption of student guilt and general disregard of individual rights."[15]

My sixth point is that respect for individual rights is even more important in the public schools than in society at large. One of the major

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13. ERIC P. HARTWIG & GARY M. RUESCH, DISCIPLINE IN THE SCHOOL 42 (1994).

14. Diana M.T.K. Autin, *Prevention and Alternatives: Reducing Out-of-School Suspensions*, at 1 (1992) (position paper for Advocates for Children of New York) (on file with author).

15. CHARLES E. SILBERMAN, CRISIS IN THE CLASSROOM: THE REMAKING OF AMERICAN EDUCATION (1970).

reasons for this conclusion was well stated by Justice Robert Jackson. It ties in with a concern that was raised by Judge Wilkinson when he recognized that at some point we do have to give young people rights, and they have to learn how to exercise them responsibly. But how can they do that if we shelter them from the experience of responsibly exercising their rights? As Justice Jackson said, "[Public schools] are educating the young for citizenship. . . . [This] is reason for scrupulous protection of constitutional freedoms of the individual child by the public schools, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[16] Underscoring this point, the Supreme Court has declared, "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[17]

Seventh, and I am going to conclude on this point, this romanticized notion that we used to have good old days before the due process revolution is really an unfounded myth. In truth, the old days were not very good, especially for the large number of students who were not given any meaningful access to the so-called "public schools." I say "so-called" because many categories of students were wholly excluded from the public schools, including three-fourths of all minority students at that time. Yes, we have many problems today, but we are at least looking at a situation where we do have truly universal access to education. That is an important gain in terms of both freedom and equal educational opportunity.

One study that has been widely cited by opponents of the due process revolution supposedly shows that in 1940 the most serious problems in public schools were such trivial infractions as talking and gum-chewing, whereas in 1987 the most serious problems in public schools included drug and alcohol abuse, pregnancy, suicide, and violent crime. Putting aside the fact that this supposed study has no empirical foundation, the actual facts show that, in terms of health, safety, and educational opportunity, young people today are better off than their 1940 counterparts.

For example, in 1940, only 49% of all young people graduated from high school. Pregnant girls were kicked out. Handicapped, learning-disabled, and troubled students were warehoused away from public view, and 75% of all minority and low-income students were excluded altogether.

Today, by contrast, more than 90% of all teenagers are enrolled in high school and 75% graduate on time, with the largest gains coming

16. West Virginia State Board of Education v. Barnette, 319 U.S. 624, 637 (1943).

17. Shelton v. Tucker, 364 U.S. 479, 487 (1960).

from stressed populations: minorities, students with disabilities, pregnant girls, and low-income youngsters. Illiteracy today is one-fifth its 1940 level. College enrollment has quadrupled.

I am certainly not arguing that 1994 — anymore than 1940, 1975, or any other era — is a halcyon time in terms of public schools. To the contrary, much serious work needs to be done in the school system, not only to improve students' educational experiences but also to improve their basic rights. What I am saying, though, is that there is no correlation between *increased* student rights and *decreased* educational opportunities. Actually, the rights revolution has gone hand-in-hand with the unprecedented opening up of meaningful educational opportunities to all students, including many who were deprived of such opportunities in the past. Our ongoing challenge is to carry forward on the path lit by the Supreme Court's decision in *Brown v. Board of Education*[18] exactly forty years ago tomorrow, namely, to ensure the constitutional rights of all public school students, and to ensure that all of them receive equal and adequate educational opportunities.

18. 347 U.S. 483 (1954).