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Student Rights Under the Due Process Clause . . . Suspensions from Public Schools; Goss v. Lopez

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CONSTITUTIONAL LAW:

Student Rights Under the Due Process Clause... Suspensions from Public Schools

Goss v. Lopez, 95 S. Ct. 729 (1975)

IN ADDRESSING ITSELF to the constitutionality of Section 3316.66 of the Ohio Revised Code,[1] the United States Supreme Court in *Goss v. Lopez*[2] has ruled for the first time upon the extent to which the rights of students are to be protected under the due process clause of the fourteenth amendment in conjunction with any disciplinary removal from a public school.[3] By its action the Court has tacitly undertaken to lift the cloud on student rights which has existed under the common law doctrine of *in loco parentis*,[4] and interpose procedural safeguards upon any decision of school officials to deprive a student of educational benefits.[5]

During the early months of 1971, Betty Crome attended a demonstration at a neighboring school and was subjected to mass arrest with other students and later released without being formally charged. Before her own school was to begin on the following morning, she was notified of her suspension for a 10-day period. Dwight Lopez was also suspended for 10 days without a hearing following a disturbance in his high-school lunchroom. He later testified that he was an innocent bystander to the disturbance.[6] Dwight Lopez, Betty Crome and seven other secondary school students, each of whom had been suspended from schools in the Columbus, Ohio, Public School System due to various incidents arising

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[1] OHIO REV. CODE ANN. § 3313.66 (Page 1972), provides in pertinent part:

> [T]he principal of a public school may suspend a pupil from school for not more than ten days.... Such ... principal shall within twenty-four hours after the time of expulsion or suspension, notify the parent or guardian of the child, and the clerk of the board of education in writing of such expulsion or suspension including the reasons therefor....

As the terms are utilized here, "suspension" refers to a dismissal from a school for a short duration, generally 10 days or less; "expulsion" refers to a dismissal from a public school for the remainder of a school term or longer.

[2] 95 S. Ct. 729 (1975).

[3] The *Goss* court approached the issue as to whether a state-created right to an education is either a protected property or liberty interest under the fourteenth amendment's due process clause.

[4] 1 W. BLACKSTONE, COMMENTARIES *453 described this common law doctrine thusly:

> [A parent] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, *viz.* that of restraint and correction, as may be necessary to answer for the purposes for which he is employed.

[5] In the absence of sufficient state involvement, private or parochial secondary schools are not amenable to the due process clause of the fourteenth amendment for the purposes of preventing arbitrary suspensions or expulsions. *See* Bright v. Isenbarger, 314 F. Supp. 1382 (N.D. Ind. 1970).

[6] Lopez v. Williams, 372 F. Supp. 1279, 1285 (S.D. Ohio 1973).

during a period of student unrest, instituted a class action suit under 42 U.S.C. Section 1983[7] against their respective school administrators. The plaintiffs sought declaratory and injunctive relief, asserting that Section 3316.66 of the Ohio Revised Code was unconstitutional in that it permitted public school officials to deprive them of their rights to an education without a hearing in violation of the due process clause of the fourteenth amendment.

A three-judge United States District Court for the Southern District of Ohio declared that plaintiffs were denied procedural due process in being suspended without a hearing either prior to suspension or within a reasonable time thereafter, and that Section 3316.66 of the Ohio Revised Code as it related to permitting such suspensions was unconstitutional.[8] The requested injunction, ordering the school administrators to expunge all references to such suspensions from the students' records, was granted.

On direct appeal,[9] the United States Supreme Court affirmed the judgment of the district court. Writing for a majority of five,[10] Justice White held that students facing a temporary suspension from a public school have a "property interest in educational benefits" and a "liberty interest in reputation" which require protection under the due process clause of the fourteenth amendment from arbitrary deprivations.[11] The opinion added that as a constitutionally protected minimum, due process requires, in connection with a suspension of 10 days or less, that the student be given notice of the accusation, an explanation of the evidence, and an opportunity to proffer a vindication.[12]

In historical context, the public school students' struggle for recognition of constitutional rights has been long and arduous.[13] As a matter of tradition the courts have been renitent to interfere with the policies and practices of the educational community.[14] Although the Supreme Court has infrequently reached constitutional rights issues

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[7] Civil Rights Act of 1871 § 1, ch. 22, § 1, 17 Stat. 13 (codified at 42 U.S.C. § 1983 [1970]). The expansion of 42 U.S.C. § 1983 in Monroe v. Pape, 365 U.S. 167 (1961), helped to facilitate the presentation of student rights suits in federal due process proceedings.

[8] Lopez v. Williams, 372 F. Supp. 1279 (S.D. Ohio 1973), *aff'd sub nom.* Goss v. Lopez, 95 S. Ct. 729 (1975).

[9] Pursuant to 28 U.S.C.A. § 1253 (1966), direct appeals to the Supreme Court are provided from decisions of three-judge district courts granting or denying an interlocutory or permanent injunction in any civil proceeding.

[10] Justices Douglas, Brennan, Stewart, and Marshall joined in the White opinion.

[11] Goss v. Lopez, 95 S. Ct. 729, 737 (1975).

[12] *Id.* at 740.

[13] *See generally* J. HOGAN, THE SCHOOLS, THE COURTS, AND THE PUBLIC INTEREST (1974), for an historical overview.

[14] *See* Epperson v. Arkansas, 393 U.S. 97, 104 (1968); Meyer v. Nebraska, 262 U.S. 390, 402 (1923).

in the educational sphere,[15] the state and its school boards have been acknowledged to have broad express or implied powers to adopt policies and regulations relating to student conduct.[16] The reasoning under the due process test has been that the courts will not strike down any policy established by a state or its school boards which is reasonably calculated to effect and promote discipline within the school.[17]

Prior to 1954 and *Brown v. Board of Education*,[18] public education was almost exclusively considered to be a matter of state and local concern and a body of case law developed at the state level that permitted, if not actually sanctioned, educational policies and practices that failed to meet federal constitutional requirements.[19] Traditionally, a court would view a particular school regulation to assure itself that reasonableness prevailed as a factor in the making of school law.[20] A state or school board's treatment of its pupils carried a presumption of validity with the burden of proof on the complainant to establish the unreasonableness of the regulation or policy.[21] The concept has evolved, however, that when a constitutional right is invoked, the burden is upon the state to justify the reasonableness of educational regulations or policies that infringe upon that right.[22]

Since 1954 the courts have embarked upon a minimal supervision of public education. There has been a gradual infusion of constitutional standards into educational policies, practices and structures. Under traditional constitutional criteria in line with the due process test, the attack on a state sanctioned educational policy or regulation has generally involved two questions:[23]

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[15] *E.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Epperson v. Arkansas, 393 U.S. 97 (1968); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923) (cases generally recognizing a liberty right under the first and fourteenth amendments of a freedom to teach and a freedom to learn).

[16] In Tinker v. Des Moines School Dist., 393 U.S. 503, 507 (1969) (in which the Court recognized a student's protected right of symbolic expression under the first and fourteenth amendments) the Supreme Court stated: "[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the states and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."

[17] *Compare* Blackwell v. Issaquena County Bd. of Education, 363 F.2d 749 (5th Cir. 1966) *with* Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966), where the court balanced a school regulation that prohibited the wearing of "freedom buttons" ("One man one vote SNCC") against the interference with the students' protected right of free expression on the basis of whether or not the buttons occasioned disruptive conduct.

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

[19] J. HOGAN, THE SCHOOLS, THE COURTS, AND THE PUBLIC INTEREST 5, 79 (1974); *see, e.g.*, Wooster v. Sunderland, 27 Cal. App. 51, 148 P. 959 (1915).

[20] *See* Pugsley v. Sellmeyer, 158 Ark. 247, 251, 252, 250 S.W. 538, 539 (1923), which upheld a school regulation which prohibited the wearing of talcum powder on the faces of female students.

[21] *Id.* at 254, 250 S.W. at 539.

[22] Tinker v. Des Moines School Dist., 393 U.S. 503 (1969).

[23] *Id.* at 509.

(1) whether the student has been unnecessarily denied a constitutionally protected right, and

(2) whether the policy or regulation is reasonable, and not arbitrary, as being pertinent to the operation and welfare of the educational process.

Therefore, it is deemed permissible to enforce appropriate standards of behavior provided that they are consistent with constitutional safeguards.

Until its decision in *Goss,* the Supreme Court only acknowledged first amendment rights to exist in the public schools, as incorporated by the force of the fourteenth amendment.[24] The Supreme Court was hesitant to rely solely on the due process clause since any reasonable basis for a state sanctioned policy or regulation would defeat the application of the due process test. This hesitancy on the part of the Court was best expressed in *West Virginia State Board of Education v. Barnette,*[25] wherein Jehovah's Witnesses challenged the constitutionality of a school board regulation that made a refusal to salute the flag grounds for expulsion from school. In delivering the opinion of the Court, Justice Jackson stated:

> [I]t is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard.[26]

Although the force of specific constitutional provisions strengthens the applicability of the due process clause, in a proper case the Supreme Court will recognize property or liberty interests to be protected by the due process clause alone.

Prior to *Goss,* only inferences could be drawn as to how the Supreme Court might rule upon the extent of due process rights to be accorded public school students.[27] With *Dixon v. Alabama State Board*

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[24] *E.g.,* Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (symbolic expression is protected as long as normal school functions are not disrupted); Epperson v. Arkansas, 393 U.S. 97, 107 (1968) (the states' right to prescribe public school curriculum does not "carry with it the right to prohibit on pain of criminal penalty, the teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment"); West Virginia v. Barnett, 319 U.S. 624 (1943) (a state cannot compel a student to pledge and salute the flag as a condition for access to public education where such compulsion would interfere with the student's intellectual or spiritual beliefs).

[25] 319 U.S. 624 (1943).

[26] *Id.* at 639.

[27] *See generally* Abbott, *Due Process and Secondary School Dismissals,* 20 CASE W. RES. L. REV. 378 (1969); Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline,* 119 U. PA. L. REV. 545 (1971); H. C. Hudgins, Jr., *The*

of Education,[28] *In re Gault,*[29] and *Kent v. United States*[30] as a backdrop, increased emphasis was placed in the federal courts on the expansion of the judicial concern with individual rights to secondary school disciplinary cases by the means of the due process clause. In *Goss,* the due process rights of students expelled were not questioned.[31] The distinction between a suspension and an expulsion was recognized.[32] The Court attested that *Dixon* had been uniformly followed by the federal courts in making the due process clause applicable to decisions to remove a student from the public school for a period of time long enough to classify the removal as an expulsion.[33] However, it appears to be due to conflicting decisions of the lower federal courts, regarding the extent to which due process rights were to be accorded suspended public school students, that the Supreme Court made its delineation of applicable due process guarantees.[34]

It was recently held in *San Antonio Independent School District v. Rodriquez*[35] that while education is important, it is not a fundamental right explicitly or implicitly guaranteed by the federal constitution. Wielding this principle as a basis for their argument, the appellants in *Goss* contended that the due process clause did not attach to protect against suspensions from the public school system. The Court made use of a two-part analysis suggested in *Board of Regents of State Colleges v. Roth*[36] in its approach to this issue: first, it determined whether the interests at stake were within the fourteenth amendment's protection of

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Discipline of Secondary School Students and Procedural Due Process: A Standard, 7 WAKE FOREST L. REV. 32 (1970); Comment, *Procedural Due Process in Secondary Schools,* 54 MARQ. L. REV. 358 (1971).

[28] 294 F.2d 150 (5th Cir.), *cert. denied,* 368 U.S. 930 (1961) (wherein the due process clause was held applicable to decisions made by a tax supported college to remove a student from the institution for a period of time long enough for the removal to be classified as an expulsion).

[29] 387 U.S. 1, 13 (1967). The Court described the due process to be accorded juvenile offenders with the statement that "whatever may be their precise impact neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."

[30] 383 U.S. 541, 555 (1966) (wherein the Court stated, "the admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness").

[31] While OHIO REV. CODE ANN. § 3316.66 (Page 1972) provides in pertinent part in the case of an expulsion that, "[t]he pupil or the parent, or guardian, or custodian of a pupil so expelled may appeal such action to the board and shall be permitted to be heard against the expulsion..." no similar procedure is provided for a suspended student.

[32] Goss v. Lopez, 95 S. Ct. 729, 737, 738 & n.8 (1975).

[33] *E.g.,* De Jesus v. Penberthy, 344 F. Supp. 70, 74 (D. Conn. 1972); Fielder v. Board of Education, 346 F. Supp. 722, 729 (D. Neb. 1972); Vought v. Van Buren Public Schools, 306 F. Supp. 1388, 1392 (E.D. Mich. 1969).

[34] As to the divergent holdings of the federal district courts *compare* Mills v. Board of Education, 348 F. Supp. 866 (D.D.C. 1972) *with* Hernandez v. School District Number One, 315 F. Supp. 289 (D. Colo. 1970).

[35] 411 U.S. 1 (1973).

[36] 408 U.S. 564 (1972).

liberty or property and then it determined whether the nature of the interests were sufficient to cause procedural due process requirements to apply.

The Court in *Roth* had stated that property interests protected within the fourteenth amendment's due process clause "are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules . . . that stem from an independent source such as state law. . . ."[37] Drawing upon the *Roth* definition, the Court in *Goss* recognized educational benefits to be a protected property interest where the state elects to "extend the right to an education" to its citizens by statute.[38] Under this criterion, a citizen's entitlement to an education is to be protected by the due process clause. On the basis of Ohio Revised Code Sections 3313.48[39] and 3313.64,[40] directing local authorities to provide a free education to all residents between five and 21 years of age, and Ohio Revised Code Section 3321.04,[41] a compulsory attendance law, the Court established that the appellees were legitimately entitled to a public education. Under the Court's analysis, a right once created is not to be arbitrarily denied simply due to a charge of misconduct, as a procedural process must come into operation to substantiate the charge.[42]

The Court based its decision not only upon a protected property interest, but also found a protected liberty interest in the appellees' reputations. Due to the damaging effect which sustained and recorded charges of misconduct can have upon a student's standing in his or her educational community and on later opportunities for higher education and employment, the Court held, under the authority of *Wisconsin v. Constantineau*,[43] that the appellees had a liberty interest in their reputations which must be protected under the due process clause.[44]

The appellants presented the argument, adopted by the dissenting

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[37] *Id.* at 577.

[38] Goss v. Lopez, 95 S. Ct. 729, 735, 736 (1975).

[39] OHIO REV. CODE ANN. § 3313.48 (Page Supp. 1974) provides in pertinent part: "The board of education of each city, exempted village, local, and joint vocational school district shall provide for the free education of the youth of school age within the district under its jurisdiction. . . ."

[40] OHIO REV. CODE ANN. § 3313.64 (Page Supp. 1974) provides in pertinent part: The schools of each city, exempted village, or local school district shall be free to all school residents between five and twenty-one years of age. . . . School residents shall be all youth who are children or wards of actual residents of the school district. District of school residence shall be the school district in which a school resident is entitled to attend school free. . . .

[41] OHIO REV. CODE ANN. § 3321.04 (Page 1972) provides in pertinent part: "Every parent, guardian, or other person having charge of any child of compulsory school age . . . must send such child to a school, which conforms to the minimum standards prescribed by the state board of education, for the full time the school attended is in session. . . . Excuses . . . may be granted. . . ."

[42] Goss v. Lopez, 95 S. Ct. 729, 736 (1975).

[43] 400 U.S. 433, 437 (1971) wherein the Court stated: "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."

[44] Goss v. Lopez, 95 S. Ct. 729, 736 (1975) (Powell, J., dissenting).

opinion, that a state created entitlement to education is not protected by the due process clause unless the state subjects the student to a "severe detriment or grievous loss" of that entitlement.[45] Suspensions from school, it was argued, do not assume constitutional dimensions.[46] Applying the *Roth* test to determine whether due process requirements attached, the Court in *Goss* looked to the nature of the property interest in educational benefits, rather than the weight that interest had when balanced against the interests of the school system.[47] Stressing the importance of the educational process, the Court concluded that a suspension for "more than a trivial period," clearly indicating even a one-day suspension,[48] has a serious impact upon a child and that certain minimal requirements of due process must be accorded to the student.[49]

In determining the nature of the minimum due process applicable to students facing suspension, the Court stated that "*some* kind of notice" and "*some* kind of hearing" is mandated.[50] The concern of the Court appears to be to prevent unfair or erroneous exclusions from the educational process and consequential interference with a student's protected interests. As a general rule notice and a hearing are required prior to suspension. However, the Court's ruling allows immediate removal of a student from school where his or her presence endangers persons or property or threatens disruption of the academic process, with notice and a hearing to follow as soon as is practicable.[51] Although not deciding nor construing the due process clause to require the school to afford the student an opportunity to secure counsel or to call and confront witnesses, the Court acknowledged by way of dicta that in longer suspensions, expulsions, or unusual situations, something more than the rudimentary procedures that the Court has detailed may be necessary.[52]

Justice Powell, writing for the minority,[53] dissented on the basis that although Ohio Revised Code Sections 3313.48, 3313.64, and 3321.04 create the educational entitlement, under the *Roth* rationale Ohio Revised Code Section 3316.66 "defines" the "dimensions" of the property interest.[54] The contention was that the Ohio legislature, having created a property right amenable to the due process clause, may also protect or

[45] As authority for the "grievous loss" standard, the case of Joint Anti-Fascist Refuge Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring) is cited.

[46] Goss v. Lopez, 95 S. Ct. 729, 742 (1975).

[47] *Id.* at 737.

[48] *Id.* at 742 n.3 (Powell, J., dissenting).

[49] *Id.* at 737.

[50] *Id.* at 738.

[51] *Id.* at 740.

[52] *Id.* at 740, 741.

[53] Justices Blackmun and Rehnquist, and Chief Justice Burger, joined in the Powell dissent.

[54] Goss v. Lopez, 95 S. Ct. 729, 742 (1975) (Powell, J., dissenting).

limit the operation of that right when it is encompassed within an "entire package of statutory provisions."[55] Protesting that the majority ignored precedent in reaching its decision, the dissenting opinion cited *Tinker v. Des Moines School District*[56] and *Epperson v. Arkansas*[57] for the view that the states have traditionally broad based powers concerning the operation of their schools which are not incompatible with the individual interests of the student.[58] The dissenting opinion further protested the majority's intrusion of the due process clause into "routine classroom decisions."[59] Classifying a suspension as an inconsequential infringement upon a student's interest in education, the minority expressed concern that the Court had entered into a "thicket" of judicial intervention into the operation of the educational process which would adversely affect the quality of education.[60]

Despite the concern expressed by the minority in *Goss*, and although the Supreme Court there expanded the scope within which procedural due process is to be accorded to public school students, the Court has not abandoned its traditional due process approach to state sanctioned educational policies and regulations.[61] Presumably on a case by case basis any reasonable legislation affecting public school students will be upheld wherever specific constitutional guarantees are not invoked. The Court has consistently denied review to public school haircut and appearance cases even though they are frequently couched in due process terms.[62] Similarly, it appears unlikely that the *Goss* decision will have an immediate

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[55] *Id.*

[56] 393 U.S. 503, 507 (1969); *see also* note 13 *supra.*

[57] 393 U.S. 97, 104 (1968).

[58] Goss v. Lopez, 95 S. Ct. 729, 744 (1975) (Powell, J., dissenting).

[59] *Id.* at 746.

[60] *Id.* at 747.

[61] In Wood v. Strickland, 95 S. Ct. 992, 1003 (1975) (an action for damages arising out of the expulsion of students who "spiked" punch at a school function in violation of a school regulation prohibiting the use of intoxicating beverages), which was decided after *Goss* was handed down, the Court held that a school board member enjoys a qualified immunity from liability for damages, under 42 U.S.C. § 1983, unless he knew or should have known that his official disciplinary actions would violate the constitutional rights of the student, or acted with malicious intent. The majority (White, J.) took the opportunity to reaffirm the traditional due process approach:

> It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion. Public high school students do have substantive and procedural rights while at school [citing *Tinker, Barnette* and *Goss*]. But § 1983 does not extend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations. The system of public education that has evolved in this Nation relies necesarily [*sic*] upon the discretion and judgment of school administrators and school board members, and § 1983 was not intended to be a vehicle for federal court correction of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees [citing *Epperson* and *Tinker*].

[62] *See generally* Tinker v. Des Moines School Dist., 393 U.S. 503, 507, 508 (1969) (specifically exempting any relation which that case might have to the "regulation of the length of skirts or the type of clothing, to hair style or deportment. . . ."); Olff v. East Side Union High School Dist., 404 U.S. 1042 (1972) (Douglas, J., dissenting); Jackson v. Dorrier, 424 F.2d 213 (6th Cir.), *cert. denied*, 400 U.S. 850 (1970);

impact on the success of those cases which challenge corporal punishment[63] or searches and seizures[64] in the public schools. The *Goss* decision, however, is evidence that the Supreme Court is willing to extend constitutional protection to public school students in a proper case.

In perspective, *Goss* furthers the continuing erosion of the proposition that the constitutional rights of children are not co-extensive with those of adults.[65] The concept that a public school student has interests which in a proper case may call forth the protection of the due process clause may promote the application and expansion of additional constitutional rights for minors. However, in continuing an assessment of the constitutional rights due to public school students, the courts appear destined to decide on a case by case basis.

While the *Goss* decision is not a "cure-all" for unjust and arbitrary suspensions of students from the public schools, it is to be expected that the requirements of procedural due process will at least curtail summary suspensions. Furthermore, the implication is that neither the Ohio school boards, nor the school boards in states similarly affected by the *Goss* decision, will be forced to seriously alter their administrative procedures in order to comply with the Supreme Court's mandate. The Court itself states, "we have imposed requirements which are, if anything, less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions."[66] Despite the minimal requirements involved in according due process, problems remain. Recent events indicate that disciplinary suspensions have been meted out for reasons which may appear upon their face to be arbitrary and unreasonable. These include suspensions based solely on race, under the guise of suspensions for truancy,[67] and the increasing extent of reliance upon the right to suspend.[68]

Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970); Ferrell v. Dallas Indep. School Dist., 392 F.2d 697 (5th Cir.), *cert. denied*, 393 U.S. 856 (1968).

[63] *See generally* Ware v. Estes, 328 F. Supp. 657 (N.D. Tex. 1970), *aff'd per curiam*, 458 F.2d 1360 (5th Cir.), *cert. denied*, 409 U.S. 1027 (1972); Comment, *Corporal Punishment in the Public Schools: The Legal Questions*, 7 AKRON L. REV. 457 (1974).

[64] *See generally* Frels, *Search and Seizure in the Public Schools*, 11 HOUSTON L. REV. 876 (1974); Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 IOWA L. REV. 739 (1974).

[65] *See* Prince v. Massachusetts, 321 U.S. 158, 170 (1944).

[66] Goss v. Lopez, 95 S. Ct. 729, 740 (1975).

[67] *See* Washington Post, Jan. 17, 1975, at C-1, which reported that the NAACP Legal Defense and Educational Fund has filed suit alleging that disproportionate suspension figures in Prince George's County Schools present a pattern of racial discrimination in discipline. The news article states in pertinent part:

> In past years, about one-third of those students suspended were suspended for truancy.... At Benjamin Tasker Jr. High, for example, where 65.9 percent of the students suspended in 1972-73 were blacks, 71 per cent of the students suspended last year [1973-74] were blacks. Blacks make up 14 percent of the school's population.

[68] *See* Goss v. Lopez, 95 S. Ct. 729, 745 n.10 (Powell, J., dissenting) (which makes reference to various suspension statistics contained in *amicus* briefs).

Now that they are under the scrutiny of the courts for the purposes of guaranteeing procedural due process, public schools presumably will be more cautious to avoid arbitrary and unreasonable deprivations of educational benefits. It is foreseeable however, that many more student rights cases will be brought into the courts on due process grounds.

Curiously, the Court places greater emphasis on a student's property interest in educational benefits than on a student's liberty interest in his or her reputation as calling forth the protection of the due process clause. The Court's rationale appears to be based on the idea that although a property interest in educational benefits is inherent wherever a state has enacted a compulsory education statute, a liberty interest in reputation may not be as clearly evidenced. In contrast to the property interest, the liberty interest in reputation is abstractly defined.[69] Additionally, in any particular case the liberty interest in reputation may be safeguarded by the fact that the suspension resulting from charges of misconduct is not recorded, or that legislative enactments allow the parent or student to challenge the contents of such school files.[70] However, if the liberty interest in reputation is to be as broadly construed as the Court appears more inclined to view it, an unconstitutional denial of an educational benefit which other students enjoy may be found. Wherever a student is deprived of an education for any period of time on charges of misconduct without procedural due process, when the charges could seriously damage the student's standing with fellow students and his teachers, an unconstitutional denial under the liberty interest may be in evidence.[71]

The *Goss* decision fails to answer the question whether a public school student is entitled to due process prior to suspension, or as soon as is practicable thereafter, in the absence of a state compulsory education statute. The obvious answer under the Court's rationale appears to be that there can be no property interest in educational benefits without a state compulsory education statute and that a right under the due process clause to notice and a hearing could not be invoked. The question is not without merit. For example, Mississippi has neither constitutional nor statutory mandatory provisions for public education.[72] It is arguable that in a case similar to *Goss* arising in such a state a liberty interest in reputation alone

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[69] *See, e.g.*, Board of Regents of State Colleges v. Roth, 408 U.S. 564, 573 (1972) ("In a constitution for a free people there can be no doubt that the meaning of 'liberty' must be broad indeed.").

[70] *E.g.*, Education Amendments of 1974, Pub. L. No. 93-380, 513, 88 Stat. 484 (Aug. 21, 1974) (parents and students are allowed access to certain public records under specific circumstances and may challenge the content of such records before they are released to employers or other schools).

[71] Goss v. Lopez, 95 S. Ct. 729, 736 (1975).

[72] Mississippi's statutory provisions which mandated public education were encompassed within MISS. CODE ANN. § 6509, 6510, 6512-6517 (1942), but were repealed by ch. 288 of the 1956 session laws.

may be enough to invoke the minimal due process requirements of the fourteenth amendment before a student may be suspended from a public school on charges of misconduct.

Having expanded the *Roth* rationale to its logical limits, the Supreme Court in *Goss* lends further authority to the proposition that governmental infringement of any property interest granted by state law which is not *de minimus* may, in a proper case, come under the protection of the due process clause.[73] However, the primary impact of the *Goss* decision is that the courts are now in agreement that education is a property interest protected under the due process clause of the fourteenth amendment. Thus, a person cannot be arbitrarily deprived of an education, wherever the right to that education is secured by a state compulsory attendance statute. The Supreme Court appears to have gone as far as it can without overruling *Rodriquez*[74] and declaring education to be a fundamental right protected by the United States Constitution.

GLENN W. SODEN

WRONGFUL DEATH: FETAL RIGHTS—CAUSE OF ACTION GRANTED FOR FETAL DEATHS UNDER WRONGFUL DEATH STATUTE

Eich v. Town of Gulf Shores, 300 So. 2d 354 (Ala. 1974)

A WRONGFUL DEATH ACTION, *Eich v. Town of Gulf Shores*,[1] was decided as a result of an automobile accident that occurred on March 2, 1974, near the small Alabama town of Gulf Shores. Although the facts of the incident were not fully recounted, it appears that the plaintiff, who was eight and one-half months pregnant at the time,[2] was struck by a negligently operated city police car and severely injured. Although plaintiff recovered from her injuries, the child did not and was stillborn.[3] Mrs. Eich then sued, seeking damages for the death of the unborn child and basing her action on an Alabama wrongful death statute, entitled "Suits for injuries causing death of minor child."[4] That statute reads in relevant

[73] *E.g.*, Arnett v. Kennedy, 416 U.S. 134 (1974), at 164 (Powell, J., concurring), and at 171 (White, J., concurring and dissenting); Connell v. Higginbotham, 403 U.S. 207 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970).

[74] 411 U.S. 1, 35-36 (1973), and at 110-17 (Marshall, J., dissenting).

[1] 300 So. 2d 354 (Ala. 1974).

[2] *Id.* at 355.

[3] *Id.*

[4] The defense of governmental immunity had been waived. *Id.* at 355 n.1.