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WITH LIBERTY AND JUSTICE FOR SOME: DENIAL
OF MEANINGFUL DUE PROCESS IN SCHOOL
DISCIPLINARY ACTIONS IN OHIO

GENEVIEVE VINCE*

ABSTRACT

Students face many different obstacles in school and arbitrary exclusion should not be one of them. Despite the Supreme Court stating that students do not shed their rights at the schoolhouse gate, they in fact do shed their rights. This Note examines how school disciplinary actions deny students meaningful due process. It discusses the foundation of modern due process, including what other rights have been incorporated into the contemporary understanding of due process as well as its historic roots. Additionally, this Note explores the case that established the procedures required of school administrators to comport with a student’s right to due process, *Goss v. Lopez*. Finally, this Note argues why *Goss*’s protections do not amount to meaningful due process and how denial of meaningful due process in school disciplinary actions can have lasting negative implications on students’ futures beyond the schoolhouse gate.

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I. INTRODUCTION

Imagine a citizen being denied meaningful due process merely because she belongs to a certain class of people. When the citizen is accused of an offense, authority figures need not listen to what the accused has to say because truly examining the situation would be too time consuming. The law permits the authority figure to act as judge and jury and quickly dispose of the matter without scrutinizing the facts presented. Authority figures can hand citizens a punishment that remains on their record and affects their future. The citizen can appeal the punishment; however,

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her appellate rights are not meaningful either, as the appellate panel is more than willing to defer to the authority figure's judgment. Now, the punishment is permanently on the citizen's record and follows her throughout life, thereby hampering opportunities and making it harder for her to succeed. Imagine a world where state and federal law implements this discrimination and makes this form of discrimination legal.

This is infuriating, right? It sounds like a story straight out of pre-civil rights America. Except, it is not. This is a modern phenomenon that affects citizens every day. But in the year 2017, with the internet, social media, and activists galore, how could an injustice like this go unnoticed? Furthermore, where is this happening, to whom is this happening, and why do so few know or seem to care about it? It is closer than one would think; in fact, most people have probably seen or heard stories like this without realizing it involved class discrimination. So, who is this class of people? The class of people is minor students, and the discrimination they face lurks behind news stories such as "8th grader Suspended for Kool-Aid, Sugar, 'Crack,'" "12-year-old boy Suspended for Staring at a Girl;" and "Parents Sue School, Police over High School Students' Rap Video Expulsions."¹

While the headlines seem irrational, stories like these are surprisingly common.² Each story involves a student excluded from school for something trivial, and these disproportionate actions are all made possible, not through state or federal law, but via the 1975 Supreme Court case *Goss v. Lopez*.³ *Goss* established that access to public education is a property interest that the Fourteenth Amendment protects.⁴ The Fourteenth Amendment protects individuals from a government body, such as administrators in a publicly funded school,⁵ to deprive citizens of their life, liberty, or property without due process of law.⁶ However, this protection is not absolute. The U.S. Constitution permits the government to deprive an individual of life, liberty, or property so long as the state actor affords the individual due process of the law.⁷ Therefore, when a school suspends or expels a student for prohibited behavior, the disciplinary action qualifies as a government body depriving an individual of his

¹ Michael Baldwin, *12-Year-Old Boy Suspended for Staring at Girl*, FOX19.COM (Sept. 30, 2015), <http://www.fox19.com/story/30158100/12-year-old-boy-suspended-for-staring-at-girl>; Homa Bash, *8th Grader Suspended for Kool-Aid, Sugar 'Crack'*, NEWSNET5 CLEVELAND (Sept. 30, 2015), <http://www.newsnet5.com/news/local-news/oh-summit/8th-grader-suspended-for-kool-aid-sugar-crack>; Lucy May, *Parents Sue Cincinnati-Area School District, Police Over High School Students' Rap Video Expulsion*, WCPO CINCINNATI (Sept. 2, 2014), <http://www.wcpo.com/news/local-news/parents-sue-northwest-local-schools-colerain-police-over-high-school-students-rap-video-expulsions>.

² When searching Google News for "student suspended for," several of the news stories recalled took place in Ohio. Other well represented states included Texas, Virginia, and South Carolina.

³ *Goss v. Lopez*, 419 U.S. 565, 573-74 (1975).

⁴ *Id.* at 574.

⁵ *Id.*; see *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637-38 (1943).

⁶ U.S. CONST. amends. V, XIV.

⁷ U.S. CONST. amends. V, XIV.

or her property.⁸ Accordingly, *Goss* held that students facing exclusion were entitled to due process of law.

Goss established two procedural requirements that schools must follow to suspend or expel a student while comporting with the student's constitutional right to due process.⁹ These procedural requirements, however, amount to no more than inconvenient administrative red tape masquerading as substantive student protections. This deception results in such headlines that highlight unreasonable, illogical, and arbitrary justifications for excluding a student from school. *Goss* does not protect students as originally intended. Instead, the case allows schools to truncate the students' constitutional right to due process.

This Note will show that students are unfairly denied meaningful due process of law when facing disciplinary actions at school. Part II will discuss the history of due process as well as important concepts absorbed into the contemporary definition. Part III will explore the history of *Goss v. Lopez*, including the Court's established protections and concerns raised in the dissent. Part IV will analyze the practical application of *Goss* and illustrate how the procedures created in the majority opinion permit schools to unfairly deprive students of their property without meaningful due process of law. Additionally, Part IV will highlight the seriousness of school disciplinary actions and how truncating students' right to due process hurts their future. Finally, Part V will propose a solution to protect students where the procedures created by *Goss* fall short.

II. DUE PROCESS

The phrase "due process" first appeared in English statutes interpreting the Magna Carta in 1354 A.D.¹⁰ Originally, due process was only a technical requirement.¹¹ Due process mandated that the court provide an accused party with notice of a hearing regarding an issue in contention so that the accused could respond to the accusation.¹² Over time, the definition and implications of due process changed as the idea absorbed additional concepts.¹³ In the United States, due process absorbed several concepts from the Bill of Rights in an effort to ensure the meaningfulness of an accused party's legal response.¹⁴ Furthermore, due process incorporated the principles of legality, which assured that laws were fair

⁸ *Goss*, 419 U.S. at 574; see *Arnett v. Kennedy*, 416 U.S. 134, 164 (1974) (Powell, J., concurring); see also *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972); see also *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

⁹ *Goss*, 419 U.S. at 574-84.

¹⁰ A.E. DICK HOWARD, *MAGNA CARTA: TEXT AND COMMENTARY* 14-15 (1964).

¹¹ Edward J. Eberle, *Procedural Due Process: The Original Understanding*, 4 CONST. COMMENT. 339, 340 (1987).

¹² Gary Lawson, *Due Process Clause*, in *THE HERITAGE GUIDE TO THE CONSTITUTION* 439, 439-40 (David F. Forte & Matthew Spalding eds., rev. 2d ed. 2014).

¹³ See generally Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585 (2009).

¹⁴ Francis W. Bird, *Evolution of Due Process of Law in the Decisions of the U.S. Supreme Court*, 13 COLUM. L. REV. 37, 46 (1913).

commands.¹⁵ By including the concepts that protected the rights of the accused party, due process shifted from a technical procedure into an amorphous concept that became synonymous with a “fair trial.”¹⁶ Notice, protections from the Bill of Rights, and the principles of legality weave the pattern currently known as due process.

A. The Principles of Legality: The Quality Assurance of Law

The principles of legality are rules and reasons that make commands legally binding.¹⁷ These principles establish that laws are fair in nature when they are clear and ascertainable.¹⁸ Indeed, to uphold the integrity of laws, the decision maker cannot use discretion to depart from previously established and agreed upon rules.¹⁹ In practicality, the principles of legality encompass all the reasons why the Court would strike down a law as substantively unfair, flawed, and unconstitutional.²⁰ For example, one principle requires that a law be publicly promulgated.²¹ Secret decrees cannot be laws because people have no notice as to what behaviors the law prohibits.²²

Another principle states that a law cannot be arbitrary; it must be rational or rationally related to the purpose of the law.²³ If, for example, a law intends to prevent highway accidents by prohibiting trucks from hauling two trailers but statistics show that trucks hauling one trailer cause significantly more accidents than trucks hauling two trailers, the law is arbitrary because the means employed do not achieve the stated purpose of the law.²⁴ A law that employs means unrelated to the end sought is irrational. Accordingly, that law would violate a principle of legality.²⁵

¹⁵ Lawson, *supra* note 12, at 439-40.

¹⁶ See *Bd. of Regents v. Roth*, 408 U.S. 564, 564 (1972); see also *Mathews v. Eldridge*, 424 U.S. 319, 333-35 (1976); *Goldberg v. Kelley*, 397 U.S. 254, 260-71 (1970); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 200-01 (1951); *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (invalidating a Nebraska state law prohibiting teachers from teaching the German language to students who had not yet passed the eighth grade because the law was “arbitrary and without reasonable relation to any legitimate state goal”); *Bi-Metallic Inv. Co. v. State Bd. of Equalization of Colo.*, 239 U.S. 441, 445-46 (1915); *ICC v. Louisville & Ashville R.R. Co.*, 227 U.S. 88, 91 (1913); *Hagar v. Reclamation Dist. No. 108*, 111 U.S. 701, 707 (1884); *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 281-86 (1856).

¹⁷ John C. Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 530-43 (1997).

¹⁸ Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 355, 356-59 (2005).

¹⁹ *Id.* at 375-77.

²⁰ Harrison, *supra* note 17, at 525-43; see generally LON L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969).

²¹ FULLER, *supra* note 20, at 157-59.

²² *Id.*

²³ Harrison, *supra* note 17, at 499-501.

²⁴ *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 694 (1981).

²⁵ *Id.* at 662; Lawson, *supra* note 12, at 439-40; Harrison, *supra* note 17, at 530.

Yet another principle of legality is that a law must be crafted so that the public is able to comply with it.²⁶ If the people cannot comply with a law and are accordingly guilty from the start, people lack adequate notice, and the law would violate a principle of legality.²⁷ Furthermore, a law can be void for vagueness.²⁸ If a law is so convoluted in its wording that a person of ordinary intelligence cannot understand what it binds him or her to do or not to do, that law is void for vagueness.²⁹ Similar to the way secret decrees violate the principles of legality for not providing the public with notice as to what behaviors are prohibited, a statute held to be void for vagueness does not provide adequate notice as to what behaviors are prohibited.³⁰

Going further, the law must be capable of faithful administration and implementation. When crafted, a law cannot leave significant discretion to law enforcement because significant discretion results in inconsistent application, creating arbitrary and irrational results.³¹ This inconsistency fails to comport with a principle of legality and ultimately fails the due process requirement of the law.³² Each of these principles helps expand and illustrate the idea of contemporary American due process. These elements are required of a law to make it a fair command, so the public can comply with it.

B. Natural Law: The Root of Fairness

The rationale at the root of due process lies within the concept of natural law. The idea of natural law began as far back as Aristotle who stated that if one were to look at the nature of the human being with all its complexities and nuances, one would see an intrinsic order of purposefulness or reason that guides one's choices.³³ This purposefulness is free will, which is a crucial aspect of natural law.³⁴ The rule of law should respect natural law.³⁵ When the rule of law respects natural law, citizens, of their own free will, enter into a covenant with the government by which the citizens agree to abide by the laws so long as the laws continue to respect natural

²⁶ FULLER, *supra* note 20, at 130-31.

²⁷ *Id.*

²⁸ Robinson, *supra* note 18, at 356-63.

²⁹ Anthony G. Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 67-68 (1960).

³⁰ *Id.*

³¹ FULLER, *supra* note 20, at 209-12.

³² *Id.*

³³ See generally ARISTOTLE, *NICOMACHEAN ETHICS* bk. V (G.P. Goold ed., H. Rackham trans., Harvard Univ. Press rev. ed. 1934) (c. 384 B.C.E.); ST. THOMAS AQUINAS, *THE SUMMA OF THEOLOGY* (1266-1273), reprinted in ST. THOMAS AQUINAS ON POLITICS AND ETHICS: A NEW TRANSLATION, BACKGROUNDS, INTERPRETATIONS (Paul E. Sigmund ed. & trans., Norton critical ed. 1988).

³⁴ Kent Greenfield, *Free Will Paradigms*, 7 DUKE J. CONST. L. & PUB. POL'Y 1, 7 (2011).

³⁵ See generally ARISTOTLE, *supra* note 33; ST. THOMAS AQUINAS, *supra* note 33.

law.³⁶ A respectful law acknowledges the values, norms, and rules by which a human should be treated and respected.³⁷

The most famous enumeration of rights rooted in natural law is the Declaration of Independence. Life, liberty, and the pursuit of happiness are the basic values, norms, and rules of personhood that the government is to respect.³⁸ Humanity in its nature demands life be respected and that people have the liberty to permit reason to guide their choices.³⁹ The pursuit of happiness is how people develop themselves into more perfect beings.⁴⁰ Natural law holds that there are these certain attributes to personhood that are inalienable, irreducible, and cannot arbitrarily be taken away.⁴¹

As Chief Justice John Marshall said in *Marbury v. Madison*, “The government of the United States has been emphatically termed a government of laws, and not of men.”⁴² If a law does not respect natural law, it is a command demanding subservience without an agreed upon justification. Such a law is the arbitrary rule of man and not within the terms of the agreement between the people and the U.S. government.⁴³ The agreement to respect natural law is the very root of the rule of law, the principles of legality, and ultimately, due process to which all citizens are entitled—that is, until *Goss v. Lopez* in 1975.

III. GOSS V. LOPEZ

Goss v. Lopez, originally hailed as a seminal case for students’ rights, created procedures that failed to protect students from a school’s arbitrary disciplinary actions.⁴⁴ In *Goss*, the school gave nine students each a ten-day suspension for destruction of school property and disruption of a learning environment.⁴⁵ Ohio state law required school administrators to provide procedural due process to any students facing suspension longer than ten days.⁴⁶ The required procedure both consisted of notice no later than twenty-four hours from the time of the disciplinary action that stated the reason for the suspension and required administrators to provide students with an informal hearing regarding the conduct that led to the suspension.⁴⁷ Ohio law

³⁶ See generally ARISTOTLE, *supra* note 33; ST. THOMAS AQUINAS, *supra* note 33.

³⁷ See *Marbury v. Madison*, 5 U.S. 137, 164 (1803); see also Kevin F. Ryan, *We Hold These Truths*, 31 WTR VT. B.J. 9, 11 (2005-2006).

³⁸ Patrick J. Charles, *Restoring “Life, Liberty, and the Pursuit of Happiness” in our Constitutional Jurisprudence: An Exercise in Legal History*, 20 WM. & MARY BILL RTS. J. 457, 470 (2011).

³⁹ RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* 41-43 (1998); Charles, *supra* note 38, at 506.

⁴⁰ BARNETT, *supra* note 39, at 73; Charles, *supra* note 38, at 477-502.

⁴¹ Charles, *supra* note 38, at 481-82.

⁴² *Marbury*, 5 U.S. at 164; see Ryan, *supra* note 37, at 11.

⁴³ See generally HENRY THOMAS, *THE LIVING WORLD OF PHILOSOPHY* (1946).

⁴⁴ MARY A. LENTZ, *LENTZ SCHOOL SECURITY* § 1:4, Westlaw (database updated Dec. 2014).

⁴⁵ *Goss v. Lopez*, 419 U.S. 565, 568 (1975).

⁴⁶ *Id.* at 567.

⁴⁷ *Id.* at 596 (Powell, J., dissenting).

further required school administrators to notify the student of his or her right to appeal the decision to the school board.⁴⁸

This particular Ohio law, however, was silent on any procedural requirements for students facing suspensions of ten days or less.⁴⁹ Because the students in *Goss* were suspended for ten days, state law did not require the school to provide the students with procedural due process.⁵⁰ The students filed suit seeking a declaration that the statute, which permitted the school to deny them procedural due process, was unconstitutional.⁵¹ The students also sought to enjoin the school from issuing other suspensions that under the same law would not be entitled to procedural due process.⁵² The district court held that the statute in question violated the students' constitutional right to due process and granted both the declaration and injunction.⁵³ The school board appealed the decision all the way up to the U.S. Supreme Court.⁵⁴ The school board's main argument was that any suspension lasting ten days or less only constituted a *de minimis* deprivation of property and was not substantial enough to require procedural due process.⁵⁵

In a narrow 5-4 decision striking down the statute, the Court stated that not affording the students with a hearing before handing down the suspensions violated their rights to due process of law prior to deprivation of life, liberty, or property.⁵⁶ The Court reasoned that "entitlement to a public education" is a property interest, and, as a property interest, the Due Process Clause of the Fourteenth Amendment protected students from the state arbitrarily depriving them of that property interest.⁵⁷ The Court reasoned that even though Ohio was not constitutionally obligated to "establish and maintain a public school system," the fact that the state offered and mandated attendance created a legal entitlement that a government body, such as the school board, could not arbitrarily withdraw "absent fundamentally fair procedures to determine whether the misconduct has occurred."⁵⁸ Overall, *Goss* provided further

⁴⁸ *Id.* at 567 (majority opinion); see OHIO REV. CODE § 3313.66 (2015).

⁴⁹ OHIO REV. CODE § 3313.66 (2015).

⁵⁰ *Goss*, 419 U.S. at 571.

⁵¹ *Id.* at 568-69.

⁵² *Id.* at 569.

⁵³ *Id.* at 571.

⁵⁴ "Because the order below granted plaintiffs' request for an injunction—ordering defendants to expunge their records—this Court has jurisdiction of the appeal pursuant to 28 U.S.C. § 1253." *Id.* at 572.

⁵⁵ *Id.* at 575-76.

⁵⁶ *Id.* at 584.

⁵⁷ *Id.* at 574. While the Court has been more uniform when determining what interests constitute deprivation of life, the interests that qualify as liberty or property have been a gray area. See, e.g., *Bell v. Burson*, 402 U.S. 535, 541-42 (1971); see also *Bd. of Regents v. Roth*, 408 U.S. 564, 569 (1972); *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971).

⁵⁸ *Goss*, 419 U.S. at 574.

affirmation that students retain their constitutional protections while they are in school.⁵⁹

Justice Powell, with whom Chief Justice Burger, Justice Blackmun, and Justice Rehnquist joined, dissented, stating that the majority's decision was an intrusion into the operation of public schools and opened a door for judicial intervention which had the potential to "affect adversely the quality of education."⁶⁰ Justice Powell first argued that public education was not a right but rather an entitlement.⁶¹ As an entitlement, students did not have a right to procedural due process outside of what state law created for them.⁶² Furthermore, even if access to education was a right, students did not possess the right to *discipline-free* education.⁶³ Thus, schools not providing students with notice and a hearing before disciplining them would not truly violate their right to education.⁶⁴

Justice Powell then argued that the procedures described in the majority opinion would unduly burden schools to the point of dysfunction.⁶⁵ Justice Powell stated that school boards have great swaths of disciplinary discretion because each school operates in a different community that has different needs.⁶⁶ Justice Powell argued that to serve a school's diverse set of needs in maintaining discipline, school boards need to have significant amounts of discretion regarding their disciplinary policies.⁶⁷ Justice Powell further argued that "one-size-fits-all" types of policies tie the hands of the administrators.⁶⁸ He alluded to the fact that some schools implement more disciplinary actions than average and that by requiring staff to provide notice and

⁵⁹ *Id.* The first seminal case for student civil rights was *Tinker v. Des Moines Indep. Comty. Sch. Dist.* 393 U.S. 503 (1969). In *Tinker*, several students filed suit seeking damages and an injunction against enforcement of a rule created by their school's principal prohibiting the students from wearing black armbands. The students along with other adults in the community decided to demonstrate their objections to the hostilities in Vietnam by all wearing black armbands on a particular day. The school principal learned of the plan and established the rule prohibiting students from wearing the armbands. When the students wore their armbands anyway, they were suspended "until they would come back without their armbands." *Id.* at 504. The Court held that the school had no evidence that wearing the armbands would have caused a substantial disruption of the learning environment and absent such evidence, the arbitrary prohibition violated the students' right to expression under the First Amendment. The Court reasoned that "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506.

⁶⁰ *Goss*, 419 U.S. at 585 (Powell, J., dissenting).

⁶¹ *Id.* at 586.

⁶² *Id.* at 586-89.

⁶³ *Id.* at 586.

⁶⁴ *Id.* at 587-89.

⁶⁵ *Id.* at 591-92.

⁶⁶ "In prior decisions, this Court has explicitly recognized that school authorities must have broad discretionary authority in the daily operations of public schools. This includes wide latitude with respect to maintaining discipline and good order." *Id.* at 589-90.

⁶⁷ *Id.* at 591-92.

⁶⁸ *Id.* at 592-93.

conduct a hearing, the disciplinary actions would pile up and require more attention; attention which would be taken away from providing the other students with a quality education.⁶⁹

Furthermore, Justice Powell argued that the requirements set forth in the majority opinion would not protect students the way the majority thought it would.⁷⁰ Justice Powell stated that the statute the majority had just invalidated provided more protection to students than the Court's new procedures ever could.⁷¹ Under the invalidated law, the principal taking the disciplinary action was required to notify not just the student, but also the student's parents and the school district's board of education.⁷² Under the *Goss* majority, schools only have to notify the student.⁷³ Justice Powell further argued that the hearing *Goss* afforded to students would not provide more protection than was already available, as the majority opinion did not change the substance of what would constitute an appropriate hearing.⁷⁴ Finally, Justice Powell noted that even if a student were subjected to an arbitrary suspension of ten days or less, that time period would not be substantial enough to justify additional protection and that such an action could easily be remedied without involving the judiciary.⁷⁵

More than forty years have passed since the Court decided *Goss*, and unfortunately, many of the concerns raised by Justice Powell in his dissent were accurate.⁷⁶ *Goss* was touted as a major win for students' rights when in reality it has not resulted in real protections for students.⁷⁷ Besides affirming prior cases holding that students had civil rights while in school, the practical application of the hearing and notice requirements established under *Goss* have shown that students do in fact shed some of their civil rights at the school house gate.⁷⁸ The notice and hearing

⁶⁹ "[The majority opinion] also demonstrate[s] that if hearings were required for a substantial percentage of short-term suspensions, school authorities would have time to do little else." *Id.* at 592.

⁷⁰ *Id.* at 595-97.

⁷¹ *Id.* at 596.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 595-96.

⁷⁵ *Id.* at 589 (Powell, J., dissenting); see also Brannon Heath, *Constitutional Law: Goss v. Lopez: Much Ado About Nothing or the Tempest*, 7 LOY. U. CHI. L.J. 193 (1976).

⁷⁶ Michael A. Ellis, *Procedural Due Process after Goss v. Lopez*, 1976 DUKE L.J. 409, 430 (1976) (arguing that the Court's reluctance to adopt true procedural protections due to the potential burden on the school administration dilutes the importance of procedural due process in that the truncated procedural due process sends the message to students that their right to due process need not be taken seriously).

⁷⁷ Powell's statement that arbitrary actions are easily remedied without judicial intervention has turned out to be untrue as seen by the mass quantities of case law and anecdotes regarding the subject.

⁷⁸ *Id.*; see *Borrell v. Bloomsburg Univ.*, 63 F. Supp. 3d 418, 448-50 (M.D. Pa. 2014) (holding that procedural due process rights were not violated by not affording an "informal give-and-take" before dismissing a student); see also *Stafford Mun. Sch. Dist. v. L.P.*, 64

requirements described in *Goss* do not substantively protect students.⁷⁹ The requirements merely created administrative red tape.

IV. STUDENTS SHED THEIR RIGHT TO MEANINGFUL DUE PROCESS AT THE SCHOOL HOUSE GATE

To illustrate the full effect of *Goss*'s shortcomings, let us follow a hypothetical disciplinary action from start to end. Imagine that Susy, a senior in high school, is from Ohio and is generally regarded as a good student. One day, Susy's classmate takes her purse and discharges Susy's pepper spray. Susy's teacher instructs her to go to the principal's office. Once in the office, Susy is told to write down what happened and given the opportunity to call her parents. Once her parents arrive, the principal, vice principal, and guidance counselor inform Susy and her parents that Susy is being suspended for disruption of class and that Susy has a right to appeal the decision to the school board.

In this situation, the first questions a parent might ask are, "How can I fight this?" or "What can I do to remedy the situation?" You believe the action is arbitrary because pepper spray is a legal substance. Susy was not the person who discharged the canister. Indeed, the student code of conduct does not explicitly or implicitly ban the substance. After all, how could Susy have known she was not permitted to possess the pepper spray if she had no prior notice? You notify the school of your intention to appeal the suspension. You go through the appeals process, and the principal informs you that the school board upheld the suspension. You feel your child's rights were violated but are unaware of what specific right was violated. The only recourse left would be to sue the school. Surely there has to be something—some cause of action for which you and your daughter are entitled relief! But what relief? Let us examine the process established in *Goss* to see what rights could be violated, how they could be violated, and where in the disciplinary process the violation could occur.

Recall that in *Goss v. Lopez*, the Court held that "entitlement to a public education" is a legally enforceable property interest, and as a property interest, the Due Process Clause protects students from the state arbitrarily depriving them of their property.⁸⁰ The Court further stated that a governmental body, such as the school board, could not arbitrarily withdraw that right based on misconduct "absent fundamentally fair procedures to determine whether [the requisite] misconduct has occurred."⁸¹ Therefore, in order for a school to withdraw a student's right to public education through disciplinary suspension, the school must provide "fundamentally fair procedures to determine whether the misconduct has occurred."⁸² This restriction over the school raises the question of what constitutes fundamentally fair procedures.

S.W.3d 559 (Tex. App. Ct. 2001) (holding that the school's failure to inform the student of a right to appeal did not violate due process).

⁷⁹ See *Borrell*, 63 F. Supp. 3d at 447-48; see also *Stafford*, 64 S.W.3d at 559; see also *Grine v. Sylvania Sch. Bd. of Educ.*, No. L-04-1137, 2004 WL 2924335, 2004 Ohio App. LEXIS 6393 (Ohio Ct. App. Dec. 17, 2004).

⁸⁰ *Goss*, 419 U.S. at 565; OHIO CONST. art. VI, § 3.

⁸¹ *Goss*, 419 U.S. at 574; OHIO REV. CODE § 3313.66 (2015); see also *Stafford*, 64 S.W.3d at 559; *Bd. of Regents v. Roth*, 408 U.S. 564, 570 n.8 (1972).

⁸² *Goss*, 419 U.S. at 574.

Upon determination that *any* removal from school constituted deprivation of property, regardless of the extent or duration, the Court established what fundamentally fair procedures look like in the school removal context.⁸³ The Court reasoned that due process is rooted in “the opportunity to be heard” and the opportunity to be heard only arises if “one is informed that the matter is pending.”⁸⁴ History has agreed with this concept and expanded upon it by incorporating other procedural protections, such as the right to counsel or the right to a jury trial, under the due process umbrella.⁸⁵ After all, notice is worthless if the rules of court are such that the answer of the accused cannot be effectively heard. Based on this principle, the Court held that students facing out-of-school suspension must be given “some kind of notice” of the reason for the possible property deprivation and “some kind of hearing” regarding the validity of the deprivation.⁸⁶

“Some kind of notice” and “some kind of hearing” are the two components of fundamentally fair procedure; however, the majority opinion never addressed what either means.⁸⁷ Because neither of these procedural requirements was adequately defined in *Goss*, subsequent case law has shaped what appropriate notice and hearing for school disciplinary actions look like.⁸⁸

A. Some Kind of Notice

As it currently stands, “some kind of notice” means that the school must inform the student what behavior or action justifies the suspension.⁸⁹ The student code of conduct need not explicitly state that this specific behavior is prohibited.⁹⁰ So long as

⁸³ The administration in *Goss* argued that even if public education was a property interest protected by due process, the procedural requirements only come into play when the student is facing a “severe detriment or grievous loss,” and that a ten-day suspension was not severe enough to require due process. *Id.* at 576, 583-84.

⁸⁴ *Id.* at 579; *see also* *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965); *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168-69 (1951); *Mullane v. Cent. Hanover Tr. Co.*, 339 U.S. 306, 314 (1950); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

⁸⁵ *See* *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *see also* *Rabe v. Washington*, 405 U.S. 313 (1972); *Benton v. Maryland*, 395 U.S. 784 (1969); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Washington v. Texas*, 388 U.S. 14 (1967); *Klopfer v. North Carolina*, 386 U.S. 213 (1967); *Parker v. Gladden*, 385 U.S. 363 (1966); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Griffin v. California*, 380 U.S. 609 (1965); *Pointer v. Texas*, 380 U.S. 400 (1965); *see also* *Malloy v. Hogan*, 378 U.S. 1 (1964); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *In re Oliver*, 333 U.S. 257 (1948); *Powell v. Alabama*, 287 U.S. 45 (1932).

⁸⁶ *Goss*, 419 U.S. at 579.

⁸⁷ *Id.* at 579; *see also* *Ellis*, *supra* note 76, at 422-30; *Heath*, *supra* note 75, at 206-10.

⁸⁸ “It also appears . . . that the . . . content of the notice . . . will depend on appropriate accommodation of the competing interests involved.” *Goss*, 419 U.S. at 579; *see also* *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961).

⁸⁹ *See* *C.Y. ex rel. Antone v. Lakeview Pub. Sch.*, 557 F. App’x 426 (6th Cir. 2014); *see also* *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Seal v. Morgan*, 229 F.3d 567 (6th Cir. 2000); *Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920 (6th Cir. 1998).

⁹⁰ *See* Krista Gesaman, *Student Media Guide to Due Process Claims*, STUDENT PRESS LAW CTR., <http://www.splc.org/article/2014/11/due-process-claims> (last visited Feb. 8, 2016).

the school administration deems the student's behavior to reasonably fall within a certain category, the act of informing a student of the code that he or she violated is sufficient notice.⁹¹ This is far removed from the modern definition of due process.⁹² Technical due process requires notice; however, contemporary due process requires the notice to be *meaningful*.⁹³ Modern due process includes procedural safeguards from the Bill of Rights and the principles of legality into the notice requirement so that an accused party may have his or her answer heard effectively, making that answer meaningful.⁹⁴ The notice requirement under *Goss* is not meaningful. It moves away from the incorporation trend by permitting schools to deny students basic procedural safeguards.⁹⁵ Notice of a disciplinary action under *Goss* does not provide the accused with the procedurally fair trial that due process has come to mean today.⁹⁶

"Some kind of notice" raises a second tangential issue. *Goss* held that notice is required and that the notice must tell students why they are being suspended.⁹⁷ However, suspensions become news headlines because of the severe punishment arising from a seemingly trivial offense that most likely never actually appeared in the student code of conduct. This pattern raises the question as to why school administrators are given substantial discretion in determining what constitutes prohibited behavior in the first place.

The *Goss* majority and dissenting opinions highlighted the need for school boards of education and administrators to have wide swaths of discretion so that the unique needs of each school could be adequately served.⁹⁸ The results of such

⁹¹ *Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist. 61*, 78 F. Supp. 2d 812 (C.D. Ill. 2000), *aff'd*, 251 F.3d 662 (7th Cir. 2001).

⁹² *Calder v. Bull*, 3 U.S. 386, 388 (1798) (stating that the very nature and spirit of the U.S. government as well as the general principles of law and reason forbid *ex post facto* laws which are "law[s] that punish[] a citizen for an innocent action, or, in other words, for an act, which, when done was in violation of no existing law").

⁹³ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). A fundamental component of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

⁹⁴ See *Argersinger v. Hamlin*, 407 U.S. 25 (1972); see also *Rabe v. Washington*, 405 U.S. 313 (1972); *Benton v. Maryland*, 395 U.S. 784 (1969); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Washington v. Texas*, 388 U.S. 14 (1967); *Klopfer v. North Carolina*, 386 U.S. 213 (1967); *Parker v. Gladden*, 385 U.S. 363 (1966); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Griffin v. California*, 380 U.S. 609 (1965); *Pointer v. Texas*, 380 U.S. 400 (1965); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *In re Oliver*, 333 U.S. 257 (1948); *Powell v. Alabama*, 287 U.S. 45 (1932).

⁹⁵ Benjamin E. Friedman, *Protecting Truth: An Argument for Juvenile Rights and a Return to In re Gault*, 58 UCLA L. REV. DISC. 165, 166-67 (2011).

⁹⁶ In fact, allowing administrators to punish students for violating the code of conduct for conduct that is not actually included in the code is arguably an *ex post facto* law in that it "criminalizes" behaviors after the fact. See *Weaver v. Graham*, 450 U.S. 24 (1981). How is a student supposed to fully comply with the code of conduct if certain behaviors are not listed?

⁹⁷ *Goss v. Lopez*, 419 U.S. 565, 579 (1975).

⁹⁸ *Id.* at 584, 592-94. Upon research into Ohio's laws, Ohio Department of Education regulations, and the county boards of education, state law is the only guidance that local school boards have when creating their codes of conduct. Neither the Department of

discretion are codes of conduct, which enumerate prohibited “categories” of behavior for which a student could be suspended or expelled; these categories are so generalized and ambiguous that any conduct could potentially fall within one.⁹⁹ For example, many codes of conduct prohibit aiding and abetting, disrespect, disruptive behavior, insubordination, unauthorized materials, and unauthorized touching.¹⁰⁰ While codes of conduct attempt to define each infraction, the definitions still fall short of giving a student adequate and meaningful notice as to what behaviors and actions are prohibited.¹⁰¹

If one were to compare student codes of conduct, one would notice that the definitions of these prohibited categories of behavior are comparable but encompass different behaviors at different schools. For example, Susy’s pepper spray incident occurred in Ohio. If Susy attended Revere High School in northeastern Ohio, she could be suspended because Revere’s definition of “Fireworks/Dangerous Instruments or Materials” actually includes possession and use of pepper spray.”¹⁰² If Susy attended Hamilton Township High School near Columbus, the school could suspend her for “disruption of school or class,” “inducing panic or reckless behavior,” or for possessing “weapons/dangerous instruments.”¹⁰³ If Susy attended

Education nor the county boards of education have much—if any—say in the substantive content that goes into a school’s code of conduct.

⁹⁹ This would be like the Ohio Revised Code including a law that made it a crime to “harm people with a baseball bat.” That leaves several questions as to what constitutes harming a person. Does morally offending someone count as harming a person? How about simply making someone slightly uncomfortable? Depending on who is enforcing the law at the time, that executive official could subjectively believe moral offense and uncomfortable feelings fall under the umbrella and arrest someone for “harming a person with a baseball bat.” There is simply no notice and the statute is far too overbroad.

¹⁰⁰ GREENVILLE CITY SCHOOLS, GREENVILLE HIGH SCHOOL BOARD OF EDUCATION POLICY, GREENVILLE, OHIO (2015); IRONTON CITY SCHOOLS, IRONTON HIGH SCHOOL STUDENT/PARENT HANDBOOK, IRONTON, OHIO (2015); REVERE LOCAL SCHOOLS, REVERE HIGH SCHOOL STUDENT HANDBOOK, RICHFIELD, OHIO (2015); HAMILTON LOCAL SCHOOL DISTRICT, HAMILTON TOWNSHIP HIGH SCHOOL STUDENT HANDBOOK, COLUMBUS, OHIO (2015); MARIETTA CITY SCHOOLS, MARIETTA HIGH SCHOOL HANDBOOK, MARIETTA, OHIO (2015). Each of these five schools was picked on two conditions; each needed to have between 800-1000 students, as well as be from one of the four corners, or sides of Ohio, with one from Columbus.

¹⁰¹ For example, the Revere High School Handbook states that students are prohibited from the “unauthorized use and/or distribution of over-the-counter medication.” REVERE HIGH SCHOOL STUDENT HANDBOOK, *supra* note 100. However, nowhere in the handbook does it state what “authorized use” is. Accordingly, a student could potentially be suspended for taking his or her own Motrin for a headache or giving Midol to a friend for menstrual cramps. And for that matter, what is authorized touching?

¹⁰² Pepper spray was only added to the student code of conduct for the first time beginning in the 2009-2010 school year. *Id.* at 16, 20; REVERE LOCAL SCHOOLS, REVERE HIGH SCHOOL STUDENT HANDBOOK, RICHFIELD, OHIO (2009); REVERE LOCAL SCHOOLS, REVERE HIGH SCHOOL STUDENT HANDBOOK, RICHFIELD, OHIO (2008).

¹⁰³ Notably, Hamilton Township High School also lists “holding hands” as an example of a prohibited display of affection. Thus, technically, a student could be suspended for holding hands with another student. *Displays of Affection*, in HAMILTON TOWNSHIP HIGH SCHOOL STUDENT HANDBOOK, *supra* note 100, at 23.

Greenville High School in western Ohio, the school would suspend her for possession of a dangerous weapon on campus, as pepper spray is likely what the board of education contemplated when the board prohibited “possession of noxious irritation or poisonous gas.”¹⁰⁴

These differences are concerning because if a state law lacked uniformity to a similar degree as these codes of conduct do, the law would be struck down for lack of due process (i.e., the law fails to provide adequate notice and is thus unfair).¹⁰⁵ The principles of legality at the root of modern due process require laws to be rational, not arbitrary, able to be obeyed, and faithfully or equally applied. This lack of uniformity is not rational. The true definition of what constitutes aiding and abetting does not change based on a school’s regional needs. Either a student helped another student violate the code of conduct or not. There is no need to give a school discretion in defining such offenses.¹⁰⁶ Because it is irrational, it is also arbitrary and difficult for students to obey.¹⁰⁷

Furthermore, students should be able to rely on public schools as government institutions to prohibit substantially similar—if not identical—behaviors in their codes of conduct.¹⁰⁸ The fact that different schools define their offenses differently, combined with the amount of individual discretion that determines whether or not an offense was committed, results in unequal and, frankly, unfaithful administration of these school codes.¹⁰⁹ Pepper spray is an excellent example. It is a common and legal personal safety device in the state of Ohio.¹¹⁰ How would a student know that a *legal* substance was banned in his or her school without adequate notice? While it is understandable that schools want to prohibit its presence on campus due to the possibility of it discharging, schools cannot ignore the fact that crime can happen

¹⁰⁴ Furthermore, pepper spray is prohibited from the Greenville High School campus entirely and thus, a student can be punished for having pepper spray in their car. *Possession of Dangerous Weapons on Campus*, in GREENVILLE HIGH SCHOOL HANDBOOK, *supra* note 100, at 29.

¹⁰⁵ See *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (stating unconstitutionally vague statutes fail to define offenses with sufficient particularity and fail to encourage non-arbitrary enforcement); see also *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982) (holding that a statute must be vague in all of its applications in order to be considered unconstitutionally void for vagueness).

¹⁰⁶ It would be like each school publishing its own dictionary of the English language.

¹⁰⁷ Harrison, *supra* note 17, at 499-501.

¹⁰⁸ “Requiring the application of law, rather than a decisionmaker’s caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself.” *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 587 (1996).

¹⁰⁹ Daniel Losen et al., *Are We Closing the School Discipline Gap?*, CTR. FOR CIVIL RIGHTS REMEDIES 1 (Feb. 2015) (stating that there is “tremendous disparity in the risk for suspension according to students’ race, gender, and disability status”); U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, *Issue Brief No. 1*, in CIVIL RIGHTS DATA COLLECTION DATA SNAPSHOT: SCHOOL DISCIPLINE 1 (Mar. 2014) (“Black students are suspended and expelled at a rate three times greater than white students”).

¹¹⁰ Note that pepper spray is not legally a dangerous weapon in Ohio. See OHIO REV. CODE § 2923.11(2015).

anywhere. Suburban school districts are not exempt.¹¹¹ Just because a school parking lot has lights does not mean that Susy is safe when she walks to her car after the sun goes down.¹¹²

B. Some Kind of Hearing

The other area where *Goss* is severely lacking is the requirement for “some kind of hearing.” The hearing requirement is just as ambiguous and ineffective as the notice requirement. In the majority opinion for *Goss*, Justice White noted that procedural due process stems from the “opportunity to be heard.”¹¹³ Thus far, “the opportunity to be heard” has become the sole requirement for “some kind of hearing.”¹¹⁴ So long as a school’s administration permits the student to make a statement, the hearing requirement of due process is met.¹¹⁵ “[O]nce school administrators tell a student what they heard or saw, ask why they heard or saw it, and allow a brief response, a student has received all the process that the Fourteenth Amendment demands.”¹¹⁶

Furthermore, this “hearing” does not require school administrators to scrutinize the events that allegedly took place.¹¹⁷ In criminal law, a hearing that comports with the defendant’s due process rights involves the accused having a chance to face and question his or her accuser, providing witnesses to corroborate the defendant’s version of events, and having the burden of proof rest with the prosecution to prove that the accused violated the law.¹¹⁸ A hearing in the school context does not require the administration to truly examine the alleged series of events. Nor does the hearing even permit students to provide witnesses to corroborate their version of events. Thus, the “hearing” becomes a game of what the staff member says versus what the

¹¹¹ See SIMONE ROBERS ET AL., U.S. DEP’T OF EDUCATION, U.S. DEP’T OF JUSTICE OFFICE OF JUSTICE PROGRAMS, INDICATORS OF SCHOOL CRIME AND SAFETY: 2014 (2015).

¹¹² *Car Jacking, Kidnapping, High School Parking Lot Robbery Suspect Arrested*, TRISTATE HOMEPAGE (Jan. 22, 2015), <http://www.tristatehomepage.com/news/news-carousel/car-jacking-kidnapping-high-school-parking-lot-robbery-suspect-arrested>; Stephen Satterly, *School Kidnapping Case Ends in Sentence*, SAFE HAVENS INT’L (July 22, 2014) <http://safehavensinternational.org/school-kidnapping-case-ends-sentence/>.

¹¹³ *Goss v. Lopez*, 419 U.S. 565, 579 (1975); see also *Armstrong v. Manzo*, 380 U.S. 545, 552 (1975); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162-64, 178 (1951); *Mullane v. Central Hanover Bank*, 339 U.S. 306, 314 (1950); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

¹¹⁴ See *C.Y. ex rel. Antone v. Lakeview Pub. Sch.*, 557 F. App’x 426, 430 (6th Cir. 2014) (stating due process fundamentally includes an opportunity to be heard); see also *Seal v. Morgan*, 229 F.3d 567, 573 (6th Cir. 2000) (stating procedural due process is “often summarized as ‘notice and an opportunity to be heard’”).

¹¹⁵ See *Antone*, 557 F. App’x at 430 (stating that so long as the student is told what the offense was and given an opportunity to respond to the accusation, a school will have met its requirements under the Due Process Clause); see also *Buchanan v. City of Bolivar*, 99 F.3d 1352, 1359 (6th Cir. 1996).

¹¹⁶ *C.B. v. Driscoll*, 82 F.3d 383, 386 (11th Cir. 1996). Now imagine if a judge were to say that at an arrestee’s initial hearing.

¹¹⁷ *Goss*, 419 U.S. at 583; see Ellis, *supra* note 76, at 423.

¹¹⁸ U.S. CONST. amend. VI; U.S. CONST. art. I, § 10; FED R. CRIM. P. 11(b)(1)(e).

student says, and the administrator gets to decide which story he or she believes more.¹¹⁹

As professional colleagues, school administrators are partial to the judgment of a teacher. When a parent challenges a teacher's judgment, teachers are more likely to support their colleague rather than question their colleague's judgment.¹²⁰ The entire process is far from a real truth-seeking process. It is a quick means to a quicker end.¹²¹ Accordingly, while students do not shed their constitutional rights at the school house gate, those rights are truncated in the name of school convenience and discretion.¹²²

While not saying what the hearing should be, the majority in *Goss* did state that the hearing would not be a "full-fledged, trial-type evidentiary hearing."¹²³ The Court reasoned that school disciplinary actions are numerous enough that requiring a full trial-type hearing would overwhelm the administration so severely that the cost of protecting students from arbitrary actions would greatly outweigh the benefit students could receive.¹²⁴ Essentially, the majority stated that "full-fledged" trial formalities were unnecessary to comport with student due process rights because, based on balancing student interests with faculty needs, the faculty's need for efficiency and expediency is a more compelling interest.¹²⁵

This outcome is concerning on several levels. First, it is not within the spirit of the law to deprive a single person of his or her constitutional rights in the name of efficiency. The Bill of Rights enumerates the most basic human rights that are not to be taken away without serious scrutiny and legitimate justification.¹²⁶ Mere efficiency is not a legitimate justification. In fact, the legislative history of the Fourth

¹¹⁹ "The rudimentary procedures provided in *Goss*, where the student's only defense would be his own testimony, with no right to confront or cross-examine adverse witnesses, to call his own witnesses, or to present other evidence, do not appear to [be truly meaningful.]" Ellis, *supra* note 76, at 423-24.

¹²⁰ "We promised [the parent] we would not be judgmental or take any of her comments personally. (That can get difficult when a parent attacks you or a member of your staff . . .)" *How I Handled . . . A Parent Who Thought Her Son's Suspension Was Unfair*, EDUC. WORLD, http://www.educationworld.com/a_admin/how_i_handled/how_i_handled015.shtml (last visited Feb. 8, 2016).

¹²¹ See *Goss*, 419 U.S. at 583; see also Ellis, *supra* note 76, at 423; Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1275-76 (1975); Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510, 1527 (1975).

¹²² See Ellis, *supra* note 76, at 423.

¹²³ *Goss*, 419 U.S. at 583; see Ellis, *supra* note 76, at 423.

¹²⁴ "Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process." *Goss*, 419 U.S. at 583; see also Ellis, *supra* note 76, at 424.

¹²⁵ *Goss*, 419 U.S. at 583.

¹²⁶ "The Bill of Rights is a list of limits on government power. For example, what the Founders saw as the natural right of individuals to speak and worship freely was protected by the First Amendment." *Bill of Rights of the United States of America*, BILL OF RIGHTS INST. (1791), <http://www.billofrights.institute.org/founding-documents/bill-of-rights/>.

Amendment shows how the Founders were opposed to efficiency as a justification for taking away rights.¹²⁷ The Fourth Amendment was created specifically as a way to prevent general search warrants, which were used for efficiency and convenience.¹²⁸ The existence of the Fourth Amendment reasons that efficiency is not an adequate justification for depriving a person of their rights without due process.¹²⁹ In schools, however, it apparently is.¹³⁰

Second, the Court created a dangerous precedent that permits binding a certain class of people and denying them meaningful due process without any rational public reason other than somehow regarding them as inferior. When a statute binds a class of people in this way, not only is it arbitrary, but it is invidious, and the Court will strike it down.¹³¹ The Court strikes these statutes down for lacking public reason for a public good, and thus, violations of the basic principle of legality that laws not be arbitrary.¹³² If denying students meaningful due process was intended to somehow protect the public, then permitting such arbitrary exclusions from school does not meet those ends whatsoever.¹³³ In fact, it most likely does the opposite because students subject to arbitrary discipline become confused, angry, and distrusting of authority.¹³⁴

¹²⁷ See U.S. GOV'T PUB. OFF., CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS, AND INTERPRETATION, FOURTH AMENDMENT SEARCH AND SEIZURE (1992) [hereinafter GPO, FOURTH].

¹²⁸ *Id.*; see also QUINCY'S MASSACHUSETTS REPORTS, WRITS OF ASSISTANCE 1761-72, App. I, 395-540; 2 LEGAL PAPERS OF JOHN ADAMS 106-47 (Wroth & Zobel eds., 1965); OLIVER M. DICKERSON, *Writs of Assistance as a Cause of the American Revolution*, in THE ERA OF THE AMERICAN REVOLUTION: STUDIES INSCRIBED TO EVARTS BOUTELL GREENE 40 (R. Morris ed., 1939).

¹²⁹ GPO FOURTH, *supra* note 127.

¹³⁰ Compare GPO FOURTH, *supra* note 127, with *Goss*, 419 U.S. at 583.

¹³¹ See *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 303-04 (1993); see also *Griffin v. Breckenridge*, 403 U.S. 88, 91-92 (1971); *Skinner v. Oklahoma*, 316 U.S. 535, 538 (1942).

¹³² "[T]o the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003). See *Lawrence v. Texas*, 539 U.S. 558 (2003); see also *Loving v. Virginia*, 388 U.S. 1, 10-12 (1967); *Griswold v. Connecticut*, 381 U.S. 479, 502-04 (1965).

¹³³ *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923); see generally *Why Some Schools Want To Expel Suspensions*, NPR (June 2, 2013), <http://www.npr.org/2013/06/02/188125079/why-some-schools-want-to-expel-suspensions> [hereinafter NPR].

¹³⁴ "All the research says that [being suspended] contributes to [students'] disengagement from school." NPR, *supra* note 133. "Not only has she lost faith in school officials, Cortes said, but so has her 15-year-old son, who struggled to wrap his head around the idea that he was being punished for possibly saving someone's life last week." Peter Holley, *The 'Infuriating' Saga of the Texas Teen Suspended After Rescuing a Classmate*, WASH. POST (Jan. 27, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/01/27/the-infuriating-saga-of-the-eighth-grader-suspended-after-rescuing-an-asthmatic-classmate/>.

C. Some Kind of Discrimination

This is not the first time students—or juveniles—have been grouped together, deemed as inferior, and subjected to discrimination. In 1964, a fifteen-year-old Arizona boy was arrested for making “lewd phone calls.”¹³⁵ At the delinquency hearing, the boy did not have an attorney, his accuser was not present, no witnesses were sworn in, and no transcript was made.¹³⁶ At the close of the hearing, the boy was ordered to confinement at the State Industrial School until he turned twenty-one.¹³⁷ Because Arizona did not permit appeals in juvenile cases, the boy’s parents filed a habeas petition for the boy’s release, which was dismissed.¹³⁸ The parents petitioned the U.S. Supreme Court, which granted certiorari and heard the case of *In re Gault* in 1967.

The Supreme Court reversed and remanded and held that minors adjudicated in the juvenile court system were entitled to the same level of due process as adults in the criminal court system.¹³⁹ Respondents argued that juvenile courts existed to help children, not to punish them, and that this difference meant that full due process rights were not necessary.¹⁴⁰ The Supreme Court disagreed and stated that although the two court systems served different purposes, a juvenile’s liberty was as much at stake in a juvenile delinquency hearing as an adult’s liberty in a criminal case.¹⁴¹ Accordingly, the Court held that juveniles are not different as a class of people and are entitled to a fair trial.¹⁴²

A few years after *Gault* in the case of *In re Winship*, the Court held that the burden of proof in delinquency cases be equal to the burden in adult criminal cases.¹⁴³ New York’s juvenile code set the burden of proof for delinquency hearings to a preponderance of the evidence.¹⁴⁴ A juvenile judged delinquent appealed, arguing that juveniles, like adults, were entitled to proof beyond a reasonable doubt when charged with a violation of criminal law.¹⁴⁵ New York argued that the state was not denying juveniles their constitutional rights because juvenile adjudications

¹³⁵ *In re Gault*, 387 U.S. 1, 3-6 (1967).

¹³⁶ *Id.* at 7.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 57-59; see Janet Friedman Stansby, *In Re Gault: Children Are People*, 55 CALIF. L. REV. 1204 (1967).

¹⁴⁰ *Gault*, 387 U.S. at 14-15.

¹⁴¹ See, e.g., Curtis C. Shears, *Legal Problems Peculiar to Children's Courts*, 48 A.B.A. J. 719, 720 (1962) (“The basic right of a juvenile is not to liberty but to custody. He has the right to have someone take care of him, and if his parents do not afford him this custodial privilege, the law must do so.”).

¹⁴² *Gault*, 387 U.S. at 57-59.

¹⁴³ *In re Winship*, 397 U.S. 358, 375-76 (1970).

¹⁴⁴ *Id.*; N.Y. FAMILY CT. ACT § 744(b) (McKinney 1963).

¹⁴⁵ *Winship*, 397 U.S. at 375-76.

are not convictions that affect any rights or privileges, the proceedings are not criminal, and delinquency status itself was not a crime.¹⁴⁶

The Court rejected that argument and held that juveniles were no less vulnerable to “dubious and unjust convictions with resulting forfeitures of life, liberty and property” than adults in the criminal system.¹⁴⁷ The Court reasoned that the constitutional rights guaranteed to secure a fair trial were the very root of the judicial system and no “civil labels and good intentions” could obviate the need for full due process rights in juvenile courts.¹⁴⁸

The *Gault* and *Winship* decisions both acknowledged that juvenile status does not justify truncation of due process rights when life, liberty, or property is at stake.¹⁴⁹ However, just five years after the *Winship* case, *Goss* held that status as a juvenile is a justification to truncate juveniles rights when their property interest in attending school is threatened.¹⁵⁰ The *Goss* majority reasoned that affording full due process rights during a disciplinary hearing was unreasonable because the extra time taken to provide students with proper hearings would interfere with the efficient and smooth functioning of a school.¹⁵¹ However, *Winship* expressly rejected that argument, and the Court stated that full due process rights in juvenile adjudications would not disturb the state’s juvenile court system, “nor will there be any effect on the informality, flexibility, or speed of the hearing at which the factfinding takes place.”¹⁵² *Goss* took a step back, ignoring the *Gault* and *Winship* line of cases which establish that juveniles as a class are entitled to full due process rights.¹⁵³ Accordingly, *Goss* permitted discrimination against a class of people for no other reason than somehow deeming them as inferior.¹⁵⁴ Arguably, *Goss* opened the door for future invidious acts that permit similar discrimination.¹⁵⁵

D. Discipline Goes Beyond the Classroom

A discussion of the scope of the effect that disciplinary actions have on students outside of school was notably missing from *Goss*’s majority and dissenting opinions. On the surface, a school suspension is an insignificant moment on a person’s path to adulthood and becomes irrelevant once the student finishes school. As it turns out, however, student disciplinary records that include punishments as “severe” as an

¹⁴⁶ *Id.*; see also *W. v. Family Court*, 247 N.E.2d 253, 254 (N.Y. 1969).

¹⁴⁷ *Winship*, 397 U.S. at 362-63 (quoting *Davis v. United States*, 160 U.S. 469, 488 (1895)).

¹⁴⁸ *Id.* at 364-65.

¹⁴⁹ See *id.*; see also *In re Gault*, 387 U.S. 1, 57-59 (1967).

¹⁵⁰ See *Goss v. Lopez*, 419 U.S. 565, 583 (1975); see also Larry Bartlett & James McCullagh, *Exclusion from the Educational Process in the Public Schools: What Process is Now Due*, 1993 BYU EDUC. & L.J. 1, 1 (1993).

¹⁵¹ *Goss*, 419 U.S. at 583.

¹⁵² See *id.*; see also *Winship*, 397 U.S. at 366.

¹⁵³ Friedman, *supra* note 95, at 166-68.

¹⁵⁴ But see Glenn W. Soden, *Constitutional Law: Student Rights Under the Due Process Clause . . . Suspensions from Public Schools*, 8 AKRON L. REV. 570, 574 (1975).

¹⁵⁵ Ellis, *supra* note 76, at 430.

out-of-school suspension or expulsion do not lose their relevance after graduation; they do not remain within the walls of the school.¹⁵⁶ Some college applications, scholarships, and even the Character and Fitness Questionnaire for the Bar Exam require the disclosure of school suspensions.¹⁵⁷ Severe disciplinary actions could cause an individual to be denied admission into college or denied scholarship funds to pay for college if he or she were admitted.¹⁵⁸

This matters because it puts students at a disadvantage in a society that so greatly values higher education.¹⁵⁹ In a country that has turned away from the manufacturing industry and towards the service industry, the public hears almost daily that everyone should go to college and every child should seek higher education.¹⁶⁰ Accordingly, if higher education is as important as the public is told, why is it okay that this important component of future success be jeopardized by a single administrator's discretion and a poorly written code of conduct?¹⁶¹

When a person's liberty is at stake, due process affords the accused protections from arbitrary actions and provides the accused with a fair trial.¹⁶² Due process

¹⁵⁶ *Goss*, 419 U.S. at 574-75.

¹⁵⁷ See Jamaal Abdul-Alim, *Most Colleges Weigh Student Discipline Records in Admissions*, EDUC. WEEK (May 29, 2015), <http://www.edweek.org/ew/articles/2015/05/29/most-colleges-weigh-student-discipline-records-in.html>. Furthermore, the Common Application, which is accepted, preferred, or even required by many universities, insists on disclosure of school suspensions or expulsions. THE COMMON APPLICATION, <https://www.commonapp.org/> (last visited Jan. 11, 2017).

¹⁵⁸ "The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned." *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). Arguably, a student denied admission to college or funds to pay for school are not free to pursue any livelihood or lawful calling.

¹⁵⁹ "The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted." *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923); see also HARVARD UNIV., THE CIVIL RIGHTS PROJECT, OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE vii (2000).

¹⁶⁰ Stephanie Ebbs, *First Lady Michelle Obama Raps 'You Should Go to College'*, ABC NEWS (Dec. 10, 2015), <http://abcnews.go.com/Politics/lady-michelle-obama-raps-college/story?id=35689604>; Mark Gongloff, *Why You Should Really Go To College*, *In 2 Charts*, HUFFPOST BUS. (updated Feb. 21, 2015), http://www.huffingtonpost.com/2015/02/20/college-income-premium_n_6720902.html; *College for All: Is Obama's Goal Attainable*, NBC NEWS (Feb. 28, 2009), http://www.nbcnews.com/id/29445201/ns/us_news-education/t/college-all-obamas-goal-attainable/#.Vq-ob7IrKM8.

¹⁶¹ Such administrative discretion could include personal animosity towards a student for previous behavioral issues.

¹⁶² See *Engle v. Isaac*, 456 U.S. 107, 126 (1982) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 97 (1977) (Stevens, J., concurring)) (describing writ as "bulwark against convictions that violate 'fundamental fairness'"); *Lisenba v. California*, 314 U.S. 219, 236 (1941) ("[D]enial of

means the accused knew which behaviors were prohibited.¹⁶³ It also means that the accused was able to comply with the law and was not subject to an arbitrary command that made the accused guilty from the start.¹⁶⁴ Due process acknowledges the values, norms and rules by which a person as a human being should be treated and respects them.¹⁶⁵ Yet, when a child's future is at stake, *Goss's* due process provides no protection from arbitrary actions.¹⁶⁶ If the United States is a nation of the rule of law, not men, then why does it permit the rule of men to hold a child back from his or her full potential? Children who are suspended from school are twice as likely to drop out of high school, and students who drop out are three times as likely to one day become incarcerated.¹⁶⁷ This relationship is known as the school-to-prison pipeline.¹⁶⁸ Thus, a suspension from school has real ramifications for that child as it could set him on a destructive path that could ultimately lead to prison.¹⁶⁹

Furthermore, subjecting these children to arbitrary discipline can create feelings of distrust and antagonism towards authority figures or even prevent these students from wanting to help people in the future for fear that their involvement could be punished.¹⁷⁰ For example, on January 14, 2016, Hugo Marquez, a student at an Oklahoma City school, was suspended until the end of May for defending a friend during a fight.¹⁷¹ In a cellphone video of the incident, Marquez is seen walking

due process is the failure to observe that fundamental fairness essential to the very concept of justice.”).

¹⁶³ “In some instances, however, school policies are overbroad or unclear, and students may not know they are violating school rules.” Gesaman, *supra* note 90.

¹⁶⁴ See *Armstrong v. Manzo*, 380 U.S. 545, 551 (1965).

¹⁶⁵ Charles, *supra* note 38, at 477-502; BARNETT, *supra* note 39, at 73.

¹⁶⁶ See *Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 935 (3d Cir. 2011); see also *Laney v. Farley*, 501 F.3d 577, 584 (6th Cir. 2007); *Miller v. Penn Manor Sch. Dist.*, 588 F.Supp.2d 606, 628 (E.D. Pa. 2008).

¹⁶⁷ See, e.g., Augustine Reyes, *The Criminalization of Student Discipline Programs and Adolescent Behavior*, 21 ST. JOHN'S J. LEGAL COMMENT 73, 95 (2006) (explaining that by sending adolescents to county detention centers and juvenile, county, or municipal courts for behavior issues like dress code violations and food fights, schools are criminalizing irksome juvenile behavior and prepping students for the school to prison pipeline); Daniel J. Losen, *Challenging Racial Disparities: The Promise and Pitfalls of the No Child Left Behind Act's Race-Conscious Accountability*, 47 HOW. L.J. 243, 257 (2004) (describing how adult prisons and juvenile justice systems are stocked with black youths who fell into a school-to-prison pipeline). See also COAL. FOR JUVENILE JUSTICE, *Abandoned in the Back Row: New Lessons in Education and Delinquency Prevention* (2001), <http://chhi.podconsulting.net/assets/documents/news/Final%20Jena%20Testimony.pdf>.

¹⁶⁸ COAL. FOR JUVENILE JUSTICE, *supra* note 167.

¹⁶⁹ See Pedro A. Noguera, *Schools, Prisons, and Social Implications of Punishment: Rethinking Disciplinary Practices*, 42 THEORY INTO PRACTICE 341, 342-43 (2003).

¹⁷⁰ Sheldra Brigham, “*I Guess I Got Knocked Out*,” *Oklahoma City High School Student Responds to Viral Fight Video*, KFOR NBC NEWSCHANNEL4, <http://kfor.com/2016/01/14/i-guess-i-got-knocked-out-oklahoma-city-high-school-student-responds-to-viral-fight-video/> (last updated Jan. 14, 2016).

¹⁷¹ *Id.*

towards the fight and standing with his hands in his pockets in between his friend and the aggressor.¹⁷² While Marquez stands between the two other boys, the aggressor punches Marquez in the face hard enough that Marquez falls and lays on the ground unconscious.¹⁷³ In an interview for Oklahoma City's local NBC News affiliate, Marquez stated that he regrets getting involved in the fight because now no one is standing up for him.¹⁷⁴ Because Marquez tried to stand up for a friend and peacefully end a fight, he might not graduate as planned in May.¹⁷⁵ This disciplinary action sent mixed messages to Marquez because now, due to this suspension, he no longer sees the value in getting involved.¹⁷⁶ Suspension taught this student that he should remain a passive bystander.¹⁷⁷

Unfortunately, Marquez is not alone. On January 25, 2016, Anthony Ruelas, a Texas student, was suspended from school for helping a classmate who was having an acute asthma attack, which the school qualified as "disobeying a teacher."¹⁷⁸ The teacher acknowledged the girl's asthma attack and emailed the school nurse per school policy.¹⁷⁹ While the teacher waited for a response, the girl fell to the floor in extreme distress.¹⁸⁰ Upon seeing this, Ruelas refused to allow the teacher to wait any longer.¹⁸¹ He picked up the girl and carried her directly to the school's main office.¹⁸² And what did the school do? It suspended him for disobeying his teacher's orders to let this girl writhe on the floor in severe distress while the teacher waited for the

¹⁷² Dallas Franklin, *5 Students Arrested After Brutal Fight is Caught on Camera at Oklahoma City High School*, KFOR NBC NEWSCHANNEL 4, <http://kfor.com/2016/01/13/increased-police-presence-at-oklahoma-city-high-school-after-brutal-fight-is-caught-on-camera/> (last updated Jan. 13, 2016).

¹⁷³ *Id.*

¹⁷⁴ Brigham, *supra* note 170.

¹⁷⁵ *Id.*

¹⁷⁶ "Yeah, and it's not really cause [sic] I got knocked out. The fact that everybody left after they seen how I was. No one helped me up." *Id.*

¹⁷⁷ "Threats of severe punishments, such as suspensions . . . may actually discourage children and adults from reporting bullying that they observe." *Misdirections in Bullying Prevention and Intervention*, STOPBULLYING.GOV, <http://www.stopbullying.gov/prevention/in-the-community/community-action-planning/misdirections-in-prevention-tipsheet.pdf> (last visited Feb. 9, 2016).

¹⁷⁸ *Teen Suspended for Helping Friend Won't Return to School*, ABC NEWSNET 5 CLEVELAND, <http://www.newsnet5.com/news/national/teen-suspended-for-helping-friend-wont-return-to-school> (last updated Jan. 26, 2016) [hereinafter *Teen Suspended*]; Holley, *supra* note 134.

¹⁷⁹ *Teen Suspended*, *supra* note 178; Holley, *supra* note 134.

¹⁸⁰ "The way he talks about Trishica's asthma attack—the little things he says, like how she was grasping [sic] for air, the way her body was moving—it really scared him." Holley, *supra* note 134.

¹⁸¹ "When he saw a life possibly slipping away, he reacted instinctively, his mother said. It's possible, she said, that her son understood what was going on better than his teacher: He has two cousins with asthma, one of whom slipped into a coma after a severe asthma attack." *Id.*

¹⁸² *Id.*

nurse to respond to the email.¹⁸³ In a statement, the school said they “applaud[] the efforts of students who act in good faith to assist others in times of need.”¹⁸⁴ And what better way to show its appreciation than by suspending this boy from school.

These scenarios are all made possible by *Goss*, an opinion that fails to show any understanding of the true significance that school disciplinary actions can have on a person outside of the school. To its credit, the Court did address possible reputation damage or emotional distress that severe disciplinary actions could have on a student.¹⁸⁵ However, this minor discussion failed to truly explore the impressionable and delicate psyche of a child because—after all—these are children, and they might not be able to process such conflicting messages.¹⁸⁶

Furthermore, the Justice Powell’s dissent goes so far as to state that any arbitrary actions could be remedied within the school and not through the judicial system.¹⁸⁷ Justice Powell’s statement was incorrect because a quick glance at the case law that has piled up in the wake of *Goss* would show that many arbitrary actions still take place which are not remedied within the school.¹⁸⁸ As it turns out, it is nearly impossible for a student to remedy an arbitrary action at all because the courts are still reluctant to intervene in an area where almost all discretion has been given to schools to make their own decisions.¹⁸⁹

In order to remedy an arbitrary action, a student must appeal the suspension to the school board, which, similar to a court, might be reluctant to substitute its discretion for that of the school principal.¹⁹⁰ If, and basically when, the administration upholds the action, the only other option would be to take the school to court. As *Goss* established, schools only violate student rights if they fail to provide this minimal notice and subpar hearing.¹⁹¹ Disciplinary actions short of

¹⁸³ “Within minutes [Ruelas] had been written up . . . and [Ruelas’s mother] received a call from school officials telling her that her son had been suspended for walking out of class.” *Id.* Now imagine if dialing 911 included a delay similar to the delay created by the policy at this school.

¹⁸⁴ *Teen Suspended*, *supra* note 178.

¹⁸⁵ *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

¹⁸⁶ Meg Wagner, *Ohio Teen Commits Suicide After School Staffers Accused Him of Smelling Like Pot at Homecoming Dance, Friend Says: ‘He Was Directly Told That He had Ruined His Life,’* N.Y. DAILY NEWS, <http://www.nydailynews.com/news/national/ohio-teen-kills-school-officials-verbal-attack-article-1.2388707> (last updated Oct. 7, 2015).

¹⁸⁷ *Goss*, 419 U.S. at 594.

¹⁸⁸ The substantial amount of case law does not account for situations involving arbitrary discipline that did not make it to court for financial or personal reasons.

¹⁸⁹ *See Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 223 (1985); *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 91-92 (1978); *Goss*, 419 U.S. at 585-86 (1975) (Powell, J., dissenting).

¹⁹⁰ OHIO REV. CODE § 3313.66 (2015); *see Laney v. Farley*, 501 F.3d 577, 579 (6th Cir. 2007); *Grine v. Sylvania Sch. Bd. of Educ.*, No. L-04-1137, 2004 WL 2924335 (Ohio Ct. App. Dec. 17, 2004); *Smith ex rel. Smith v. Revere Local Sch. Dist. Bd. of Educ.*, No. 20275, 2001 WL 489980, 2001 Ohio App. LEXIS 2055 (Ohio Ct. App. 2001).

¹⁹¹ OHIO REV. CODE § 3313.66 (2015); *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985); *Goss*, 419 U.S. at 579.

involving physical abuse that would shock the conscious are foolproof and practically guaranteed to be upheld.¹⁹²

Now, going back to Susy's suspension, *Goss* established that Susy has a property interest in attending school. Because the U.S. Constitution protects Susy from deprivation of property without due process of law, the school cannot deprive Susy of her equal access to public education without due process. Here, due process consists of notice and a hearing described in *Goss*. Susy's school provided her with notice. The school informed Susy as to the reason for her suspension. Susy's school also provided her with a hearing. The administration gave her an opportunity to be heard by requiring her to make a statement, which was supposedly read by the principal. Because the school provided notice and a hearing consistent with the requirements in *Goss*, the school provided due process of law. Therefore, Susy's property interest in attending school was not arbitrarily deprived without due process of law. Accordingly, the school's disciplinary action did not violate any of Susy's civil rights. Thus, Susy has no legal claim to support her feeling that the suspension was inherently wrong.

V. STUDENTS ARE ENTITLED TO MEANINGFUL DUE PROCESS

Because *Goss* is not protecting students as intended, there needs to be legislative intervention. Specifically, the state legislatures need to establish a model student code of conduct that properly defines what the prohibited behaviors are. The notice requirement of *Goss*, while noble, mostly fails due to the lack of uniformity, specificity, and clarity in student codes of conduct.¹⁹³ "*Goss* notice" lacks any protective power because it only requires schools to justify and tell students of the reason for suspension, but the standard does not require the reason to be legitimate.¹⁹⁴ Any behavior that a staff member finds objectionable could be legally punishable so long as the school can fit that behavior into one of several ambiguous categories of prohibited conduct.¹⁹⁵

Currently, each school district has a different code of conduct that, while prohibiting mainly the same types of behaviors, fails to provide adequate notice of what the prohibited behaviors truly are. Some banned behaviors like "gambling" are well defined in that students have adequate notice that they are prohibited from "engaging in any games of chance."¹⁹⁶ However, while some schools define gambling as engaging in a game of chance, others schools include possession of playing cards and dice under "gambling" because they are "gambling paraphernalia"

¹⁹² See generally *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443 (5th Cir. 1994); *B.B. v. Appleton Area Sch. Dist.*, No. 12-C-115, 2013 WL 3972250, 2013 U.S. Dist. LEXIS 107392 (E.D. Wis. 2013).

¹⁹³ See generally *Kolender v. Lawson*, 461 U.S. 352 (1983); *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982).

¹⁹⁴ *Goss*, 419 U.S. at 579.

¹⁹⁵ *Id.* at 574 (conceding that the state's authority to prescribe standards for discipline is very broad).

¹⁹⁶ GREENVILLE HIGH SCHOOL BOARD OF EDUCATION POLICY, *supra* note 100; HAMILTON TOWNSHIP HIGH SCHOOL STUDENT HANDBOOK, *supra* note 100; IRONTON HIGH SCHOOL STUDENT/PARENT HANDBOOK, *supra* note 100; MARIETTA HIGH SCHOOL HANDBOOK, *supra* note 100; REVERE HIGH SCHOOL STUDENT HANDBOOK, *supra* note 100.

or could potentially “facilitate gambling.”¹⁹⁷ While it is true that playing cards could *potentially* facilitate gambling, the concept of gambling facilitation is not, by nature, within the scope of mere possession of playing cards.¹⁹⁸ For such a small topic, the school districts have managed to include a wide range of behavior for which a student could face suspension. Accordingly, a model code of conduct that uniformly defines prohibited behaviors would drastically improve the efficacy and protection of notice contemplated in *Goss*.¹⁹⁹

Returning to the headlines from the beginning of this Note, many of those children would not have been suspended for those particular behaviors had schools actually given adequate notice to students as to which behaviors were prohibited beforehand. For the student who purchased “sugar crack,” while the administration believed she had purchased drugs or drug paraphernalia, *she did not actually purchase drugs*.²⁰⁰ She bought a bag of sugar and Kool-Aid powder that other students referred to as “happy crack” because sugar allegedly makes children hyperactive.²⁰¹ Instead of suspending this student, the school could have used the situation as a learning experience to teach students that drugs need to be taken seriously and that they should not jokingly apply the names of narcotics to every day substances. If the school still felt it necessary to punish the student for possessing a bag of sugar, a detention would have sufficed. It would have gotten the school’s point across without potentially affecting this child’s future. She did not need to miss school over a bag of sugar.

The *Goss* hearing requirement also needs legislative intervention, as it is frankly worthless. The school only is required to hear what the student says and not actually

¹⁹⁷ GREENVILLE HIGH SCHOOL BOARD OF EDUCATION POLICY, *supra* note 100.

¹⁹⁸ Upon searching “why can’t you have playing cards in school” on Google, the author finds a Yahoo Answers conversation in which a teacher asks the general public why they think playing cards are banned in school because the teacher “need[s] a good reason to tell my students.” The teacher clearly does not see supposed inherent questionable nature of playing cards, and based on the answers, neither does the general public. d dawg, *Why is Playing Cards in Class/School Bad?* YAHOO ANSWERS <https://answers.yahoo.com/question/index?qid=20080529201022AApDYRN> (last visited Nov. 20, 2016). Another page asks the public to debate whether or not Pokémon Cards should be allowed in schools because, apparently, Pokémon Cards are also a topic of contention. *Should Pokemon Cards be Allowed in Schools?*, DEBATE.ORG, <http://www.debate.org/opinions/should-pokemon-cards-be-allowed-in-schools> (last visited Nov. 13, 2016).

¹⁹⁹ Section 3313.666 of the Ohio Revised Code is an example of a state law which guides school districts in the creation of their conduct policies. Under R.C. § 3313.666(B), schools are required to implement a policy that prohibits the harassment, intimidation, or bullying of another student on school grounds, on a school bus, or any school-sponsored event. This law is specific without tying the hands of school administrators. While many school districts include a detailed harassment policy pursuant to this law, many other schools remain in violation because there is no government body to monitor the contents of these codes of conduct. The violations are only discovered when a private party looks into it. OHIO REV. CODE § 3313.66 (2015).

²⁰⁰ Bash, *supra* note 1. In an interview with News Channel 5, the eighth grade student said she had never seen cocaine before and that the substance the students called “happy crack” was just sugar and Kool-Aid which was consumed by licking it off their finger.

²⁰¹ *Id.*

investigate the matter further.²⁰² The fact that this procedural requirement pits a student's word against a staff member means that the student almost always will lose.²⁰³ Because exclusion from school does not magically become irrelevant upon graduation, exclusion needs to be taken more seriously, and students need more procedural safeguards than just the opportunity to be heard. The legislature needs to mandate procedures that force school administrators to consider the whole student and not just whatever incident landed him or her in the principal's office. Students should be permitted to argue their side of the story. If that means other students making statements as witnesses, then so be it because possible exclusion is extremely serious.

Furthermore, students deserve impartial appellate panels. As of now, Ohio's state law only mandates that there be an appeals process beyond the initial disciplinary hearing.²⁰⁴ This typically amounts to a student making a statement either in front of the superintendent and two board members or to three local board members.²⁰⁵ Similar to the "opportunity to be heard" standard at the disciplinary level, this appeal will typically be fruitless because, again, why would local board members believe this student's word against what staff and the principal believe happened.²⁰⁶ The legislature needs to mandate that the appeals hearings for disciplinary actions consider the whole student as well. Again, if this means student witness statements or even other staff members making statements in support of the student's character, then so be it. Such additions to hearing procedures would not unduly burden school administrators because it only requires a few additional precautions before formally excluding a student from school. The minimal hearing that administrators are required to hold now does not consider how this exclusion from school could affect a student's future.²⁰⁷ They are only thinking of the present circumstances.

²⁰² *Goss v. Lopez*, 419 U.S. 565, 577-84 (1975); *see also* *C.Y. ex rel. Antone v. Lakeview Pub. Sch.*, 557 F. App'x 426, 426 (6th Cir. 2014); *Buchanan v. City of Bolivar*, 99 F.3d 1352, 1359 (6th Cir. 1996); Ellis, *supra* note 76.

²⁰³ People tend to trust the word of authority figures more than their own instincts merely because the figure is in that position of authority. Stanley Milgrim, *Behavior Study of Obedience*, 67 J. ABNORMAL & SOC. PSYCHOL. 371, 375-77 (1963).

²⁰⁴ "The superintendent or principal, within one school day after the time of a pupil's expulsion or suspension, shall notify in writing the parent, guardian, or custodian of the pupil and the treasurer of the board of education of the expulsion or suspension. The notice shall include the reasons for the expulsion or suspension, notification of the right of the pupil or the pupil's parent, guardian, or custodian to appeal the expulsion or suspension to the board of education or to its designee." OHIO REV. CODE § 3313.66(D) (2015).

²⁰⁵ *See generally* STUDENT DISCIPLINE RIGHTS AND PROCEDURES: A GUIDE FOR ADVOCATES, EDUCATION LAW CENTER (Elizabeth Athos et al. eds., 2d ed. 2012), http://www.edlawcenter.org/assets/files/pdfs/publications/StudentDisciplineRights_Guide_2012.pdf; THE PARENT'S GUIDE TO UNDERSTANDING STUDENT DISCIPLINE POLICIES AND PRACTICES IN VIRGINIA SCHOOLS, VIRGINIA DEP'T OF EDUCATION (2008), http://www.doe.virginia.gov/support/student_conduct/parents_guide_student_discipline_policies.pdf.

²⁰⁶ *See generally* STANLEY MILGRIM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW (1969).

²⁰⁷ "The only cost to the school would be the time spent by the person checking the information given by the student and could be done with minimal disruption of either teachers

As a further procedural safeguard, students need to have the opportunity to appeal their disciplinary action outside of the local school system before seeking judicial intervention. This could be accomplished by establishing an additional level of appeals at the county level or state board of education. Again, this additional level of appeals should permit the student to have the chance to make a *real* case for what happened and how the exclusion unfairly burdens him or her as opposed to another “opportunity to be heard.” Students have the opportunity to be heard. What they do not have is the opportunity to have their statements be taken seriously and for their disciplinary actions to be scrutinized by an impartial third party.

VI. CONCLUSION

Goss ultimately created a no-win situation for students when it tried to protect them. One concern addressed in Justice Powell’s dissent was that this notice and hearing requirement laid out in the majority opinion was so ambiguous that it did not amount to any protection at all.²⁰⁸ Justice Powell, as it turned out, was rightly concerned. “Some kind of notice” and “some kind of hearing” have been the central issues surrounding *Goss*, and their practical application has not lead to any substantive protection of student interests.

The *Goss* Court sought to create further protections for students while not impinging on the discretion given to school administrations. However, while trying not to tie the hands of administrators, the *Goss* Court undermined the rights of students and truncated the civil rights they are entitled to while in school. While it is understandable that the Court did not want to unduly burden educational quality and efficiency, it still should not have done so by truncating students’ right to due process. The majority believed that the students’ rights were not as important as the faculty’s needs, but because school disciplinary actions can follow a person into adulthood just like a criminal record, students should be afforded the full protections afforded to those in the criminal justice system.²⁰⁹

Many of *Goss*’s shortcomings could be solved—or at the very least lessened—with legislative intervention. Notice could be improved if legislatures were to create uniform codes of conduct that adequately defined prohibited behaviors in a way that gave meaningful notice to students beforehand as well as taking some of the arbitrary discretion away from staff members. The hearing requirement could be fixed if the legislature implemented procedural protections that more closely mirrored the protections enjoyed by those in the criminal justice system, such as the right to put on a real, meaningful case, confront the accuser, and present evidence and witnesses. Furthermore, students would benefit if their appellate hearings had more procedural safeguards akin to the criminal justice system. And finally, there needs to be an additional level of appeal before a student must turn to the justice system for relief.

or students. While some may argue that this could be substantial given the great frequency of suspensions in our school systems today, it is small compared to the reduced risk of error that would result and may instill in the accused student the belief that his opportunity to explain his position was more than a formal meaningless gesture.” Dennis J. Christensen, *Democracy in the Classroom: Due Process and School Discipline*, 58 MARQ. L. REV. 705, 719-20 (1975).

²⁰⁸ *Goss v. Lopez*, 419 U.S. 565, 595-97 (1975).

²⁰⁹ *Id.* at 574-75.

In conclusion, although *Goss* tried to help students, it ultimately failed. Until state legislatures implement more procedural safeguards, we are doing a disservice to our students by subjecting them to the proverbial mine field that is “being a student.”