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ARTICLES

LEGALIZATION OF DISPUTE RESOLUTION, DISTRUST OF AUTHORITY, AND ORGANIZATIONAL THEORY: IMPLEMENTING DUE PROCESS FOR STUDENTS IN THE PUBLIC SCHOOLS*

MARK G. YUDOF†

I. INTRODUCTION

During the past decade, the legal system has had an increasing impact on the administration of public schools. Part of this trend has involved a restructuring of authority relations between school officials and students to require due process in contested administrative actions. Congressional enactments require hearings where a student charges that his school records are misleading or inaccurate.1 Courts require administrators to provide hearings or other opportunities for students to contest serious disciplinary actions.2 States also have adopted open-records acts, as well as statutes prescribing hearings for suspensions of particular duration. Large urban school districts have adopted codes of student rights and responsibilities.3

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Yet policymakers and courts are moving into an area of bureaucratic governance about which they know little empirically. And they are doing this in an unsystematic way. This entails no small risk. If even the best experts within public school systems have been unable to eliminate the arbitrariness and impersonality inherent in these bureaucracies, naive outside intervention conceivably can exacerbate these problems. Alternatively, due process requirements may waste resources because they have no effect at all. In this situation, the good intentions of "due process regime" defenders are not enough to insure that proceduralization will lead to a fairer application of school policies or vindicate the dignity and participation interests of students and parents.

In the absence of systematic empirical research, a respected line of research on authority relationships in organizational settings may help us anticipate the kind of risks inherent in due process requirements. Dating back to Max Weber, the father of the study of modern bureaucracy, researchers have been skeptical of the benefits of increasing legalization of authority relationships in large organizations. They have found that the restructuring of superior-subordinate relationships around formalized rules often occurs only after a breakdown of informal trust in the exercise of authority by superiors. Indeed, formalization may heighten the impersonality of superior-subordinate relations and undermine the informal feedback so necessary to get at the causes of the tensions. Thus, formalization can be both a reaction to and a reinforcer of distrust in authority relationships.

The risk of a vicious cycle of legalization and distrust does


not suggest that due process in public schools is inevitably a bad thing. By and large, due process decisions, the procedural rights afforded handicapped children, and the student records and open-meeting laws seem reasonable measures directed at the elimination of arbitrary decisionmaking by public school officials. Yet the heart of the matter is this: in a well-functioning public school system there must be a point of equilibrium or balance between law and less formal means of social control, between adherence to rules and the exercise of individual initiative and discretion. Due process requirements must be counterbalanced or supplemented with less formal mechanisms—perhaps mediation or ombudsmen—to restore the openness and personal interaction so necessary for trust. In public schools, it is difficult to imagine much learning taking place in an atmosphere pervaded with adversarial relationships.

This line of organization research also suggests limits even to this "balancing" approach. If public distrust in all institutions becomes too great, schools may not be able to resist the tide of legalization in our culture at large. Even if schools do resist the tide, pragmatic variations to make the legalization model more informal, such as mediation or ombudsmen, may no longer be able to lower distrust sufficiently to make possible true education. It is unclear whether public distrust has reached the point where the legalization model will no longer be workable in schools. When it is reached, however, policymakers will be forced to consider much more basic restructuring of authority relationships in schools—possibly applying models such as direct community control in order to limit educators' discretion while restoring public trust. Such alternative models may even be inconsistent with legalization, building rather upon notions of direct participation.

There is no conclusive evidence that the legal system's intrusion is jeopardizing the informality of schools or that due process has become irrelevant for minimizing the public's distrust of authority. But the dangers are real. First, there is a high degree of distrust of authority in society in general—possibly an inevitable outgrowth of the welfare state. Second, according to organization research, formalization of rules as an organizational response to this distrust can lead to a cycle of further legaliza-

6. Professor Black posits the theory that "law varies inversely with other social control... law is stronger where other social control is weaker..." D. BLACK, THE BEHAVIOR OF LAW 107 (1976).
tion. Third, forces in public school systems presently exist which can easily facilitate such an overly rigid legalization model.

This plausible scenario presents a fundamental challenge. Standards must be developed for deciding when a legalization model in public schools becomes counterproductive. Within the philosophy of liberalism, there presently exists no coherent analysis of due process that deals with the dangers of legalization in a setting of large-scale organizations. This will become more clear through a closer examination of the legalization trend.

II. THE GROWING DISTRUST OF AUTHORITY AS CONTEXT FOR LEGALIZATION

The root causes of the trend toward legalization in public schools and other public institutions lie in a mounting distrust which frequently rises to the level of a crisis of authority. The etiology of this largely post-World War II phenomenon is not entirely clear. Part of it may have to do with the equality revolution and the revolution in rising expectations. As particular groups demand equal treatment, and as people generally demand more of government in the satisfaction of their wants, the public service products of government inevitably receive greater scrutiny. The emphasis upon accountability and constraining discretion may also owe much to the breakdown in consensus over significant public policy issues (for example, race relations), as well as the unreliability of policy sciences and central planning in achieving important policy objectives. In the absence of expertise which yields answers to such basic issues as the decline of urban neighborhoods or the learning problems of the poor, the tendency is to emphasize process in the scrutiny of public decisions at each step of the way.

It is not surprising that legalization has been widely adopted as a model for achieving this accountability of process. Particularly in its due process hearing form, legalization has

been a widely approved instrument of liberal philosophy for accommodating the ethic of individualism with the expansion of the welfare state. Legalization rests on the idea of individual rights, particularly procedural entitlements against the state, which may or may not advance the collective interest. With the welfare state allocating so many goods and services on the basis of class membership or roles, the requirements of legalization provide an opportunity for the individual to assert the merits of his own case against the background of group allocations and group justice. Perhaps the underlying assumption is that electoral and interest group politics are not sufficient to protect dignity, participation, equality, and other interests against government bureaucracies which are highly resistant to such traditional polyarchical controls. Although the effectiveness of this model can be questioned, belief in its efficacy apparently is widespread.

Public schools have been caught up in this general distrust-legalization trend. On the one hand, like prisons, military bases, and the family, they are the last bastions resisting the legalization process. (One reason may be that public schools traditionally have enjoyed a greater favor in the public eye than other major institutions such as the Supreme Court, the Congress, big business, and labor unions.) On the other hand, overall public confidence in schools is declining dramatically. According to polls conducted by the Roper organization, 64% of the public in 1959 believed that the schools were doing an "excellent" or "good" job. By 1971, this figure had slipped to 50%; and in 1976, it stood at 47%. A 1980 Gallup poll indicated that only 28% of Americans felt a "great deal" of confidence in the public schools.

16. Gallup, The 12th Annual Gallup Poll of the Public's Attitudes Toward the
This trend undoubtedly reflects more than just a general decline in public trust. Specific factors which cause distrust in public schools include the decline in student test scores and studies questioning the effectiveness of pouring additional resources into public schools. The equality revolution and the revolution of rising expectations have reinforced the notion that public schools should not only educate, but also provide the means for socioeconomic achievement. Progress rarely can live up to such rising client expectations. As fertility rates decline and school population levels off, only about one-fourth of all adults have children in the public schools. With sharply increasing local and state tax burdens, those who perceive no real benefit from public schools may also be more critical of educators' performance. Such critics may begin to view education as a private and not a public good. The civil rights movement, the perceived failure of many Johnsonian social programs, and a growing anti-professional bias may further contribute to the decline in public trust in public schools.

Needless to say, the Supreme Court has played a key role in affirming the basic commitment of the courts to legalization in public schools. The leading case in the school discipline context is Goss v. Lopez, decided by the Supreme Court in 1975. At issue was a principal's temporary suspension of several Ohio students for misconduct. The principal based his action on an Ohio law which allowed principals to suspend students for up to ten days without conducting a due process hearing. Nine students brought suit to invalidate the statute to the extent that it denied them a hearing.

A closely divided (5-4) Supreme Court ruled in favor of the students. The Court insisted that a deprivation of a legal entitlement was involved here: namely, the entitlement of a free public education mandated by Ohio state law. Even a temporary depri-

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21. See, e.g., Wilkinson, supra note 5.
vation of that entitlement was significant, given the impact that a suspension can have upon a student's employment opportunities and his reputation (a liberty interest) among fellow students and teachers. In requiring some form of due process, the Court was making a strong statement about the role of law in public schools. It sought to offset the burdens of due process by requiring only some form of notice, explanation of the evidence, and an opportunity to be heard—not a formal hearing, the right of cross-examination, or the right to counsel. Nevertheless, this decision may prove to be a significant step toward legalization of authority relationships in public schools.

Yet the legalization response in the public school sector has not been simply a creation of a federal "imperial" judiciary imposing its own values on a hostile citizenry. Congress, the states, and local governments all have been involved in this trend. Legalization finds parallels in other aspects of public school relationships: particularly in the increasing assertion of teacher rights and increasing reliance on collective bargaining agreements, arbitration, or other grievance procedures for resolving faculty-administration disagreements. The rising concern about the spiraling crime rate or the lack of discipline in public schools has not dampened this trend, probably because there is no necessary inconsistency. As Judith Shklar cogently has

23. Id. at 581.
26. Professor Wilkinson disagrees:

   My point is not that Dr. Gallup's findings should bind the Supreme Court and certainly not that public reaction to disruptive behavior always deserves free reign. But I do question the sensitivity of any decision to begin constitutionalizing the disciplinary process at its lowest rungs at precisely that time when the public is deeply anxious over a lack of discipline in the schools and when the maximum flexibility may be required by school officials in different parts of the country to reduce the level of violence in secondary education.

Wilkinson, supra note 5, at 66. While recognizing that the Goss decision "may yet be fairly limited," Professor Wilkinson regards Goss as giving rise to "public dissatisfaction [akin to that accompanying the Supreme Court's] championship of the criminally accused at a time of rising crime." Id.

For documentation of the public's concern for the lack of discipline in public schools, see Gallup, The 12th Annual Gallup Poll of the Public's Attitudes Toward the
noted, "procedurally 'correct' repression is perfectly compatible with legalism." Legalization is addressed to the arbitrary application of rules and the mode of rule formation, not to the content of those rules. Thus legalization will permit existing disciplinary measures, and perhaps even sterner ones, so long as the prescribed process is followed.

III. THE TENDENCY OF FORMALIZATION TO REINFORCE DISTRUST

If distrust has created more formalized due process procedures in schools, will this restructuring of authority reduce distrust and enhance learning, the substantive goal of schools? For Weber, modern organizations face a fundamental dilemma in structuring authority in a formalized manner. To achieve their goals, superiors must exercise a high degree of control and discipline. To give the appearance that the exercise of authority is fair and legitimate while maintaining predictability, superiors increasingly will rely upon impersonal rules and procedures. Yet this proliferation of rules ultimately may create an iron cage wherein impersonality and preoccupation with procedure will undermine substantive goals. Weber's pessimism is not based upon a narrow analysis of specific organizations. Rather, he fears a spillover of distrust of authority onto all bureaucracies in society, which in turn will provoke a cultural preoccupation with a legalization model.

Although Weber's profound pessimism often has been criticized, he has pointed to a dilemma which is particularly problematic for school officials. If they rely too heavily on formalized procedures, they make the learning process even more impersonal; if authority relations remain too informal, disputes may lead to a perception of arbitrariness which also undermines trust. To avoid a vicious cycle of formalization and distrust, school officials must delicately balance formality and informality. Into that balance, the legal system is now intruding in rather uninformed ways, as the broad cultural trend toward legalization.

27. J. Shklar, Legalism 17 (1964).
places pressure on the legal system to act.

The difficulty of achieving a balance that avoids this vicious cycle is documented in two books which have become classics in the field of organizational behavior. One is Alvin Gouldner's *Patterns of Industrial Bureaucracy* dealing with the failures of new management to improve a mining operation by introducing more formalized rules. The other is Michel Crozier's *The Bureaucratic Phenomenon*, a study of the pathologies of formalization in two French organizations.

In Gouldner's study, a new manager from the outside replaced an old manager of a gypsum mine who had run the operation very informally, based upon a high degree of mutual trust with the workers. Unable to observe what was occurring below the surface of the mine, and lacking personal relationships with the miners, the new manager began rigorously to apply a number of formal rules to improve output. These procedures created serious tension for the miners because the nature of underground mining demanded a high degree of informality in response to safety risks.

What particularly interested Gouldner was that application of formal rules may create a self-perpetuating dynamic. Rules are promulgated to mitigate the tensions created by much closer supervision. Supposedly, impersonal rules are a less threatening exercise of authority. More rules, however, may create more apathy and cynicism toward authority, leading to more rules. The problem, Gouldner noted, is that rules per se do not get at the causes of the original tensions that led to formalization—in this case, the unique dynamics of the mining task itself.

Crozier's study also found a vicious cycle of distrust and formalization when rigid enforcement of rules and procedures led to passive resistance by workers and to the undermining of organizational goals. Like Weber, however, Crozier concluded that the social context, not just internal dynamics, explained this phenomenon. The French distaste for hierarchical authority

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had, over generations, led to extensive formalization in organizations in order to protect values of equality and fairness. This cultural pattern left individual organizations with little leverage to restore a balance of informality.\textsuperscript{33}

Taken together, these studies suggest that decisions to formalize authority relationships must take into account not only the degree of informal trust necessary for an organization's specific task (be it mining or schooling), but also the overriding societal pressures toward legalization. In the school context, the key question then becomes whether forces shaping public school policy will facilitate the implementation of an overlegalized due process regime that destroys any delicate balancing of formal and informal authority mechanisms.

IV. \textbf{FORCES OPERATING TO FACILITATE THE DUE PROCESS REGIME IN PUBLIC SCHOOLS}

Our knowledge of the implementation process in organizations is very limited, so it is impossible to predict with complete certainty that schools are predisposed to facilitate an overformalized due process regime. As Eugene Bardach recently lamented, studies of implementation are few in number, and the process of determining what goes on in the "black box"—be it corporation, labor union, school, or hospital—has reached only a primitive stage of development.\textsuperscript{34} Yet both historical evidence and our present knowledge about the dynamics of organizational implementation strongly suggest that a due process regime, once imposed by outside actors, rapidly will be implemented.

\textbf{A. The Historical Record}

The most intriguing observations about the introduction of due process into the public schools have been the speed with which it has already occurred and the absence of organized, vocal resistance. Due process for students became a matter of scholarly concern with the publication in 1957 of an article by Professor Warren Seavey of the Harvard Law School.\textsuperscript{35} In a famous line, Professor Seavey chastised the courts for failing to give suspended students the minimal procedural protection

“given to a pickpocket.”36 In 1961, the United States Court of Appeals for the Fifth Circuit took up the banner in Dixon v. Alabama State Board of Education,37 holding that students are entitled to a due process hearing (falling short of a full-dress judicial hearing) before being expelled or suspended for an extended period of time. Between 1961 and 1975, every circuit court in the nation adopted the Dixon approach, although they did not all agree on what constitutes an adequate bearing, what length of suspension, and what non-suspension penalties should trigger the hearing requirement.38 In 1975, the Supreme Court addressed these questions for the first time in Goss v. Lopez,39 the ten-day suspension case discussed above.40 In Goss, “due process” amounted to no more than a brief, informal conversation with the principal or other responsible official, and the Court admitted this.41 Nevertheless, Goss went further than earlier cases. And although the Court declined to reach the question of what procedures would be required if a longer suspension were involved, it did not appear inclined to reverse Dixon and its progeny.42 Subsequently, however, the Court refused to extend Goss to grading and other academic decisions having an impact on students.43

36. Id. at 1407.
37. 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961).
40. See text accompanying notes 22-23 supra.
41. 419 U.S. at 576 n.8.
42. Id. at 582-84.
43. Board of Curators v. Horowitz, 435 U.S. 78 (1978). Justice Rehnquist's opinion for the Court is somewhat confusing. The opinion first states that the Court need not determine whether any process was due and if so, how much, for respondent has been awarded at least as much due process as the Fourteenth Amendment requires. The school fully informed respondent of the faculty's dissatisfaction with her clinical progress and the danger that this posed to timely graduation and continued enrollment [in medical school]. The ultimate decision to dismiss respondent was careful and deliberate.

Id. at 85. Nonetheless, the majority opinion also concludes that there is a constitutional distinction “between decisions to suspend or dismiss a student for disciplinary purposes and similar actions taken for academic reasons. . . .” Id. at 87. “Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative fact-finding proceedings to which we have traditionally attached a full hearing requirement.” Id. at 89. This distinction, and its application to the case at
The anticipated public and school official "outcry" over the decision was virtually nonexistent. The response was as far removed from the school prayer and desegregation decisions as one could imagine. The Goss case received limited publicity, and few commentators or pundits took up the dissent's view that Goss would be calamitous for the public schools. Perhaps many believed that the Court was operating properly, defining procedural and not substantive fairness. Civil rights groups were the most outspoken, and they tended to criticize the decision for not going far enough. The National Association of Secondary School Principals and the National School Boards Association greeted Goss with an uncharacteristic yawn: the decision would not have much effect "because most schools already follow this course." The real concern was with a companion case, Wood v. Strickland, in which the Court laid down the ground rules for recovery of damages against school officials who violate students' constitutional rights. But even here, national and state organizations of school board members, administrators, and principals simply arranged for the promulgation of revised insurance policies making available coverage against the new class of risks for constitutional torts.

The point, then, is that legalization of dispute resolution in the public schools has not proved to be an inflammatory issue.


46. 17 Educ. U.S.A. 129 (1975), quoted in Kirp, Proceduralism and Bureaucracy, supra note 2, at 853; discussion with August W. Steinhilber, Associate Executive Director, National School Boards Association (Feb. 15, 1979). In a survey of superintendents and school board members in Texas, 96% of the respondents believed that their school districts were in compliance with Goss. See J. Bible, Survey of Texas School Trustees, Superintendents, Principals and Teachers 17 (1978) (unpublished manuscript on file at the Wisconsin Law Review) [hereinafter cited as J. Bible, Survey of Texas Schools].

47. 420 U.S. 308 (1975).

48. Id. at 313-22. See also Carey v. Piphus, 435 U.S. 247 (1978); Yudof, Liability for Constitutional Torts, supra note 5.

49. Discussion with August W. Steinhilber, supra note 46.
as so many judicial decisions affecting the schools have been. There are not many people in the population at large or among school board members and administrators who are prepared to do battle over this issue. To be sure, school officials may disagree with particular applications of due process rules; they may lament the interference with their discretion. But due process is not the sort of issue where outside pressure for noncompliance is likely to accumulate. A school district or state board of education that complies with the formal requirements of due process hardly is taking its collective and individual lives in its hands. Because citizens are poorly informed about the issue, it would be difficult to organize pressure on schools to comply. But public acquiescence should be enough where there is some incentive for administrators and teachers at the state and local levels to comply with due process requirements.

B. Institutional Dynamics Facilitating Implementation

Will incentives facilitate continued implementation of due process protections, at least at the formal level? A widely accepted view of organizations is that they are “political systems” where implementation depends upon the key actors supporting the change having a stronger coalition than actors resisting change.\(^5\) In public schools, those most likely to support proceduralization are administrators. Students and parents probably will remain somewhat neutral. Those most likely to oppose this trend are building administrators, teachers, and counselors, who are immediately responsible for student discipline and who do not have the luxury of viewing problems from the distance of central administration. Some resistance to due process requirements inevitably will occur among these groups.\(^6\) Yet a close analysis of all these actors suggests that any slippage may not significantly deflate the due process balloon.

1. CENTRAL ADMINISTRATORS AND BOARD MEMBERS

While administrators and board members may complain of legal intervention into the affairs of public schools, the truth is that legalization of dispute resolution presents school officials


with a technique for handling student discipline and other problems in a relatively efficient manner. One recent survey showed that more than four-fifths of the administrators responding agreed that there was a need for some kind of notice and hearing in student suspension cases. Proceduralization is consistent with a number of important administrative criteria.

From a resource perspective, hearings may cost money; but promulgation of uniform procedural rules for handling disputes may be cost effective compared to resolving such matters on an ad hoc basis. Due process is consistent with the bureaucratic zeal for uniformity and established routines. Adherence to specified rules and procedures is hardly a new development for central administration. Legalization already seems to be the rule rather than the exception in complying with programs ranging from Title I of the Elementary and Secondary Education Act (compensatory education for disadvantaged children) and the National School Lunch Act, to antidiscrimination laws and collective bargaining with teachers.

Furthermore, proceduralization may bolster the administrators’ monitoring powers in an organizational context so “loosely-coupled” as to pose difficulties for central direction, especially when resources for monitoring are quite limited. Even if they are not helpful as a means to control subordinates, fair procedures have symbolic advantages. Administrators can appear to be fair in their decisions; and their authority may even be enhanced as they get to play judge for a day as hearing officers. Of course, there is the possibility of conflict with teachers and prin-

52. J. Bible, Survey of Texas Schools, supra note 46, at 15.
55. See generally Limits of Justice, supra note 4.
56. See generally D. Kirp & M. Yudof, supra note 5.
57. See note 7 supra. As Professor March notes, “The situation is masked sometimes by considerable panoply of hierarchical artifacts—plans, memoranda, meetings, rules, deference, annoyance, organization charts, evaluations; but most observers agree that direct administrative leverage over education is relatively small and distributed widely through a large number of only loosely coordinated administrative positions.” March, American Public School Administration: A Short Analysis, 86 Sch. Rev. 217, 229-30 (1978).
58. Educational administration is small in size and simple in structure. Compared with other major bureaucratic institutions, schools devote a relatively small part of their resources to administrative expenses. . . . The hierarchy is typically quite flat and (except in a few conspicuous cases) uncomplicated. . . . The degree of specialization within administration is modest.

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principals if decisions regularly are reversed. But this is unlikely. A large measure of the appeal of legalization is that it does not require specific outcomes. The symbolism brings to mind the old adage, "Give him a fair trial, then hang him." 59

An additional concern of administrators has been a recent Supreme Court trend toward making municipalities and school districts more vulnerable to suits for constitutional torts under section 1983 of the Civil Rights Act. 60 This trend represents a departure from the Court's historic ruling in Monroe v. Pape 61 that municipalities are not "persons" within the meaning of section 1983 and thus cannot be sued under the Civil Rights Act. 62 Overruling Monroe v. Pape on this point, the Supreme Court in Monell v. Department of Social Services of New York 63 allowed recovery under section 1983 against local government entities, although only if the damage resulted pursuant to official policy or custom. Moreover, in Owen v. City of Independence 64 the Court eliminated the good-faith immunity defense for cities in section 1983 actions once an official policy was found to violate constitutional rights. Left open in both Monell and Owen was a precise definition of what constitutes official policy and custom. The new standard does not reach as far as absolute liability under the doctrine of respondeat superior, but it clearly makes school districts vulnerable for system-wide practices that violate student rights. 65 It is therefore in the interest of school administrators, both as individuals and as public employees, to adopt and implement policies which formally comply with Supreme Court requirements in decisions such as Goss.

In sum, due process rules will find a ready, if not enthusiastic, constituency among school administrators and board members. What is critical, however, is the extent to which central administrators believe they have met the legal requirements when objectively this is not the case. 66 Recent evidence suggests

62. Id. at 187-92.
64. 445 U.S. 622 (1980).
a substantial gap between the will to comply and actual compliance. The vital question, then, is the extent to which central administration's obedience to due process norms will be carried out in the individual schools themselves; that is, how will parents, students, teachers, principals, and other actors in the school building respond?

2. PARENTS AND STUDENTS

As a general matter, parents seem apathetic toward proceduralization. Experience with recent federal acts creating procedural rights for parents suggests that few take advantage of these statutory rights. Parents are more interested in results than process. They have a tendency, perhaps eroding, to defer to the judgments of educators. Certainly parents do not march or petition for greater procedural protections for their children. Perhaps this is because the proceduralization process has moved relatively smoothly. There is no need for dramatic political gestures. Administrative and legislative officials seem to perceive this and to act accordingly. Indeed, due process may be a way to deflect parental pressures for more substantial changes in the public schools.

Put somewhat differently, legalization of dispute resolution, for better or worse, is so deeply embedded in the culture that application of the model to the schools appears to be the natural, and not the unnatural, direction in which to move.

Further, pressure for proceduralization may be effective even if only a relatively few parents press for procedural guarantees when their children are threatened with adverse school decisions. With the assistance of the courts, these few may achieve proceduralization goals where the majority basically do not care. These parents may be of middle or upper middle class professional backgrounds, people attuned to process values. They may be poor or minority parents, ably represented by legal services offices and civil rights organizations. They may be parents of virtually any severely punished students; for discipline often is sought only for other people's children—fairness is sought for one's own. In any event, effective parental intervention is not

67. Id. This may be due to a lack of sound legal advice and to disparities between the school district's formal rules and the day-to-day handling of disciplinary matters. Id. at 16.

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dependent on arousing the sympathies of the majority of adults with school-age children.

Perhaps the same can be said of students. Presumably, many students simply accept the decisionmaking apparatus in the schools, unaware that they are treated in a procedurally unfair manner. Perhaps they perceive little difference in result when they are afforded process rights. There has been no great ground swell of student pressure for the adoption of the due process model. Yet due process obviously improves students' status, for they are treated as citizens with bundles of procedural rights and not simply as the objects of completely unbridled administrative discretion. Students in many cities have participated in the drafting of codes of student rights and responsibilities, and certainly they do not appear to oppose the legalization process. Probably a few students are vociferous in supporting due process, while the others approach it with the same mixture of acquiescence and desirability as their parents. As one student leader informally told me, "Students invoke due process only when they are at their wit's end. Otherwise, they take the path of least resistance."70

3. PRINCIPALS, TEACHERS, AND BUILDING PERSONNEL

Principals, teachers, and other school personnel charged with student discipline may not be as receptive as other actors to the legalization of dispute resolution. On the other hand, there are factors offsetting this reluctance—both positive incentives and negative legal sanctions for non-compliance. On balance, these offsetting factors may neutralize the factors creating resistance.

a. Factors creating resistance to due process

Evidence of teacher reluctance to implement due process measures may be found in the tendency of teacher unions to include student discipline provisions in their collective bargaining agreements. Teachers do not necessarily share the enthusiasm of the bureaucracy for uniformity and routine. While there are lesson plans, required routines, and innumerable institutional rules to be abided, the teacher views himself or herself as a profes-


sional and not as a bureaucrat. The essence of this professionalism is that the teacher enters into a trusting relationship with students; communicates with them by using professional skills; and, to the extent possible, treats each student as an individual, with a unique set of abilities and attitudes. As Dan Lortie has noted, teachers care less about "tasks and activities rooted in organizational matters than about those rooted in classroom matters." And the qualities that make a good teacher are not necessarily those which lead to promotion to administrative posts.

Proceduralization also threatens to take matters out of the teacher's hands as disciplinary problems are referred to higher authorities. This may undermine teachers' "organizationally centrifugal" impulses toward the classroom. The students may get "uppity" as they proclaim their right to seek justice elsewhere, and this may pose a greater threat to the authority of building people than central administrators. There is always the possibility that the principal's or teacher's judgment will be reversed or modified by superiors. Proceduralization may also delay decisions, with the teacher having to cope with the student until final disposition of the controversy.

Teachers also may perceive proceduralization as undermining the intimate interpersonal relationship necessary for education to take place. Students and teachers may view themselves as potential or real adversaries rather than partners in a joint educational process. And proceduralization may be inconsistent with teachers' training. They view themselves as experts in communicating knowledge, and not as would-be lawyers making legal determinations vis-à-vis their students. Their peers, notably the other teachers in the building, may look with jaundiced eyes upon those who make concessions to the legalization process. They may characterize cooperation in the due process regime as caving into superiors or, worse yet, allowing the courts to interfere in the teaching process. I suspect then that teachers, and principals to a lesser extent, do not view proceduralization as an

73. Id. at 164.
74. See Kirp, Proceduralism and Bureaucracy, supra note 2; M. Metz, Classrooms and Corridors 245 (1978).
unmixed blessing. They are more likely than central administrators to seek ways to subvert the process.

b. Factors supporting compliance

Yet there are also reasons why teachers and principals may support compliance. First, teachers themselves are introducing more legalistic procedures to protect their own interests against arbitrariness, favoritism and discrimination by administrators. In the words of Albert Shanker, president of the United Federation of Teachers of New York City:

A major part of the efforts to secure a first-class citizenship for teachers must be directed toward establishing equitable procedures, rules, and regulations which would reduce (if not eliminate) . . . the sub rosa system of favoritism and discrimination current in schools . . . . These procedures are not designed to replace the administrative and supervisory echelon, but to provide a system of checks and balances whereby whimsical administrative decisions may be appealed.75

In this posture, teachers both understand and encourage legalization of dispute settlement, reducing somewhat their hostility toward proceduralization of disputes with students.

Second, legalization still leaves substantial power in the hands of principals and teachers to determine when more formal procedures will be utilized. The critical decision is to refer a student to the appropriate building administrator for discipline, and this enables teachers to keep a large measure of control over the process in all but the most outrageous cases of misbehavior. For example, if there is consistent race or class bias in the meting out of suspensions, it may well be more a function of these referral decisions than of the treatment of students after they enter the formal process.76 Beyond this, it is not even clear that the formal rules and procedures operate as much of a constraint on the actions of the school disciplinarian; for, according to school administrators, there is a ritual and confession process associated with most disciplinary actions. This begins with some formal assertion of authority by the school official (stand up, 75. Shanker, Aspirations of the Empire State Federation of Teachers, in EMPLOYER-EMPLOYEE RELATIONS IN THE PUBLIC SCHOOLS (R. Doherty ed. 1967).
76. See generally Yudof, Suspension and Expulsion of Black Students From the Public Schools: Academic Capital Punishment and the Constitution, 39 LAW & CONTEMP. PROB. 374 (1975).
take off your hat)" and proceeds to a recitation of the facts by the student, a confession of student error, an inquiry into the student's motivation, and then to the "sentencing." In most cases, the student effectively will have waived his procedural rights, and the matter will not appear in official channels unless the punishment is severe or the student and/or his parents is outraged by the unfairness of the result.

Third, as always proceduralization may be a way for teachers to avoid taking responsibility for a particular decision. Consider this standard advice in a book on discipline and the classroom teacher. "Usually schools have adopted special policies on suspending pupils, and it becomes requisite that teachers go through special channels before being able to execute a suspension. . . . In general, teachers should familiarize themselves with the procedures required by the school." In a sense, once the matter is in the appropriate institutional channels, the teacher can wash his or her hands of it. This is particularly appealing if it is unlikely that superiors will reverse the original decision of the teacher and place the student back in the class. This is consistent with findings that disciplinary matters are more subject to institutional rules than are instructional matters.

Finally, one should not underestimate the normative power of the law. Teachers and principals may seek to comply with procedural requirements irrespective of their prior personal attitudes toward such matters.

This is not to say that schools never change in a coordinated fashion. On the contrary, it is obvious that they do. But that movement is not movement induced by a coherent, tightly structured administrative system. Diffuse systems change generally as a consequence of the spread or contagion of knowledge and beliefs or of broad system incentives, much the way fashions in clothing spread through a population of loosely connected customers.

Teachers also may fear personal or school district liability, and they may wish to avoid becoming embroiled in litigation.

77. Goffman, in another context, describes such rituals as "obedience test[s]" and "will-breaking contest[s]." E. GOFFMAN, ASYLUMS 17-18 (1961).
79. See NATIONAL INSTITUTE OF EDUCATION, supra note 58, at 33-37.
While it is easy to overestimate teacher opposition to due process procedures, let us assume that many teachers and principals, consciously or otherwise, will seek to subvert the new legal regime. What will they do? What is it that is in their power to do? The primary method for avoiding administratively imposed procedures would be to use devices for rule enforcement which fall short of the types of punishment which trigger due process requirements. One easy example is the infliction of corporal punishment. According to the Supreme Court (more accurately, in the mind of Justice Stewart), short-term suspensions require some opportunity to contest the charges; long-term suspensions probably require something more akin to a full-dress hearing; but corporal punishment, no matter how harshly inflicted, requires no such hearing. This gives the teacher a choice among enforcement mechanisms. The teacher simply may inflict corporal punishment for a rule violation, and no particular process will be required (unless the district has its own rules). The teacher may attempt to suspend a student for only a few days, in which case only a brief conversation between the principal and the student will be required. This is a quite limited threat, and probably would have been required even before Goss. Finally, the teacher may seek a long-term suspension, and only then would the matter be passed on to higher authorities for more formal consideration.

The teacher has a wide variety of sanctions and methods at her command that are unlikely to trigger due process review. Certainly, a teacher can scold a student and hold him up to his peers in the class as a deviant. The arousal of peer group pressure is a tried and true method of obtaining conformity with rules. A teacher may isolate the student (seating him at the back of the class), reduce grades, refuse to write recommendations for college, record adverse information on the student record (although this could trigger further scrutiny under the Buckley Amendment), decline to call on the student, transfer the student to another class, or decline to issue bathroom or library

81. See generally N. Faust, supra note 78; M. Metz, supra note 74, at 97-101.
83. Id. at 584.
85. See authorities cited at note 81 supra.
passes. A teacher may also seek aid from counselors and parents, arranging a conference to discuss the student’s problems. On occasion, these measures may lead to more formal procedures, but often the matter will end where it began—in the classroom.

Some of these penalties may be severe, and they may even force a student to drop out of school. It is fair to say that in those instances—and I believe that they will be relatively few—teachers have subverted the due process regime. On the other hand, the unreviewable sanctions may be employed most often when the student has violated classroom and not school rules; for in each classroom there exists an informal “constitution, verbalized or unverbalized, consistent or inconsistent... that governs behavior.”

Giving teachers the power to enforce the classroom constitution is a reasonable allocation of rule enforcement powers between teachers and administrators. More importantly, some of the methods adopted by teachers may lend themselves to informal resolution of disagreements, thereby reducing the necessity to turn to more formal procedures. Student-teacher, parent-teacher, and parent-principal conferences all may be quite useful in this regard. They introduce a degree of flexibility in the rule enforcement enterprise and reinforce the notion that students, parents, teachers, and administrators share a common interest in the educational well-being of the student.

c. Legal sanctions as a factor in compliance

Assuming that the balance between factors supporting resistance and factors supporting compliance leaves teachers and principals ambivalent, the risk of legal sanction may be enough to tip the scales toward compliance. Recent court decisions have both upheld substantive rights afforded students and allowed

recoveries against school officials and school districts for violating the constitutional rights of students. Although I have dealt with this topic in detail elsewhere, I will sketch the general outline of the argument here.

Under Wood v. Strickland, a school official may be held personally liable only when he or she has violated "settled, indisputable" constitutional principles. As a general matter there are few such principles in the school law area, and many of these are really fact-law rules. For example, a student has a constitutional right to wear a black armband or to distribute pamphlets or newspapers on school grounds, so long as these activities will not "materially and substantially interfere" with the operations of the public schools. A reasonable forecast of such disruption is all that is required, not its actual occurrence. In this situation, prior knowledge of the rule in the abstract would not be determinative of liability; rather, it is its particular application to the case at hand which is the issue. If the school official acts at all reasonably, it is unlikely that liability will be imposed. This, I believe, will be true for most substantive constitutional rights: the ambiguity of the rules and the difficulties of their application will make judges and juries reluctant to award substantial damages.

Despite some vagueness, the law of due process, at least within each of the eleven federal circuits, is relatively settled. As a result of Goss, each circuit will have its rules regarding hear-

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91. See Yudof, Liability for Constitutional Torts, supra note 5. See generally Cass, Damage Suits Against Public Officers, 129 U. Pa. L. Rev. 1110 (1981). Much of the remaining discussion in this section is taken directly or in modified form from my earlier article.
93. See Yudof, Students' Rights, supra note 89, at 1342.
ings for those suspended for more than ten days and for those who are punished in other ways. There will be appellate decisions on what sort of notice the student must receive of the charges against him, the necessity for an informal conference or formal hearing, the format for introducing documentary evidence, the availability of legal counsel, the opportunity to cross-examine witnesses, and the like. Failure to obey these procedural rules may lead to liability. To be sure, damages may be difficult to calculate, and indemnification and insurance may be widely available, but a risk-avoidance strategy on the part of school personnel seems inevitable. Hence, the primary impact of Wood, in the light of cases requiring formal procedures, "may be to speed up the process of legalization within the public schools."

With regard to substantive constitutional rules imposed by courts, I believe that there will be substantial evasion of court decrees in the public schools, but that these methods of evasion will strengthen and not weaken the movement toward formalization of dispute resolution. Substantive rules such as those that allow children to decline to salute the flag in school or that require officials to tolerate undesired political speech by students may be perceived as a threat to authority. Such rules may be viewed as imposed by an outside agency with little knowledge of the educational process, as inconsistent with community and individual norms, and as an assault on the status of teachers. In order to avoid complying with such rules without subjecting themselves to the hazards of personal liability and injunctions, educators are likely to practice "defensive education." This is particularly true if teachers are unaware of the distinction between individual and governmental liability or if they are unsure of their personal exposure to liability in a particular case.

An analogy to the plight of medical doctors may be in order, for they, too, face accountability suits in the form of damages for malpractice. A Medical Malpractice Commission appointed by


98. See Piphus v. Carey, 545 F.2d 30 (7th Cir. 1976), rev'd and remanded, 435 U.S. 247 (1978); Strickland v. Inlow, 519 F.2d 744 (8th Cir. 1975).


100. See Yudof, Students' Rights, supra note 89, at 1383-92; text accompanying note 49 supra.

101. Id. at 1395.
the Secretary of Health, Education, and Welfare has described defensive medicine as "the alteration of modes of medical practice, induced by the threat of liability, for the principal purposes of forestalling the possibility of lawsuits by patients as well as providing a good legal defense in the event such lawsuits are instituted." In practicing medicine, many physicians take care to treat the chart as well as the patient by ordering extra tests and procedures to document the propriety of their treatment. In some cases, physicians may be unwilling to take risks on new cures where there is no certainty of effectiveness. There also appears to be some reluctance to publish in medical journals the details of diagnostic and therapeutic techniques which have not proved efficacious. The fear is that patients or lawyers will see the published materials and use them as the basis of lawsuits. In addition, medical malpractice suits may encourage some doctors to retire early or to locate in states where malpractice laws are less favorable to plaintiffs.

With regard to all of these reactions to the threat of liability, it has proved difficult to determine precisely how many doctors have altered their behavior, to gauge the impact on patients, or to measure the increased costs of medical care attributable to this cause. Also, the fact that liability may encourage doctors to exercise greater care in the performance of their duties is rarely mentioned. The literature tends to be anecdotal, unscientific, and "pro-physician." Nonetheless, it seems reasonably clear that many more physicians today see the patient as a potential enemy and exhibit hostility toward the legal profession for its part in the malpractice conspiracy. Perhaps the latter feeling is best exemplified by a recent bumper sticker: "Support Your American Trial Lawyers' Association—Send Your Son to Medical School."

The parallels between physicians and educators are far from perfect. Their status and organizational roles, and certainly their economic situations, differ. The reach of malpractice suits under tort law is far greater than the reach of constitutional law, limited, as it is, to deprivations under color of state law. But in some respects educators seem likely to follow the lead of doctors in reacting to the threat of litigation. Apart from the directly imposed requirements of due process, educators, like physicians, probably will resort to complex procedures and recordkeeping in

order to protect themselves and their school districts against substantive constitutional claims. Meticulous documentation of facts may reinforce the school official's version and may be important, particularly where liability hinges on the reasonableness of a forecast of disruption.

The appearance or reality of deliberation and consultation with teachers, parents, lawyers, and others may also convince a court that the actions were taken in good faith (a defense not available to the district). This is also a way of spreading the responsibility for decisions and insuring that actions will be treated as those of the school district. Further, more expansive procedures, including full adversary hearings, while time-consuming and expensive, may leave parents and students with the feeling that they have had an adequate opportunity to challenge the actions taken against them. Even if this is not the case, the practical necessity of working one's way through the various levels of school district review—even if exhaustion of remedies is not legally required—may discourage potential plaintiffs from bringing their cases to court. As the matter drags on, as expenses mount, and as the injury becomes more remote, parents and students may begin to think that the price of vindication is too high.

There are other ways in which educators may attempt to cope. They may be less likely to make controversial decisions, such as suspending rowdy students or affording special treatment to children with unusual talents or disabilities. With the current distaste for any form of differentiation, equality of treatment may appear to be the safest, if not necessarily the soundest, course. Alternatively, school officials may routinely hold hearings or delegate to parents and students decisions which previously they took upon themselves. If a parent authorizes action which is ultimately found to violate the constitution, this may be treated as a waiver of any constitutional claim. Even if the waiver is not informed and intelligent, the existence of such a waiver on paper may be probative as to the good faith of school authorities.

Changes in the behavior of teachers and administrators may be more subtle. As greater care is taken with official records, an

oral tradition may develop as a way of communicating information without risking court action. Teachers may label an outspoken student as a “troublemaker” in discussions with other teachers, while declining to specify this in written form. School people are likely to begin describing their conduct in official records and communication in the language that courts require for a favorable decision. Whether consciously or otherwise, a principal is not likely to admit suspending a student for passing out literature which is ideologically objectionable. Rather, the principal and the school records will speak of actual or likely disruption to the educational process. Prayers will be converted into voluntary periods for “meditation.” The decisionmaking processes as well as the language employed in public schools will be legalized. As noted earlier, educators also may resort to sanctions falling short of suspension and expulsion to insulate themselves from judicial review. Courts are far more likely to intervene in school affairs where exclusion has been employed to thwart the exercise of constitutional rights of students.

Looking at these avoidance mechanisms as a whole, it seems likely that the due process regime will be reinforced by the practice of “defensive education.” Great efforts will be made to accommodate the forms and language of dispute resolution to legal requirements, and process may be perceived as a way of avoiding compliance with substantive rules. Ironically, in the name of fairness of procedure, educators may be able to contain the threat of student rules to the established routines, values, and goals of public schools.

V. LEGALIZATION, FAIRNESS AND THE FUTURE

If my assessment is correct, then many of the criticisms of the legalization of dispute resolution in the public schools have fallen wide of the mark. Due process requirements will not increase disorder in the schools; administrators and teachers will not be left helpless in disciplining those who commit violence and vandalism. Proceduralization is hardly the demise of authority. Neither is the basic problem that public school systems will fail to comply with procedural requirements. My concern is that untempered public distrust will lead to a formalism in which procedure is deified at the expense of education.

Extrapolating this trend into the future, public schools will

105. See D. KIRK & M. YUDOF, supra note 5, at 187.
not be very joyous places. They might well reflect an "increasingly anomic world in which private entitlement backed by formal procedure apparently arises to fill a vacuum left by a withering of that certain spirit we may call community." One scenario is the expansion of formal procedures to other academic functions such as grading, extracurricular activities, curriculum setting, and selection of textbooks. Another possibility is the expansion of school rules to noninstructional aspects of schooling. As one recent study of American high schools indicates, school rules already are likely to deal with such matters as student damage to property, smoking, hall passes, dress codes, and disruptive activities.

Presently, very few rules directly affect teachers, and those that do are addressed to methods of dealing with student disruptions and parental complaints, not management or instructional requirements. Yet this, too, may be changed by the expanding tide of legalization, portending more "objective," and perhaps more wrongheaded, rules for evaluating teacher and administrator performance. The process of instruction may become more constrained by rules as the substance of courses and methods of testing are prescribed more meticulously. And formality of evaluation and enforcement may replace the informal techniques which currently dominate the instructional realm.

Carrying the trend still one step further, "outsiders"—members of the American Arbitration Association, for example—may be called upon to replace administrators as judges. This would be akin to arbitration arrangements in labor-management relations, where each side lacks confidence in the ability of the other to reach a fair decision. Beyond this, one can imagine committees made up of representatives of the school board, administration, teachers, parents, and students promulgating rules. This already has occurred in some school districts. Perhaps formal rule-making procedures will be adopted by school boards. Proposed rules would be circulated (say in a "School Rules Register") at least thirty days before final action would be taken. Impact statements would be drafted, detailing

106. See Michelman, supra note 10, at 149.
107. Despite the fact that the Supreme Court did not require due process procedures in Bd. of Curators v. Horowitz, 435 U.S. 78 (1978), it is noteworthy that the university in that case had extensive procedures far beyond that required by earlier precedents in academic dismissal cases.
108. See National Institute of Education, supra note 58, at 34.
109. Id. at 42-43.
the impact of the rules on particular groups of students, such as minorities. The emphasis would be on reducing all rules to writing, leaving less to be assumed or misunderstood, and opening up the rule-making process to those with an interest in the outcome of that process. On an ad hoc basis, I suspect many school boards are already doing this, as well.

Other perfections of the due process regime already are emerging. Student councils in some school districts have set up mini-legal service enterprises within the schools to advise students charged with infractions about their legal and other rights. High school courses on law may reinforce this trend. Some states already permit the virtually automatic appeal of adverse school board decisions to the state commissioner of education and the state board of education. Information retrieval systems may be developed to allow access to past rulings as the principle of stare decisis takes hold. For example, there is already an official reporter system which reproduces the decisions of the New York Education Department.

There may well be ways to limit the vicious Weberian cycle. Due process, David Kirp has reminded us, is not necessarily coincident with the outermost boundaries of formalism and adversary hearings. Indeed, Goss itself may be looked upon as an effort to promote collegiality and informal resolution of disputes. Building on Goss, Kirp has proposed that "orderly, thoughtful" conversations between the disputants would be preferable to formalism.

Goss embodies a paradox. By the very device of imposing minimal procedural safeguards . . . , the decision aspires to increase reliance on nonformal adversarial procedures, to encourage a kind of collegiality—actual exchange and even negotiation, leading to mutually acceptable outcomes or at least shared understandings—in a system which has treated fiat as an administratively convenient rule of thumb. Conversation . . . serves as a vehicle for resolving what are likely to be factually uncomplicated disputes, but it does more than that. It enables students to feel that they are being listened to and may encourage them to raise underlying griev-

113. Kirp, Proceduralism and Bureaucracy, supra note 2, at 865.
ances. It provides administrators with a relatively inexpensive vehicle for monitoring, and hence a basis for reshaping, institutional relationships.\textsuperscript{114}

Yet I do not share Kirp's optimism because I do not accept his etiology. Nonformalism is premised on trust, and trust is lacking in the school environment. Formalism did not create that mistrust, it is merely a manifestation of the underlying lack of community. The re-establishment of trust is a precondition to the establishment of the informal structures that Kirp finds so appealing. Perhaps it is possible to break the cycle with nonformalism, hoping that trust will emerge by imposing the conditions for community. Yet the degree of public distrust, the destabilizing effects of formalism as documented by organizational researchers, and the probable responsiveness of public school officials to continued formalization present valid grounds for pessimism.

Too much optimism may cause us to avoid the fundamental problem we face. The philosophy of liberalism, upon which legality and due process are based provides us with no clear standards or mechanisms for consciously minimizing the risks of legalization. In the absence of a coherent philosophy, it is surprising how far and how fast the legalization trend has proceeded.\textsuperscript{115} If the principles of legality are to be workable in a society of large-scale organizations, they must be carefully re-examined. This will require empirical examination as well as theoretical analysis.

On a fundamental level, the relationship between distrust, a declining sense of community, bureaucracy, equality, participation, and legalization may provide the most severe test of the principles of liberalism.\textsuperscript{116} There is merit to the formalization of

\textsuperscript{114} Id. at 864, 865 (emphasis in original).

\textsuperscript{115} A driving force behind the legalization trend in America may be the breakdown in the political process, described in Lester Thurow's recent analysis of the American political and economic structure. See L. THUROW, THE ZERO-SUM SOCIETY (1980). Thurow’s argument is that American society is experiencing a breakdown in polyarchy as a means of governing. The political structure works best as a means of allocating economic gains. Yet we are experiencing a fundamental shift in the economy from a period of high growth to a static era in which the dominant political issues are those of loss allocation. Polyarchic government is less able to govern in this situation because conflicts involve a zero-sum game. In the light of this analysis, legalization can be interpreted as an effort to reassert through the legal process what is being lost in the political process.

\textsuperscript{116} See generally C. LINDBLOM, POLITICS AND MARKETS (1977); T. LOWI, THE END OF LIBERALISM (1969); Michelman, supra note 10. Consider these remarks of Daniel Bell:

Now, the technical-economic realm, which became central in the beginning of capitalism, is . . . based on the axial principle of economizing: the effort to achieve
dispute resolution if courts, legislatures and administrative bodies are not too closely wedded to the traditional adversary hearing. Uniformity of treatment for similar cases, as well as reliable fact-finding, may be desirable outcomes of legalization.\textsuperscript{1} While I may share the lawyer's mentality, the goal of eliminating arbitrary exercises of authority strikes me as a worthy endeavor.\textsuperscript{118} Because most teachers and administrators probably will follow the prescriptions of the legal mode, legalization over time may lead to more fair and predictable results. The opportunity to participate in the decisionmaking process and present one's side of the story may vindicate important dignitary and participation interests.\textsuperscript{119} These interests are not quantifiable, but they may

\begin{quote}
efficiency through the breakdown of all activities into the smallest components of unit cost. . . . The axial structure, based on specialization and hierarchy, is one of bureaucratic coordination. Necessarily, individuals are treated not as persons but as "things" (in the sociological jargon their behavior) regulated by the role requirements, as instruments to maximize profit. In short, individuals are dissolved into their function.

The political realm, which regulates conflict, is governed by the axial principle of equality: equality before the law, equal civil rights, and, most recently, the claims of equal social and economic rights. Because these claims become translated into entitlements, the political order increasingly intervenes in the economic and social realms. . . . The axial structure of the polity is representation, and, more recently, participation. And the demands for participation, as a principle, now are carried over into all other realms of the society. The tensions between bureaucracy and equality frame the social conflicts of the day. . . .

In this democratization of culture, every individual, understandably, seeks to realize his full "potential," and so the individual "self" comes increasingly into conflict with the role requirements of the technical-economic order.

\end{quote}


\textsuperscript{118} "Arbitrariness" obviously is a relative concept and not easily defined: Discretion is arbitrary when it is whimsical, or governed by criteria extraneous to legitimate means or ends. All of this is a matter of degree. Few decisions are completely arbitrary, yet we may compare the more and the less.


contribute to the feeling that one is being treated fairly and that someone is listening to one’s grievances. Even if they do not restore trust and understanding, formal procedures at least may give rise to civility and respect.\textsuperscript{120}

Recognizing the legal equality of students, at least with respect to some interests, may give rise to two related developments.\textsuperscript{121} From experience with proceduralization, children may learn from their school experience about democratic ideals.\textsuperscript{122} If as a nation we are persuaded that nonarbitrary application of legal rules is a good thing, it makes sense to inculcate that value in the public schools.\textsuperscript{123} This characterization may even carry over into the pedagogy of educational institutions. Legalization appears to be far more consistent with progressive notions of child-centered learning than with traditional concepts of children as passive learners.\textsuperscript{124}

On the negative side, I am disturbed by the tendency to progress toward the extreme of reducing arbitrariness and thus discretion in even its most inconsequential forms. Just as the “equality revolution” knows no bounds and focuses on smaller and smaller inequalities, so too the demand for legalization may be nearly insatiable in the quest for procedural fairness. The result of such a progression toward absolutism and formal order is not likely to be substantive justice.

Substantive justice is undone when there is too great a commitment to upholding the autonomy and integrity of the legal process. Rigid adherence to precedent and mechanical application of rules hamper the capacity of the legal system to take account of new interests and circumstances, or to adapt to social inequality. Formal justice tends to serve the status quo.\textsuperscript{125}

Beyond the rigidity of extreme legalization, there are a myriad of delicate decisions, made within complex organizations, that

\textsuperscript{121} See Selznick, supra note 118, at 117-18; Yudof, Liability for Constitutional Torts, supra note 5, at 1398-99.
\textsuperscript{125} P. Selznick, supra note 118, at 13-14.
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require carefully measured judgments, and that are not realistically amenable to formalization—at least not if reasonable decisions are to be made. Thus, the momentum of the movement to eliminate absolute arbitrariness in bureaucracies may carry us to the point of preferring order to liberty, procedural regularity to substantive fairness. This arises out of a desire to right every wrong, to leave no injury unremedied, to trust no one, to abide no inconvenience or personal hurt. Yet legalization, far from reaching these goals, may only accelerate distrust and alienation. In the words of Grant Gilmore,

The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb. . . . The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.

