School Discipline Procedures: Some Empirical Findings and Some Theoretical Questions

Lee E. Teitelbaum
University of New Mexico

Follow this and additional works at: http://www.repository.law.indiana.edu/ilj
Part of the Education Law Commons

Recommended Citation
Available at: http://www.repository.law.indiana.edu/ilj/vol58/iss4/1
School Discipline Procedures:
Some Empirical Findings and Some
Theoretical Questions †

LEE E. TEITELBAUM*

Until the last ten years or so, the operation of public schools was largely a matter for local determination, subject even to state control only in certain respects. Recently, however, a number of federal statutes and judicial decisions have regulated, in one way or another, the activities of public schools,¹ and some of these have engendered state legislative action also affecting local practices.² The complexity of this regulatory enterprise is apparent. On the one hand, legislative and judicial decisions announce policies that are expected to produce consistent behavior at a remote level. For that to transpire, several circumstances must concur. The rule or desired practice must be clearly expressed. It must be known to and understood by those charged with implementation. Local administrators must be able and willing to carry out the policy.³ In addition,

† Copyright 1984 by Lee E. Teitelbaum. Photocopy reproduction of the article made for or used by any non-profit educational institution is permitted.
* Professor of Law, University of New Mexico; B.A., LL.B., Harvard University; LL.M., Northwestern University. This research was conducted at the Center for the Study of Legal Policy Relating to Children of the Indiana University School of Law, and was supported by a grant from the Lilly Endowment.
Data collection for this study was designed and carried out by Ms. Susan Hillman, a doctoral student at Indiana University and formerly Research Assistant at the Center, who also commented very helpfully on an earlier draft of this paper. The author also wishes to express his deep gratitude to Professor Stephen Wasby of the State University of New York at Albany, Department of Political Science, for his thoughtful and critical suggestions. Any error remains, of course, the author’s responsibility.
² E.g., IND. CODE §§ 20-8.1-5-1 to -17 (1982).
where several agencies are responsible for administration they must agree about their obligations and discharge them uniformly and in coordination.

On the other hand, regulation has significance for local actors whether or not they accurately follow specific commands. While appellate courts in particular may and should act on a piecemeal basis, program administrators ordinarily cannot. The latter must carry on comprehensive schemes without interruption. For example, the Supreme Court held in *In re Gault*\(^4\) that certain rights (the right to counsel, notice of charges, cross-examination, and the privilege against self-incrimination) obtain in juvenile delinquency proceedings and expressly reserved until a later date the applicability of other procedural entitlements, such as the rights to bail and to proof beyond a reasonable doubt.\(^5\) State legislatures and lower courts must, however, take a position on such questions in the light of existing Supreme Court decisions which clearly refused to consider them. Thus, utterance of a judicial decision may carry with it a penumbral effect which influences conduct in areas where no command has yet been issued and may not be issued for a considerable period of time.

The relationship between judicial or legislative regulation and the behavior of those affected by regulatory activity is, therefore, a complicated matter from a number of perspectives. Social and political scientists have tended to focus on compliance with stated judicial commands by courts, although there has been some recent attention to more diffuse consequences of judicial action. The present study, which concerns public school disciplinary practices in Indiana, crosses these lines. The United States Supreme Court has imposed procedural rules for short disciplinary suspensions of students,\(^6\) but has expressly declined to decide what procedures are necessary for other kinds of student disciplinary sanctions. The Indiana legislature has gone somewhat further, specifying procedures for expulsion and exclusion from school, but not for in-school suspension of students.\(^7\) School administrators, however, have not been able to avoid deciding what process is required for the alternative methods of discipline they employ. They must either abandon sanctions for which clear guidance is lacking, which may be undesirable or even impracticable, or they must decide, on scanty information, what probably will be required by courts when they ultimately address the procedural requirements for those alternatives. This latter approach carries with it some significant risks, including the possibility that the action taken will not only be declared invalid but will give rise to an action for damages predicated upon violation of a student's civil rights.\(^8\)

---

\(^4\) 387 U.S. 1 (1967).
\(^5\) *Id.* at 11-12.
\(^7\) *Indiana Due Process and Pupil Discipline Code*, IND. CODE §§ 20-8.1-5-8, -10 (1982).
The ways in which schools have adapted to these situations is a central inquiry for the study reported here. It must be said that this research is preliminary and that much of what is reported is descriptive. However, descriptive data regarding school practices and procedures is a necessary first step to understanding the relationship of policy decisions to local school activities, and these data may provoke further and more focused investigation into this and related areas. This study also serves as a vehicle for examining several methodological and theoretical issues associated with research on the effect of Supreme Court decisions and other legal rules.

I. LEGAL FRAMEWORK AND RESEARCH DESIGN

A. The Legal Framework for School Discipline in Indiana

Conceptually if not chronologically, discussion of the current legal framework for student discipline in Indiana may begin with *Goss v. Lopez,* in which the Supreme Court first addressed the constitutional status of disciplinary action by public school officials. Like many initial Court decisions in previously unregulated areas," *Goss* combined strong language justifying the application of constitutional standards to disciplinary decisions with a carefully circumscribed holding.

To explain why the due process clause applied at all, the majority observed that students possess constitutional rights which they do not "shed ... at the schoolhouse door" and, more particularly, that suspension from school without adequate process violates both property and liberty interests held by public school students. The property entitlement is that created by state statutes and constitutions assuring a free education to all residents between certain ages. The liberty interest lies in freedom from the injury to a student's "good name, reputation, honor, or integrity" that official charges of misconduct, if sustained and made known, can occasion. Moreover, these interests were not, in the Court's view, of minor consequence. Because "education is perhaps the most important function of state and local governments ... the total exclusion from the educational process for more than a trivial period, and certainly if the suspension is for ten days, is a serious event in the life of the suspended child."
Despite this strong language, the Court did not decide all or even many issues concerning the process required in various school discipline situations. The holding of the case is addressed only to the "ordinary" suspension of less than ten days. The Court declined entirely to address the range of disciplinary sanctions beyond short suspension that schools routinely employ. In dictum, the Court observed that "Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures;" however, the nature of these more formal procedures was left to a later day. Because the holding is limited to short suspensions, procedures for corporal punishment, transfers to other schools or programs, exclusion from extracurricular activities and other disciplinary actions likewise went unspecified.

Goss established, therefore, the proposition that students possess constitutionally protected interests in public education which cannot be denied without due process, but did not specify what processes are required in any but the "usual" short suspension case. The uncertainty created by such a decision was, if anything, heightened by Wood v. Strickland, decided shortly after Goss, which held that civil liability could be imposed on a school board member who suspends a student when the official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected...." Although Wood insists that school officials "were not charged with predicting the future course of constitutional law" but only with good faith respect for a student's "clearly established constitutional right," this limitation affords small comfort to those educators who find little settled by existing Supreme Court decisions.

The Indiana statutory law follows but goes considerably farther in its coverage than existing Supreme Court decisions. With regard to "short suspensions" (the only kind recognized by state law), Goss and the Indiana Due Process and Pupil Discipline Code now contain identical requirements: a student must receive (1) notice of charges facing him, which may be informal, and if the student denies those charges, (2) a summary of the evidence against him and (3) an informal opportunity to respond.

16 Id. at 584.
17 420 U.S. 308 (1975).
18 Id. at 322.
19 Id.
20 Carey v. Piphus, 435 U.S. 247 (1978) limited the damages recoverable by students suspended from public elementary and secondary schools without procedural due process. The Court held that, in the absence of proof of actual injury resulting from suspension, students are entitled to recover only nominal damages. However, this limitation seems to suppose that the disciplinary action was in fact justified, but imposed without appropriate process; presumably damages would be more readily available if the action was in fact unjustified or if emotional or other injury associated with the deprivation of a hearing could be established.
21 Goss, 419 U.S. at 581; IND. CODE § 20-8.1-5-6(b) (1982).
Moreover, the statute, like *Goss*, presumes that the hearing will be conducted prior to disciplinary action unless emergent circumstances demand immediate removal of the child from school premises. The present Code provisions, enacted in August of 1980 and obviously designed to track the requirements of *Goss*, came into force just before this study was conducted.

Indiana legislation also addresses the expulsion and exclusion of students. While the most that one can say as a constitutional matter is that expulsion or exclusion must be accompanied by at least the process required for short suspensions and probably by some unstated increment beyond that, the Due Process and Pupil Discipline Code does specify procedures for these sanctions. These rules, many of which have been in place since 1971, will be described in detail below; for present purposes, it is enough to say that the Code contains an extremely formal and comprehensive set of requirements which go well beyond what is ordinarily thought necessary for administrative hearings.

Finally, there are some forms of discipline which remain unregulated either by Supreme Court or state legislative action. The most commonly invoked of these is in-school suspension, which involves exclusion from regular classes but not from school premises. Transfer of students to alternative school programs is likewise determined entirely by local practice, as are deprivations of school privileges and exclusions from extracurricular activities.

**B. Research Design**

Local school disciplinary actions in Indiana are governed in some respects by federal judicial policy and state legislation, in others by state regulation only, and in yet other areas remain unregulated by central authority. The research methodology gathered information about sanctions and procedures in all three categories. With regard to the first of these areas, we were interested in knowing whether “short suspension” practices in local districts were consistent with Supreme Court decisions and state law across schools of different sizes and in different locations (urban and rural) within the state. We were also concerned with factors that are hypothetically related to local acceptance of federal or state policy concerning school discipline. Information regarding knowledge of judicial decisions, statutory rules, and local practices were collected from principals, counselors, and teachers in the sample schools. These largely descriptive data tell us something about the context in which rules...
governing disciplinary action are introduced and provide information about their consistency (if not compliance) with centrally promulgated rules.

With respect to matters regulated by state law but not Supreme Court decision, such as expulsions, the initial area of interest concerned the kinds of rules adopted and their relationship to Supreme Court dicta, if not to its holdings. In addition, we gathered information concerning local knowledge of, and consistency in practice with, state law across schools of various sizes and settings.

For sanctions which are governed by neither judicial decisions nor the state code, we were primarily concerned with investigating current incidence and practice in Indiana. It might be supposed that unregulated alternatives will be preferred to regulated forms of discipline at least where regulation is not welcome at the local level. Because centralized governance of school disciplinary action is a relatively recent development and might be thought undesirable by local school officials, it seemed useful to inquire whether sanctions not yet addressed by the Court or the legislature were widely used.

C. Population and Sample

Research was carried out in fifteen Indiana high schools during the Spring of 1981. Only high schools were sampled; combined junior and senior high schools were excluded from the population because of the likelihood that different sanctions, procedures, and lines of authority would exist for the various age levels. Schools were selected on the basis of location (urban and rural) and size (small, medium, and large). Three schools were selected for each category except that of "small urban" schools. The latter category was not filled because no urban public schools in Indiana were listed as having classes falling into our range for "small" schools. Selection of schools for each category was based on random selection from a list of public schools published by the North Central Association. Although we were prepared to substitute for schools which declined to cooperate, this was necessary in only one instance.

Within each school, various measures were administered to the principal, counselor, and three teachers. In most instances, the principal himself

---

25 Urban communities were defined for research purposes as those having a population of more than 50,000 and rural communities included those with fewer than 25,000 residents.

26 Small schools were defined operationally as those with fewer than 150 students per class, medium schools as those with 200-450 students per class, and large schools had more than 500 pupils per class.

27 The sample population accordingly is:

<table>
<thead>
<tr>
<th>School</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Rural</td>
</tr>
<tr>
<td>Small</td>
<td>3</td>
</tr>
<tr>
<td>Medium</td>
<td>3</td>
</tr>
<tr>
<td>Large</td>
<td>3</td>
</tr>
</tbody>
</table>
participated; in a few schools, however, an assistant principal was chosen because he was the official primarily responsible for disciplinary matters. In two of the large urban schools, a dean of students (having significant disciplinary responsibility) also participated. Assistant principals and deans were counted with principals, however, for reporting purposes. The teachers were selected by the principals of the schools, and we cannot exclude the possibility that the latter chose teachers believed to be sympathetic with the school's disciplinary activities. Any actual bias of this kind is, however, largely irrelevant to our study; as it happened, teachers rarely answered questions regarding practice or knowledge in the same way as the principals who chose them.

D. Measures Used

1. Code Adoption

One of the first measures of response to judicial policy is found in legislative activity at the state and local level. The Indiana Due Process and Pupil Discipline Code was examined with a view towards its consistency with Supreme Court decisions in areas directly addressed by judicially created rules (i.e., short suspensions) and those where judicial decisions are only suggestive. The first of these provides some measure of consistency with governing judicial policy; the second, a measure of the way in which the legislature anticipated yet unannounced policy determinations. Finally, analysis of code provisions is necessary to determine the fit between local practices and statewide legislative policy.

2. Practices

We were interested in examining several aspects of current disciplinary practice in public schools. The first aspect concerns the kinds of sanctions now imposed by schools. From an impact perspective, it is important to know whether suspensions from school are routinely used after Goss v. Lopez or whether other kinds of sanctions are employed which may not be perceived as importing requirements of procedural formality. If new devices for handling misconduct have been introduced, their characters may be significant in judging whether substantive changes in discipline have resulted from imposition of procedural demands. For descriptive purposes, it is also important to determine the relative incidence of various sanctions across schools and the kinds of cases in which they are used.

The second aspect of practices studied concerns the use of procedures in connection with disciplinary action. More particularly, it is important

---

to know whether judicially or legislatively-imposed rules are followed and, equally significant, what procedures are followed where sanctions determined by courts or codes are not involved.

Investigation of these practices would have been conducted best through participant observation of a large number of cases. This strategy was not available because “hearings” are not scheduled in advance and because we could not place observers in the schools on a daily basis. We decided to use, as a second best choice, an interview technique emphasizing vignettes describing students and their misconduct. All respondents (principals, counselors, and teachers) were asked, given the situation set forth in the vignette, what disciplinary action would be taken in their schools and what procedures, if any, would be followed in each situation. Six basic fact patterns, with variations by gravity of offense and student’s prior record, were presented to each participant. In order to avoid any effect associated with the sequence of questions, the order of presentation for each respondent was determined by shuffling the cards containing the vignettes.

As a second step, we also obtained information on disciplinary action over the 1979-1980 academic year from each school. In most cases these data came from school records, although in a few cases, where records were unavailable, we had to rely on estimates by school administrators.

3. Knowledge of Procedural Rules

Because this study is concerned in part with consistency between local practice and judicial or legislative rules, we investigated what educators know of those rules and their sources. To the extent one is interested in compliance, data on knowledge is essential. Compliance with judicial or other commands presupposes knowledge of those commands together with conforming behavior. In addition, we sought to investigate whether knowledge of various legal requirements is differently distributed among school districts and among school personnel. Accordingly, onsite interviews with principals, counselors and teachers were conducted to ascertain their knowledge and understanding of Supreme Court decisions and state laws regarding student discipline.

All respondents were also asked whether procedural requirements imposed constraints on their activities. Perception of such constraints offers a rough measure of attitudes toward procedural notions in the school setting.

---

II. DISCIPLINE IN INDIANA HIGH SCHOOLS: SANCTIONS AND PROCEDURES

A. Short Suspensions and Compliance: Consistency with Judicial and Legislative Regulation

It is convenient to begin examination of disciplinary practices and procedures with short suspensions from school because the legal rules governing that sanction are clearest. All suspensions in Indiana are short suspensions; any exclusion from school beyond five days is treated as an expulsion. In the usual case, suspension is itself a sanction, but it may also be invoked as a precursor to expulsion. A student for whom the latter is proposed will routinely be suspended while the procedure for expulsion is initiated and, ordinarily, until the expulsion hearing is commenced. Presumably, a suspension will become an expulsion in those cases where the student does not request a hearing to oppose the latter penalty.

1. Incidence of Suspensions

Suspension from school has long been the primary formal disciplinary action invoked for misbehaving students and as Table I indicates, suspension remains an important disciplinary sanction in Indiana.

---

30 IND. CODE § 20-8.1-5.6(a) (1982).
31 In 1975, the year Goss v. Lopez was decided, it was estimated that 10% of all school children were suspended at least once during the school year and that an additional fraction was dismissed or discharged from school under threat of suspension. A REPORT OF THE CHILDREN'S DEFENSE FUND OF THE WASHINGTON RESEARCH PROJECT, INC., SCHOOL SUSPENSIONS: ARE THEY HELPING CHILDREN? 10 (1975).
TABLE 1

Proportion of Disciplinary Sanctions to Student Population by Size and Settings of Schools

<table>
<thead>
<tr>
<th>Size and Setting Of School</th>
<th>In-School Suspension</th>
<th>Suspension</th>
<th>Expulsion</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>N</td>
<td>%</td>
<td>N</td>
<td>%</td>
</tr>
<tr>
<td>Small (Rural)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>(3)</td>
<td>1%</td>
<td>(6)</td>
<td>1.5%</td>
</tr>
<tr>
<td>2</td>
<td>(4)</td>
<td>&lt;1%</td>
<td>(1)</td>
<td>&lt;1%</td>
</tr>
<tr>
<td>3</td>
<td>0</td>
<td></td>
<td>(3)</td>
<td>&lt;1%</td>
</tr>
<tr>
<td>Medium (Rural)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>(54)</td>
<td>5.6%</td>
<td>(59)</td>
<td>6.2%</td>
</tr>
<tr>
<td>2</td>
<td>(410)</td>
<td>30.4</td>
<td>(24)</td>
<td>&lt;1%</td>
</tr>
<tr>
<td>3</td>
<td>(69)</td>
<td>5.9</td>
<td>(10)</td>
<td>&lt;1%</td>
</tr>
<tr>
<td>Med. (Urban)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>(362)</td>
<td>25.5%</td>
<td>(108)</td>
<td>7.6%</td>
</tr>
<tr>
<td>2</td>
<td>(151)</td>
<td>10.4</td>
<td>(12)</td>
<td>&lt;1%</td>
</tr>
<tr>
<td>3</td>
<td>(154)</td>
<td>11.9</td>
<td>(51)</td>
<td>3.9</td>
</tr>
<tr>
<td>Large (Rural)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>(200)</td>
<td>7.4%</td>
<td>(39)</td>
<td>1.4%</td>
</tr>
<tr>
<td>2</td>
<td>(140)</td>
<td>8.5</td>
<td>(45)</td>
<td>2.7</td>
</tr>
<tr>
<td>3</td>
<td>(110)</td>
<td>5.3</td>
<td>(67)</td>
<td>3.2</td>
</tr>
<tr>
<td>Large (Urban)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>(434)</td>
<td>21.8%</td>
<td>(132)</td>
<td>6.6%</td>
</tr>
<tr>
<td>2</td>
<td>(405)</td>
<td>20.0</td>
<td>(106)</td>
<td>5.2</td>
</tr>
<tr>
<td>3</td>
<td>(304)</td>
<td>15.7</td>
<td>(16)</td>
<td>&lt;1%</td>
</tr>
<tr>
<td>Total</td>
<td>(1891)</td>
<td></td>
<td>(1408)</td>
<td></td>
</tr>
</tbody>
</table>

1. Students are excluded from class and kept in office for one to three days, but no record of such actions is kept.
2. Principal says that school does not have in-school suspension program but teachers may exclude a student for "a couple or three days."
3. Alternative schools are used rather than expulsion, and children over 16 are allowed to withdraw from school.
4. For children over 16, withdrawal is the usual outcome.
5. Principal reports that in-school suspension is used "to a small degree," but they apparently are not recorded in school disciplinary records.

The fifteen sample schools imposed in-school suspension, suspension from school, and expulsion on 3,590 occasions during the 1980-1981 school year. These schools serve a total population of some 21,350 students.

---

These three classes of disciplinary action cover virtually all formal sanctions reported by our respondents. We gathered data on corporal punishment, but these are not set out in Table 1 because only one school reported using this sanction. The principals and teachers...
thus the overall formal discipline rate for those sample schools was 16.8\%.

Expulsions, however, are rarely ordered in any of these schools, and formal disciplinary action is largely distributed between short suspensions from school and in-school suspension. The former accounted for 1,400 instances of disciplinary action, or 6.6\% of the student population. In-school suspensions, which do not involve removal from school premises but only from regular classrooms, will be discussed separately. It is important to note that this sanction accounted for 8.9\% of disciplinary action at all schools, even though only ten of the fifteen schools had adopted this relatively recent alternative to expulsion and out-of-school suspension of students. If in-school suspension is combined with the traditional short suspension, these forms of temporary exclusion produced 3,300 disciplinary actions, or a sanction rate of 15.5\%. It may or may not be true that, prior to adoption of in-school suspensions as a disciplinary alternative, most or all of these pupils would have been temporarily excluded from school. However, suspensions of various kinds clearly remain a common method of student discipline, affecting a substantial number of students in Indiana as well as nationally.

2. Short Suspension Procedures

Both Goss v. Lopez and the Indiana Due Process and Pupil Discipline Code now require that students faced with suspension from school be advised of the charges against them and, if those charges are denied, provided with a summary of the evidence regarding their misconduct and an informal opportunity to respond to the charges prior to removal from school. Twelve of the seventeen principals and deans (71\%), when asked to describe the procedures followed in suspension cases, mentioned all of the rights required by Goss and state law.\(^4\) Another two omitted one

---

### Suspension Procedures

<table>
<thead>
<tr>
<th>Rights</th>
<th>Some Rights</th>
<th>Not Mentioned</th>
<th>Don't Know</th>
</tr>
</thead>
<tbody>
<tr>
<td>Principals</td>
<td>70.6% (12)</td>
<td>11.8% (2)</td>
<td>17.6% (3)</td>
</tr>
<tr>
<td>Counselors</td>
<td>28.6% (4)</td>
<td>14.2% (2)</td>
<td>57.1% (6)</td>
</tr>
<tr>
<td>Teachers</td>
<td>17.5% (8)</td>
<td>5.5% (4)</td>
<td>60.0% (27)</td>
</tr>
</tbody>
</table>

\(\chi^2 = 30.570\)

\(p = .01\)

Two caveats concerning these data, pointing in different directions, should be stated. The first is that the data here are self-reported, which presents significant problems of
of these requirements, and three principals did not mention any of the procedures called for by judicial and legislative mandate. Moreover, all fourteen principals and deans who mentioned the Goss procedures also mentioned that these procedures were employed prior to suspension of students, as Goss further requires.

If we accept the principals' responses as substantially accurate, it appears that Indiana high schools generally handle short suspensions in a fashion consistent with Goss v. Lopez. The easiest explanation for the considerable degree of consistency is that the majority of schools are complying with judicial and legislative rules: that is, following those rules because they are authoritative declarations of law. There are impediments to this conclusion that will be discussed later, but even if compliance can be assumed, one is left to ask why schools have followed the law

accuracy. See Stapleton, Ito & Aday, Informant Error in a Court Survey (Paper presented to the Southern Sociological Society, Louisville, Ky., Apr. 1981). See also, Mauldin & Marks, Problems of Responses in Enumerative Surveys, 15 Am. Soc. Rev. 649 (1950). While we know what school personnel say they do or is done, it is more difficult to state confidently that what is reported in fact reflects what happens in these schools. Answers by school officials may, for example, reflect school policy rather than actual practice. See, e.g., K. Dolbeare & P. Hammond, The School Prayer Decisions 32-33, 43-45 (1971). We tried to anticipate this difficulty by securing multiple responders in all schools (principal, counselor, and three teachers); however, it developed that only principals even claim routine familiarity with the procedures followed for school disciplinary matters. Moreover, it seems to be true that only principals and deans are involved regularly in the school disciplinary process. Teachers act only as initiators of disciplinary decisions; their affirmative responsibility ends when the child is sent to an administrative office. Counselors likewise play little significant part in most disciplinary decisions, although they may, after discipline has been imposed, act as advisors to students or their families.

Accordingly, the data in this section represent what principals say takes place in their schools, without any reliable source of corroboration. On the other hand, the methodology used required respondents to describe, without prompting, what was done procedurally in the schools, and the vignettes offered them open-ended opportunities to describe both the action that might be taken and the procedures that would be used. This open-ended technique required principals and others to base their answers upon their knowledge and experience in the conduct of these matters, which offers some basis for believing that the responses provide a reasonably accurate measure of familiarity with operating practices and procedures.

In one case, the summary of evidence was not mentioned; in the other, opportunity to explain was omitted.

We also collected responses from counselors and teachers concerning suspension procedures in their schools. Their answers disagreed significantly from those of their principals. Less than 30% of the counselors and less than 20 percent of the teachers mentioned the three required steps when asked about disciplinary process in their schools. Approximately the same proportions mentioned that these steps were taken before suspension rather than after the fact. Interpretation of this disparity in responses presents some difficulty. Inconsistency might indicate inaccuracy in the principals' reports of procedures in their schools and particularly that the level of compliance with legal requirements is lower than their answers claim. However, the interviews made clear that in fact few teachers and counselors are actually involved in disciplinary matters and that they had little first-hand knowledge of the procedures employed within their schools. Accordingly, inconsistency of response probably indicates lack of knowledge rather than inconsistent knowledge or experience with disciplinary procedures.

These impediments will be discussed in section III(A) of this article.
despite contrary predictions by a number of thoughtful commentators.\textsuperscript{38}

To answer this question, it is important to note that predictions of non-compliance rested on several plausible assumptions. Initially, there was doubt about whether all schools and personnel would learn about \textit{Goss} and its requirements.\textsuperscript{39} This was a reasonable doubt to entertain, perhaps especially for small and rural school districts which may be isolated from the flow of relevant information. Secondly, there was reason to believe that school personnel would resent the intrusion that \textit{Goss} imposed on their activities and would find its requirements burdensome.\textsuperscript{40} Compliance assumes not only knowledge of but willingness to follow legal rules, and the second element might produce non-compliance even where the first exists.

Our survey suggests that skepticism about dissemination of \textit{Goss}' requirements was to some extent well-founded. It appears that, five years after \textit{Goss}, knowledge of both the decision and its specific rules remains incomplete. Table 2 indicates the reported knowledge of the \textit{Goss} decision itself; not by name, but by whether respondents know that the Supreme Court had ever established rules for short suspensions.

\textsuperscript{38} It was widely predicted, after \textit{Goss}, that some schools would not know of the decision or choose to ignore it, while others would truncate the hearing elements so as to render them merely perfunctory. \textit{E.g.,} Kirp, \textit{Proceduralism and Bureaucracy: Due Process in the School Setting}, 28 STAN. L. REV. 841, 860 (1976). This perception is strengthened by experience with local school resistance to other Supreme Court decisions. See S. WASBY, supra note 3, at 129-33; Birkby, \textit{The Supreme Court and the Bible Belt: Tennessee Reaction to the "Schempp" Decision}, in \textit{The Impact of Supreme Court Decisions} 110 (T. Becker & M. Feeley eds. 2d ed. 1973); but see Hazard, \textit{Goss} v. Lopez and \textit{Wood} v. Strickland: Some Implications for School Practice, 4 J.L. & EDUC. 605 (1975); Buss, \textit{Implications of Goss v. Lopez and Wood v. Strickland for Professional Discretion and Liability in Schools}, 4 J.L. & EDUC. 567, 570 (1975) (\textit{Goss} requires "only the most minimal" process).

\textsuperscript{39} See Kirp, supra note 38, at 860. It has frequently been pointed out that dissemination of Supreme Court decisions cannot be taken for granted. Knowledge varies with the nature of the audience, the methods of communication, and other factors. See S. WASBY, supra note 3, at 83, 99; R.M. JOHNSON, \textit{The Dynamics of Compliance} 58-95 (1967); see also Levin, \textit{Constitutional Law and Obscene Literature: An Investigation of Bookseller Censorship Practice}, in \textit{The Impact of Supreme Court Decisions} 119, 132 (T. Becker & M. Feeley eds. 2d ed. 1973) ("The lines of communication connecting appellate courts, trial courts, political elites and booksellers may be so tenuous and haphazard that policy messages emanating from state capitals either become garbled or peter out entirely before reaching the local bookstore.").

\textsuperscript{40} Experience with school prayer decisions provides one instance of reluctance of local schools to follow judicial policy. See sources cited supra note 38. \textit{Goss} may be perceived as interfering with the character-shaping enterprise that most schools consider a primary task, as casting doubt on the fairness of teachers and administrators, as impeaching the authority of school personnel, and as impeding maintenance of order in the school. See Kirp, supra note 38, at 854-59; P. GRAUL & J.W. JONES, \textit{Student Rights and Responsibilities Reversed: Current Trends in School Policies and Programs} (1976).
TABLE 2

Knowledge of Supreme Court Decision on Short Suspensions by Occupation and Size and Setting of Schools

<table>
<thead>
<tr>
<th>Knew of Decision</th>
<th>Principals (N=17)</th>
<th>Counselors (N=15)</th>
<th>Teachers (N=45)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Size of School</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Small</td>
<td>100% (3)</td>
<td>33% (1)</td>
<td>13% (1)</td>
</tr>
<tr>
<td>Medium</td>
<td>83% (5)</td>
<td>17% (1)</td>
<td>11% (2)</td>
</tr>
<tr>
<td>Large</td>
<td>50% (4)</td>
<td>0</td>
<td>11% (2)</td>
</tr>
<tr>
<td>Setting of School</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rural</td>
<td>80% (8)</td>
<td>11% (1)</td>
<td>11% (3)</td>
</tr>
<tr>
<td>Urban</td>
<td>57% (4)</td>
<td>17% (1)</td>
<td>11% (2)</td>
</tr>
</tbody>
</table>

As this Table indicates, only twelve of seventeen principals (70.6%) knew that the Supreme Court had decided a case dealing with suspension procedures, and virtually no teachers or counselors knew of such a decision. Contrary to what might plausibly have been supposed, however, neither size nor setting of school is strongly related to knowledge. Indeed, it appears that knowledge of the existence of the decision among administrators is somewhat greater in smaller schools in both rural and urban settings.

The same general pattern holds, moreover, when we asked those respondents who knew of *Goss* to state its requirements. Only seven of the twelve principals who knew of *Goss*, and of the seventeen principals overall (41%), revealed accurate knowledge of what *Goss* requires. As with knowledge of *Goss* itself, no difference in accurate knowledge exists across schools of different sizes and settings.

---

The following table summarizes these data.

**Accurate Knowledge of Suspension Procedures by Principals**

<table>
<thead>
<tr>
<th>Size of School</th>
<th>Principals With Knowledge (N=12)</th>
<th>All Principals (N=17)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Small</td>
<td>67% (2)</td>
<td>67% (2)</td>
</tr>
<tr>
<td>Medium</td>
<td>60% (3)</td>
<td>50% (3)</td>
</tr>
<tr>
<td>Large</td>
<td>50% (2)</td>
<td>25% (2)</td>
</tr>
<tr>
<td>Setting of School</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rural</td>
<td>63% (5)</td>
<td>50% (5)</td>
</tr>
<tr>
<td>Urban</td>
<td>50% (2)</td>
<td>29% (2)</td>
</tr>
</tbody>
</table>
If only forty-one percent of the school administrators knew accurately what *Goss* requires, but seventy-one percent followed its procedures,\(^\text{42}\) the basis for adopting those procedures must come from a source other than the judicial decision. The obvious alternative is state law, which imposes the same process elements as *Goss*. And, in fact, all but one of the principals and deans in our school population (94%) did describe accurately the state law requirements for suspension.

The consistency of practice with judicial policy that we found in Indiana seems to be attributable to knowledge of the state code rather than of *Goss*. In states without a code that closely follows *Goss*, and where knowledge of Supreme Court decisions is as low as it was in our sample schools, the skepticism expressed shortly after *Goss* may well be justified.

Knowledge of procedural requirements, from whatever source, does not by itself explain behavior consistent with those requirements. It was also hypothesized that some school officials who knew of the Supreme Court rules might resist their implementation. This same hypothesis might apply to legislative rules, to the extent they appeared to burden principals and school boards in their professional activities. When our data were collected in the spring of 1981, however, principals did not perceive these procedural rules as severe impediments to discharge of their administrative responsibilities. We asked respondents whether they viewed school disciplinary procedures as a constraint on their actions and found, with some surprise, that only slightly more than one-third of the principals and teachers so regarded them.

**TABLE 3**

<table>
<thead>
<tr>
<th>Occupation</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>Principal</td>
<td>35.5% (6)</td>
<td>64.7% (11)</td>
</tr>
<tr>
<td>Counselor</td>
<td>46.7% (7)</td>
<td>53.3% (8)</td>
</tr>
<tr>
<td>Teacher</td>
<td>35.6% (16)</td>
<td>64.4% (29)</td>
</tr>
</tbody>
</table>

The infrequency of constraint felt by those imposing discipline is particularly striking because the question addresses not only the requirements for short suspensions but also the highly elaborate process applicable to expulsions. Over time, therefore, the anxiety widely believed to attend *Goss* may have waned or even disappeared.

Several further factors may also contribute to the acceptance by Indiana

\(^{42}\) See * supra* text at note 34.
high schools of these procedural rules. One element is the genuinely rudimentary nature of the rules themselves. When initial emotions have cooled, it is difficult to view what Goss requires as a serious obstacle to disciplinary action. A second factor may be that the Supreme Court has not added to the requirements imposed on schools since the Goss decision itself; indeed, the two most recent decisions declined to extend even Goss' minimal process to corporal punishment and to academic penalties invoked by educational institutions. If Goss might initially have been resisted because of what it seemed to threaten by way of further regulation, that apprehension has doubtless lessened over recent years. Finally, the emergence of in-school suspensions as a formal but unregulated alternative sanction may have diminished the sense of constraint in some schools. To the extent that schools can continue to act informally in a considerable number of its disciplinary matters, imposition of minimal requirements for some other sanctions seems less onerous.

B. Expulsions

1. Incidence

As Table 1 indicated, expulsions (including any suspension from school for more than five days) are relatively infrequent. Only five of the sample schools employed that sanction for more than one percent of the student population and only one school for more than three percent. Whether the rate of expulsion can be called low is another matter, however. Because expulsion is the most serious step that a school can take, any significant rate of expulsion may be regarded as serious. Moreover, expulsion constitutes a significant proportion of all disciplinary actions in some schools, as the following table reveals.

---

"Ingraham v. Wright, 430 U.S. 651 (1977)."
"University of Mo. v. Horowitz, 435 U.S. 78 (1978)."
TABLE 4

Relative Frequency of Sanctions

<table>
<thead>
<tr>
<th>School</th>
<th>In-School Suspension</th>
<th>Short Suspension</th>
<th>Expulsion</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Small (Rural)</td>
<td>1</td>
<td>30%</td>
<td>60%</td>
<td>10%</td>
</tr>
<tr>
<td></td>
<td>2</td>
<td>DNH</td>
<td>80%</td>
<td>20%</td>
</tr>
<tr>
<td></td>
<td>3</td>
<td>0</td>
<td>75%</td>
<td>25%</td>
</tr>
<tr>
<td>Medium (Rural)</td>
<td>1</td>
<td>45%</td>
<td>49%</td>
<td>7%</td>
</tr>
<tr>
<td></td>
<td>2</td>
<td>90%</td>
<td>5%</td>
<td>5%</td>
</tr>
<tr>
<td></td>
<td>3</td>
<td>82%</td>
<td>12%</td>
<td>6%</td>
</tr>
<tr>
<td>Medium (Urban)</td>
<td>1</td>
<td>75%</td>
<td>22%</td>
<td>3%</td>
</tr>
<tr>
<td></td>
<td>2</td>
<td>0</td>
<td>93%</td>
<td>7%</td>
</tr>
<tr>
<td></td>
<td>3</td>
<td>75%</td>
<td>25%</td>
<td>0</td>
</tr>
<tr>
<td>Large (Rural)</td>
<td>1</td>
<td>0</td>
<td>84%</td>
<td>16%</td>
</tr>
<tr>
<td></td>
<td>2</td>
<td>DNH</td>
<td>76%</td>
<td>24%</td>
</tr>
<tr>
<td></td>
<td>3</td>
<td>DNH</td>
<td>63%</td>
<td>38%</td>
</tr>
<tr>
<td>Large (Urban)</td>
<td>1</td>
<td>71%</td>
<td>22%</td>
<td>8%</td>
</tr>
<tr>
<td></td>
<td>2</td>
<td>78%</td>
<td>20%</td>
<td>2%</td>
</tr>
<tr>
<td></td>
<td>3</td>
<td>DNH</td>
<td>95%</td>
<td>5%</td>
</tr>
</tbody>
</table>

*Percents do not add up to 100 due to rounding.
†DHN = Does not have.

The relative frequency of expulsion varies considerably among schools, although in only large rural schools does that sanction involve a large number of students.

It should be said also that the manner of treating and recording expulsions in some schools diminishes the reported incidence of this sanction. Although the Indiana School Discipline Code establishes a number of grounds for expulsion,\textsuperscript{45} truancy seems to be a major reason for that sanction. In the large rural school with sixty-seven expulsions, for example, fifty-three are truancy cases. Interview and vignette data reveal that two of the medium sized urban schools handle truancy matters differently, however. In one, children over sixteen years of age are given a choice of withdrawal from school or attendance at an alternative school program.

\textsuperscript{45} Ind. Code § 20-8.1-5-4 (1982) (This provision sets forth the grounds for expulsion or suspension, including use of violence, force, threat, passive resistance or other conduct constituting an interference with school purposes, damage or attempt to damage or steal school property, damage to or stealing of private property on school grounds or during an educational function off school grounds, causing or threatening physical injury, possessing or being under the influence of drugs, and a variety of other forms of misconduct).
whereas truant children under sixteen are sent to the alternative school. The alternative school is a one-half day program within the school, but subject to a different curriculum. Neither withdrawal nor assignment to the alternative school is treated as an expulsion, no “due-process” hearing is held, and the expulsion rate falls accordingly (in this case, to zero). In a second medium urban school, truant students over sixteen are simply encouraged to withdraw, without the filing of a notice of expulsion. This method also reduces the incidence of formal expulsions.

Accordingly, the expulsion rates reflect as much about reporting practices and internal devices for dealing with truant children as they do about the use of the sanction itself. The reported expulsion rate does not reflect all children whose withdrawal from school is prompted by misconduct, but only those who are still within compulsory attendance age limits or wish to continue despite allegations of misconduct. Unfortunately, we did not have access to withdrawal records and thus do not know how many students accepted permanent removal rather than insist upon use of expulsion procedures.

2. Procedures

It is not possible to speak of “compliance” with federal judicial policy in connection with expulsion procedures, at least above a rudimentary level. The Supreme Court has not yet decided what procedures must accompany that sanction, although something beyond the Goss requirements probably is necessary. The Indiana Due Process and Pupil Discipline Code does, however, specify procedures to be used for expulsions and consistency with those norms can be evaluated. The current requirements, many of which have been in place since 1971, are highly elaborate. The first step involves submission of written charges by the principal to the superintendent of schools. If the superintendent decides that there are reasonable grounds for investigation, he is required to appoint a hearing examiner within a specified period. The examiner must then send a statement to the pupil and his or her parents explaining the procedure for initiating a hearing and advising them of the violation claimed, the acts constituting the violation, a summary of the evidence to be presented against the student, the penalty requested by the principal, the hearing procedures used in the event of challenge by the student, and their substantive rights to representation, discovery of records and witnesses, and to the hearing itself. If the student requests a hearing, that will be held upon a record (by short-hand reporter or audio or videotape, supplied by the school). The student is also entitled to findings concerning both behavior and sanction, which will be reviewed by the superintendent.40

40 Id. § 20-8.1-5-8.
The hearing itself is a highly formalized procedure, with considerably more protection for the student than is usually true of administrative hearings. The pupil has not only the rights listed above, but also rights to presentation of evidence, sworn testimony, and to discovery of the evidence to be used against him. The hearing is closed for the protection of the student's privacy. Most remarkably, the child is entitled to the privilege of remaining silent throughout, coupled with an express right not to be punished or threatened with punishment for refusing to testify. Moreover, there is a stated right to a severance of hearings in the event that more than one student is involved and it appears that prejudice might result from a joint hearing. Finally, provision is made for a right to appeal. The only concession to notions of informality usual in administrative hearings lies in the provision that the hearing examiner is not bound by rules of evidence or courtroom procedure.\footnote{Id. § 20-8.1-5-10.}

Table 5 describes the extent to which principals mentioned various expulsion procedures when asked to recall the rights associated with that penalty.\footnote{We also asked counselors and teachers about the procedures followed in expulsion cases in their schools. As with suspensions, however, it seems that teachers are generally unfamiliar with those procedures, largely because they take no active part in expulsion matters. Indeed, this is even more true for expulsions than was so for suspensions, since the former are handled, in one teacher's words, "downtown."}
### TABLE 5

Expulsion Procedures Reported by Principals and Deans (N=16)

<table>
<thead>
<tr>
<th></th>
<th>Percent</th>
<th>No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preliminary Rights</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Written Charges</td>
<td>93.8</td>
<td>15</td>
</tr>
<tr>
<td>Hearing Examiner</td>
<td>93.8</td>
<td>15</td>
</tr>
<tr>
<td>Notice of Hearing</td>
<td>100.0</td>
<td>16</td>
</tr>
<tr>
<td>Notice of Rights</td>
<td>87.5</td>
<td>14</td>
</tr>
<tr>
<td>Discovery Rights</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Summary of Evidence</td>
<td>31.3</td>
<td>5</td>
</tr>
<tr>
<td>Discovery of Affidavits</td>
<td>31.3</td>
<td>5</td>
</tr>
<tr>
<td>Identity of Witnesses</td>
<td>37.4</td>
<td>6</td>
</tr>
<tr>
<td>All</td>
<td>31.3</td>
<td>5</td>
</tr>
<tr>
<td>Hearing Rights</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hearing</td>
<td>93.8</td>
<td>15</td>
</tr>
<tr>
<td>Representation</td>
<td>93.8</td>
<td>15</td>
</tr>
<tr>
<td>Record</td>
<td>37.5</td>
<td>6</td>
</tr>
<tr>
<td>Closed Hearing</td>
<td>56.3</td>
<td>9</td>
</tr>
<tr>
<td>To be Heard</td>
<td>31.3</td>
<td>5</td>
</tr>
<tr>
<td>Silence</td>
<td>25.0</td>
<td>4</td>
</tr>
<tr>
<td>Sworn Evidence</td>
<td>100.0</td>
<td>16</td>
</tr>
<tr>
<td>Produce Witnesses</td>
<td>68.8</td>
<td>11</td>
</tr>
<tr>
<td>Presence</td>
<td>43.8</td>
<td>7</td>
</tr>
<tr>
<td>Right to Appeal</td>
<td>62.5</td>
<td>10</td>
</tr>
</tbody>
</table>

In addition, several rights were mentioned fewer than four times by the principals, and some were not mentioned at all. Among these are the rights to a severance of hearings, not to be punished for failure to testify at the hearing, and to articulated findings of fact and recommendations for sanction.

In view of the complex expulsion requirements set forth by Indiana law and the open-ended question format, the principals' responses in most areas are striking in their consistency with state law. All or all but one or two of the sixteen principals and deans reported use of the Code’s preliminary procedures for initiating the process and notifying the child and parents of their rights, for which these respondents bear some responsibility themselves. In addition, all or all but one mentioned the chief characteristics of the expulsion hearing: the hearing itself, the right to
representation, and the use of sworn testimony. Significant numbers also mentioned the student's right to produce witnesses (69%), to appeal (63%), and to a closed hearing (56%). The rights least often mentioned had to do with discovery of evidence, the right to be heard, and the right to silence.

Even as an indication of knowledge of state law, the rate of accurate responses by principals and deans would be impressive. As a measure of practice, the results are even more remarkable. It is also possible that, for several reasons, these respondents underreported the extent of compliance. One reason is the interview technique used. Not only may administrators have forgotten procedures that in fact are used, but they may also have collapsed categories of rights that we (and the Code) considered separate. For example, a respondent who said there was a right to a hearing might have assumed that a hearing necessarily entails the rights to be present and to be heard; having said the first, he may well have assumed that he reported the others too.

In evaluating the reported compliance rate, it is also important to remember that expulsions are administered primarily by hearing examiners rather than by principals. The latter group might well be unfamiliar with various procedures used, or not know that those procedures were required by statute rather than imposed by examiners as a matter of discretion. Accordingly, we interviewed school superintendents (who may act as hearing examiners) and independent hearing examiners in the sample districts concerning the procedures used in expulsion cases. It was, unfortunately, difficult to arrange onsite interviews with these officials and, in the result, a telephone survey was used in which respondents were asked whether specific statutory procedures were followed. Principals or hearing examiners from fourteen of the fifteen districts agreed to the telephone interview, and virtually all stated that they followed every practice required by the state code. The few deviations from this response pattern are insignificant: one respondent said that he did not allow discovery of the witnesses against the pupil, two said they did not place witnesses on oath, and three required greater formality by forbidding hearsay evidence during expulsion proceedings.

In summary, it seems that at least the initial and the most important procedures, according to both principals and superintendents or hearing examiners, are followed in most if not all of the school districts surveyed. Whether rights such as discovery, silence without punishment, and the like are similarly respected is harder to state with confidence. While virtually all superintendents and hearing examiners reported compliance with those rights, we have only occasional confirmation from a second source. On the other hand, the lack of confirmatory evidence from principals regarding these rights may be attributed to lack of recall at the time or to the assumption that one stated right necessarily implied other rights.
The degree of formal compliance reported by our respondents is particularly significant because of the complex and technical procedure required in Indiana. It may be, however, that compliance is possible because the elaborate mechanism for expulsion is used only rarely. The creation of a procedural scheme by judicial or legislative command does not necessarily mean that it will be employed by those for whom it was established. Lack of knowledge, real or apparent inconvenience, and the wish to avoid confrontation with authority, among other factors, may lead the presumed beneficiaries of due process hearings not to initiate the use of those procedures.\footnote{Kirp, supra note 38, at 861. The same view was proposed by another careful observer of schools and law: "[T]he cost to most students of launching a challenge to disregard of \textit{Goss} is very great indeed. They are "in" the system, part of an ongoing set of relationships. Disapproval of a student's conduct by teachers, counselors, and administrators can be visited upon the student in countless painful and legally unprotected ways." Buss, supra note 38, at 574.}

David Kirp, one of the most astute observers in the school law area, suggested that even the informal procedures mandated by \textit{Goss} might not often be pursued by students.

Even if \textit{Goss} is not ignored, few hearings may in fact be held. In other noncriminal law contexts where the Supreme Court has established a right to due process, the Court has not required that the hearing itself take place, but only that notice and the \textit{opportunity for a hearing} be provided. That opportunity has been infrequently utilized by those who potentially might benefit from it. For example, a mere 6 percent of those denied welfare benefits or stricken from the welfare rolls request a hearing.

If this prediction is plausible for informal proceedings, which take place within the relatively familiar setting of the local school, it seems even more so for formal expulsion procedures conducted by the school superintendent or hearing examiner. Accordingly, we gathered data on the frequency with which students faced with expulsion requested due process hearings and the rate of expulsion after a hearing. Only medium and large schools are included, because of the low incidence of this sanction (never more than one) in small rural schools.
TABLE 6
Percentage of Expelled Students Requesting Hearing and Expelled After Hearing

<table>
<thead>
<tr>
<th></th>
<th>Number Expelled</th>
<th>% Requesting Hearing</th>
<th>% Expelled After Hearing</th>
</tr>
</thead>
<tbody>
<tr>
<td>Medium Rural</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>8</td>
<td>75</td>
<td>90</td>
</tr>
<tr>
<td>2</td>
<td>22</td>
<td>30</td>
<td>100</td>
</tr>
<tr>
<td>3</td>
<td>5</td>
<td>20</td>
<td>100</td>
</tr>
<tr>
<td>Medium Urban</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>15</td>
<td>9</td>
<td>90*</td>
</tr>
<tr>
<td>2</td>
<td>12</td>
<td>5</td>
<td>90*</td>
</tr>
<tr>
<td>3</td>
<td>0</td>
<td>100**</td>
<td>33*</td>
</tr>
<tr>
<td>Large Rural</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>39</td>
<td>22x</td>
<td>75</td>
</tr>
<tr>
<td>2</td>
<td>45</td>
<td>20</td>
<td>75</td>
</tr>
<tr>
<td>3</td>
<td>67</td>
<td>20</td>
<td>75</td>
</tr>
<tr>
<td>Large Urban</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>49</td>
<td>5</td>
<td>90*</td>
</tr>
<tr>
<td>2</td>
<td>10</td>
<td>45</td>
<td>75*</td>
</tr>
<tr>
<td>3</td>
<td>16</td>
<td>71</td>
<td>50</td>
</tr>
<tr>
<td>Average</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>34.75</td>
<td>78.75</td>
<td></td>
</tr>
</tbody>
</table>

*Includes attendance cases.

**The hearing officer in this district encourages students and parents to request a hearing. The officer holds a conference with the student and parents to discuss the hearing procedure and their rights, although the letter required by law is also sent. The hearing officer attributes the 100% hearing request rate to this process.

*Estimate by superintendent or hearing examiner.

Overall, slightly more than one-third of the expelled students requested a hearing prior to that decision. In absolute terms, this rate is low, confirming Professor Kirp's hypothesis. Relatively, however, it is considerably higher than that for welfare beneficiaries adversely affected by agency decisions and somewhat higher than the rate of appeals from adverse determinations of eligibility for disability benefits. It is also significantly higher than the rate of requests for hearings by unsuccessful social security disability claimants who are denied benefits upon initial request.

---

31 Kirp, supra note 38, at 861.
32 It has been estimated that there were 38,000 cessations of disability benefits in 1971 and 10,941 requests for consideration, a challenge rate of 29%. Richardson v. Wright, 405 U.S. 208, 224 (1972) (Brennan, J., dissenting).
Several factors might influence this request rate in different ways. On the one hand, lack of information about the availability of review, often a problem in other settings, seems not to arise here if we believe the principals and superintendents who say that notices are routinely sent to children and parents when expulsion is sought. And, unlike some other settings, it seems unlikely that the pupil and his family are concerned with preserving goodwill between child and school, since expulsion will terminate the relationship between them. On the other hand, expulsion may not be wholly unwelcome from the student’s point of view. To the extent that truancy has occasioned this step and the child is over sixteen, expulsion simply allows the child to continue his previous behavior without any sense of conflicting obligation to or threat from the school. Other factors might also account for the infrequency of challenges to expulsion. It may be that expulsion is ordinarily sought when the evidence of misconduct is clear. This is usually true with truancy and may be in other situations as well. Where the misconduct is indisputable, challenge either to the charges or the sanction will often seem futile, a perception confirmed by the high rate of expulsion (79%) where hearings are held. In addition, some students and parents may view expulsion as the action of public authority against which they are relatively powerless. Ironically, it is at least plausible that the very formality of the proceeding, which is detailed in the notice letter sent upon initiation of the process, engenders anxiety and a sense of futility among unsophisticated parents and children, leading them to avoid an apparently formal and difficult process with which they do not feel competent to deal.

In addition to the infrequency of challenges to expulsion decisions, schools may have reduced the demand for procedures by using alternative strategies for students with severe truancy problems. To the extent schools encourage or allow students over sixteen to withdraw, or place them in alternative schools, the necessity for expulsion procedures is diminished. Withdrawal ordinarily involves no process and the same seemed to be true in the sample schools for educational transfers. We do not have data on the number of withdrawals or transfers in the sample schools nor, of course, on the number of withdrawals or transfers occasioned by student misconduct. However, we do know that truancy cases fall heavily in the withdrawal category and that, in schools with high expulsion rates, truancy is the most common reason for that sanction. It seems a fair inference that significant numbers of pupils are removed from school, permanently or indefinitely, without resort to formal procedure.

The use of these alternatives to expulsion may suggest that, whatever

---

See Kirp, supra note 38, at 861. It may, however, be that while notice is sent, the student and his parents cannot read or understand what they receive. The family may be functionally illiterate or the advice so phrased as to make comprehension difficult for people unused to formal communications.
the level of formal compliance with the state Code, some Indiana schools are "avoiding" or "evading" its substance. As with the widespread use of "in-school" rather than out-of-school suspensions, whether these strategies amount to avoidance or evasion of state law requirements will be taken up later in this discussion.55

C. In-School Suspension

Suspension and expulsion from school are the "traditional" methods of formal student discipline. However, a variety of alternatives have also found a place in public schools, many of which first appeared or gained popularity since the Goss decision.56 The common element of these alternative programs lies in suspending the misbehaving pupil from regular classes and privileges, but not from the school itself. Beyond this general characteristic, however, alternative discipline strategies include a variety of programs bearing a variety of labels. Some schools employ a "cooling off" or "time out" room, to which students are referred for short periods of time in order to "unwind."57 Others may rely on a "suspension room" or supervised study hall in which pupils are expected to complete regular and perhaps supplementary class assignments. "In-school suspension" may also include considerably more sophisticated programs than those just described. Some schools employ alternative classrooms in which ability, achievement, and preference testing is done and a special teacher administers assignments, designed by him- or herself or by the regular classroom teacher.58 Special tasks, such as study related to "values clarification," may be included.59 And a few schools have adopted behavior modification, group counseling, and other psychodynamic techniques for disruptive students who are removed from class.60

It seems certain that even within these categories of in-school suspension, significant differences in the nature of the sanction exist. The label "behavior modification" has no single meaning within the school setting; it may be applied to a sophisticated system based on a token economy.61

---

55 See infra text accompanying notes 81-82.
57 McClung, supra note 56, at 63; McClung, School Classification: Some Legal Approaches to Labels, 14 INEQUALITY IN EDUC. 17, 22 (1973).
59 Zimmerman & Archbold, supra note 58, at 66.
60 McClung, supra note 56, at 64-65; Levine, Glavin, Quay, Amesley & Werry, An Experimental Resource Room for Behavior Problem Children, 38 EXCEPTIONAL CHILDREN 131 (1971).
61 McClung, supra note 56, at 64.
to placement in a ten by eight foot plywood booth, or to any other enterprise whose general purpose includes reformation of the pupil's conduct in school. The same variety of meaning obtains for the "time-out" room, which is sometimes described as an area providing a "non-punitive atmosphere, with perhaps a comfortable couch, and books and magazines around the room" but may also refer simply to an isolation room in which the student is confined for some period of time.

1. Incidence

Ten of the fifteen sample schools in Indiana employed some form of in-school suspension. As is true nationally, various labels are applied to these programs. One calls its version a "learning center," another a "behavior clinic," a third school sends pupils to a "secluded room," and a fourth calls its program an "alternative high school." The remainder are content with the terms "in-school" or "on-site" suspension. Somewhat different arrangements for students are also included within the general category of in-school suspension, although program characteristics are not as different as their labels might suggest and, moreover, are generally unrelated to the label attached to the program. The "behavior clinic," for example, apparently amounts to confinement in the principal's office, and the "alternative high school" differs from other kinds of in-school suspension primarily in the fact that students are sent to a separate building on the grounds rather than to a separate room within the school building.

An "in-school suspension" program used in Connecticut was described in the following way:

Rather than spend the days of suspension in academic limbo, students here are instead isolated from their classmates by being placed in booths in the behavior modification lab. There, academic-oriented time is alternated with recreational periods every 15 minutes in another room.... In the two months that the project has been underway... the counselors report a reduction in recurring problems.

A student, said [the principal], can be placed in the booth for any infraction of school rules, from smoking on school grounds to fighting or cutting classes. Prior to any decision to suspend, a conference is held with the child's parents.

While in the booth, the student usually is given assignments, either by his teacher or a counselor-psychologist. "The student has an educational day that is structured," said... a counselor. "If he needs help with English or math, we can hook him up with a tutor."

While the plywood booths are soundproof and only 10 by 8 feet in size, [the counselor] said their purpose is not "isolation for the sake of isolation. The kids need a break every 15 minutes because the booths have no stimulation. It would not be humane to keep anybody in there all day."


The "time-out" room in a one non-sample Indiana middle school is a 5 by 6 foot room which was used (despite not having been installed with lights, a window, or a ventilation
The most common in-school suspension program consists of placement in a separate, supervised room for a period of one to five days. The pupil's regular classroom teachers are responsible for providing assignments, for which (unlike suspension from school) the student may receive credit. Suspended children are generally isolated from the rest of the student body, entirely or at least during class hours. The principal effect of this sanction in the sample schools consists in removing children from their usual classes. Schools did not report use of special testing for suspended pupils nor did any special curriculum seem to be available.

By whatever name and with whatever real meaning, in-school suspension has become, within a relatively brief period, the most common method of student discipline in the public high schools we investigated. Despite the fact that this sanction is not formally employed in one-third of the sample schools, it accounts for more disciplinary actions than any other device. The overall rate for in-school suspension was 8.9% of the student population at all fifteen schools and 13.8% of the student population if only schools with in-school suspension are counted. This punishment is particularly common in medium and large schools, where it accounts for between 45 and 90% of all sanctions. 

The rise of in-school suspension has had two significant effects on the overall frequency and distribution of disciplinary sanctions. The first concerns the rate of sanctions in various schools. Table 7 indicates the disciplinary rates for medium and large schools controlling for availability of in-school suspension. (Small schools are excluded because their formal discipline rates are uniformly low and closely comparable).

---

system) for emotionally disturbed students. The area director of special education observed that this is "a technique typically used with emotionally handicapped students. I think about anywhere you go, you'll see some kind of time-out system." The principal of this school described the room's function in the following way: "The time-out room is to be used, for 3-5 minutes, when a child becomes hyperactive, disruptive, or abusive to other students. It's only there so they can calm down in isolation. It in no way is to be used as punishment or a disciplinary measure." As it happened, the first student placed in the unfinished room developed a claustrophobic reaction. Leonard, *The Learning Process*, Bloomington (Ind.) Herald-Telephone, Sept. 3, 1980.

* It should be added that these figures understate, if anything, the use of this form of discipline. We included in our data only schools with formal programs, where in-school suspension was recognized as a special disciplinary alternative. We thus did not include a medium-sized urban school where the principal stated that the school did not have an in-school suspension program but also observed that teachers were allowed to exclude students from class "for a couple of three days." No records were kept of such actions in this school and their frequency is accordingly unknown. In addition, two schools with formal in-school suspension did not keep records concerning this sanction, although the principal reported that it was used "from time to time." If we could include these informal or unrecorded, but relatively lengthy, removals from class, the incidence of in-school suspension would rise appreciably.
Numbers and Rates of Suspension Per Population for Urban and Rural Schools With and Without In-School Suspension

<table>
<thead>
<tr>
<th>With or Without ISS</th>
<th>Urban No.</th>
<th>Rural No.</th>
<th>Mean Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>With ISS</td>
<td>1826</td>
<td>661</td>
<td>22.3</td>
</tr>
<tr>
<td>Without ISS</td>
<td>722</td>
<td>362</td>
<td>11.7</td>
</tr>
</tbody>
</table>

Schools with a formal in-school suspension program have significantly higher rates of disciplinary action than those which rely on suspension and expulsion alone. This effect is found in both urban and rural schools in about the same degree: the formal disciplinary rate is almost twice as high for both settings when in-school suspension is available. The same holds true when size of schools is controlled; no significant differences generally were found between medium and large schools with respect to rates of disciplinary actions. Thus, availability of in-school suspension seems to produce effects independent of size or setting of school.

Adoption of in-school suspension seems to have an effect on the distribution as well as the frequency of sanctions. As Table 1 revealed, the frequency of suspension from school declines sharply where in-school suspension is used. The average out-of-school suspension rate for the seven medium- and large-sized schools with both alternatives is 4.4% of the student population, whereas the rate of suspensions from school for the five schools without an in-school alternative is more than twice as high (9.5%). These figures indicate that the use of in-school suspension increases the frequency of formal sanctions, but decreases the relative gravity of disciplinary actions by drawing off some cases that might have resulted in temporary exclusion from school.

These results are not entirely surprising. Various costs are associated with the use of relatively severe school penalties. Due process is required for both suspensions and expulsions and, even though the requirements for the former are rudimentary, they still may deter its use. Moreover, the Indiana state school funding law, like that of a number of other states, depends on “average daily school attendance,” and children suspended or expelled from school are not counted for this purpose. When disciplinary alternatives are available that do not imply either procedural

---

66 Ind. Code § 21-2-12-7 (1975) (this provision provides that a school’s “entitlements” for tax purposes are determined in part by multiplying the “average daily attendance” of that school for the previous year by a fixed sum).
requirements or financial cost, they may be invoked more frequently and may be substituted for more costly forms of discipline.

2. Procedures

In-school suspension is usually administered with the informality associated with temporary exclusions from school prior to Goss v. Lopez. Parents are notified of the suspension from classes and, in some schools, are required to sign a notice allowing the student to participate in the suspension program.

It was reported in at least one school that refusal of parental permission would lead to commencement of expulsion proceedings. In other schools, however, telephone notification may be all that is undertaken and, in several, suspension from classes is considered so informal that its imposition is not entered on the student's permanent record. Whether parental notice is formal or not, however, it seems that no hearing or other process (even of a rudimentary kind) is employed prior to or in connection with the decision to suspend a child from classes.

The lack of procedure associated with in-school suspension is considered one of its attractions both by local administrators and in the educational literature. Whether current practices will ultimately be found satisfactory is a matter that will be discussed shortly. Certainly, however, these practices are not expressly regulated either by Supreme Court decisions or by the state Code, and it can be argued that even the rudimentary procedures of Goss v. Lopez will be held unnecessary when courts ultimately address in-school suspensions.

III. COMPLIANCE, IMPACT, AND THE EFFECT OF JUDICIAL DECISIONS

The previous section explored the behavior of school officials in connection with three kinds of disciplinary sanctions. For one of them, short suspension, both Supreme Court decision and state law, require procedures for notice and hearing. We found general but not universal consistency in practice with these procedural requirements. This level of consistency seemed to be attributable more to state law than judicial policy. It also appeared that a number of schools regularly use in-school suspension, an unregulated disciplinary sanction, where suspension might

---

67 See, e.g., Meares & Kittle, In-House Suspension, 60 NASSP BULL. 60, 62-63 (1976). Several of our respondents said that in-school suspension was adopted because hearings were not required.
68 See infra text accompanying notes 94-105.
69 Goss, 419 U.S. 565.
70 IND. CODE § 20-8.1-5-6 (1982).
have occurred previously. The popularity of in-school suspension is based, in part, on the assumption that removal from classes can be imposed without a hearing or any other process. These circumstances suggest, but do not demonstrate, the existence of some form of avoidance or evasion of judicial and legislative mandates by resort to a sanction that can be administered informally. A similar strategy was observed in connection with expulsions. The level of reported formal compliance was remarkably high, but the use in some schools of alternative strategies (such as encouraged withdrawal from school) presents issues of substantive compliance.

This section examines certain methodological and theoretical issues concerning the relationship of observed behavior and legal rules that are raised by our findings. It appears that very few of the findings reported in Part II can be evaluated in terms of traditional legal effectiveness theory and, conversely, that these notions can explain little of what was observed. The discussion below explores the difficulty of evaluating school disciplinary behavior under traditional notions of legal effectiveness, compliance, avoidance and evasion, and the reasons for this difficulty.

For some time, social and political scientific discussion of judicial action has focused primarily on locating gaps between legal norms and official or community behavior. Donald Black has summarized this kind of inquiry in the following way:

With one phrase, legal effectiveness, we capture the major thematic concern of contemporary sociology of law. The wide range of work that revolves around the legal effectiveness theme displays a common strategy of problem formulation, mainly a comparison a legal reality to legal ideal of some kind. Typically a gap is shown between law-in-action and law-in-theory. Often the sociologist then goes on to suggest how the reality might be brought close to the ideal. Law is regarded as ineffective and in need of reform owing to the disparity between the legal reality and the ideal.¹⁷

Legal effectiveness research most commonly focuses on “compliance” with legal commands, meaning the extent to which officials and laymen obey rules known and directed to them. Attention may also be directed to “avoidance” or “evasion” of legal rules. If an agency affected by some recent rule of law modifies its behavior so as to make the law inapplicable in terms to its practice, that change is said to “avoid” the legal command if it is successful in escaping the scope of the command and to “evoke” the law if it is not.²² Plainly, classification as avoidance or evasion will

depend on legal action subsequent to both utterance of the initial rule and the agency's reaction to it.

These aspects of the legal effectiveness approach are subject, however, to certain limiting assumptions. They suppose, initially, that a relatively clear norm exists against which the behavior of those subject to the norm can be measured. This requires that the court or legislature have undertaken to establish a precise norm. Secondly, legal effectiveness research assumes that one can accurately identify the reason for conduct that is consistent or inconsistent with legal norms. To say that certain conduct does or does not comply even with a clear norm, the following circumstances must be true:

1. The norm must be known to those whose behavior it governs and must be understood by them accurately. Behavior that adventitiously comports with what is ordered does not reflect compliance with that order; similarly, non-conforming conduct does not amount to non-compliance unless the actor is aware of the inconsistent rule.
2. If the norm imposes a requirement that may be waived by the beneficiary of the rule, it must be known to those for whose protection the norm was established. If the rule is not mandatory in all instances, and no one invokes it, judgments about non-compliance cannot be drawn.
3. By the same token, those benefitted by some rule must choose to assert that rule, where it is known, before it can be said that failure to provide that benefit constitutes noncompliance.
4. The behavior of the officials in providing a benefit (following a rule) must be produced either as a matter of course (that is, because the rule always requires that behavior) or because of demands by rights holders.

Finally, to the extent that comparison of norms and conduct constitutes the sole or primary issue under investigation, the legal effectiveness approach supposes that legal rules are important solely or primarily for what they expressly command of social actors.\(^1\)

These assumptions have been challenged in recent years, primarily on two grounds. One is that such an inquiry entails methodological problems which can rarely be overcome and therefore limit the utility of this inquiry for explaining the function of legal rules. The second concerns the theoretical assumption upon which such research seems to be based: that judicial decisions are important because of what they expressly command of officials or members of the community. This assumption has been questioned by those who hold that promulgation of legal rules has other functions that are at least as important as the direct orders they convey and should be understood as part of the nature of judicial or legal action itself.

\(^{1}\) I am indebted to Professor Richard Lempert of The University of Michigan Law School for suggestions regarding the formulation of these assumptions.
A. Methodological Problems

1. The Problem of Clarity of Legal Norms

Legal effectiveness research is concerned with the fit between legal norms and behavior. For such research to be done, relevant legal norms must be identified and their content specified with considerable accuracy. Unfortunately, legal rules cannot always be defined precisely, and this is very often the case with judicially established rules.\textsuperscript{74} A judicial rule may be unclear because what it requires of people is expressed ambiguously or because the activities governed by the rule are not precisely defined. When requirements are ambiguous, it is impossible to say with confidence that certain behavior does or does not "comply" with the legal rule in question, or that responsive conduct amounts to evasion or avoidance. When the scope of requirements is unclear, one cannot assert that observed behavior should have been consistent with a particular legal rule.

It is important for both the methodological and theoretical issues discussed in this section to recognize that ambiguity about the content and extension of legal rules is not merely occasional and accidental but frequent and institutional. Supreme Court decisions, to take the immediately relevant instance, do not purport to describe comprehensively what persons may and may not do across a broad range of activities. They speak rather to a small set of activities, or often a single kind of act, carried out under specifically defined conditions. As a matter of legal doctrine, the Court's decision, its "holding," is limited to the facts and issues presented in the case before them. There are, of course, many things that a court may say beyond its holding, either by way of rationale or dictum. These statements frequently illuminate the meaning of a decision but do not expand the rule of the case. The limits implied by the "holding" of a case are justified by the realization that courts usually lack full exposition of all relevant considerations concerning issues or facts that are not directly involved in the case before them. Without full consideration, a court is less likely to reach an accurate judgment about factual and legal questions and, therefore, does not and ought not attempt to decide hypothetical or moot issues. Accordingly, judicial rule-making is not a

\textsuperscript{74} The ambiguity of legal norms has not always been recognized. Malcolm Feeley has observed of legal effectiveness research that

[The specification of [legal] goals—the law-in-theory—is rarely regarded as problematic by the researchers who follow this approach. Typically legal goals tend to be viewed as self-evident or easily identified and are posited without much ado. . . . Thus the basis of comparison—the standard against which reality is measured—is rarely clearly identified and operationalized. Feeley, The Concept of Law in Social Science: A Critique and Notes on an Expanded View, in The Sociology of Law: A Conflict Perspective 13, 15 (C. Reasons & R. Rich eds. 1978).
process designed for creating a body of law comprehensively governing human activity.\textsuperscript{75}

Even within the class of actually decided cases, moreover, uncertainty regarding the meaning of rules is common. As a political matter, it is significant that the Supreme Court is a collegial group whose holdings frequently seek to accommodate different views of the values and rules announced.\textsuperscript{76} Clarity regarding the precise implications of an opinion is likely to be sacrificed in the interest of securing a majority in the case. Clarity may also be compromised by the need to justify a current decision in light of prior authority, whose present application depends on arguments by analogy or unarticulated premises inferred from earlier decisions. While such arguments are legitimate and often indispensable, they also may produce doubt about the basis or scope of the holding of the case in which they are employed.

The uncertainties resulting from doctrinal and political limitations are peculiarly great when courts enter areas they have not previously addressed. The limited decisions that emerge typically create more questions about what will be required than they answer.

Piecemeal decisions unsettle old patterns without providing unambiguous new patterns to which expectations can conform. Time and time again, public and private decisionmakers have both underread and underreacted and overreacted to the implications of a new trend of Supreme Court decisions—only to find later that their adaptations have been, respectively, insufficient or excessive.\textsuperscript{77}

Our study of school disciplinary practices after \textit{Goss v. Lopez} illustrates both the uncertainty that frequently attends early judicial forays into an area of activity and the extent to which the need for a clear legal rule limits legal effectiveness research. Take, first, the easiest situation: the relationship between procedural rules for short suspensions and reported practices. \textit{Goss} does provide clear rules to a point, and we were able to compare local school behavior with legal requirements on the following issues: Is notice of charges given, is a summary of evidence provided, and do students have an opportunity to respond to the charges against them? Even within the clearest area of decision, however, there are matters about which compliance could not be evaluated. Suppose, for example, that a school informs a student prior to suspension that he is charged with theft from another (unnamed) student. It is impossible to say whether this practice complies with the \textit{Goss} requirement of notice of charges because the Supreme Court declared only that notice is required and did not define the content required of the notice. Or suppose that


\textsuperscript{76} Levine & Becker, \textit{Toward and Beyond a Theory of Supreme Court Impact}, in \textit{The Impact of Supreme Court Decisions} 230, 231-32 (T. Becker & M. Feeley eds. 2d ed. 1979).

\textsuperscript{77} Horowitz, supra note 75, at 35.
the student, who denies the theft, is then told that a teacher saw his misconduct. The teacher is not identified and the evidence of theft is not further specified. This conduct may constitute an adequate summary of the evidence or it may not; because the Court did not indicate what such a summary must include, however, nothing can fairly be said about compliance.

The necessity for clear legal rules describing conduct thus constrains sharply what can be said about legal effectiveness even where conduct is expressly addressed by the Court. Such constraint is even more apparent when the applicability of rules is questionable. It often happens that a court announces a rule for situations where certain conditions obtain. However, the case itself only addresses one such situation and leaves open what other kinds of facts and conditions fall within this class and thus are subject to the stated rule. This uncertainty of extension currently obtains with respect to in-school suspensions. The Supreme Court has announced several rules for suspension procedure, but was only concerned in the case before it with suspensions from school. Educators in Indiana and nationally assume, therefore, that the Goss holding does not apply to in-school suspensions. This assumption contains, however, two distinct propositions: that Goss does not itself hold that the procedures it announced apply to in-school suspension and that the Court will not hold that in-school suspensions so resemble in their consequences out-of-school suspensions that both must be accompanied by the same procedure.

---

8 A number of other areas of ambiguity within the Goss rules have been identified by William Buss, including the following:

[Does Goss] tell us anything about very short suspensions, say, for one day or a fraction of a day; resulting when a student is sent home from school because of misconduct? Is it still arguable that the deprivation involved in such a situation amounts to deprivation of constitutional liberty or property? What about indefinable suspensions, as where a student is kept out of school until he agrees to have his hair cut in a certain way or to discontinue wearing an armband? Should such suspensions be regarded as even shorter than the Goss suspension standard because the student has control of his or her destiny: i.e., by complying with the school's directive, the suspension ends? Or should the serious effects of extended suspension be considered whatever the cause?


Ambiguity also exists in connection with the Court's observation that the rules it announced in Goss apply only to the "usual" short suspension situation. The question of what this class includes is left unspecified, moving one critic of the decision to ask: "After all, what 'situation' isn't 'unusual' in the mind's eye of a resourceful plaintiff's attorney. . . . Claims will certainly abound that the student suspended just before graduation, or just before examination time, or even before the 'big game' is entitled to protection beyond those provided in the usual situation." Kola, Hard Choices in School Discipline and The Hardening of the Due Process Mold, 4 J.L. & Educ. 583, 585 (1975).

Surely school officials are correct as to the first of these points, but the second is disputable. As we will have occasion to see, a good case can indeed be made that in-school suspensions are sufficiently different from suspensions from school that they should not be treated identically for procedural purposes. However, a plausible argument can also be advanced that *Goss* should and will apply to some or all in-school suspensions. Because the ambit of *Goss* is unclear, one cannot say whether its rules apply to in-school suspensions and judgments about compliance should not be made.

A similar problem in defining the extension of judicial decisions arises in connection with the use of withdrawals or transfers to an alternative school in lieu of expulsion. *Goss* indicated that at least its rudimentary procedures, and probably something more, would be required for "longer suspensions and expulsions" from school. It is certainly arguable that withdrawals procured under threat of expulsion and disciplinary transfers to a radically different educational program will be held to fall within the class of longer suspensions or expulsions. At least one pre-*Goss* federal circuit court case concluded that transfer of a student to a "Continuation School" was "tantamount to expulsion" and that the transferring school was required to give the pupil "some opportunity to present a mitigative argument." It is also arguable, however, that to permit withdrawal by a student with an extensive history of truancy or other misconduct is a generous act on the school's part, saving the former from the stigma of expulsion if he or she so elects but also preserving the right to a hearing if the student wishes continued enrollment. Transfers to alternative institutions can also be distinguished from expulsions, because they do not involve a total deprivation of public education nor carry the degree of stigma associated with permanent removal from the educational system.

If it should be held that withdrawals and/or transfers amount to denial of public education in the same degree as expulsion, they presumably will fall within the class described as "expulsion" by *Goss* and thus be subject to whatever procedures are ultimately required for such sanc-

---

50 See infra text accompanying notes 97-98 & 103-05.

Mr. Justice Powell, dissenting in *Goss*, declared that the protected interests involved in involuntary transfers are "identical in principle" with those discussed by the majority in connection with short suspensions. 419 U.S. at 584, 597. This suggests, of course, that transfers might be treated as suspensions rather than expulsions, which is not necessarily inconsistent with the *Betts* decision. Although *Betts* analogizes transfers to expulsions, the procedures addressed are similar to those later required by *Goss* for the less drastic remedy.

See also, Quintinella v. Carey, No. 75-C-829 (N.D. Ill. March 31, 1975) (action transferring petitioner to a high school equivalency class meeting at night is the "functional equivalent of an absolute suspension" because student could not receive a "standard high school diploma").
52 See Comment, supra note 81, at 965-66.
tions. Their inclusion within this class remains to be decided, however, and it is impossible until that time to say whether use of either strategy amounts to avoidance or evasion of the Supreme Court's command.

It is also worth mentioning that the expulsion issue reflects yet a third kind of uncertainty commonly associated with legal norms. Part of the requisite procedures for expulsion can be inferred: at a minimum, the Goss rights must be accorded students facing this penalty. It appears, however, that something further must also be done procedurally before a student is expelled from school, and these further requirements have not been articulated. The remarkably formal procedure adopted by the Indiana legislature would almost surely satisfy any requirements the Supreme Court is likely to impose, but that is hardly a measure of accurate compliance with the Court's rules. The Supreme Court might well hold some of those requirements unnecessary as a constitutional matter because they too heavily burden school disciplinary decisions.83

2. The Problem of Causation

The need for precise rules to measure legal effectiveness thus significantly limits the available areas of inquiry. Judicial rules are sufficiently clear to allow judgments about compliance only with respect to some aspects of short suspension procedure. Where the condition of adequate clarity is met, however, methodological problems in establishing compliance remain. We have already seen, in discussing short suspensions, that even where the Supreme Court adopted clear procedural rules which most Indiana high schools follow, one cannot necessarily say that those schools comply with Goss. "Compliance," as that term is ordinarily employed by social and political scientists, refers to a direct causal relation between legal command and behavior. Accordingly, three elements in addition to a clear rule are said to be necessary: (a) knowledge of the rule; (b) intention to conform one's behavior to the command; and (c) conforming behavior in fact.84 In addition, it seems (although this is less clearly stated in the literature) that compliance presumes conforming behavior because one has been directed by law to act in a certain way.85 Certainly the fact of conduct consistent with a Supreme Court mandate is not sufficient to establish compliance with that mandate; there must also be

83 Cf. Parham v. J. R., 442 U.S. 584 (1979) (the court held that hearing procedures for parental commitment of children as mentally retarded are not constitutionally required because the costs involved outweigh any increased accuracy in fact finding. Although the decision clearly holds that a state may adopt a hearing process, it also expresses doubt about the desirability of that strategy).


85 S. WASBY, supra note 3, at 29.
awareness of the rule and an intention to follow that rule, whether one likes it or not.\footnote{See, e.g., Wasby, supra note 84; Barth, Perception and Acceptance of Supreme Court Decisions at the State and Local Level, 17 J. PUB. L. 308, 315 (1968).}

Presumably, the converse of this definition of compliance also holds true: noncompliance occurs only if some person or agency knows of a rule governing behavior and intentionally fails to obey it. One who is unaware of the legal rule or believes (wrongly) that he is following the rule is not guilty of noncompliance.\footnote{This assumption of compliance research contrasts sharply, of course, with the legal rule for liability. It is familiar knowledge that ignorance of the law is no excuse, whereas ignorance seemingly avoids an imputation of noncompliance.} It would be true that a Supreme Court decision or other rule is not given effect, but that should be attributed to a failure of communication or understanding rather than to a failure of compliance.

Given these restrictions, our data—even if accepted as an entirely accurate reflection of local school practices—permit few conclusions concerning compliance. We cannot say that the 71% of schools that act in a manner consistent with Goss' requirements for short suspensions are complying with that decision, nor that the schools which do not act in an entirely consistent fashion are engaging in noncompliance. Compliance requires accurate knowledge of the legal norm, combined with action intended to accomplish that norm. Our interview data indicated that knowledge of the Goss decision by principals was considerably lower than the rate of inconsistent behavior. While only 41% of the principals and deans had accurate information concerning judicial policy, almost 71% followed the rules embodied in that policy.\footnote{See supra Table 2 and accompanying text.} Plainly, these procedural rules were adopted for some reason other than the Court's command and thus do not indicate compliance with that command.

The most likely alternative basis is state law, which imposes the same process elements as Goss. It does seem that all but one of the principals and deans (94%) could state accurately the state law requirements for suspension. It is tempting, therefore, to view the reported practices as an instance of compliance with state legislative rules, rather than judicially created commands. Compliance requires, however, not only accurate knowledge of norms, which is present, but a direct causal relation. We do not know what practices were followed by local schools prior to modification of the state code and, without that information, causal statements cannot be made. Some school officials might have adopted the same process without external commands, but because they think those procedures are appropriate as a matter of educational administration.\footnote{See S. WASBY, supra note 3, at 29.} Indeed, the Supreme Court supposed this would often be the case. The majority opinion observed that the procedures it imposed are, if anything,
“less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions.” Nor was this suggestion mere wishful thinking or post hoc rationalization on the Court’s part. As it happens, the school actually involved in Goss had previously adopted an informal procedure “remarkably similar” to that required by the Court but had not, unfortunately, followed its existing procedure in the litigated instance.¹¹

The difficulty that attends conclusions about compliance with requirements for short suspensions exists for noncompliance as well. In almost every case, principals in the schools which failed to follow the Goss procedures lacked accurate knowledge of what Goss demanded of them. Accordingly, their conduct, while inconsistent with the Supreme Court’s mandate, is not the intentional disregard of legal rules that is ordinarily understood as noncompliance. Indeed, confident judgments concerning noncompliance can only be made where local practices are inconsistent with state law requirements, which were generally known by our respondents. Even here, however, the inference is only probable. Other explanations, such as an incorrect belief by principals that their practices comported with state law, are also plausible on the evidence available.

3. The Problems Applied

It appears that a legal effectiveness approach, if used with the strictness necessary for direct causal statements about rules and conduct, rarely permits evaluative statements about observed behavior. Legal rules are often unclear in content and extension, and causal problems add to the difficulty of evaluation. Two strategies are available in dealing with these obstacles. One is to infer, lacking clear commands, some generalized notion of legal requirements from existing authority and then compare court or school behavior with that notion.¹² The other is to exclude from consideration the relationship of law to behavior except where the law announces clear commands.

Neither of these approaches is ultimately satisfactory. A hypothetical construction of what due process requires in a given situation, for example, is a highly speculative enterprise. One glance at the prevailing general calculus for determining what process is due reveals why this is so. A court must take into account, and weigh against each other, the following considerations:

First, the private interest that will be affected by the official action;

---

¹¹ Id.
second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

The elusiveness of predicting what process is due can be illustrated by a careful analysis of in-school suspension practices. We have already seen that educators generally assume that this penalty may be employed without resort to any special process. They may be right in this belief. In holding that a suspended student suffers a constitutionally recognized deprivation requiring some adequate form of process, *Goss v. Lopez* relied heavily on the property interest lost when pupils are excluded, even temporarily, from educational benefits granted by state law. Students under in-school suspension are not, however, denied all educational opportunities, even though they are removed from their regular classrooms. Indeed, proponents of this sanction often consider it of special educational value for the students upon whom it is imposed. Some programs use in-school suspension as an occasion for testing students to determine if academic deficiencies are related to misconduct. In-school suspension has also been described as an arrangement by which "school staff would work with problem students in a separate environment, where individual problems—such as poor self-concept, the need for intensive individualized instruction, and emotional, social, and environmental difficulties—could receive more attention." Even in less ambitious programs, students remain in school and are expected to complete the same academic assignments given their classmates. Accordingly, students are not denied state-created entitlements to education through in-school suspension and, absent such a deprivation, due process is not required.

A persuasive argument can also be made, however, that some or all forms of in-school suspension must be accompanied by the process set forth in *Goss v. Lopez*. Most broadly, it may be suggested that the necessity for due process in *Goss* was predicated on an infringement of a liberty interest as well as deprivation of a property entitlement. The majority in *Goss* observed that suspension may affect adversely a student's "good name, reputation, honor, or integrity" as well as his right to receive education. Damage to reputation may accompany suspension from classes as well as suspension from school. Classmates will know of the disciplinary

---


54 *Goss*, 419 U.S. at 574.

55 See supra text accompanying note 58.

56 Harvey & Moosha, supra note 58, at 15.

57 *Goss*, 419 U.S. at 735.
action and others may learn of it if the fact of discipline is entered on
the child's permanent record. Two legal questions are therefore raised.
The first is whether the possibility of an injury to reputation is itself
a sufficient liberty concern to require Goss-type procedures. The second
is whether, if reputational interests will suffice, harm only among students
is sufficient to implicate those interests where in-school suspension goes
unrecorded.

No answer to either question can confidently be given. Although there
is precedent indicating that interests in reputation alone may require due
process protection, few recent decisions have so held and, indeed, the
Court has indicated that stigma by itself is not a major concern. The
argument for procedural protection is weaker yet where reputation is
affected only among classmates. The Court may reach one of two doc-
trinally different conclusions, both of which yield the same result. It may
be decided that the stigma confined to other students is de minimis and,
consequently, that no constitutionally protected liberty interest has been
invaded by in-school suspension. Alternatively, the Court might decide
that, even if a liberty interest in avoiding stigma is invaded by in-school
suspension, that interest is so minor that it is outweighed by the cost
and inconvenience associated with procedural requirements. On either
theory, the school will not be obliged to hold even a rudimentary hearing
when it suspends a child from classes but not from school.

Proponents of hearings in connection with in-school suspension may,
however, further claim that some in-school suspension programs do not
in fact provide educational benefits equivalent to the ordinary curriculum
and, therefore, inflict the same harm deemed to require protection in Goss.
The strongest case for this conclusion would arise with practices like
"benching," which apparently requires a pupil "to sit on a bench all day
long doing nothing." This discipline denies the student an education

98 See Comment, Procedural Due Process in the Public Schools, 1976 Wis. L. REV. 934,
960-61.
100 The role of stigma in due process analysis is currently unclear. At least one member
of the Supreme Court appears to have doubts about this concept, which he characterizes
as "a subjective judgment that is standardless." University of Cal. v. Bakke, 438 U.S. 265,
294 n.34 (1978) (opinion of Mr. Justice Powell). In Paul v. Davis, 424 U.S. 693 (1976), the
Court rejected the contention that harm to reputation was by itself sufficient to constitute
a deprivation of liberty or property. But the Court carefully distinguished cases like Wiscon-
sin v. Constantineau, 400 U.S. 433 (1971), in which the stigmatization was accompanied
by deprivation of some other statutory or constitutional right. In the situation under con-
sideration, the child may or may not be held to suffer an independent deprivation of a
statutory right to education, and the result is thus unclear under the rationale of Paul.
102 Cf. Ingraham v. Wright, 430 U.S. 651 (1977) (no procedures required for corporal punish-
ment); Parham v. J.R., 442 U.S. 584 (1979) (no procedure beyond review by medical profes-
sional required for commitment by parents of child as mentally retarded).
perhaps as fully as if he were excluded from school. Even where some authentic educational component exists, it can be argued that in-school suspension necessarily involves a change in educational program, if only in loss of exposure to other students. The issue then becomes whether a change rather than a denial of educational program entails due process rights. This question is particularly difficult to resolve because it may involve factual issues concerning both the quality of the program and the appropriateness of the program for participating students. Moreover, judicial decisions provide little clear guidance on the role of due process in program assignments within the public school setting. There are, it is true, cases holding that at least a non-adversarial opportunity to inquire into pupil placement is necessary for some kinds of assignments, but these decisions do not expressly control the present issue. The relatively few existing cases are all lower court decisions, frequently based on consent decrees, and therefore not controlling in other jurisdictions. Moreover, these decisions deal primarily with placement for educational rather than disciplinary reasons. The procedures thought appropriate for this purpose typically involve an informal, conversational sharing of ideas rather than the conflict resolution opportunities usually contemplated by due process in a disciplinary setting.

It is, fortunately, unnecessary for present purposes to resolve these interesting but tangled questions. Certainly one cannot say with confidence whether in-school suspension requires some form of hearing or what that form would be. Moreover, good faith arguments can be made in either direction. Any effort to hypothesize due process requirements in connection with in-school suspension must therefore be inaccurate as a descriptive matter and unfair to the extent that normative judgments about non-compliance or evasion are offered.

Would it, perhaps, be fairer to give school officials the benefit of the legal doubt and consider the use of informally-processed in-school suspensions in place of suspensions from school, or withdrawals in place of expulsions, as instances of “avoidance” rather than “evasion?” The answer is plainly “Yes,” but increased fairness is purchased at the cost of evaluative capacity under a command theory. While “avoidance” carries with it an unpleasant connotation, in this context the term necessarily assumes that the conduct is lawful. For example, the paradigmatic tax avoider finds a favorable provision in the Internal Revenue Code and, by investing in oil drilling partnerships which yield large deductions, pays less taxes than seems just. However, any negative judgment implied by the term “avoidance” here must be derived from some source outside

---

of law, because the law actively encourages the taxpayer's investment by granting it preferential treatment. Certainly it would be inconsistent to say that our taxpayer is acting in a fashion normatively inconsistent with legal rules when he or she is doing precisely what the law encourages. Officials in our sample schools may occupy a similar position when they employ in-school suspensions or encourage withdrawals. It is arguable that, by burdening suspensions from school, the Supreme Court wished to encourage other methods of student discipline and it surely did not mean to prohibit other, less intrusive, forms of student discipline. Given our initial assumption that in-school suspension is not within the Goss holding and therefore an instance of avoidance, this lawful change in practice away from regulated activity does not seem normatively condemnable. The change may have been an anticipated or an unanticipated reaction to Goss by the public schools, but is not subject to evaluation against the commands announced by that case.

If the difficulty of predicting legal outcomes often makes it inaccurate and unfair to speak in terms of compliance or legal effectiveness, the alternative would seem to be exclusion of behavior that is not responsive to clear commands from the scope of research. To exclude such behavior ignores two elements, however. The first is that prediction or anticipation of law is an integral part of societal response to legal decisions. The second is that this form of response is not conducted without regard to law but in light of it, through the kind of reasoning that the common law process itself assumes. The following section will argue that an adequate theory of law must consider the significance of judicial decisions for yet undecided controversies in which they will figure, and research into the relationship between law and social action must take into account the same process.

B. The Theoretical Problem

The methodological limitations associated with traditional legal effectiveness research reflect theoretical limitations inherent in viewing law solely or primarily as a legal command backed by coercive authority. Although this view has found eminent support, it has also been criticized on a number of grounds, two of which concern us here.

1. Judicial Decisions That Do Not Command

The first criticism is that a command theory does not adequately account for laws that authorize varieties of behavior rather than require

specific conduct. Rules defining the ways in which valid contracts or
wills may be made offer the usual instances of such laws; they do not
impose duties or obligations but rather empower individuals to create
legal relationships for themselves. Although private law areas provide
the typical cases of permissive rules, rules of similar effect also exist in
the constitutional arena. Take, for example, the Supreme Court's deci-
sion in Ingraham v. Wright, which addressed due process requirements
for corporal punishment in public schools. Ingraham held that, although
pupils have a liberty interest that is affected by paddling, neither notice
of charges nor even a rudimentary hearing is constitutionally required
when that sanction is employed. The Court's decision does not mean that
a school may not provide procedures before paddling a child, but rather
that it is not compelled to do so. Such a decision establishes no coercive
norm but is plainly as much a statement of law as Goss, which does
establish such norms. It should be clear that, where law creates no coer-
cive rule, there can be no question of compliance. If a school does not
provide procedures for corporal punishment, it is because the school
chooses not to, not because it must not. If a school does create some form
of process for this sanction, that is because it wishes to do so, not because
it must. Neither event constitutes obedience to a command.

Such decisions may, of course, have an impact of some kind. Suppose
that a school had established procedures for corporal punishment after
Goss was decided but before Ingraham v. Wright, believing that the
Supreme Court would ultimately hold that a child facing corporal punish-
ment is entitled to the same protection as one about to be suspended.
If those procedures were dismantled after Ingraham made clear that they
were unnecessary, a causal relationship between Ingraham and local prac-
tice would surely exist. That relationship also has nothing to do with com-
pliance, since the school was equally free to leave in place or to eliminate
its process for corporal punishments.

It might be said that decisions like Ingraham, which are by no means
uncommon, neither resemble laws facilitating contracts nor contradict
a view of law as command. Rather, they amount to a declaration that
no constitutional rule governs the behavior in question. For this distinc-
tion to be significant, however, one must view law only as a set of affir-
mative decisions: Thou shalt do this and Thou shalt not do that. From the
perspective of the governed community, decisions that say one may do
certain things if one wants are quite as important as prescriptive or pro-

---

109 See, e.g., Parham v. J.R., 442 U.S. 584 (1979) (states may but need not provide hear-
ings prior to commitment of children as retarded); McKeiver v. Pennsylvania, 403 U.S.
528 (1971) (states may but need not provide jury trial for delinquency prosecutions).
scriptive statements. If we follow the usual view that laws define the limits of behavior and that otherwise citizens are free to act, declarations concerning the areas of regulation and the areas of freedom serve an identical function.

2. Judicial Decisions As Predictors of Commands

The second deficiency of a theory of law as command lies in its failure to recognize that the effect of commands may extend beyond their terms. H.L.A. Hart observed that the theory of law as command misses "the way in which rules [of law] function as rules in the life of those who are normally the majority of society. These are the officials, lawyers, or private persons who use them, in one way or another, as guides to the conduct of social life."

Most members of the community want to follow legal rules and many want at least to avoid contact with formal legal processes. They use law, so far as it is known to them, to guide their conduct in a way that will keep them distant from legal conflict. This kind of behavior is expressly relied upon by criminal laws, for which deterrence is a primary goal, but also in virtually every area where laws state norms for behavior that we expect to be followed. Indeed, if most citizens did not apply the law to themselves but insisted upon enforcement by society, the legal system would collapse from over-use.

Were all laws clear and comprehensive, this point about self-application would lose much of its force for present purposes. We have seen, however, that laws are not always comprehensive and unambiguous. What, then, shall the citizen do who wishes for moral or prudential reasons to abide by the law?

In some instances, he may avoid kinds of activity for which rules are unclear. In others, however, life must continue despite the absence of clear law. Two examples in the Introduction illustrate this point. The Supreme Court in 1967 decided that juveniles charged with delinquency are entitled to the rights to notice of charges, representation by counsel, and...
cross-examination, and the privilege against self-incrimination. At the same time, it limited its holding to those rights, expressly reserving judgment on issues such as the appropriate burden of proof, right to bail, and right to an appeal. Juvenile courts, however, could not avoid dealing with these issues; they had to decide what burden of proof applied in order to decide any case before them and whether bail was necessary in order to deal with any detained child.

Similarly, school boards and principals after Goss could not practically limit disciplinary action to short suspension from school, although it was the only sanction for which clear guidance existed. For some students, such as chronic truants, that penalty is futile. For others, including violent or otherwise dangerous pupils, it is simply insufficient. And, in the other direction, suspension from school is a relatively severe measure which may be inappropriate and damaging for children who engage only in minor and occasional misconduct.

In both instances, administrators (whether trial judges or educators) were required to maintain programs knowing that the law would at some stage review their activities but without knowing what it would say about them. In deciding how to conduct their business in these unsettled areas, judges and school administrators often wished to do what was right. They may have wished this because they respected the law, because they did not want their actions upset by subsequent litigative challenge, or because (in the school discipline situation) they feared civil liability in the event their practices turned out to be legally improper. Whatever the reason, these officials had to predict or anticipate what the law would be and, in making that prediction, relied on the early and piecemeal decisions that had been rendered. Those decisions, however fragmentary their coverage, identify the rights and interests and announce the themes that will be most directly relevant to later decisions in the area.

Anticipation of subsequent decisions and reliance upon prior authority in doing so, it should be emphasized, are not merely practical adaptations to life but integral parts of legal development. From a legal positivist perspective, the study of law itself involves "nothing but the prediction that if a man does or omits certain things he will be made to suffer in this way or that way by judgment of the court. . . ." This prediction

---

113 In re Gault, 387 U.S. 1 (1967).
114 See supra text accompanying notes 17-20.
115 O.W. HOLMES, JR., THE PATH OF THE LAW 457, 458 (1897). From a social science perspective, the phenomenon of prediction is an attribute of political authority. Malcolm Feeley summarizes this theory in the following way:
Following Weber, Friedrich has argued that to a large extent "authority," i.e. legitimate power, is the ability to have people anticipate interests and act accordingly without having to rely on explicit communications and the concomitant threat of sanctions. Clearly, the Supreme Court is an institution enjoying a particularly high position of legitimacy within American society.
is properly made, moreover, on the basis of what authority there is that is most directly in point. For example, although Goss does not hold that any particular process is required for sanctions other than short suspensions, it does hold that children possess certain liberty interests in attending school, that certain acts deprive them of those interests, and that under some circumstances deprivation cannot occur without process of some description. These legal categories will also operate for subsequent decisions and, moreover, decisions will be made by analogizing to the circumstances actually considered in Goss. Any earlier decision is precedential, even if it does not declare a result for later cases in the area.

A clear illustration of the relationship between cases that do not decide particular propositions and anticipation of later decisions arises in the juvenile court area. We have seen that In re Gault, while holding certain rights previously associated with criminal prosecutions applicable to delinquency proceedings, did not pass on the appropriate burden of proof in these matters. Courts, nevertheless, had to decide whether they should retain the traditional "preponderance of the evidence" standard or adopt the more stringent requirement of proof beyond a reasonable doubt. The Supreme Court of Illinois decided that the latter burden would be required, relying on Gault's emphasis on the severity of the consequences attendant upon an adjudication of delinquency.\textsuperscript{116} "It would seem," the Illinois court concluded,

that the reasons which caused the Supreme Court to import the constitutional requirements of an adversary criminal trial into delinquency hearings logically require that a finding of delinquency for misconduct...is valid only when the acts of delinquency are proved beyond a reasonable doubt. ... We need not be reminded that the Gault decision did not pass upon the precise question of the quantum of proof that must be shown to validate a finding of delinquency. We believe, however, that the language of that opinion exhibits a spirit that transcends specific issues there involved, and that, in view thereof, it would not be consistent with due process or equal protection to grant allegedly delinquent juveniles the same procedural rights that protect adults charged with crimes, while depriving these rights of their full efficacy by allowing a finding upon a lesser standard of proof than that required to sustain a criminal conviction.\textsuperscript{117}

For this reason, therefore, we could expect that anticipated reactions would account for some substantial portion of the total impact of the Supreme Court. Feeley, \textit{Power, Impact, and the Supreme Court}, in \textit{The Impact of Supreme Court Decisions} 218, 225 (T. Becker & M. Feeley eds. 2d ed. 1973). The "law of anticipated reactions" described by Feeley seemingly presumes the existence of particular behavior desired by the Court. The anticipation described in the text does not, however, suppose that the Court has yet decided what it wishes in areas not yet resolved by existing authority; nevertheless, prediction and anticipation are necessary substitutes for knowledge of what the law requires.

\textsuperscript{116} \textit{In re Urbasek}, 38 Ill. 2d 535, 232 N.E.2d 716 (1967).

\textsuperscript{117} \textit{Id.} at 540, 232 N.E.2d at 719 (emphasis supplied).
The Supreme Court of California, however, reached the opposite conclusion, again based on its reading of the *Gault* decision.

It is inconceivable to us... that our highest Court attempted, through *Gault*, to undermine the basic philosophy, idealism and purposes of the juvenile court. We believe that the Supreme Court did not lose sight of the humane and beneficial elements of the juvenile court system... it did not intend to convert the juvenile court into a criminal court for young people. Rather, we find that the Supreme Court recognized that juvenile courts, while acting within the constitutional guarantees of due process, must, nonetheless, retain their flexible procedures and techniques.\(^\text{118}\)

Once the assumption was made that *Gault* did not generally affect traditional juvenile court values, it was easy to conclude that while the adjudicative hearing must “measure up to the essentials of due process and fair treatment,” proof beyond a reasonable doubt was not one of these essentials.

What is important here is that both the California and Illinois courts tried to anticipate what would be required of juvenile courts by looking to a Supreme Court decision that expressly declared that it was not addressing the question of burden of proof. It is also important that, although the Illinois prediction was ultimately confirmed,\(^\text{119}\) both decisions are reasonable in their treatment of an unclear but undeniably crucial precedent.

Although we do not have as clear an example of anticipation based on early decisions in the school discipline setting as for juvenile court procedure, its existence cannot reasonably be doubted. Indeed, this process has informed discussions and practices for all of the kinds of sanctions we have examined. Arguments surrounding procedural requirements for in-school suspension, reviewed above, commonly rely on some interpretation of *Goss v. Lopez*, although the *Goss* holding is limited to suspensions from school. The current view of educators, expressed in journals\(^\text{120}\) and during our interviews, is not simply that no law exists in this area but that current law (that is, *Goss*) requires a due process hearing only where the sanction imposed has certain consequences. Because the *Goss* opinion relied heavily on denial of educational benefits to justify its result and in-school suspension provides those benefits, the latter form of discipline is arguably exempt as a constitutional matter from hearing requirements. Those who contend for the opposite conclusion will likewise base their predictions on the Supreme Court’s expressed rationale in *Goss*, as will


\(^{120}\) See supra note 67.
lower federal courts, state courts, and the Supreme Court itself when they deal with this issue.

Another manifestation of the penumbra created by early or piecemeal decisions is evident in the Indiana Due Process and Pupil Discipline Code provisions on expulsions, even though the Code initially reflected trends in lower court rather than Supreme Court decisions.\(^\text{121}\) It is impossible to believe that procedures such as the right to remain silent, not to be punished for one's silence, to a formal record and to severance of cases were incorporated because they reflected anyone's idea of desirable administrative practice. They doubtless appear because they seemed to legislators and their legal advisors to meet whatever process courts might demand for expulsion matters.\(^\text{122}\) This judgment was in turn reached on the basis of previous court decisions setting forth elements of due process in school disciplinary and other settings. The fact that the Code's provisions are probably more formal than what is necessary does not matter for present purposes; they surely represent a preference for adopting a scheme that, in view of existing law, seems sure to satisfy future requirements rather than one that may be closer to what will be commanded but also may be found deficient in some respect.

_**Goss**, like _Gault_ and other early decisions, is thus as important for what it presages as for what it says. It is probably true, as many have said, that _Goss_ itself is a minimal step which will have little significant impact on schools. However, its rationale is of considerable importance. It has

\(^{121}\) See Note, _Recent Developments_, 6 IND. L. REV. 300, 330-31 (1972), suggesting that the Indiana Code was adopted in recognition of "The growing body of federal case law on student due process and [in anticipation of] its trend. . . ."

\(^{122}\) Wasby has described the same process in a different setting:

It may be that, technically, "Neither the enterprise nor the government is necessarily bound by decisions to which they are not a party. . . . They continue on their practices until a specific judicial decree is aimed at them." . . . _Maybe—but_ one can be fairly sure that corporation counsel and government attorneys as well are examining court decisions carefully to see what they can learn as a basis for their future behavior, whether that behavior be directed at complying with the Court's rulings or in some way circumventing them. We certainly find cases where lawyers have taken the doctrines used in one case and extended it to other areas. . . . This has led to the statement that 'the test of the quality of an opinion is the light it casts, outside the four corners of the particular lawsuit, in guiding the judgment of the hundreds of thousands of lawyers and government officials who have to deal at first hand with the problems of everyday life and of the thousands of judges who have to handle the great mass of the litigation which ultimately develops.' The importance of doctrine for the study of impact is shown by statements such as the foregoing and Shapiro's remark that "the overall impact of the Supreme Court and other political agencies is largely a matter of the verbal propositions of the law it advances. . . . For those propositions not only become part of the governing law that other agencies must at the very least appear to obey, but also determine what kinds of claims the justices themselves will subject to their attitudes in the future.

influenced the ways in which other disciplinary sanctions are imposed by providing a basis for predicting, rightly or wrongly, what due process means for such actions. Goss may also have influenced both the development of alternative sanctions and elections by school administrators among available disciplinary alternatives.

These applications of judicial decisions cannot be explained by a command theory of law. Nevertheless, they are based upon law in a sense that cannot well be doubted and should not be ignored. The activity of anticipation, which reflects the most common business of working lawyers and of laymen who apply the law to themselves, must be considered in dealing with the behavior that results from legal action even if the causal relationships are more obscure and normative evaluation is more problematic.

**CONCLUSION**

This study reveals a variety of responses by state and local school officials to regulation of student disciplinary procedures. From a legal effectiveness perspective, practices in the sample schools seem consistent with state law requirements and, if coincidentally, with the limited rules announced by Supreme Court decision. This observation, however, reflects little of the complex pattern observed in the sample schools. It covers, for example, only one aspect of the procedure for expulsion used in Indiana. That procedure, which resembles the process for trying criminal cases far more closely than usual notions of administrative hearings, does constitute a set of legislative commands to local schools, but is at least equally important as a response to Supreme Court and lower court due process decisions. It is, moreover, a particular kind of response: one that relies on existing but not conclusive authority to reach a “safe” result. Although the legislature might have left procedures at a more informal level, it elected rather to insure the legal validity of its process by eliminating virtually all elements of informality. In doing so, the legislature acted as any businessman or private person who, when faced with uncertainty in the applicable law, balances risk and advantage. The choice of “safe” results, keeping far from the margin of what the law seems to require, cannot be explained in terms of obedience to commands, because existing commands do not reach that far, nor is there reason to think they will require everything that Indiana has provided.

Moreover, legal effectiveness tells us little about the expulsion procedures used at the local level. It does appear that, when expulsion is used, the required procedures are followed. This is important, but is only one aspect of what occurs in practice. A number of schools encourage withdrawal by children over sixteen and employ program transfers for students who might otherwise be expelled. Ordinary notions of compliance are of little help in evaluating these alternative strategies, because the
statutory rules on expulsion do not clearly govern withdrawals or program transfers. It is not more useful to talk in terms of "avoidance" and "evasion." The latter notion cannot be applied because the illegality of using these practices for children who engage in serious or repeated misconduct is far from clear. The notion of "avoidance" is even less helpful in this connection. If there are legally permissible strategies for dealing with such children (e.g., withdrawal or transfer), and these are used, the law dealing with other strategies (i.e., expulsion) is neither effective nor ineffective when the former are used. The link between rules for expulsion and resort to different sanctions is not one of obedience or disobedience to commands, but of preference for using a less regulated alternative that is arguably available. Here, as with legislative action, school officials are anticipating and applying to themselves rules on the extension of legal commands in a way that legal effectiveness theory does not capture.

The same points obtain for in-school suspension, the recent but single most common form of discipline reported in our sample schools. Legal effectiveness notions do not advance our understanding of this practice to any significant degree, except on an hypothesized and doubtful assumption that in-school and out-of-school suspensions must be treated alike for constitutional purposes. However, the popularity of this device for handling misbehaving students rests at least partially on the use of law by school officials in precisely the same way that lawyers use law to advise their clients and that judges interpret previous authority in deciding pending disputes.

Accordingly, the criticisms of traditional legal effectiveness research, articulated by a number of social and political scientists during the last ten years or so, seem borne out by this study. As a tenable theory of law must take account of self-application of law by laymen and of anticipation by laymen and lawyers alike, so an adequate theory of behavioral response to law must ultimately include these activities within its purview.