

# Chapter One

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## The Impasse

### Proceduralism Versus Orthodoxy

#### PROCEDURALISM AND ORTHODOXY

Democratic education has been developed but also diminished by two interested and mutually hostile camps with very different basic pedagogical outlooks and agendas. I'll designate these camps with the imperfect labels "religious orthodoxy" and "liberal proceduralism." Each outlook continues forcefully to influence U.S. public schools, in obvious as well as not-so-obvious ways. Of overwhelming importance on the contemporary scene is a steadily growing orthodox disenchantment with the very idea of public schooling that is manifest in phenomena such as support for vouchers, home schooling, and other withdrawal initiatives. All this must be understood in large part as a rebellion against liberal proceduralism, perceived by orthodoxy as, in a way paradoxically, simultaneously aggressive and nihilistic. A good place to examine this dynamic is in one of proceduralism's key triumphs in education: the ascendancy, especially since the late 1960s, of an expansive conception of students' rights. Orthodoxy wants none of this development; these liberal "victories" are from its point of view indictable failures. Though often portrayed as such, this is not merely a blind and reactive lashing out on the part of orthodoxy. It may be drastically wrongheaded from a liberal proceduralist point of view, but the religious orthodox backlash against students' rights is nonetheless surprisingly coherent.

On my analysis, taking religious orthodoxy's critique seriously is key toward revealing how current school policy debate has been artificially narrowed, straitjacketed into overly tight parameters by these win-at-all-costs ideological antagonists. The problem is that neither can win; they are locked almost necessarily into a no exit sort of stalemate, where their very

definitions of themselves require the existence of one another; they cannot do without their antagonistic “others.” So it is that they lock into one another’s gaze, a mutually myopic obsession that debilitatingly restricts our collective educational vision. Our basic conception of democratic education has in this way suffered by becoming artificially thinned, as if starved of sustenance by the very forces that created it, neglected and abused by its own parents, as it were. Democratic education is victimized by a kind of ideological child abuse perpetrated by some very bad parents. We may love them still, but we must also get beyond them.

My illustration of this imperative proceeds in the following manner: First, I’ll explain and defend my chosen terminology, and in the process describe how religious orthodoxy and liberal proceduralism tend to translate themselves into antagonistic education policy prescriptions. Second, I’ll use this simple yet cogent set of ideas to examine the under-theorized yet crucial area of students’ rights and the concomitant demise of the traditional doctrine of *in loco parentis*. Third, as distinct from the fortunes of what I’m calling its liberal proceduralist variant, I’ll assess the limits of liberalism’s general ability to mount a principled response to the challenges presented by the religious orthodox withdrawal from public schooling. In my view, contemporary liberalism, like any victorious ideology, must avoid succumbing to a hubris that will, if unchecked, tend to push itself self-defeatingly too far. Liberalism needs to better recognize its limitations, dependencies and debts. Through its history and current tensions, U.S. schooling provides a very good lens for seeing these.

### THE LABELS “LIBERAL PROCEDURALISM” AND “RELIGIOUS ORTHODOXY”

A note about why I’ve favored the phrases “liberal proceduralism” and “religious orthodoxy” (which, for convenience’s sake, I’ll often shorten to “proceduralism” and “orthodoxy”). I do not mean this pair of labels in a strict philosophically technical sense, but rather as loose and convenient shorthand for describing what I take to be the main *actually existing* moral-cum-political positions across a range of education policy controversies. Roughly, though, by “orthodoxy” I mean something close to what John Rawls and other liberal theorists mean by “comprehensive doctrine”: a worldview or outlook that supplies answers to final questions about human existence and the cosmos, orders the virtues, and otherwise supplies to adherents something substantive and

determinate toward ultimate meaning and purpose. Among the United States's actually existing orthodoxies is what I'm calling "religious orthodoxy," by which I mean to encompass an assortment of Bible-based religions and, most notably, various Christian fundamentalist and evangelical orientations. This latter supplies the most widespread and politically salient examples. There are of course as many different types of orthodoxy as there are religions, sects, cults, philosophies, and so forth, and the potential number of them is infinite. But in most areas of the United States, only the Bible-based orthodoxies are large and organized enough to count significantly in the politics of education at local, state, and national levels. For these reasons, along with its connotations of a certain doctrinal strictness, "religious orthodoxy" seems to me the best label for present purposes.

Arrayed at most points against religious orthodoxy is what I'm calling "liberal proceduralism." Here my meaning is akin to what political philosophers call *modus vivendi* liberalism, whose core commitment is to a liberal but above all efficacious strategy for "going along to get along," that is, to widely recognized rules of fair play, organized around notions such as due process and the like. As is true in terms of its historical development, there may be substantive moral commitments to such ideals as equality and freedom (or, at the thinnest, some ideal such as Hobbesian self-preservation) underlying liberal proceduralism. But, as I'll elaborate below, as it actually exists as an effective political force in education, liberal proceduralism rarely gets around to substantively linking its commitment to process with the championing of particular positive ideals. As it has actually developed, liberal proceduralism is epitomized by the mass of constitutional, case, and statutory law that more and more, particularly since the 1960s, directs and even micromanages school operations. In fact, this nearly all-encompassing process of juridification—in schools and elsewhere—represents a triumph of liberal proceduralism.<sup>1</sup> Against what is often portrayed, it is a mistake, I think, to view the primary antagonism as that between God-fearing orthodoxy and an equally militant "secular humanism" that is advancing its own conception of human flourishing. Though there are secular humanists who advance human perfectibility as their highest ideal, in education policy religious orthodoxy's primary antagonists are better described as animated by a deliberately content and substance-eschewing liberal proceduralism that forcefully asserts human rights and kindred notions, but has almost no propensity and/or ability to justify such commitments in terms of anything larger than the commitments themselves.

As is the case with orthodoxy, proceduralism can come in infinite varieties, each of which typically emerges from some more substantive outlook. Almost any such outlook may become—please forgive the ugly word—“proceduralized.” There is a Roman Catholic proceduralism, a proceduralism arising from Bolshevism, a proceduralism appropriate to an ancient Persian satrapy, and so on *ad infinitum*. Proceduralism exists as a sort of exoskeleton that may come to encase and ultimately replace its generative substantive core doctrine, whatever that doctrine may be. Some may experience this replacement as tantamount to a Hegelian master-slave reversal, where the procedures that were originally meant to advance “the cause” or help “fight the good fight” become ends in themselves, such that the original core doctrines have been all but forgotten. Alert idealists will often see this process as a betrayal.

In accord with this picture, where more philosophical precision is necessary, I’ll distinguish the liberal kind of proceduralism from the kind of liberalism that confidently advances its comprehensive core commitments and as such is, in fact, a kind of liberal orthodoxy.<sup>2</sup> To make the distinction stand out as much as possible, and to continue following Rawls, I’ll call this kind of liberalism “Enlightenment liberalism,” which would include such philosophical exotica as Kantians, utilitarians, certain natural law theorists, “strong” or “participatory” democrats, and others.<sup>3</sup> In these Enlightenment liberalisms, there is an articulated moral, even metaphysical core—a conception of the Good—that underwrites whatever attendant prescriptions may be on offer. There is some larger story concerning the role liberal virtues such as reason and autonomy play, perhaps a teleological story of human progress, some kind of theism or pantheism, or some more elaborate narrative explaining why, in the end, we should prefer liberal virtues to others. So my terminology is largely consistent with Rawls’s and allied accounts, but I intend the labels “religious orthodoxy” and “liberal proceduralism” in their more historical and sociological senses rather than in the subtler senses that are possible.<sup>4</sup> Additionally, as I explain below, I intend them mainly to express educational outlooks, and as such they have no essential affinity with political distinctions such as “left-right,” “liberal-conservative,” “religious right-secular left,” though there may be strong affiliative tendencies. Thus my qualifying phrase “actually existing,” meant to indicate a concern with the policy disputes as they have in fact presented themselves. Though philosophers and others can dream of a thousand variations and alternatives, “religious orthodoxy” and “liberal proceduralism,” when properly specified, will provide appropriate labels for my analysis.

## RELIGIOUS ORTHODOXY AND LIBERAL PROCEDURALISM AS EDUCATIONAL OUTLOOKS

In the United States, liberal proceduralism and religious orthodoxy have had inextricably interwoven careers. Since the arrival of the first European settlers, the two orientations have both united and divided Americans, sometimes as distinctive allegiances pertaining to identifiable groups, yet just as often within the hearts and minds of individuals themselves. The frequently intolerant orthodoxy of early New England, for example, John Winthrop's quasi-theocratic "City on a Hill," was simultaneously intermixed with nascent liberal concerns with basic freedoms, as would befit a group of erstwhile religious dissidents. Middle colonies like Pennsylvania and New York, while eventually more liberally tolerant of religious diversity than their New England neighbors, could scarcely be said to be lacking substantive, even state-sanctioned religious visions of the true commonwealth. From the start, educational policy represented a confluence of these powerful riverlike forces where, as a product of them both, the City on a Hill envisaged and enacted schools for itself. Colonial Massachusetts's touchstone Old Deluder Satan Act (1647) required every settlement with greater than fifty families to maintain a school in order to teach children basic literacy to combat the ignorance upon which Satan (and also Catholics) could allegedly prey. "It being one chief project of that old deluder, Satan, to keep men from the knowledge of the Scriptures . . . It is therefore ordered, that every township in this jurisdiction, after the Lord hath increased them to the number of fifty householders, shall then forthwith appoint one within their town to teach all such children as shall resort to him to write and read."<sup>5</sup> Schools exist to further both the liberal goal of universal enlightenment via the individual's ability to think and reason for him- or herself, right alongside the orthodox agenda of promoting a particular version of Christianity. With a Calvinist twist, this brand of energetic Protestantism saw these two goals as inseparable: since salvation results from our own individual effort, we must first be able to identify it on our own, extracting ourselves *by our own efforts* from confusion and sin. Literature scholar Andrew Delbanco describes the psychological intensity of this peculiar vision of salvation through learning: "In the course of this instruction, laypeople had to learn how to distinguish between true and false grace—between the real thing and the counterfeit version that taunts you by lifting you up only to drop you down lower than where you began." And to banish the thought of any intergenerational resting on laurels, preachers like John Cotton would warn, "Do not think that you

shall be saved because you are the children of Christian parents.” Every individual needed to acquire these salvific powers of discernment, the ability to “go home and consider whether the things that have been taught were true or no.”<sup>6</sup>

This urgent need to enable everyone to see things for themselves, while originally the provincial product of Puritanism, had its own powerful expansive momentum; the Enlightenment cat of discerning by one’s own lights is let out of its bag. But it is released into a world of less and less consensus over religious and other matters—a dissensus partly of internal provenance and partly from an increasing immigrant influx of ever more different others with ideas of their own, including internal immigrants such as Native American Indians and ex-slaves. There is simply no guarantee, once all these heterogeneous individuals “go home and consider,” that the conclusions they each reach will accord with any orthodoxy, even the one that set them to considering in the first place. It is a safe bet that John Cotton did not anticipate this. Yet religious orthodoxy persists in that it keeps supplying the yearning, the questions that only it is designed to answer; the God-shaped hole in our hearts persists. The problem is that the questions can no longer reliably be stilled by the traditional metaphysical comforts, and a fortiori by any that are collectively shared. This leaves simply more and greater “going home and considering,” this time minus Cotton’s or anyone else’s bedrock verities on which each of us is foreordained to land. We are, in a way, turned out of our own houses in a sort of self-imposed exile of the mind and heart. We search and continue to search; we become “seekers” for whom any landing or settlement becomes necessarily provisional, temporary, or both. In this way the original religious impetus for learning to see by one’s own lights becomes fused with the Enlightenment drive for the same. It is a perpetual attempt at orthodox fulfillment through adherence to liberal process, a notably robust yet combustible fuel mixture for ideals.

This peculiar incongruity is one way of understanding the marked American tendency to see the road to collective self-improvement—even (perhaps especially) where we are deeply conflicted about what exactly counts as improvement—as running through education, where we transmit orthodoxies or their remnants while we simultaneously cultivate the competencies needed by searchers on the open road. This creates the unstable situation of religious orthodoxy having to rely on inherently unreliable liberal processes of inquiry, unreliable in the sense that those processes will not guarantee to orthodoxy any outcome. This instability becomes quite visible as a series of ambivalences in U.S. education policy where,

across a range of controversies, religious orthodoxy and liberal proceduralism have encamped across from one another, rising to battle from time to time.

As basic “philosophies of education,” liberal proceduralism and religious orthodoxy may be distinguished by their differing understandings of their own relationship (or lack thereof) to an encompassing and supervising conception of the Good and, more specifically, by the patterns that those understandings tend to follow. For liberal proceduralism, education is most accurately described as a search for the Good, whereas orthodoxy of whatever type is more at home conceiving of education as initiation into some more or less determinate and settled conception of the Good. Well-known binaries for parsing this distinction rise to mind: proceduralism focuses on means and orthodoxy on ends, process and product, negative freedom and positive, journey and goal, instrument and project, procedure and substance, and so on.

The education of liberal proceduralism emphasizes the need to give students tools that will be useful and/or necessary in their individual search for the Good. This is to be distinguished from the phrase “liberal education” which, insofar as it arises from an agreed-on curriculum, canon, or both presupposes a strong association with some substantive vision of the Good and, through that often-covert dependency, actually shares a deeper kinship with orthodoxy.<sup>7</sup> The education of proceduralism tends to emphasize equipping and enabling the learner for the search, stressing such academic and social skills and dispositions as critical thinking, dialogical competence, techniques for conflict resolution, and where relevant to the pursuit of extracurricular goals, various basic and more subject-specialized literacies (reading, science, art, history, etc.). It rests on a certain democratic faith, a kind of pluralist Jeffersonian-Peircean conviction that in the long run a heterogeneity of competent voices—the more the better—is more conducive to truth-seeking in whatever field of endeavor than is a homogeneity maintained by exclusions of various sorts; at its purest it is suspicious of the move to keep out the riff-raff, Platonic and Heideggerian assumptions that “the many” or “the they” necessarily lead one into the perdition of inauthenticity. Though proceduralism can sometimes use the language of virtue to describe the requisite democratic competencies, it is generally unable to give a full account of the grounding of those virtues, other than the circular one that they are to be cultivated because they are necessary for democracy.<sup>8</sup> Conversely, to the extent that a fuller account is provided, liberal proceduralism thereby shades into its own kind of secular orthodoxy, which is to say it becomes once again its parent, the more

comprehensively committed Enlightenment liberalism that requires a substantive conception of the Good. The true liberal proceduralist, though, always stops just short of such self-confirming certainties. An apt motto for the education of proceduralism would be André Gide's aphorism that advises us to follow those who seek the truth but beware those who have found it.<sup>9</sup>

In the most general terms, if it is to remain itself, proceduralism must beware any tendency, including its own, to metamorphose into its pedagogical opposite, orthodoxy. If proceduralism is the verb that wants to control the action, orthodoxy aspires to be the subject of the sentence. For by definition, the orthodox—particularly the religious orthodox—understand themselves to have found the truth or at least its proper vicinity. Orthodox education in its many variants presupposes this: it is typically conceived as initiation into a relatively settled conception of the Good, a means by which to inculcate into students a love and understanding of a determinate conception of the Good that itself remains more or less unquestioned. The motto here is “The Lord is my shepherd; I shall not want” (Psalm 23). In contrast to liberalism, orthodoxy may in this sense more legitimately call its virtues “virtues” because their necessity is accounted for by the comprehensive conception of the Good on offer. As a strict function of this conception, most actually existing orthodoxies tend to stress in their pedagogical programs virtues reflecting the augmentation of the ruling conception, those that would increase its nearness, accessibility, scope, and intensity of adherence, and the comprehensiveness of its application. Orthodoxy accordingly typically fosters the cultivation of a package of virtues containing such as integrity, consistency, loyalty, community solidarity (particularly vis-à-vis those with alien beliefs), steadfastness of faith, proselytizing zeal, and/or piety. As Alasdair MacIntyre has convincingly argued, one might even say that orthodoxy is a precondition for such character traits or virtues in that without some substantive basis they are arbitrary and ultimately meaningless. MacIntyre writes: “unless there is a *telos* which transcends the limited goods of practices by constituting the good of a whole of a human life, the good of a human life conceived as a unity, it will *both* be the case that a certain subversive arbitrariness will invade moral life *and* that we shall be unable to specify the context of certain virtues adequately.”<sup>10</sup> Without the bedrock of some *telos*-supplying orthodoxy, any durable ideals of character or virtue are, literally, lost. With no ultimate *raison d'être*, they simply crumble. Orthodoxy avoids this specter of nihilism by fashioning the individual as a vehicle, literally, for the greater Good; a person's



ultimate satisfaction should consist in realizing and accepting one's place in the universe so ordered. Outside this Good-ordered (often God-ordered) network of purposes, life is cold, lonely, chaotic, and ultimately meaningless. So understood, orthodoxy, particularly in its eschatological, biblical manifestations, further carries with it the assumption that society and politics are, even at their best, ultimately instrumental to the Good, and so are to be judged finally by the extent to which they facilitate the flowering of the favored orthodox conception.

As I elaborate below with reference to the case of contemporary religious fundamentalism, this is one reason why politicized orthodoxy can be surprisingly protean strategically: one moment the orthodox Christian or Muslim is a libertarian defender of basic constitutional freedoms and the next moment, often on seizing control, an archenemy of the same. From the orthodox point of view, this is actually not hypocrisy but rather the sublimest integrity: using political rights for the sake of the ultimate Good, the Good-identified ends most obviously justifying the political means, a kind of rule-utilitarianism of the holy.

These considerations are key for appreciating how orthodoxy and proceduralism each have their own kinds of heterogeneity and homogeneity, in sharp contrast to the typical picture that tries to make natural allies between, on the one hand, liberal proceduralism and diversity and, on the other, religious orthodoxy with that which is monolithic. For proceduralism and orthodoxy both foster their own kinds of heterogeneity as well as homogeneity. When examined more closely from this angle, there is a surprising degree of both internal diversity and internal uniformity allowed in both orientations. In orthodoxy, for example, there is generally wide latitude given concerning the paths by which one might come to the Good. One might, say, come to faith by an absurdist leap, aesthetic catharsis, or via some kind of emotional or moral revelation. One might always have had it, come gradually to it, or come to it from out of the blue all at once, on the road to Damascus, as it were. One might even be argued into it, or otherwise convinced by intellectual means, for example, a cosmological proof or the like. Especially for religious conceptions of the Good, the permissible motives and means for entrance seem nearly inexhaustible. Even self-interest and heteronomous desires to achieve rewards and avoid punishments (e.g., heaven, hell, excommunication, etc.) are typically deemed acceptable, and, in fact, often are regarded as pedagogically necessary for getting children habituated reliably: stories and simulations of the joys of heaven and torments of hell are particularly effective. All sorts and manner of routes to the Good—even those associated with somewhat baser,

self-interested motives—are usually possible. In this sense, there exists a very big tent for the faithful, often capacious enough to permit a much richer diversity than is commonly recognized. High-minded, low-minded, rational, fanatical, long timer, newcomer, sinner, saint, and so on—there may be as many routes to salvation via the Good as there are individuals. As means to its relatively fixed ends, orthodoxy is capable of admitting the wildest diversity.<sup>11</sup>

Similarly, and in this case true to its reputation, liberal proceduralism perpetrates its own wild diversity, a value pluralism about ends that is limned only procedurally. Aside from cases where certain ends such as slavery or genocide would seem inherently to violate the relatively thin norms of basic fairness on which liberal procedures are based, liberal proceduralism recognizes that many different systems of value may simultaneously be reasonable, that is, not violative of basic liberal procedural constraints, such as due process rights. Moreover, underlying liberal proceduralism more generally is the assumption that, despite the expected convergences around practical matters, rationality will in a larger sense produce not a convergence of value-outcomes but rather a divergence. When it is given free play, rationality writ large necessarily leads to disagreement and differences about what in life matters most; truth seeking will and should lead individuals on different paths (including, potentially, into orthodoxy). Even John Dewey and other liberals who look to scientific procedure as a model for democratic political process do not admire science so much for any alleged political implications of its substantive conclusions (as in the case of social Darwinism, most conscientious liberals would recognize the naturalistic fallacy in normative prescriptions purporting to be derived from science alone) as for the fairness and openness of its procedures, the Protestant-derived, quasi-democratic presumption that in principle anyone could repeat the experiment and so verify or refute it on his or her own. In this way science liberates our minds, though the substantive propositions those minds are supposed to embrace once they have been liberated cannot be decided a priori. There is, then, a socially ameliorative effect to be anticipated from scientific method as a frame of mind—if, that is, it is inculcated as widely as possible via education—in the indirect sense that because of it our collective intelligence and aptitude at solving social problems will be heightened. Wherever it might ultimately lead, this kind of Deweyan faith in the ameliorative effects of scientific method writ large is as far as it is possible to be from any ipse dixit orthodoxy. The Deweyan emphasis on “growth,” like its Lockean forbear “liberty,” reveals less an allegiance to anything standing static and a priori than to a certain kind of

socially dispersible activity, a restlessness that expands, chooses, grows, and the like, but not in any predetermined direction.

Despite the types of heterogeneity they permit, however, proceduralism and orthodoxy form mirror images of one another's characteristic forms of intolerance. For orthodoxy, revealed Truth stands as an a priori standard by which worthiness in all its most significant senses is measured. Whatever diversity among routes to getting there, there *is* a "there" there, a "there" that supplies a unifying and direction-providing telos, combing out all snags of divergence in proportion to their nearness to the gathering point provided by the One True Good. Whatever may have been our starting point and journey, we are all to end up in the same place, illuminated in the light of the Good. (One often finds here an accompanying license to intervene "for their own good" in the practices of those who seem consistently to land in outer darkness.) By contrast, liberal proceduralism's rational seekers, while they are not required to end up in the same place, are expected to travel in roughly the same agreed-upon manner; they have to follow the rules. In the final analysis, the liberal proceduralist's performance is evaluated according to the soundness of the reasons for her chosen route, her arguments and justifications, the fairness and openness characterizing the course of her life, defined most relevantly by her decisions, the defensibility of the moral choices she has made by her own lights.

These are the two orientations' most basic priorities. For proceduralism, the soundness of one's reasons and justifications has moral and intellectual primacy, whereas the precise answers one finds as a result of adhering to the procedures thus sanctioned are of secondary importance. For orthodoxy, however, proximity to the Good/God is of primary and overwhelming importance, far more significant than the antecedents and arguments that have caused and characterized one's movement into that nearness.

By way of illustration, consider briefly two hotly contested school policy controversies and how the primary antagonists tend to draw their battle lines. (Again: not how they *could* be drawn by suppler and subtler minds, but how they tend actually to be drawn.) First is evolution versus creationism, a conflict enduring across a range of historical permutations, from the star-studded *Scopes* "Monkey Trial" of the 1920s (Clarence Darrow and William Jennings Bryan were the two sides' advocates), to the defining U.S. Supreme Court cases of recent decades, most notably *Epperson v. Arkansas* (1968) (a state may not ban the teaching of evolution) and *Edwards v. Aguillard* (1986) (so-called "equal time" for creationism laws have no

secular purpose and therefore violate the Establishment Clause), to recent controversies surrounding the Board of Education of the State of Kansas rescinding and then restoring a state requirement that local school districts be able to opt out of evolution as part of their science curricula and the Dover, Pennsylvania school district's utilization of a neo-creationist "intelligent design" textbook in the context of its biology classes.<sup>12</sup> Whatever the complexities of current and proposed statutory remedies, I would suggest that the larger logic of this disagreement is fairly clear and simple. The liberal side champions largely proceduralist goals such as critical thinking, unfettered inquiry and scientific literacy, on the argument that our schools simply cannot produce scientific literates if they ignore for no good reason an entire area of scientific inquiry. To do so would, in fact, compromise the very idea of science and scientific method by voiding a priori an entire area of research, in effect asking students to base their beliefs about the world on something other than empirical evidence. It would also undermine the ability to coherently teach biology and biologically-based fields because evolutionary theory constitutes these areas' very organizing principle. As the paleontologist Stephen Jay Gould pithily summarizes, teaching biology without evolution would be "like teaching English but making grammar optional."<sup>13</sup> At its most consistent, the proceduralist defense of evolution in the science curriculum does not rest upon any particular affinity (or lack thereof) for any larger *conclusions* about the world implied by evolutionary biology, but rather on the conviction that one must pursue the truth of the matter—whatever matter—wherever honest and competent inquiry leads. One might ultimately be right or wrong, but any deviation from procedural purity would properly be considered illiberal. Science and evolution are from this point of view inextricable; to abandon one would necessarily be to abandon the other.

By contrast, and notwithstanding the weak legitimating gestures toward a "creation science" or an "intelligent design" (that allegedly just happens to accord with Genesis), the actually existing orthodox view of the matter, when presented honestly, stands quite clearly and straightforwardly opposed to the liberal-allied proceduralist view. An explanation of so fundamental a matter as our origin as human beings and, before that, life forms of whatever type, must cohere in some demonstrable fashion with the biblical account. Since all ultimate meaning and what one might call symbolic sustenance must derive from that account, then that account's status and sway over the lives of adherents must never be compromised. In this sense, the Church contra Galileo had it quite right: to the naive enthusiast, talk of a nongeo-centric universe might seem to be a discovery

bounded within the realm of astronomy and not religion or morality. As has been the historical drift, even within the Church, one is made to accept the reasonability of such a fighting retreat, the “progressive” distinction between matters of science and faith. But earlier Church leaders knew that once the Bible’s authority is rendered contingent in one area, there is little to stop it being questioned in other areas as well, a slippery slope, literally, to Hell.

Even allowing for the hermeneutical complexities of ascertaining any text’s meaning, those who would pick and choose among Scriptural passages offer precisely a liberalized version of religious orthodoxy that is, in short, no orthodoxy at all (particularly when this “editing” takes place ever further outside the established and official canons of commentary and interpretation). The very sorting, of, presumably, the “reasonable” passages from the “unreasonable” ones, presupposes liberal procedural norms of critical thinking, evidentiary sustainability, and, even worse, so many expedient adjustments to social convention. But as a matter of psychology and common sense, it is difficult to control these procedural dispositions and to circumscribe what one might think of as their authorized jurisdiction. The Biblical account must remain supreme, whatever its implausibility to secularized ears. Far too much is at stake. An important contemporary example of what is at stake is fundamentalist Christian alarm over what it sees as the morally nihilistic implications of evolutionary theory, particularly in the area of evolutionary psychology, where evolution allegedly causally explains behaviors such as rape and murder. Even where fundamentalists are willing to embrace such subtleties as the distinction between “explaining” and “explaining away,” they are wont to deny emphatically that these distinctions can be sustained pedagogically in the actual teaching of children. As Michael Farris, President of the Home School Legal Defense Association, in a newspaper editorial entitled “Study Indirectly Shows the Evils of Evolution,” writes, “[I]f, however, you want your kids to believe that rape, racism, and murder are always wrong—even when committed on a high school campus—better keep them away from schools that teach evolution, lest they follow this theory to its logical anti-social conclusion.”<sup>14</sup>

One simply cannot understand the orthodox opposition to the teaching of evolution without understanding this characteristic fear of an unholy slippery slope. Admittedly, there are confusingly mixed signals arising from the political debate, especially from those in the orthodox camp who have convinced themselves that they are advancing liberal procedural norms such as equal treatment (of the two views) or critical thinking (e.g., the alleged pedagogical benefits to students of comparing

the two “theories”) when they fight to assure a place for creationism/intelligent design in the science curriculum. In the heat of the battle to sway public opinion, orthodox advocates very often try to claim *all* arguments, including the liberal ones, for their side. (In doing so they often also betray their deep lack of affinity with what science would require of them, as when they claim that any time there are disputed points within a scientific field, as there always are, the whole field is therefore simply a matter of opinion.) For true religious orthodoxy, however, these are just strategic moves, whatever the ideological casualties the orthodox camp suffers as a result of the liberalizing political process. What motivates orthodox activism to take sides on matters of policy is by definition directly rooted in the perceived relationship of a policy to the orthodox conception of the Good. All else is merely tactical.

Another symptom of this ideological opposition can be found in debates over sex education in public schools, from lessons about sexuality and pressing topics such as venereal disease and AIDS prevention to headline grabbing instances of condom distribution and the like. The reigning orthodox position is that premarital, and certainly adolescent sexuality is wrong, period: “Just say no.” (Again: there is of course any number of possible orthodox positions regarding sexuality, including actual and imagined religions and cults where, say, teenage sexuality is encouraged. But these kinds of exotica have little political relevance.) This absolutist position most obviously stems from the biblical prohibition against extramarital sex. Here, sexuality is first a moral issue, not one of psychology or health. It is an arena within which free will and soul-worthiness is tested; failing here is tantamount to failing as a person. Further, the orthodox see giving information about sexuality—no matter how noncommittal is the mode of this information’s transmission—as implying an official acceptance of sin, a wholesale giving up that says, “since we cannot stop it, we might as well make sure the kids do it safely.” It is a matter of good hygiene and rational prediction concerning what is known to psychologists and health professionals about adolescent sexual behavior.

While this sounds like the very soul of reasonability to liberal proceduralist ears, the orthodox mind can only see this reality-accepting gesture as an outright condoning of what it views as a damningly sinful promiscuity. Utilitarian predictions about the likely consequences of sexual behavior are beside the point (except perhaps as evidence of God’s displeasure). By contrast, the proceduralist view—which happens to be the official view in most school districts, with the common but small qualification that abstinence should enjoy priority as a “preferred” method—is that more

neutral goals such as health, safety, and the prevention of unwanted teen pregnancy trump the substantive concerns of orthodox groups. Proceduralists in administrative roles are typically happy to “agree to disagree” with their more determined constituents, usually offering offended parents the ability to opt their own children out of the sex education as a path of least resistance. In this way, the proceduralist panacea of more choice (at least *parental* choice) is viewed as a way to resolve such problems. Of paramount importance to the liberal proceduralist school official is ensuring the health, safety and future life chances of the children in his or her care, not for any particular purpose, but to make sure everyone maintains his or her life options in as full a way as possible.

When the condoms are distributed and rhetorical war ensues, we then have a dispute that is stronger and deeper than is typically evoked by the term “disagreement.” It is conflict over what even *counts* as morally significant. For religious orthodoxy, something counts to the extent that it is relevant to the accepted or revealed conception of the Good. For liberal proceduralists, something counts (qua public morality) insofar as it is instrumental to or considered a component part of the shared procedural norms of fair play. The educational ramifications of each view are stark in an area like sex education. While the orthodox seek to integrate sexual behavior and belief into their substantive, Good-ordered system of values and virtues, the proceduralist champions the creation of individuals who are equipped and disposed to make sexual choices (according to the rules of “good,” i.e., efficacious, choosing) by the light of *their own* beliefs, whatever those may be. Proceduralism can certainly identify as problematic a sexually active teen on a doomed quest for peer acceptance pursuant to a sense of self-worth. Such a client should be counseled toward a change. Yet proceduralism would also be bound to recognize as a problem a teen who is abstinent for the wrong reasons (e.g., “I’m fat, so fear of humiliation keeps me a virgin”), who therefore ought also be counseled to change, even though that change might lead away from abstinence. Absent subtler forms of motives-scrutinizing Kantianism, though, for the orthodox, staying away from sin is staying away from sin *simpliciter*; many methods may be permitted for keeping one on the right path toward the Good; the struggles and tribulations, the “lust in one’s heart,” as it were, can be forgiven. Again, the only “evidence” necessary is proximity to the Good and the symptoms thereof (e.g., the prosperousness of God’s elect in Calvinism). Liberal proceduralism scrutinizes the choosing process, orthodoxy the choices themselves. Characteristically, neither allows much of a basis for mutual recognition.

## STUDENTS' RIGHTS AND THE DEMISE OF IN LOCO PARENTIS

An additional and more significant lens through which to view this divide is the postwar rise of students' rights, along with the concomitant demise of the older doctrine of *in loco parentis* (Lat. "in place of the parent"). Traditionally relatively unquestioned, *in loco parentis* held that, when children are in its care (during the school day, on school grounds, including bus transportation), the school has the same level of authority and responsibility for its students as have parents for their own children at other times; school and parent in effect pass back and forth the legal baton of guardianship. In this setting, the protections of the Bill of Rights, qua protections against government, do not really apply; for students' rights purposes, because its application defines school officials as temporary parents, *in loco parentis* effectively removes schools from the constitutional realm. If the child sent to her room for talking back or for having cigarettes in her purse has neither First Amendment "freedom of speech" nor Fourth Amendment "unreasonable search and seizure" claims against her parents, then neither would she have such claims against her teachers or principals. But *in loco parentis* no longer obtains in this way, largely as a result of key U.S. Supreme Court decisions. This is particularly true regarding the "authority" part of the old arrangement. (The "responsibility" part remains and even grows, mostly via tort claims involving educator negligence, often in the form of legal duties and standards of care and the like.)<sup>15</sup> This demise of *in loco parentis* underlines the extent to which liberal procedural goals have, for better or worse, crowded out the more forthrightly morally based "school rules" characteristic of previous eras.

The *Tinker* case (1969) is the signal liberal proceduralist victory in this area.<sup>16</sup> Writing for the *Tinker* majority, Justice Fortas famously asserted that, along with their teachers, students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," thereby inaugurating the present era of students' rights.<sup>17</sup> During this period, students have won progressively greater constitutional protections across an impressive range: freedom of speech and assembly, rights of due process in discipline, particularly regarding suspensions and expulsions, in the Fourth Amendment area of protections against unreasonable searches and seizures, as well as more recently in other areas of emergent national concern such as sexual harassment perpetrated by school personnel or other students (where the school has turned a blind eye).<sup>18</sup> In addition, although court-mandated desegregation and related compliance efforts are clearly waning, statutory due process protections continue to expand quite powerfully concerning



the formal rights and related services owed to disabled students by federal statute (viz., the *Individuals with Disabilities Education Act* [IDEA]) and its reauthorizations, including a newer, larger and more controversial group of the “learning disabled.”<sup>19</sup>

In each of these areas, procedural norms reign more or less supreme as the official modes of justification. It is important to concede, however, that the above constitutionally based students’ rights gains are rooted in ideals of equity and fair play that do, admittedly, form the spare substantive core underlying the liberal proceduralism of the U.S. Constitution. (Again: I am not dealing with ideal philosophical types, but merely with strong tendencies as they actually exhibit themselves politically.) Yet, however substantively based in the genealogical sense, this actually existing liberal proceduralism must continually distance itself from its own, more substantive, Enlightenment liberalism progenitor. This occurs in at least two major ways that help ensure its merely procedural nature and disallow it from devolving into Enlightenment liberalism. First, the constitutional settlements—the great liberal legal victories—are almost always couched in neutralist terms that require governmental actors *de jure* to bracket out substantive content from decision-making processes. The zone of discretion for educational authorities, where they may exercise relatively autonomous moral action (as opposed to mere rule following), has correspondingly shrunk. Second, even though these victories, *qua* constitutional settlements, have by definition a traceable lineage to substantive moral ideals of liberty, equality, and so on, they are not typically experienced that way. Owing, among other things, to a scarcity of official commitment to public legal education (a kind of civic education deficit that is under appreciated), “privacy,” “equality,” various “freedoms-*of*,” and so forth, are usually experienced as *mere* procedures. As such, they so often degenerate into matters of blind rule following or irrational- and/or capricious-seeming bureaucratic dictates that help produce debilitatingly widespread frustration and cynicism. The great ideals of the day are proceduralized into mountains of paperwork, elaborate rules and bylaws of forgotten provenance, and increasingly, a timid, though, in many cases, bottom-line rational, reluctance to stand up to lawyers’ demands on behalf of their clients’ rights, usually in the form of some official’s procedural violation. Both of these processes form what one might describe as liberalism’s new pathos of distance from its own core ideals. This is a defining aspect of what I’ve specified as the victory of liberal proceduralism, over not only religious orthodoxy but also over more substantive secular understandings of liberalism itself (e.g., what I’ve been calling Enlightenment liberalism, which

is comparatively forthright about its deepest normative commitments and how those matter to its vision of the human Good). This victory is quite apparent in today's public schools.

*Tinker* itself is emblematic. The student-plaintiffs wore black armbands to protest the Vietnam War. When their Des Moines, Iowa high school disciplined them for doing so they erred, largely because, as the Supreme Court reasoned, it was clear that school officials were singling out for sanction *this* particular expression (viz., opposition to the War) rather than simply prohibiting for some pedagogical reason certain kinds of behaviors or expression in general. A telling point in the students' favor, for example, was the fact that the school had previously allowed other expressions, including on one occasion a German military insignia. It was clear that the students were punished because of a disagreement with the *content* of their belief, rather than a more "innocent" desire by school officials to carry on their responsibilities as educators. Hence the *Tinker* test: student freedom of speech may be curtailed only where the expression would constitute a "material and substantial disruption" of the educational process.<sup>20</sup> (Though modified in subsequent years, most notably to exclude "school sponsored" activities such as school newspapers,<sup>21</sup> along with instances of obscenity or vulgarity by students,<sup>22</sup> *Tinker* and its test remain good law.) As stated in the decision, quoting Justice William Brennan's use of the Holmesian metaphor, the "marketplace of ideas" on which democracy depends is to be valued such that a certain level of turbulence arising from students' exercise of free speech rights must be tolerated.<sup>23</sup>

What the public school must never do is engage in "viewpoint discrimination"; it must officially maintain a principled, content-neutral indifference (with only a few highly specified exceptions) to the particular views being expressed. This same prohibition against viewpoint discrimination applies to the selection and/or removal of library material,<sup>24</sup> school decisions about the existence of noncurricular-related student groups,<sup>25</sup> and the use of school facilities by outside community groups.<sup>26</sup> Each of these laws is, on my view, eminently reasonable when taken on its own individual merits, and so my argument does not take issue with any of them per se. I'm trying instead to underscore how the mandatory priority of ideological neutrality in school administrative decisions represents a victory for liberal proceduralism, rather than for any particular substantive vision of the Good. As such, Enlightenment liberals should not take too much heart from this pattern of case law, remembering that all that glitters is not gold. For, as is true in so many other areas of life, the de jure has a way of becoming de facto in terms of how people actually conduct

their lives. This means that the rule that must be followed—in this case a content-bracketing neutrality—becomes internalized as a habit of thinking, an impulse, even a *vis à tergo* “conviction” that does not always stop at viewpoint *discrimination* but also often proceeds in practice to prohibit *viewpoint* altogether. As a school administrator or board member in these litigious times, one is usually better safe than sorry; having an identifiable viewpoint on any potentially disputable matter can become extremely costly, and it is rarely worth the risk. No school administrative decision is likely to be momentous enough to become, as they say, the hill on which one is willing to die, to end one’s career. With this further prudential reinforcement, the proceduralist momentum is all-but irresistible, as no public school can afford to maintain any real and sustained connection with any substantive conception of the Good, a state of affairs one might term “whateverism.”<sup>27</sup> As a result, to quote from Gerald Grant’s classic study *The World We Created at Hamilton High*, “a school tends to be reduced to a set of procedures for guaranteeing individual rights and setting forth what is legally proscribed.”<sup>28</sup>

Consider some further proceduralist victories in the public schools. Far from the courtrooms where they are propounded, the great substantive due process protections are typically experienced in a highly formalistic way, as a gamut to be run of rules and procedures usually inexplicable to those affected by them, where those most intimately involved are “not to wonder why . . .” Examples are easy to find. Take the often Byzantine procedural requirements regarding long-term suspensions and expulsions. Rooted in the substantive ideals of the Fourteenth Amendment (both the Due Process and Equal Protection Clauses), substantial due process protections obtain for punishments involving long-term suspensions and expulsions (defined as over ten days) because public school attendance is considered to be a “property” interest. And so, as in the case of any attempt by the state to deprive citizens of property (e.g., fines, garnishments, seizures, etc.), augmented procedures must be followed in deciding and implementing such a penalty. With regard to suspensions and expulsions, the Court has drawn the line at ten days: students are considered to be deprived of their state-created property interest in public schooling if their punishment requires their removal from school for over ten days.<sup>29</sup> (Though there is no “right” to education mentioned anywhere in the U.S. Constitution,<sup>30</sup> all fifty state constitutions have language guaranteeing free public schooling, thereby authorizing the application of the Fourteenth Amendment to this state-established “property interest.”) This of course does not mean there is any prohibition against

such punishments—any more than there is a prohibition against the state depriving a citizen of whatever it seeks to take away, up to and including life itself in capital cases—but only that the proper procedures must be followed in order to convict.

As in many areas of law, though, adherence to the substantive constitutional core (those all-important clauses) is so often experienced as a thick forest of red tape and assorted hoop jumping that it rapidly diminishes in its appearance of rationality. In large part because of these procedural protections, school discipline, and in particular suspensions and expulsions, have become incredibly expensive and complicated maneuvers for which even medium-size school districts must retain full-time legal counsel. And, as is generally true concerning the relationship between law and human, and in particular, bureaucratic behavior, the actual litigation is of much less overall consequence than is its subsequent chilling effect (sometimes desired, sometimes not). When contemplating a suspension or expulsion, say, in a school district with a “zero tolerance” policy for drugs and/or weapons possession, school officials typically must *first* decide on the punishment’s procedural feasibility, *then* on its justice (*qua* dessert) and overall effects on the welfare of the school community. As a result, there has developed a widespread sense among school administrators (a patently obvious matter among those with whom I have worked) that there exists too wide a gulf between what “real” justice would require and what the procedural encumbrances will in fact allow, precipitating a sort of legitimation crisis in contemporary school discipline. Such irresolution is typical of what Powell, Farrar, and Cohen famously call “the shopping mall high school.” The juridified moral climate of such schools is summarized by one of Powell et al.’s administrator-subjects, who observes that “the law seemed to teach that students had many rights no matter what they did and few responsibilities. It was often too much trouble and too great an expense to suspend or expel the unruly.”<sup>31</sup> As James Davison Hunter suggests, the larger worry is that such conditions render traditional approaches to moral education—and perhaps moral education of any kind—as “little more than vacuous platitudes, lacking any morally compelling logic and emptied of binding moral authority.”<sup>32</sup>

Likewise, substantive victories for students’ rights in other important areas have predictably become proceduralized in ways that are difficult at times even for experts to follow. Take the Fourth Amendment prohibition against unreasonable search and seizure. In the landmark school search and seizure case *New Jersey v. T.L.O.* (1985), the Supreme Court sought to define a standard for school officials who wish to search students. The