CORPORAL PUNISHMENT: FOR SCHOOL CHILDREN ONLY

It has been observed that there is a cyclic movement in the area of constitutional law.[1] It appears that this cyclic movement has turned to the eighth amendment[2] which has been spotlighted by the United States Supreme Court in its recent decisions.[3] This Note is concerned in part with the applicability of the cruel and unusual punishment clause of the eighth amendment to disciplinary corporal punishment inflicted upon the public school student.

The Supreme Court, in *Ingraham v. Wright*,[4] had occasion to address such an application. Five justices[5] determined that the prohibition of the cruel and unusual punishment clause was meant to protect only those convicted of crimes and did not protect the public school child undergoing disciplinary corporal punishment. A strong dissent by the remaining four justices[6] reached an opposite conclusion. This Note will examine the evolution of the cruel and unusual punishment clause as it was developed historically and as it was interpreted by the judiciary. This discussion will lead to a consideration of other law involving the administration of disciplinary corporal punishment in the public school setting, with the resulting collision of the rights of the student, of the parent and of the school.

I. DEVELOPMENT OF THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE

A. *Historical Development*

"But if any harm follow, then thou shalt give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe."[7] This was the *lex talionis* given by God to

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1. Mosk, *The Eighth Amendment Rediscovered*, 1 LOY. L.A.L. REV. 4 (1968) [hereinafter cited as Mosk].

2. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

3. Ingraham v. Wright, 97 S. Ct. 1401 (1977); Estelle v. Gamble, 97 S. Ct. 285 (1976); Gregg v. Georgia, 428 U.S. 153 (1976).

4. 97 S. Ct. 1401 (1977).

5. Powell, J., delivered the opinion of the Court in which Stewart, Blackmun and Rehnquist, J.J., and Burger, C.J., joined.

6. White, J., filed a dissenting opinion in which Brennan, Marshall and Stevens, J.J. joined.

7. *Exodus* 21:23-25 (American Revised Standard).

Moses. *Lex talionis* included neither mitigation nor mercy.[8] Although it contained the element of retribution, *lex talionis* was limited by the concept of equivalency—the punishment equal to the crime.[9] Thus, the root of the eighth amendment was established.

The doctrine of proportionality between the offense and the punishment appeared in England in codified form about 900 A.D. in the Laws of King Alfred, with a defendant being charged a specified amount for each injury he inflicted to each part of the body. After the Norman conquest of England in 1066, the system of compensation was replaced by discretionary amercement[11] which did allow the peculiar circumstances of a particular offense to be considered, yet it also opened the way for the imposition of excessive punishment in the form of fines.[12]

Some authorities believe that the cruel and unusual punishment clause in the English Bill of Rights of 1689[13] was written in response to a method of punishment which took place in a period of English history known as the "Bloody Assize." During this time a condemned man convicted of treason would be hanged by the neck, cut down while alive, disembowelled with the bowels burned before him, beheaded and finally quartered.[14] Granucci, who is often cited by the Supreme Court and by other courts in eighth amendment cases, challenges the belief that the "Bloody Assize" method of punishment was the fountainhead of the cruel and unusual clause on three grounds: first, the methods of punishment employed prior to the "Bloody Assize" were used after the English Bill of Rights; second, the chief prosecutor of the "Bloody Assize" was a leading member of the drafting committee for the Bill, making it highly unlikely he would condemn his own prior acts; and third, the "Bloody Assize" was mentioned only once in debate on the bill.[15] Other authorities, including Granucci, find the cruel and unusual punishment clause of the English Bill of Rights a response to the Titus Oates affair.[16] One of the documents

8. Granucci, *"Nor Cruel and Unusual Punishment Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 844 (1969) [hereinafter cited as Granucci]. This author is greatly indebted to Mr. Granucci as the bulk of this section is based upon his excellent research.

9. *Id.*

10. *Id.* at 845.

11. Instead of a fine being pre-established at a set amount, penalties were left to the discretion of the person assessing them.

12. Granucci, *supra* note 8, at 845.

13. This provision reads: "That excessive bail ought not to be required, nor excessive fines imposed nor cruel and unusual punishment inflicted." 10 declaratory cl. English Bill of Rights of 1689. The eighth amendment substitutes the word "shall" for "ought." U.S. CONST. amend. VIII.

14. Granucci, *supra* note 8, at 853-54.

15. *Id.* at 854-55.

16. *Id.* at 856-59. Oates, a minister of the Church of England, claimed there was a plot to assassinate King Charles.

> According to Oates, two Jesuit priests were to shoot the King with silver bullets, four 'Irish Ruffians' had been hired to stab him, and if all failed, the Queen's doctor,

in the Oates' case used the specific words "cruel" and "unusual" in reference to the punishment. It seems clear however, based on the nature of the sentence imposed, that no restriction on the *method* of punishment was contemplated. Rather, the emphasis of the language was apparently on the *excessiveness* of the punishment,[17] and thus based on the concept of proportionality expressed in *lex talionis*.

Consequently, Granucci finds it paradoxical that the eighth amendment was interpreted in American colonial law as a prohibition against the method of punishment. He believes the idea that some methods of punishment might be cruel can be traced to Sir Robert Beale, an English writer in the 1580's who had studied law,[18] and the Puritan minister and attorney who introduced the concept to the American colonies, Nathaniel Ward.[19] The focus on the method of punishment results in a fixed historical approach, which concentrates on the abuses the English were seeking to prohibit; the resultant outcome is that only those penalties proscribed in England at the time the amendment was written can be circumscribed by the amendment.[20] This perspective therefore demands that one determine the categories of punishments contrary to English law which the American framers would have been seeking to prohibit.[21]

Sir George Wakeman, was to poison him. The assassination was to be followed by an invasion of Catholic armies which would put the King's brother, James, on the throne. Oates claimed to have learned this by attending a Jesuit meeting at the White Horse Tavern in the Strand on April 24, 1678. Oates was an inveterate perjurer and the 'Popish Plot' a complete hoax, but the Earl of Shaftesbury, seeing political profit in such a plot, gave Oates his support. On September 28, Oates swore to all this before a London Magistrate, Sir Edmund Berry Godfrey. Within ten days Godfrey was murdered. The crime has never been explained. The Catholics accused Oates; Shaftesbury and Protestant England accused the Jesuits.

In the hysteria that followed 15 Catholics were executed following convictions for treason. . . .

In 1685, following the succession of James II, evidence of Oates' perjury abounded. It had been learned that Oates was not even in England on April 24, 1678, ... He was indicted on two counts of perjury. . . . Oates tried to defend himself by asserting that everyone involved . . . had believed his story. He was convicted on both counts. . . . Oates was sentenced to (1) a fine of 2000 marks, (2) life imprisonment, (3) whippings, (4) pilloring four times a year and (5) to be defrocked. . . . Oates petitioned both houses of Parliament for a release from the judgment, calling it 'inhumane and unparalleled.'

Id.

17. *Id.* at 859. Although Oates' petition for release was rejected by the House of Lords, a dissent by a minority of the House leads Grannuci to conclude that "[i]n the context of the Oates' case, 'cruel and unusual' seems to have meant a severe punishment unauthorized by statute and not within the jurisdiction of the court to impose." *Id.*

18. *Id.* at 847-48.

19. *Id.* at 850-51.

20. Comment, *The Eighth Amendment, Beccaria, And The Enlightenment: An Historical Justification For The Weems v. United States Excessive Punishment Doctrine*, 24 BUFFALO L. REV. 783 (1975) [hereinafter cited as BUFFALO Comment].

21. Weems v. United States, 217 U.S. 349, 390 (1910) (White, J., dissenting).

If Granucci's contentions are correct, however, such an approach emphasizing the methods of punishment would be historically invalid, as prohibitions against methods of punishment are nonexistent in English law. On the other hand, the prohibition against excessive punishment, well established in England according to Granucci, was ignored in the colonies,[22] thus lending evidence to the view that the eighth amendment's origins are rooted in proportionality concepts.

Granucci contends that while the authors of the eighth amendment took the language from the English Bill of Rights of 1689, which had been transferred to the Virginia Declaration of Rights of 1776, the founders substituted the interpretation given by Beale and Ward. This interpretation emphasized the methods of punishment as opposed to the excessiveness of punishment.[23]

Another means of placing the amendment in proper historical context is to incorporate the influence on political thought of Enlightenment philosophy prevalent in Europe, England and in the colonies at the time.[24] This approach leads to the conclusion that colonial leaders were aware of the proportionality aspects of punishment and that the later misinterpretations were the responsibility of the courts. Historical evidence in the form of books, papers and letters shows that colonial leaders such as Jefferson, Franklin, Madison and Adams were influenced by Enlightenment philosophy and more particularly by the works of Montesquieu, Beccaria and Voltaire.[25] In 1721 Montesquieu, in *The Persian Letters*, pronounced that increased severity of punishment does not result in increased obedience to the law.[26] In 1764, Beccaria, an Italian social philosopher, wrote a treatise *On Crimes and Punishments* favoring deterrence over retribution.[27] In proposing that a balancing between the crime and the punishment is needed, Beccaria saw as a danger in excessive penalties that the severity of the punishment for one crime might in fact lead to the commitment of other offenses to avoid the original penalty.[28] In 1766, Voltaire, the prominent French writer, published a *Commentary* on the Beccaria treatise which served to popularize his ideas and give impetus to the movement toward penal reform.[29]

One example of a colonial leader's awareness of proportionality is

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22. Granucci, *supra* note 8, at 847.

23. *Id.* at 860. Another possible source of misinterpretation is 4 W. BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND ch. 29 (1768). Granucci, *supra* note 8, at 862-65.

24. BUFFALO Comment, *supra* note 20, at 792-93.

25. *Id.* at 807.

26. *Id.* at 810.

27. *Id.* at 808-09.

28. *Id.* at 809-10. For an interesting account of John Adams' use of Beccarian philosophy in his defense of British Captain Preston following the Boston Massacre, *see* F. KIDDER, HISTORY OF THE BOSTON MASSACRE 232 (1870).

29. BUFFALO Comment, *supra* note 20, at 811-12.

represented by a letter written by Thomas Jefferson to another colonial explaining his position on punishment:

> Punishments I know are necessary, and I would provide them, strict and inflexible, but *proportioned to the crime*. Death might be inflicted for murther and perhaps for treason if you would take out the description of treason all crimes which are not such in their nature. Rape, buggery & c. punish by castration, all other crimes by working on high roads, rivers gallies & c. a *certain time proportioned to the offense*.[30]

Examples of the proportionality doctrine are also found in early colonial constitutions. Pennsylvania's constitution of 1776 proclaimed that "penal laws . . . shall be reformed by the future Legislatures of this State, . . . and punishments made in some cases less sanguinary and in general *more proportionate to the crimes*."[31]

Despite this evidence of colonial cognizance of proportionality, a survey of Supreme Court opinions reveals that early decisions dealt with the method of punishment. It was not until 1910 that a majority of the Court applied what was in fact the original Mosaic law of *lex talionis*, making the punishment equal the crime, to invalidate a punishment under the eighth amendment which was disproportionate to the crime.[32]

B. *Judicial Development*

In looking at its own past decisions, the Supreme Court in *Ingraham v. Wright*[33] pointed out that every decision determining if a punishment is cruel and unusual has involved a criminal punishment[34] which could be circumscribed by the clause in one of three ways.[35] First, the clause may limit the method of punishment.[36] Second, it may forbid a punishment not in proportion to the crime.[37] Third, it may restrict the types of activity that may be made criminal.[38]

In early eighth amendment cases, the Court was not concerned with the proportionality of the punishment, but rather with the method of ex-

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30. *Id.* at 817-18, *quoting* 1 THE PAPERS OF JEFFERSON 505 (J. Boyd ed. 1950) (emphasis added) [hereinafter cited as JEFFERSON PAPERS].

31. BUFFALO Comment, *supra* note 20, at 821, *quoting* Pa. Const. § 38 (1776) (emphasis added). For additional examples of early laws dealing with punishments, *see* JEFFERSON PAPERS, *supra* note 30, at 819-26.

32. Weems v. United States, 217 U.S. 349 (1910). For an article dealing with proportionality of punishment, *see* Wheeler, *Toward a Theory of Limited Punishment II: The Eighth Amendment After Furman v. Georgia*, 25 STAN. L. REV. 62 (1972).

33. 97 S. Ct. 1401 (1977).

34. Ingraham v. Wright, 97 S. Ct. 1401, 1410 (1977).

35. *Id.*

36. Trop v. Dulles, 356 U.S. 86, 101 (1958).

37. Weems v. United States, 217 U.S. 349 (1910).

38. Robinson v. California, 370 U.S. 660 (1962).

ecution, which was scrutinized for its torturous or barbarous elements.[39] An early illustration of this approach was reflected in *Wilkerson v. Utah*[40] wherein the court determined that shooting as a method of carrying out the death penalty for first degree murder was not prohibited by the eighth amendment.[41] The Court again examined the method of punishment in *Louisiana ex rel Francis v. Resweber*,[42] and suggested that the constitutional protection stands against "cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely."[43]

A new emphasis was foreshadowed in *O'Neil v. Vermont*.[44] O'Neil, licensed to sell liquor in New York, supplied liquor to mail order customers in violation of a Vermont statute dealing with intoxicating liquor. He was fined $6638.72; when the fine went unpaid, O'Neil was sentenced to fifty-four years in prison. Although the majority did not examine the cruelty of the penalty, Mr. Justice Field in dissent, relying on the language of the amendment itself, decided that punishments "excessive in length or severity are greatly disproportioned to the offenses charged. The whole inhibition [of the eighth amendment] is against that which is excessive either in bail required, or fine imposed, or punishment inflicted."[45]

Further development of the emphasis on the aspect of proportionality is found in *Weems v. United States*,[46] which broke the pattern of focusing on method and concentrated on the proportionality aspect of having the punishment fit the crime.[47] This focus resulted in the first reversal by the Court of a conviction under the cruel and unusual punishment clause and in the first finding by the Court that a punishment provided for by the statute was both cruel and unusual. Weems, convicted of making a false entry in government payroll books, was sentenced to fifteen years of hard labor to be performed in chains, the loss of basic civil rights and a life-time of surveillance. The majority viewed the punishment as cruel "in

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39. Torture is mentioned in Wilkerson v. Utah, 99 U.S. 130, 136 (1879) and *In re* Kemmler, 136 U.S. 436, 447 (1890).

40. 99 U.S. 130 (1879).

41. Wilkerson v. Utah, 99 U.S. 130, 134-45 (1879).

42. 329 U.S. 459, 464 (1947).

43. Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 464 (1947). Another important aspect of this case is that eight justices assumed the applicability of the eighth amendment to the states. Originally the eighth amendment was held to apply only to the federal government. In 1890 a unanimous Court held that the eighth amendment through the fourteenth could not operate to keep a state from electrocuting a prisoner convicted of a felony. *In re* Kemmler, 136 U.S. 436 (1890). In O'Neil v. Vermont, 144 U.S. 323 (1892), three justices waivered from the *Kemmler* position.

44. 144 U.S. 323 (1892).

45. O'Neil v. Vermont, 144 U.S. 323, 340 (1892) (Field, J., dissenting).

46. 217 U.S. 349 (1910).

47. Weems v. United States, 217 U.S. 349, 366-68 (1910).

its excess of imprisonment and that which accompanies and follows imprisonment" and "unusual in its character."[48] The opinion in *Weems* supposed that

> [s]uch penalties . . . amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths [this conviction took place in the Phillipines], and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense.[49]

The Court considered both the severity and the excessiveness of the defendant's sentence in declaring the punishment void.[50] *Weems* is additionally important because it introduces the evolving nature of the eighth amendment. The court announced that the cruel and unusual punishment clause "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."[51]

This evolutionary nature was emphasized by Chief Justice Warren in *Trop v. Dulles*,[52] when he stated that "the words of the amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society"[53] with the result that penalties must be in harmony with "the dignity of man."[54] Trop was convicted of desertion by a military court, was sentenced to three years of hard labor, deprived of pay and allowances and dishonorably discharged. Subsequent to his sentencing, Trop was denied a passport. At issue was not the amount of punishment, but whether the penalty of denationalization was "forbidden by the principle of civilized treatment. . . ."[55] The Court held that dena-

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48. *Id.* at 377.

49. *Id.* at 366-67. Six years later the Court seemed to retreat from this proportionality doctrine in Badders v. United States, 240 U.S. 391 (1916).

50. Weems v. United States, 217 U.S. 349 (1910). *See* BUFFALO Comment, *supra* note 20, at 796. The author later suggests that the limited use of inhumane punishment for a heinous offense could be less objectionable than the excessive use of a humane punishment such as imprisonment. *Id.* at 822. In only three cases since *Weems* have laws been held to provide for cruel and unusual punishment: Furman v. Georgia, 408 U.S. 238 (1972); Robinson v. California, 370 U.S. 660 (1962); Trop v. Dulles, 356 U.S. 86 (1958).

51. 217 U.S. 349, 378 (1910).

52. 356 U.S. 86 (1958). *Trop* is also important for establishing the scope of the eighth amendment which was found to apply to all punishments under "penal laws." Trop v. Dulles, 356 U.S. 86, 96 (1958).

53. *Id.* at 100-01.

54. *Id.* at 100. The "dignity of man" concept was examined by the Court in Gregg v. Georgia, 428 U.S. 153 (1976). The interpretation given by *Gregg* was that at the very least the punishment should not be excessive. Excessiveness, related to punishment in the abstract, was found to have two aspects—that the punishment not involve unnecessary and wanton infliction of pain and that the punishment not be grossly disproportionate to the severity of the crime.

55. Trop v. Dulles, 356 U.S. 86, 99 (1958).

tionalization under the particular circumstances was prohibited by the eighth amendment.

The most recent development in the eighth amendment evolution occurred in *Robinson v. California*.[56] There the eighth amendment was held to restrict the kinds of activity which may be made criminal. Robinson was convicted under a statute which made it a crime to be a narcotics addict, but the conviction was held to violate the cruel and unusual punishment clause. In finding the California statute unconstitutional the Court stated: "in light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendment."[57] It has been proposed that there are three answers to the question of why punishment for an illness would be cruel and unusual.[58] One proposition is that the law in *Robinson* punished status rather than acts.[59] Another view is that the law may not punish the victim of an illness who is unable to voluntarily change his condition.[60] A third approach is that an illness may be innocently or involuntarily contracted.[61] Because it is unclear which of these three rationales the Court was applying in *Robinson*, the decision is of questionable precedential value.[62]

C. *Analysis of the Language*

The courts and legal scholars have utilized various definitions to ascertain the substance of one or more of the three elements—cruel, unusual and punishment—which make up the eighth amendment clause.

Cruel comes from the Latin *crudelis* which means raw, unfeeling, rough. Cruel at the time of the English Bill of Rights meant severe.[63] A list of punishments historically viewed as cruel includes burning at the stake, crucifixion, breaking on the wheel, quartering, the rack and the thumb screw.[64]

One commentator proposes that unusual means "that which is atypical of and not endemic to the mores of the current social order, ir-

56. 370 U.S. 660 (1962). This decision marks the first time the eighth amendment was explicitly applied to the states. *See* note 42 *supra*.

57. Robinson v. California, 370 U.S. 660, 666 (1962).

58. Note, *The Cruel and Unusual Punishment Clause And The Substantive Criminal Law*, 79 HARV. L. REV. 635, 646 (1966).

59. *Id.* at 646-47.

60. *Id.* at 648.

61. *Id.*

62. *Id.* at 655. *Robinson* was followed in People v. Feagley, 14 Cal. 3d 338, 535 P.2d 373, 121 Cal. Rptr. 509 (1975), in which the California Supreme Court concluded that if Feagley's confinement was based on his status as a mentally disordered sex offender, his confinement violated the eighth amendment.

63. Granucci, *supra* note 8, at 860.

64. B. SCHWAERZ, CONSTITUTIONAL LAW 244 (1972).

regular and unwonted. . . ."[65] It may be that if unusual were to be interpreted as novel, the cruel and unusual punishment clause could not have been used to prohibit any punishment not in use at the time of the amendment's adoption.[66] Such an interpretation has not occurred.[67] It has been suggested that unusual has a restricted meaning and that in the final analysis the ban is "on all undue cruelty, whether unusual or not."[68]

The layperson would probably define punishment as retribution for wrongdoing accompanied by pain and suffering.[69] The Supreme Court's concept of punishment might be inferred from what it has said to be the legitimate purpose of punishment. These purposes are deterrence, isolation and rehabilitation.[70]

Once it has been determined that a particular action constitutes punishment, that punishment must be examined to resolve whether or not the punishment falls within the proscription of the eighth amendment. A statute will be penal in nature when it imposes a disability for punishment purposes. A nonpenal statute imposes a disability for another legitimate governmental purpose.[71] The courts have typically interpreted punishment to mean criminal penalty.[72] In *Trop v. Dulles*[73] the Supreme Court applied the eighth amendment to all punishments prescribed by penal laws.[74] The two-part test announced by the *Trop* Court focused on whether the statute imposed a "disability for the purpose of punishment,"[75] and whether it set out a "consequence that will befall one who fails to abide by the regulating provisions."[76]

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65. Mosk, *supra* note 1, at 20.

66. Note, *The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment*, 36 N.Y.U.L. REV. 846, 849 (1961) [hereinafter cited as N.Y.U. Note].

67. *In re* Kemmler, 136 U.S. 436 (1890) (electrocution); State v. Gee Jon, 46 Nev. 418, 211 P. 676 (1923) (lethal gas). *See also* Mickle v. Henrichs, 262 F. 687 (D. Nev. 1918) (vasectomy as punishment for rape unusual).

68. N.Y.U. Note, *supra* note 66, at 850.

69. *Id.* A collateral issue is against whom does the cruel and unusual punishment clause run—the legislature, the courts, or both? Courts have tended to take the position that it applies only to the legislature; therefore, as long as a punishment imposed by the court is within the statutory limits, assuming that the statute passes muster otherwise, the action by the court will stand. The opposing view is that the cruel and unusual punishment clause applies to both legislatures and the courts.

70. Rudolph v. Alabama, 275 Ala. 115, 152 So. 2d 662, *cert. denied*, 375 U.S. 889, 891 (1963) (Goldberg, J., dissenting).

71. Trop v. Dulles, 356 U.S. 86, 96 (1958).

72. N.Y.U. Note, *supra* note 66, at 850.

73. 356 U.S. 86 (1958).

74. Trop v. Dulles, 356 U.S. 86, 94-100 (1958).

75. *Id.* at 96.

76. *Id.* at 97. On the first hearing of *Ingraham v. Wright* by the Fifth Circuit, "[i]nfliction of corporal punishment by public school personnel [was found to meet] both tests." Ingraham v. Wright, 498 F.2d 248, 259-60 n.20 (5th Cir. 1974), *rev'd on rehearing*, 525 F.2d 909 (5th Cir. 1976), *aff'd*, 97 S. Ct. 1401 (1977). Therefore, the penalty was penal in nature and was

II. Disciplinary Corporal Punishment in the Public Schools

A. *Conflicting Rights of the Parties Involved*

1. *The Child*

In the last decade, the legal rights of children have undergone a profound expansion, by virtue of judicial decisions and legislative efforts. The Supreme Court has recognized the rights of children and more specifically the rights of students: "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[77] Students are "persons" under the constitution who are "possessed of fundamental rights which the State must respect. . . ."[78] One of these rights identified by the Supreme Court more than eighty years ago, yet desecrated by the infliction of unreasonable disciplinary corporal punishment, is "the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[79]

2. *The Parent*

Parental rights is a more fully developed area of the law. A series of Supreme Court cases have upheld the rights of parents in matters affecting their children.[80]

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparations for obligations the state can neither supply nor hinder. . . . And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.[81]

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subject to the application of the eighth amendment. *See also* Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), wherein the petitioner challenged a federal statute revoking individual citizenship if one left the country during wartime to avoid military induction. In its determination of whether the statute was penal in nature the Court considered

> [w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. . . .

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963).

77. *In re* Gault, 387 U.S. 1, 13 (1967).

78. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 511 (1969). *See also* Burt, *Developing Constitutional Rights Of, In, and For Children*, 39 Law & Contemp. Prob. 118 (1975) [hereinafter cited as Burt]. Burt proposes that *Tinker* was in reality a case of children expressing their parents' view. *Id.* at 122.

79. Union Pacific Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891).

80. Prince v. Massachusetts, 321 U.S. 158 (1944); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). *See also* Moskoswitz, *Parental Rights and State Education*, 40 Wash. L. Rev. 623 (1975).

81. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

In two recent Supreme Court cases, the Court found that the "rights to conceive and to raise one's children have been deemed 'essential' "[82] and that "[the] primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."[83]

One authority suggests that "when the state contravenes parental decisions in child rearing with the claimed purpose of benefiting the child, the state must present a convincing case that its intervention, in fact, will serve its professed goal."[84] The courts should sanction the contravention of parental desires only when the need for state intervention has been convincingly identified, and when there is "a close correspondence between that need and the means proposed to satisfy that need."[85]

3. *The School*

The chief legal duty of the public school is exercising the degree of control necessary to enable the school to meet educational goals and to prevent personal injury and property damage without infringing the common law, the constitutional or the statutory rights of the pupil.[86] Schools are vested with broad power to reach this objective, and only recently have their actions faced serious and continuing challenges. The Supreme Court has said that a "State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on other fundamental rights and interests. . . ."[87]

B. *Hesitancy by the Courts*

There has been a reluctance on the part of courts to interfere in educational affairs because it is felt that judges lack the necessary expertise to deal adequately with the specialized issues presented. One authority submits that the outcome of litigation in the educational area "depends on the extent of the judges' deference to the school authorities or on their own educational intuitions, rather than on inferences drawn from clear-cut educational principles."[88]

The reluctance of the courts to interfere in school affairs is exemplified by the Supreme Court's opinion in *Epperson v. Arkansas*,[89] which stated that the judiciary "do[es] not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems

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82. Stanley v. Illinois, 405 U.S. 645, 651 (1972).
83. Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).
84. Burt, *supra* note 78, at 127.
85. *Id.*
86. Ladd, *Allegedly Disruptive Student Behavior and the Legal Authority of School Officials*, 19 J. PUB. L. 209, 210 (1970) [hereinafter cited as Ladd].
87. Wisconsin v. Yoder, 406 U.S. 205, 214 (1972).
88. Ladd, *supra* note 86, at 209.
89. 393 U.S. 97 (1968).

and which do not directly and sharply implicate basic constitutional values."[90] However, basic constitutional values were implicated in decisions beginning with *Brown v. Board of Education*,[91] followed by *Tinker v. Des Moines Independent School District*,[92] *Goss v. Lopez*[93] and most recently by *Ingraham v. Wright*.[94] These decisions, in varying degrees, evidence a more stringent degree of judicial scrutiny towards the educational process.

C. *Delegating Parental Authority to Punish*

A cause of action for battery arises when a person performs an act which proximately results in harmful or offensive contact with another person, without the recipient's consent.[95] The imposition of corporal punishment upon public school students may be based upon the consent of the parent or of the child,[96] the doctrine of in loco parentis[97] or upon statutory authority.[98] If a child, or the parent acting as guardian, provides consent to the imposition of corporal punishment, the potential cause of action in tort for battery is negated.[99]

1. *Doctrine of in loco parentis*

The Restatement of Torts (Second), section 147 provides:

> (1) A parent is privileged to apply such reasonable force or to impose such reasonable confinement upon his child as he reasonably believes to be necessary for its proper control, training, or education.
> (2) One other than a parent who has been given by law or has voluntarily assumed in whole or in part the function of controlling, training, or educating a child, is privileged to apply such reasonable force or to impose such reasonable confinement as he reasonably believes to be necessary for its proper control, training, or education, except in so far as the parent has restricted the privilege of one to whom he has entrusted the child.[100]

Subsection 2 embodies the doctrine of in loco parentis. In essence, the

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90. Epperson v. Arkansas, 393 U.S. 97, 104 (1968). The Fifth Circuit in Ingraham v. Wright refused to examine such individual instances of punishment for each child. Ingraham v. Wright, 525 F.2d 909, 917 (5th Cir. 1976), *aff'd*, 97 S. Ct. 1401 (1977).

91. 347 U.S. 483 (1954) (fourteenth amendment denial of equal protection).

92. 393 U.S. 503 (1969) (first amendment rights).

93. 419 U.S. 565 (1975) (procedural due process in the context of a disciplinary suspension).

94. 97 S. Ct. 1401 (1977) (fourteenth amendment due process and eighth amendment).

95. W. PROSSER, THE LAW OF TORTS § 10, 34-37 (4th ed. 1971).

96. *See* text accompanying note 158 *infra*.

97. *See* text accompanying notes 114-30 *infra*.

98. *See* text accompanying notes 131-38 *infra*.

99. Prosser states that the "gist of the action for battery is not the hostile intent of the defendant, but rather the absence of consent to the contact on the part of the plaintiff." W. PROSSER, THE LAW OF TORTS § 10, 36 (4th ed. 1971).

100. RESTATEMENT (SECOND) OF TORTS § 147 (1965).

concept of in loco parentis operates in relation to the cause of action for battery as a qualified privilege, allowing the person who may exercise the privilege to inflict corporal punishment upon a child, provided the privilege is not abused.[101]

Early in our country's history, the parent selected the child's teacher. The parties entered a contractual relationship whereby the parent delegated his authority to discipline the child to the teacher. This arrangement was altered by the advent of compulsory education,[102] and as a result, the state has assumed control, through its local school boards, over discipline in the educational process.

The Iowa Supreme Court in the early case of *Rowe v. Rugg*[103] explained the concept of in loco parentis. In upholding the actions of an aunt, who, acting under authorization of the child's mother, corporally punished her nephew, the court recognized the general rule "that those having the care, custody and control of minor children may, for the purpose of proper discipline and control, administer such moderate and reasonable chastisement as shall effect the desired object, and this rule has been applied generally to all those occupying a position in *loco parentis*."[104]

There are two postures that courts have assumed when the actions of a person claiming to be in loco parentis are questioned. The majority position examines the reasonableness of the force used by the actor, with consideration given to willfulness, wrongfulness or unlawfulness. The minority position does not consider these criteria but rather protects the actor unless his action causes permanent injury to the child or the punishment is administered with malice.[105] Improper punishment or punishment for an improper purpose is not protected by the doctrine. Thus, both positions assumed by the courts qualify the applicability of the privilege.

Some jurisdictions grant a presumption of reasonableness to school authorities' actions.[106] In others, the burden of showing reasonableness is

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101. *See generally*, W. PROSSER, THE LAW OF TORTS § 16, 98-99 (4th ed. 1971).

102. *See* Woltz, *Compulsory Attendance at School*, 20 LAW & CONTEMP. PROB. 3 (1955). Compulsory school attendance laws came first to Massachusetts in 1852. These laws establish the ages between which school attendance is mandatory, place upon parents and guardians a legal obligation to free children to attend and set up sanctions and enforcement procedures to insure that the provisions of the law are met. *See id.* at 4.

103. 117 Iowa 606, 91 N.W. 903 (1902).

104. Rowe v. Rugg, 117 Iowa 606, 607, 91 N.W. 903 (1902).

105. *See, e.g.*, Suits v. Glover, 71 So. 2d 49 (Ala. 1954).

106. Drake v. Thomas, 310 Ill. App. 57, 33 N.E.2d 889 (App. Ct. 1941). *See generally*, Note, *In Loco Parentis and Due Process: Should These Doctrines Apply to Corporal Punishment?*, 26 BAYLOR L. REV. 678 (1974). It has been suggested that the decisions in Tinker v. Des Moines Independent School Dist., 393 U.S. 503 (1969) and in *In re* Gault, 387 U.S. 1 (1967), have raised a presumption favoring parents and putting a burden on schools to show the courts why they have acted as they did. Burt, *supra* note 78, at 125-28.

on the teacher.[107] The reasonableness of a teacher's action was upheld in *Marlar v. Bill*,[108] which provides a good illustration of the doctrine of in loco parentis as applied in the school setting.[109] A student went into a classroom during recess and raised a window. As a response, the superintendent struck the child with a ruler. The superintendent's action was upheld by the court as reasonable and necessary, as it was inflicted with no malice and was not excessive, "but commensurate only with the offense."[110]

The doctrine of in loco parentis does not provide for blanket permission to deal with the child as the teacher chooses. Restraints and limits have been established for the privilege's proper application. In *Guerrieri v. Tyson*,[111] a teacher was not allowed to use a codification of in loco parentis as a defense in an assault and battery action. The teacher, who noticed a child had an infected finger, heated a pan of scalding water. Another teacher covered the child's eyes while the first held his hand in the water. The hand became covered with blisters which were punctured by the teacher. The child was hospitalized for twenty-eight days and was left with a permanently disfigured hand. The delegation of parental

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107. Harris v. Galilley, 125 Pa. Super. 505, 189 A. 779 (1937). Factors courts may consider in determining the reasonableness of one acting in loco parentis include:

> (1) The actor's relationship to the child; (2) the age of the child; (3) the child's sex; (4) the child's physical and mental condition; (5) the nature of the offense and apparent motive; (6) whether the punishment or confinement is reasonably necessary and appropriate; (7) whether the punishment is disproportionate to the offense; (8) whether the punishment is necessarily degrading; (9) whether the punishment is likely to cause permanent injury or serious harm; (10) whether the punishment was inflicted for a salutary purpose; (11) whether the actors were free from malice; (12) the child's example on other children; (13) the kind of instrument used; (14) the extent or nature of the use of the instrument; (15) the sensitivity of the child; (16) the child's responsibilities; (17) the child's tolerance to pain; (18) and whether the child was old enough to understand the punishment.

Tripp, *Acting "In Loco Parentis" as a Defense to Assault and Battery*, 16 CLEV. MAR. L. REV. 39, 43-44 (1967).

108. 181 Tenn. 100, 178 S.W.2d 634 (1944).

109. An example of codification of in loco parentis specifically referring to teachers is found in Or. Rev. Stat. § 161.205(1) (1973), which provides:

> 161.205 Use of physical force generally. The use of physical force upon another person that would otherwise constitute an offense is justifiable and not criminal under any of the following circumstances:
>
> (1) A parent, guardian or other person entrusted with the care and supervision of a minor or an incompetent person may use reasonable physical force upon such minor or incompetent person when and to the extent he reasonably believes it necessary to maintain discipline or to promote the welfare of the minor or incompetent person. A teacher may use reasonable physical force upon a student when and to the extent the teacher reasonably believes it necessary to maintain order in the school or classroom.

110. Marlar v. Bill, 181 Tenn. 100, ____ , 178 S.W.2d 634, 635 (1944).

111. 147 Pa. Super. 239, 24 A.2d 468 (1942).

authority authorized by the statutory in loco parentis provision was held not to extend to medical treatment of an injury or a disease.[112]

The Tennessee court in *Marlar v. Bill*[113] acknowledged additional ramifications of the doctrine. While to perform effectively a teacher must be vested with the power to compel obedience, the teacher does not have the right to chastise the child for all offenses, as the punishment which could be inflicted would not be tempered by the natural affection that a parent feels for its child.[114] The early Vermont case of *Lander v. Seaver*[115] articulates this principle:

> From the intimacy and nature of the relation, and the necessary character of family government, the law suffers no intrusion upon the authority of the parent, and the privacy of domestic life, unless in extreme cases of cruelty and injustice. This parental power is little liable to abuse, for it is continually restrained by natural affection; the tenderness which the parent feels for his offspring, an affection ever on the alert, and acting rather by instinct than reasoning.
>
> The school master has no such natural restraint. Hence he may not safely be trusted with all a parent's authority for he does not act from the instinct of parental affection. He should be guided and restrained by judgment and wise discretion and hence is responsible for their reasonable exercise.[116]

2. *Statutory Authority*

There is a substantial variation in the states' proscription or authorization of disciplinary corporal punishment.[117] Massachusetts[118] and New Jersey[119] have outlawed corporal punishment in the schools. Some

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112. Guerrieri v. Tyson, 147 Pa. Super. 239, ____ , 24 A.2d 468, 469 (1942).

113. 181 Tenn. 100, 178 S.W.2d 634 (1944).

114. Marlar v. Bill, 181 Tenn. 100, ____ , 178 S.W.2d 634, 635 (1944), *citing* 24 Ruling Case Law 638.

115. 32 Vt. 114 (1859).

116. Lander v. Seaver, 32 Vt. 114, 122-23 (1859).

117. Legislatures in 23 states have laws governing corporal punishment. Twenty-one jurisdictions authorize its moderate use in public schools: CAL. EDUCATION CODE §§ 49000-49001 (1976); DEL. CODE ANN. tit. 14, § 701 (Supp. 1975 & 1976); FLA. STAT. ANN. § 232.27 (1977); GEO. CODE ANN. §§ 32-835, 32-836 (1976); HAW. REV. STAT. §§ 298-16 (Supp. 1975), 703-309 (2) (1975); ILL. ANN. STAT. ch. 122, §§ 22-24, 34-84a (Supp. 1977); IND. CODE ANN. § 20-8, 1-5-2 (1975); MD. EDUC. CODE ANN. art. 77, § 98B (1975) (in specified counties); MICH. COMP. LAWS ANN. § 340.756 (1976); MONT. REV. CODES ANN. § 75-6109 (1971); NEV. REV. STAT. § 392.465 (1975); N.C. GEN. STAT. § 115-146 (1975); OHIO REV. CODE ANN. § 3319.41 (Page 1972); OKLA. STAT. ANN. tit. 70, § 6-114 (1972); PENN. CONS. STAT. ANN. tit. 24, § 13-1317 (Supp. 1977); S.C. CODE § 59-63-260 (1976); S.D. COMP. LAWS ANN. § 13-32-2 (1975); VT. STAT. ANN. tit. 16, § 1161 (1974); VA. CODE ANN. § 22-231.1 (1973); W. VA. CODE § 18A-5-1 (1977); WYO. STAT. § 21.1-64 (Supp. 1975).

118. MASS. GEN. LAWS ANN. ch. 71 § 37G (1978 Supp.).

119. N.J. STAT. ANN. 18A:6-1 (West 1968).

> Corporal punishment of pupils. No person employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon a pupil attending such school or institution; but

state criminal codes acknowledge a teacher's privilege under common law to administer corporal punishment.[120] California's statute requires prior parental approval in writing.[121] The Florida statute stipulates that a written explanation of the punishment be furnished upon request.[122] Some

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any such person may, within the scope of his employment, use and apply such amounts of force as is reasonable and necessary:

(1) to quell a disturbance, threatening physical injury to others;

(2) to obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil;

(3) for the purpose of self-defense; and

(4) for the protection of persons or property; and such acts, or any of them, shall not be construed to constitute corporal punishment within the meaning and intendment of this section. Every resolution, bylaw, rule, ordinance, or act or authority permitting or authorizing corporal punishment to be inflicted upon a pupil attending a school or educational institution shall be void.

Id.

120. CONN. GEN. STAT. § 53a-18 (Supp. 1977) provides in part:

Use of reasonable physical force or deadly physical force generally.

The use of physical force upon another person which would otherwise constitute an offense is justifiable and not criminal under any of the following circumstances:

(1) A parent, guardian, teacher or other person entrusted with the care and supervision of a minor or an incompetent person may use reasonable physical force upon such minor or incompetent person when and to the extent that he reasonably believes it is necessary to maintain discipline or to promote the welfare of such minor or incompetent person. . . .

For other examples *see* ARIZ. REV. STAT. § 13-246(A)(1) (1956); NEB. REV. STAT. § 28-840(2) (1975); NEW YORK PENAL CODE § 35.10 (McKinney 1975); ORE. REV. STAT. § 161.205(1) (1975).

121. The California statute provides:

(a) Corporal punishment shall not be administered to a pupil without the prior written approval of the pupil's parent or guardian. The written approval shall be valid for the school year in which it is submitted but may be withdrawn by the parent or guardian at any time.

(b) If a school district has adopted a policy of corporal punishment pursuant to Section 49000, at the beginning of the first semester or quarter of the regular school term the governing board of each such school district shall notify the parent or guardian in a manner similar to that provided pursuant to Section 48980 that corporal punishment shall not be administered to a pupil without the prior written approval of the pupil's parent or guardian.

CAL. EDUCATION CODE § 49001 (1976). Mont. Rev. Codes Ann. § 75-6109 (1971) also requires prior parental notification.

122. The Florida statutes provides:

Authority of teacher. Subject to law and to the rules of the district school board, each teacher or other member of the staff of any school shall have such authority for the control and discipline of students as may be assigned to him by the principal of his designated representative and shall keep good order in the classroom and in other places in which he is assigned to be in charge of students. If a teacher feels that corporal punishment is necessary, at least the following procedures shall be followed:

* * *

(3) A teacher or principal who has administered punishment shall, upon request, provide the pupil's parent or guardian with a written explanation of the reason for the punishment and the name of the other [adult] who was present.

statutes such as the statute operative in Maryland, provide that punishment may be rendered only by the principal.[123] Other statutes provide for the presence of a witness when the punishment is to be imposed.[124]

D. *Disciplining the Student*

1. *The Behavior*

Student behavior may be divided into that controlled by school authorities, that controlled by persons other than school authorities and that controlled by the student himself.[125] Disruptive behavior by students within the control of school authorities can take various forms, including the manifestation of idiosyncracies, expressions of feelings or opinions, overt disturbances, disobedience or violation of the rights of others. Interactions with fellow students leading to their distraction or provoking undesirable reactions from them also may be considered disruptive.[126]

2. *The Punishment*

Punishment in the school environment may take the form of detention, corporal punishment, reprimands, suspension or expulsion. The Iowa Supreme Court articulated the objectives of punishment in the school context in *State v. Mizner*.[127] In *Mizner*, the defendant teacher was sent notes by the father of the twenty-one year old pupil asking him to excuse her from afternoon classes and more specifically from algebra class. There was a confrontation over the excuse for two consecutive days, with the second argument resulting in the student being struck approximately

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FLA. STAT. ANN. § 232.27 (1977).

123. The Maryland statute provides:

> Irrespective of any bylaw, rule or regulation made or approved by the State Board of Education, nothing shall prohibit the use of corporal punishment by a principal or vice-principal in the county school system in Allegany, Anne Arundel, Calvert, Carroll, Caroline, Cecil, Charles, Dorchester, Frederick, Garrett, Harford, Kent, Queen Anne's, St. Mary's, Somerset, Talbot, Washington, Wicomico, and Worcester counties. The board of education of each of the herein named counties may establish rules and regulations governing the use of corporal punishment in their respective county school system.

MD. EDUC. CODE ANN. art. 77, § 98B (1975).

124. For example, the Hawaii statute provides:

> Punishment of pupils limited. No physical punishment of any kind may be inflicted upon any pupil, but reasonable force may be used by a teacher in order to restrain a pupil in attendance at school from hurting himself or any other person or property and reasonable force may be used as defined in section 703-309(2) by a principal or his agent only with another teacher present and out of the presence of any other student but only for the purposes outlined in section 703-309(2)(a).

HAW. REV. STAT. § 298-16 (Supp. 1975).

125. Ladd, *supra* note 86, at 209-10.

126. *Id.* at 213-14.

127. 50 Iowa 145 (1878).

a dozen times, causing the teacher's whip to break. The jury instructions listed the following as objectives and purposes for punishment of students by school authorities: "*[f]irst*, the reformation and the highest good of the pupil; *second*, the enforcement and maintenance of correct discipline in school; and *third*, as an example to evildoers."[128] The court further added that no punishment could be justified unless it was for a definite offense, and the child understood why the punishment was rendered. This requirement was not construed to mean that the teacher specifically had to state to the child that the punishment was for a particular offense, it being sufficient if the child as a "reasonable being" would understand. The *Mizner* court concluded that the teacher had acted outside the ambit of the privilege, as the defendant was not authorized to punish a student for refusing to do what her parent had requested she be excused from doing. The court found the proper remedy to be expulsion of the pupil, rather than corporal punishment.[129] In order to be construed as reasonable, the punishment must be administered without malice, be free of cruelty or excessiveness, be suited to the child's age and sex and be rendered in the pupil-teacher relationship. Similar factors relating to reasonableness, including "the seriousness of the offense, the attitude and past behavior of the child, the nature and severity of the punishment, the age and strength of the child, and the availability of less severe but equally effective means of discipline" were compiled by the Supreme Court in *Ingraham v. Wright*.[130]

E. *Constitutional Challenges to Corporal Punishment*

1. *In General*

Corporal punishment has been attacked as cruel and unusual, as a violation of due process rights, or as a usurpation of parental rights to raise a child. While traditional tort and criminal remedies did not come into play until after the penalty was administered, an attack based on the

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128. State v. Mizner, 50 Iowa 145, 149 (1878).

129. Sumption, *The Control of Pupil Conduct by The School*, 20 LAW & CONTEMP. PROB. 80, 89 (1955). The Restatement of Torts (Second) section 150 gives the following factors as those to be used to determine whether the use of force upon a child is reasonable:

(a) whether the actor is a parent;
(b) the age, sex, and physical and mental condition of the child;
(c) the nature of his offense and his apparent motive;
(d) the influence of his example upon other children of the same family or group;
(e) whether the force or confinement is reasonably necessary and appropriate to compel obedience to a proper command;
(f) whether it is disproportionate to the offense, unnecessarily degrading, or likely to cause serious or permanent harm.

RESTATEMENT (SECOND) OF TORTS § 150 (1965).

130. 97 S. Ct. 1401, 1408 (1977), *citing* 1 F. HARPER & F. JAMES, THE LAW OF TORTS 290-91 (1956).

eighth amendment was particularly valuable in certain circumstances, as it could be made before the punishment was inflicted. Court decisions dealing with the applicability of the eighth amendment to disciplinary corporal punishment in the schools fell into three categories: those which recognized the applicability of the amendment to the school context,[131] those which rejected the cruel and unusual punishment clause's application to punishment inflicted upon students,[132] and those that assumed without deciding that it applied, but in the case *sub judice* the punishment did not reach the level of severity needed to be cruel and unusual.[133] Prior to the Supreme Court's decision in *Ingraham v. Wright*,[134] it appeared that the weight of judicial authority rejected claims based on the eighth amendment, as these decisions simply assumed that the strictures of the cruel and unusual punishment clause did not apply to the civil context of corporal punishment.[135]

Other than challenges to corporal punishment based upon the eighth amendment, attacks have been premised on fourteenth amendment grounds. The decision in *Baker v. Owens*[136] exemplifies this type of challenge. The plaintiffs in *Baker*[137] challenged the infliction of corporal punishment on procedural due process grounds[138] and the plaintiff-parent challenged the administration of corporal punishment upon her child on the ground that it violated her rights as a parent to determine disciplinary methods for her child,[139] as she had previously informed school officials of her objection to such punishment. The *Baker* court held that school officials and teachers must provide minimal procedural due process to students in the course of inflicting corporal punishment.[140] The

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131. Bramlet v. Wilson, 495 F.2d 714 (8th Cir. 1974).

132. Sims v. Waln, 388 F. Supp. 543 (S.D. Ohio 1974), *aff'd*, 536 F.2d 686 (6th Cir. 1976); Gonyaw v. Gray, 361 F. Supp. 366 (D. Vt. 1973). The decision by the Fifth Circuit in Ingraham v. Wright, 525 F.2d 909 (5th Cir. 1976), *aff'd*, 97 S. Ct. 1401 (1977) is also in this category. *See* 7 CUM. L. REV. 169 (1976).

133. Glaser v. Marietta, 351 F. Supp. 555 (W.D. Pa. 1972); Ware v. Estes, 328 F. Supp. 657 (N.D. Tex. 1971), *aff'd per curiam*, 458 F.2d 1360 (5th Cir.), *cert. denied*, 409 U.S. 1027 (1972); Sims v. Board of Ed., 329 F. Supp. 678 (D.N.M. 1971).

134. 97 S. Ct. 1401 (1977).

135. *See, e.g.*, Ingraham v. Wright, 525 F.2d 909 (5th Cir. 1976), *aff'd*, 97 S. Ct. 1401 (1977); Sims v. Waln, 388 F. Supp. 543 (S.D. Ohio 1974), *aff'd*, 536 F.2d 686 (6th Cir. 1976); Baker v. Owen, 395 F. Supp. 294 (M.D.N.C.), *aff'd*, 423 U.S. 907 (1975); Gonyaw v. Gray, 361 F. Supp. 366 (D. Vt. 1973).

136. 395 F. Supp. 294 (M.D.N.C.), *aff'd*, 423 U.S. 907 (1975).

137. Baker v. Owens, 395 F. Supp. 294 (M.D.N.C.), *aff'd*, 423 U.S. 907 (1975). Plaintiff Russell Baker, the student, claimed that the infliction of corporal punishment violated the eighth amendment and his procedural due process rights. His mother challenged the imposition of such punishment on the basis that it violated her rights as a parent. *Id.*

138. *Id.* at 296.

139. *Id.*

140. *Id.* at 302-03. The district court stated that the student must be told that specific behavior would result in corporal punishment; the punishment must be administered in the

court in *Baker* rejected the plaintiff-parent's challenge that the school officials violated her parental rights by inflicting corporal punishment after she had previously objected to its imposition. The *Baker* court characterized the parent's claim as grounded in the fourteenth amendment, as she had asserted that her parental right to discipline her child was "fundamental."[141] The *Baker* court, although holding that a parent has a constitutional right in this respect, rejected the plaintiff-parent's interpretation:

> We simply cannot foresee a parent's absolute disapproval of reasonable corporal punishment soon achieving the kind of societal respect that is clearly accorded the desire to expose one's child to certain fields of knowledge, to send him to a private or parochial school, or to pass on one's religious heritage to him. Thus, regardless whether the specific parental interests involved in *Meyer, Pierce,* and *Prince* should be considered fundamental, and without disparaging one whit Mrs. Baker's right to decide the methods of punishment to be employed with Russell Carl by herself or other private parties, we cannot say that her right of total opposition to his corporal punishment is fundamental in a constitutional sense.[142]

The court resolved the plaintiff's challenge by finding that the school officials' interest in preserving school discipline constituted a legitimate state objective which outweighed the plaintiff-parent's right to select the manner of punishment of her child.[143]

In *Glaser v. Marietta,*[144] a student and his mother sought to enjoin the school district from inflicting corporal punishment. The *Glaser* court adopted a different approach from that utilized in *Baker*, finding that the parental interest in controlling the manner of child discipline outweighed the interests of the school authorities.[145] In essence, the *Glaser* court relied upon prior decisions[146] involving parental rights in imposing upon the school district the duty to show a "powerful countervailing interest to overrule the private rights of the parent."[147]

The viability of a challenge to corporal punishment based upon a usurpation of parental rights approach can only be ascertained by future

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presence of a second school official who knows why the punishment is being given; and the punishing official must provide the child's parents with an explanation of his reasons for punishing and the name of the second official present if the parents so request. *Id.*

141. *Id.* at 299.

142. *Id.* at 300.

143. *Id.*

144. 351 F. Supp. 555 (W.D. Pa. 1972).

145. Glaser v. Marietta, 351 F. Supp. 555, 560-61 (W.D. Pa. 1972).

146. Wisconsin v. Yoder, 406 U.S. 205 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Prince v. Massachusetts, 321 U.S. 158 (1944).

147. Glaser v. Marietta, 351 F. Supp. 555, 560 (W.D. Pa. 1972). The *Glaser* court expressly rejected the viewpoint embodied in The Restatement of Torts (Second), which provides that the "will of the parent cannot defeat the policy of the State." RESTATEMENT (SECOND) OF TORTS § 152, comment d (1965).

development. In any event, it seems clear that a prerequisite to a successful challenge based upon this approach necessitates a parental objection to the use of corporal punishment upon the child.[148] The question of whether a corporally punished student can mount a challenge to such punishment on procedural due process and eighth amendment grounds was answered in *Ingraham v. Wright*.[149]

2. *Ingraham v. Wright*

a. *The Eighth Amendment*

The Supreme Court's treatment of corporal punishment in *Ingraham v. Wright*[150] resolves the conflict in the courts over the applicability of the eighth amendment to the school context. When suit was filed by plaintiffs Ingraham and Andrews,[151] both were junior high students seeking individual damages under 42 U.S.C. sections 1981-1988.[152] The complaint also contained a class action on behalf of all the students in Dade County schools for declaratory and injunctive relief. Defendants in the action were the junior high principal, an assistant principal, an assistant to the principal, and the county superintendent of schools.[153] The Florida statute[154] in effect when the cause of action accrued required that teachers consult the principal or teacher in charge of the school before administering corporal punishment which was not to be "degrading or unduly severe in its nature. . . ."[155] It was found at trial that consulting the principal or teacher in charge prior to the infliction of punishment was, in practice, often omitted. Plaintiff Ingraham, slow to respond to his teacher's instructions, was held face down and hit twenty times with a paddle nearly two feet long, three to four inches wide and approximately one-half inch thick. The consequence of this correction was a hematoma, which rendered Ingraham unable to attend school for eleven days. Plaintiff Andrews was paddled a number of times including once for not having socks, another time for not having sneakers and again for breaking something in class. A third student was hit on the hand and suffered a resultant fracture and disfigurement. A fourth student was hit about fifty

148. *See* Sims v. Waln, 536 F.2d 686, 689 (6th Cir. 1976) (the court rejected the plaintiff's claim that her parental rights had been violated because she had previously consented to school authorities corporally punishing her child).

149. 97 S. Ct. 1401 (1977).

150. 97 S. Ct. 1401 (1977). For an analysis of Ingraham v. Wright after the hearing in the Fifth Circuit, *see* 7 CUM. L. REV. 169 (1976); 53 TEX. L. REV. 395 (1975).

151. In 1974 Ingraham was convicted of three counts of aggravated assault against a policeman, and he is currently a trustee of the Florida courts. Newsweek, May 2, 1977, at 66.

152. 42 U.S.C. §§ 1981-1988 (1970).

153. Ingraham v. Wright, 97 S. Ct. 1401, 1403-04 (1977).

154. FLA. STAT. ANN. § 232.27 (1961).

155. *Id.*

times for allegedly making an obscene phone call.[156] Five to ten hits on the head was the punishment for the fifth student, who had refused to assume the correct paddling position. This student was later hit with a belt and a bruise requiring surgery developed where the student was struck.

While acknowledging the history of the eighth amendment as it has been described here, the majority of the Court in *Ingraham* refused to enlarge the shield of the eighth amendment to protect school children against cruel and unusual punishment.[157] These justices were unconvinced by the argument that the drafters of the eighth amendment could not have anticipated our current system of compulsory public education and the schools' opportunities for the infliction of disciplinary corporal punishment.[158] The Court thus appeared to place great reliance on the historical fact that corporal punishment has existed in this country since the adoption of the eighth amendment, thereby lending credence to the majority's perspective that such punishment was viewed with "contemporary approval."[159]

Nor was the majority persuaded by the argument that criminals were receiving more protection than that afforded to school children.[160] In distinguishing the school child's position from that of the prisoner, the Court found that the child had greater protections because he "brings with him the support of family and friends,"[161] he "is rarely apart from teachers and other pupils who may witness and protest any instances of mistreatment,"[162] and "the openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner."[163] In the lower court decision, the Fifth Circuit made similar comments in differentiating the school from the prison situation by pointing out the deterrent effect of "the natural restraint that generally exists when one strikes a child."[164] The circuit court further believed that "while whipping an adult prisoner is sufficiently degrading to offend 'contemporary concepts of decency,' we cannot believe paddling a child, a long-accepted means of disciplining and inculcating concepts of obedience and responsibility, offends current notions of decency and human dignity."[165]

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156. Another student later confessed to making the call.
157. Ingraham v. Wright, 97 S. Ct. 1401, 1412 (1977).
158. *Id.* at 1411.
159. *Id.* at 1408.
160. *Id.* at 1412.
161. *Id.*
162. *Id.*
163. *Id.*
164. Ingraham v. Wright, 525 F.2d 909, 915 n.5 (5th Cir. 1976), *aff'd*, 97 S.Ct. 1401 (1977).
165. *Id.*

The dissenters viewed the eighth amendment as reflecting "a societal judgment that there are some punishments that are so barbaric and inhumane that we will not permit them to be imposed on anyone, no matter how opprobrious the offense."[166] Mr. Justice White, in dissent, stated that it would follow *a fortiori* that if there are some punishments that may not be imposed on prisoners, such punishments could not be imposed for lesser offenses, including violations of school rules.[167] The dissenters emphatically pronounced the majority's recognition of a distinction between criminal and noncriminal as "plainly wrong." The relevant inquiry, according to the dissent, is not whether the offense for which a punishment is inflicted has been labeled as criminal, but "whether the purpose of the deprivation is among those ordinarily associated with punishment. . . ."[168] The four dissenting justices perceived the failure of the drafters of the Constitution to use the word criminal to modify punishment as "strong evidence that the amendment was designed to prohibit all inhumane or barbaric punishments, no matter what the nature of the offense for which the punishment is imposed."[169]

Mr. Justice White did not go so far as to say that all corporal punishment inflicted in the public schools would be cruel and unusual per se.

> [I]t can hardly be said that the use of moderate paddlings in the discipline of children is inconsistent with the country's evolving standards of decency.
>
> On the other hand, when punishment involves a cruel, severe beating or chopping off an ear, something more than merely the dignity of the individual is involved. Whenever a given criminal punishment is 'cruel and unusual' because it is inhumane or barbaric, I can think of no reason why it would be any less inhumane or barbaric when inflicted on a school child, as punishment for classroom misconduct.
>
> The issue in this case is whether spankings inflicted on public school children for breaking school rules is 'punishment,' not whether such punishment is 'cruel and unusual.' If the Eighth Amendment does not bar moderate spanking in public schools, it is because moderate spanking is not 'cruel and unusual,' not because it is not 'punishment' as the majority suggests.[170]

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166. Ingraham v. Wright, 97 S. Ct. 1401, 1419 (1977) (White, J., dissenting).

167. *Id.*

168. *Id.* at 1420.

169. *Id.* According to the dissent, spanking school children is punishment which:

> involves an institutionalized response to the violation of some official rule or regulation proscribing certain conduct and is imposed for the purpose of rehabilitating the offender, deterring the offender and others like him from committing the violation in the future, and inflicting some measure of social retribution for the harm that has been done.

Id.

170. Ingraham v. Wright, 97 S. Ct. 1401, 1419 n.1 (1977) (White, J., dissenting). In 1972 a group from the National Education Association proposed a model law regarding corporal punishment:

A purist application of the original meaning of the cruel and unusual punishment clause based on *lex talionis*, rather than the hybrid misinterpretation that later developed, could have been used to render the punishment[171] given plaintiff Ingraham and the other students a violation of the eighth amendment. Truly no proportionality could be found here. It is impossible to conceive of circumstances under which equal punishment for minor school disciplinary violations could be punishment severe enough to result in a hematoma that kept a child from school for eleven days, or a fracture and disfigurement, or surgery from a lump that developed where a student was struck.

b. *The Due Process Clause*

The decision in *Ingraham v. Wright*,[172] in addition to foreclosing the possibility of using the eighth amendment to challenge disciplinary corporal punishment in the schools, also foreclosed the possibility of a procedural due process challenge when it stated "corporal punishment in public school implicated a constitutionally protected liberty interest, but we hold that the traditional common law remedies are fully adequate to afford due process."[173] It may be that future challenges could be based successfully on substantive due process grounds. The petitioners in *Ingraham* did raise the substantive due process issue, but certiorari was limited by the Court to the eighth amendment and the procedural due process issue.[174]

Corporal Punishment of Pupils

No person employed or engaged by any educational system within this state, whether public or private, shall inflict or cause to be inflicted corporal punishment or bodily pain upon a pupil attending any school or institution within such education system; provided, however, that any such person may, within the scope of his employment, use and apply such amounts of physical restraint as may be reasonable and necessary:

1) to protect himself, the pupil or others from physical injury;

2) to obtain possession of a weapon or other dangerous object upon the person or within the control of a pupil;

3) to protect property from serious harm; and such physical restraint shall not be construed to constitute corporal punishment or bodily pain within the meaning and intendment of this section. Every resolution, bylaw, rule, ordinance, or other act or authority permitting or authorizing corporal punishment or bodily pain to be inflicted upon a pupil attending a school or educational institution shall be void.

Ingraham v. Wright, 498 F.2d 248, 264 n.32 (5th Cir. 1974), *rev'd on rehearing*, 525 F.2d 909 (5th Cir. 1976), *aff'd*, 97 S. Ct. 1401 (1977), *quoting*, Report of The Task Force on Corporal Punishment, National Education Association 29-A (1972).

171. *See* text accompanying note 169 *supra*.

172. 97 S. Ct. 1401 (1977).

173. Ingraham v. Wright, 97 S. Ct. 1401, 1413 (1977).

174. *Id.* at 1406 n.12. Substantive due process arguments are proposed by Steinberg, *Justice Overdue: Time to Reevaluate The Constitutionality of Corporal Punishment in Schools*, 2 No.Ky. S.L.F. 32, 44 (1974). Corporal punishment has been outlawed in New Jersey since 1867. With concentration of urban population within New Jersey, the state undoubtedly

The Supreme Court has previously confronted the question of the applicability of procedural due process in the educational context of disciplinary action. In *Goss v. Lopez*,[175] the Supreme Court held that the strictures of the due process clause applied to a ten day suspension of a student for disciplinary reasons. In a five to four decision, the Court held:

> [d]ue process requires, in a connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him, and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. The Clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school.[176]

The *Ingraham* Court distinguishes *Goss* on the basis that corporal punishment in the schools lends itself to a "low incidence of abuse"[177] and that available judicial remedies in the event of unduly severe or unreasonable corporal punishment are sufficient.[178] The majority in *Ingraham* also justified the rejection of procedural due process protection on the basis that the administrative burdens which would occur if an informal hearing was required would outweigh the benefits of the safeguards.[179] Such a result seems somewhat inconsistent with the requirements of *Goss*, if not an implicit rejection.

Finally, the dissent viewed the alternative proposed by the majority, of a tort action as "utterly inadequate." Common law remedies

> do nothing to protect the student from . . . the risk of reasonable, good faith mistake in the school disciplinary process. . . . Even if the student could sue for good faith error in the infliction of punishment, the lawsuit occurs after the punishment has been finally imposed. The infliction of physical pain is final and irreparable; it cannot be undone in a subsequent proceeding.[180]

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has discipline problems as serious as those encountered in the adjoining states. However, the troublemaker who finds sanctuary in New Jersey will be free from the invasion of his bodily integrity while the troublemaker across the border in New York may experience corporal punishment. A similar arbitrariness is found in the random assignment of children to schools or of children to a particular teacher within the school. Because of differing philosophies, schools and teachers handle the disruptive student in differing ways; some schools and teachers frequently apply corporal punishment and others avoid it. Commentary, 58 MARQ. L. REV. 705, 739 (1975).

175. 419 U.S. 565 (1975).

176. Goss v. Lopez, 419 U.S. 565, 581 (1975). A passage from *Goss* seems particularly relevant to the question of corporal punishment: "we have imposed requirements which are, if anything, less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions." *Id.* at 583.

177. Ingraham v. Wright, 97 S. Ct. 1401, 1416 n.46 (1977).

178. *Id.* The Court stated: "The subsequent civil and criminal proceedings available in this case may be viewed as affording substantially greater protection than the informal conference mandated by Goss." *Id.*

179. *Id.* at 1417-18.

180. *Id.* at 1425 (White, J., dissenting).

Justice White's criticism also disputed "the majority's conclusion that a damage remedy for excessive corporal punishment affords adequate process resting on the novel theory that the State may punish an individual without giving him any opportunity to present his side of the story, as long as he can later recover damages from a state official if he is innocent."[181] A further inadequacy was asserted by the dissent because "a teacher's limited resources may deter the jury from awarding, or prevent the student from collecting, the full amount of damages to which he is entitled."[182]

3. *The Aftermath*

The Supreme Court's treatment of the eighth amendment and procedural due process issues in *Ingraham*, aside from the obvious result of immunizing corporal punishment of students from these grounds of constitutional protection,[183] raises significant issues in regard to the future treatment of the eighth amendment and the due process clause.

In holding that the permissible scope of the eighth amendment only extends to punishment in the criminal context,[184] the Court narrows the

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181. Ingraham v. Wright, 97 S. Ct. 1401, 1425 (1977) (White, J., dissenting).

182. *Id.* at n.11.

183. The arguments against corporal punishment are persuasive. There was testimony in *Ingraham* by an educational psychologist as to the possibility of psychological harm resulting from beatings instituted by teachers. The psychologist pointed out "that corporal punishment could damage a child's development be engendering anxiety, frustration, and hostility, or by causing sheer pathological withdrawal or hatred of the school environment . . . that since children model their behavior after adults, a child who is corporally punished may learn from this that physical force is an appropriate way in which to handle conflicts, [and] that the child who is corporally punished often becomes more aggressive and more hostile than he was prior to his punishment." Ingraham v. Wright, 498 F.2d 248, 264 (5th Cir. 1974), *rev'd on rehearing*, 525 F.2d 909 (5th Cir. 1976), *aff'd*, 97 S. Ct. 1401 (1977). It has also been recognized that a potential by-product of corporal punishment is juvenile delinquency: "[i]nsofar as [corporal punishment] relies on fear, it disrupts the learning process by repressing that natural tendency of children to explore. This fear may be channeled into aggression against the teacher, against the school, or against society." 6 HARV. C.R.-C.L.L. REV. 583, 584 (1971). Perhaps the most persuasive argument against corporal punishment is that it inhibits "the development of self-criticism and self-direction in the child." *Id.* It is obviously in the interest of society that children develop an inner sense of self-discipline and restraint and that they not be dependent on authority outside themselves to impose limitations on behavior.

184. The *Ingraham* Court recognizes three avenues in which the cruel and unusual punishment clause may operate: "first, it limits the kinds of punishment that can be imposed on those convicted of crimes, . . . second, it proscribes punishment grossly disproportionate to the severity of the crime, . . . and third, it imposes substantive limits on what can be made criminal and punished as such. . . ." Ingraham v. Wright, 97 S. Ct. 1401, 1410 (1977). Apparently the Supreme Court would view its holding in Estelle v. Gamble, 97 S. Ct. 285 (1976), wherein the Court determined that the eighth amendment was violated by prison officials' failure to provide medical treatment to a prisoner in their custody, as being includable in the first category. Mr. Justice White, in dissent, takes exception to this characterization, labeling the *Estelle* case as simply "misconduct by a prison official." Ingraham v. Wright, 97 S. Ct. 1401, 1421 n.4 (White, J., dissenting). This characterization is significant, as it may indicate

future application of the cruel and unsual punishment clause. The *Ingraham* Court, in the process, clarifies the applicability of the "evolving standards of decency"[185] language articulated in *Trop v. Dulles*,[186] as being limited in application to the question of whether "criminal punishments are 'cruel and unusual' under the Amendment."[187] Because the Court did not specifically define the parameters of "criminal" for purposes of the future application of the eighth amendment, an unanswered question left by *Ingraham* is to what extent certain punishments might be denominated as being "criminal." As the majority of the *Ingraham* Court expressly leaves the question open,[188] the thrust of their comment appears to focus on confinement as a prerequisite to finding a sufficient nexus to punishment which would be regarded as "criminal" for purposes of eighth amendment protection.

The *Ingraham* Court's reliance in both the eighth amendment[189] and procedural due process[190] context on the premise that the adequacy of a state law remedy affords sufficient protection to dispense with the imposition of constitutional protection, represents a significant and novel approach to the question of whether the application of a constitutional provision is warranted. This conclusion is supported by the majority in *Ingraham* having cited only one case[191] as authority for the proposition that state law is relevant in a determination of whether a constitutional provision should be given effect in a certain setting. Thus it appears that in one sense the decision in *Ingraham* can be viewed as an extension[192] of the Supreme Court's effort to extract new principles of federalism.[193]

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the types of claims that will be viewed by the Court as being sufficiently "criminal," so as to invoke the strictures of the eighth amemdment.

185. Trop v. Dulles, 356 U.S. 86, 101 (1958).

186. *Id.*

187. Ingraham v. Wright, 97 S. Ct. 1401, 1411 n.36 (1977).

188. *Id.* at n.37. The court stated: "We have no occasion in this case, for example, to consider whether or under what circumstances persons involuntarily confined in mental or juvenile institutions can claim the protection of the Eighth Amendment." *Id.*

189. *Id.* at 1412.

190. *Id.* at 1416.

191. Bonner v. Coughlin, 517 F.2d 1311 (7th Cir. 1975), *modified en banc*, 545 F.2d 565 (7th Cir. 1976) (held that a prisoner's right to recover under state law for the negligence of the prison guards in leaving his cell door open, which led to the theft of the prisoner's trial transcript, afforded the prisoner sufficient "process").

192. *See, e.g.*, Paul v. Davis, 424 U.S. 693 (1976) (plaintiff's suit against police officials, grounded in the due process clause, was dismissed as the police officials conduct in falsely labeling the plaintiff as an active shoplifter was insufficient to establish a due process liberty interest); Stone v. Powell, 428 U.S. 465 (1976) (a fourth amendment claim presented to the state courts cannot later be asserted as a basis for habeas corpus relief).

193. The decision in *Ingraham* implicates federalism considerations in part because of the tortious character of the claims underlying the plaintiffs' contentions. In Bivens v. Six Unknown Narcotics Agents, 403 U.S. 388 (1971), the Supreme Court fashioned a federal cause of action for a violation of the fourth amendment, holding that under the circumstances the

Whether the adequacy of state law remedies will serve as a future consideration in determining whether constitutional provisions should apply in certain contexts can only be speculated. Yet it is clear that the express utilization of this rationale in *Ingraham* certainly provides the foundation for future application of the rationale.

Ingraham v. Wright,[194] in a practical sense, indicates that while society seems to have catapulted forward toward humane treatment of criminals, public school children are not offered the same protections. After *Ingraham*, the remaining alternatives that a corporally punished student possesses extend only to an action for assault and battery—which is qualified by the in loco parentis privilege—and the potential criminal process, which would involve the exercise of prosecutorial discretion. A viable action may still exist on substantive due process grounds, an area the *Ingraham* Court elected not to address. A challenge on the basis of a usurption of parental rights may have potential, but the ramifications of this approach are unclear. Thus, a statement made by the Indiana Supreme Court almost one hundred and twenty-five years ago seems as valid now as when it was propounded:

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plaintiff, who had been the subject of a warrantless search, had stated a cause of action for damages against the federal law enforcement officers who had invaded the sanctity of his home. In dissent, Mr. Justice Burger asserted that the fashioning of a federal remedy for violations of the Bill of Rights was the province of Congress, and not the Court. *See* Bivens v. Six Unknown Narcotic Agents, 403 U.S. 388 (1971) (Burger, J., dissenting). In *Bivens*, the Court created a federal cause of action, despite the fact that the plaintiff's claim was cognizable under state law in the form of an action of trespass, false imprisonment or invasion of privacy.

In Paul v. Davis, 424 U.S. 693 (1976), the Court was confronted with an analogous problem. In *Paul*, the plaintiff asserted that he was denied his procedural due process rights of notice and an opportunity to be heard when police officials distributed a flyer among area merchants which labeled him as an "active shoplifter," when a theft charge against him had been previously dismissed. The Court, after characterizing the plaintiff's claim as "nothing more than a claim for defamation under state law," proceeded to find that the plaintiff did not possess the requisite interest in property or liberty necessary to assert a claim based on a denial of due process. *Id.* at 698. It seems evident that a critical factor in the Court's decision in *Paul* was the premise that the due process clause should not serve as the foundation for a development of federal tort law.

As the claims seeking constitutional recognition in *Ingraham* are remediable under state law through an assault and battery action, the Court in *Ingraham* can be described as designating the roles to be assumed by state and federal law. By utilizing this rationale, the Court appears to have gone beyond the concern expressed in *Paul*, and has now apparently provided a basis for protection against the evolution of a body of non-statutory federal tort law. The reliance on the presence of adequate state law remedies in both the eighth amendment and due process context in *Ingraham* thus provides a basis for future rejection of claims seeking constitutional recognition which also are cognizable under state tort law. This rationale thus undermines the foundation of the holding in *Bivens*, and perhaps indicates a trend to reject claims seeking constitutional recognition which are also remediable under a state's tort law.

194. 97 S. Ct. 1401 (1977).

> The law still tolerates corporal punishment in the school-room. . . . The public seem to cling to a despotism in the government of schools which has been discarded every where else. Whether such training be congenial to our institutions and favorable to the full development of the future man is worthy of serious consideration. . . . One thing seems obvious. The very act of resorting to the rod demonstrates the incapacity of the teacher for one of the most important parts of his vocation, namely, school government. For such a teacher the nurseries of the republic are not the proper element.[195]

Judith Graves Higgs

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195. Cooper v. McJunkin, 4 Ind. 290, 291 (1853).

Case Notes

CONSTITUTIONAL LAW—EQUAL PROTECTION—VILLAGE REFUSAL TO REZONE TO ALLOW FOR CONSTRUCTION OF RACIALLY INTEGRATED LOW INCOME HOUSING HELD NOT VIOLATIVE OF EQUAL PROTECTION ABSENT A SHOWING THAT DISCRIMINATORY INTENT OR PURPOSE IS A MOTIVATING FACTOR.—*Village of Arlington Heights v. Metropolitan Housing Development Corp.* (U.S. Sup. Ct. 1977).

Plaintiff Metropolitan Housing Development Corporation (MHDC), a nonprofit organization created for the purpose of developing low cost housing in a Chicago suburb, entered into a conditional contract[1] for the purchase of fifteen acres of undeveloped land in the Village of Arlington Heights,[2] with the intent of constructing a federally subsidized[3] townhouse project[4] for persons of low to moderate incomes.[5] MHDC's re-

1. MHDC entered into a 99 year lease and sale agreement with the Clerics of St. Viator, a Catholic religious order holding title to 80 acres of undeveloped land near the center of the Village of Arlington Heights. Although MHDC took immediate possession of the 15 acre parcel as lessee, the sale agreement was contingent on MHDC's obtaining federal financial assistance for the project, *see* note 3 *infra*, and MHDC's obtaining a rezoning of the parcel from R-3 (single family detached) to R-5 (multiple family). It was stipulated that both the lease and sale agreements would be void should MHDC prove unsuccessful in meeting these contingencies. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 97 S. Ct. 555, 559 (1977).

2. Arlington Heights is an affluent suburban community located approximately 25 miles northwest of Chicago's loop. Zoned primarily for single family homes, the community is highly segregated. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 97 S. Ct. 555, 558 (1977).

3. MHDC initially proposed to subsidize the project under § 236 of the National Housing and Urban Development Act of 1968, 12 U.S.C. § 1715z-1, which authorized low interest loans to qualified developers for the purchase, construction and rehabilitation of racially integrated projects such as the one proposed for Arlington Heights. 12 U.S.C. § 1715z-1 (1970).

In 1973 assistance under § 236 was suspended by executive decision. However, MHDC indicated that alternative federal funding could be obtained under § 8 of the Housing and Community Development Act of 1974, 42 U.S.C. § 1437f (IV Supp. 1970), as amended by the Housing Authorization Act of 1976, Pub. L. No. 94-375, § 2, 90 Stat. 1068, 42 U.S.C. § 1437f (IV Supp. 1970). Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 97 S. Ct. 555 (1977).

4. "Lincoln Green," the proposed development, was to consist of 20 two-story townhouse structures with a total of 190 units, occupying approximately 40% of the 15 acre site. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 97 S. Ct. 555, 559 (1977).