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Corporal Punishment in Public Schools: Constitutional Challenge After Ingraham v. Wright

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I. INTRODUCTION

Corporal punishment has been employed to maintain discipline and order in American schools since the colonial period.[1] During that era, the practice was not restricted to the classroom: corporal punishment was the generally accepted mode of correction for practically every civil and criminal offense.[2] Attitudes toward correction did not begin to change until after the American Revolution. Since then, corporal punishment has been steadily discarded as a method of correction in both prisons and the military.[3] Despite discontinuance in these areas, corporal punishment remains a well-established facet of the American educational process. Only a few

1. H. FALK, CORPORAL PUNISHMENT 20 (1941).

2. *Id.* at 34. During the colonial period, only the Quakers shunned physical punishment as a means of disciplining wrongdoers, opting instead for incarceration in penitentiaries where offenders could reflect upon their misdeeds. *See* K. ERIKSON, THE WAYWARD PURITANS 201 (1966). The Quakers, however, were far from popular in the age of Puritanism. Considered outcasts, they were driven from the Eastern seaboard colonies to form settlements of their own. H. FALK, *supra* note 1, at 18.

3. *See, e.g.*, Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968) (outlawing the use of the strap on prisoners); 18 U.S.C. § 2191 (1976) (originally enacted as Act of June 25, 1948, ch. 645, 62 Stat. 800) (outlawing the flogging of sailors).

states and municipalities have legislative prohibitions against the use of this disciplinary method in their public schools,[4] and the courts consistently have rejected constitutional challenges to provisions authorizing its use.[5]

Although use of the rod has continued for many years, the practice raises social issues of considerable controversy.[6] In 1853, Justice William Stuart of the Indiana Supreme Court lamented the legislature's failure to outlaw the use of corporal punishment in disciplining school children. Writing for the court in *Cooper v. McJunkin*,[7] he stated:

> It can hardly be doubted but that public opinion will, in time, strike the ferule from the hands of the teacher, leaving him as the true basis of government, only the resources of his intellect and heart. . . . The husband can no longer moderately chastise his wife; nor, according to more recent authorities, the master his servant or apprentice. Even the degrading cruelties of the naval service have been arrested. Why the person of the school-boy, "with his shining morning face," should be less sacred in the eye of the law than that of the apprentice or the sailor, is not easily explained.[8]

Justice Stuart's conclusion that the legislative process is the proper avenue for reform remains valid. As representative bodies, legislatures theoretically enact and amend the laws as changes in societal attitudes dictate. Resolution of the question whether corporal punishment should be used as a means of disciplining school children requires basic value judgments that courts are ill-equipped to make. Nonetheless, to the extent that a form of punishment has constitutional implications, the judicial function must be exercised. Challenges to the constitutionality of corporal punishment have commonly relied upon four theories: cruel and unusual punishment, the parental rights doctrine, procedural due process, and substan-

4. The following states have enacted such statutes: Maine, ME. REV. STAT. ANN. tit. 20, § 918 (West Supp. 1978); Massachusetts, MASS. ANN. LAWS ch. 71, § 37G (Michie/Law. Co-op Supp. 1978); New Jersey, N.J. STAT. ANN. § 18A:6-1 (West 1968). A number of cities have also prohibited corporal punishment in schools: Baltimore, Boston, Chicago, New York, Philadelphia, Pittsburgh, St. Paul, San Francisco, and Washington, D.C. CITIZENS COMMISSION TO INVESTIGATE CORPORAL PUNISHMENT IN JUNIOR HIGH SCHOOL 22, CORPORAL PUNISHMENT AND SCHOOL SUSPENSIONS 20 n.29 (MARC Monograph No. 2, 1974).

5. *See* text accompanying notes 25 and 71 *infra*.

6. *See* L. COBB, CORPORAL PUNISHMENT (1847) (offering an argument against the practice). Perhaps more impressive than the content of the book itself are the letters, incorporated into the appendix, from numerous influential persons of the day who supported the author's view. Among them: Millard Fillmore, then a candidate for President of the United States; Horace Mann, Secretary of the Massachusetts Board of Education; and William H. Seward, former Governor of the State of New York. *See also* SPECIAL COMMITTEE, BOARD OF EDUCATION OF THE CITY OF NEW YORK, CORPORAL PUNISHMENT IN PUBLIC SCHOOLS (1908).

7. 4 Ind. 290 (1853).

8. *Id.* at 292-93.

tive due process. The first three issues have been resolved formally by the Supreme Court of the United States.[9] The substantive due process issue, however, has been determined conclusively only in the Fifth Circuit.[10]

This Note will first review these four issues as they have confronted the lower courts and then will analyze *Ingraham v. Wright,*[11] in which the Supreme Court ruled on the cruel and unusual punishment and procedural due process issues. Discussion will center on the substantive due process issue, suggesting the feasibility of a suit challenging the practice as administered in a given instance.[12]

II. Challenges in the Lower Courts

Each of the four theories discussed herein presents a unique approach to challenging the constitutionality of physically punishing school children. The cruel and unusual punishment and substantive due process challenges may be utilized to question the constitutionality of both the provision authorizing corporal punishment and the practice as applied in individual instances. While the issues raised by these two challenges are essentially the same, the scope and analysis afforded to each approach combine to give them separate identities.[13] The parental rights question involves neither the constitutional validity of the practice itself nor the rights of the child being punished. Instead, the issue is whether the state interferes with a parent's right to control his or her upbringing by authorizing the use of corporal punishment in the schools. Similarly, the procedural due process challenge does not question the practice itself, focusing instead upon the treatment the child receives prior to punishment. Specifically, the issues are whether the child should receive prior notice that physical punishment might be administered for the offense committed, and whether the child should have the opportunity to be heard before being punished.

Before these four approaches are examined further, the question of federal jurisdiction deserves brief review. The provision com-

9. Ingraham v. Wright, 430 U.S. 651 (1977) (deciding the cruel and unusual punishment and procedural due process issues); Baker v. Owen, 395 F. Supp. 294 (M.D.N.C.), *aff'd,* 423 U.S. 907 (1975) (deciding the parental rights issue).

10. Ingraham v. Wright, 525 F.2d 909 (5th Cir. 1976). In granting certiorari, the Supreme Court excluded the substantive due process issue from review. 425 U.S. 990-91 (1976).

11. *See* note 9 *supra.*

12. This Note will approach only the issues as they affect public schools. While the observations and conclusions offered may be applicable to private schools, the issue whether corporal punishment administered in private schools constitutes state action is beyond the scope of this Note.

13. *See* text accompanying notes 22-24 & 63-68 *infra.*

monly employed to establish federal subject matter jurisdiction in a corporal punishment case is section 1983 of Title 42 of the United States Code,[14] under which courts can impose both damages and an injunction upon the culpable party. In order to maintain a section 1983 action, however, the plaintiff must meet two threshold requirements. First, the claim must be based upon an interference with federally insured rights by a person acting under color of state law.[15] The second requirement, one not expressly outlined in the statute but fashioned by the courts, demands that the claim be "substantial." The plaintiff must present a valid claim that is not "obviously frivolous" when compared with prior cases dismissing section 1983 suits.[16] Courts considering challenges to corporal punishment in public schools have uniformly found these threshold requirements satisfied.[17]

A. *Cruel and Unusual Punishment*

The most prevalent of all constitutional challenges to corporal punishment in public schools is the claim that the practice violates the cruel and unusual punishment clause of the eighth amendment. The analytic approach originally adopted by courts faced with cruel and unusual punishment challenges consisted of comparing the challenged practice to those punishments that were considered cruel and unusual in 1789.[18] In *Weems v. United States,*[19] the Supreme Court formally rejected this restrictive approach, stating that the eighth amendment is "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlight-

14. 42 U.S.C. § 1983 (1976) states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

15. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970).

16. *See* Hagans v. Lavine, 415 U.S. 528, 536-38 (1974). *See also Ex parte* Poresky, 290 U.S. 30 (1933); Hannis Distilling Co. v. Mayor of Baltimore, 216 U.S. 285 (1910). The substantiality requirement is not peculiar to § 1983 actions, but must be shown in any case asserting federal jurisdiction.

17. In one case, plaintiff failed to pass the substantiality test at the district court level. Sims v. Waln, 388 F. Supp. 543 (S.D. Ohio 1974). The Sixth Circuit, however, reversed the lower court decision on the substantiality issue, though affirming on other grounds. 536 F.2d 686 (6th Cir. 1976), *cert. denied,* 431 U.S. 903 (1977).

18. *See In re* Kemmler, 136 U.S. 436 (1890); Wilkerson v. Utah, 99 U.S. 130 (1878). *See also* CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA 1251-52 (1973).

19. 217 U.S. 349 (1910).

ened by a humane justice."[20] *Weems* also broadened the scope of the clause by holding that a facially permissible form of punishment may be cruel and unusual as administered in a particular case. Although the courts previously had examined only the nature of the punishment,[21] the *Weems* Court ruled that if the punishment was of a length or severity unreasonbly disproportionate to the offense committed, the punishment as applied would be condemned as excessive.[22] Reinforcing the *Weems* holding, the Court established the current methodology in *Trop v. Dulles*,[23] requiring courts to scrutinize the challenged practice in light of "the evolving standards of decency that mark the progress of a maturing society."[24] Although the *Trop* approach adequately expresses the goal to be achieved, it defies application as a constitutional standard. Thus, the lower courts have adopted divergent views in ruling on the eighth amendment challenges to corporal punishment in public schools. Most federal courts have agreed that, although physically punishing school children is not per se "cruel and unusual," an excessive or unreasonably severe punishment violates the eighth amendment proscription.[25] One district court has ruled, however, that the practice does not merit constitutional scrutiny because adequate remedies for excessive or unduly severe punishments are obtainable in civil or criminal actions.[26] Another court held that the eighth amendment is applicable only in criminal cases.[27] The Supreme Court adopted the latter view in *Ingraham v. Wright*.[28] At first blush, this decision may seem incongruous with the language of the eighth amendment. As will be discussed below, however, the Court's holding is justifiable. Moreover, it does not eliminate the possibility of challenging the practice itself on other constitutional grounds.

B. Parental Rights

Briefly stated, the doctrine of parental rights vests the natural parent or legal guardian with the power to control the upbringing

20. *Id.* at 378.

21. *See* O'Neil v. Vermont, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting).

22. 217 U.S. at 381. *See also* CONGRESSIONAL RESEARCH SERVICE, *supra* note 18, at 1254-55.

23. 356 U.S. 86 (1958).

24. *Id.* at 100-01.

25. *See, e.g.*, Bramlet v. Wilson, 495 F.2d 714 (8th Cir. 1974); Baker v. Owen, 395 F. Supp. 294 (M.D.N.C.), *aff'd*, 423 U.S. 907 (1975); Glaser v. Marietta, 351 F. Supp. 555 (W.D. Pa. 1972).

26. Ware v. Estes, 328 F. Supp. 657, 660 (N.D. Tex. 1971), *aff'd per curiam*, 458 F.2d 1360 (5th Cir.), *cert. denied*, 409 U.S. 1027 (1972).

27. Gonyaw v. Gray, 361 F. Supp. 366, 368 (D. Vt. 1973).

28. 430 U.S. 651 (1977).

of his or her child. Asserted most commonly in a substantive due process context, the doctrine raises the issue of whether state action interfering with parental rights is justifiable. The Supreme Court first interpreted the fourteenth amendment to protect parental rights in *Meyer v. Nebraska,*[29] holding that a statute restricting instruction of foreign langnages in public and private schools unreasonably interfered with plaintiffs' liberty interest in controlling their children's educations and thus violated the due process clause.[30] Shortly thereafter, in *Pierce v. Society of Sisters,*[31] the Court relied upon *Meyer* to invalidate an Oregon statute requiring children to attend public schools to the exclusion of private and parochial schools.[32]

The first limitation on the doctrine was established in *Prince v. Massachusetts,*[33] in which the Court upheld the conviction of a Jehovah's Witness who had allowed her niece to sell religious tabloids in violation of state child labor laws. Rejecting appellant's contention that the statute unreasonably interfered with her fourteenth amendment right to control the upbringing of children in her custody, the Court limited *Meyer* in ruling that the state may intervene to restrict parental rights when either the public interest or the best interests of the child are at stake.[34] The Court refined the *Prince* ruling in *Wisconsin v. Yoder.*[35] In *Yoder,* Amish parents violated a statute requiring children to attend school until age sixteen by removing their underage children from school after the children had completed the eighth grade. The Supreme Court affirmed the Wisconsin Supreme Court's decision overturning the conviction on first amendment free exercise grounds.[36] Although cited primarily for the first amendment holding, *Yoder* also addressed a parental rights issue. Recognizing that parents have a "traditional interest" in the religious upbringing of their children,[37] the Court cited *Pierce* in concluding that the parent has the right to provide an education equivalent to that required by the state.[38] The Court found that the

29. 262 U.S. 390 (1923).
30. *Id.* at 401.
31. 268 U.S. 510 (1925).
32. *Id.* at 534-35.
33. 321 U.S. 158 (1944).
34. *Id.* at 166-67.
35. 406 U.S. 205 (1972).
36. Finding that the Amish faith requires its followers to adopt a lifestyle that necessarily excludes formal education beyond a certain age, the Court concluded that a state law requiring continued formal education conflicted with the tenets of the Amish faith and thus violated the free exercise clause of the first amendment. *Id.* at 218-19.
37. *Id.* at 214.
38. *Id.* at 213.

respondents had demonstrated that their method of continuing education satisfied the state's interest in compulsory education.[39]

When the parental rights doctrine has been asserted in constitutional challenges to corporal punishment in public schools, the courts uniformly have upheld the practice, employing a rational basis test balancing the state's interest in maintaining order and discipline in the schools against the parent's right of control.[40] In *Baker v. Owen,*[41] the leading case in this area, a parent instructed school officials not to paddle her child because she opposed the practice in principle. The Supreme Court summarily affirmed a three-judge district court holding that the state has a legitimate interest in authorizing the use of corporal punishment, even over the parent's restrictions. The district court refused to view parental rights as fundamental, stating that the decisions in *Meyer* and *Pierce* do not "enshrine parental rights so high in the hierarchy of constitutional values."[42] Distinguishing *Baker* from *Meyer, Pierce,* and *Prince,* the court reasoned that although those cases implicated values of "unquestioned acceptance,"[43] the concern in *Baker*—the opposition to corporal punishment—was one of substantial controversy, and therefore did not merit deference when infringed by a legitimate state interest.[44]

Although not relied upon by the court in *Baker,* dictum in *Yoder* provides additional support for the decision:

> A way of life . . . may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations . . . . [T]he very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.[45]

Accordingly, since the parent's directive to the school officials in *Baker* was based solely upon her personal feelings regarding corporal punishment, *Yoder* indicates that the court properly rejected her claim. The Supreme Court's summary affirmance of *Baker* establishes the definitive rule on the parental rights issue.

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39. *Id.* at 235-36.

40. *See, e.g.,* Gonyaw v. Gray, 361 F. Supp. 366, 369 (D. Vt. 1973); Ware v. Estes, 328 F. Supp. 657, 660 (N.D. Tex. 1971), *aff'd per curiam,* 458 F.2d 1360 (5th Cir.), *cert. denied,* 409 U.S. 1027 (1972).

41. 395 F. Supp. 294 (M.D.N.C.) (three-judge panel), *aff'd,* 423 U.S. 907 (1975) (affirmance restricted to parental rights issue). *See* Ingraham v. Wright, 525 F.2d 909, 917-18 (5th Cir. 1976).

42. 395 F. Supp. at 299.

43. *Id.* at 300.

44. *Id.*

45. 406 U.S. at 215-16.

C. Procedural Due Process

The due process clause of the fourteenth amendment prohibits state deprivations of life, liberty, or property without due process of law. Interpretation of the clause has developed a list of procedural safeguards, of which the Supreme Court has recognized notice and hearing as most essential.[46] Actions alleging deprivation of these safeguards must meet two threshold tests: a plaintiff must show, first, that the claim arises out of some state action, and, second, that the state action interferes with an interest in life, liberty, or property entitled to constitutional protection.[47]

In cases of corporal punishment in public schools, the existence of state action is beyond question.[48] In the *Civil Rights Cases,*[49] the Supreme Court identified the fundamental criteria for determining whether a deprivation resulted from an act of the state: the interference must be the product of either state legislation or the acts of a person performing under authority vested in him by the state.[50] Subsequent decisions have established that interferences by governmental entities subordinate to the state level also invoke due process protections.[51] Thus, a provision authorizing corporal punishment in public schools constitutes state action, whether in the form of a state law, a municipal ordinance, or a school district regulation.[52]

Only one corporal punishment case has addressed the second threshold consideration in due process analysis. In *Baker v. Owen* the court expressly held that a constitutionally protected liberty interest was present, ruling that a child has a legitimate interest in avoiding unwarranted corporal punishment.[53] Subsequent to *Baker,* however, the Supreme Court adopted a narrower approach for deter-

46. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171-72 (1951). *See also* Friendly, *Some Kind of Hearing,* 123 U. PA. L. REV. 1267, 1279-95 (1975).

47. *See, e.g.,* Board of Regents v. Roth, 408 U.S. 564 (1972) (interference with constitutionally protected interest); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (state action). *See also* Blumstein, *Constitutional Perspectives on Governmental Decisions Affecting Human Life and Health,* 40 L. & CONTEMP. PROB. 231, 238-41 (1976).

48. This Note does not address the constitutionality of corporal punishment in private schools. *See* note 12 *supra.*

49. 109 U.S. 3 (1883).

50. *Id.* at 13.

51. *See, e.g.,* Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 315 (1968).

52. None of the cases considering challenges to corporal punishment in public schools addressed the state action question, apparently conceding the issue.

53. 395 F. Supp. 294, 302 (M.D.N.C. 1975) (three-judge panel). Although *Baker* was summarily affirmed by the Supreme Court, 423 U.S. 907 (1975), that affirmance was limited to the lower court's parental rights holding. *See* note 41 *supra.*

mining whether an interest is constitutionally protected. In *Paul v. Davis,*[54] respondent asserted that the state had interfered with his liberty interest in reputation by including his name on an active shoplifter list distributed among local merchants, despite the fact that he had never been prosecuted for that crime. The Court held that since an adequate remedy was available in the form of a defamation action, the interest allegedly interfered with did not merit constitutional protection.[55] A similar rationale could be employed to deny constitutional protection for the liberty interest found in *Baker:* because civil and criminal assault and battery actions arguably provide adequate remedies for a student aggrieved by unreasonable corporal punishment, courts could interpret *Paul* as denying procedural due process protection.[56]

Once the threshold requirements are met, the final determination is what procedural safeguards, if any, must be afforded.[57] Due process is a flexible concept, affording procedural safeguards appropriate to the circumstances and interests involved in a particular situation. Past corporal punishment cases reached conflicting positions on the question whether any procedural protections prior to punishment are necessary. The court in *Sims v. Board of Education*[58] determined that the governmental interest in swift discipline so outweighed the individual interest affected that no notice or hearing had to be afforded.[59] In *Baker v. Owen,* on the other hand, the court required that certain informal prepunishment procedures be guaranteed.[60] After *Baker* was decided, however, the view espoused in *Sims v. Board of Education* reemerged. In *Sims v. Waln,*[61]

54. 424 U.S. 693 (1976).

55. *Id.* at 712-13.

56. *See* Gonyaw v. Gray, 361 F. Supp. 366, 371 (D. Vt. 1973) (suggesting that civil and criminal remedies eliminate the need for procedural safeguards).

57. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

58. 329 F. Supp. 678 (D.N.M. 1971).

59. *Id.* at 683-84.

60. 395 F. Supp. at 302-03. The panel stated that, "except for those acts of misconduct which are so anti-social or disruptive as to shock the conscience," corporal punishment was forhidden as a first method of discipline. The court ruled further that the student must have prior notice of those offenses that could occasion its use; that the punishment be administered in the presence of another school official having knowledge of the reason for the punishment, giving the student a fair opportunity to rebut those reasons; and that the punishing official provide a written synopsis of the episode to the student's parents upon request. *Id.* In reaching this decision, the *Baker* court may have relied upon the Supreme Court's earlier decision in *Goss v. Lopez,* 419 U.S. 565 (1975). In *Goss,* the Court held that students suspended from public schools must first be afforded the "rudimentary precautions" of notice of the charges and an opportunity to be heard. *Id.* at 581. *See also* Coffman v. Kuehler, 409 F. Supp. 546, 549-51 (N.D. Tex. 1976).

61. 536 F.2d 686 (6th Cir. 1976).

the Sixth Circuit held that no procedural safeguards had to be provided prior to administering corporal punishment, rejecting the *Baker* holding in favor of the Fifth Circuit's more recent decision in *Ingraham v. Wright*,[62] discussed below.

D. Substantive Due Process

In addition to guaranteeing procedural safeguards before the state deprives a person of life, liberty, or property, the due process clause protects against unjustified governmental interference with those interests. Simply stated, the "fairness" of the state action is at issue in a substantive due process claim.[63] The Supreme Court has developed two standards for determining whether substantive due process has been violated. When the state interferes with a nonfundamental individual interest in life, liberty, or property, the government must show that the state action bears a "reasonable relation to a proper legislative purpose."[64] Application of the rational basis test almost always results in judicial approval of the state action.[65] When the court deems the interest interfered with to be a "fundamental right,"[66] the government must justify the state action by showing that it serves a "compelling interest," and that the method used to achieve the desired end is the least restrictive alternative available.[67] In contrast to the rational basis test, strict scrutiny analysis consistently results in invalidation of the state action.[68]

On its face, this summary suggests that cases raising substantive due process issues will be subjected to one or the other of two, distinct levels of analysis. Some commentators have argued, however, that the Court engages in a "sliding scale" approach, first

62. 525 F.2d 909 (5th Cir. 1976).

63. *See* Ross v. Moffitt, 417 U.S. 600, 609 (1974).

64. Nebbia v. New York, 291 U.S. 502, 537 (1934).

65. *See* McCoy, *Recent Equal Protection Decisions—Fundamental Right to Travel or "Newcomers" as a Suspect Class?*, 28 VAND. L. REV. 987, 989 n.13 (1975).

66. The proper method of identifying "fundamental rights" remains unclear. Originally, the Court treated only the enumerated protections of the first amendment as fundamental. *See* NAACP v. Button, 371 U.S. 415 (1963). Subsequently, however, the Court read the first amendment to include other unenumerated rights—primarily, the right to "privacy." *See* Griswold v. Connecticut, 381 U.S. 479 (1965). Justice Rehnquist later attempted to define the scope of the right to privacy by listing the components of that right: marriage, procreation, contraception, family relationships, child rearing, and education. Paul v. Davis, 424 U.S. 693, 713 (1976).

67. Roe v. Wade, 410 U.S. 113, 155 (1973).

68. "So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard [compelling state interest], and I doubt one ever will, for it demands nothing less than perfection." Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972) (Burger, C.J., dissenting).

placing the interest involved on a continuum between ordinary interests and fundamental rights and then applying appropriate scrutiny. *Griswold v. Connecticut*[69] best illustrates this approach. In *Griswold,* the Court abolished the state's prohibition against the use of contraceptive devices, but four separate opinions offered varying rationales for the result. Collectively, the opinions suggest that, while the interest involved may not be one of fundamental import, it possessed a significance worthy of stricter protection than that afforded by the rational basis standard.[70]

The availability of an intermediate level of scrutiny may be essential in future cases asserting that the use of corporal punishment to discipline school children violates substantive due process. Thus far, the lower courts have consistently applied the rational basis standard in rejecting substantive due process challenges. Recognizing a state's interest in maintaining classroom order, the courts have found that the use of corporal punishment is a legitimate means of attaining that end.[71]

Those cases, however, focused upon only the provision authorizing corporal punishment. In three cases, plaintiffs challenged the practice as administered. The claims were rejected in each case, but for different reasons. In *Coffman v. Kuehler,*[72] the court found that the blows administered were not unreasonable in relation to the offense committed.[73] In *Ware v. Estes,*[74] the court recognized that corporal punishment had been abused by "seven thousand-odd" teachers in the school district,[75] but refused to apply constitutional scrutiny, reasoning that common law afforded adequate remedy.[76] Finally, in *Ingraham v. Wright,*[77] the Fifth Circuit rendered an en banc decision similar to *Ware,* recognizing the available common law remedy and refusing to review each instance of punishment in a constitutional context.[78] Because the Supreme Court denied cer-

69. 381 U.S. 479 (1965).

70. G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 637 (9th ed. 1975). *See also* Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The* Griswold *Case,* 64 MICH. L. REV. 235, 242-47 (1965).

71. *See, e.g.,* Coffman v. Kuehler, 409 F. Supp. 546, 549 (N.D. Tex. 1976); Gonyaw v. Gray, 361 F. Supp. 366, 369 (D. Vt. 1973); Sims v. Board of Educ., 329 F. Supp. 678, 685 (D.N.M. 1971); Ware v. Estes, 328 F. Supp. 657, 658-59 (N.D. Tex. 1971), *aff'd per curiam,* 458 F.2d 1360, 1361 (5th Cir.), *cert. denied,* 409 U.S. 1027 (1972).

72. 409 F. Supp. 546 (N.D. Tex. 1976).

73. *Id.* at 549.

74. 328 F. Supp. 657 (N.D. Tex. 1971).

75. *Id.* at 658.

76. *Id.* at 660.

77. 525 F.2d 909 (5th Cir. 1976).

78. *Id.* at 917.

tiorari on the substantive due process issue, the resolution of that issue in *Ingraham* is binding only in the Fifth Circuit. Because it represents the only explicit treatment by a circuit court, however, the decision will be analyzed in a later discussion.

E. Summary

These four approaches—cruel and unusual punishment, parental rights, procedural due process, and substantive due process—constitute the major avenues of constitutional challenge to corporal punishment in public schools. The Supreme Court's affirmance of *Baker* resolves the parental rights issue so that no further comment is necessary. The remainder of this Note will discuss the viability of the other three challenges in light of the Court's decision in *Ingraham v. Wright*.[79]

III. *Ingraham v. Wright*

A. The Facts

Petitioners, two students enrolled in a Dade County, Florida junior high school, filed suit in federal district court after receiving severe corporal punishment from administrative officials at that school.[80] The students filed individual claims under sections 1981 through 1988 of Title 42 of the United States Code, seeking compensatory and punitive damages. They also filed suit as representatives of a class including all Dade County public school students, seeking declaratory and injunctive relief against further use of corporal punishment in the school system.[81]

In the individual claims, petitioners contended that the punishments as administered violated the cruel and unusual punishment clause of the eighth amendment. The class action contained three allegations. First, petitioners argued that corporal punishment was cruel and unusual both on its face and as applied at the school. Second, they contended that because the practice served no legiti-

79. 430 U.S. 651 (1977).

80. Petitioner Ingraham received twenty blows with a wooden paddle from the school principal for loitering in the school auditorium after being told to leave by another teacher. Two assistant principals held Ingraham against a table while the paddling was administered. He suffered a hematoma, requiring medical attention and bed rest for ten days. Petitioner Andrews received beatings on two separate occasions. In the first incident, a school official struck him on the legs, arms, buttocks, back, and neck for tardiness and resisting punishment. In the second incident, Andrews suffered an injured wrist requiring medical attention when punished for breaking glass in sheet metal class, despite his insistence that he was not responsible. Ingraham v. Wright, 498 F.2d 248, 256-57 (5th Cir. 1974).

81. Instances of punishments administered to other students at the schools are reported in 498 F.2d at 257-59.

mate purpose and was administered in an arbitrary and capricious manner, the state had deprived the students of a liberty interest in violation of substantive due process. Finally, petitioners challenged the practice on procedural due process grounds, arguing that the school employed corporal punishment without prior notice of the consequences of the offenses committed and without an opportunity to be heard. Petitioners joined the school principal, the vice principals, and the Dade County School Board as defendants in the action.

B. The Lower Court Decisions

The United States District Court for the Southern District of Florida granted defendants' motion for a directed verdict on all counts.[82] The court first dismissed the class action for failure to show a right to relief, then granted a directed verdict on the individual claims, ruling that the evidence offered was insufficient to support a jury verdict for plaintiffs.[83]

The Fifth Circuit reversed and remanded, one judge dissenting.[84] The court held that although the school board's policy statement authorizing the use of corporal punishment in Dade County public schools did not itself violate the eighth amendment, corporal punishment as administered at the school was " 'excessive' in the constitutional sense" and therefore violative of the cruel and unusual punishment clause.[85] The court expressly rejected defendants' argument that the proscriptions of that clause are applicable only to criminal penalties.[86] In ruling that the class action should not have been dismissed, the court rejected the view that abuse throughout the school system had to be shown in order to invoke constitutional scrutiny, stating that an eighth amendment violation could occur at a single institution.[87] Furthermore, the court held that the district court erred in determining that the evidence on the individual claims was insufficient.[88] Turning to the procedural due process question, the court ruled that some form of notice and hearing, however informal, must be afforded and that the student should be informed in advance that the school may respond to certain acts with physical punishment.[89] Finally, the court held that although

82. The unreported district court decision is summarized in 498 F.2d at 251-53.
83. *Id.*
84. Judge Morgan was the sole dissenter.
85. 498 F.2d at 264.
86. *Id.* at 259 n.20.
87. *Id.* at 262.
88. *Id.* at 265.
89. *Id.* at 267-68.

moderate corporal punishment had a legitimate purpose, the type of punishment inflicted in the instant case "went beyond legitimate bounds" and therefore violated substantive due process.[90]

On rehearing, the Fifth Circuit, sitting en banc, reinstated the holdings of the district court, with five of fifteen judges dissenting.[91] The court held that the cruel and unusual punishment clause applied only in cases imposing punishments for criminal offenses,[92] and that plaintiffs' proper remedy rested in tort and in criminal sanctions.[93] Turning to the substantive due process issue, the panel found that Florida statutory provisions and the school board's policy statement together reflected a legitimate state purpose and eliminated any arbitrary or capricious element in the practice.[94] Conjoining this finding with the availability of criminal and civil remedies, the court refused to scrutinize individual incidents to determine whether the punishment as applied was arbitrary or capricious.[95] The court reasoned that examination of specific events would constitute a misuse of judicial power, since such a decision would necessarily require the court to substitute its judgment as to the appropriate measure of punishment for that of school officials.[96] Finally, arguing that prepunishment procedures would dilute the effectiveness of the punishment and that no grievous loss would result in their absence, the panel concluded that procedural safeguards are not required prior to administering corporal punishment.[97]

C. *The Supreme Court Decision*

The Supreme Court granted certiorari on the issues of cruel and unusual punishment and procedural due process, but excluded the substantive due process issue from review.[98] The Court ruled, five to four, that the eighth amendment's proscription against cruel and unusual punishment applies only in cases imposing punishment for criminal misconduct, and that the availability of common law remedies satisfies due process even in the absence of prior notice and hearing.[99]

90. *Id.* at 269.
91. 525 F.2d 909 (5th Cir. 1976).
92. *Id.* at 913.
93. *Id.* at 915.
94. *Id.* at 916-17.
95. *Id.* at 917.
96. *Id.*
97. *Id.*
98. 425 U.S. 990 (1976).
99. 430 U.S. 651 (1977).

Dealing first with the cruel and unusual punishment issue, Justice Powell, writing the majority opinion, began by reviewing the history of the eighth amendment. Because the framers modeled the amendment after a similar English provision that applied exclusively in criminal cases,[100] and because it was added after the original Constitution was criticized for its failure to provide protections to convicted criminals,[101] the Court concluded that only punishments imposed for criminal wrongs were within the scope of the amendment.[102] Refusing to "wrench the Eighth Amendment from its historical context,"[103] Justice Powell reasoned further that the openness of the school environment and the availability of criminal and civil remedies against a teacher who inflicts abusive punishment combine to eliminate the need for eighth amendment protection.[104]

Turning to the procedural due process issue, the Court first acknowledged that petitioners' claims asserted a liberty interest worthy of constitutional protection.[105] Restating the notion that the nature, not the weight, of the interest determines whether due process requirements should be afforded,[106] the Court held that fourteenth amendment liberty interests are implicated when persons acting under color of state law inflict physical punishment upon children.[107]

The Court then considered whether procedural safeguards should be required,[108] employing the three-step analysis enunciated in *Mathews v. Eldridge*.[109] The Court first concluded that a child's interest in freedom from unjustified or unreasonable punishment is

100. *Id.* at 664-65.

101. *Id.* at 666.

102. *Id.* at 664. The Court cited several prior decisions providing implicit support for this conclusion: Estelle v. Gamble, 429 U.S. 97 (1976); Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972); Powell v. Texas, 392 U.S. 514 (1968); Robinson v. California, 370 U.S. 660 (1962); Trop v. Dulles, 356 U.S. 86 (1958); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947); Weems v. United States, 217 U.S. 349 (1910); Howard v. Fleming, 191 U.S. 126 (1903); *In re* Kemmler, 136 U.S. 436 (1890); Wilkerson v. Utah, 99 U.S. 130 (1878); Pervear v. Commonwealth, 72 U.S. (5 Wall.) 475 (1867).

103. 430 U.S. at 669.

104. *Id.* at 670.

105. *Id.* at 672.

106. *Id.*

107. *Id.* at 674.

108. *Id.*

109. The analysis requires consideration of three distinct factors: "First, the private interest that will be affected . . .; second, the risk of an erroneous deprivation of such interest . . . and the probable value, if any, of additional or substitute procedural safeguards; and finally, the [state] interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Id. at 675 (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

not insubstantial.[110] Next examining the safeguards that Florida law offered against such punishment, however, the Court found that civil and criminal sanctions were sufficient to deter unreasonable punishments by school authorities.[111] The Court reiterated that the open environment of the schools and the presence of other responsible officials served to temper further any possibility of abusive punishment.[112] Analogizing to fourth amendment decisions permitting law enforcement officers to make warrantless public arrests upon their own belief that probable cause exists, the Court stated that the risk of school officials acting unreasonably was so minimal that a prior hearing was unnecessary.[113] Finally, the Court explored the viability of procedural safeguards from a cost-benefit viewpoint, finding that the inevitable delays and the diversion of school personnel would detract from the effectiveness of the punishment, perhaps ultimately causing authorities to abandon this mode of maintaining discipline.[114] Combining these findings, the Court held that the due process clause does not require notice and hearing prior to the administration of corporal punishment to school children.[115]

Justice White delivered a forceful dissent.[116] Disagreeing with the majority's restrictive application of the eighth amendment, he contended that the language, not the history, of the amendment should control.[117] Arguing that any action regarded as punishment should fall within the purview of the amendment,[118] Justice White found it anomalous to afford constitutional protection against cruel and unusual punishment to prisoners but not to persons committing noncriminal misdeeds.[119] In his view, the open environment of a school becomes irrelevant when abusive punishment has been administered.[120] Furthermore, Justice White disagreed with the majority position that subsequent civil and criminal sanctions are adequate substitutes for eighth amendment scrutiny, contending that the common law provisions are merely remedial, whereas the pros-

110. 430 U.S. at 676.

111. *Id.* at 676-78.

112. *Id.* at 677-78. The Court found that the abusive punishment administered at the school was an "aberration." *Id.* at 677. The testimony summarized in 498 F.2d at 255-59, however, conflicts with this finding.

113. 430 U.S. at 679-80.

114. *Id.* at 680-81.

115. *Id.* at 682. *See also id.* at 672: "[W]e hold that the traditional common-law remedies are fully adequate to afford due process."

116. *Id.* at 683. (White, J., dissenting).

117. *Id.* at 685.

118. *Id.*

119. *Id.* at 689.

120. *Id.* at 690.

criptions of the cruel and unusual punishment clause may be used to provide protection against future abuse.[121]

In rejecting the majority's procedural due process holding, Justice White further developed the argument that subsequent tort actions do not adequately protect against the infliction of unwarranted punishment.[122] First, he pointed out that under Florida law a teacher cannot be liable for erroneously punishing a child, so long as the teacher acts in good faith.[123] Second, he asserted that the tort action only offers subsequent remedy for a wrong that itself cannot be undone.[124] Expanding on this proposition, he argued that, while the possibility of tort liability may deter unreasonable punishments, this potential cannot satisfy the due process requirements of prior notice and opportunity to be heard. Justice White concluded by rejecting the majority's "warrantless arrests" analogy, finding the comparison invalid because the fourth amendment applies only in a criminal context, in which the state may have a more compelling interest in capturing a criminal without an independent determination of probable cause.[125]

In a separate dissenting opinion, Justice Stevens amplified Justice White's position that subsequent common law remedies do not satisfy due process.[126] Stating that such remedies may be adequate substitutes for prior notice and hearing in cases implicating property interests, Justice Stevens questioned the majority's reliance upon such remedies when a liberty interest was at stake.[127]

IV. Analysis of *Ingraham*

Because the Court denied certiorari on the substantive due process issue, *Ingraham* offers no guidance in determining whether the fourteenth amendment prohibits severe corporal punishment in public schools. With that issue eliminated, the case became a vehicle for defining the scope of the eighth amendment and for creating a new approach to determining the necessity of prior procedural safeguards.

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121. *Id.* at 690-91.

122. *Id.* at 693. Justice White relied heavily on the seminal school-related procedural due process case, Goss v. Lopez, 419 U.S. 565 (1975).

123. 430 U.S. at 693-94.

124. *Id.* at 695.

125. *Id.* at 697-98. Justice White also asserted that the majority opinion misstated the rationale behind the warrantless arrest decisions. *Id.* at 698-99.

126. *Id.* at 700. (Stevens, J., dissenting).

127. *Id.* at 701.

A. *The Cruel and Unusual Punishment Holding*

In holding that the proscriptions of the cruel and unusual punishment clause do not apply to punishments administered for noncriminal misconduct, the majority placed a fair and logical limitation upon the scope of that provision. Giving full measure to Justice White's argument that the language of the eighth amendment should control its application, the majority view remains persuasive. In sixteen words, the amendment prohibits excessive bail, excessive fines, and cruel and unusual punishments.[128] When considered in context with two other proscriptions aimed solely at criminal procedures, the cruel and unusual punishment clause, logically speaking, was intended to apply only to criminal punishment.

Had *Ingraham* come before the Court prior to the advent of substantive due process, Justice White's contention would bear greater weight. Certainly, it would be anomalous to afford protection from cruel and unusual punishment to those convicted of crimes while denying similar safeguards to those living within the law. Substantive due process, however, guarantees these same protections to the noncriminal class. Under cruel and unusual punishment analysis, a punishment authorized by the state that offends "evolving standards of decency" or that is unreasonably disproportionate to the offense committed is unconstitutional. Similarly, substantive due process invalidates any state action that is arbitrary, capricious, or unrelated to a legitimate state purpose. Although cruel and unusual punishment and substantive due process analyses have different articulations and textual foundations, they are virtually identical both in purpose and in actual application. Thus, substantive due process could be utilized to prohibit cruel and unusual punishment in the criminal context, rendering the eighth amendment mere surplusage. Similarly, if applied in noncriminal cases, the cruel and unusual punishment clause would essentially duplicate substantive due process safeguards to the extent that the state action challenges could be characterized as "punishment." Although the decision in *Ingraham* in effect isolates the eighth amendment as a specialized subset of substantive due process, its safeguards are unnecessary in the noncriminal area.

This strongly suggests that the Court should have addressed the substantive due process issue in *Ingraham*. Indeed, Justice White endorsed this view. In footnote five to his dissent,[129] he stated that

128. U.S. CONST. amend. VIII ("Excessive bail sball not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

129. 430 U.S. at 689 n.5 (Wbite, J., dissenting).

the majority's holding on the cruel and unusual punishment issue, coupled with the recognition of a liberty interest for the purposes of procedural due process, imply that petitioners' remedy rested in their substantive due process claim. Justice White therefore concluded that the Court should have amended the grant of certiorari to include the substantive due process issue.[130]

While the Court's eighth amendment holding is sufficient for the purposes of the instant case, the analysis adopted may present problems in future criminal cases. Throughout the majority opinion, Justice Powell asserted that the cruel and unusual punishment clause applies only to *punishments* imposed upon those *convicted* of criminal offenses.[131] A strict reading of this language conflicts with at least one prior Supreme Court decision and with another rule firmly established in the lower courts. In *Estelle v. Gamble*,[132] the Court held that denial of proper medical care to a convicted and incarcerated criminal by prison officials violated the cruel and unusual punishment clause. Clearly, as Justice White points out in footnote four to his dissent,[133] the Court applied the eighth amendment in *Estelle* to remedy a situation created by the misconduct of prison officials. Since the punishment was a prison term, not the denial of medical care, a strict interpretation of Justice Powell's opinion leads to the conclusion that the Court employed the cruel and unusual punishment clause improperly in *Estelle*.[134] Similarly, if conviction is a prerequisite to eighth amendment scrutiny, then a number of lower court decisions holding that pretrial detainees are entitled to eighth amendment protection become questionable.[135]

130. *Id.*

131. "An examination of the history of the Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes." *Id.* at 664.

> These decisions recognize that the Cruel and Unusual Punishments Clause circumscribes the criminal process in three ways: 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.

Id. at 667.

132. 429 U.S. 97 (1976).

133. 430 U.S. at 688 n.4 (White, J., dissenting).

134. Similarly, the "conviction" limitation also questions a number of lower court decisions holding that the clause does not allow persons to be incarcerated in poor or inadequate facilities. *See, e.g.*, Jones v. Wittenberg, 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd*, 456 F.2d 854 (6th Cir. 1972); Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

135. *See, e.g.*, Collins v. Schoonfield, 344 F. Supp. 257 (D. Md. 1972); Brenneman v. Madigan, 343 F. Supp. 128 (N.D. Cal. 1972); Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971).

The instant opinion indicates that the cruel and unusual punishment clause applies only when a convicted criminal brings an action questioning a punishment imposed by a court. Although the Court may not have intended such a narrow interpretation, its holding may require explanation in subsequent decisions.

B. *The Procedural Due Process Holding*

In holding that common law remedies adequately satisfy procedural due process, the Supreme Court presents a theory that is less persuasive than its eighth amendment holding. To avoid inappropriate comparisons, *Ingraham* first must be distinguished from *Paul v. Davis.*[136] To recapitulate, *Paul* indicated that for the purposes of due process, certain wrongs that can be fully redressed in common law actions will not be elevated to interferences with constitutionally protected interests.[137] In *Ingraham,* however, the Court recognized that petitioners asserted an interest of constitutional status but nonetheless ruled that traditional notice and hearing were not necessary because subsequent common law remedies satisfied due process.

The Court's reliance in *Ingraham* on the availability of remedies in tort to obviate the need for due process is ill-conceived. When considering whether procedural safeguards should be afforded, the possibility that the injury suffered may be redressed in subsequent common law actions is irrelevant. While both common law remedies and procedural due process may be applicable in a given situation, the concepts have independent bases. Due process is a guarantee of specific protections that by their nature must be afforded before a deprivation of life, liberty, or property occurs.[138] Thus procedural due process is a protective concept, eliminating the erroneous or unreasonable deprivation in advance. Tort and criminal law, on the other hand, are remedial in nature. Generally, the common law provides redress to a person injured by the prior misconduct of another. Because these protections have fundamentally different goals, one cannot be employed to achieve the end of another.

From a practical standpoint, the notion that a common law

136. 424 U.S. 693 (1976). *See* text accompanying notes 54-55 *supra.*

137. *Id.* at 712.

138. *See, e.g.,* Fuentes v. Shevin, 407 U.S. 67, 82 (1972); Bell v. Burson, 402 U.S. 535, 542 (1971); Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971). Since the procedural safeguards must he given before the deprivation occurs, there is no remedy for the petitioners themselves. As in *Paul,* their deprivation has already occurred, and so their remedy does in fact rest in state tort action. The issue is still valid, however, in considering petitioners' request for injunctive relief in behalf of all Dade County public school students.

remedy can provide an adequate substitute for procedural due process has some merit in certain cases. When the state interferes with a property interest, the loss often may be calculated with some accuracy and a common law remedy can in theory restore the injured party to the position enjoyed prior to the loss.[139] In *Ingraham,* however, the interest affected, liberty, was intangible and of largely indeterminable monetary value. A monetary award, even if substantial, may provide inadequate compensation for the psychological effect of excessive punishment inflicted by school officials. Regardless of the interest affected, however, compensation does not provide the central protection of procedural due process—prevention of erroneous loss.[140]

To support the view that common law remedies are adequate alternatives, the *Ingraham* majority suggested that requiring prior notice and hearing would reduce the effectiveness of the punishment and divert the attention of school officials from other administrative duties to such a degree that corporal punishment might be abandoned as a means of maintaining discipline.[141] To the contrary, the time spent in prepunishment deliberation may in fact increase the punishment's effectiveness. Furthermore, assuming that corporal punishment is to be used sparingly and only as a last resort, and conceding that the safeguards should be as informal as the procedures suggested in *Baker v. Owen,*[142] the Court's fear that notice and hearing would present substantial administrative burdens is greatly exaggerated.

The Supreme Court's procedural due process analysis raises a troublesome obstacle, not simply for subsequent corporal punishment cases, but for all future procedural due process claims. It is difficult to imagine an interference with life, liberty, or property that does not give rise to a corresponding common law action. By establishing subsequent common law remedies as viable substitutes for procedural safeguards, the *Ingraham* decision overlooks the vital characteristics that identify due process as a protection instead of a remedy.

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139. *See* text accompanying notes 126-27 *supra.*

140. Justice White pointed out that common law remedies are wholly insufficient when a teacher punishes a student erroneously, provided the error is made under a good faith belief that the student had committed a punishable offense. 430 U.S. at 693-94 (White, J., dissenting). Furthermore, White questioned whether the damages awarded would provide full redress since the damages would be levied against the individual instead of the wealthier school system. *Id.* at 694 n.11.

141. *See* text accompanying note 114 *supra.*

142. *See* text accompanying note 60 *supra.*

V. THE SUBSTANTIVE DUE PROCESS CHALLENGE

Although *Ingraham* resolved the cruel and unusual punishment and procedural due process issues, the question whether corporal punishment on its face or when applied in an unreasonable manner violates substantive due process remains unresolved. Although lower courts have considered issues involving the practice itself, the courtroom is not the proper forum for determining the facial validity of corporal punishment in public schools. Corporal punishment has long been recognized as a proper method of disciplining the errant school child. Nonetheless, the practice has hardly received unanimous public approval and continues to provoke substantial argument. The legislatures and school boards, as representatives of the public in general, are best suited to make a policy choice that accurately reflects the public conscience.

A totally different question arises when a school official administers punishment in an unreasonably severe or excessive manner. The courts have both the power and the duty to protect individuals suffering from the actions of persons who abuse authority vested in them by the state. In analyzing the feasibility of a substantive due process challenge to instances of severe corporal punishment, three questions must be addressed: the adequacy of tort remedy as an alternative to this form of constitutional scrutiny, the nature of the interest affected, and the level of scrutiny that should be applied.

Noting the availability of a common law remedy, the Fifth Circuit panel in *Ingraham* refused to consider individual cases of abusive punishment.[143] Admittedly, when an injured party seeks redress after an isolated instance of abusive punishment, a substantive due process claim can afford no greater relief than a tort action. In *Ingraham,* however, the evidence clearly demonstrated that unreasonable punishments were the rule rather than the exception at petitioners' school.[144] Petitioners did not assert substantive due process in seeking individual redress;[145] only the class action, which sought an injunction against further abusive punishment, raised that issue.[146] Offering prospective as well as remedial relief, substantive due process protects individuals from future state interference with constitutionally protected interests if that interference is unjust or unreasonable. The common law actions suggested by the

143. *See* text accompanying note 95 *supra.*

144. *See* note 81 *supra.*

145. Petitioners asserted only cruel and unusual punishment in their individual claims.

146. *See* text accompanying note 81 *supra.*

panel are retributive and therefore cannot fulfill this protective need.[147]

The nature of the interest interfered with and the appropriate standard of review are the two vital elements of substantive due process analysis. To obtain the strictest scrutiny of state action, a child must establish that the interest violated by the infliction of physical punishment rises to a level of a fundamental right. In *Rochin v. California,*[148] the Supreme Court indicated that the individual's interest in freedom from bodily intrusion is a fundamental interest. In *Rochin,* law enforcement officers forced petitioner to undergo a stomach-pumping, causing him to regurgitate two morphine capsules which later were used as evidence to convict him. The Court overturned the conviction, stating that such bodily interference "shocks the conscience."[149] In finding the treatment violative of the due process clause, Justice Frankfurter recognized that the clause protected "personal immunities" that are "fundamental" or "implicit in the concept of ordered liberty."[150]

If the court recognizes that the interest has fundamental import, the state bears the virtually insurmountable burden of demonstrating that the interference serves a compelling state interest.[151] If the court refuses to apply strict scrutiny, the sliding scale approach[152] should be employed to argue that a standard of review stricter than the rational basis test should be applied. Even under the traditional rational basis test, however, the state's interest in maintaining school discipline does not include administering punishment as severe as that inflicted upon petitioners in *Ingraham.*[153] Thus at some point on the continuum of the severity of the punishment, the state action becomes invalid, regardless of the standard applied. When corporal punishment is administered beyond this point on a widespread basis, the courts should utilize substantive due process to remedy the abuse.

Once the court finds a violation of substantive due process, what remedy will assure reform? Enjoining the practice in its entirety is inappropriate because the state has a legitimate interest in employing reasonable corporal punishment to maintain discipline

147. *See* text accompanying notes 138-39 *supra.*

148. 342 U.S. 165 (1952).

149. *Id.* at 172.

150. *Id.* at 169 (quoting Cardozo, J., in Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) and Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

151. *See* text accompanying note 68 *supra.*

152. *See* text accompanying notes 69-70 *supra.*

153. *See* note 80 *supra.*

and order in schools.[154] On the other hand, courts are understandably reluctant to impose specific standards demarking that which is reasonable from that which is not. Properly, that is the function of the legislatures and school boards.[155] The middle ground available to the court is to enjoin the infliction of corporal punishment until the responsible entity establishes guidelines. An analogous situation is found in *Talley v. Stephens.*[156] In *Talley,* the district court, finding that the strap was being administered in a cruel and unusual manner in the Arkansas penitentiary system, enjoined prison officials from further use of the strap until the State Penitentiary Board provided acceptable guidelines for its use.[157]

If the court chooses this alternative, it should not accept only bare compliance with its order. If the aim is to prevent abusive punishment, then the guidelines must be detailed and specific, allowing discretion only in the student's favor. Guidelines of this nature would have the correlative effect of providing at least some measure of procedural due process protection. Although they need not require an informal hearing, the student would at least be provided with knowledge of the punishable offenses and the amount of punishment to be inflicted in a particular case. This requirement would not violate the *Ingraham* procedural due process holding; the guidelines are necessary to satisfy substantive, not procedural, due process. Additionally, such guidelines could be used as an "abuse per se" standard by courts considering individual assault and battery actions.

The approach outlined above will not completely eradicate the problem in all cases. Requiring school authorities to establish guidelines diminishes but does not eliminate the possibility of future occurrences of abusive punishment. In the event the guidelines do not achieve their purpose, the court has only one effective course of action: complete prohibition against the use of corporal punishment in the offending school system. Indeed, this was the ultimate result in the Arkansas penitentiary system. In *Jackson v. Bishop,*[158] inmates brought a second suit alleging that the strap was being administered in a cruel and unusual manner despite the newly promulgated guidelines. The district court again enjoined use of the strap until further guidelines were established,[159] but on appeal, the

154. *See* text accompanying notes 71-73 *supra.*
155. *See* Ingraham v. Wright, 525 F.2d 909, 917 (5th Cir. 1976).
156. 247 F. Supp. 683 (E.D. Ark. 1965).
157. *Id.* at 689.
158. 268 F. Supp. 804 (E.D. Ark. 1967).
159. *Id.* at 815.

Eighth Circuit reversed, issuing a permanent injunction against the use of corporal punishment in the Arkansas penitentiary system.[160] In support of the permanent injunction, the court asserted that in the case before it, guidelines were simply insufficient to prevent abusive punishments.[161]

VI. CONCLUSION

In deciding whether Arkansas school children should be allowed to learn the Darwinian theory of evolution, the Supreme Court stated in *Epperson v. Arkansas:*[162]

> By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values. On the other hand, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[163]

Unquestionably, courts should defer to the states and school districts when issues of educational policy and administration arise. Even though corporal punishment may be of questionable value in disciplining children and maintaining classroom order, the legislature is the proper forum for resolution of this controversy. When corporal punishment is inflicted in a manner that exceeds its legitimate purpose, however, the courts must intervene and afford proper remedy. In those cases in which the child is punished in error, or in isolated instances of severe punishment inflicted in anger or cruelty, common law actions will provide adequate remedies. When unreasonable punishments are visited upon students with regularity, however, the federal courts must uphold the guarantees of substantive due process.

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160. 404 F.2d 571 (8th Cir. 1968).
161. *Id.* at 579-80.
162. 393 U.S. 97 (1968).
163. *Id.* at 104 (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)) (footnote omitted).