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Ingraham v. Wright: Corporal Punishment in Schools Passes Constitutional Tests

COMMENTS

INGRAHAM v. WRIGHT:[1] CORPORAL PUNISHMENT IN SCHOOLS PASSES CONSTITUTIONAL TESTS

INTRODUCTION

During the 1970-1971 school year, public schools in Dade County, Florida used corporal punishment as a means of disciplining misbehaving students. This disciplinary technique was utilized pursuant to Florida state legislation[2] and a local school board policy regulation.[3] In essence, the law permitted teachers to paddle students after consultation with the principal, and subject to a general prohibition against "degrading or unduly severe" punishment.[4] The school board regulation provided additional guidelines to regulate the use of this disciplinary sanction.[5]

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1. 430 U.S. 651 (1977).

2. FLA. STAT. ANN. § 232.27 (West 1961).

3. Dade County Board of Education Policy 5144. The text of the Policy is found at note 5 *infra*.

4. In the 1970-71 school year, FLA. STAT. ANN. § 232.27 (West 1961) provided:

> Each teacher or other member of the staff of any school shall assume such authority for the control of pupils as may be assigned to him by the principal and shall keep good order in the classroom and in other places in which he is assigned to be in charge of pupils, but he shall not inflict corporal punishment before consulting the principal or teacher in charge of the school, and in no case shall such punishment be degrading or unduly severe in this nature.

The Florida Legislature subsequently amended this statute. The amemdments became effective on July 1, 1976:

> "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 or 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:
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> "(1) The use of corporal punishment shall be approved in principle by the principal before it is used, but approval is not necessary for each specific instance in which it is used.
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> "(2) A teacher or principal may administer corporal punishment only in the presence of another adult who is informed beforehand and in the student's presence, of the reason for the punishment.
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> "(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." Fla. Stat. Ann. § 232.27 (1977) (codifier's notation omitted). Corporal punishment is now defined as "the moderate use of physical force or physical contact by a teacher or principal as may be necessary to maintain discipline or to enforce school rules." § 228.041(28). The local school boards are expressly authorized to adopt rules governing student conduct and discipline and are directed to make available codes of student conduct. § 230.23(6). Teachers and principals are given immunity from civil and criminal liability for enforcing disciplinary rules, "[e]xcept in the case of excessive force or cruel and unusual punishment . . . ." § 232.275.

Ingraham v. Wright, 430 U.S. 651, 655 n.6 (1977).

5. 430 U.S. at 656 n.7. Policy 5144 of the Dade County Board of Education authorized the use of corporal punishment where other means of seeking cooperation

On January 7, 1971, suit was filed in United States District Court for the Southern District of Florida by two junior high school students, James Ingraham and Roosevelt Andrews, alleging, individually and on behalf of all Dade County students as a class,[6] that the infliction of corporal punishment at the Charles Drew Junior High School in Dade County, Florida resulted in a deprivation of their constitutional rights under 42 U.S.C. §§ 1981-1988.[7] Evidence was presented at a week-long trial before the district court. The testimony of sixteen students described rather harsh incidents of corporal punishment at Drew Junior High School. James Ingraham testified that he was forced over a table in the principal's office and received twenty blows with a paddle because he was slow to respond to a teacher's instructions.[8] As a result, the boy lost eleven days of school and suffered from a large hematoma which required medical attention.[9] Roosevelt Andrews testified that he was paddled several times for minor infractions; on two occasions he was struck on his arms, once depriving him of the full use of an arm for one week.[10]

The district court, acting on the assumption that all the testimony was credible, issued a directed verdict in favor of the defendants,[11] holding that the punishment as authorized and practiced generally in the county schools violated no constitutional right.[12] The court observed that while corporal punishment could, in some instances, violate the eighth amendment, on the facts of this case a jury could not lawfully find "elements of severity, arbitrary inflictions, unacceptability in terms of contemporary standards, or

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from the student failed. The regulation specified that the principal should determine the necessity for corporal discipline, that the student should understand the seriousness of the offense and the reason for the punishment, and that the punishment should be administered in the presence of another adult. The student should not be paddled in an atmosphere which is likely to produce shame and ridicule. The policy guidelines further cautioned against administering corporal punishment to a child under psychological or medical treatment and warned the school personnel of the possibility of personal liability if physical injuries resulted.

6. Counts one and two were individual damage actions by Ingraham and Andrews based on paddling incidents that allegedly occurred in October, 1970 at Drew Junior High School. Count three was a class action for declaratory and injunctive relief on behalf of all students in the Dade County schools. The district court certified the class under FED. R. CIV. P. 23(b)(2) and 23(c)(1) to include "[a]ll students of the Dade County School system who are subject to the corporal punishment policies issued by the Defendant, Dade County School Board . . . ." *See* 430 U.S. at 654 n.2.

7. 42 U.S.C. §§ 1981-1988 (1970). Named as defendants in all counts were Willie J. Wright, principal of the Drew Junior High School, Lemmie Deliford, an assistant principal, Solomon Barnes, an assistant to the principal, and Edward L. Whigham, superintendent of the Dade County school system. 430 U.S. at 653-54.

8. Ingraham v. Wright, 498 F.2d 248, 256 (5th Cir. 1974), *vacated,* 525 F.2d 909 (5th Cir. 1976) (en banc), *aff'd,* 430 U.S. 651 (1977).

9. *Id.*

10. *Id.* at 257. Several other students testified to receiving severe paddlings which resulted in serious injuries, including broken bones, head wounds, and massive hematomas. *Id.* at 255-59.

11. Ingraham v. Wright, No. 71-23 (S.D. Fla. 1973), *rev'd,* 498 F.2d 248 (5th Cir. 1974), *vacated,* 525 F.2d 909 (5th Cir. 1976) (en banc), *aff'd,* 430 U.S. 651 (1977).

12. 430 U.S. at 658.

gross disproportion which are necessary to bring 'punishment' to the constitutional level of 'cruel and unusual punishment.' "[13]

On appeal, a three-judge panel of the United States Court of Appeals for the Fifth Circuit reversed the lower court decision and remanded the case for a jury trial on the merits.[14] The two-judge majority found that corporal punishment as practiced in Dade County, Florida, and particularly at the Drew Junior High School, was so severe that it violated both the eighth and fourteenth amendments to the United States Constitution.[15] Moreover, in the court's view, the procedures in School Board Policy 5144 failed to satisfy the requirements of the due process clause.[16] In a dissenting opinion, Judge Lewis R. Morgan argued that there was no constitutional question involved in the case at all and, therefore, that no rights had been violated.[17] He contended that federal courts should not intervene in the internal disciplinary practices of one school.[18]

Upon rehearing, the en banc court rejected the reasoning of the three-judge panel and affirmed the district court's directed verdict.[19] The court concluded that the cruel and unusual punishment clause of the eighth amendment is inapplicable to corporal punishment in public schools because

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13. *Id.*

14. Ingraham v. Wright, 498 F.2d 248 (5th Cir. 1974), *vacated,* 525 F.2d 909 (5th Cir. 1976) (en banc), *aff'd,* 430 U.S. 651 (1977).

15. *Id.* The appellate court considered the age of the individuals, the nature of the misconduct, the risk of physical and psychological damage, and the availability of alternative disciplinary measures. It concluded that the system of punishment at Drew Junior High School was excessive and, therefore, that it violated the eighth amendment's proscription against punishments which are greatly disproportionate to the offense. *Id.* at 264. The court explained that although it was unwilling to say that mild or moderate corporal punishment is unrelated to the achievement of any legitimate educational purpose, the severe punishment meted out at Drew went beyond legitimate bounds and, therefore, violated the fourteenth amendment. *Id.* at 269.

16. The majority outlined procedural guidelines which should be followed in the use of corporal discipline in public schools. Included in the court's guidelines were the following: (1) the student must "know and understand" the rule under which he is to be punished; (2) the school authorities must tell him before he is punished precisely what he has done which merits punishment; (3) if the student concedes that he has engaged in certain conduct, but claims that he did not know that such conduct was prohibited, school officials should proceed with caution, inquiring whether in fact the student was ignorant of such school rules; (4) the school should publish written rules of conduct to eliminate many problems which may arise; and (5) if the student claims he is innocent of the alleged conduct, school authorities should make sufficient inquiries to insure that the student is guilty beyond any reasonable doubt. Eyewitnesses should be questioned by the principal or his designee, and the student should be allowed to call witnesses on his own behalf. The student should also be permitted to respond to the witnesses against him. In some cases, the court suggested that the student should be accorded an opportunity to question opposing witnesses. The court emphasized that the full panoply of procedures, such as found in a courtroom, is not required and that the hearing described above could take place in an informal setting. No formal rules of procedure or evidence need be followed. *Id.* at 267–68. For further discussion of the decision of the court of appeals, see 43 GEO. WASH. L. REV. 1435 (1975); 12 HOUS. L. REV. 500 (1975); 53 TEX. L. REV. 395 (1975).

17. 498 F.2d at 270–71 (Morgan, J., dissenting).

18. *Id.*

19. Ingraham v. Wright, 525 F.2d 909 (5th Cir. 1976) (en banc), *aff'd,* 430 U.S. 651 (1977).

this constitutional guarantee only applies to punishment invoked as a sanction for criminal conduct.[20] Additionally, the majority observed that due process under the fourteenth amendment does not unconditionally require an opportunity to be heard.[21] The claims in the instant case were not found to be substantial enough in a constitutional sense to justify the time and effort required to adhere to due process procedures in schools[22] or to warrant federal court interference.[23] The court suggested the plaintiffs could pursue the possibility of alternative remedies under state criminal or civil law.[24]

The Supreme Court granted certiorari to decide whether the eighth amendment's cruel and unusual punishment clause applies to the infliction of severe corporal discipline on public school children and whether the due process clause of the fourteenth amendment is violated when students are subjected to such punishment without notice of the charges against them and without an opportunity to be heard by a neutral person with authority to decide whether corporal punishment is necessary.[25] A five-justice majority of the Supreme Court, in an opinion written by Justice Powell, affirmed the

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20. *Id.* Distinguishing the case of Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968), where the Eighth Circuit enjoined the use of a strap in prisons, the majority explained that prisons and public schools are not analogous in the context of eighth amendment coverage. Judge Morgan, speaking for the majority, emphasized that the eighth amendment was intended to prevent the imposition of unduly harsh penalties for criminal conduct. It logically follows that discipline imposed upon persons incarcerated for criminal conduct falls within its coverage, "since such discipline is part of the total punishment to which the individual is being subjected for his crime." 525 F.2d at 914-15. To extend the *Jackson* case from the prison context to the school setting would "distort the intended scope of the Amendment." *Id.* at 915.

21. *See id.* at 919.

22. The value of corporal punishment, the court contended, might be "severely diluted" by an elaborate procedural process. *Id.* To require a published schedule of infractions would serve to remove "a valid judgmental aspect from a decision which should properly be left to the experienced administrator." *Id.* A hearing requirement could undermine the effectiveness and utility of paddling, as administrators probably have little time under present procedures to handle all the disciplinary problems which beset them. Furthermore, a requirement that the relationship between parents, students, and school officials be conducted in an adverse atmosphere in accordance with the procedural rules of a court of law " 'would hardly best serve the interest of any of those involved.' " *Id.* (quoting Whatley v. Pike County Bd. of Educ., No. 977 (N.D. Ga. 1971)).

23. Quoting Justice Fortas in Epperson v. Arkansas, 393 U.S. 97, 104 (1968), the court observed that

> "[j]udicial interposition in the operation of the public school systems of the nation raises problems requiring care and restraint. . . . 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."

525 F.2d at 919-20.

24. 525 F.2d at 915, 917. For further discussion of the en banc opinion of the court of appeals, see Comment, *Corporal Punishment: Forty Whacks with the Fourteenth Amendment*, 28 U. FLA. L. REV. 869 (1976); 7 CUM. L. REV. 169 (1976); 45 U. CIN. L. REV. 500 (1976).

25. Ingraham v. Wright, 425 U.S. 990 (1976). The Supreme Court denied review of the third question presented in the petition for certiorari — that is, whether the infliction of severe corporal punishment upon public school students was arbitrary, capricious, and unrelated to a legitimate educational purpose and, therefore, was a

directed verdict entered by the district court and held that the students' claim that corporal punishment violated both the eighth and fourteenth amendments did not state a cause of action under either federal law or the Constitution.[26]

This Comment will evaluate the *Ingraham* Court's analysis of the eighth amendment and due process claims. The first part will outline the Court's disposition of these issues. The Comment will then examine the eighth amendment issue and suggest that a functional approach to eighth amendment guarantees is more consonant with the history and function of the Constitution than is the historical approach embraced by the Court. Finally, the due process claim will be analyzed in terms of procedural safeguards afforded by other recent Supreme Court cases. It will be concluded that the availability of state remedies should have no place in an evaluation of the need for procedural due process in the schools.

Before reaching the constitutional issues, the Court observed that corporal punishment as a means of disciplining students dates back to the colonial period[27] and continues to play a role in the public education of school children in most parts of the country.[28] Moreover, in a majority of jurisdictions, school officials possess a qualified privilege to apply such force as they reasonably believe is necessary for a child's proper control, training

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violation of substantive due process under the fourteenth amendment. *See* Petitioner's Brief for Certiorari at 2, Ingraham v. Wright, 430 U.S. 651 (1977).

The question whether corporal punishment in public schools violated either the eighth or fourteenth amendments appeared ripe for review by the nation's highest court. In addition to the uncertainty evidenced in the panel and en banc opinions in the *Ingraham* case, there was substantial confusion in other courts as well. *See* Sims v. Waln, 536 F.2d 686 (6th Cir. 1976) (imposition of corporal punishment is not a per se violation of the eighth amendment, and the paddlings at the school in question were not excessive; any due process guarantees which may be required were not infringed); Bramlet v. Wilson, 495 F.2d 714 (8th Cir. 1974) (excessive corporal punishment may contravene the eighth amendment's cruel and unusual punishment clause); Roberts v. Way, 398 F. Supp. 856 (D. Vt. 1975) (excessive corporal punishment may violate the eighth amendment); Baker v. Owen, 395 F. Supp. 294 (M.D.N.C.) (corporal punishment does not violate the eighth amendment; however, the school must accord students minimal due process), *aff'd mem. on other grounds*, 423 U.S. 907 (1975); Gonyaw v. Gray, 361 F. Supp. 366 (D. Vt. 1973); (corporal punishment as a civil penalty violates neither the eighth nor the fourteenth amendment); Glaser v. Marietta, 351 F. Supp. 555 (W.D. Pa. 1972) (school disciplinary rule, on its face, does not violate the fourteenth amendment); Sims v. Board of Educ., 329 F. Supp. 678 (D.N.M. 1971) (school regulation authorizing corporal punishment does not violate either the eighth or fourteenth amendment); 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) (corporal punishment does not violate either the fourteenth or eighth amendment).

26. Ingraham v. Wright, 430 U.S. 651 (1977).

27. *Id.* at 660–61.

28. *Id. See also* E. BOLMEIER, THE SCHOOL IN THE LEGAL STRUCTURE § 16.17, at 277 (2d ed. 1973); 43 GEO. WASH. L. REV. 1485 (1975).

The Court, however, noted that professional and public opinion is divided on the value of this disciplinary tactic. 430 U.S. at 660–61. *See also* Amicus Brief of National Education Association; Amicus Brief of American Psychological Task Force on the Rights of Children and Youth, Ingraham v. Wright, 430 U.S. 651 (1977); Buss, *Procedural Due Process For School Discipline: Probing The Constitutional Outline*, 119 U. PA. L. REV. 545, 582 (1971).

and education.[29] If this privilege is abused, remedies exist under state criminal or civil law.[30]

Analyzing the eighth amendment claim, the Court emphasized that the application of the cruel and unusual punishment clause has traditionally been limited to protecting those convicted of crimes.[31] Refusing to be swayed into departing from this well-established precedent, the Court held that the "eighth amendment does not apply to the paddling of children as a means of maintaining discipline in public schools."[32] In reaching this decision, Justice Powell acknowledged that corporal discipline in prisons has been abandoned.[33] However, in the majority's view a prisoner and a school child are in vastly different situations, separated by the harsh facts of criminal incarceration.[34] A prisoner is afforded eighth amendment protection because he is susceptible to abusive treatment in the context of a penal system; a student, however, attends an open institution which is scrutinized on a daily basis by family members, friends, and the community.[35]

With regard to the petitioners' due process assertions, the Court explained that determining the application of this constitutional guarantee requires a two-stage analysis: first, the Court must ascertain whether the asserted interests are encompassed within the fourteenth amendment's

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29. 430 U.S. at 661-62. *See also* N. EDWARDS, THE COURTS AND THE PUBLIC SCHOOLS 610-15 (3d ed. 1971); 1 F. HARPER AND F. JAMES, THE LAW OF TORTS § 3.20, at 291-92 (1956); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 27, at 136-37 (4th ed. 1971).

30. 430 U.S. at 661. *See also* N. EDWARDS, THE COURTS AND THE PUBLIC SCHOOLS 610-15 (3d ed. 1971); RESTATEMENT (SECOND) OF TORTS § 150, Comments c-e (1965); Proehl, *Tort Liability of Teachers,* 12 VAND. L. REV. 723, 734-39 (1959).

31. 430 U.S. at 664. Justice Powell reviewed the history surrounding the adoption of the eighth amendment and concluded that the principal concern of the framers of the Constitution was to outlaw torturous and abusive criminal punishments. *Id.* at 664-66. Moreover, Justice Powell stated that the Court's prior applications of this amendment had all dealt with criminal punishments. *Id.* at 666-67. *See* Estelle v. Gamble, 429 U.S. 97 (1976) (incarceration without medical care); Gregg v. Georgia, 428 U.S. 153 (1976) (execution for murder); Furman v. Georgia, 408 U.S. 238 (1972) (execution for murder); Powell v. Texas, 392 U.S. 514 (1968) ($20 fine for public drunkenness); Robinson v. California, 370 U.S. 660 (1962) (incarceration as a criminal for addiction to narcotics); Trop v. Dulles, 356 U.S. 86 (1958) (plurality opinion) (expatriation for desertion); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947) (execution by electrocution after a failed first attempt); Weems v. United States, 217 U.S. 349 (1910) (15 years imprisonment and other penalties for falsifying an official document; Howard v. Fleming, 191 U.S. 126 (1903) (10 years imprisonment for conspiracy to defraud); *In re* Kemmler, 136 U.S. 436 (1890) (execution by electrocution); Wilkerson v. Utah, 99 U.S. 130 (1879) (execution by firing squad); Pervear v. Commonwealth, 5 Wall. 475 (1867) (fine and imprisonment at hard labor for bootlegging).

Justice Powell emphasized that in those few instances where the Court was confronted with claims that sought to apply the eighth amendment to situations outside the criminal process, the Court had no difficulty in concluding that the amendment was inapplicable, 430 U.S. at 667-68. *See, e.g.,* Uphaus v. Wyman, 360 U.S. 72 (1959) (a judgment of civil contempt resulting in incarceration pending compliance with a subpoena); Fong Yue Ting v. United States, 149 U.S. 698 (1893) (deportation of aliens).

32. 430 U.S. at 664.

33. *Id.* at 660. *See* Jackson v. Bishop, 404 F.2d 571, 579-80 (8th Cir. 1968).

34. 430 U.S. at 668-69.

35. *Id.* at 669-71.

protection of "life, liberty or property" and, second, if such interests are protected, the Court must decide what procedures are necessary to assure "due process of law."[36] Applying this analysis, the Court concluded that a constitutionally protected liberty interest is implicated whenever school authorities, acting under color of state law, deliberately punish a child for misconduct by restraining the student and by inflicting on him an appreciable degree of physical pain.[37] The Court held, however, that additional procedural safeguards were unnecessary because the traditional common law remedies for abusive corporal punishment are fully adequate to afford the requisite due process.[38]

In determining what process is due the *Ingraham* Court analyzed three distinct factors: first, the private interest that will be affected; second, the risk of an erroneous deprivation and the probable value, if any, of additional or substitute procedures; and, finally, the state interest involved and the burden on the state that additional or substitute procedures would entail.[39] In analyzing the private interest involved in avoiding corporal punishment, the Court noted that in accordance with a long-standing accommodation between the child's interest in his personal security and the traditional common law privilege to discipline students, no deprivation of substantive rights can occur where the corporal punishment remains within the limits of that privilege.[40]

The Court acknowledged, however, that even punishment protected by the privilege must be inflicted in accordance with procedural safeguards that minimize the risk of wrongful punishment and provide for the fair resolution of disputed questions of justification.[41] Therefore, Justice Powell reviewed the corporal discipline practiced in the Dade County schools to determine the risk of an erroneous deprivation under those procedures and the value of requiring additional or substitute procedural safeguards.[42] The *Ingraham* Court concluded that in this case the students' due process interests were already protected by adequate safeguards[43] and that most

36. *Id.* at 672 (citing Board of Regents v. Roth, 408 U.S. 564, 569-72 (1972); Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

37. *Id.* at 672-74. The opinion emphasized that "liberty" under the due process clause includes the right to be free from, and to obtain judicial relief for, unjustified intrusion of personal security. *Id.* at 673. For an analysis of the original interpretation of this constitutional right, see *Shattuck, The True Meaning Of The Term "Liberty" In Those Clauses In The Federal And State Constitutions Which Protect "Life, Liberty And Property,"* 4 HARV. L. REV. 365 (1891).

38. 430 U.S. at 672.

39. *Id.* at 675. This three-prong approach was first articulated by the Court in Mathews v. Eldridge, 424 U.S. 319, 335 (1976). *See also* Arnett v. Kennedy, 416 U.S. 134, 167-68 (1974); Goldberg v. Kelly, 397 U.S. 254, 263-66 (1970); Cafeteria and Restaurant Workers Local 473 v. McElroy, 367 U.S. 886, 895 (1961).

40. 430 U.S. at 675-76.

41. *Id.* at 676.

42. *Id.* at 676-80.

43. *Id.* at 676-82. The Court emphasized that the statute requires the teacher and principal to decide whether corporal punishment is reasonably necessary under the circumstances and to exercise the sanction with prudence and restraint. *Id.* at 677. If the punishment is excessive, school authorities may be liable for damages; if malice is shown, they may be subject to criminal penalties. *Id. See* note 2 *supra.*

cases of corporal discipline at the Drew school were not excessive.[44] Moreover, in those instances where severe punishment had occurred, the student remained free to seek a remedy in state court under the available civil and criminal laws.[45] In this setting, the Court found that procedural safeguards prior to intrusions on a child's personal security were neither constitutionally mandated nor necessary.[46]

Turning to the state interest involved, Justice Powell agreed with school officials that it would be impracticable to formulate a rule of procedural due process that varies with the particular discipline to be imposed. Thus, if affording a student a prior hearing were required at all, it would need to precede any paddling, however moderate or trivial.[47] On this basis, the majority rejected the students' request for notice and hearing, reasoning that such a requirement would significantly intrude into the educational responsibility that lies with public school authorities and would require a diversion of educational resources. Moreover, the Court was concerned that mandatory prior notice and hearing may lead school authorities to abandon corporal punishment altogether rather than to incur the burdens of complying with such procedural requirements.[48]

Justice White, in an opinion joined by Justices Brennan, Marshall, and Stevens, dissented from the Court's eighth amendment and procedural due process holdings. He reminded the Court that the eighth amendment reflects a societal judgment that some punishments are so barbaric and inhumane that they may not be imposed constitutionally on anyone, regardless of how

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44. *See* 430 U.S. at 477-78.

45. *Id.* at 678.

46. *Id.* at 678-80. The Court analogized the claim for advance procedural safeguards in public school corporal punishment cases to warrantless probable cause public arrests under the fourth amendment. In the latter instance, despite the risk that the police may act unreasonably in arresting a suspect, the traditional common law rule permitting such arrests without an advance determination of the facts has been reaffirmed by the Court in United States v. Watson, 423 U.S. 411 (1976). Although an advance determination of probable cause by a magistrate would be desirable, the Court refused to transform this judicial preference into a constitutional rule, particularly where the nation has traditionally authorized warrantless probable cause arrests. Similarly Justice Powell concluded that in corporal punishment situations there is no reason to depart from tradition and require an advance determination of the facts. 430 U.S. at 679-80.

47. *See id.* at 680.

48. *Id.* at 680-82. The Court balanced the rights of the students with the needs of school authorities. Thus, upon finding "the low incidence of abuse, the openness of our schools, and the common law safeguards that already exist," the Court concluded that the risk of error that may result in a deprivation of a student's constitutional rights could "only be regarded as minimal." *Id.* at 682. The public schools, on the other hand, need flexibility in disciplining misbehaving students. Quoting from its opinion in Goss v. Lopez, 419 U.S. 565, 580 (1975), the Court explained that " '[e]vents calling for discipline are frequent occurrences and sometimes require immediate, effective action.' " 430 U.S. at 681 (footnote omitted). The Court has continually recognized the "need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." Tinker v. Des Moines School Dist., 393 U.S. 503, 507 (1969). *See also* note 160 *infra*.

opprobrious the underlying offense.[49] In the dissent's view, similar punishments logically may not be imposed on persons for less culpable acts, such as breaches of school discipline: "if it is constitutionally impermissible to cut off someone's ear for the commission of a murder, it must be unconstitutional to cut off a child's ear for being late to class."[50] Because the eighth amendment contains no language which limits its application solely to a criminal context, Justice White reasoned that the relevant inquiry should be whether the purpose of the deprivation is among those ordinarily associated with punishment — such as retribution, rehabilitation, or deterrence — rather than whether the offense for which the punishment is inflicted has been labeled criminal.[51] Furthermore, the dissent regarded the majority's observation that aggrieved students could resort to state remedies as irrelevant to a determination of the scope of eighth amendment protection.[52]

With respect to the due process issue, Justice White noted that the purpose of due process in this context is to protect the student from those punishments that the state would not have inflicted had it found the facts in a more reliable way.[53] The dissent observed that the promotion of reliable factfinding underlay the Court's decision in *Goss v. Lopez*[54] to require that a student be given an opportunity to be heard prior to suspension from school.[55] Justice White perceived no constitutional difference between the need for reliable factfinding in cases of suspension and cases of corporal punishment: both involve important liberty or property rights which must

49. 430 U.S. at 684 (White, J., dissenting). *See* Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 841 & n.10 (1969). *See also* notes 62 to 66 and accompanying text *infra*.

50. 430 U.S. at 684 (White, J., dissenting).

51. *Id.* at 686-88 (citing Trop v. Dulles, 356 U.S. 86, 96 (1958)). The dissent asserted that no one can deny that the spanking of a school child is "punishment." Justice White argued:

> Like other forms of punishment, spanking of school children 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. at 685-86.

52. *Id.* at 690-91. "Even assuming that the remedies available to public school students are adequate under Florida law, the availability of state remedies has never been determinative of the coverage or of the protections afforded by the Eighth Amendment." *Id.* at 690 (footnote omitted). The dissent noted that the majority's argument was implicitly rejected by the Court in Estelle v. Gamble, 429 U.S. 97, 107 (1976), where it was held that the failure to provide for the medical needs of prisoners could constitute cruel and unusual punishment even though a medical malpractice remedy in tort was available to the prisoners under the state tort law. 430 U.S. at 691.

53. *Id.* at 692 (citing Mathews v. Eldridge, 424 U.S. 319, 335, 344 (1976)).

54. 419 U.S. 565 (1975).

55. The *Goss* Court, explaining the need for an informal hearing, said:

> Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process.

419 U.S. at 580.

be protected from arbitrary or mistaken deprivation.[56] While acknowledging that some burden would be placed on school disciplinary procedures if the "rudimentary precautions" established in *Goss* were required in corporal punishment situations,[57] the dissent argued that those costs would be no greater whether the student is paddled or suspended; in either case the risk of wrongful punishment is no smaller while the danger of a significant intrusion into the disciplinary process is just as great.[58]

Finally, the dissent contended that there is no basis, either in logic or authority, for the majority's assumption that the right to commence an action in state court to recover damages for excessive corporal punishment affords substantially greater protection than the informal conference mandated in *Goss*.[59] In the dissent's view, the right to bring an action in tort would be "utterly inadequate" to protect a student from erroneously inflicted corporal punishment for two reasons. First, under Florida law, a student who was punished for an act he did not commit cannot recover from a teacher who had proceeded in utmost good faith and had relied on the reports and advice of others.[60] Second, a tort action would be inadequate for the simple reason that it comes too late; a lawsuit necessarily occurs after the punishment is imposed, while the infliction of pain remains final and irreparable.[61]

THE EIGHTH AMENDMENT

In order to prevent the use of torturous and barbarous methods of criminal punishment employed by some European countries,[62] the framers

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56. *See* 430 U.S. at 692-93.

57. *See id.* at 700.

58. *Id.* (citing the majority opinion, 430 U.S. at 681-82). *See* Goss v. Lopez, 419 U.S. 565, 585 (1975) (Powell, J., dissenting).

59. 430 U.S. at 699 (citing the majority opinion, 430 U.S. at 678 n.46).

60. *Id.* at 693-94. Justice White emphasized that

> the student has no remedy at all for punishment imposed on the basis of mistaken facts, at least as long as the punishment was reasonable from the point of view of the disciplinarian, uninformed by any prior hearing. The "traditional common law remedies" on which the majority relies . . . thus do nothing to protect the student from the danger that concerned the Court in *Goss* — the risk of reasonable, good faith mistake in the school disciplinary process.

Id. at 694-95 (footnote omitted).

The defense of "good faith mistake" has been traditionally recognized in most jurisdictions. *See* note 30 *supra*.

61. 430 U.S. at 695.

62. At a meeting of the Virginia delegation called to consider the United States Constitution, Patrick Henry voiced strong objection to the lack of a prohibition on cruel and unusual punishments. The delegate from Virginia remarked:

> Congress, from their general powers, may fully go into business of human legislation. They may legislate, in criminal cases, from treason to the lowest offense — petty larceny. They may define crimes and prescribe punishment. . . . But when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives . . . .
>
> In this business of legislation, your members of Congress will loose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel unusual punishments. These are prohibited by your declaration of rights. What has distinguished our ancestors? — That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law, in preference to the common law. They may introduce

of the Constitution drafted the eighth amendment's cruel and unusual punishment clause.[63] Patterned after the English Bill of Rights of 1689[64] and the Virginia Declaration of Rights,[65] the prohibition was originally intended to apply to punishments imposed as sanctions for criminal conduct.[66] Relying on the amendment's historical genesis, the *Ingraham* Court refused to extend the eighth amendment's protection to punishments inflicted in a civil context — for violations of public school rules and regulations.[67] The Court's analysis, however, fails to articulate an adequate justification for this distinction.

The language of the eighth amendment does not specify that it comprehends only criminally-related punishments.[68] Although the application of this constitutional protection has not been confined solely to punishments inflicted for violations of criminal statutes, prior cases nevertheless tended to limit its application to criminal or quasi-criminal situations.[69] For example, in the companion cases of *Perez v.*

> the practice of France, Spain, and Germany — of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government, by torture, in order to punish with still more relentless severity. We are then lost and undone.

3 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 447-48 (2d ed. 1881). *See generally* Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning,* 57 CAL. L. REV. 839 (1969).

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

64. "That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted." English Bill of Rights, 1688, 1 W. & M., c. 2, § 10.

65. On June 12, 1776 the Virginia convention adopted a Declaration of Rights drafted by George Mason, Fairfax County delegate. Section 9 of the Declaration mirrored the protections of the English Bill of Rights of 1689. Following its inclusion in the Virginia Constitution, eight other states adopted the clause, the federal government placed it into the Northwest Ordinance of 1787, and it was added to the United States Constitution in 1791 as the eighth amendment. Granucci, *"Nor Cruel and Unusual Punishment Inflicted:" The Original Meaning,* 57 CAL. L. REV. 839, 840 (1969) (citing R. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 1776-1791 (1955)).

66. "[Congress will] have to ascertain, point out, and determine what kinds of punishments shall be inflicted on those *convicted of crimes.* They are nowhere restrained from inventing the most cruel and unheard of punishments and annexing them to crime . . . ." 2 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 111 (2d ed. 1881) (emphasis added).

67. *See* note 35 and accompanying text *supra.*

68. *See* note 63 *supra. See also* Ingraham v. Wright, 430 U.S. 651, 685 (1977) (White, J., dissenting).

69. *See, e.g.,* Estelle v. Gamble, 429 U.S. 97 (1976) (deliberate indifference to medical needs of prisoners by prison officials); Trop v. Dulles, 356 U.S. 86 (1958) (loss of nationality due to desertion from the army); Nelson v. Heyne, 491 F.2d 352 (7th Cir.), *cert. denied,* 417 U.S. 976 (1974) (corporal punishment in state correctional school of which one-third of the students were non-criminal offenders, with no distinction drawn between criminal and non-criminal students); Knecht v. Gillman, 488 F.2d 1136 (8th Cir. 1973) (injection of vomit-inducing drugs as part of aversion therapy used on mentally ill inmates); Wheeler v. Glass, 473 F.2d 983 (7th Cir. 1973) (disciplinary techniques in state hospital for retarded children); Vann v. Scott, 467 F.2d 1235 (7th Cir. 1972) (runaway children confined to state corrective institutions); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968) (whipping prisoners to maintain

Brownell[70] and *Trop v. Dulles*,[71] the Court considered the punishment of denationalization. The Court held that such a punishment was constitutionally permissible in *Perez* because it was inflicted as a sanction for the *civilly*-precluded act of voting in a foreign election. However, in *Trop*, this punishment was considered cruel and unusual because it was imposed for the *criminall*-precluded act of desertion. In either decision, however, were the situations explicitly distinguished on the ground that the eighth amendment is limited to the criminal context.[72] Nonetheless, prior to the *Ingraham* decision, the federal judiciary had demonstrated both a reluctance to extend the eighth amendment to punishments for civil violations[73] and confusion over whether such an interpretation would be constitutionally proper. The *Ingraham* Court, in concluding that the protection of this constitutional guarantee is available only where there is a criminal nexus,[74] may have finally resolved the debate.[75]

As early as the 1910 decision in *Weems v. United States*,[76] the Supreme Court acknowledged that the eighth amendment's ban on cruel and unusual punishments "must be capable of wider application than the mischief which

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discipline); Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354 (D.R.I. 1972) (confinement to isolation cells in boys training school). A common characteristic which runs through each of these cases is that they arise in the criminal or quasi-criminal context (*i.e.*, punishment for criminal acts or treatment of prisoners and other involuntarily institutionalized persons). *See also* note 93 and accompanying text *infra*.

70. 356 U.S. 44 (1958), *overruled*, Affroyim v. Rusk, 387 U.S. 253 (1967).

71. 356 U.S. 86 (1958) (Warren, C.J.) (plurality opinion).

72. The *Trop* Court, emphasizing that there existed a "vital difference between the two statutes that purport to implement these powers decreeing loss of citizenship," *id.* at 93 (Warren, C.J.), noted that the *Trop* statute authorized the sanction for those found guilty of the crime of desertion. In contrast, the statute in *Perez* permitted denationalization to resolve possible international problems which may result when one votes in a foreign election. It must be noted, however, that in neither decision are the cases explicitly distinguished on the ground that the eighth amendment was inapplicable in *Perez* because the wrong committed violated a civil statute, while the constitutional protection was afforded in *Trop* because the defendant's actions fell within a criminal context. This conclusion can only be inferred. *See* Ingraham v. Wright, 430 U.S. 651, 687 n.3 (1977) (White, J., dissenting).

73. *See, e.g.*, Uphaus v. Wyman, 360 U.S. 72, 81-82 (1959) (civil contempt for refusal to comply with a subpoena to produce documents); Donaldson v. Read Magazine, Inc., 333 U.S. 178 (1948) (Postmaster General's order preventing publisher from receiving mail and cashing postal money orders due to belief that publisher was using the mails to defraud); Fong Yue Ting v. U.S., 149 United States 698 (1893) (deportation of alien); United States v. Stangland, 242 F.2d 843 (7th Cir. 1957) (fine for violation of a civil regulatory statute).

74. 430 U.S. at 666-68.

75. There had been language in several of the earlier cases which limited application of the eighth amendment to the criminal context. In Powell v. Texas, 392 U.S. 514 (1968), the Court said: "The primary purpose of [the eighth amendment] has *always* been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of *criminal* statutes . . . ." *Id.* at 531-32 (emphasis added). *See also* Negrich v. Hohn, 246 F. Supp. 173, 176 (W.D. Pa. 1965), *aff'd*, 379 F.2d 213 (3d Cir. 1967). The *Ingraham* decision, however, appears to be the first time the Supreme Court explicitly limited the scope of this amendment by applying the criminal/civil distinction.

76. 217 U.S. 349 (1910).

gave it birth" if it is to remain vital.[77] The *Weems* Court reasoned that "[t]ime works changes, brings into existence new conditions and purposes,"[78] and, hence, that the basic guarantees contained in the Bill of Rights must grow and change with the times.[79] Consequently, rather than adhering to the rigid view that the eighth amendment applies only to punishments originally contemplated by the drafters, it would be more appropriate to look to the spirit of the original intent and, following the guidelines enunciated in *Weems*,[80] to extend the amendment's protection to new situations analogous to those that motivated the amendment's adoption.

The need for a flexible approach to the cruel and unusual punishment clause is understood by the fact that, at the time the eighth amendment was adopted, the concept of a free compulsory public school system, although contemplated by a few of the founding fathers, was far from a reality.[81] This system of education did not arise in the United States until the mid-1800's.[82] The present expansive system of compulsory education, characterized by the Supreme Court as "perhaps the most important function of state and local governments,"[83] was unknown to the Constitution's framers. Punishments inflicted in this particular institutional setting, therefore, cannot be said to fall strictly within the original understanding of the eighth amendment.[84]

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77. *Id.* at 373.

78. *Id.*

79. The *Weems* Court, after tracing the legislative history of the eighth amendment, explained that the general language of legislation, both statutory and constitutional, should not be confined to the form that the evil had originally taken:

> [Constitutions] are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it." The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. . . . The meaning and vitality of the Constitution have developed against narrow and restrictive construction.

Id.

Thus, the *Weems* Court permitted the extension of the eighth amendment to a punishment (fine and imprisonment at hard and painful labor for twelve years) which had not been a punishment originally contemplated by the framers to be cruel and unusual.

80. *See* notes 76 to 79 and accompanying text *supra.*

81. Several framers of the Constitution believed in the necessity of public education. In 1779, a plan to educate school children at public cost for three years and a few gifted boys beyond that was presented by Thomas Jefferson to the Virginia Legislature. This proposal was rejected. Forty years later Jefferson offered another plan for public schools, but this was again voted down. *See* 6 ENCYCLOPEDIA BRITANNICA MACROPAEDIA 365-66 (15th ed. 1974).

82. *Id.* at 365-67.

83. Brown v. Board of Educ., 347 U.S. 483, 493 (1954). *See* Wisconsin v. Yoder, 406 U.S. 205, 213 (1972). *See also* Abington School Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring). *See generally* Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948).

84. While corporal punishment may have been a very common practice at the time of the founding fathers in *private* schools, a distinction must be drawn between

A criterion for determining the scope of the eighth amendment that is more congruous with the concerns that motivated its adoption would be whether the sanction imposed on the individual is "punishment."[85] This approach would clearly adhere to the language of the cruel and unusual punishment clause while remaining consistent with the modern evolving standard enunciated by the *Weems* Court and necessitated by changes in American society since the amendment's adoption.[86] The Supreme Court and a number of lower federal courts have, on occasion, extended the protection of the eighth amendment to punishments in noncriminal situations.[87] The treatment accorded prisoners,[88] retarded children and mental patients,[89] runaway children,[90] criminal and noncriminal juveniles attending state correctional institutions,[91] and army deserters[92] has been scrutinized to determine whether it comports with the requirements of the cruel and unusual punishment clause. Although the sanctions imposed in these instances were "civil," in that they were not imposed for violations of penal statutes, the courts, nevertheless, have held the eighth amendment implicated. It is significant that the purpose of the deprivation in each of these situations was among those ordinarily associated with punishment, such as retribution, rehabilitation or deterrence.[93]

Similarly, corporal punishment imposed on a public school student is "punishment" in that it serves as retribution for the student's misconduct and is intended to rehabilitate the individual while deterring other students

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private and state action since the due process clause is applicable only in the latter instance.

85. In Trop v. Dulles, 356 U.S. 86 (1958), the Supreme Court explained that the legislative classification of a statute as penal or non-penal is not conclusive in determining whether there has been a violation of the eighth amendment. "[E]ven a clear legislative classification of a statute as 'non-penal' would not alter the fundamental nature of a plainly penal statute. . . . If the statute imposes a disability for the purposes of punishment — that is, to reprimand the wrongdoer, to deter others, etc. — it has been considered penal," and the eighth amendment would apply. *Id.* at 95-96 (footnotes omitted). Consequently, as the dissent in *Ingraham* notes, "[t]he relevant inquiry is not whether the offense for which a punishment is inflicted has been labeled criminal, but whether the purpose of the deprivation is among those ordinarily associated with punishment, such as retribution, rehabilitation, or deterrence." 430 U.S. at 686-87 (footnote omitted). *See* Knecht v. Gillman, 488 F.2d 1136, 1139 (8th Cir. 1973); Vann v. Scott, 467 F.2d 1235, 1240 (7th Cir. 1972).

86. *See* notes 76 to 79 and accompanying text *supra.*

87. *See* cases cited in note 69 *supra* & notes 88 to 92 *infra.*

88. Estelle v. Gamble, 429 U.S. 97 (1976); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968).

89. Knecht v. Gillman, 488 F.2d 1136 (8th Cir. 1973); Wheeler v. Glass, 473 F.2d 983 (7th Cir. 1973).

90. Vann v. Scott, 467 F.2d 1235 (7th Cir. 1972).

91. Nelson v. Heyne, 491 F.2d 352 (7th Cir.), *cert. denied,* 417 U.S. 976 (1974); Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354 (D.R.I. 1972).

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

93. *See, e.g.,* Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354 (D.R.I. 1972), where the federal district court for Rhode Island applied the cruel and unusual punishment clause to a situation involving school-aged juveniles confined to a state correctional school. "The fact that juveniles are *in theory* not punished but merely confined for rehabilitative purposes, does not preclude operation of the Eighth Amendment," the court explained. "The reality of confinement in Annex B is that it is punishment." *Id.* at 1366 (emphasis in original).

from committing the same or similar violations of school rules and regulations. Although the punishment is inflicted in the institutionalized setting of a public school rather than a prison, a hospital or state training school, it is no less punishment and no less state action.[94] By attempting to distinguish the cases according to either a criminal/civil formula or the "extent of compulsory confinement," the *Ingraham* Court placed labels on constitutional guarantees that defy rather than promote logical reasoning.[95] The Court offers no explanation why either the "civil" label or the "openness" of the institution that imposes the sanction should preclude eighth amendment application to punishments that are functionally identical to those imposed for criminal violations or for prisoner misbehavior.

Finally, the fact that corporal punishment traditionally has been used to discipline students does not free it from eighth amendment scrutiny. The Court has consistently held that the eighth amendment applies to the states through the fourteenth amendment,[96] that students are protected by the due process clause,[97] and that these constitutional rights are not shed at the schoolhouse door.[98] The Supreme Court has therefore recognized that

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94. The majority's attempt to distinguish schools and prisons, *see* 430 U.S. at 668–71, 669 n.37, is unconvincing. Both students and individuals confined to prisons, mental hospitals and juvenile training schools are involuntarily placed in some form of institution. The fact that schools are "open institutions" subject to constant public scrutiny, *id.* at 670, should not, of itself, take schools out of the reach of the eighth amendment. Abuses can and do occur in such settings, as the facts of the *Ingraham* case reveal. *See* notes 9 & 10 *supra*. When punishment in public schools falls within the sphere of the "cruel and unusual," the courts, with the full remedies of the eighth amendment, should intervene because, as the dissent notes, "if a punishment is so barbaric and inhumane that it goes beyond the tolerance of a civilized society, its openness to public scrutiny should have nothing to do with its constitutional validity." 430 U.S. at 690 (White, J., dissenting).

Furthermore, merely because prisons, unlike public schools, have abandoned the use of whippings and other types of beatings does not make corporal punishment permissible under the eighth amendment in the latter instance and unconstitutional in the former, as the Court seems to believe. It is conceivable that prisons have abandoned the use of corporal discipline mainly because of the adverse court decisions against its use in the prison environment. *See, e.g.*, Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968); Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965) (use of the strap in prisons, if excessive, held to constitute cruel and unusual punishment). *See generally* 60 AM. JUR. 2d *Penal and Correctional Institutions* § 43 (1972); Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 84 HARV. L. REV. 456 (1970); 24 STAN. L. REV. 838 (1972). *See also* Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970).

95. In Trop v. Dulles, 356 U.S. 86 (1958), the government argued that the statute authorizing the sanction of denationalization for the crime of desertion was not "penal" and, therefore, the eighth amendment did not apply. Refusing to accept this contention, Chief Justice Warren countered: "How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels pasted on them!" *Id.* at 94. *See also In re* Gault, 387 U.S. 1, 27–33 (1967); Knecht v. Gillman, 488 F.2d 1136, 1139 (8th Cir. 1973) (citing Trop v. Dulles, 356 U.S. 86 (1958)); Vann v. Scott, 467 F.2d 1235, 1240–41 (7th Cir. 1972).

96. Robinson v. California, 370 U.S. 660 (1962); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947).

97. *See* Goss v. Lopez, 419 U.S. 565 (1975); West Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). *See also* note 121 and accompanying text *infra*.

98. *See* Tinker v. Des Moines School Dist., 393 U.S. 503, 506 (1969).

constitutional guarantees place limits on school officials' authority over school children.[99]

In the recent decision of *Gregg v. Georgia*,[100] the Court embraced the language of earlier cases and held that the eighth amendment bars not only those punishments that are "barbaric," but also those that are "excessive."[101] Under the *Gregg* test a punishment is unconstitutionally "excessive" if it (1) involves the unnecessary and wanton infliction of pain; [102] or (2) is grossly disproportionate to the severity of the offense.[103] Furthermore, under *Gregg*, in determining whether the punishment is "excessive," the Court should be guided by objective indicia that reflect the public attitude toward a particular sanction.[104]

Excessive corporal punishment could well be found to fall within these concepts of "excessive" punishment. The facts of the *Ingraham* case reveal numerous instances of what could be considered extreme and unnecessary inflictions of pain.[105] Beating a child so severely that he required hospitalization, merely because the student, in protesting his innocence, refused to submit to the punishment, may be adjudged a punishment which is highly disproportionate to the offense.[106]

There is a current debate as to whether corporal punishment in the public school setting is repugnant to standards of contemporary society. Presently, only two states expressly prohibit this form of discipline, while twenty-three states permit it by negative implication, and ten states expressly permit its use.[107] Nevertheless, while practitioners, scholars, legislators, the courts and the general public may disagree on whether corporal punishment, per se, is a proper disciplinary technique, it is doubtful

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99. *Id.* at 511. *See also* note 29 and accompanying text *supra*; note 129 and accompanying text *infra*.

100. 428 U.S. 153 (1976).

101. *Id.* at 171-73 (citing Furman v. Georgia, 408 U.S. 238 (1972); Robinson v. California, 370 U.S. 660 (1962); Trop v. Dulles, 356 U.S. 86 (1958); Weems v. United States, 217 U.S. 349 (1910)). *See also* Coker v. Georgia, 433 U.S. 584, 591-92 (1977).

102. 428 U.S. at 173 (citing Furman v. Georgia, 408 U.S. 238, 392-93 (1972) (Burger, C.J., dissenting); Weems v. United States, 217 U.S. 349, 381 (1910); Wilkerson v. Utah, 99 U.S. 130, 136 (1879)). *See also* Coker v. Georgia, 433 U.S. 584, 591-92 (1977).

103. 428 U.S. at 173 (citing Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion) (dictum); Weems v. United States, 217 U.S. 349, 367 (1910)). In Coker v. Georgia, 433 U.S. 584 (1977), the Court applied this factor and concluded that a sentence of death is grossly disproportionate and excessive punishment for the crime of rape. It is therefore forbidden by the eighth amendment. *Id.* at 592 & n.4.

104. 428 U.S. at 173 (citing Robinson v. California, 370 U.S. 660, 666 (1962); Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968); and quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (the eighth amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society")). *See also* Coker v. Georgia, 433 U.S. 584, 592-97 (1977).

105. *See* notes 9 & 10 and accompanying text *supra*.

106. *See* Ingraham v. Wright, 498 F.2d 248, 258-59 (5th Cir. 1974), *vacated*, 525 F.2d 909 (5th Cir. 1976) (en banc), *aff'd*, 97 S. Ct. 1401 (1977).

107. *See* Brief for Petitioners at 31-32, Ingraham v. Wright, 430 U.S. 651 (1977). For a sampling of varying scholarly opinions on the effectiveness and value of corporal discipline, see sources cited in Ingraham v. Wright, 430 U.S. 651, 660-61 n.17 (1977). The judiciary is also divided on the acceptability of this sanction. *See* note 25 *supra*.

that society would condone the excessive and abusive beating of school children at issue in the *Ingraham* case.

Cruel and unusual punishment has been found with respect to the death penalty,[108] penal incarceration for drug addiction,[109] civil commitment for status without treatment,[110] strip cells and solitary confinements,[111] the use of tranquilizing drugs on juveniles at state training schools,[112] corporal punishment of prisoners and juveniles at state training schools,[113] and denationalization of army deserters.[114] Consistent with the Constitution, excessive corporal punishment as experienced in the Drew Junior High School could be adjudged to fall within this group of prohibited punishments.

PROCEDURAL DUE PROCESS

The purpose of the due process clause is to protect individuals from unjustified impairments of constitutionally recognized rights.[115] In determining whether due process requirements apply, a court must initially analyze the nature of the interest at stake. In *Board of Regents v. Roth*,[116] the Supreme Court explained that the concept of "liberty" should be given a rather broad construction.[117] Liberty has always included the concept that one should be free from unjustified intrusions on personal security,[118] including freedom from bodily restraint and punishment.[119] The *Ingraham* Court, recognizing this principle, acknowledged that the infliction of corporal punishment on students by public school authorities implicates fourteenth amendment liberty interests.[120] In determining what, if any,

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108. Furman v. Georgia, 408 U.S. 238 (1972) (per curiam).

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

110. Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1967); New York Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973).

111. LaReau v. MacDougall, 473 F.2d 974 (2d Cir. 1972), *cert. denied*, 414 U.S. 878 (1973); Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972), *aff'd*, 501 F.2d 1291 (5th Cir. 1974); Landman v. Royster, 333 F. Supp. 621, 644-48 (E.D. Va. 1971).

112. Nelson v. Heyne, 491 F.2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974).

113. *Id.* at 354-57; Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968).

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

115. *See* Ingraham v. Wright, 430 U.S. 651, 672-74 (1977). *See generally* Shattuck, *The True Meaning of the Term "Liberty" In Those Clauses In The Federal And State Constitutions Which Protect "Life, Liberty, And Property,"* 4 HARV. L. REV. 365 (1891). The applicable portion of the fourteenth amendment reads as follows: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

116. 408 U.S. 564 (1972).

117. *See id.* at 571. *See also* Stanley v. Illinois, 405 U.S. 645, 651 (1972); Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954). The *Roth* Court cautioned, however, that the "range of interests protected by procedural due process is not infinite." 408 U.S. at 570. *See also id.* at 572.

118. *See* Ingraham v. Wright, 430 U.S. 651, 673 n.41 (1977).

119. *See, e.g., id.* at 672 n.42 (citing cases). *See also* Terry v. Ohio, 392 U.S. 1 (1968).

120. "[W]here school authorities, acting under color of state law, deliberately decide to punish a child . . . and inflict appreciable physical pain, we hold that Fourteenth Amendment liberty interests are implicated." 430 U.S. at 674 (footnote omitted). The majority, however, found no property rights impaired by this form of

process was due these public school children the Court applied the three-pronged test of *Mathews v. Eldridge*.[121] The majority concluded that although the students had a substantial interest in being free from unnecessary inflictions of corporal punishment, state civil and criminal law provided adequate protection, and any additional or substitute procedures would be unduly burdensome on school authorities in their administration of discipline.[122]

The *Ingraham* Court observed that the determination of what process is due requires a balancing of competing interests.[123] Accordingly, a student's right to be free from unwarranted bodily intrusion must be measured against the public school's interest in disciplining misbehaving students without unnecessary judicial interference.[124] The Supreme Court has recognized that state and local authorities have a strong interest in the independent operation of the public school system,[125] and the Court has avoided intervention into internal school affairs unless constitutional

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school discipline. In Goss v. Lopez, 419 U.S. 565 (1975), the Court found that a property right was involved when students were suspended from school. The Court explained that the loss of the benefit of education for a period of time amounted to a denial of property. *Id.* at 572–76. Petitioners in *Ingraham* similarly argued that infliction of excessive corporal punishment could result in the loss of schooling since the injuries sustained may require the student to be absent from school while recovering. *See* Brief for Petitioners at 42–48, Ingraham v. Wright, 430 U.S. 651 (1977). In rejecting this argument the Supreme Court explained that although corporal punishment may, in rare instances, unintentionally result in a child being absent from school temporarily, the nature of the practice itself, unlike suspension, does not deprive students of property. 430 U.S. at 674 n.43.

Nevertheless, it could be argued that corporal punishment may be a far more severe deprivation than suspension in certain situations. The paddled child may sustain serious physical and psychological injuries and may also be caused to miss an appreciable number of school days as a result of these injuries. In contrast, the scars that may be left on a student who has been suspended are significantly less. *See* Goss v. Lopez, 419 U.S. 565, 588–89 (1975). Nevertheless, as the Court held in San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973), the right to education is not a "fundamental" property right.

121. 424 U.S. 319 (1976). In *Mathews*, the Court explained that:

> [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 335.

122. 430 U.S. at 674–82.

123. *Id.* at 675 (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)). *See generally* Wolff v. McDonnell, 418 U.S. 539, 572 (1974); Arnett v. Kennedy, 416 U.S. 134, 167–71 (1974) (Powell, J., concurring); Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled on other grounds*, Benton v. Maryland, 395 U.S. 784, 793–95 (1969); Jacobson v. Massachusetts, 197 U.S. 11, 26–29 (1905).

124. *See* 430 U.S. at 674–82.

125. *See* note 23 *supra*. *See also* Goss v. Lopez, 419 U.S. 565, 578 (1975); Tinker v. Des Moines School Dist., 393 U.S. 503, 507 (1969). For an explanation of the *in loco parentis* role of the schools see Commentary, *Democracy In The Classroom: Due Process And School Discipline*, 58 MARQ. L. REV. 705, 706 (1975).

considerations compelled such action.[126] In *Goss v. Lopez,*[127] the Court noted this concern,[128] but nevertheless held that where internal school disciplinary methods conflict with constitutional rights and the deprivation of constitutional interests is more than *de minimus,* the judiciary has the duty to step in.[129] Consequently, the *Goss* Court required that school authorities provide at least informal procedural safeguards prior to suspending a student from school.[130]

In determining whether similar informal procedural safeguards were necessary prior to the infliction of corporal punishment on a school child, the *Ingraham* Court noted that alternative avenues of redress for abusive corporal discipline presently exist under state criminal and civil law.[131] Justice Powell concluded that the availability of such sanctions afford significant protection against unjustified corporal punishment because teachers and school authorities are unlikely to inflict unnecessary or excessive punishment when a possible consequence of doing so is the institution of a civil or criminal proceeding against them.[132] Furthermore, in the majority's view, a child subjected to an unjust beating may be adequately compensated by bringing such an action in state court.[133] Accordingly, the *Ingraham* Court held that neither additional nor substitute procedural safeguards were constitutionally required prior to the infliction of corporal punishment on public school students.[134] The *Goss* decision was

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126. Concluding that a state may not compel a student to salute the flag, Justice Jackson, speaking for the Court in West Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), explained:

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures — Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

Id. at 637. *See also* Tinker v. Des Moines School Dist., 393 U.S. 503, 507 (1969); Epperson v. Arkansas, 393 U.S. 97, 104 (1968); note 120 and accompanying text *supra.*

127. 419 U.S. 565 (1975).

128. *Id.* at 578.

129. "The authority possessed by the State to prescribe and enforce standards of conduct in its schools although concededly very broad, must be exercised consistently with constitutional safeguards."

130. "At the very minimum," the *Goss* Court explained, "students facing suspension and consequent interference with a protected property interest must be given *some* kind of notice and afforded *some* kind of hearing." 419 U.S. at 579 (emphasis in original). For strong and consistent recognition of this principle, *see also* Armstrong v. Manzo, 380 U.S. 545 (1965); Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950); Grannis v. Ordean, 234 U.S. 385 (1914); Baldwin v. Hale, 68 U.S. 223, 233 (1863).

131. *See* 430 U.S. at 661, 676–78. *See also* note 30 and accompanying text *supra. But see* note 29 and accompanying text *supra.*

132. 430 U.S. at 678.

133. *Id.* at 676 n.45.

134. *Id.* at 678–80.

distinguished on the ground that no similar state court remedies existed to protect a student who was unjustly suspended from school.[135]

The availability of criminal or civil remedies in state court inadequately protects the student's liberty interest for several reasons. First, the majority indicated no authority for their conclusion that the existence of state sanctions actually deters school authorities from inflicting unnecessary or excessive corporal punishment. Furthermore, under a well-established common law privilege, a teacher acting in good faith may be immune from suit.[136] Thus, a student who has been mistakenly punished may have no remedy at all if the punishment was reasonable from the disciplinarian's point of view.[137] The case of *North American Cold Storage Company v. Chicago*,[138] provides an interesting contrast. In that case, the Court held that notice and a hearing were not necessary prior to the condemnation and destruction of putrid food by city officials who were acting pursuant to a city ordinance.[139] The majority reasoned that the owner of the destroyed food was sufficiently protected because the official who seized the food, in a subsequent action against him, was required to show as a matter of fact that such action was within the statute.[140] It was not a defense to the wrongful destruction of property that the city official was acting on the basis of mistaken facts or proceeded reasonably and in utmost good faith.[141] No comparable protection exists for public school students who have been beaten mistakenly because school authorities are now shielded from liability by a well-established and recognized qualified privilege.

Finally, and most importantly, a tort or criminal action would be instituted only after the wrong has already occurred and after the child has suffered physical and psychological pain. Hence, contrary to the majority's understanding, this solution cannot protect school children from abusive treatment because any rights or interests the child may possess would only be recognized and protected after the constitutional deprivation has occurred.[142]

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135. *Id.* at 678 n.46. "The subsequent civil and criminal proceedings available" to students who are abusively bothered by public school officials, Justice Powell contended, "may be viewed as affording substantially greater protection to the child than the informal conference mandated in *Goss*." *Id.* Thus, the Court found that the remedies available to one who has been mistakenly paddled significantly differ from those available to a student who is wrongfully suspended from school and, accordingly, *Goss* and *Ingraham* are distinguishable.

136. *See* N. EDWARDS, THE COURTS AND THE PUBLIC SCHOOLS 610-15 (3d ed. 1971); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 27, at 136-37 (4th ed. 1971). *See also* Wood v. Strickland, 420 U.S. 308 (1975).

137. 430 U.S. at 693-96 (White, J., dissenting).

138. 211 U.S. 306 (1908).

139. *Id.* at 320.

140. *Id.*

141. *Id.* at 316.

142. *See* Ingraham v. Wright, 430 U.S. 651, 695-97 (1977) (White, J., dissenting). Justice White perceives the majority's "novel theory" as devoid of both logic and precedent: "The logic of this theory would permit a State that punished speeding with a one-day jail sentence to make a driver serve his sentence first without a trial and then sue to recover damages for wrongful imprisonment." *Id.* at 696 (footnote omitted). *See also id.* at 696-97 nn.13 & 14. The dissent further reminded the Court

The sole case cited by the majority in support of its conclusion that a prior hearing is less compelling where the state provides alternative remedies is *Bonner v. Coughlin.*[143] In that case, a prisoner sought damages for the loss of his property due to the negligence of prison officials.[144] The Seventh Circuit concluded that since adequate remedies existed under state tort law it was unnecessary to provide a federal tort remedy.[145] This case is distinguishable from *Ingraham* on three separate grounds. First, the appellant in *Bonner* did not seek a prior hearing to ensure against an unwarranted deprivation of a constitutionally protected right; rather, he sought only compensation for damages already sustained as a result of a negligent act.[146] Because no panoply of due process safeguards would have protected the appellant against the deprivation he sustained, the only adequate remedy was to make him whole for the loss he suffered.[147] The court properly concluded that such relief was available under state law.[148] In contrast, the procedural safeguards of prior notice and hearing sought by the petitioners in *Ingraham* may have prevented future deprivations of constitutionally recognized interests. Because state remedies could not adequately provide such protection, the constitutionally mandated notice and hearing requirements should have been ordered. Second, unlike the school officials in *Ingraham,* the prison officials in *Bonner* possessed no qualified immunity in a state negligence suit.[149] Third, while the deprivation in *Bonner* involved the loss of property for which the state could make the aggrieved plaintiff whole, a student could never be made whole in a state civil or criminal suit for unjustified or excessive corporal discipline.[150] Consequently, in contrast to *Bonner,* prior procedural safeguards were necessary in *Ingraham* in order that such deprivations may be avoided.

The conclusion reached by the *Ingraham* Court sharply conflicts with both the spirit and purpose of due process guarantees.[151] The availability of

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that in cases construing the due process clause it has been consistently held that some kind of hearing is required at some time prior to any deprivation of a protected liberty or property interest. *Id.* at 697. Thus, in Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 168 (1951), Justice Frankfurter explained that the "right to be heard *before* being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." (emphasis added). *See generally* Goss v. Lopez, 419 U.S. 565, 578-79 (1975); Arnett v. Kennedy, 416 U.S. 134, 178-79 (1974) (White, J., concurring in part and dissenting in part) (citing cases); Armstrong v. Manzo, 380 U.S. 545, 550, 552 (1965).

143. 517 F.2d 1311 (7th Cir. 1975), *modified,* 545 F.2d 565 (7th Cir. 1976) (en banc).

144. *See id.* at 1318.

145. *Id.* at 1319.

146. *Id.* at 1318.

147. *See* Ingraham v. Wright, 430 U.S. 651, 696-97 n.14 (White, J., dissenting).

148. Bonner v. Coughlin, 517 F.2d 1311, 1319 (7th Cir. 1975).

149. 430 U.S. at 696-97 n.14.

150. Referring to the recent case of G.M. Leasing Corp. v. United States, 429 U.S. 338, 351-59 (1977), Justice White explained that advance procedural safeguards are more compelling where the government inflicts an injury which cannot be repaired in a subsequent judicial proceeding (invasion of privacy) than when it inflicts a temporary injury which can be undone (seizure of property). 430 U.S. at 696 n.12.

151. "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," minimal requirements of due process must be satisfied. Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971). There

remedies under state tort or criminal law has been held not to prevent an aggrieved party from invoking a federal forum to vindicate violation of a specific constitutional right.[152] The implications of such a holding reveal a threat to these very basic constitutional rights. Under the Court's theory, all a state need do to avoid federal constitutional adjudication of its action is to devise a law which provides its potential victims a redress in state court. Such an approach would seem to conflict with the basic notion that the Constitution is the supreme law of the land.[153] Furthermore, unlike the situations in the recent cases of *Paul v. Davis*[154] and *Bishop v. Wood*,[155]

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is nothing contained in this constitutional right which indicates that it is only applicable where no alternative remedies are available.

152. In Monroe v. Pape, 365 U.S. 167 (1961), the Court explicitly rejected the position it adopted in *Ingraham*. Referring to a federal statute, Justice Douglas, speaking for the Court, explained that "[i]t is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Id.* at 183. *See also* Bishop v. Wood, 426 U.S. 341, 354-55 (1976) (Brennan, J., dissenting); Paul v. Davis, 424 U.S. 693, 714-18 (1976) (Brennan, J., dissenting).

The fact that a student may have alternative remedies in state court appears to be a recently recognized factor in determining whether due process safeguards may be instituted by the federal judiciary. In Paul v. Davis, 424 U.S. 693 (1976), the Court refused to invoke the due process clause to protect persons from torts committed by a state. *Id.* at 699-701. Rejecting petitioner's argument that the fourteenth amendment should provide him a right to be free from any injury wherever the state may be characterized as a tortfeasor, the Court replied that "such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Id.* at 701. *See also* Bishop v. Wood, 426 U.S. 341 (1976). Furthermore, in Estelle v. Gamble, 429 U.S. 97 (1976), the Court noted that a federal constitutional cause of action may exist against some prison officials for acting indifferently to the medical needs of prisoners. Nevertheless, the Court held that such an action could not be maintained against prison physicians for their failure to order additional tests and treatment; at most the doctors' inaction constituted medical malpractice and the proper forum is state court under the Texas Tort Claims Act. *Id.* at 107. *But see* Ingraham v. Wright, 430 U.S. 651, 690-91 (1977), where Justice White explained that the Court's holding in *Estelle* implicitly furthers the doctrine enunciated in Monroe v. Pape.

153. The deferral of constitutional and other federal matters to state court has been used increasingly by the Supreme Court in recent years. For a discussion of this doctrine, see Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293 (1976).

154. 424 U.S. 693 (1976). In this case, a flyer captioned "Active Shoplifters" and containing the name and photograph of Edward C. Davis was distributed by the police to various merchants. Davis brought suit against the police chiefs in the United States District Court (W.D. Ky.) under 42 U.S.C. § 1983 (1970) alleging that the actions of these state officials deprived him of his constitutional rights. The Supreme Court, in a 5-3 decision (Justice Stevens did not take part), held that reputation alone does not implicate any "liberty" or "property" interests sufficient to invoke the procedural protection of the due process clause. 424 U.S. at 701-12. Moreover, something more than simple defamation must be involved to establish a claim under 42 U.S.C. § 1983.

155. 426 U.S. 341 (1976). A former policeman, discharged from his job without a hearing, brought suit against the City of Marion, North Carolina, the City Manager, and the Chief of Police, claiming that his constitutional rights, protected by the fourteenth amendment, had been violated. The Supreme Court held that neither a property nor liberty interest had been implicated by the actions of the city officials and, therefore, no constitutional violation could be found. The federal court is not the appropriate forum in which to review a public agency's personnel decisions, the Court explained. If the official action was erroneous it "can best be corrected in other ways." *Id.* at 350.

excessive corporal punishment implicates specific and important constitutional interests which require the protections guaranteed by the fourteenth amendment.[156] The effect of the *Ingraham* decision is to recognize a constitutional liberty interest, but to afford it no practical protection at all.

Although recognizing that implementation of any procedural safeguards would interfere, to some extent, with school disciplinary practices, the *Goss* Court found that informal due process protections could be instituted before suspension without unduly burdening the educational system.[157] By contrast, the *Ingraham* Court concluded that requiring these identical informal procedures prior to the infliction of corporal punishment would impermissibly curtail effective discipline and order in the nation's public schools.[158] However, as *Goss* illustrates, it would seem that procedural safeguards could be instituted prior to every infliction of corporal punishment without destroying this disciplinary technique or unduly burdening the educational process.[159] Such informal prerequisites could easily embody the following features. First, a code of disciplinary practices should be devised and issued to all students so as to afford them adequate prior notice that certain behavior would constitute an infraction of school

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156. In both Bishop v. Wood, 426 U.S. 341 (1976), and Paul v. Davis, 424 U.S. 693 (1976), the Court concluded that the alleged wrong committed by government officials failed to implicate any specific "liberty" or "property" interest. In contrast, the *Ingraham* Court admitted that the infliction of corporal punishment in public schools involved substantial liberty rights of the child. *See* note 120 and accompanying text *supra*. Thus, the reasoning involved in *Paul* is inapposite to a situation, similar to Monroe v. Pape, 365 U.S. 167 (1961), where specific constitutional rights are recognized.

157. *See* Goss v. Lopez, 419 U.S. 565, 580–81 (1975); note 55 *supra*.

158. *See* 430 U.S. at 680–81. Suspension is a sanction infrequently imposed, when all attempts at reaching the child have failed. Corporal punishment, in contrast, is administered more often and to a greater number of students. It can be argued that requiring due process safeguards prior to each paddling would seriously invade the school disciplinary process, whereas affording a student notice and hearing before an infrequent suspension would not. The Court emphasized that the hearing requirement would divert time, personnel, and attention from normal school pursuits. Moreover, the majority warned that school authorities may avoid the use of corporal punishment, for less effective measures, rather than be burdened with procedural requirements. *Id.*

The mere fact that schools resort to suspension less often than corporal punishment should not deny those subjected to the latter the protections of the due process clause. Since this sanction is administered more frequently and to a greater number of children, the risk of both error and abuse would be higher. Due process safeguards would protect these children from such consequences. Further, as the dissent in *Ingraham* noted, the "significant intrusion" feared by the majority is exaggerated. 430 U.S. at 700. The principal, or his designee, need only take a few minutes to explain to the child the charges and evidence against him, and to allow the student a chance to present his side. There is no requirement under the due process clause that the student be permitted to secure counsel or call and cross-examine witnesses. Goss v. Lopez, 419 U.S. 565, 583 (1975). Thus, these constitutional safeguards are, " 'if anything, less than a fair-minded principal would impose upon himself' in order to avoid injustice." Ingraham v. Wright, 430 U.S. at 700 (footnote omitted) (quoting Goss v. Lopez, 419 U.S. at 583). For further discussion of the informal procedure which could be imposed without unduly burdening the school disciplinary process, see text accompanying note 14 *supra* and notes 128 to 133 *infra*.

159. Goss v. Lopez, 419 U.S. 565, 580–83 (1975).

rules and regulations. Second, a student charged with a violation of the code must be told of what he is being accused and the basis of the accusation.[160] Third, the offending child must be afforded an opportunity to present his version of the facts.[161] If the student protests his innocence, further inquiry must be pursued in order to prevent unwarranted and mistaken punishment. Fourth, a neutral person should both decide whether the student is guilty of the alleged offense and, if the student is guilty, inflict the punishment.[162] Finally, a cooling-off period should be instituted to ensure that the child is not disciplined in a moment of anger or hostility.[163] These procedural safeguards can be instituted efficiently in an informal manner and with a minimal expenditure of teacher time and effort.[164]

Had the Court declared that summary corporal punishment of public school students constituted an unconstitutional deprivation of liberty and prescribed that such procedural safeguards be adhered to before every infliction of this sanction, potential victims of abusive or unjustified paddlings would be protected, to some extent, before an injury occurred.[165] School officials would also be apprised of the scope of their authority and disciplinary methods. Accordingly, if the school official thereafter violated any judicially prescribed procedural safeguard, the child would have the choice of seeking civil, criminal or constitutional remedies in either state or federal court. The mere fact that one of these remedies is available in one forum would not prevent him from seeking relief under another theory in a different forum.

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160. *Id.* at 582. *See also* Tate v. Board of Educ., 453 F.2d 975, 979 (8th Cir. 1972); Vail v. Board of Educ., 354 F. Supp. 592, 603 (D.N.H.), *vacated and remanded,* 502 F.2d 1159 (1st Cir. 1973).

161. Goss v. Lopez, 419 U.S. 565, 582 (1975). *See also* Baker v. Owen, 395 F. Supp. 294 (M.D.N.C. 1975), *aff'd mem.,* 423 U.S. 907 (1975). Informal give and take is needed to assure the preservation of due process protections.

162. This requirement will protect the student from unnecessarily harsh treatment at the hands of an actual participant in the controversy. *Cf.* Taylor v. Hayes, 418 U.S. 488, 501 (1974) (need for a separation of factfinder and person preferring charge recognized).

163. A cooling-off period would reduce the chance of arbitrary and capricious infliction of corporal discipline. This period need not be of a duration so long as to weaken the effects of the punishment. Rather, it should last only long enough to permit tempers to cool so that the student will be dealt with fairly.

164. *See* note 159 *supra.*

165. Finding the need for such procedural safeguards prior to imposing a suspension on a public school student, Justice White, speaking for the Court in *Goss,* emphasized the benefits of such protections:

> "[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . ." "Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."

Goss v. Lopez, 419 U.S. 565, 580 (1975) (quoting Joint Anti-Fascists Comm. v. McGrath, 341 U.S. 123, 170 (1951)). "The Clause requires at least these rudimentary precautions against unfair or mistaken finding of misconduct . . . ." Goss v. Lopez, 419 U.S. at 581. *See also* note 55 *supra.*

CONCLUSION

The *Ingraham* decision has settled several disputed questions of constitutional law and has raised numerous new dilemmas. For the first time in its almost two-hundred-year history, the Supreme Court has explicitly and unequivocally rejected the notion that the eighth amendment guarantee against cruel and unusual punishment applies to individuals punished in a civil setting. Only those who are found guilty in a criminal court of law and who are involuntarily confined to an institution appear entitled to the protection of this constitutional guarantee. However, the Court made no attempt to explain where the line limiting eighth amendment coverage is to be drawn. Thus, the rights of others in institutional settings, including mental patients, juveniles at state correctional schools, and retarded children, are left in doubt, to be clarified only by subsequent Supreme Court decisions. The *Ingraham* decision may have absolutely no impact on individuals punished outside the realm of the public school system, as the Court may later limit its holding to the specific facts of that case. Only future adjudication will delineate the proper scope of eighth amendment protection and the true impact of the decision in *Ingraham.*

Recent decisions have evidenced a weakening of due process coverage, rights, and guarantees. The *Paul* and *Bishop* cases[166] appear to limit the applicability of the fourteenth amendment to instances where no alternative remedies in state court are available to afford adequate relief. *Mathews v. Eldridge,*[167] further provided that, even where specific constitutionally protected interests are implicated by state action, due process safeguards may not necessarily be required if the effects of such procedures would undermine the governmental interest. *Ingraham* adopts these conclusions and further establishes this new trend. Consequently, *Goss,*[168] the pinnacle of the school due process cases, would appear to be drastically diluted. For the first time since its decision in that case, the Court was asked to extend those same procedural requirements to another aspect of school discipline. The *Ingraham* Court withdrew from this precedent by embracing the antiquated view that the privileges afforded school officials to deal with students have supremacy over students' constitutional rights. Unless the Court limits its holding to the area of corporal punishment, *Ingraham* could well presage a complete reversal of the *Goss* doctrine. The *Ingraham* holding thus may signal the beginning of a new era in the constitutional rights of students. Relying on the policies that underlie the *Ingraham* decision, the Court may refuse to intrude into internal school practices in other areas of student concern, such as censorship of student newspapers and school dress codes. Children's constitutional rights outside the school environment could also be severely narrowed. The progeny of this decision will be scrutinized carefully to determine *Ingraham's* actual impact and whether a new constitutional era has actually begun.

166. *See* text accompanying notes 155 & 156 *supra.*
167. 424 U.S. 319 (1976).
168. *See* notes 127 to 130 and accompanying text *supra.*