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Recommended Citation

David J. Novotny, *The Eighth Amendment and Procedural Due Process as Restraints on the Administration of Corporal Punishment in Public Schools - Ingraham v. Wright*, 26 DePaul L. Rev. 121 (1976)

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THE EIGHTH AMENDMENT AND PROCEDURAL DUE PROCESS AS RESTRAINTS ON THE ADMINISTRATION OF CORPORAL PUNISHMENT IN PUBLIC SCHOOLS—*INGRAHAM V. WRIGHT*

Public schools that choose to enforce student discipline by the use of corporal punishment often must contend with suits brought by students and their parents. Frequently, these suits are in the form of civil rights actions alleging that the discipline violated the student's Eighth Amendment right against cruel and unusual punishment. In addition, the plaintiffs may charge that the practice of corporal punishment, as authorized by state statute, violates the student's right to procedural and substantive due process of law.¹

In *Ingraham v. Wright*,² the Fifth Circuit Court of Appeals faced these issues in an action brought by the parents of James Ingraham and Roosevelt Andrews, two public junior high school students in Dade County, Florida. The pupils were corporally punished by school officials for various acts of misconduct. Ingraham alleged that the punishment resulted in painful injuries, causing his absence from school.³ Andrews claimed that he was beaten twice, requiring medical treatment to relieve his resulting discomfort.⁴ Plaintiffs brought individual claims against the principal and assistant principal for compensatory and punitive damages under 42 U.S.C. §1983.⁵ In addition, a class action was brought, seeking injunctive relief against the use of corporal punishment in the school system. Plaintiffs asserted that such punishment, on its

1. Teachers who inflict corporal punishment, of course, are subject to state tort law. Generally, the teacher is said to be *in loco parentis* (in the place of the parent) and thus privileged to discipline a student to the same extent as the parents. However, if the corporal punishment is inflicted wantonly, with malice, or with unreasonable force, then the privilege has been exceeded, and the teacher is subject to both civil and criminal battery charges. See, e.g., *City of Macomb v. Gould*, 104 Ill.App.2d 361, 244 N.E.2d 634 (3d Dist. 1969). The plaintiffs in *Ingraham* did not raise a tort claim. For that reason, such actions will not be discussed in this Note.

2. 525 F.2d 909 (5th Cir.), cert. granted, 96 S.Ct. 2200 (1976).

3. The opinion indicates that Ingraham was disciplined for creating a class disruption. The punishment inflicted upon him caused painful bruises that necessitated the use of cold compresses, pain-killing pills, and ten days rest at home. 525 F.2d at 911.

4. Andrews was punished for tardiness and for breaking glass in sheet metal class. *Id.*

5. 42 U.S.C. §1983 (1970) provides:

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

face and as applied, violated the Eighth Amendment⁶ right against cruel and unusual punishment. They also claimed that the practice of corporal punishment, authorized by Florida statute,⁷ deprived them of liberty without procedural and substantive due process of law.

The district court dismissed the suit, deciding that the plaintiffs' constitutional rights had not been violated.⁸ In its final review, the court of appeals, *en banc*, rendered an opinion containing two particularly significant conclusions. First, the court held that the Eighth Amendment guarantee against cruel and unusual punishment is inapplicable to the administration of corporal punishment in public schools.⁹ Second, the court decided that the statute which authorized the use of corporal punishment did not violate substantive or procedural due process.¹⁰

The question of the applicability of the Eighth Amendment to such situations is unsettled.¹¹ Consequently, the *Ingraham* decision is significant because the court firmly holds that the Eighth Amendment does

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

7. FLA. STAT. ANN. §232.27 (1961) provides:

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 its nature. Under no circumstances may a teacher (except of a one-teacher school) suspend a pupil from school or class.

8. After presentation of the plaintiffs' case, the court granted the defendants' motion for a directed verdict on the ground that no jury lawfully could find an infringement of constitutional rights. 525 F.2d at 912. The plaintiffs appealed this dismissal, and the court of appeals remanded the case for a determination of whether the plaintiffs' Eighth Amendment and due process rights had been violated. *Ingraham v. Wright*, 498 F.2d 248 (5th Cir. 1974). On remand, the district court again dismissed the suit after the presentation of the plaintiffs' case. Plaintiffs appealed, and the court of appeals then decided that no deprivation of constitutional rights had occurred. *Ingraham v. Wright*, 525 F.2d 909 (5th Cir. 1976).

9. This decision represented a change in position on the part of the court of appeals. *Ingraham v. Wright*, 498 F.2d 248 (5th Cir. 1974), the initial appellate review, clearly was viewed as holding that the Eighth Amendment guarantee against cruel and unusual punishment does apply to the administration of corporal punishment in public schools. See, e.g., Note, *Neither Corporal Punishment Per Se Nor School Board Policies that Authorize Reasonable Corporal Punishment Violate the Eighth Amendment's Prohibition Against Cruel and Unusual Punishment, but the Unreasonable Infliction of Such Punishment by Officials at One School Does Contravene the Eighth Amendment*, 43 GEO. WASH. L. REV. 1435 (1975); 12 HOUSTON L. REV. 500 (1975).

10. 525 F.2d 909, 915, 917 (5th Cir. 1976).

11. See notes 15 & 23 *infra*.

not apply, and it supports its reasoning with a substantial review of the Eighth Amendment. The holding is also important because it was made in the face of one recent decision¹² which held that certain procedural safeguards, such as notice and an informal hearing, are required prior to the administration of corporal punishment. The question of the Eighth Amendment's applicability to public schools and the procedural due process requirements of corporal punishment will be considered by the United States Supreme Court on review.¹³

It is probable that the Supreme Court will affirm the *Ingraham* Eighth Amendment decision and reverse the court's holding on procedural due process. The purpose of this Note is to explain why the *Ingraham* court's Eighth Amendment holding was sound. In addition, it will demonstrate why the Supreme Court may modify the holding that no procedural safeguards are required in the administration of corporal punishment.¹⁴

THE INAPPLICABILITY OF THE EIGHTH AMENDMENT TO THE PUBLIC SCHOOLS

The *Ingraham* court held that the Eighth Amendment protection against cruel and unusual punishment does not apply to the administration of corporal punishment in public schools.¹⁵ The court explained

12. *Baker v. Owen*, 395 F. Supp. 294 (M.D.N.C. 1975), *aff'd on other grounds*, 423 U.S. 907 (1975). See notes 54-59 and accompanying text *infra*.

13. 96 S.Ct. 2200 (1976).

14. The substantive due process issue will not be considered in this Note for two reasons. First, the issue will not be reviewed by the Supreme Court. Second, the *Ingraham* court's holding on this matter was not unusual. All courts that have faced the question of whether the practice of reasonable corporal punishment violates substantive due process have held that such punishment is a reasonable means of achieving the legitimate state goal of maintaining order and discipline in public schools. See, e.g., *Sims v. Waln*, 388 F. Supp. 543 (S.D. Ohio 1974); *Gonyaw v. Gray*, 361 F. Supp. 366 (D.Vt. 1973); *Sims v. Board of Educ.*, 329 F. Supp. 678 (D.N.M. 1971). Thus, statutes which authorize the use of corporal punishment consistently have been held to comply with the requirements of substantive due process. *Id.*

15. Two previous cases, *Sims v. Waln*, 388 F. Supp. 543 (S.D. Ohio 1974) and *Gonyaw v. Gray*, 361 F. Supp. 366 (D.Vt. 1973) also held that the Eighth Amendment was inapplicable to public schools. However, neither of those courts provided much supportive reasoning to substantiate its holding. In *Gonyaw*, the court offered a mere one-sentence statement to the effect that the Eighth Amendment cannot be used to challenge non-criminal punishments. 361 F. Supp. at 368. In *Sims*, the court made a similar statement and attempted to justify it by citing *Negrich v. Hohn*, 246 F. Supp. 173 (W.D. Pa. 1965), in which the court held that the Eighth Amendment does not prohibit severe corporal punishment in prisons. 388 F. Supp. at 549-50. However, the *Negrich* holding is clearly erroneous, as the Eighth Amendment is well recognized as a guard on prison conditions. See, e.g., notes 25 & 26 *infra* and Comment, *Prisoner's Constitutional Rights: Segregated Confinement as Cruel and Unusual Punishment*, 1972 WASH. U.L.Q. 347. The error of the

that, historically, the Eighth Amendment had served exclusively as a limitation on punishments imposed for criminal conduct. Therefore, the court reasoned, the amendment cannot be used as a restraint upon inflictions of corporal punishment in public schools.¹⁶ The court's approach consisted of a survey of the origins of the Eighth Amendment and the manner in which courts have allowed it to be applied.

It easily can be established that the Eighth Amendment historically has come to bear primarily on criminal matters. As the *Ingraham* court indicated, speeches given by various statesmen at the time the amendment was being considered indicate that the framers were concerned solely with criminal punishments.¹⁷ The court noted also that Supreme Court decisions involving the Eighth Amendment have focused on penalties invoked for criminal conduct.¹⁸ Particular attention was given to dicta in *Powell v. Texas*,¹⁹ which said:

Negrich holding, upon which *Sims* heavily relied, renders the *Sims* holding equally without precedential value. As a result, courts have ignored the *Gonyaw* and *Sims* holdings and have continued to allow Eighth Amendment challenges to corporal punishment in public schools, thus perpetuating the confusion in this area. See, e.g., *Roberts v. Way*, 398 F. Supp. 856 (D.Vt. 1975), a case decided in the same district as *Gonyaw*.

16. Other courts, however, have allowed Eighth Amendment challenges to corporal punishment in public schools. See notes 23-27 and accompanying text *infra*.

17. 525 F.2d at 913 n.1. For example, at the constitutional convention held in Boston, one representative protested that Congress had the unlimited power to "determine what kind of punishments shall be inflicted on persons convicted of crimes." 2 J. ELLIOT'S DEBATES 111 (Reprint of 2d ed. 1937) (emphasis added). At the Virginia convention, Patrick Henry expressed a similar concern, noting that Congress had the power to "define crimes and prescribe punishments," but "when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives." 3 *id.* 447 (emphasis added). Later, the prohibition against cruel and unusual punishment was written into the proposed constitutional amendments. One Congressman protested this provision, however, claiming that "villains often deserve whipping, and perhaps having their ears cut off." *Furman v. Georgia*, 408 U.S. 238, 244 (1972), quoting 1 *Annals of Cong.* 754 (1789). See generally Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CAL. L. REV. 839 (1969); Note, *Cruel and Unusual Punishment Provision of Eighth Amendment as Restriction Upon State Action Through the Due Process Clause*, 34 MINN. L. REV. 134 (1950); Note, *The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment*, 36 N.Y.U. L. REV. 846 (1961).

18. 525 F.2d at 913. Three of the cases to which the court referred were *Furman v. Georgia*, 408 U.S. 238 (1972); *Robinson v. California*, 370 U.S. 660 (1962); and *Weems v. United States*, 217 U.S. 349 (1910). In *Furman*, the Court held that the death penalty, when carried out in a discriminatory and arbitrary manner, violated the Cruel and Unusual Punishment Clause. In *Robinson*, the Court invalidated a statute which criminalized the status of being a narcotics addict on the theory that any punishment imposed upon a person due to his illness (addiction) was cruel and unusual. In *Weems*, the Court held that a penalty of twelve to twenty years at hard and painful labor for the crime of falsifying a public document was so disproportionate to the offense as to be cruel and unusual.

19. 392 U.S. 514 (1968) (upholding Texas statute which criminalized act of being intoxicated in public place).

[T]he primary purpose of [the cruel and unusual punishment clause] has always been considered. . . to be directed at the method or kind of punishment imposed for the violation of criminal statutes²⁰

Thus, by reviewing the ratification and case history of the Eighth Amendment, the *Ingraham* court reasoned that the amendment is a limitation which applies exclusively to criminal punishments. Consequently, it cannot be used to attack instances of non-criminal corporal punishment in schools.

The *Ingraham* holding is supported additionally by the fact that most courts, when faced with Eighth Amendment challenges in noncriminal situations, have held the amendment inapplicable. For example, aliens who have been ordered deported often have challenged these orders on the theory that deportation would constitute cruel and unusual punishment under the particular circumstances involved. Since deportation is not a criminal proceeding, courts frequently have rejected these claims on the ground that the Eighth Amendment is inapplicable.²¹ Indeed, courts have denied Eighth Amendment claims in many non-criminal situations.²² It follows that, since corporal punishment in public schools is not a criminal punishment, the Eighth Amendment is inapplicable.

It should be noted, however, that the general treatment afforded the Eighth Amendment in non-criminal matters has not prevented some courts from sustaining Eighth Amendment challenges to corporal punishment in public schools.²³ In its review of *Ingraham*, the Supreme

20. 392 U.S. at 531-32.

21. See *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Brea-Garcia v. Immigration & Naturalization Serv.*, 531 F.2d 693 (3d Cir. 1976); *Cortez v. Immigration & Naturalization Serv.*, 395 F.2d 965 (5th Cir. 1968); *Chabolla-Delgado v. Immigration & Naturalization Serv.*, 384 F.2d 360 (9th Cir. 1967); *Soewapadji v. Wixon*, 157 F.2d 289 (9th Cir.), *cert. denied*, 329 U.S. 792 (1946), *reh. denied*, 329 U.S. 833 (1947); *Costanzo v. Tillinghast*, 56 F.2d 566 (1st Cir.), *aff'd*, 287 U.S. 341 (1932); *Stokes v. United States*, 393 F. Supp. 24 (S.D.N.Y. 1975); *Buckley v. Gibney*, 332 F. Supp. 790 (S.D.N.Y.), *aff'd mem.*, 449 F.2d 1305 (2d Cir. 1971).

22. See *Zwick v. Freeman*, 373 F.2d 110 (2d Cir. 1967) (holding Department of Agriculture order effectively limiting petitioner's future employment opportunities not subject to an Eighth Amendment challenge); *United States v. Stangland*, 242 F.2d 843 (7th Cir. 1957) (holding Eighth Amendment inapplicable in a civil suit brought to recover penalties due for growing wheat in excess of quota); *In re Walsh*, 64 Misc.2d 293, 315 N.Y.S.2d 59 (Family Ct. Westchester Cty. 1970) (holding proceeding to remove abused child from home not subject to parents' claim that removal was cruel and unusual).

23. Indeed, a majority of those few courts dealing with the issue have held the amendment to be applicable to corporal punishment. Prior to *Ingraham*, the Eighth Amendment argument was rejected in only two reported cases. See note 15 *supra*. Courts in at least five other cases did not object to the application of the amendment. In three of those five cases, the court ultimately ruled that the punishment in question was not severe enough to be considered "cruel and unusual." Consequently, these courts did not find it necessary

Court will consider the justification offered by these courts. *Bramlet v. Wilson*²⁴ was one such case in which the court felt justified in allowing an Eighth Amendment claim. There, the plaintiffs brought a civil rights action against a public school superintendent, alleging that they were corporally punished with excessive force and that their Eighth Amendment rights were violated. After the district court dismissed the suit, the Court of Appeals for the Eighth Circuit reversed and remanded on the ground that an excessive degree of corporal punishment could constitute a violation of the Eighth Amendment. In support, the *Bramlet* court cited several cases in which the infliction of severe corporal punishment in prisons was held to violate the Eighth Amendment.²⁵ Such reasoning, however, is not sound because the court was attempting to justify an application of the Eighth Amendment to non-criminal behavior in public schools by citing cases involving punishments for criminal conduct. It is doubtful that such questionable reasoning will persuade the Supreme Court to reverse the *Ingraham* decision.²⁶

In *Roberts v. Way*,²⁷ the District Court of Vermont allowed an Eighth Amendment challenge to corporal punishment, basing its holding largely on *Trop v. Dulles*.²⁸ In *Trop*, the United States Supreme Court

to offer reasoning in support of the Eighth Amendment's applicability. See *Glaser v. Marietta*, 351 F. Supp. 555 (W.D. Pa. 1972); *Sims v. Board of Education*, 329 F. Supp. 678 (D.N.M. 1971); *Ware v. Estes*, 328 F. Supp. 657 (N.D. Tex. 1971), *aff'd mem.*, 458 F.2d 1360 (5th Cir.), *cert. denied*, 409 U.S. 1027 (1972).

24. 495 F.2d 714 (8th Cir. 1974).

25. *Id.* at 717. The cases cited were *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968); *Nelson v. Heyne*, 355 F. Supp. 451 (N.D. Ind. 1972), *aff'd*, 491 F.2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974); and *Collins v. Schoonfield*, 344 F. Supp. 257 (D. Md. 1972).

26. One of the cases that both the dissent in *Ingraham* and the *Bramlet* court cited was *Nelson v. Heyne*, 355 F. Supp. 451 (N.D. Ind. 1972). That case involved the use of severe corporal punishment at the Indiana Boys School, which was technically not a prison but rather a medium security correctional institution. About one-third of the boys were "non-criminal" offenders. It can be argued persuasively that this was nevertheless a case of "criminal" punishment within the context of the Eighth Amendment for two reasons. First, a two-thirds majority of the boys in the institution technically were criminal offenders. Second, the remainder of the boys were there because of previous actions inflicted against society. According to state law, such conduct may not be categorized as "criminal" because of the age of the offender. Nevertheless, such offensive conduct is in essence criminal, and thus within the scope of the Eighth Amendment. *Ingraham v. Wright*, 525 F.2d 909, 923 (5th Cir. 1976) (Rives, J., dissenting); *Bramlet v. Wilson*, 495 F.2d 714, 717 (8th Cir. 1974).

27. 398 F. Supp. 856 (D. Vt. 1975). In *Roberts*, a sixth grade pupil was corporally punished, and a civil rights action subsequently was brought against several school officials for damages and an injunction. In response to the plaintiff's motion to dismiss, the court held that certain instances of corporal punishment could be restricted by the Cruel and Unusual Punishment Clause.

28. 356 U.S. 86 (1958).

said that the Eighth Amendment "must draw its meaning from evolving standards of decency that mark the progress of a maturing society."²⁹ The *Roberts* court determined that this flexibility in interpretation justified a decision that the amendment could be violated by certain instances of corporal punishment in public schools.

The Supreme Court, in its review of *Ingraham*, undoubtedly will consider whether the *Trop* Court intended such an interpretation. An examination of the facts in *Trop* reveals that the *Roberts* court may have erred in basing its decision on that statement. In *Trop*, the Court held unconstitutional the section of the Nationality Act of 1940³⁰ which provided that persons who are convicted of wartime desertion and dishonorably discharged will lose their citizenship. Chief Justice Warren's opinion, with which three Justices concurred,³¹ first questioned whether the statute involved was "penal" in nature and thus subject to the constraints of the Eighth Amendment. He reasoned that the statute could serve no legitimate purpose other than punishment.³² Consequently, the statute was considered to be essentially "penal" and therefore subject to the Cruel and Unusual Punishment Clause. In considering whether loss of citizenship was a cruel and unusual punishment, the Court remarked that the Eighth Amendment "must draw its meaning from evolving standards of decency that mark the progress of a maturing society."³³ Thus, it appears that the *Trop* Court's statement regarding the Eighth Amendment's flexibility was intended to convey the idea that the words "cruel and unusual" should be interpreted flexibly within a criminal or penal context. The Court did not mean to imply that the Eighth Amendment should be applied to any situation, regardless of whether a criminal punishment is involved.

It can be argued that the situation in *Trop* was non-criminal and, therefore, the Court was allowing a non-criminal application of the amendment. If true, then *Trop* would lend strong support to the position that the amendment is applicable to public schools. However, that position appears weak. Even though the loss of citizenship involved in *Trop* was not imposed by criminal authorities, the fact remains that it was inflicted pursuant to a conviction by court-martial, a proceeding of criminal character. In addition, the Court frequently referred to the act

29. *Id.* at 101.

30. 8 U.S.C. §1481(a)(8)(1970).

31. Justices Black, Douglas, and Whittaker concurred in Chief Justice Warren's opinion. Justice Brennan concurred in the Court's decision but, in his own opinion, explained that he felt that the statute was unconstitutional in that Congress did not have the power to take away citizenship for penal reasons.

32. 356 U.S. at 97.

33. *Id.* at 101.

of wartime desertion as a "crime."³⁴ Thus, it does not appear that the Court viewed its holding as allowing a non-criminal application of the Eighth Amendment.

It also can be argued that the infliction of corporal punishment in public schools is essentially "penal" and that therefore the Eighth Amendment should apply.³⁵ However, that argument assumes a very broad interpretation of the word "penal." It is doubtful that the *Trop* Court intended that the concept of "penal" practices should be extended to include corporal punishment in public schools. In *Trop*, the punishment was imposed after conviction in a formal court-martial proceeding. However, in the administration of corporal punishment, there is no proceeding of an essentially criminal nature. Therefore, the classification of corporal punishment as "penal" within the context of the *Trop* opinion is questionable.

Hence, it is clear that the ratification and application of the Eighth Amendment demonstrate that the Cruel and Unusual Punishment Clause generally has served as a limitation only upon criminal punishments. In addition, the reasoning offered by the courts which have extended the amendment to noncriminal situations is not sound. The *Bramlet* court mistakenly justified the extension by citing criminal cases. The *Roberts* court's reliance on *Trop* also was misplaced because *Trop* was an essentially criminal case. It does not support a non-criminal application of the Eighth Amendment. Furthermore, corporal punishment cannot be classified as "penal" in the sense of the *Trop* opinion and, therefore, is not subject to the constraints of the Eighth Amendment. Thus, the Supreme Court can be expected to affirm the *Ingraham* Eighth Amendment decision, holding that the amendment cannot serve as a restraint on inflictions of corporal punishment in public schools.³⁶

34. *Id.* at 90, 91, 92, 93, 99, 103.

35. See note 31 and accompanying text *supra*.

36. The *Ingraham* dissent felt that part of the opinion in *Brown v. Board of Educ.*, 347 U.S. 483 (1954), supported the idea that the Eighth Amendment should be applied to public schools in the administration of corporal punishment. It cited a passage of *Brown* in which the Supreme Court discussed its interpretation of the Equal Protection Clause of the Fourteenth Amendment:

In approaching this problem, we cannot turn the clock back to 1868 when the amendment was adopted . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives the plaintiffs of the equal protection of the laws

525 F.2d at 923, quoting *Brown v. Board of Educ.*, 347 U.S. at 492-93. However, that passage does not serve as a theoretical basis for applying the Eighth Amendment to public schools. In *Brown*, the Supreme Court redefined the concept of equal protection. The

PROCEDURAL DUE PROCESS REQUIREMENTS OF CORPORAL PUNISHMENT

The demands of procedural due process of law require that state governmental activities that infringe upon Fourteenth Amendment concepts of liberty and property must be accompanied by minimum procedural safeguards.³⁷ In determining whether such safeguards are required, the court first will define the property or liberty interest in jeopardy.³⁸ Secondly, the court will determine what procedural safeguards, if any, are necessary. Although these procedures have been defined in various ways, the basic concept appears to be that deprivations of liberty or property by the state must be "preceded by notice and opportunity for hearing appropriate to the nature of the case."³⁹

In *Ingraham*, the plaintiffs alleged that those procedures required by statute regarding the administration of corporal punishment did not satisfy the requirements of due process. In Florida, the only procedure actually mandated was a consultation with the school principal prior to punishment.⁴⁰ The court felt that no further safeguards were necessary. In so holding, the court followed the reasoning employed in other public school corporal punishment cases such as *Gonyaw v. Gray*,⁴¹ *Glaser v.*

Court did not extend the application of the Fourteenth Amendment. In contrast, the dissent in *Ingraham* was attempting to extend the protection of the Eighth Amendment to situations in which the amendment had never applied. *Brown* cannot be used as authority for the dissent's proposal.

37. *Arnett v. Kennedy*, 416 U.S. 134, 164 (1974).

38. The interest is not required to be secured by the Constitution. *See, e.g., Goss v. Lopez*, 419 U.S. 565, 574 (1975), in which the Supreme Court held that a student's property right to public education, though founded in state law and not the United States Constitution, nevertheless falls under the protection of procedural due process.

39. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950). The requisite procedures also have been characterized as those dictated by "fairness and reasonableness in light of the totality of circumstances." *Ingraham v. Wright*, 525 F.2d 909, 917 (5th Cir. 1976), *citing Hannah v. Larcht*, 363 U.S. 420 (1960) and *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123 (1951). "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972), *quoting Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1854).

40. *See note 7 supra*. A local school board policy provided other limitations, such as administering the punishment with "kindness." However, the facts in *Ingraham* showed that this policy clearly was not followed. 525 F.2d at 916 n.6.

41. 361 F. Supp. 366 (D.Vt. 1973). In *Gonyaw*, the plaintiffs were 12-year old students who had been punished with several strokes of a belt. The plaintiffs alleged that the state statute which authorized the use of corporal punishment in schools violated procedural due process. The statute itself included no provisions for procedural safeguards:

A teacher . . . may resort to any reasonable form of punishment, including corporal punishment, and to any reasonable degree, for the purpose of securing

Marietta,⁴² and *Sims v. Board of Education*.⁴³ Those decisions indicated that such punishment is not a sufficiently serious deprivation of rights to warrant additional procedural safeguards.

The *Ingraham* holding may prove to be erroneous. A close analysis of the Supreme Court's current standing on procedural due process, together with a consideration of the facts in *Ingraham*, indicates that certain procedural safeguards may be required by the Constitution in administering corporal punishment.

Applying a due process analysis, it first must be determined whether the student has an interest protected by the Fourteenth Amendment in avoiding physical intrusions. The Supreme Court has indicated that the right to liberty includes "freedom from bodily restraint."⁴⁴ The Court has also noted that the concept of liberty is to be interpreted broadly.⁴⁵ Corporal punishment, like restraint, is an intrusion upon physical dignity. Thus, it appears reasonable to conclude that a liberty interest in avoiding physical intrusions such as corporal punishment does exist.⁴⁶

obedience . . . or for the purpose of securing or maintaining order in and control of [a] school.

VERMONT STAT. ANN. ch. 16, §1161 (1973). The plaintiffs also alleged that the corporal punishment was in violation of the Eighth Amendment and substantive due process. See notes 14 & 15 and accompanying text *supra*.

42. 351 F. Supp. 555 (W.D. Pa. 1972). In *Glaser*, the plaintiff was given three "medium" paddle strokes. He unsuccessfully alleged that the school district regulation that guided the administration of corporal punishment violated procedural due process. The regulation provided that the student should be informed of the reason for punishment and that it should be administered in the presence of another adult. 351 F. Supp. at 556.

43. 329 F. Supp. 678 (D.N.M. 1971). In this case, the plaintiff received moderate corporal punishment. A civil rights action was brought for declaratory and injunctive relief, alleging that the punishment violated the Eighth Amendment, and also that the school district regulation which guided the use of corporal punishment violated procedural and substantive due process. See note 14 and accompanying text *supra*. The regulation provided that corporal punishment should be administered in the presence of the school principal. 329 F. Supp. at 680.

44. *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972), quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Property interests, on the other hand, are characterized as "interests that a person has already acquired in specific benefits." *Id.* at 576. The right to freedom from physical punishments thus seems categorized more appropriately as "liberty" than "property."

45. *Id.* at 572.

46. The possible origins of a basic liberty interest or right to avoid physical punishment are many. It has been suggested that this right is derived directly from the Fourth Amendment. In *Schmerber v. California*, 384 U.S. 757 (1966), the Court said, "The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusions by the State." 384 U.S. at 767. See Brief for Petitioner at 52, *Ingraham v. Wright*, ___ U.S. _____. It also has been suggested, in the context of sub-

One question remaining is whether any procedures are required by the Due Process Clause to protect that liberty interest. In so determining, the severity of the deprivation is not conclusive.⁴⁷ Rather, the nature of the interest governs.⁴⁸ Thus, if the right or interest of which the individual is being deprived is one protected by the Fourteenth Amendment, then the individual has a basic right to procedural protection.⁴⁹ The only existing qualification is that the liberty or property deprivation must be greater than *de minimis*.⁵⁰ Applying that concept to *Ingraham*, it is arguable that corporal punishment is by its nature a deprivation of liberty that is greater than *de minimis*.⁵¹ The Supreme Court always has viewed physical intrusions with suspicion and has noted that “[e]ven a limited search of the outer clothing” is a “severe . . . intrusion upon cherished personal security.”⁵² Certainly, then, physical contact to the student’s body, which often is painful and capable of causing injury, is a deprivation of liberty that is not so insubstantial as to be termed *de minimis*. It follows that the student does have a basic right to procedural protection in corporal punishment.

stantive due process, that such a right is inherent in the penumbral right to privacy pronounced in the abortion decision of *Roe v. Wade*, 410 U.S. 113 (1973). See Note, *Corporal Punishment—Schools and School Districts—Constitutional Law*, 12 Duq. L. Rev. 645 (1974). This same theory could be applied to procedural due process.

47. *Goss v. Lopez*, 419 U.S. 565, 576 (1975), quoting *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972).

48. *Goss v. Lopez*, 419 U.S. 565, 575-76 (1975), quoting *Board of Regents v. Roth*, 408 U.S. 564, 570-71 (1972).

49. *Id.*

50. *Goss v. Lopez*, 419 U.S. 565, 576 (1975). Here, the Court held that a student is entitled to certain procedural safeguards before being suspended from a public high school. The Court viewed suspension as a deprivation of the student’s property interest in education as well as his or her liberty interest in maintaining a good reputation. *Id.* at 576. The Court ultimately held that procedural safeguards were required before suspension because “suspension from school is not *de minimis*.” *Id.* at 576. Thus, the Court apparently applied the *de minimis* test to both property and liberty, although the Court had earlier mentioned the *de minimis* test in terms of a property deprivation without mentioning liberty. *Id.* at 576. At any rate, the Court has not indicated that property and liberty interests are to be treated differently. They frequently are discussed together, and apparently are viewed only as terms that help to define the scope of the Fourteenth Amendment’s protection. See, e.g., *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972).

51. For this analysis, corporal punishment is defined as the purposeful striking of a pupil for purposes of chastisement. In its less severe forms, this type of punishment is often referred to as a “padding,” and is inflicted with the intention of producing mild pain. Thus, instances in which a teacher may grasp a student’s arm while reprimanding him would not qualify as corporal punishment.

52. *Terry v. Ohio*, 392 U.S. 1, 24-25 (1968).

Once the basic right to protective procedures has been established, it must be decided specifically what procedures are required. It is in this analysis that the severity of the liberty deprivation may be considered, together with the state's interest and purpose in infringing upon that liberty.⁵³ The Supreme Court, in its review of *Ingraham*, will consider the potential severity of the deprivation of liberty which occurs in the infliction of corporal punishment, along with the state's interest in maintaining order and discipline in the public schools. Then some reasonable due process requirements will be formulated for the imposition of such punishment.

Such a procedure was outlined by a three-judge district court in *Baker v. Owen*,⁵⁴ the only reported case requiring that corporal punishment be administered within the constraints of certain procedures. In *Baker*, a civil rights action based on 42 U.S.C. §1983⁵⁵ was brought on behalf of a sixth grade pupil who had been paddled moderately. The plaintiffs asserted that the statute which authorized the use of corporal punishment⁵⁶ was in violation of the Due Process Clause.⁵⁷ Upholding the statute on its face, the court prescribed a supplemental three-part procedure.⁵⁸ Basically, this procedure required that the student must be informed which behavior may invoke corporal punishment, that the punishment must be carried out in the presence of another school official who is informed of the reason for punishment, and that the parents be provided a written explanation of the reason for punishment on request.⁵⁹

53. *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961).

54. 395 F. Supp. 294 (M.D.N.C. 1975), *aff'd on other grounds*, 423 U.S. 907 (1975).

55. See note 5 *supra*.

56. NORTH CAROLINA GEN. STAT. §115-146 (1975), which provides, in relevant part:

Principals [and] teachers . . . in the public schools of this State may use reasonable force in the exercise of lawful authority to restrain or correct pupils and maintain order.

57. The court rejected the plaintiffs' claim that the infliction of reasonable corporal punishment upon a child without his or her parents' consent was in violation of a parental right to govern the upbringing of the child. The court noted that such a parental right is not "fundamental." Therefore, it is not necessary that the state show a "compelling interest" in corporal punishment. Rather, it was sufficient that the practice of reasonable corporal punishment bore a reasonable relationship to the legitimate state objective of maintaining order in the schools. 395 F. Supp. at 300.

58. The court held that corporal punishment is a deprivation of liberty which is greater than *de minimis*. 395 F. Supp. at 301.

59. The protective effect of this procedure lies in the fact that the student has an opportunity to protest his innocence to a responsive school official. Also, the officials are

In applying the current concepts of procedural due process to the question of corporal punishment, it appears that the *Ingraham* court erred in refusing to require procedural protection. The Supreme Court should be expected to reverse this holding and mandate some minimal procedural standards for the administration of corporal punishment. These procedures need not be elaborate or formal. The reasonable steps set forth in *Baker* would be satisfactory and fair to both the student and the state.

CONCLUSION

The *Ingraham* court's holding that the Eighth Amendment is inapplicable to public schools in the administration of corporal punishment is well supported by the ratification and case history of the amendment. Those courts that have held to the contrary have relied upon questionable reasoning that should not persuade the Supreme Court to reverse the *Ingraham* holding. The *Ingraham* court's refusal to mandate procedural protection in the imposition of corporal punishment may not be as soundly based. In view of the Supreme Court's recent pronouncements on procedural due process, it would be consistent for the Court to require some minimal procedures to accompany this mode of student discipline.

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held accountable to the student's parents. This decreases the possibility that students will be punished arbitrarily or without sufficient reason. For a commentary on the *Baker* decision and a discussion of the practical implications of the court's holding, see Note, *Procedural Due Process in the Administration of Corporal Punishment*, 11 WAKE FOREST L. REV. 703 (1975).