Excessive Exercise as Corporal Punishment in Moore v. Willis Independent School District - Has the Fifth Circuit Totally Isolated Itself in Its Position

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EXCESSIVE EXERCISE AS CORPORAL PUNISHMENT IN MOORE v. WILLIS INDEPENDENT SCHOOL DISTRICT - HAS THE FIFTH CIRCUIT "TOTALLY ISOLATED" ITSELF IN ITS POSITION?

"Granted, athletes are paid a great deal, but when sports start taking lives instead of generating grins, society needs to take another look at what's truly important."

I. INTRODUCTION

An ongoing debate exists over the problems with our nation’s education and sports programs; however, you “never hear experts arguing – nor see solid research proving – that schools [and athletic teams] would be much better if only the students were beaten [and punished] more regularly.” The use of physical discipline, or corporal punishment, on children has a long and sordid tradition in America’s homes, schools and athletic programs. The recent deaths of middle school, high school, college, semi-professional and professional athletes indicates that the use of excessive exercise and punishment by school officials and coaches can kill.


The practice of corporal punishment originated from the belief that “children were inherently evil and that beating [them] was an effective method of driving the devil from them.” Leonard P. Edwards, CORPORAL PUNISHMENT AND THE LEGAL SYSTEM, 36 SANTA CLARA L. REV. 983, 987 (1996). See generally Fox v. Cleveland, No. 00-2249, 2001 U.S. DIST. LEXIS 15149, at *7 (W.D. Ark. Aug. 22, 2001). This belief was enhanced by Judge Dawson, who commented “[that] while this court is sympathetic to the concern of parents who do not wish for their children to be subjected to any corporal punishment in school, it is permitted by law and has been one accepted form of discipline in this country for many years.” Id. See generally IRWIN A. HYMAN & JAMES H. WISE, CORPORAL PUNISHMENT IN AMERICAN EDUCATION: READINGS IN HISTORY, PRACTICE AND ALTERNATIVES 23 (Irwin A. Hyman & James H. Wise eds., 1979).

4. See Pedro F. Fonteboa & George Richards, Taking Extra Precautions: High School Coaches Keeping Close Eye on Hydration, MIAMI HERALD, Aug. 7, 2001, at 1D. Recently numerous football players have suffered many tragedies during practices. For example, on July 25, 2001, University of Florida freshman fullback Eraste Au-
Athletic officials and the media attempt to spin athletic injuries and deaths as unfortunate byproducts of playing the game.\textsuperscript{5} Despite their spin, "[c]oaches tweak and torque the athlete to see how far [they] can be pushed."\textsuperscript{6} Today athletes are treated as superhuman-heroes who are expected to play even when hurt, sick or fatigued.\textsuperscript{7}

According to common law standards, public school teachers and coaches may impose reasonable but not excessive force to discipline a child.\textsuperscript{8} The use of excessive force or exercise to discipline a child violates that child's substantive due process rights.\textsuperscript{9} In \textit{Fox v. Cleveland},\textsuperscript{10} however, Judge Dawson, a United States District Judge for the Western District of Arkansas recently opined that "[w]hether corporal punishment is a good or bad idea is not for this court to determine."\textsuperscript{11} Meanwhile, some students who are subjected to corporal punishment in public schools sustain physical and psychological injuries that are too excessive to be considered

tin, eighteen, died six days after collapsing of heatstroke while jogging to the Gators' locker room after voluntary conditioning workout. \textit{See id.} Then on August 1, 2001, Minnesota Vikings star lineman Korey Stringer, twenty-seven, died fifteen hours after collapsing of heatstroke during the Vikings' preseason practice on July 31, 2001. \textit{See id.} On that same day at Clinton Central High, Indiana athlete, Travis Stowers, seventeen, died from a brain aneurysm or heat stroke. \textit{See Steve Adamek, Sudden Death; Rash of Football Fatalities Puts Focus on Alarming Trend, Rec. (Bergen County, N.J.), Aug. 26, 2001, at A1.} A couple days later on August 3, Northwestern University football safety Rashidi Wheeler, twenty-two, collapsed and died after a workout. \textit{See Fonteboa & Richards, supra.} Wheeler had chronic asthma, but played with the condition since high school. \textit{See id.} In addition, on August 15, 2001, in Monticello, Georgia, a middle school player Jamarious Derez Bennett, thirteen, died from defective coronary artery during stretching drills on a day with a heat index in the 100s. \textit{See Adamek, supra.}

6. \textit{See id.}
7. \textit{See Ball, supra note 1.}
11. \textit{Id.} at *7 (Judge Dawson commenting). Judge Dawson articulated that discipline did not seem to be a problem for schools that had opted not to implement corporal punishment. \textit{See id.} Choosing not to "spare the rod" is a local decision for schools, as long as the punishment administered in those schools is not excessive or unreasonable. \textit{See id.}
reasonable in the eyes of the law. As a result, "a principal's office and the boxing ring are the only two public places in America where it's legally sanctioned to strike another person."15

This Note examines the constitutionality of excessive exercise as corporal punishment in Moore v. Willis Independent School District and analyzes whether students have a right to bodily integrity through the Fourteenth Amendment's Substantive Due Process Clause. Section II explores the facts of Moore. Section III of this Note surveys the elements of corporal punishment, with a focus upon both excessive exercise and excessive gym class exercise as a form of corporal punishment. Section IV delineates the Moore court's rationale in holding that as long as adequate state remedies exist for students who are subjected to excessive corporal punishment, there is no need to provide students with a Fourteenth Amendment substantive due process right. Section V provides a critical analysis of the court's determination that the availability of state court remedies precludes federal courts from considering students' substantive due process claims. In addition, Section V examines the compelling evidence that demonstrates why the Fifth Circuit should reconsider its stand on not providing a substantive due process right when corporal punishment is administered. Finally, Section VI discusses the implications and future effects of Moore on corporal punishment and excessive exercise.19

12. For cases holding the punishment administered was too excessive to be considered reasonable in the eyes of the law, see infra note 51.
14. For a discussion of Moore facts, see infra notes 20-36 and accompanying text.
15. For a discussion of excessive exercise and excessive gym class punishment, see infra notes 52-60 and accompanying text. For current estimates of corporal punishment in public schools and a description of the complex legal background behind corporal punishment, including both the Fourteenth Amendment substantive due process analysis and state statutory analysis, see infra notes 66-121.
16. For narrative analysis of the Moore decision, see infra notes 122-61 and accompanying text.
17. For critical analysis of the Moore decision, see infra notes 162-210 and accompanying text.
18. For a discussion on why the Fifth Circuit should reconsider its stances on corporal punishment, see infra notes 162-210 and accompanying text.
19. For a discussion of the impact of the Moore decision, see infra notes 211-29 and accompanying text.
II. FACTS

Aaron Moore was an eighth-grade student at Lynn Lucas Middle School in the Willis Texas Independent School District. Moore and approximately eighty other boys were enrolled in Allen Beene’s gym class. During class, Beene witnessed Moore talking during roll call, a violation of school policy, and punished Moore by having him to do one hundred “ups and downs.” Though Moore had never been similarly reprimanded in the past, he knew that failure to complete one hundred “ups and downs,” also known as squat-thrusts, would result in serious repercussions.

Beene warned Moore that if he stopped he would have to start over or go to the principal’s office. Moore finished the one hundred squat-thrusts and then participated in approximately twenty to twenty-five minutes of the required weight lifting for gym class. For the duration of the gym class, Moore did not complain to Beene of pain or fatigue, fearing such complaints would lead to further punishment. A few days later, however, Moore was diagnosed with rhabdomyolysis and renal failure; he also developed es-

20. See Moore v. Willis Indep. Sch. Dist., 233 F.3d 871, 873 (5th Cir. 2000). In April 1997, Aaron Moore was a fourteen-year-old student athlete who had just completed the school’s basketball season and was preparing to try out for the school’s track team. See id.

21. See id.

22. See id. According to an affidavit:
Beene described the exercise thus: [t]o perform an up-down the student starts in the standing position, then squats until he can place his hands flat on the floor. When the hands have been placed on the floor the legs are then extended fully to the rear while the arms remain straight at the elbows with the torso elevated above the floor. The legs are then drawn back under the torso into a squatting position, and the exercise is completed by returning to a standing position.

Id. at 873 n.3.

23. See id. at 873. A classmate counted the repetitions while Moore completed his punishment for fear of facing similar repercussions. See id.

24. See id. at 873.

25. See Moore, 233 F.3d at 873.

26. See id.
ophagitis/gastritis. As a result of Moore's ailments, he was hospitalized and missed three weeks of school.

Nancy Moore, Aaron's mother, asserted "Beene told her the 'ups and downs' were a means of punishment necessary to control middle school students." Mrs. Moore also claimed that Beene told her that he had "intentionally inflicted pain on her son, explaining, '[w]ith high school kids you can have them do two ups and downs and they remember the next time, [but] [w]ith junior high kids, you have to inflict pain or they don't remember." Mrs. Moore further commented that Ron Eikenberg, the school district's athletic director, revealed to her that "the coaches at the junior high were out of control and . . . did their own thing."

The Moores subsequently filed suit in federal district court, pursuant to 42 U.S.C. § 1983, alleging violations of the First, Fifth and Fourteenth Amendments of the United States Constitution against both the school district and Allen Beene. The school district and Beene responded to Moore's charges with motions to dismiss for failure to state a claim and, alternatively, for summary judgment. In their response to the summary judgment motion, the Moores conceded to the dismissal of their First Amendment claim, leaving only the substantive due process and state-law claims. The district court subsequently issued a final order grant-

27. See id.; see also id. at 873 n.4 (stating, "[r]habdomyolysis is a degenerative disease of the skeletal muscle that involves destruction of the muscle tissue, evidenced by the presence of myoglobin in the urine"). Renal failure represents the "inability of a kidney to excrete metabolites at normal plasma levels under conditions of normal loading, or the inability to retain electrolytes under conditions of normal intake." Richard Sloan, Sloan-Dorland Annotated Medical-Legal Dictionary 235 (West Publ'n Co. 1992). Esophagitis is "the inflammation of the esophagus." Id. at 226. Gastritis is "the inflammation of the stomach." Id. at 252.

28. See Moore, 233 F.3d at 873. Since the excessive exercise, Aaron has been unable to participate in any sports or extracurricular activities and continues to experience fatigue. See id.

29. Id. at 873.
30. Id.
31. Id.

32. See id. For explanation of 42 U.S.C. § 1983, see infra note 92. The Moores also filed suit against the school district individually under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2001), a claim they later non-suited, and against Beene alone for state-law claims of negligence and intentional infliction of emotional distress. See Moore, 233 F.3d at 873.

33. See Moore, 233 F.3d at 873.

34. See id. The matter was referred to a magistrate judge, who recommended that the defendants' motion for summary judgment be granted as to all claims after concluding that the plaintiffs could not allege a due process violation and that Beene was entitled to official immunity from the state-law claims. See id. at 873-74.
ing the defendants’ motion for summary judgment.\textsuperscript{35} On appeal, the Fifth Circuit determined the Moores had an adequate remedy under Texas law for Aaron’s alleged mistreatment and, therefore, could not make a constitutional claim. Consequently, the Moore’s federal claims were dismissed.\textsuperscript{36}

III. Background

The United States Department of Education’s most recent estimates put the number of regular school-administered instances of corporal punishment at over 600,000 per year, with southern states subjecting students to more corporal punishment than states in other regions.\textsuperscript{37} Many parents, teachers and coaches grew up in environments where corporal punishment was openly accepted.\textsuperscript{38} Accordingly, these individuals tend to strongly defend this style of punishment out of loyalty to their predecessors.\textsuperscript{39} However, today it has been said that

the law [is] establishing a double standard: teachers [and coaches] who detect unusual bruises on children’s bodies are required to report suspected abuse to authorities, while parents who see the same thing on their children as a result of educators’ [or coaches] disciplinary procedures get little to no back up from the law.\textsuperscript{40}

To the extent that the force or punishment administered by a school official is excessive or unreasonable, the educator or coach in virtually all states is subject to possible civil and criminal liability.\textsuperscript{41} Whether a particular state allows the practice of corporal pun-

\textsuperscript{35} See id. at 874.

\textsuperscript{36} See id. at 875.


\textsuperscript{39} See id. (reporting adult’s opinions that “they deserved it and therefore children deserve to be [punished] when they misbehave”).

\textsuperscript{40} Rebecca Catalanello, Boys, Blacks Paddled the Most, MOBILE REC., July 19, 2001, at 1A (quoting mother whose son was subjected to corporal punishment). Ironically, teachers who violate child abuse laws, but follow school policy, receive qualified immunity; while parents are liable for violating those same statutes. See Carolyn Peri Weiss, Note, Curbing Violence or Teaching it: Criminal Immunity for Teachers who Inflict Corporal Punishment, 74 WASH. U. L.Q. 1251, 1277 (1996).

\textsuperscript{41} See, e.g., Ingraham v. Wright, 430 U.S. 651, 661 (1977); Simms v. Sch. Dist. No. 1, 508 P.2d 256, 259 (Or. 1973) (discussing teacher’s potential liability for administering corporal punishment); Carr v. Wright, 423 S.W.2d 521, 522 (Ky.
ishment in their schools depends upon the decisions made by state policymakers.\textsuperscript{42} Nevertheless, local school officials retain the discretion to prohibit corporal punishment in their schools where the state fails to proscribe corporal punishment.\textsuperscript{43}

A. What Constitutes Corporal Punishment?

According to Black's Law Dictionary, corporal punishment is "physical punishment . . . inflicted upon the body."\textsuperscript{44} The hallmark of corporal punishment as it appears in schools is the use of physical force by a school official to reprimand a student for a school related misbehavior.\textsuperscript{45} Although states generally have not defined corporal punishment, a growing number have started to include it

1968) (same). For examples of teacher liability in the Fifth Circuit, see infra note 140.

42. See Imbrogno, supra note 37, at 129. Where a state law forbids schools from using corporal punishment, local school administrators are prohibited from dispensing this form of discipline. See id. These administrators retain no discretion on this matter. See id. "However, states which permit corporal punishment either do not address the issue in their legislative codes or, if permitting the practice by statute, draft the statute in permissive, as opposed to mandatory terms, allowing, but not requiring, schools to utilize physical force in disciplining their students." Id.

43. See Fox v. Cleveland, No. 00-2249, 2001 U.S. Dist. LEXIS 15149, at *7 (W.D. Ark. Aug. 22, 2001). Judge Dawson, in Fox, states that "[s]ome schools, . . . do not choose to 'spare the rod' and that is a local decision as long as the punishment is not excessive or unreasonable." Id.; see also Anzalone v. Tangipahoa Parish Sch. Bd., No. 95-2533, 1995 U.S. Dist. LEXIS 17660 at *2 (E.D. La. Nov. 17, 1995). In Anzalone, the court upheld the following state statute that passed discretion on to local policy makers: "[i]n those cases in which a parish or city school board decides to use corporal punishment, each parish or city school board shall adopt such rules and regulations as it deems necessary to implement and control any form of corporal punishment in schools in its district." Id.; see also Rodriguez v. Johnson, 504 N.Y.S.2d 379, 383 (1986) (noting that several school districts in New York State, including New York City, have outlawed all forms of corporal punishment). "No corporal punishment shall be inflicted in any of the public schools, no punishment of any kind tending to cause excessive fear or physical or mental distress." Rodriguez, 504 N.Y.S.2d at 385 n.22 (citing Bylaws of the Bd. of Educ., City Sch. Dist. of City of New York § 10.4 (1977)); see also Fla. Stat. Ann. § 230.23(6)(e)(1) (2000) ("The school board shall have the authority to prohibit the use of corporal punishment, provided that the school board adopts or has adopted a written program of alternative control or discipline.").

44. BLACK'S LAW DICTIONARY 1000 (7th ed. 2000).

45. See Neal ex rel. Neal v. Fulton County Bd. of Educ., 229 F.3d 1069, 1072 (11th Cir. 2000) (citing Ingraham v. Wright, 430 U.S. 651, 661 (1977)).

In addition to Ingraham's definition of corporal punishment, the Tenth Circuit, in Garcia v. Miera, outlined three categories of corporal punishment: (1) punishment not exceeding long-established common law standards of reasonableness are not actionable; (2) punishment exceeding traditional standards, which fail to provide adequate state remedies, violate one's procedural due process rights; and (3) punishments that are so abhorrently excessive "as to be shocking to the conscience violated substantive due process rights, without regard to the adequacy of state remedies." 817 F.2d 650, 656 (10th Cir. 1987).
in their public education statutes. These statutes define corporal punishment as “the use of physical force with the intention of causing a child to experience pain, but not injury, for the purpose of correction or control of the child’s behavior.” In those states where corporal punishment is allowed in school, such discipline provides no indication that children are either better behaved or more attentive. Conversely, researchers have found a direct relationship between corporal punishment in schools and delinquent and criminal behavior later in life. The most familiar forms of corporal punishment include “spanking, slapping, grabbing or

46. See, e.g., Fla. Stat. Ann. § 228.041(27) (2000) (defining corporal punishment 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 rule”); Mich. Comp. Laws Serv. § 380.1512 (2001) (defining corporal punishment as “the deliberate infliction of physical pain by hitting, paddling, spanking, slapping, or any other physical force used as a means of discipline”).


48. See Cynthia D. Sweeney, Comment, Corporal Punishment in Public Schools: A Violation of Substantive Due Process?, 33 Hastings L.J. 1245, 1279 (1982) (suggesting, on the basis of social science studies, that even moderate use of corporal punishment is “not rationally related to any legitimate education objective”); see also Spare the Rod, supra note 2 (arguing alternatively if punishment were so effective, officials wouldn’t need to resort to it so frequently and repeatedly).


[e]vidence indicates that hitting [and excessively punishing a child] is more than ethically wrong, that it hurts them for years afterward and in many complex ways. Physical punishment harms the child physically and emotionally. Hitting children increases their hostility and teaches violence. And because hitting creates a frustrated and unhappy child, hitting increases, not decreases, the child’s anti-social behavior.


However, as critics have observed, the data indicating a connection between corporal punishment of children and violence as an adult is debatable. But see Demie Kurz, Corporal Punishment and Adult Use of Violence: A Critique of “Discipline and Deviance,” 38 Soc. Probs. 155, 156 (1991) (indicating disappointing results
shoving a child roughly . . . and hitting with certain objects such as a hair brush, belt or paddle.\textsuperscript{50} The more cruel and abusive forms of corporal punishment include piercing the skin with straight pins, hitting kids with blunt objects, breaking bones, contouring limbs, smacking across the genitals and ordering excessive exercise.\textsuperscript{51}

Excessive exercise is prevalent in student-based athletic programs.\textsuperscript{52} It is not, however, the only form of corporal punishment from social scientists trying to explain why children who experience physical punishment lead to adult violence).

\textsuperscript{50} STRAUS & DONELLY, supra note 47, at 5; see also Saylor v. Bd. of Educ., 118 F.3d 507, 511 (6th Cir. 1997) (depicting corporal punishment by paddling); Garcia v. Miera, 817 F.2d 650, 653 (10th Cir. 1987) (describing principal holding student upside down by ankles and paddling student).


Additionally, some less traditional forms of discipline have been described as corporal punishment. See, e.g., London v. Dir. of DeWitt Pub. Schs., 194 F.3d 873, 875 (8th Cir. 1999) (dragging student across room and banging student’s head against metal pole by school official described as corporal punishment); P.B. v. Koch, 96 F.3d 1298, 1300 (9th Cir. 1996). In Koch, the school principal hit a student in the mouth, grabbed and squeezed the student’s neck, punched the student in the chest, and threw the student headfirst into lockers. See Koch, 96 F.3d at 1300; see also Metzger v. Osbeck, 841 F.2d 518, 519-20 (3d Cir. 1988). In Metzger, the school official grabbed a student in a chokehold, caused the student to lose consciousness and fall to the pavement where the student broke his nose and fractured his teeth. See Metzger, 841 F.2d at 519-20.

\textsuperscript{52} See Violent Coaching in Seymour, Texas — Correspondence Received by Parents and Teachers Against Violence in Education, Jan. 27, 1989, available at http://nospank.net/seymour.htm (last visited Oct. 15, 2001). In the article, two parents describe the mistreatment of their sons, where excessive exercise and gym class punishment were used to discipline them. See id. In particular, Susan Chambers explained that the basketball coach punished her son because he was failing English. See id. A doctor had recently treated the boy for a cerebral concussion the school knew about. See id. The coach proceeded to punish the boy by giving him one lick with the paddle and forcing him to run laps until he was told to stop. See id. The punishment entailed:

[running] numerous lengths and then was told to stop, and then was asked “Do you want to run more laps or get another lick?” The boy chose the paddle, because as he [told] his mother, “he couldn’t possibly run any more and would have passed out because he had such a headache and was totally exhausted.”
administered by coaches. In a Tennessee school gymnasium, a physical education teacher allegedly hit a student on the arm with a baseball bat. In an Illinois school locker room, a gym coach ordered two students to stand naked for sixteen minutes while yelling expletives at them for accidentally tearing their swimming suits before gym class. The gym coaches at the Old Joe Bradley High School in Huntsville, Alabama, have two palm-down prints painted on their desk. Students at Old Joe Bradley High School were called into the office "whenever they were caught cutting up in the hall." The students were told to "match palm-to-palm and lean and wait." In Detroit, Michigan, it is called "getting the wood," in which football players were struck by coaches with a paddle for various infractions such as talking back to teachers, receiving poor pro-

Id. As a result the coach was never to hit another student again and a letter was put in his permanent record. See id. As for Mrs. Chambers' son, he returned to the basketball program, was forced to sit the bench and the coach never allowed him to play in another basketball game. See id.; see also Letter to the Editor About a Violent Coach, Forced Exercise and Near Death, NEWS & OBSERVER, (Raleigh, N.C.), Mar. 18, 1992, available at http://www.nospank.net/coach1.htm (last visited Oct. 15, 2001) (hereinafter Letter to the Editor) (describing incident of violent coach in North Carolina who forced exercise on student who almost died). In this letter to the editor, a student recounted a near death experience he had because a coach forced him to exercise. See Letter to the Editor. The student recalled that one day he told the "Phys [E]d. coach" he wasn't feeling well. See id. Instead of the coach instructing him to take it easy, the coach ordered the boy to go on a three mile run. See id. The boy wrote that "the longer I ran, the sicker I got. I'd run a while and fall down and be sick a while. It took me 2 1/2 hours. The coach, who never came to look for me, reported me as skipping school." Id.

Later that night a doctor found the boy's appendix had ruptured, and rushed him to a hospital. See id. Emergency surgery was performed to save the boy's life. See id. For the next two days it was unknown whether the boy would live or die. See id. In his article, State, Coaches Can Offer No Alternative to Pain Sweat, John Bogert describes the abuse of physical education teachers and coaches. See John Bogert, State, Coaches Can Offer No Alternative to Pain Sweat, S. BAY DAILY BREEZE, July 13, 1989 available at http://nospank.net/bogert.htm. Specifically, Bogert wrote:

Know what hell is: 55 minutes with Coach Kapinski. But 55 minutes with Coach had a way of stretching out—like chewing gum on hot tarmac—into endless, aching minutes of punishment push-ups and (if you really screwed up, which we always did) the after school detention periods Coach called "tea parties."

Id. A "tea party" according to Bogert was "an hour under the [hot] sun in [California] frog-walking and sit-upping until [their bodies] screamed." Id.

53. See infra notes 50-51 and accompanying text.
55. See Daniel S. v. Bd. of Educ., 152 F. Supp. 2d 949, 951-52 (N.D. Ill. 2001) (finding plaintiff's substantive due process claim foreclosed because they successfully stated claims based on same conduct under Fourth Amendment).
57. See id.
58. See id.
gress reports or getting poor grades.59 And finally, in Camden, New York, a wrestling coach was found guilty of using excessive force when he slammed a student into the wall and hit him in the face with his forearm.60

B. Recent Decreases in the Use of Corporal Punishment

Although the amount and severity of corporal punishment and excessive exercise has decreased in the Twentieth Century, both still remain an integral component of the American family, school and playing field.61 Educators, psychologists, doctors, civil-rights lawyers and parents have compiled evidence which demonstrates that “[c]orporal punishment in school [or any other learning environment such as extracurricular sports programs] teaches a child to distrust authority, not to respect it, and creates an environment im-
imical to the self-confidence needed for learning.”62 Opponents of corporal punishment and excessive exercise argue that such disciplinary measures “perpetuate[ ] a cycle of violence, teaching children that violence is an appropriate tool for managing the behavior of others.”63 Yet, teachers and others in society believe, “just as parents must have the right to use corporal punishment ‘when necess-
ary,’ teachers also need a similar right to maintain discipline and order in schools.”64 Nevertheless, corporal punishment in public

59. Fred Girard, Player Says Coach Hit, Bruised Him: Police Examine January Pad-
year-old Omi Judkins, a student at Murray-Wright:
If you got a D, basically you were getting the wood. . . . If you got all C's
and up you were OK. Every D counts for three (whacks with the paddle),
and every F counts for five. We were over a long desk, palms down, facing
forward, and he just proceeded to hit us. I had two F's and a D, so I was
supposed to get 13 hits, but he stopped at number 10.
Id. Judkins remembered as Coach Blankenship struck him, he justified his actions
by saying, “that he wasn't doing it out of malice, he was trying to make me a man so
that I could survive out in the world.” Id.

60. See Jury Finds Camden Coach Used Excessive Force, DAILY SENTINEL (Rome,
N.Y.), Oct. 26, 2001, at 9. A federal jury awarded $20,000 to a former Camden
High athlete for his claim that he was assaulted by the varsity wrestling coach and
harassed by his teammates for filing suit. See id.

61. See Susan H. Bitensky, Spare the Rod, Embrace Out Humanity: Toward a New
Legal Regime Prohibiting Corporal Punishment of Children, 31 U. MICH. J.L. REFORM


63. Id.

64. Straus & Donnelly, supra note 47, at 47.
schools, including excessive exercise, remains the only state-sanctioned corporal punishment in the United States.65

C. Legal Framework Behind Corporal Punishment

1. United States Supreme Court rules on Corporal Punishment in Ingraham v. Wright

The leading Supreme Court case addressing the issue of corporal punishment in public schools is Ingraham v. Wright.66 This opinion has fostered judicial indifference to corporal punishment in schools.67 The case involved a severe incident of corporal punishment where the student developed a hematoma requiring medical attention and keeping him out of school for several days.68 The Supreme Court granted certiorari and limited its inquiry to two issues: (1) whether disciplinary corporal punishment of public school students violates the Eighth Amendment’s ban against cruel and unusual punishment; and (2) whether procedural due process requires notice and a hearing before corporal punishment is administered.69 The Court, however, declined to address the third issue of substantive due process; now the primary battlefield for constitutional challenges to public schools’ use of corporal punishment.70

65. See Imbrogno, supra note 37, at 125; see also Shannon Magsam, Arkansas Schools Still Using Paddle, Osceola School District: 1,800 Students; 1,752 Paddlings in One Year, ARK. DEMOCRAT-GAZETTE, Feb. 11, 2001, at 1B (showing argument against corporal punishment because “schools are the only institution in America in which striking another person is legally sanctioned”). Corporal punishment is not allowed in prisons, military institutions or in mental hospitals. See id.; see also Graham v. Connor, 490 U.S. 386 (1989) (stating in dicta convicted prisoner protected from excessive force); Youngberg v. Romeo, 457 U.S. 307 (1982) (holding patient at mental hospital had substantive due process right).


68. See Ingraham, 430 U.S. at 657 (footnotes omitted).

69. See id. at 659.

70. See id. at 659 n.12; Parkinson, supra note 67, at 281 (explaining development of battlefield).
a. Eighth Amendment Cruel and Unusual Punishment Analysis

The Ingraham Court held that the corporal punishment used, paddling, was neither cruel nor unusual punishment banned by the Eighth Amendment.\(^{71}\) On an examination of Eighth Amendment history and past precedent of the Supreme Court, the shelter against cruel and unusual punishment was designed to protect those convicted of crimes, not school students.\(^{72}\) Accordingly, the Court concluded that the Eighth Amendment was inapplicable when public school teachers or administrators inflict disciplinary corporal punishment.\(^{73}\)

b. Fourteenth Amendment Procedural Due Process Analysis

The Supreme Court also addressed whether the Constitution required a hearing before corporal punishment could be administered.\(^{74}\) The Court believed that “[i]n view of the low incidence of abuse, the openness of our schools, and the common-law safeguards that already exist, the risk of error that may result in violation of a schoolchild’s substantive rights can only be regarded as minimal.”\(^{75}\) The Court held that notice and a hearing prior to the administering of corporal punishment in public schools is not required by the Due Process Clause of the Constitution.\(^{76}\)

c. Fourteenth Amendment Substantive Due Process Analysis

The Supreme Court in Ingraham specifically declined to address the substantive due process question, leaving it open for the circuit courts to address.\(^{77}\) The Court in Ingraham, however, did

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71. See id. at 664-71.
72. See id. at 664. The Supreme Court adheres to this longstanding limitation and held that the Eighth Amendment does not apply in the corporal punishment arena as a means of maintaining discipline in public schools. See id.
73. See Ingraham, 430 U.S. at 671.
74. See id. at 680-82.
75. Id. at 682. The Court found that “[i]mposing additional administrative safeguards as a Constitutional [sic] requirement might reduce that risk marginally, but would also entail a significant intrusion into an area of primary educational responsibility.” Id.
76. See id.
77. See Parkinson, supra note 67, at 295 (noting longstanding acceptance of corporal punishment in schools and possibility of state court remedies). The Court in turn argued that having to determine the appropriateness of every instance of punishment would be an abuse of its judicial power. See Ingraham v. Wright, 525 F.2d 909, 917 (5th Cir. 1976) (en banc), aff'd, 430 U.S. 651 (1977). For a discussion of the Fifth Circuit’s view regarding substantive due process claims in the context of corporal punishment, see infra notes 114-21 and accompanying text.
suggest that excessive corporal punishment violates one's substantive due process rights. As the Court explained, "corporal punishment in public schools implicates a constitutionally protected liberty interest." The Court went on to say that "where school authorities, acting under color of state law, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain, . . . Fourteenth Amendment liberty interests are implicated." However, the Court emphasized that familiar constraints in the school, and also in the community, provide substantial protection against the violation of constitutional rights by school authorities. Nevertheless, in the course of deciding that state law remedies were adequate to protect against deprivations without procedural due process, the Court observed that "there [could] be no deprivation of substantive rights as long as disciplinary corporal punishment [was] within the limits of the common law privilege [to use reasonable force in disciplining children]." The Supreme Court held that "unlike a procedural due process violation, a substantive due process violation is complete when it occurs, making irrelevant the availability of any post hoc state remedy." In addition, the Supreme Court, in Monroe v. Pape, found that regardless of an adequate state remedy, the federal remedy is supplementary to the state remedy. This distinction is a distinction the federal courts have constantly made between procedural and substantive due process claims.


79. Ingraham, 420 U.S. at 672.

80. Id. at 674.

81. See New Jersey v. T.L.O., 469 U.S. 325, 349 (1985) (discussing Ingraham). In T.L.O., the Court, in discussing Ingraham, noted that "[a]t the end of the school day, the child is invariably free to return home. Even while at school, the child brings with him the support of family and friends and is rarely apart from teachers and other pupils who may witness and protest any instances of mistreatment." T.L.O., 469 U.S. at 349 (quoting Ingraham, 430 U.S. at 670).

82. Ingraham, 430 U.S. at 676 (emphasis added).


85. See id. at 185. "Federal and State rights may . . . exist in parallel, and federal courts may not avoid the obligation to define and vindicate the federal constitutional right merely because of a coincidence of related rights and remedies in the federal and state systems." Hall v. Tawney, 621 F.2d 607, 612 (4th Cir. 1980).

86. See Parkinson, supra note 67, at 302.
2. State Views on Corporate Punishment

Prior to Ingraham, only two states had banned all forms of corporate punishment, including excessive exercise, in public schools.\textsuperscript{87} Presently, twenty-seven states and the District of Columbia forbid the use of corporate punishment in public schools.\textsuperscript{88} Regardless, more than half of the United States still permits physical punishment in schools, and the discipline traditions rooted in the culture of many of these states suggests it may take generations before any of them change.\textsuperscript{89}

\textsuperscript{87} See Ingraham, 430 U.S. at 663. Those states were Massachusetts and New Jersey. See id.


Similarly, in Maine, teachers may use reasonable force against a student who “creates a disturbance” if the teacher “reasonably believes it necessary to control the disturbing behavior.” Me. Rev. Stat. Ann. tit. 17A, § 106 (West 1983). A comment to the statute, however, indicates that teachers are “not granted authority to use force in order to punish” students. Id. at cmt. 2 (emphasis added). In New Hampshire, corporal punishment is allowed “only in cases of self defense or under very exceptional circumstances. Such punishment is not recognized by the state board of education as a desirable method of discipline in New Hampshire schools.” N.H. Code Admin. R. Ed. 203.02 (1990). Rhode Island does not specifically prohibit corporal punishment in schools; however, when a parent or person responsible for the welfare of a child inflicts excessive corporal punishment, the child is considered to have been abused and/or neglected. R.I. Gen. Laws. § 40-11-2 (2001). Because corporal punishment, in schools, is not forbidden in Rhode Island but all school districts are directed to devise a discipline policy no districts have permitted the use of corporal punishment on students. See Parkinson, supra note 67, at 279 n.30 (citing Telephone Interview with Mr. Vila, Legal Office, Rhode Island Department of Education (Mar. 23, 1994)).

\textsuperscript{89} See Parkinson, supra note 67, at 280. States that permit pupil beating include: Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas and Wyoming. See Jordan Riak, Danger Zones: States in the U.S. that Permit Pupil Beating,
3. **Pre-Moore** Circuit Court Decisions

a. Courts that recognize a substantive due process claim for corporal punishment

In recent years, federal circuit courts have debated the issue of whether students are entitled to Fourteenth Amendment substantive due process protection when subjected to corporal punishment of any form in public schools. In *Hall v. Tawney*, the Fourth Circuit became the first circuit court to find that excessive corporal punishment in public schools could violate a child’s constitutional right to substantive due process, thereby subjecting school officials to liability under 42 U.S.C. § 1983. Additionally, the Fourth Circuit provided public school children a substantive due process right to bodily integrity. Following the Fourth Circuit’s lead in *Hall*, the Third, Sixth, Eighth, Ninth, Tenth and Eleventh Circuits also determined that students had a right to bodily integrity and should be afforded a right to substantive due process. This right, however, 

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90. See Parkinson, supra note 67, at 290 (observing several circuit courts addressed substantive due process issues for students subjected to corporal punishment).

91. 621 F.2d 607 (4th Cir. 1980).

92. See id. at 611-12. Section 1983 provides:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, 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 any action at law, suit in equity, or other proper proceeding for redress.


93. See *Hall*, 621 F.2d at 613. Substantive due process violations are recognized "as a last line of defense against those literally outrageous abuses of official power whose very variety makes formulation of a more precise standard impossible . . . we [the Fourth Circuit] simply do not see how we can fail also to recognize it in public school children . . . ." Id.

94. See Neal *ex rel.* Neal v. Fulton County Bd. of Educ., 229 F.3d 1069, 1076 (11th Cir. 2000) (finding coach who struck athlete in eye with metal weight lock and blinding athlete was adequate substantive due process claim); London v. Dirs. of the DeWitt Pub. Sch., 194 F.3d 873, 876-77 (8th Cir. 1999) (dragging student across room and banging student’s head against metal pole by school official was corporal punishment and sufficed to warrant substantive due process violation); Saylor v. Bd. of Educ., 118 F.3d 507, 514 (6th Cir. 1997) (holding excessive corporal punishment could violate student’s substantive due process right irrespective of availability of adequate state law remedy, here five licks with paddle did not give rise to constitutional violation); P.B. v. Alfred Koch, 95 F.3d 1298, 1303 n.4 (9th Cir. 1996) (noting Koch’s excessive use of physical force violated plaintiff’s clearly established rights giving rise to substantive due process claim); Metzger v. Osbeck, 841 F.2d 518, 520 (3d Cir. 1988) (ruling coaches conduct of putting student in
ever, is afforded to students only when the punishment imposed is found to be severe, arbitrary or capricious.95

Even though circuit courts have found that substantive due process protects school children from any form of excessive corporal punishment, the Fourteenth Amendment often provides little actual protection for students.96 To meet a substantive due process claim, a student must prove that the punishment administered "shocks the conscience," or was "excessive, arbitrary or capricious," and "not dispensed in furtherance of a legitimate goal of maintaining order."97 To determine whether the force used was excessive, some courts have applied a totality of the circumstances standard.98 Specifically, these courts assess "(1) the need for the application of corporal punishment, (2) the relationship between the need and


96. See David Orentlicher, Corporal Punishment in the Schools, 267 JAMA 3205, 3205 (1992) (observing lower federal courts’ emphasizing few limitations imposed under such right to liberty through Fourteenth Amendment substantive due process in corporal punishment cases).

97. Neal, 229 F.3d at 1075. Excessive corporal punishment, when not dispensed in compliance with a valid school policy allowing corporal punishment, as in Ingraham, “may be actionable under the due process clause when it is tantamount to arbitrary, egregious and conscious-shocking behavior.” Id. In the Tenth Circuit, the issue was whether the corporal punishment or excessive exercise “applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.” See Garcia, 817 F.2d at 655 (citing Hall, 621 F.2d at 613).

98. See Neal, 229 F.3d at 1075.
amount of punishment administered, and (3) the extent of the injury inflicted."\textsuperscript{99}

Nonetheless, the circuit courts differ as to whether a substantive due process right is available when an adequate state remedy is available to the claimant as well.\textsuperscript{100} For example, the Third Circuit, in \textit{Metzger v. Osbeck},\textsuperscript{101} found that a decision to discipline a student, if accomplished through excessive force and appreciable physical pain, may constitute an invasion of the student's Fifth Amendment liberty interest in personal security and a violation of Fourteenth Amendment's substantive due process.\textsuperscript{102} The Seventh Circuit further recognized that unreasonable liberty restrictions or corporal punishment could violate public school students' Fourth Amendment rights.\textsuperscript{103} Similarly, in \textit{Wise v. Pea Ridge School District}\textsuperscript{104} and \textit{London v. Directors of the DeWitt Public Schools},\textsuperscript{105} the Eighth Circuit found that the administration of corporal punishment may violate

\textsuperscript{99} See id. The Eleventh Circuit, in \textit{Neal}, held that, "at a minimum, the plaintiff must allege facts demonstrating that (1) a school official intentionally used an amount of force that was obviously excessive under the circumstances and (2) the force used presented a reasonably foreseeable risk of serious bodily injury." \textit{Id.}

Some circuits offer a fourth requirement in which the plaintiff must demonstrate that "the punishment was administered in a good faith effort to maintain discipline or maliciously and sadistically for the very purpose of causing harm." See \textit{Wise v. Pea Ridge Sch. Dist.}, 855 F.2d 560, 564 (8th Cir. 1988); see also \textit{London v. Dirs. of DeWitt Pub. Sch.}, 194 F.3d 873, 876 (8th Cir. 1999) (using the four factors established in \textit{Wise}).

\textsuperscript{100} See, e.g., \textit{Neal}, 229 F.3d at 1075 (holding excessive corporal punishment could violate student's substantive due process right irrespective of availability of adequate state law remedy); \textit{Saylor v. Bd. of Educ.}, 118 F.3d 507, 514 (6th Cir. 1997) (same).

In \textit{Neal}, a football coach blinded a student in one eye when he struck the athlete with a metal weight lock, as a form of punishment for plaintiff's involvement in a fight with another student. See \textit{Neal}, 229 F.3d at 1071 (explaining coach excessively punished plaintiff when his eye "was knocked completely out of its socket," leaving it "destroyed and dismembered").

\textsuperscript{101} 841 F.2d 518 (3rd Cir. 1988).

\textsuperscript{102} See id. at 519. In \textit{Metzger}, Defendant Coach Osbeck, chairman of the school's physical education department, overheard a junior high school student, Charles Metzger, using foul language. See id. Coach Osbeck grabbed Charles Metzger in a chokehold causing him to lose consciousness and fall to the pavement, where he fractured his nose and teeth. See id. at 519-20. The court found the school official's act to be excessive and deserving of a substantive due process violation. See id. at 520. The court believed that a reasonable jury could find the restraints employed by Coach Osbeck, if responsible for the student's loss of consciousness, exceeds the degree of force needed to correct Metzger's alleged breach of discipline. See id.

\textsuperscript{103} See \textit{Wallace v. Batavia Sch. Dist.} 101, 68 F.3d 1010, 1014-16 (7th Cir. 1995). The Fourth Amendment standard is one of "objective reasonableness" under the circumstances, without regard to the official's underlying intent or motivation. See \textit{Graham v. Connor}, 490 U.S. 386, 397 (1989).

\textsuperscript{104} 397 F.2d 560, 564 (8th Cir. 1988).

\textsuperscript{105} 194 F.3d 873, 876-77 (8th Cir. 1999).
students' liberty interests in personal security as well as substantive due process rights. Likewise, in *P.B. v. Alfred Koch*, the Ninth Circuit held that a principal who physically assaulted students violated clearly established constitutional rights. Additionally, the Tenth Circuit, in *Garcia v. Miera*, found that although *Ingraham* characterized ordinary corporal punishment as violating no substantive due process rights of school children, the *Ingraham* Court nevertheless acknowledged corporal punishment as implicating a fundamental liberty interest protected by the Due Process Clause. Ultimately, the Tenth Circuit concluded that *Ingraham* "clearly signaled . . . at some degree of excessiveness of cruelty, the meting out of such punishment violates the [s]ubstantive [d]ue [p]rocess rights of the pupil." Finally, in *Neal ex rel. Neal v. Fulton County Board of Education*, the Eleventh Circuit held that a student alleging excessive corporal punishment can, in certain circumstances, assert a cause of action for a violation of his rights under the Fourteenth Amendment's Due Process Clause.

b. Courts that do not recognize a substantive due process claim for corporal punishment

Alternatively, the Fifth Circuit, in *Fee v. Herndon*, agreed that "corporal punishment in public schools 'is a deprivation of substantive due process when it is arbitrary, capricious, or wholly unrelated

106. See Wise, 855 F.2d at 564; London, 194 F.3d at 876-77.
107. 96 F.3d 1298 (9th Cir. 1996).
108. See id. at 1303 n.4 (noting possible uncertainty of finding appropriate test to hold Koch accountable under does not immunize Koch from liability). The Court in *Koch* found, for purposes of resolving the qualified immunity appeal, they need not and do not resolve the question of whether the Fourth Amendment, rather than the Due Process Clause, protects a student from the use of excessive force by a school official. See id.

The standard for evaluating a qualified immunity claim was set forth in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Under the *Harlow* test, government officials "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. Determination of qualified immunity is now based "on the objective reasonableness of an official's conduct, as measured by reference to clearly established law . . . ." *Id.* See generally Stephanie E. Balcerzak, Note, *Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation*, 95 YALE L.J. 126 (1986) (detailing qualified immunity under § 1983).

109. 817 F.2d 650 (10th Cir. 1987).
110. See id. at 654.
111. *Id.*
112. 229 F.3d 1069 (11th Cir. 2000).
113. See id. at 1075.
114. 900 F.2d 804 (5th Cir. 1990).
to the legitimate state goal of maintaining an atmosphere conducive to learning.” 115 Recently, the Fifth Circuit, in Doe v. Taylor, 116 found a teacher’s conduct wholly unrelated to a legitimate state goal when the teacher sexually molested the student. 117 Nevertheless, the Fifth Circuit refused to recognize a cause of action where adequate state law remedies exist. 118 Accordingly, Fifth Circuit “precedents dictate that injuries sustained incidentally to corporal punishment . . . do not implicate the [D]ue [P]rocess [C]lause if the forum state affords adequate post-punishment civil or criminal remedies for the student to vindicate legal transgressions.” 119 No other court has adopted this exception, which has been expressly rejected by the other circuits. 120 This background leads us to the present Fifth Circuit case of Moore v. Willis Independent School District. 121

IV. Analysis

A. Narrative Analysis

1. Majority Decision

The Fifth Circuit begins its analysis in Moore by examining the summary judgment standard. 122 The Moore court reviewed the record de novo, applying the same standard as the district court, and determined that the dismissal was appropriate. 123 The standard for

115. Id. at 808 (quoting Woodard v. Los Fresnos Indep. Sch. Dist., 732 F.2d 1243, 1246 (5th Cir. 1984)).
116. 15 F.3d 443 (5th Cir. 1994) (en banc).
117. See id. at 445 (declaring substantive due process right available when student is sexually molested).
118. See Fee, 900 F.2d at 808. For examples of Texas precedent see Barr v. Bernhard, 562 S.W.2d 844, 849 (Tex. 1978) (finding appropriate remedy was criminal conviction for assault); Grimes v. Stringer, 957 S.W.2d 865 (Tex. App. 1997) (noting remedy was potential civil recovery in tort); Hogenson v. Williams, 542 S.W.2d 456 (Tex. Civ. App. 1976) (observing criminal conviction possible remedy for assault).
119. Fee, 900 F.2d at 808.
120. See, e.g., P.B. v. Koch, 96 F.3d 1298, 1302 n.3 (9th Cir. 1996). The Fifth Circuit approach is also at odds with Eleventh Circuit precedent. See McKinney v. Pate, 20 F.3d 1550, 1556-57 (11th Cir. 1994) (noting unlike procedural due process claim, “violation of a substantive due process right . . . is complete when it occurs; hence, the availability vel non of an adequate post-deprivation state remedy is irrelevant”).
121. 233 F.3d 871 (5th Cir. 2000).
122. See id. at 874.
123. See id. (citing Morris v. Covan World Wide Moving, Inc., 144 F.3d 377, 380 (5th Cir. 1998)). A motion for summary judgment is properly granted only if there is no genuine issue as to any material fact. See id. (citing Fed. R. Civ. P. § 56(c)).
summary judgment "mirrors that for judgment as a matter of law." Here, the court reviewed all favorable evidence to the moving party, concluding that the evidence the jury is not required to believe must be disregarded. The court further stipulated that credence should be given to the nonmoving party when favorable evidence, as well as uncontradicted and unimpeached evidence, supports the moving party.

The Moore court continued its analysis by examining Aaron Moore’s substantive due process claim. The court analyzed the plaintiff’s requirements for alleging a claim under 42 U.S.C. § 1983. In particular, the court noted that the plaintiff must first allege a violation of a right secured by the Constitution or laws of the United States. Second, the plaintiff must demonstrate that a person acting under color of state law committed the alleged deprivation. The Fifth Circuit ultimately held that the Moores did not and could not meet the first requirement of a § 1983 claim because the Fifth Circuit does not recognize, as a constitutional violation, the conduct of which the Moores complained.

The court further distinguished Moore from its recent case, Doe v. Taylor, where the Fifth Circuit recognized a student’s substantive

124. Id. (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)). The court further stipulated that “the court must review all of the evidence in the record, but make no credibility determinations or weigh any evidence.” Id. (citing Reeves v. Sanderson Plumbing Products, Inc., 550 U.S. 133 (2000)).

125. See id. (citing Reeves).

126. See Moore, 233 F.3d at 874 (same).

127. See id.

128. See id.

129. See id. (citing Leffall v. Dallas Indep. Sch. Dist., 28 F.3d 521, 525 (5th Cir. 1994).

130. See id. (same).

131. See Moore, 233 F.3d at 874 (remarking its determination was based on precedent); see also Siegert v. Gilley, 500 U.S. 226, 232 (1991) (noting whether plaintiff had been deprived rights secured by Constitution requires threshold inquiry into § 1983 claim).

132. See Moore, 233 F.3d at 874 (finding no claim even if against school system, administrators or employees alleged to have inflicted punishment). The court continues its analysis by discussing Fee v. Herndon, where the Fifth Circuit observes that "corporal punishment in public schools is a deprivation of substantive due process when it is arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning." Fee, 900 F.2d 804, 808 (5th Cir. 1990) (citing Woodard v. Los Fresnos Indep. Sch. Dist., 732 F.2d 1243, 1246 (5th Cir. 1984)).
due process claim. The Fifth Circuit, in *Taylor*, acknowledged that students have a liberty interest in maintaining bodily integrity that can be violated when there is no legitimate state goal. *Moore*, however, focused upon excessive exercise imposed as punishment to maintain discipline, "clearly a legitimate state goal." Unlike *Moore*, *Taylor* involved the sexual molestation of a student by a teacher, which is an act unrelated to a legitimate state purpose. The *Moore* court thus held that discipline must be preserved "in school classrooms and gymnasiums to create an [environment] in which students can learn."  

The court in *Moore*, also recognized that school officials, including coaches, must understand that forcing students to perform unreasonably excessive exercise violates the student's constitutional right to bodily integrity by posing a risk of significant harm. The *Moore* court distinguished this constitutional right, clarifying that it is not implicated when the conduct complained of is "corporal punishment — even unreasonably excessive corporal punishment intended as a disciplinary measure." The *Moore* court additionally held that because the Moores had an adequate remedy under Texas law, they were banned from stating a constitutional claim and their federal claims must be dismissed. Following Fifth Circuit

133. See *Moore*, 233 F.3d at 875 (distinguishing *Moore* from Doe v. Taylor, 15 F.3d 443 (5th Cir. 1994)).
134. See id. (explaining student's right in maintaining bodily integrity had been violated by teacher's conduct).
135. Id.
136. See id. (distinguishing *Moore* from *Taylor*); see also *Jefferson v. Ysleta Indep. Sch. Dist.*, 817 F.2d 303, 305 (5th Cir. 1987) (finding student's substantive due process rights implicated when she was allegedly tied to chair for two days as part of instructional technique).
137. *Moore*, 233 F.3d at 875.
138. See id.
139. Id. The *Moore* Court quoted *Fee*, [o]ur precedents dictate that injuries sustained incidentally to corporal punishment, irrespective of the severity of those injuries or the sensitivity of the student, do not implicate the due process clause if the forum state affords adequate post-punishment civil or criminal remedies for the student to vindicate legal transgressions.
140. See *Moore*, 233 F.3d at 875. Texas law immunizes educators against criminal responsibility when they use force against students, but only if they act reasonably when implementing corporal punishment. See id. In particular, the Educator-Student provision of the Texas Criminal Code states:

The use of force, but not deadly force, against a person is justified: (1) if the actor is entrusted with the care, supervision, or administration of the person for a special purpose; and (2) when and to the degree the actor reasonably believes the force is necessary to further the special purpose or to maintain discipline in a group.
precedent, the district court barred the Moores from proving Coach Beene's alleged mistreatment of student Aaron Moore as arbitrary, thus precluding their substantive due process claim against either the school district or Coach Beene.141

Notably, the Fifth Circuit found nothing arbitrary or unreasonable with the district court's finding.142 Furthermore, the court declined to exercise jurisdiction over the ancillary state law claims asserted by the Moores.143 The Fifth Circuit thereby reversed the district court's grant of summary judgment on the remaining state-law claims, remanding those claims back to the district court for dismissal without prejudice.144

2. Circuit Judge Wiener's Special Concurrence

In a concurring opinion, Justice Wiener observed that the Fifth Circuit, in recent years, "has become increasingly isolated in . . . [its] position that substantive due process [could not] be impli-

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Id. (citing Texas Penal Code § 962). Texas law provides a civil remedy, which imposes liability on a school employee who is negligent or uses excessive force resulting in a bodily injury when disciplining students. See id. For example, § 22.051(a) of the Texas Education Code states:

A professional employee of a school district is not personally liable for any act that is incident to or within the scope of the duties of the employee's position of employment and that involves the exercise of judgment or discretion on the part of the employee, except in circumstances in which a professional employee uses excessive force in the discipline of students or negligence resulting in bodily injury to students.

Id. at 875 (emphasis added) (Tex. Educ. Code § 22.051(a)). The court furnished examples of cases where Texas provided adequate traditional common-law remedies for students who had been subjected to excessive physical force. See id. at 876.

The court notes that these remedies include the possibility of potential civil recovery in tort, or criminal conviction for assault, as well as injury to a child. See id. (citing Barr v. Bernhard, 562 S.W.2d 844, 849 (Tex. 1978) (recognizing civil recovery for assault); Grimes v. Stringer, 957 S.W.2d 865, 867 (Tex. App. 1997) (potential civil recovery in tort).

In Spacek v. Charles, a middle school student claimed that the high school coaches violated state and federal law when they approached him and allegedly threatened to kill him if he did not improve his grades so that he could play high school sports. See 928 S.W.2d 88, 91 (Tex. App. 1996). The coaches countered that the incident did not occur as the student stated. See id. The coaches also claimed that, as a state employee acting within the scope of their employment, they were immune from suit. See id. The court held for the student in part and for the coach in part. See id. The court found that the coaches were immune from a portion of the federal claims. See id. The court, however, held that a substantial question as to the use of excessive force existed and that if it was determined that the coaches used excessive force, then they would not be immune from suit. See id.

141. See Moore, 233 F.3d at 876. The Fifth Circuit affirmed the district courts dismissal. See id.
142. See id.
143. See id. at 876.
144. See id.
icated by injuries that students suffer incidental to disciplinary corporal punishment as long as the state affords adequate civil or criminal remedies." Justice Wiener, therefore, perceived the Fifth Circuit to be totally isolated in its decision. Initially, Judge Wiener began by examining the Supreme Court's analysis in *Ingraham v. Wright.* Judge Wiener explained that in *Ingraham,* the Supreme Court limited its grant of certiorari to whether a due process violation existed and whether corporal punishment in schools represented cruel and unusual punishment. The *Ingraham* Court held that corporal punishment implicated Fourteenth Amendment liberty interests and that "there can be no deprivation of substantive rights as long as disciplinary corporal punishment is within the limits of the common-law privilege." The Fifth Circuit had previously decided the substantive due process claim, while the Supreme Court opted not to address the issue.

The Fifth Circuit previously held that "when a state sets reasonable limits and provides adequate remedies, corporal punishment cannot constitute arbitrary state action and therefore cannot sup-

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145. *Id.* at 876-77 (Wiener, J., specially concurring). Nevertheless, Judge Wiener felt Aaron's injuries and the circumstances surrounding them did not constitute a substantive due process violation. *See id.* at 877.

146. *See Moore,* 233 F.3d at 877.

147. *See id.* at 877.

148. *See id.* (noting that Supreme Court declined to review third question of whether severe corporal punishment can constitute substantive due process violation, question that the Fifth Circuit answered negatively in *Ingraham v. Wright,* 430 U.S. 651, 676 (1997)).

149. *Ingraham,* 430 U.S. at 676. In *Ingraham,* the Supreme Court "framed the threshold question [for] whether corporal punishment may rise to a substantive due process violation: did the corporal punishment imposed exceed the common-law privilege historically afforded to school authorities seeking to discipline students?" *Moore,* 233 F.3d at 877.

However, in *Moore,* Justice Wiener found that what the Supreme Court did not hold in *Ingraham* was more significant than what it did hold. *See Moore,* 233 F.3d at 877. Judge Wiener explained that the Supreme Court in *Ingraham* "did not proclaim that an adequate remedy provided by state law or procedure constitutes a per se bar to a student's ability to state a substantive due process claim based on excessive corporal punishment." *Id.* Furthermore, Judge Wiener notes that the Supreme Court in subsequent decisions has also found that "unlike a procedural due process violation, a substantive due process violation is complete when it occurs, making irrelevant the availability of any post hoc state remedy." *Id.* (citing *Zinermon v. Burch,* 494 U.S. 113, 125 (1990)). *Zinermon* found that "[t]he constitutional violation actionable under § 1983 is complete when the wrongful action is taken. A plaintiff . . . may invoke § 1983 regardless of any state-tort remedy that might be available to compensate him for the deprivation of these rights." *Id.* at 877, n.6 (quoting *Zinermon*).

150. *See Moore,* 233 F.3d at 877 (Wiener, J., specially concurring) (indicating over last two decades Fifth Circuit has recognized part of *Ingraham* decision that was not reviewed by Supreme Court).
port a claim grounded in a violation of substantive due process.”

Justice Wiener continued by explaining that “a careful reading of the cases that make up this line of decisions reveals that we have never closely examined the adequacy of those state remedies, instead simply dismissing section 1983 claims against school districts and individual defendants alike, regardless of whether they might be immune from suit.” While the majority in Moore refused to imply an opinion on the district court’s holding that Coach Beene was immune from liability, which ultimately indicated that he acted reasonably, the Fifth Circuit provided no federal relief for the student. According to the Fifth Circuit, the constitutional right to bodily integrity is not implicated when corporal punishment is alleged by a student. Justice Wiener, submitted to the fact that, under Texas law if all defendants in corporal punishment cases are found to be immune from liability, the next question is “whether the state really provides a remedy to injured students at all, much less an adequate one.”

Judge Wiener demonstrated in his special concurrence that no other circuit court deciding the issue of substantive due process in school corporal punishment or excessive exercise cases has followed the Fifth Circuit’s lead. Rather, the Third, Fourth, Sixth, Eighth, Tenth and Eleventh Circuits have all held that excessive corporal punishment, irrespective of an adequate state law remedy, may violate students’ substantive due process rights. The Ninth Circuit has held that students are protected from excessive force under either the Fourth Amendment or the Due Process Clause.

151. Id. at 878.
152. Id. (stipulating “[a]s a matter of fact, Texas school districts generally do have state-law governmental immunity from tort claims brought by injured students’); see, e.g., Fee v. Herndon, 900 F.2d 804, 810 (5th Cir. 1990) (interpreting without holding that under state law relief after the fact is unavailable against school officials); Barr v. Bernhard, 562 S.W.2d 844, 846 (Tex. 1978) (“The law is well settled in this state that an independent school district is an agency of the state and, while exercising governmental functions, is not answerable for its negligence in a suit sounding in tort.”).
153. See Moore, 233 F.3d at 878.
154. See id. at 875.
155. Id. (emphasis added).
156. Id. at 878.
157. See id. at 878-79. For circuit court cases, see supra note 94 and accompanying text.
158. See Moore, 233 F.3d at 878-79 (citing P.B. v. Koch, 96 F.3d 1298, 1303 n.4 (9th Cir. 1996)). For a discussion of principal’s physical assault on student in Koch, see supra note 51. The court in Koch also noted that “for purposes of resolving this qualified immunity appeal, we need not and do not resolve the question of whether the Fourth Amendment, rather than the Due Process Clause, protects a
Additionally, the Seventh Circuit has also held that unreasonable liberty restrictions or corporal punishment could violate a public school student’s Fourth Amendment rights.\textsuperscript{159} Based on the holdings in other circuit court decisions, Justice Wiener found that the Fifth Circuit, in \textit{Fee v. Herndon}, “placed too much reliance on the mere existence of putative state-law remedies when [it] answered in the negative the question ‘whether the federal Constitution independently shields public school students from excessive discipline.’”\textsuperscript{160} In his conclusion, Justice Wiener suggested “now is the time for this court, sitting \textit{en banc}, to re-examine its position.”\textsuperscript{161}

B. Critical Analysis

The Fifth Circuit inappropriately adopted the narrow rule that when adequate state remedies are available, excessive corporal punishment, and excessive exercise, in school can never support a substantive due process claim.\textsuperscript{162} \textit{Moore} was not a case where a teacher used reasonable force to restore order in the face of a school disturbance.\textsuperscript{163} Here, Aaron Moore’s claim presented the Fifth Circuit with a proper occasion to re-examine its view on corporal punishment and whether students subjected to such punishment in the form of excessive exercise can allege a substantive due process claim.\textsuperscript{164} Instead, the majority opinion in \textit{Moore} completely isolated the Fifth Circuit in its position that substantive due process cannot be implicated by injuries that students suffer incidental to disciplinary corporal punishment, whatever its form, provided that the student from the use of excessive force by a school official.” \textit{Koch}, 96 F.3d at 1303 n.4.

\textsuperscript{159} See Moore, 233 F.3d at 879 (Wiener, J., specially concurring) (citing Wallace v. Batavia Sch. Dist. 101, 68 F.3d 1010, 1014-16 (7th Cir. 1995) (where court used Fourth Amendment seizure standard to evaluate corporal punishment). The Seventh Circuit in \textit{Wallace} rejected plaintiff student’s theory of recovery under both the Fourth and Fourteenth Amendments. See \textit{Wallace}, 68 F.3d at 1014-16.

\textsuperscript{160} Moore, 233 F.3d at 879 (Wiener, J., specially concurring) (citing Fee v. Herndon, 900 F.2d 804, 808 (5th Cir. 1990)).

\textsuperscript{161} Id. at 880. Justice Wiener asked the court:

\textit{Id.}

Can we be the only circuit that is “in step” and all the rest out of step? We should not demur in our own housekeeping chores and merely leave to the Supreme Court the job of eliminating the existing split between this one circuit and all the rest that have announced an opposite position on the subject.

\textit{Id.}

\textsuperscript{162} See id. at 874. For further discussion on how the court arrived at its holding, see supra note 132 and accompanying text.

\textsuperscript{163} For a discussion of the actual excessive exercise inflicted, see \textit{supra} notes 22-24 and accompanying text.

\textsuperscript{164} See Moore, 233 F.3d at 877 (Wiener, J., specially concurring).
state affords adequate civil or criminal remedies.\textsuperscript{165} Discipline can rise to a level of arbitrary, capricious and shocking to the conscience thereby affording a substantive due process claim.\textsuperscript{166} A substantive due process claim is not available when disciplinary punishment is related to a legitimate government objective.\textsuperscript{167} That legitimate government objective is to maintain order, discipline and the educational environment; however, excessive exercise is not substantially related to this legitimate government objective giving rise to a substantive due process violation.\textsuperscript{168} Using excessive exercise as discipline, such as forcing school athletes to run laps, do push-ups, do squat thrusts or undergo other excessive physical punishment for misbehavior, is just as illegal as corporal punishment and has been deemed to be one of the most abusive forms of discipline.\textsuperscript{169} When a student or athlete is forced to do squat thrusts, push-ups or run laps, it should be done as part of a well thought-out program where all students or athletes are expected to participate in these activities as part of a conditioning aspect of the athletic curriculum.\textsuperscript{170} Singling out students or athletes to perform push-ups or laps as a type of discipline is "contrary

\textsuperscript{165} See id. For further discussion on Texas' use of adequate state remedies to preclude federal remedies, see supra notes 140-41 and accompanying text.

\textsuperscript{166} See Neal ex rel. Neal v. Fulton County Bd. of Educ., 299 F.3d 1069, 1074-75 (11th Cir. 2000) (citing London v. Dir. of DeWitt Pub. Schs., 194 F.3d 873, 876-77 (8th Cir. 1999) (citing Wise v. Pea Ridge Sch. Dist., 855 F.2d 560, 564-65 (8th Cir. 1988)); Saylor v. Bd. of Educ., 118 F.3d 507, 514 (6th Cir. 1997); Metzger v. Osbeck, 841 F.2d 518, 520 (3d Cir. 1988); Garcia v. Miera, 817 F.2d 650, 653 (10th Cir. 1987); Hall v. Tawney, 621 F.2d 607, 611-14 (4th Cir. 1980); see also Fee, 900 F.2d at 808 ("[C]orporal punishment in public schools is a deprivation of substantive due process when it is arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning.").


\textsuperscript{169} See State Advises Against Push-Up Punishment, UNITED PRESS INT'L, July 11, 1989, available at http://www.lexis.com/research/retrieve/frames?_M=884aee5bb46044f8b8cfdd6a1b05d66a9f&fntstr=VKW1C&docnum=1&startdoc=1&_startchk=1wvchp=dGLSts1l1b&md5=74c3b30bedd479a5271b892a999d165 (commenting on sentiment advised by California State Department of Education); see also Waechter, 773 F. Supp. at 1007 (describing excessive exercise imposed on student, leading to student's death). The excessive exercise imposed in Waechter was a 350-yard dash, known as "gut run," and was required to be completed in less than two minutes. See Waechter, 733 F. Supp. at 1007. The fifth grade teacher instructed the student to run the "gut run" as punishment for talking in line with another classmate during recess. See id. While completing the run, the student suffered a cardiac arrhythmia and died. See id.

to sound educational practices."  

Excessive exercise "is not going to teach discipline or respect."  

Disruptive students, who are commanded to perform painful or uncomfortable acts, are not going to change their behavior.  

Discipline through excessive exercise will not address the athlete’s behavioral problems, but instead, creates a loathing for physical activity.  

Over time this dislike of physical activity will be more harmful to the athlete’s long-term health than any current “beneficial conditioning.”

Research also demonstrates that “children [exposed to corporal punishment] are from two to six times more likely to be physically aggressive, to become juvenile delinquents, and later, as adults, to use physical violence against their spouses, to have sadomasochistic tendencies and to suffer from depression.”  

Recent brain research also shows that higher-level thinking will shut down

171. See id. Sometimes coaches forget that teenagers are not adults, or that one teen does not have the same athletic ability as another. See Rainer Martens, Ph.D., Successful Coaching 29 (Lynn Hooper & Julia Anderson eds., Human Kinetics 1990) (1981). When coaches fail to view their athletes as successful, they have set unrealistic expectations. See id. Coaches often have to decide whether to pursue victory at all costs, with a possible expense being the demise of an athlete’s physical well-being or development. See id. at 3.

172. Scott, supra note 170. Coaches need to provide evaluation, not punishment through excessive exercise, especially when it is clear that athletes don’t know right from wrong. See Martens, supra note 171, at 30. Praise your athletes if their behavior is good and tell them specifically what is good about it. See id. If their actions are wrong, a good coach should give the athlete specific instructions on how to improve rather than punishing them through excessive exercise. See id.

173. See Scott, supra note 170. Educators argue that “punishment does not work,” that it can lead to more unpleasant behavior than the original problem behavior and can even create hostility in the athlete. See Martens, supra note 171, at 40.

174. Scott, supra note 170. The “time-out” method is an effective form of punishment available as an alternative for coaches to excessive exercise because athletes generally just want to actively participate. See Martens, supra note 171, at 41.

175. See Scott, supra note 170; see also How Should Coaches Punish Athletes?, STAR Trib., Apr. 23, 1998, at B8 (offering guidelines to coaches stipulating they should never make athletes sweat). The guidelines specify that coaches should never use physical activity as punishment. See How Should Coaches Punish Athletes?, STAR Trib., Apr. 23, 1998, at B8. The reasoning is that having students run laps or do push-ups only causes athletes to resent physical activity and sports. See id. The guidelines further state that physical activity is something that students should learn to enjoy throughout their lives. See id. Interestingly, “[m]any outstanding athletes candidly say that their best memories of sport[s] are not the victories themselves, but the months of preparation and anticipation and the self-revelation before and during the competition.” Martens, supra note 171, at 7.

if children feel threatened. 177 Experienced on a regular basis, this stress will produce an inability to think before acting. 178

In what the Fifth Circuit calls the “leading [Supreme Court] corporal punishment case,” Ingraham v. Wright, the Supreme Court declined to address whether severe corporal punishment could constitute a substantive due process violation. 179 In doing so, the Supreme Court fostered the Fifth Circuit’s decision on the issue of substantive due process in the context of corporal punishment. 180 Even though the Ingraham Court declined to answer the substantive due process question, the Court did suggest a favorable view that excessive corporal punishment violates substantive due process. 181 The Court also explained that “where school authorities, acting under color of state law, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain, we hold that the Fourteenth Amendment liberty interests are implicated.” 182 Yet in the course of deciding that state law remedies were adequate to protect against deprivations without procedural due process, the Ingraham Court observed, that “there [could] be no deprivation of substantive rights as long as disciplinary corporal punishment [was] within the limits of the common law privilege [to use reasonable force in disciplining children].” 183

177. See id.
178. See id. Resnick explained that: when higher-level thinking skills close down

[t]he limbic system, which is responsible for the fight or flight response, takes over. When this happens, chemicals in the brain are released that actually affect the developing architecture of the brain. This type of high stress on a regular basis has been proven to produce a brain which is impulsive, hyper-reactive and which does not have the ability to think before acting.

Id.
179. See Moore, 233 F.3d at 877 (Wiener, J., specially concurring) (citing Ingraham v. Wright, 430 U.S. 651, 659 n.12, 679 n.47 (1977)).
180. See Parkinson, supra note 67, at 295 (noting Fifth Circuit’s acknowledgement of state court remedies and longstanding acceptance of corporal punishment in schools). The Fifth Circuit contended in Ingraham that it would be an abuse of its judicial power to determine the appropriateness of particular punishments. See Ingraham v. Wright, 525 F.2d 909, 917 (5th Cir. 1976) (en banc), aff’d, 430 U.S. 651 (1977).
181. See Ingraham, 430 U.S. at 672 (finding that corporal punishment in public schools does implicate a “constitutionally protected liberty interest”); see also Neal ex rel. Neal v. Fulton County Bd. of Educ., 229 F.3d 1069, 1074-75 (11th Cir. 2000) (indicating those Courts of Appeals which have examined Ingraham’s language have held that “plaintiff[s] alleging excessive corporal punishment may in certain circumstances state a claim under the Substantive Due Process Clause”).
182. Ingraham, 430 U.S. at 674.
183. Id. at 676 (emphasis added).
Most interestingly, however, is what the Supreme Court did not hold in Ingraham - that "an adequate remedy provided by state law or procedure constitutes a per se bar to a student's ability to state a substantive due process claim" based on excessive corporal punishment.\(^{184}\) The Supreme Court's subsequent writings heighten the significance of this by stating that "unlike a procedural due process violation, a substantive due process violation is complete when it occurs, making irrelevant the availability of any post hoc state remedy."\(^{185}\) Thus, the Fifth Circuit's posture on substantive due process claims is predicated on the belief that the availability of state court remedies precludes federal court consideration.\(^{186}\) The Fifth Circuit's analysis, however, "ignores a distinction federal courts have consistently made between" both procedural and substantive due process claims.\(^{187}\) In Moore, Judge Wiener was concerned with the court's holding and whether Texas law actually provided an adequate state remedy at all for students injured by teachers and coaches in school.\(^{188}\) The Supreme Court, in Monroe v. Pape, found 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."\(^{189}\)

While, the Fifth Circuit in Ingraham answered the substantive due process question in the negative, it did not state that corporal punishment could not rise to the level of a constitutional violation under any circumstances.\(^{190}\) When examining Moore, the case is similar to Neal ex rel. Neal v. Fulton because both are distinguishable

\(^{184}\) Moore, 233 F.3d at 877 (Wiener, J., specially concurring).

\(^{185}\) Id. at 877 (citing Zinermon v. Burch, 494 U.S. 113, 125 (1990)). The Supreme Court in Zinermon noted that a constitutional violation actionable under § 1983 is complete when the wrongful action is taken. See Zinermon, 494 U.S. at 125. Regardless of any available state remedy, a plaintiff may invoke § 1983 for compensation for the deprivation of any constitutional rights. See id.

\(^{186}\) See Parkinson, supra note 67, at 302.

\(^{187}\) Id.

\(^{188}\) See Moore, 233 F.3d at 878 (Wiener, J., specially concurring). Justice Wiener questions the Fifth Circuit's decision because "if all defendants are immune from liability under Texas law, the question presented becomes whether the state really provides a remedy to injured students at all, much less an adequate one." Id.

\(^{189}\) Monroe v. Pape, 365 U.S. 167, 183 (1961). "Federal and State rights may exist in parallel, and federal courts may not avoid the obligation to define and vindicate the federal constitutional right merely because of a coincidence of related rights and remedies in the federal and state systems." Hall v. Tawney, 621 F.2d 607, 612 (4th Cir. 1980).

\(^{190}\) See Neal ex rel. Neal v. Fulton County Bd. of Educ., 229 F.3d 1069, 1073 (11th Cir. 2000) (interpreting Ingraham).
from the Fifth Circuit's view of *Ingraham*. In *Moore*, just as in *Neal*, it was not argued that the excessive exercise Coach Beene imposed was pursuant to a school corporal punishment policy which *Ingraham* requires. Also, the case fails to note whether Coach Beene conferred with school administrators before punishing Moore or whether he was expressly authorized by school officials to administer the punishment he allegedly inflicted upon Moore. Instead, Coach Beene, a gym teacher, summarily and arbitrarily punished Moore, a student, by ordering Moore to perform one hundred "ups and downs."

The *Moore* court's view on substantive due process is not in accord with any other federal appellate court. In refusing to consider questions on substantive due process, with regard to excessive exercise and corporal punishment, the Fifth Circuit stands alone. In the context of disciplinary corporal punishment in public schools, a "substantive due process claim is quite different than a claim of assault and battery under state tort law." The focus on the abuse of power is a crucial distinction between constitutional violations and routine torts. Nonetheless, some corporal punishments in school may be "so brutal, demeaning and harmful," so "literally outrageous," as to violate the student's Fourteenth Amend-

191. See id. at 1074 (distinguishing *Neal* from *Ingraham*).
192. See id.
193. See generally *Moore*, 233 F.3d 871 (5th Cir. 2000). See also, *Neal*, 229 F.3d at 1074 (suggesting facts of *Neal* distinctively different from *Ingraham*, presenting entirely different issue). Although not required by *Ingraham* many states and school districts require the teacher to confer with principal before punishment is administered; that the punishment be administered in the presence of another school official; and that the parents be notified before corporal punishment is administered. See id. at 1073 n.1.
194. See *Moore*, 233 F.3d at 873 (Wiener, J., specially concurring). It is uncertain whether the excessive exercise imposed in *Moore* would necessarily rise to the level of a constitutional violation, but the Moores should have had the opportunity to argue that their son's substantive due process rights were violated. See id. at 877.
195. See id. at 880.
196. See Parkinson, supra note 67, at 303; see also *Moore*, 233 F.3d at 878-79 (Wiener, J., specially concurring) (noting Fifth Circuit isolation from other jurisdictions on substantive due process issue). For a further discussion of the Fifth Circuit's isolation on this issue, see supra notes 145-61 and accompanying text.
197. Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980). Substantive due process determinations do not turn on whether ten licks as opposed to five licks would be excessive as would be the case in a state tort claim. See id. Instead, substantive due process is concerned with violations of bodily security of a higher magnitude. See id.
198. See Metzger v. Osbeck, 841 F.2d 518, 523 (3d Cir. 1988) (Weis, J., concurring in part and dissenting in part) (advising caution when relying on extent of injuries to determine when conduct escalates to constitutional violation). The extent of an injury affects the amount of damages, not liability. See id.
mental rights. The existence of the privilege of bodily security is the "most fundamental aspect of personal privacy" and is unmistakably established in our constitutional decisions as an attribute of the ordered liberty that is the concern of substantive due process. For public school children, who are lawfully confined to the classroom, arbitrary corporal punishment represents an invasion of personal security to which their parents have not consented when entrusting their children to the State. The Fourth Circuit, in Hall v. Tawney, declared that

the substantive due process inquiry . . . must be whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.

Determining whether a constitutional violation has occurred, courts must examine why force was applied, the correlation between the need and the amount of force used, the extent of injury, the teacher’s or coach’s actions to keep or restore order and the reasons for inflicting harm. In some instances, corporal punishment that is reasonably related to the legitimate state interest of maintaining order in schools or on the athletic field will not violate a student’s Fourteenth Amendment rights. Nonetheless, the Fifth Circuit refuses to examine each individual instance of punishment to determine whether it has been administered arbitrarily or capriciously.

199. See Hall, 621 F.2d at 613.
200. See id.
202. Hall, 621 F.2d at 613; see also Saylor v. Bd. of Educ., 118 F.3d 507, 514 (6th Cir. 1997) (agreeing that Hall’s substantive due process inquiry is appropriate to make in instant case).
203. See Metzger, 841 F.2d at 520 (citing Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)). In Metzger, the court stated that a jury might reasonably conclude that as a physical education teacher and extracurricular sports coach, Osbeck should have been aware of the inherent risks of restraining a student by force. See id. at 521.
204. See Hall, 621 F.2d at 611-12 (explaining that one’s constitutional rights can be violated when punishment exceeds in severity that which is reasonably related to maintaining classroom order).
205. See Ingraham v. Wright, 525 F.2d 909, 917 (5th Cir. 1976) (en banc), aff’d, 930 U.S. 651 (1977) (noting it is not court’s duty to rule on wisdom of school’s internal discipline regulation). The Fifth Circuit explained that such in-
Overall, many courts have been reluctant to expand the concept of substantive due process because "guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended." A persuasive rationale articulated by some courts is that the Fourteenth Amendment is not a "front of tort law" to be used, through section 1983, to transfer state tort claims into federal causes of action. Nevertheless, in certain situations, a student or athlete alleging corporal punishment generally, and excessive exercise particularly, may assert a cause of action for violating their rights under the Fourteenth Amendment's Due Process Clause, except in the Fifth Circuit.

The Fifth Circuit's tolerance for corporal punishment reflects not only the undervaluation of students but also an overvaluation of pain and other kinds of suffering. Due to this circuit's overvaluation of pain and suffering, it is inclined to see greater virtue in corporal punishment than is justified by its actual benefits and harms.

V. Impact

The continuing uncertainty surrounding substantive due process has led to a conflict among the circuits that treat the constitutional rights of students differently depending on where they live. This inconsistency has been apparent at least since 1980, when a student's substantive due process right to be free from excessive corporal punishment was recognized in Hall by the Fifth Circuit. It is too late to argue that federal courts should stay out of the corporal punishment and excessive exercise arenas, so now it is

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207. See id. The Supreme Court did not think that the drafters of the Fourteenth Amendment intended the Amendment to play such a role in our society. See Parratt v. Taylor, 451 U.S. 527, 544 (1981).
208. See Moore v. Willis Indep. Sch. Dist., 233 F.3d 871, 874 (5th Cir. 2000); see also supra note 94 and accompanying text (discussing circuits that have similarly upheld a cause of action for substantive due process).
209. See Orentlicher, supra note 47, at 177 (observing children are undervalued).
210. See id. at 185. Alternatively, the pain caused by corporal punishment is mistaken to be beneficial to a child's social progress when in actuality it is more harmful to the child's psychological and behavioral well-being. See id.
211. Parkinson, supra note 67, at 302.
212. See id.
“incumbent upon them to apply a meaningful standard by which to judge substantive due process claims.”

Perhaps the strongest argument against corporal punishment and excessive exercise is the availability of non-violent alternatives for disciplining students and athletes. Many argue that “discipline has nothing to do with punishment.” Discipline is about teaching students and athletes what they need to know to become self-disciplined and responsible. It is important to acknowledge that no absolute empirical evidence exists on the effects of corporal punishment. Despite uncertainties in the data, however, the existence of evidence suggesting harm leaves reason to be concerned about corporal punishment, because even if corporal punishment is effective, it still violates basic values of human dignity and respect. With the Fifth Circuit’s decision sanctioning corporal punishment, it is al-

213. Id. at 303-04.

214. See Irwin A. Hyman, Corporal Punishment, Psychological Maltreatment, Violence, and Punishiveness in America: Research, Advocacy, and Public Policy, 4 APPLIED & PREVENTATIVE PSYCHOL. 113, 119 (1995). However, regardless of these alternatives “it is important for coaches to have realistic goals not only about their athletes’ performance abilities, but about their emotional and social behavior as well. Remember, it’s natural for kids to ‘horse around’ and have fun.” MARTENS, supra note 171, at 29.

215. See Resnick, supra note 38.

216. See id. (noting that discipline is about helping students behave better next time). “Coaches clearly face a dilemma about their objectives when they coach.” MARTENS, supra note 171, at 5. When it comes to sports, society awards winners, not losers. See id. “Coaches who play only their best athletes, who play injured athletes, or who scream disparagingly at athletes who have erred demonstrate that winning is more important to them than [the] athletes’ development.” Id.

217. See Orentlicher, supra note 47, at 160; see also Marjorie Lindner Gunnoe & Carrie Lea Mariner, Toward a Developmental-Contextual Model of the Effects of Parental Spanking on Children’s Aggression, 151 ARCHIVES OF PEDIATRICS & ADOLESCENT MED. 768, 774 (1997) (recognizing additional research needed to reconcile competing interpretations offered on effectiveness of corporal punishment). Additional research, however, is not required for understanding that excessive exercise is not essential to evaluate an athlete’s performance; the sports competition does that already. See MARTENS, supra note 171, at 30. “Usually athletes know when they have played poorly. Who needs to be told you made an error when the ball goes between your legs and the game winning run scores? Athletes need some room to make mistakes—that’s part of learning.” Id.

218. See Orentlicher, supra note 47, at 160 (commenting that society no longer condones or tolerates physical assaults of people, especially children).

Even in the context of professional sports, society does not condone violence outside the playing arena. See Erik Brady & Gary Mihoces, Crossing the Line: Player-Coach Battle Stirs Debate, USA TODAY, Dec. 5, 1997, at C1 (discussing public’s intolerance of off-field violent incidents involving players and coaches). “A sports league does not have to accept or condone behavior that would not be tolerated in any other segment of society,” announced NBA Commissioner David Stern regarding the suspension of a player for physically assaulting his coach. Id.
most impossible for society to send a clear message against the use of physical violence.\textsuperscript{219}  

There can be no debate that the existence of excessive exercise or corporal punishment in gym class can cause serious injuries and can kill in some instances.\textsuperscript{220} Athletes are expected to give 110% and push their bodies beyond its limit, to retain their spot on the team and prevent their jobs from going to someone who will.\textsuperscript{221} The recent deaths of athletes of all ages and abilities, should signal that requiring an athlete to give 110% isn’t always positive.\textsuperscript{222} Clearly, excessive exercise is one of the most abusive forms of corporal punishment and, yet, students rarely complain.\textsuperscript{223} It is Vince

\textsuperscript{219} See Orentlicher, supra note 47, at 185.  

\textsuperscript{220} For recent tragedies resulting from excessive exercise, see supra note 4. See also Ball, supra note 1 (indicating sports officials at all competitive levels have begun intense investigations into practices to prevent future deaths from excessive exercise). "Winning or [disciplining] ... is never more important than athletes’ well-being, regardless of the mixed messages our society sends." Martens, supra note 171, at 8 (emphasis added). When coaches keep winning in perspective, sport programs produce young people who enjoy sports, who strive for excellence, who dare to risk error in order to learn, and who grow with both praise and constructive criticism. When winning is kept in perspective, there is room for fun in the pursuit of victory—or, more accurately, the pursuit of victory is fun. With proper leadership, sport programs produce young people who accept responsibilities, who accept others, and most of all accept themselves. Id.

\textsuperscript{221} See Training Camp Tragedy, Topeka Capital Journal, Aug. 3, 2001. The fact remains that the game, whatever sport it may be, "is no longer in its purest form and won’t be again—until athletes stop abusing their bodies to avoid losing their status on the team, hurting their ego, or quite possibly, losing their job." Ball, supra note 1. This mentality is true for "[c]oaches who skillfully help young people become better [individuals] but fail to win an often unknown [number] of games are considered losers, and all too often are fired." Martens, supra note 171, at 5; see also Cordelia Anderson, College Football Coaches Under Pressure: Increased Need for Exemplary Communication Skills, Sports Media Challenge: Hot Corner (Nov. 1998), available at http://www.mediachallenge.com/hotcorner/coaches.html (last visited Dec. 30, 2001) (describing two college football coaches relieved of their positions due to losing seasons).

\textsuperscript{222} See Training Camp Tragedy, supra note 221. Recent tragedies "must serve as a wakeup call to coaches and players alike to the danger of [excessive exercise] and practicing football—or soccer, or cross country or even volleyball ... in oppressive heat." Id. The objective of every athlete and coach should be to win within the rules of the game. See Martens, supra note 171, at 6. "Winning isn’t everything, it’s the only thing," should not be the objective. See id. at 6-7 (emphasis added). Athletes should never feel pressured to continue practicing or pushing harder, for fear of suffering consequences, against what their body is telling them, even if it means sitting out when others are still participating. See Ball, supra note 1.

\textsuperscript{223} For a discussion of various abusive forms of corporal punishment, see supra note 51 and accompanying text. See also supra note 60 and accompanying text describing how a student who complained of excessive force by a coach was harassed by fellow teammates.
Lombardi's sentiment that "winning is not everything . . . it's the only thing," that permeates the coaching mentality, while frequently damaging the athlete-coach relationship.\textsuperscript{224} Nonetheless, an attempt to change the current mentality of coaches that accept corporal punishment and excessive exercise as appropriate disciplinary and conditioning measures, would most likely prove impossible.\textsuperscript{225} Still, making coaches and players more aware of and accountable for the dangers of excessive exercise is possible.\textsuperscript{226} Coaches and teachers need to realize that when excessive force or exercise is used to discipline or condition a student, it violates that student's substantive due process rights, regardless of the availability of an adequate state remedy.\textsuperscript{227}

The Fifth Circuit should re-evaluate its stance on corporal punishment and the availability of a substantive due process claim, because it is the only circuit not "in step" with other federal circuit courts.\textsuperscript{228} The Fifth Circuit should not "demure in [its] own housekeeping chores and . . . leave to the Supreme Court the job of eliminating the existing split between this one circuit and all the rest that have announced an opposite position on the subject."\textsuperscript{229}

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\textsuperscript{224} See Carolyn Thornton, For Lombardi, Winning Wasn't the Only Thing, BROWN/JOURNAL PUBLIC AFFAIRS CONFERENCE, Feb. 29, 2000, available at http://www.projo.com/special/bpconf/20000229.htm (noting Vince Lombardi uttered this phrase more than 30 years ago and since then it has transcended the sports world and become ingrained in American culture). "Trust between students and school officials, including teachers and coaches, is critical to learning because it helps motivate students to learn independently and comply with instructions without coercion." See Weiss, \textit{supra} note 40, at 1284-85. When coaches use criticism and punishment to eliminate undesirable behaviors, this negative communication "increases athletes' fear of failure, lowers their self-esteem, and destroys [the coach's] credibility." Martens, \textit{supra} note 171, at 28. Coaches are more likely to build successful teams when they understand the importance of the athlete-coach relationship. See Anderson, \textit{supra} note 221. Even though many coaches believe that the "spontaneous tirade" is effective, it can be counterproductive. See id. "Strong athlete-coach relationships may not guarantee a win, but they build trust within a team and improve its long term prospects." \textit{Id.}

\textsuperscript{225} See Training Camp Tragedy, \textit{supra} note 221. All too many veteran coaches are accustomed to the pursuit of winning regardless of the costs. See Martens, \textit{supra} note 171, at 5. "This [mentality] must change, and coaches must take responsibility for making the change." \textit{Id.} Coaches must resist the forces of society and the media encouraging them to win at all costs, while becoming clearer about their coaching objectives. See \textit{id.}

\textsuperscript{226} See Training Camp Tragedy, \textit{supra} note 221.

\textsuperscript{227} See Saylor v. Bd. of Educ., 118 F.3d 507, 514 (6th Cir. 1997); \textit{see also} \textit{supra} note 94 and accompanying text.

\textsuperscript{228} See Moore v. Willis Indep. Sch. Dist., 233 F.3d 871, 880 (5th Cir. 2000) (Wiener, J., specially concurring).

\textsuperscript{229} \textit{Id.}