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Constitutional Law - Disciplinary Infliction of Corporal Punishment by Public School Authorities without a Prior Hearing Is Not Cruel and Usual Punishment and Is Not Violative of the Student's Fourteenth Amendment Procedural Due Process Rights

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Nonetheless, it is submitted that the Fifth Circuit's decision was proper insofar as its holding was limited by Martin and did not extend to the expansive dicta in Nichols. By applying the Martin "intent and preparedness" rule to an attempt to procure employment as a commission salesman, the Fifth Circuit arguably fashioned or could have fashioned a limited holding in favor of Quinonez' position. After all, plaintiff had passed his certification examinations with high marks, and but for the "no-switching" agreement would have, in all probability, established a clientele, earned commissions, and improved the competitiveness of the securities dealing business.

So construed, the impact of Quinonez will not extend as far as Nichols. It would not give a treble damage claim to all those whose employment was terminated; it would not even give an actionable claim to all aspiring, but unsuccessful, commission salesmen alleging antitrust violations. It would only grant relief to those who could allege sufficient facts to show that they were prepared and able to serve clients as commission salesmen, but were prevented from doing so by conduct amounting to antitrust violations. So limited, it is submitted that Quinonez reached an eminently reasonable result.

J. Kurt Straub

CONSTITUTIONAL LAW — DISCIPLINARY INFlictION OF CORPORAL PUNISHMENT BY PUBLIC SCHOOL AUTHORITIES WITHOUT A PRIOR HEARING IS NOT CRUEL AND UNUSUAL PUNISHMENT AND IS NOT VIOLATIVE OF THE STUDENT'S FOURTEENTH AMENDMENT PROCEDURAL DUE PROCESS RIGHTS.


Petitioners James Ingraham and Roosevelt Andrews, junior high school students in Dade County, Florida, filed a complaint against school officials alleging that disciplinary paddlings inflicted upon them by school authorities deprived the students of their constitutional rights. Specifically,

46. See text accompanying note 24 supra.

47. Such a holding would, in effect, be the intersection of the sales commission/-employment cases (see note 21 supra) and the "intent and preparedness" cases (see note 18 supra) which are both exceptions to the general rule (see note 17 supra). If it is logical to treat commission salesmen with an established clientele as an ongoing commercial enterprise, then it is submitted that it is just as logical to apply the "intent and preparedness" rule to both situations equally.

48. 540 F.2d at 827 n.5.

1. Ingraham v. Wright, 430 U.S. 651, 653–54 (1977). The federal cause of action was claimed under 42 U.S.C. §§ 1981–1988 (1970). 430 U.S. at 653. The petitioners' complaint consisted of three counts. Id. The first two counts were individual actions for compensatory and punitive damages. Id. The third count, a class action on behalf
the students asserted that the paddlings\(^2\) violated the eighth amendment prohibition against cruel and unusual punishment;\(^3\) and that the lack of adequate notice and a hearing before corporal punishment was administered constituted a denial of procedural due process as required by the fourteenth amendment.\(^4\)

After the presentation of petitioners’ case, the district court granted respondents’ motion to dismiss.\(^5\) On appeal to the United States Court of Appeals for the Fifth Circuit,\(^6\) a three-judge panel reversed on the grounds that the facts revealed punishments so severe and oppressive as to violate the eighth amendment.\(^7\) Moreover, the panel held that adequate procedural safeguards were mandated by the fourteenth amendment before corporal punishment could be inflicted.\(^8\) However, on rehearing, the Fifth Circuit sitting en banc reversed the three judge panel and affirmed the decision of the district court.\(^9\) The United States Supreme Court, granted certiorari,\(^10\) and later affirmed,\(^11\) holding that: 1) the eighth amendment is inapplicable to the disciplinary infliction of corporal punishment by public school

of the county’s public school students, sought declaratory and injunctive relief against the use of corporal punishment in the school system. \(\text{Id.}\)

Named in the complaint as defendants were the principal, assistant principal, and assistant to the principal of the petitioners’ junior high school (all three of whom allegedly participated in incidents of severe paddlings), the county school superintendent, and the Dade County School Board. \(\text{Id. at 654.}\) The suit against the school board was later dismissed on the ground that the board was not a “person” within the meaning of \(\text{§ 1983.}\) \(\text{Ingraham v. Wright, 525 F.2d 909, 912 (5th Cir. 1976) (en banc), citing 42 U.S.C. \text{§ 1983 (1970).}\)}\)

2. At trial in the district court, Ingraham and Andrews testified that they were subjected to severe paddlings which resulted in injuries requiring professional medical attention, medication, and, in one case, rest at home for a number of days. The trial court’s disposition of the case is not reported. \(\text{Ingraham v. Wright, 498 F.2d 248, 256–57 (5th Cir. 1974) (panel opinion), vacated on rehearing, 525 F.2d 909 (1976) (en banc).}\) Other students from the same school recounted similar incidents of physical injuries which resulted from school disciplinary procedures. \(498 F.2d at 257–59.\) Since the case was dismissed before respondents’ case was presented, no evidence was introduced to rebut the testimony of the students. \(\text{Id. at 253.}\)

3. \(\text{Ingraham v. Wright, 525 F.2d 909, 911 (5th Cir. 1976) (en banc), citing U.S. Const. amend. VIII.}\) The full text of the eighth amendment is as follows: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” \(\text{U.S. Const. amend. VIII.}\)

4. \(525 F.2d at 911–12.\) The complaint also contained a substantive due process challenge, alleging that the infliction of corporal punishment upon students constitutes “arbitrary governmental action” and deprives all students of liberty without due process of law. \(\text{Id. at 915.}\) This issue was denied certiorari by the Supreme Court. \(\text{See 430 U.S. at 659 n.12.}\)

5. \(\text{See 498 F.2d at 251.}\) Although the district court conceded that the eighth amendment might apply to some instances of disciplinary punishment, it held that it did not apply to the situation at hand. \(\text{See 430 U.S. at 658.}\)

6. \(498 F.2d 248 (5th Cir. 1974) (panel opinion), vacated on rehearing, 525 F.2d 909 (1976).\)

7. \(498 F.2d at 264.\)
8. \(\text{Id. at 267–68.}\)
9. \(525 F.2d 909, 920 (5th Cir. 1976) (en banc).\)
10. \(425 U.S. 990 (1976).\)
11. \(430 U.S. 651, 683 (1977).\) Justice Powell delivered the opinion of the Court, in which Chief Justice Burger and Justices Stewart, Blackmun and Rehnquist joined. Justice White’s dissenting opinion was joined by Justices Brennan, Marshall, and Stevens. Justice Stevens also wrote a separate dissenting opinion.
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authorities; and 2) that the fourteenth amendment's procedural due process requirement is satisfied if adequate common law constraints and remedies are available. Ingraham v. Wright, 430 U.S. 651 (1977).

Prior to the Ingraham decision, federal courts were divided on the question of the applicability of the eighth amendment's cruel and unusual punishment clause to public school disciplinary methods.\(^\text{12}\) However, the consensus among those courts which acknowledged the possible applicability of the eighth amendment was that corporal punishment, although not cruel and unusual per se, could violate the amendment if excessive force were applied to the student.\(^\text{13}\)

Notwithstanding these federal court cases, the history of the eighth amendment and of Supreme Court decisions appear to support the view that the cruel and unusual punishment clause is applicable solely to punishments resulting from the commission of criminal offenses.\(^\text{14}\) The ultimate derivation of the eighth amendment text is the English Bill of Rights of 1689.\(^\text{15}\) While the English version referred exclusively to criminal punishments,\(^\text{16}\) the precise intendment of our American framers is unclear.\(^\text{17}\)

12. Only one court has directly held that the eighth amendment was applicable. Bramlet v. Wilson, 495 F.2d 714 (8th Cir. 1974) (an excessive amount of physical punishment could be held to be cruel and unusual). Other courts have concluded that while the amendment might apply to cases of excessive punishment, it did not apply to the situation before them. See Baker v. Owen, 395 F. Supp. 294 (M.D.N.C.), aff'd, 423 U.S. 907 (1975) (assuming, without fully considering, that the eighth amendment could apply, punishment in this case did not approach a cruel and unusual level); Glaser v. Marietta, 351 F. Supp. 555 (W.D. Pa. 1972) (corporal punishment as practiced in this school district not violative of the Constitution); Ware v. Estes, 328 F. Supp. 657 (N.D. Tex. 1971), aff'd per curiam, 458 F.2d 1360 (5th Cir. 1972) (corporal punishment as authorized by Texas law did not amount to be cruel and unusual punishment); Sims v. Board of Educ., 329 F. Supp. 678 (D.N.M. 1971), aff'd per curiam, 458 F.2d 1360 (5th Cir. 1972) (corporal punishment as authorized by Texas law did not amount to be cruel and unusual punishment); Sims v. Board of Educ., 329 F. Supp. 678 (D.N.M. 1971) (court held that corporal punishment was not per se cruel and unusual, but declined to rule that the eighth amendment could never apply in a civil proceeding).

Two courts have, however, determined that the eighth amendment does not apply to a civil action concerning school discipline. See Sims v. Waln, 388 F. Supp. 543 (S.D. Ohio 1974) (eighth amendment not applicable in a civil context); Gonyaw v. Gray, 361 F. Supp. 366 (D. Vi. 1973) (eighth amendment applies only to penalties imposed for criminal behavior).


14. See notes 16–28 and accompanying text infra. It is important to note that the Court has applied the eighth amendment to the states through the due process clause of the fourteenth amendment. See, e.g., Estelle v. Gamble, 429 U.S. 97, 101 (1977); Furman v. Georgia, 408 U.S. 238 passim (1972) (per curiam) (concurring opinions of Douglas, J., Brennan, J., and Stewart, J.); Robinson v. California, 370 U.S. 660, 666 (1962).


16. Although historians and constitutional scholars do not agree upon the particular event which induced the English to add this provision to their Bill of Rights, they do agree that its aim was to restrain judges in their imposition of criminal sentences. See Granucci, supra note 15, at 859; Note, supra note 15, at 161.

17. In a concurring opinion in Furman v. Georgia, 408 U.S. 238 (1972), Mr. Justice Brennan observed that there is "very little evidence of the Framers' intent" and that
Supreme Court in Weems v. United States\(^\text{18}\) suggested that although the text of the amendment was the same as its ancestor, its scope, in terms of limitations upon the government, was intended to be much broader.\(^\text{19}\)

An analysis of the Supreme Court cases interpreting the cruel and unusual punishment clause\(^\text{20}\) reveals two categories of cases — those which deal directly with punishments imposed for the violation of criminal statutes\(^\text{21}\) and those which involve crimes only collaterally.\(^\text{22}\) An example of the second class of cases is Estelle v. Gamble.\(^\text{23}\) In Estelle, the Court concluded that "deliberate indifference to serious medical needs of prisoners constitutes" action prohibited by the eighth amendment.\(^\text{24}\) Although the petitioner in Estelle was a convicted criminal, the fact that a crime had been committed was not relevant to the case.\(^\text{25}\) Another example of this second

the clause "is not susceptible of precise definition." \textit{Id.} at 258. The Court in Wilkerson v. Utah, 99 U.S. 130 (1878) noted that "[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision." \textit{Id.} at 135-36.

\(^{18}\) 217 U.S. 349 (1910).

\(^{19}\) \textit{Id.} at 371-72. The Court quoted from a constitutional debater who argued that while doctrines or practices might be borrowed from the English, the "principles and maxims" underlying our government are unique. \textit{Id.} at 372, quoting 2 J. ELLIOT, \textit{DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION} 437 (2d ed. 1859) (James Wilson — Pennsylvania) [hereinafter cited as \textit{2 J. ELLIOT}]. The Weems Court also expressed the view that the framers of the Constitution were concerned primarily with curbing abuses of governmental power at all levels, i.e., not merely abuses of the judiciary. 217 U.S. at 372-73. It is submitted, therefore, that reliance upon the English interpretation may not be relevant. It is further submitted that if the Constitution is dynamic and open to change to conform to societal standards, then even the original intention of its framers becomes less important. As the Weems Court stated: "Legislation, both statutory and constitutional, is enacted . . . from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken." \textit{Id.} at 373.

\(^{20}\) For a discussion of these cases, see notes 21-28 and accompanying text infra.


One case which does not fall squarely within either category is Robinson v. California, 370 U.S. 660 (1962). In \textit{Robinson}, the Court determined that a statute, which made the status of narcotic addiction a criminal offense, inflicted cruel and unusual punishment in violation of the eighth amendment. \textit{Id.} at 666. The \textit{Robinson} Court, rather than focusing upon the actual punishment imposed, concentrated on the classification of an illness (drug addiction) as a crime. \textit{See id.} at 666-67.


\(^{24}\) \textit{Id.} at 104. Although the \textit{Estelle} Court found that a cause of action existed for incarceration without medical care, it held that the petitioner had not alleged sufficient facts to prove his cause of action for damages. \textit{Id.} at 106-08.

\(^{25}\) The \textit{Estelle} opinion did not mention the particular crime the petitioner had committed.
category is *Trop v. Dulles*, which held that a statutory provision which deprived convicted wartime military deserters of their citizenship constituted cruel and unusual punishment in violation of the eighth amendment. The distinguishing factor in *Trop* was that the Court appeared to rest its decision upon a finding that an essentially penal statute could not be upheld unless it served a legitimate governmental purpose other than to punish.

Therefore, in light of *Estelle* and *Trop*, it is reasonable to conclude that the eighth amendment is capable of fairly flexible interpretation. Extending the coverage of this provision to include the unquestionably noncriminal punishment of schoolchildren, however, is without clear precedent.

While the petitioners' attempt to apply the eighth amendment to school discipline presented the *Ingraham* Court with a novel contention, the same is not true with respect to the procedural due process claim. In the 1975 *Goss v. Lopez* decision, the Court applied the fourteenth amendment and declared unconstitutional a state statute which permitted the suspension of students for up to ten days without a prior hearing. The *Goss* Court reasoned that suspensions resulted in a deprivation of both property and liberty interests, and concluded that due process required at least "some kind of notice and . . . some kind of hearing."
Within the last decade, the Supreme Court has increased its emphasis upon the need to satisfy procedural due process requirements and has developed a two-pronged analysis to ascertain their satisfaction. According to the Court in *Morrissey v. Brewer*, the first query is whether a liberty or property interest contemplated by the fourteenth amendment is affected. If either interest is involved, the second question concerns determination of "what process is due." To resolve the latter question, three important factors, enunciated in *Matthews v. Eldridge*, must be considered: 1) the interest of the individual; 2) the "risk of erroneous deprivation" of that interest through present procedures and the value of alternative measures; and 3) the government's interest. In *Goss*, the Court found that the additional burden imposed upon the state in providing presuspension hearings did not outweigh the possible risk to the individual student's property and liberty interests.

The *Ingraham* Court, confronted with the argument that corporal punishment of schoolchildren could, in some cases, violate the eighth amendment, relied heavily upon a detailed historical analysis and traditional common law. Justice Powell, writing for the majority, stressed that the teacher's privilege to use reasonable force in disciplining students is a basis tenet of common law.


34. 408 U.S. 471 (1972). In *Morrissey*, the petitioner's parole had been revoked without affording him the opportunity of a prior hearing. *Id.* at 472. Using the test enunciated in the text accompanying notes 35 & 36 infra, the *Morrissey* Court determined that the parolee's liberty interest was involved and an informal hearing was required prior to the revocation of parole in order to satisfy due process requirements. *Id.* at 482.

35. *Id.* at 481. As the Court explained, "The question is not . . . merely the 'weight' of the individual's interest, but [rather] the nature of the interest." *Id.*

36. *Id.*

37. 424 U.S. 319 (1976). The Court in *Matthews* held that when an individual's social security benefits are terminated without affording the recipient a prior evidentiary hearing, this does not constitute a violation of due process. *Id.* at 349.

38. *Id.* at 335. The *Matthews* Court noted that financial and administrative considerations are relevant to the determination of the government's interest. *Id.* However, in Goldberg v. Kelly, 397 U.S. 254 (1970), the Court dealt with the due process issue in connection with the termination of welfare benefits and listed an additional state interest—"to foster the dignity and well-being of all persons within [the nation's] borders." *Id.* at 264–65. The *Goldberg* Court found that this interest competed with the state's financial and administrative concerns. *Id.* at 266.

39. 419 U.S. at 575–76.

40. 430 U.S. at 659–69.

41. *Id.* at 1406–08. Common law has provided the teacher with a privilege to impose whatever force is reasonable under the circumstances in order to maintain discipline in the classroom. See F. HARPER & F. JAMES, THE LAW OF TORTS 288–92 (1956); W. PROSSER, LAW OF TORTS 136–37 (4th ed. 1971); Proehl, Tort Liability of Teachers, 12 VAND. L. REV. 723, 734–38 (1959). This common law view is also reflected in the *Restatement (Second) of Torts* § 147(2) (1965).

In determining what is reasonable force, courts consider factors such as: 1) the size and age of the child; 2) the nature of the offense; 3) the severity of the punishment; and 4) the availability of alternate methods of effective discipline. See F. HARPER & F. JAMES, supra, at 290–91; W. PROSSER, supra, at 137; *Restatement*...
which is recognized today by virtually all of the states either through legislation or judicial precedent.\(^{42}\)

Although the Court recognized that the teacher's privilege could be abused,\(^{43}\) the majority found no foundation for the petitioners' theory that the cruel and unusual punishment clause could be applied to instances of excessive or unreasonable corporal punishment.\(^{44}\) Conceding that the drafters of the Constitution expected the eighth amendment to restrain legislatures as well as judges,\(^{45}\) the Court nonetheless determined that the provision was not intended to be applied beyond the realm of the criminal process.\(^{46}\) In support of this conclusion, the Court cited several legislative debates dealing with the amendment's adoption, and noted that the debates referred to the provision solely in terms of restricting criminal punishments.\(^{47}\) Furthermore, the majority reviewed prior Supreme Court decisions involving the cruel and unusual punishment clause and found that all of these cases dealt with punishments in some way connected with violations of criminal statutes.\(^{48}\)

Addressing appellant's contention that limiting the applicability of the eighth amendment would provide imprisoned criminals with greater protection from corporal punishment than schoolchildren, the Court stated that such reasoning could not justify "wrenching the Eighth Amendment from its historical context and extending it to traditional disciplinary practices in the public schools."\(^{49}\) In distinguishing between schoolchildren

\(^{(2)\text{nd}}\) OF TORTS §150, Comments c-e (1965). The majority of courts hold that reasonableness is a question of fact to be determined by the jury. See, e.g., Calway v. Williamson, 130 Conn. 575, 36 A.2d 377 (1944); Swigart v. Ballou, 106 Ill. App. 226 (1903); State v. Fischer, 245 Iowa 170, 60 N.W.2d 105 (1953); Patterson v. Nutter, 78 Me. 509, 7 A. 273 (1886); Harris v. Gaililey, 125 Pa. Super. 505, 189 A. 779 (1937). However, some courts have taken the position that there is a presumption of reasonableness when a teacher administers discipline to a student. See, e.g., Drake v. Thomas, 310 Ill. App. 57, 33 N.E.2d 889 (1941); State v. Pendergrass, 19 N.C. 365 (1937); Phillips v. Johns, 12 Tenn. App. 354 (1930). These later cases have required the student to prove malice or serious injury in order to recover. See also W. Prosser, supra, at 137; Proehl, supra, at 732.


\(^{43}\) 430 U.S. at 661.

\(^{44}\) Id. at 664.

\(^{45}\) Id. at 665. The Court acknowledged that this restriction was broader than that imposed by the English model. Id. at 666. For a further discussion of the scope of the eighth amendment, see note 19 and accompanying text supra.


\(^{47}\) 430 U.S. at 666 & n.35. The Court referred to debates in the Massachusetts and Virginia Conventions and in the First Congress. Id. See 2 J. Elliot, supra note 19, at 111. (Abraham Holmes — Massachusetts); 3 J. Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution 447 (2d ed. 1859) (Patrick Henry — Virginia); 1 Annals of Congress 754 (1789). For example, Abraham Holmes was quoted as criticizing the lack of restraint upon Congress' power to prescribe "what kind of punishments shall be inflicted on persons convicted of crimes." 430 U.S. at 666 n.35, citing 2 J. Elliot, supra note 19, at 111.

\(^{48}\) 430 U.S. at 666-68. For a discussion of these cases, see notes 21-28 and accompanying text supra.

\(^{49}\) 430 U.S. at 668-69.
and criminals, the majority stressed that the public school is open to scrutiny and supervision from the community, whereas incarceration separates the criminal from family and friends. Moreover, the Court emphasized that common law constraints against excessive or unreasonable corporal punishment were available to the student. In light of these two factors, the Court resolved that eighth amendment protection was not needed in this area.

While refusing to apply the eighth amendment to public school paddlings, the Ingraham Court did determine that fourteenth amendment liberty interests are affected where school authorities, acting under color of state law, intentionally inflict physical punishment upon students. This conclusion stemmed from the Court's examination of both English common law and American interpretations of the due process clause. Recognizing that among the historic liberties protected by our Constitution is the right to be free from "bodily restraint and punishment" without due process of law, the Court held that this interest was involved in the instant case.

In deciding whether advance procedural safeguards were necessary to protect this liberty interest, the Court relied upon the balancing test developed in Matthews. The majority initially examined the private

50. Id. at 669-70. In his dissenting opinion, Justice White criticized the reasoning of the majority stating: "If a punishment is so barbaric and inhumane that it goes beyond the tolerance of a civilized society, its openness to public scrutiny should have nothing to do with its constitutional validity." Id. at 690 (White, J., dissenting).

51. Id. at 670. According to the Restatement (Second) of Torts, the teacher's privilege is lost when a punishment is "unnecessarily severe" or when it "inflicts serious or permanent harm." Restatement (Second) of Torts §150, Comment e (1965). See also W. Prosser, supra note 41, at 137; Proehl, supra note 41, at 734-38. However, whether civil remedies can provide effective redress for the student is dependent upon the standard of reasonableness applied by the court. See note 41 supra.

Justice White, in his dissent, took exception to the majority's analysis regarding common law restraints 430 U.S. at 690-91 (White, J., dissenting). In his view, the availability of an alternate state remedy is irrelevant in determining whether the punishment is cruel and unusual. Id.

52. Id. at 671.

53. Id. at 674.

54. Id. at 673 & n.41, citing 1 W. Blackstone, Commentaries* 134 (Magna Carta and subsequent acts of Parliament protected the individual from deprivations of personal security without due process of law).

55. 430 U.S. at 673-74. While the Court observed that no precise definition of liberty interest had yet been formulated, the majority relied upon cases dealing with various types of invasions of personal security. Id. at 673-74 & n.42, citing Skinner v. Oklahoma, 316 U.S. 535 (1942) (sterilization); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (vaccination); Union Pacific Ry. Co. v. Botsford, 141 U.S. 250 (1891) (physical examinations).

56. 430 U.S. at 673-74.

57. Id. at 674. The Court qualified this finding by stating that "[t]here is... a de minimis level of imposition with which the Constitution is not concerned." Id. Although the Court did not define "de minimis" in this context, apparently the majority would consider any conduct which is not intentional or which does not result in measurable physical discomfort as falling within this category. See id.

58. Id. at 674-75, citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976). For a discussion of this test, see text accompanying notes 37 & 38 supra.
interest of the students involved in *Ingraham*. It noted that history and the common law have limited the child’s interest by providing school authorities with the privilege to use reasonable force in disciplining students. The Court decided, however, that “the child has a strong interest in procedural safeguards that minimize the risk” of unjustified corporal punishment.

Secondly, the Court reviewed the applicable Florida law, to determine the procedural safeguards available and the risk of “erroneous deprivation” of the liberty interest in the case *sub judice*. The majority was satisfied with Florida’s requirement that teachers consult with the principal before inflicting corporal punishment and its retention of common law remedies in the event of abuse. The Court further concluded that the mistreatment suffered by appellants was an “aberration” and that the risk of such mistaken punishment is “typically insignificant.”

Finally, the majority considered the third factor of the *Matthews* balancing test — the state’s interest. In resolving this issue, the Court determined that the cost of added safeguards was great while the incremental benefit was minimal. The majority reasoned that school authorities would likely abandon corporal punishment if forced to provide

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59. 430 U.S. at 675-76.
60. *Id.* For a discussion of this common law privilege, see note 41 *supra*.
61. 430 U.S. at 676. The Court recognized that whenever punishment is intentionally inflicted, there exists some risk of unlawful invasion of the child’s liberty interest. *Id.*
62. *Id.* at 676-78. The law in effect at the time of the alleged unlawful disciplinary actions was *Fla. Stat. Ann.* § 232.27 (West 1961) (amended 1976). The provision, prior to amendment, required the approval of the principal before infliction of corporal punishment. *Id.* The section, as amended, has added requirements that another adult be present when punishment is administered and that a written explanation to the student’s parents be provided upon request. *Fla. Stat. Ann.* § 232.27 (West 1977).
63. 430 U.S. at 676-77. Justice White’s dissent expressed reservations concerning the actual scope of Florida law concerning damage actions brought against teachers. *Id.* at 693-95 & n.11, 700 (White, J., dissenting). According to Florida law, a teacher or other school official, “[e]xcept in the case of excessive force or cruel and unusual punishment, . . . shall not be civilly or criminally liable for any action carried out in conformity with state board and district school board rules.” *Fla. Stat. Ann.* § 232.275 (West 1977). Justice White stressed the fact that the majority failed to cite any Florida cases recognizing the student’s damage remedy. 430 U.S. at 694 n.11 (White, J., dissenting). He also noted that a theory of either common law or statutory immunity could preclude the student from recovering in the case of corporal punishment administered in good faith but which was in fact unjustified. *Id.* at 694-95 n.11. See, e.g., Wood v. Strickland, 420 U.S. 308 (1975) (good faith immunity rule adopted for school discipline actions under 42 U.S.C. § 1983). Responding to the dissent’s argument, the majority attributed the lack of cases on point to the “low incidence of abuse.” 430 U.S. at 677-78 & nn. 45 & 46.
64. *Id.* at 677-78. The majority drew an analogy to criminal law with respect to the need for prior procedural safeguards. *Id.* at 679-80. The Court maintained that the corporal punishment of students is comparable to the practice of warrantless arrests on probable cause, since both involve a deprivation of a liberty interest and are based upon common law tradition. *Id.* The majority pointed to the fact that while warrantless arrests involve a risk of violating the fourth amendment (U.S. CONST., amend. IV) the tradition of providing only post-deprivation hearings has been upheld. 430 U.S. at 679, citing *United States v. Watson*, 423 U.S. 411, 423 (1976).
65. *Id.* at 680-82.
66. *Id.*
prior hearings, and that teachers would choose other, perhaps less effective, means of discipline. The Court observed that such a choice should result from "community debate and legislative action" and not from a judicial due process determination. Another concern voiced by the majority was that this requirement would constitute a "significant intrusion" into an area for which the states and school authorities are primarily responsible.

On balance, the Court concluded that while the intentional infliction of corporal punishment did affect a child's liberty interest, the risk of error was minimal. Further, the Court held that the private liberty interest did not outweigh the burden that additional safeguards would place upon the states and upon school officials, especially since those safeguards "might reduce the risk [only] marginally."

In his dissent, Justice White declared that the omission of the word "criminal" from the cruel and unusual punishment clause provides evidence that its application is not to be limited or qualified. Moreover, the dissent proposed that a "purposive approach" be employed to resolve eighth amendment issues. If the sanction under consideration is "among those ordinarily associated with punishment, such as retribution, rehabilitation, or deterrence," then the dissent would consider it as subject to the eighth amendment.

The dissent likewise disagreed with the holding of the majority with respect to the due process issue. The dissent questioned the effectiveness of

67. Id. at 680. The Court maintained that a predeprivation hearing requirement "would work a transformation in the law governing corporal punishment." Id.
68. Id. at 680–81. The Court concluded that such a change in policy would "most likely occur in the ordinary case where the contemplated punishment is well within the common law privilege." Id. at 681.
69. Id.
70. Id. at 682. For a discussion of the issue of judicial reluctance to interfere in matters of school policy, see note 98 and accompanying text infra.
71. 430 U.S. at 682.
72. Id. The majority stated: "At some point the benefit of an additional safeguard to the individual affected ... and to society in terms of increased assurance that the action is just, may be outweighed by the cost." Id. quoting Matthews v. Eldridge, 424 U.S. 319, 348 (1976).
73. 430 U.S. at 683–700 (White, J., dissenting). See note 11 supra.
74. Id. at 685 (White, J., dissenting). The dissent termed the majority's historical analysis of the meaning of the eighth amendment language "vague and inconclusive." Id. For a discussion of the majority's analysis, see notes 45–47 and accompanying text supra.
75. Id. at 686–88 (White, J., dissenting). According to the dissent, this purposive approach was adopted by the Supreme Court in Trop when it determined that the punishment imposed by the statute under scrutiny was penal in nature and violative of the cruel and unusual punishment clause. Id. at 687 n.3, citing Trop v. Dulles, 356 U.S. 86, 96 (1958).
76. 430 U.S. at 686–87 (White, J., dissenting) (citation omitted). In the view of the dissent, use of the purposive approach would clearly place spanking in the public schools within the meaning of "punishment" as that term is used in the eighth amendment. Id. at 687 (White, J., dissenting).
77. Id. at 692–700 (White, J., dissenting). For the majority's position, see notes 53–72 and accompanying text supra.
common law remedies for wrongful or excessive punishment,\textsuperscript{78} and rejected the majority's determination that these remedies contributed to reducing the risk of error.\textsuperscript{79} Corporal punishment, according to the dissent, is no less a threat to the student's constitutionally protected interests than suspension.\textsuperscript{80} Therefore, the dissent concluded that the same procedural safeguards made applicable to suspension by the \textit{Goss} decision,\textsuperscript{81} should extend to corporal punishment.\textsuperscript{82}

It is submitted that while the majority's interpretation of the cruel and unusual punishment clause reflected a well-reasoned analysis of legislative and judicial history, it failed to resolve several questions. As noted by the dissent,\textsuperscript{83} the text of the eighth amendment does not include the modifying word "criminal."\textsuperscript{84} However, even if it is conceded that the amendment was \textit{originally} intended to apply solely to criminal punishments, this should not be determinative of its current scope. As the Court stated in \textit{Weems},\textsuperscript{85} "a principal to be vital must be capable of wider application than the mischief which gave it birth."\textsuperscript{86}

In point of fact, the cruel and unusual punishment clause has been the subject of relatively flexible interpretations in the past, as illustrated by the \textit{Trop}\textsuperscript{87} and \textit{Estelle}\textsuperscript{88} decisions. These cases indicate that the amendment's application extends beyond punishments for the violation of criminal statutes.\textsuperscript{89} Rather than using an approach which looks solely to the status of

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\item \textsuperscript{78} 430 U.S. at 693-96 (White, J., dissenting). The dissent criticized Florida law for failing to provide redress in the case of a good faith error by a school disciplinarian who has inflicted corporal punishment upon a student. \textit{Id.} at 693-95. For a discussion of the scope of the Florida law, see note 62 \textit{supra}. In addition, the dissent contended that Florida law deprived the students of due process since the common law remedy is available only after the deprivation has occurred. 430 U.S. at 695-96 (White, J., dissenting).
\item \textsuperscript{79} \textit{Id.} at 699-700 (White, J., dissenting).
\item \textsuperscript{80} \textit{Id.} at 700. The dissent reasoned also that in terms of cost, risk of error, and interference with the disciplinary process, there is no difference between paddling and suspending a student. \textit{Id.}
\item \textsuperscript{81} For a discussion of \textit{Goss}, see notes 29-32 & 39 and accompanying text \textit{supra}.
\item \textsuperscript{82} 430 U.S. at 700 (White, J., dissenting).
\item \textsuperscript{83} See note 74 and accompanying text \textit{supra}.
\item \textsuperscript{84} For the text of the eighth amendment, see note 3 \textit{supra}. The majority argued that, although the "reference to 'criminal cases' was eliminated from the final draft [of the English Bill of Rights], the preservation of a similar reference in its preamble indicated[d] that the deletion was without substantive significance." 430 U.S. at 665, \textit{citing} English Bill of Rights of 1689. The majority also pointed to the early legislative debates in the United States which refer specifically to criminal punishments. 430 U.S. at 665-66. See note 47 and accompanying text \textit{supra}.
\item \textsuperscript{85} \textit{Weems} v. United States, 217 U.S. 349 (1910). For a discussion of this case, see notes 18 & 19 and accompanying text \textit{supra}.
\item \textsuperscript{86} 217 U.S. at 373. It is submitted that there are other provisions of the Constitution which have been applied in ways that might surprise its authors. For example, it is possible that the framers of the Constitution would not have expected the commerce clause, \textit{U.S. Const.}, art. I, § 8, cl. 3, to eventually provide Congress with the authority to combat racial discrimination. See, \textit{e.g.}, \textit{Heart of Atlanta Motel} v. United States, 379 U.S. 241 (1964) (Civil Rights Act of 1964 based in part on congressional power to regulate interstate commerce).
\item \textsuperscript{87} For a discussion of \textit{Trop}, see notes 26-28 and accompanying text \textit{supra}.
\item \textsuperscript{88} For a discussion of \textit{Estelle}, see notes 23-25 and accompanying text \textit{supra}.
\item \textsuperscript{89} See notes 23-28 and accompanying text \textit{supra}.
\end{itemize}
the "victim," the dissent in Ingraham suggested an analysis which would consider the purpose of the punishment.\textsuperscript{90} It is submitted, however, that the dissent's system of classification might prove to be overbroad and unmanageable in practice, with a variety of state actions becoming subject to eighth amendment scrutiny because of their retributive, rehabilitative, or deterrent aspects.

Conversely, it is suggested that the Ingraham majority's justification for refusing to extend the reach of the eighth amendment to the instant situation is not entirely satisfactory. The two factors which the majority listed in support of its decision — openness to community scrutiny\textsuperscript{91} and availability of common law constraints\textsuperscript{92} — are both subject to challenge.

With regard to the first factor, it may be argued initially that the Court did not take into consideration the realities of the modern urban public school. The existence or effectiveness of community control upon such a school is not easily determinable.\textsuperscript{93} Even assuming a truly open institution, the majority failed to address the dissent's contention that "openness to public scrutiny should have nothing to do with . . . constitutional validity,"\textsuperscript{94} since exposure does not render an essentially cruel punishment constitutional.\textsuperscript{95} The second factor relied on by the majority may also be criticized, since the Court had so recently sanctioned an opposite approach in Estelle\textsuperscript{96} by implicitly recognizing that an eighth amendment action might be proper despite the existence of a tort remedy under state law.\textsuperscript{97}

The major conclusion to be drawn from the due process argument propounded by the majority is that the Court did not wish to further restrict the discretion of school authorities\textsuperscript{98} by broadening its holding in Goss.\textsuperscript{99}

\textsuperscript{90} For a discussion of the dissent's argument, see notes 73–82 and accompanying text supra.
\textsuperscript{91} See note 50 and accompanying text supra.
\textsuperscript{92} See note 51 and accompanying text supra.
\textsuperscript{93} In fact, a 1972 Senate Report dealing with unequal educational opportunities found that minority and disadvantaged groups are often "powerless to affect the policies of school boards, school administrators and others who . . . make the . . . decisions that affect their children's education." S. REP. No. 92-000, 92d Cong., 2d Sess. 13 (1972).
\textsuperscript{94} 430 U.S. at 691 (White, J., dissenting).
\textsuperscript{95} Id.
\textsuperscript{96} For a discussion of this case, see notes 23–25 and accompanying text supra.
\textsuperscript{97} See 430 U.S. at 1422 (White, J., dissenting), citing Estelle v. Gamble, 429 U.S. 97, 107 (1976). In Estelle, the state remedy available to the petitioner — a prisoner who had received inadequate or improper medical attention — was a medical malpractice action. 429 U.S. at 107.
\textsuperscript{98} In general, the Supreme Court has shown a reluctance to interfere in matters of public school policy or regulation. See Buss, Procedural Due Process for School Discipline: Probing the Constitutional Outline, 119 U. PA. L. REV. 545, 550 (1971).

In those cases where the Court has rendered a decision affecting the schools, it has consistently stressed that state and school officials are the primary arbiters of educational matters. See, e.g., Tinker v. Des Moines School Dist., 393 U.S. 503, 507 (1969) (state and school authorities should have comprehensive authority, consistent with fundamental safeguards, to prescribe and control conduct in the schools); Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (judicial interference in matters of school operation requires care and restraint); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) (boards of education have important, delicate, and highly discretionary functions).

\textsuperscript{99} For a discussion of Goss, see notes 29–32 & 39 and accompanying text supra.
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However, an examination of the factors listed by the Court in support of its decision does not help explain how the Court distinguished between corporal punishment and suspension in determining that only the latter requires a predeprivation notice and hearing. There was no indication in the majority's opinion that the corporal punishment in the case sub judice had a lower incidence of abuse than the disciplinary suspension involved in Goss. While recognizing that the existence of common law restraints is unique to corporal punishment, the question of whether this factor alone justifies the dissimilar treatment of these two methods of discipline remains. It may be argued that the existence of a state law remedy, especially a post-deprivation remedy, should have no effect upon the recognition of a federal constitutional right.

While the Court expressed an understandable concern that predeprivation hearings might affect the teacher's choice of disciplinary method, it is submitted that its decision may have such an effect in any case. With the possibility of constitutional limitations upon corporal punishment having been eliminated and with the procedural due process requirements still in effect for suspension, the former disciplinary alternative may grow in popularity.

Unquestionably, the Ingraham decision has resolved the conflict among the lower federal courts over the application of the cruel and unusual punishment clause to public school discipline. However, the Court's interpretation of the scope of this provision may have an impact in areas other than corporal punishment. It is predictable that, as a result of Ingraham, future attempts to invoke the protection of the eighth amendment will require evidence that the punishment is in some way connected to a conviction for crime. Moreover, the Court's due process decision dilutes the impact of Goss and represents a setback in the area of student rights.

100. See text accompanying notes 60-70 supra.
102. The Ingraham Court's statement that the risk of corporal punishment "without cause" is low because the offending conduct is usually viewed by the teacher is not substantiated by the Court. See 430 U.S. at 677-78. Although declaring that the low incidence of abuse distinguishes Ingraham from Goss, the Court did not cite to any evidence to support this proposition. See id. at 678 n.46.
103. The Ingraham majority cited the availability of "established judicial remedies in the event of abuse" as a factor distinguishing corporal punishments from suspensions. 430 U.S. at 678 n.46.
104. It should be noted that the majority cited with approval an article which stated: "[P]rior hearings might well be dispensed with in many circumstances in which the state's conduct, if not adequately justified, would constitute a common-law tort." 430 U.S. at 679 n.47, citing Monaghan, Of "Liberty" and "Property," 62 CORNELL L. REV. 405, 431 (1977) (footnote omitted). If the Court had truly adopted this approach, it is suggested that the implications could be far-reaching. For example, this could affect suits by state mental patients or juveniles in state institutions other than public schools.
106. For a discussion of this conflict, see notes 12 & 13 and accompanying text supra.
107. For a discussion of this case, see notes 29-32 & 39 and accompanying text supra.