Marquette Law Review

Volume 61
Issue 1 *Fall 1977*

Article 10

1977

Constitutional Law - Eighth Amendment - Physical Punishment in Public Schools (Ingraham v. Wright)

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mere statement that commitment counsel must assume a more active, adversary role does not guarantee that future proceedings will be free of constitutional infirmities. Whether those committed in the future are afforded due process of law remains a question which will have to be determined on a case by case basis.

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Constitutional Law—Eighth Amendment—Physical Punishment In Public Schools—In *Ingraham v. Wright*,[1] the United States Supreme Court refused to extend the eighth amendment protection against cruel and unusual punishment[2] to Dade County, Florida school children who were severely beaten by their principal and other school officials. Additionally, while finding that the pupils had a liberty interest in personal security worthy of protection under the fourteenth amendment,[3] the Court ruled that the Dade County system of corporal punishment was not itself violative of due process, in view of the common law safeguards and state tort remedies available in cases of abuse.

Ingraham was a class action brought for injunctive and declaratory relief and damages by students in Drew Junior High School on behalf of all students similarly situated in the Dade County, Florida school system. The plaintiffs alleged that respondent school officials inflicted severe and continuing corporal punishment upon students in Drew Junior High in violation of the constitutional prohibitions against cruel and unusual punishment and deprivation of liberty without due process.

The trial court dismissed the action without the presenta-

1. 97 S. Ct. 1401 (1977).

2. The eight amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

3. In part, the fourteenth amendment states,

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

tion of any evidence by defendants, finding no constitutional basis for relief on either the eighth or the fourteenth amendment questions.[4] A panel of the Fifth Circuit Court of Appeals reversed, finding that the severity of the punishments inflicted were such that the eighth amendment could be invoked, and that plaintiffs had been deprived of liberty without due process.[5] *En banc,* upon rehearing, the panel decision was vacated and the district court dismissal reinstated.[6] The United States Supreme Court affirmed.[7]

The facts in *Ingraham* presented a clear basis upon which the Court could decide the eighth amendment question. Plaintiffs and many other students at Drew Junior High were beaten severely and systematically over a long period of time, in clear contravention of the applicable Florida statute:

> Each teacher or other member of the staff of any school shall assume such authority for the control of pupils as may be assigned to him by the principal and shall keep good order in the classroom and in other places in which he is assigned to be in charge of pupils, but he shall not inflict corporal punishment before consulting the principal or teacher in charge of the school, and in no case shall such punishment be degrading or unduly severe in its nature. Under no circumstances may a teacher (except of a one-teacher school) suspend a pupil from school or class.[8]

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4. Ingraham v. Wright, No. 71-23 (S.D. Fla. 1973).
5. 498 F.2d 248 (5th Cir. 1974).
6. 525 F.2d 909 (5th Cir. 1976).
7. 97 S. Ct. 1401 (1977).
8. Fla. Stat. § 232.27 (1975). As revised in 1976, § 232.27 provides,

Subject to law and to the rules of the district school board, each teacher or other member of the staff of any school shall have such authority for the control and discipline of students as may be assigned to him by the principal or his designated representative and shall keep good order in the classroom and in other places in which he is assigned to be in charge of students. If a teacher feels that corporal punishment is necessary, at least the following procedures shall be followed:

(1) The use of corporal punishment shall be approved in principle by the principal before it is used, but approval is not necessary for each specific instance in which it is used.

(2) A teacher or principal may administer corporal punishment only in the presence of another adult who is informed beforehand, and in the student's presence, of the reason for the punishment.

(3) A teacher or principal who has administered punishment shall, upon request, provide the pupil's parent or guardian with a written explanation of the reason for the punishment and the name of the other [adult] who was present.

On three occasions, twice when boys were accused of "playing hooky" and once when plaintiff Bloom was accused of making an obscene phone call,[9] fifty "licks" with a long wooden mallet were administered by two assistants to the principal.[10] In one instance, Daniel Lee was forced to join a line of students who were required to bend over the back of a chair with their hands on the front of the seat (the favored position for such paddlings). When Daniel asked what he had done to deserve punishment, Mr. Barnes hit him on the hand with a mallet four or five times. A bone in Daniel's right hand was fractured, which prompted the district court judge to state "[i]t seems to me to be disfigured, a portion of his right knuckle is enlarged to some degree."[11]

With this factual basis, Justice Powell, writing for the five member majority[12] engaged in a wide-ranging discussion of the history of corporal punishment in common law. He pointed out that corporal punishment had its beginnings with the doctrine of in loco parentis, first espoused in the 18th century, and enshrined by Blackstone in his Commentaries.[13] The doctrine was developed to cover situations in which private tutors, hired and paid by parents to instruct their children, felt it necessary to use corporal punishment in dealing with their charges. The tutors were permitted to stand in the lawful place of the parents while disciplining their students.[14]

With compulsory attendance rules in effect throughout the United States,[15] in loco parentis has been modified or abandoned altogether in favor of the parens patriae doctrine.[16] Thus,

9. Another student later admitted making the call. 498 F.2d at 258.

10. *Id.* In each case, the boys' buttocks and legs were black and blue and swollen; Reginald Bloom required medical attention.

11. *Id.* This and other severe punishments are detailed at length in Brief for Petitioners at 8-17.

12. Chief Justice Burger and Justices Stewart, Blackmun and Rehnquist joined Justice Powell in his opinion. A dissent was filed by Justice White and joined in by Justices Brennan, Marshall and Stevens. Justice Stevens also filed a separate dissent.

13. 1 BLACKSTONE, COMMENTARIES* 453.

14. *See* A. REITMAN, J. FOLLMANN & E. LADD, CORPORAL PUNISHMENT IN THE PUBLIC SCHOOLS (ACLU Reports, 1972); 6 HARV. C.R.-C.L. L. REV. 583 (1970-71).

15. *See, e.g.*, WIS. STAT. § 118.15 (1975).

16. The term refers to "the state, as a sovereign — referring to the sovereign power of guardianship over persons under disability; . . . such as minors. . . ." BLACK'S LAW DICTIONARY 1269 (Rev. 4th ed. 1968) (citations omitted). A discussion of the deficiencies of the judicial system as used against minors can be found in Brief for Appellants at 13-18. *In re* Gault, 387 U.S. 1 (1967). *See also* A. REITMAN, J. FULLMAN, E. LADD, CORPORAL PUNISHMENT IN THE PUBLIC SCHOOLS (ACLU Report, 1972).

with the Supreme Court's summary approval,[17] corporal punishment is now sanctioned in most states notwithstanding the parents' disapproval or contrary direction.[18] This background led the majority to conclude that traditional common law remedies and restraints, coupled with the openness of the schools and the freedom of students to leave school at will,[19] made it unnecessary for the Court to extend eighth amendment rights to school children.

CRUEL AND UNUSUAL PUNISHMENT

The majority holding on the eighth amendment issue was based on the premise that the Supreme Court had applied the cruel and unusual punishment clause only in cases dealing with criminal punishments, and since an extension to noncriminal cases was unnecessary and would serve no useful purpose, the court's policy would not change.[20] Relying on this criminal/civil distinction, the Court attempted to fit the body of eighth amendment law into this analysis.

The opinion cited several previous decisions in support of the claim that the cruel and unusual punishment clause applies only in criminal cases. Capital punishment cases[21] and cases dealing with long prison terms[22] predominate in these decisions. As further authority, the Court cited such cases as

17. Baker v. Owen, 423 U.S. 907 (1975).

18. California forbids corporal punishment without parental approval. CAL. EDUC. CODE § 49001 (West 1976). In the present case, Mr. Andrews, father of plaintiff Roosevelt Andrews, demanded that the principal discontinue the use of corporal punishment after Roosevelt received a particularly severe beating. Roosevelt was not thereafter exempt from corporal punishment. Brief for Petitioners at 13.

19. James Ingraham, who was held by Mr. Barnes and Mr. Deliford while Mr. Wright administered 20 "licks," might dispute the Court's openness argument. James required medical attention for severe bruises and a hematoma, and missed 11 days of school as a result of the beating. 498 F.2d at 256.

20. 97 S. Ct. at 1411-12. The *Ingraham* opinion includes a lengthy discussion of the origins and evolution of the eighth amendment. For an exhaustive discussion, *see* Granocci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning* 57 CALIF. L. REV. 839 (1969).

21. The latest round of capital punishment cases, beginning with Furman v. Georgia, 408 U.S. 238 (1972), and continuing with the consideration of state statutes on a state by state basis by the Court are, of course, prime objects of eighth amendment scrutiny. *See* Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Profitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976).

22. *See, e.g.*, Weems v. United States, 217 U.S. 349 (1910), in which the Court reversed a prison term of 12 years for falsifying public documents in the Philippines. The punishment was found to be cruel and unusual.

Robinson v. California,[23] in which the Court found unconstitutional a California statute which declared that narcotics addiction was a criminal offense. Of course, the fact that many criminal punishment cases have been decided on eighth amendment grounds could hardly sustain the argument made for excluding other kinds of punishment from eighth amendment protection.

Curiously the Court relied on *Trop v. Dulles*[24] and *Estelle v. Gamble*[25] in support of the thesis that eighth amendment protection would be afforded only in criminal punishment cases. However, the reliance was faulty for the *Estelle* decision, in fact, was not based on the eighth amendment as it affects criminal punishments.[26] The plaintiff in *Estelle* alleged that he was denied adequate medical treatment while in prison, and the Supreme Court held that deliberate denial of medical care to prison inmates was impermissible under the cruel and unusual punishment clause.[27] The clause was involved not because a refusal to provide medical care was punishment for a crime, but because such refusal was cruel and unusual.[28]

In *Trop,* the Court held that denationalization for desertion was barred as a cruel and unusual punishment by the eighth amendment.[29] The government's argument in this case was that the statute dealing with denationalization for desertion was a nonpenal exercise of the war power by Congress and therefore not covered by the cruel and unusual punishment clause. The Court rejected this argument, finding that the label placed on a statute would not determine its nature. Rather, the

23. 370 U.S. 660 (1962).

24. 356 U.S. 86 (1958).

25. 429 U.S. 97 (1976), *rehearing denied,* 429 U.S. 1066 (1977).

26. *Id.*

27. *Id.* at 104-05. In Gamble's case, the Court found no deliberate indifference to plaintiff's medical needs.

28. *Id.*

In the dissenting opinion in *Ingraham,* Justice White states:

> Yet the constitutional prohibition is against cruel and unusual *punishments;* nowhere is that prohibition limited or modified by the language of the Constitution. Certainly the fact that the Framers did not choose to insert the word "criminal" into the language of the Eighth Amendment is strong evidence that the Amendment was designed to prohibit all inhumane or barbaric punishments, no matter what the nature of the offense for which the punishment is imposed.

97 S. Ct. at 1420.

29. 356 U.S. at 101.

Court held that a purposive approach should be used: "In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment — that is, to reprimand the wrongdoer, to deter others, etc.,—it has been considered penal."[30] The opinion stated that the purpose of the statute in question was clearly penal since the intent was to impose a deprivation of liberty, and therefore the eighth amendment applied.[31]

This finding distinguishes *Trop* from other deportation cases in which the Court allowed aliens to be deported as a valid exercise of state power. For example, in *Mahler v. Eby*[32] the Court stated that "[t]he sovereign power to expel aliens is political and is vested in the political departments of the Government."[33] And, "The right to expel aliens is a sovereign power necessary to the safety of the country and only limited by treaty obligations in respect thereto entered into with other governments."[34] In these cases the Court does not refuse to apply eighth amendment guarantees to noncriminal punish-

30. *Id.* at 96 (footnotes omitted). *See also* Knecht v. Gillman, 488 F.2d 1136, 1139 (8th Cir. 1973), in which the court states, "At the outset we note that the mere characterization of an act as 'treatment' does not insulate it from eighth amendment scrutiny."

31. In Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), the Supreme Court again used the purposive approach, scorned by the majority in *Ingraham* as without basis, in determining whether a statute was penal and therefore covered by the eighth amendment:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment — retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry.

Id. at 168-69 (footnotes omitted). If, weighing these criteria, the statute can be said to be punitive, then the eighth amendment should be applied, according to the Court.

32. 264 U.S. 32 (1924).

33. *Id.* at 40.

34. *Id.* at 39. *See also* Bugajewitz v. Adams, 228 U.S. 585 (1913), on which the majority relies. In *Bugajewitz* the Court finds that the reason for deportation is the harm done to the country by the presence of the alien. The Court stated, "nor is the deportation a punishment; it is simply a refusal by the Government to harbor persons whom it does not want." *Id.* at 591. The majority in *Ingraham* insisted that the distinction in this and other cases is between criminal and noncriminal punishments. A fair reading of the cases suggests that the real distinction is between penal and nonpenal statutes. In this context, it can hardly be argued that beating a child with a paddle is not penal.

ments as the majority suggested; rather, it finds that not punishment, but the exercise of a valid state power is involved. The distinction is clear.

The *Ingraham* case is likewise distinguishable from *Uphaus v. Wyman,*[35] cited in the majority opinion as further evidence of a noncriminal case in which the cruel and unusual punishment clause was held inapplicable. In *Uphaus,* the Supreme Court upheld a civil contempt finding pursuant to a New Hampshire statute, imposed when a camp owner refused to produce records subpoenaed for a "subversives" check. The camp owner was jailed for an indefinite period, pending the release of the records.

In holding that no eighth amendment rights were denied in *Uphaus,* the Court enlarged on the penal/nonpenal distinction by finding that a legitimate state interest in compelling the production of documents, rather than punishment, was the reason for the contempt ruling. Thus, the confinement was justified in a civil setting and was not penal.[36] Therefore, contrary to the majority conclusion, while there is no clear precedent for applying the eighth amendment to corporal punishment in public schools, neither is there precedent for its nonapplication.[37] In fact, since the purposes of the Florida corporal punishment statute are clearly penal,[38] the Court's decision in *Ingraham* seems to reject the logic used in *Trop* to extend eighth amendment protections to non-criminal, but nevertheless penal deprivations.

Not only is the Court's failure to apply the cruel and unusual punishment clause to civil cases unnecessary in light of previous decisions, but in this fact situation it also is contrary to the recent judicial tendency to expand constitutional protec-

35. 360 U.S. 72 (1959).

36. *Id.*

37. Lower court decisions on this point have not been in agreement. In Gonyaw v. Gray, 361 F. Supp. 366 (D. Vt. 1973), the cruel and unusual punishments clause was found not to apply to statutorily authorized corporal punishment. The court claimed that the clause applied only to criminal cases. *But see* Ware v. Estes, 328 F. Supp. 657 (N.D. Tex. 1971). While the court did find that the clause did not apply to the statute and punishment then at issue, it did not suggest that the clause would not apply in the proper case.

In Sims v. Waln, 536 F.2d 686 (6th Cir. 1976), Ingraham v. Wright, 525 F.2d 909 (5th Cir. 1976) is used as precedent to support the *Sims'* court's rejection of the cruel and unusual punishments argument as applied to public schools.

38. *See* note 8, *supra.*

tions in juvenile cases.

In a footnote to the *Ingraham* decision,[39] Justice Powell disposed of a series of opinions, having their real beginnings with *In re Gault,*[40] in which many courts recognized the rights of children faced with prosecution in the juvenile court system to full constitutional protections.

In *Gault,*[41] a juvenile charged with making an obscene phone call, which Justice Fortas, writing for the majority, characterized as "the irritatingly offensive, adolescent, sex variety,"[42] was sent to a juvenile home for six years. Noting that the penalty for adults convicted of the same offense was two months and that Gault was not afforded even the rudiments of due process,[43] the Supreme Court reversed the Arizona Supreme Court decision which had upheld the juvenile court ruling.[44]

Gault was a far-reaching decision; the majority opinion touched on many aspects of the handling of children in juvenile court. Essentially, *Gault* stood for the principle that constitutional protections may not be withheld from people merely because they have not yet reached maturity. Justice Fortas found, for example, that "[t]he essential difference between Gerald's case and a normal criminal case is that safeguards available to adults were discarded in Gerald's case. The summary procedure as well as the long commitment was possible because Gerald was 15 years of age instead of over 18."[45]

When the majority dismissed *Gault* in a footnote, it also

39. 97 S. Ct. at 1411 n.37.

40. 387 U.S. 1 (1967).

41. While *Gault* was decided on due process grounds, the sweeping language used in the majority opinion demonstrates the clear intent of the court to protect juveniles against the full range of invasions of their constitutional rights.

42. 387 U.S. at 4.

43. *See* Brief for Appellants at 9-13, *In re* Gault, 387 U.S. 1 (1967) for a complete explanation of the procedures in the Arizona Juvenile Court. For example, Gault received no notice, had no opportunity to confront his accuser (in fact, a probation officer spoke with the alleged recipient of the call once; she made no further statements), and there was no appeal procedure.

44. 387 U.S. at 59. The case reached the Arizona Supreme Court on a writ of habeas corpus, since juvenile cases were not appealable in Arizona at that time.

45. *Id.* at 29. There is obvious irony if *Gault* and *Ingraham* are compared. As noted previously, a student at Drew Junior High School received fifty "licks" for allegedly making an obscene phone call which he denied making. In *Gault,* the same offense, with the same protestations of innocence, brought a six year sentence. Surely, then, measured against the adult penalty, either fifty "licks" or a six year sentence are cruel and unusual punishments.

held that a group of cases decided in district and circuit courts dealing with the cruel and unusual punishment clause as applied to juvenile homes were not compelling authority, since the reason for the extension of eighth amendment guarantees to these juveniles was the prison-like setting in which they lived; in contrast, the openness of schools meant no such protections were necessary for the plaintiffs in *Ingraham*.[46]

The fallacious character of this argument is pointed out by Justice White in his dissent:

> The mere fact that a public flogging or a public execution would be available for all to see would not render the punishment constitutional if it were otherwise impermissible. Similarly, the majority would not suggest that a prisoner who is placed in a minimum security prison and permitted to go home on the weekends should be any less entitled to Eighth Amendment protections than his counterpart in a maximum security prison.[47]

In fact, *Gault* and other cited juvenile cases stood for the proposition that the cruel and unusual punishment clause of the eighth amendment would be applicable whenever punishments were cruel and unusual; the decisions clearly did not say that punishments need to be criminal for the protection to be afforded.

In *Inmates of Boys' Training School v. Affleck,* the court stated,

> If a boy were confined indoors by his parents, given no education or exercise and allowed no visitors, and his medical needs were ignored, it is likely that the state would intervene and remove the child for his own protection. . . . Certainly, then, the state acting in its *parens patriae* capacity cannot treat the boy in the same manner and justify having deprived him of his liberty. Children are not chattels.[48]

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46. 97 S. Ct. at 1411-12.

47. *Id.* at 1422.

48. 346 F. Supp. 1354, 1367 (D. R.I. 1972). Two attempted suicides at the school in question were punished by solitary confinement; no medical attention was given. In one of the attempts in which a child slit his wrists, the blood was allowed to dry on his body. The cruel and unusual punishment clause was invoked in this case. *See also* Vann v. Scott, 467 F.2d 1235 (7th Cir. 1972); Martarella v. Kelley, 349 F. Supp. 575 (S.D. N.Y. 1972), in which the court applied the cruel and unusual punishment clause to a statute labeled "nonpenal" which nevertheless was invoked to place children in detention homes with horrible conditions.

Surely the destructive environment in a public school where vice-principals walked the halls carrying brass knuckles is as "insidiously destructive of the humanity of these boys"[49] as is lack of physical exercise in a training school.

Finally, in *Weems v. United States,* the Supreme Court, in dealing with the permissible breadth of the cruel and unusual punishment clause, suggested that the constitutional prohibition against cruel and unusual punishment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."[50] It is indeed unfortunate that, in the *Ingraham* decision, this suggestion was not followed and that the human rights of students subject to corporal punishment are now left unprotected.

LIBERTY INTEREST IN DUE PROCESS OF LAW

In a conclusory footnote to his eighth amendment argument, Justice Powell states,

> As these cases demonstrate, the State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law. Where the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment.[51]

Curiously, the process due turns out to be the same remedy available when the due process clause is not involved.[52] The Court's argument was based on the availability of common law safeguards and the openness of the school environment, coupled with the availability of a state tort remedy if there was any infringement of the liberty interest.[53] However, two points should be made about this argument. While the trend of deci-

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Many of the children in the cited cases were in the homes due to parental neglect and not because of any criminal or reprehensible behavior on their part.

49. 346 F. Supp. at 1365.

50. 217 U.S. 349, 378 (1910).

51. 97 S. Ct. at 1412-13 n.40.

52. *See* Paul v. Davis, 424 U.S. 693 (1976). The Court found no liberty interest in reputation alone. Writing for the majority, Justice Rehnquist suggested that a state tort action in defamation was the proper remedy.

53. As Justice White points out in his dissent, "under Florida law, a student punished for an act he did not commit cannot recover damages from a teacher 'proceeding in the utmost good faith . . . on the reports and advice of others'." 97 S. Ct. at 1424 (footnote omitted). The tort remedy may well be elusive.

sions in the Court's recent past supports *Ingraham's* due process argument, at least insofar as the Court refused to make a federal remedy available,[54] much precedent is ignored.[55] The refusal runs counter to a line of decisions culminating in *Goss v. Lopez,*[56] in which the Supreme Court found that students suspended from public schools for fewer than ten days had a protected property interest in education, and that minimal due process was necessary to protect that interest.[57]

In his dissent in *Goss,* Justice Powell argued that, "[a]s it is difficult to think of any less consequential infringement than suspension of a junior high school student for a single day, it is equally difficult to perceive any principled limit to the new reach of procedural due process."[58] This statement can now be contrasted with the majority opinion in *Ingraham,* in which Justice Powell states, "School authorities viewed corporal punishment as a less drastic means of discipline than suspension or expulsion."[59] Logically, then, the majority should find no protected liberty interest in *Ingraham.*[60] Yet, such an interest is found. The distinguishing factor between *Goss* and the series of decisions extending constitutional due process protections to school children on the one hand[61] and *Ingraham* on the other

54. *See, e.g.,* Paul v. Davis, 424 U.S. 693 (1976); Rizzo v. Goode, 423 U.S. 362 (1976); Montanye v. Haymes, 427 U.S. 236 (1976); Bishop v. Wood, 426 U.S. 341 (1976).

55. *See, e.g.,* Monroe v. Pape, 365 U.S. 167 (1961) where the Court said, "[i]t is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Id.* at 183. *Monroe* had its beginnings in United States v. Classic, 313 U.S. 299 (1941), and Screws v. United States, 325 U.S. 91 (1945). In *Screws,* the Court states, "Nor does its [the offense's] punishment by federal authority encroach on state authority or relieve the state from its responsibility for punishing state offenses." *Id.* at 108.

56. 419 U.S. 565 (1975). *See also* Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969); Betts v. Board of Educ. of Chicago, 466 F.2d 629 (7th Cir. 1972); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1969); Buttny v. Smiley, 281 F. Supp. 280 (D. Colo. 1968); and Esteban v. Central Mo. State College, 277 F. Supp. 649 (W.D. Mo. 1967).

57. The Court defined minimal due process as "oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." 419 U.S. at 581.

58. *Id.* at 600 (footnote omitted).

59. 97 S. Ct. at 1405. In fact the respondents claimed at the district court level that corporal punishment was an alternative remedy, not a less serious one. 498 F.2d at 264.

60. The other dissenting justices in Goss v. Lopez, 419 U.S. 565 (1975), were Chief Justice Burger and Justices Blackmun and Rehnquist.

61. *See* note 55, *supra.*

would seem to be the *Ingraham* Court's contention that excessive and even brutal corporal punishment is less consequential than a one day suspension. Surely, since corporal punishment has been almost uniformly abolished in penal institutions throughout the country as cruel and unusual punishment,[62] the very least parents and students should expect is meticulous procedural protection before the infliction of such punishment.[63]

A post-infliction state tort remedy, the protection suggested by the majority, in fact provides no protection. At most, a suit for damages could be brought after the fact. The majority's contention that this is the only process due is, in this writer's opinion, the most alarming point made in the decision. Two dangerous lines of argument are now opened up: First, that state remedies should be exhausted before access to federal courts is made available,[64] and second, that state remedies may be the only recourse notwithstanding the violation of a constitutional right under color of state law.

This reasoning flows logically from recent decisions restricting relief on fourteenth amendment grounds. In *Paul v. Davis,*[65] the Supreme Court refused to afford a federal remedy for a claimed liberty interest in reputation.[66] This decision disregarded the findings in *Wisconsin v. Constantineau.*[67] That case

62. 97 S. Ct. at 1422 (dissenting opinion). *See also* A. REITMAN, J. FOLLMANN & E. LADD, CORPORAL PUNISHMENTS IN THE PUBLIC SCHOOLS at 9 (ACLU Reports, 1972), wherein the authors state, "It is, therefore, startling to confront the fact that schools are the one remaining institution in this country where corporal punishment may be legally inflicted."

63. In *Gault,* Justice Fortas, for the majority, states:

> Failure to observe the fundamental requirements of due process has resulted in instances, which might have been avoided, of unfairness to individuals and inadequate or inaccurate findings of fact and unfortunate prescriptions of remedy. Due process of law is the one primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise.

387 U.S. at 19-20 (footnote omitted). *See also* Kent v. United States, 383 U.S. 541, 555 (1966), where Justice Fortas stated, "But the admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness."

64. The exhaustion doctrine is appearing with frequency in later decisions. For an extensive discussion of this issue, *see Developments in the Law—Section 1983 and Federalism,* 90 HARV. L. REV. 1133, 1264-74 (1977). The doctrine is outside the scope of this paper.

65. 424 U.S. 693 (1976).

66. For an analysis of Paul v. Davis, *see* 60 MARQ. L. REV. 162 (1976).

67. 400 U.S. 433 (1971).

involved the "posting" in all liquor stores of names of anyone reported to be alcoholic. The persons named were prohibited from buying alcoholic beverages. In declaring the Wisconsin statute which authorized "posting" unconstitutional, the Court found that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."[68]

In *Paul,* the *Constantineau* decision was said not to have extended due process protections to the liberty interest in reputation; rather, it was distinguished from *Paul* as extending constitutional protection to "the right to purchase or obtain liquor in common with the rest of the citizenry."[69] This misstatement of the clear meaning of *Constantineau* demonstrates the Court's intent to sharply restrict the reach of fourteenth amendment protections.[70]

In his dissent in *Bishop v. Wood,* Mr. Justice Brennan called the *Paul v. Davis* decision, "overtly hostile to the basic constitutional safeguards of the Due Process Clauses of the Fifth and Fourteenth Amendments."[71] How much more hostile, then, is the assertion that even with a liberty interest to be protected, the protection afforded by the Supreme Court is the availability of a post-punishment state tort remedy, which in fact may not be available.[72]

Those who feared that *Paul* would be extended to narrow

68. *Id.* at 437.

69. 424 U.S. at 708. In *Paul,* a man's name and picture were placed on a flyer of "Known Shoplifters" and distributed to local merchants, despite the fact that the man had never been convicted of shoplifting and, in fact, had been arrested only once. The charges were dropped on that occasion.

70. Justices Brennan and Marshall in their dissenting opinion found this a ridiculous reading of the Wisconsin v. Constantineau decision. 424 U.S. at 731-33.

71. 426 U.S. 341, 351 (1976). This case sharply restricts the property and liberty interests in state employment and reputation. Justices Blackmun, White and Marshall also dissented.

72. There is no tort remedy available against public officials in Florida unless bad faith can be shown. 97 S. Ct. at 1424-25 n.11 (dissenting opinion). The Florida statute states,

> Except in the case of excessive force or cruel and unusual punishment, a teacher or other member of the instructional staff, a principal or his designated representative, or a bus driver shall not be civilly or criminally liable for any action carried out in conformity with the state board and district school board rules regarding the control, discipline, suspension, and expulsion of students.

Fla. Stat. Ann. § 232.275 (West 1977).

the scope of section 1983 remedies[73] must take into account another threat at least as serious. That is, that even with a finding of a constitutionally protected interest, state courts still may afford the only remedy. This is an unusual construction of the intent of the writers of the due process clause.

In explaining the origins of section 1983[74] cases generally, the Court in *Monroe v. Pape*[75] found three categories in which the statute, and consequently fourteenth amendment due process protections, could be invoked: to override state laws;[76] to provide a federal remedy when state law is inadequate; and to provide a federal remedy when the state remedy, while adequate in theory, is not available in practice. As Justice White suggests, such a remedy was probably unavailable to plaintiffs in *Ingraham.*[77] Thus, paradoxically, the constitutional remedy made available by the Supreme Court to compensate for the practical unavailability of state tort remedies is a state tort remedy.

Finally, the majority draws an analogy between corporal punishment and warrantless public arrests made with probable cause.[78] The risk of unreasonable arrest is equated with the risk of unwarranted and unreasonable corporal punishments. However, the liberty interest invaded when mistaken warrantless

73. *See, e.g., Developments in the Law—Section 1983 and Federalism,* 90 HARV. L. REV. 1133 (1977); 60 MARQ. L. REV. 162 (1976); E. Alexander, Due Process in the State and Federal System (Paper #10, WCLU Foundation Civil Rights — Civil Liberties — Litigation Conference, 1977).

74. 42 U.S.C. § 1983 (1970) provides:

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

This statute is derived from the Ku Klux Klan Act, ch. 22, § 1, 17 Stat. 13 (1871).

75. 365 U.S. 167, 173-74 (1961). The opinion contains an excellent discussion of due process rights.

76. The substantive due process issue was dealt with summarily in *Ingraham.* The Court decided that the Florida statute, cited at note 8, *supra,* fulfilled substantive due process requirements. 97 S. Ct. at 1415-16.

Generally, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

77. 97 S. Ct. at 1423-25.

78. *Id.* at 1417. Such arrests have not been found violative of the fourth amendment.

arrests are made is different in kind from the interest invaded when excessive or mistaken corporal punishment is inflicted.[79] Once a hand is disfigured, once a head is beaten so badly as to require surgery, or once a child is put in fear for his personal integrity in a public junior high school, damages would seem a pale remedy. On the other hand, a mistaken arrest can quickly be cured, since it is merely the first step in an elaborate procedure molded specifically to protect the accused's rights.

In *Ingraham,* constitutional protection of the basic right to personal security and bodily integrity has been denied. The refusal to intrude on the "educational" process[80] in Drew Junior High School, even with clear evidence of the unconscionable activities engaged in by those in authority at the school, denegrates the value of children's rights.

More generally, therefore, the Court's disposal of the case on the basis that the eighth amendment's protection against cruel and unusual punishment applies only in criminal cases exposes a basic fallacy in the artificial criminal/civil distinction; the infliction of injury through institutional punishment is nonetheless serious if the punishment stems from a noncriminal situation. Furthermore, the Court's handling of the due process issue ignores the tenor of section 1983 decisions, particularly as they had developed over the three decades prior to the Burger Court. It is the due process rationale which contains the most devastating implications for those who suffer deprivation of a protected life, liberty or property interest without adequate notice and opportunity to be heard. The majority's fourteenth amendment argument will have a far-reaching and devastating effect upon the right to due process.

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79. *Id.* at 1426. Justice White posits that this novel theory, if extended, would mean the order of trial, then punishment, could be reversed; the wrongly incarcerated citizen then could collect damages in state court.

80. *See, e.g.,* United States v. Watson, 423 U.S. 411 (1976), where a warrantless daytime arrest by postal officers was upheld as a valid use of the arrest power. The procedures followed after such an arrest were explained in detail. As the dissent in *Ingraham* makes clear, the two procedures are poles apart.

81. This refusal was the major basis not only for the *Ingraham* decision, but also for the dissent in *Goss.* 419 U.S. at 585.