


August 2015

# Corporal Punishment in the Public Schools: The Legal Question

William Irwin Arbuckle III

Please take a moment to share how this work helps you [through this survey](#). Your feedback will be important as we plan further development of our repository.

Follow this and additional works at: <http://ideaexchange.uakron.edu/akronlawreview>

 Part of the [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

---

## Recommended Citation

Arbuckle, William Irwin III (1974) "Corporal Punishment in the Public Schools: The Legal Question," *Akron Law Review*: Vol. 7 : Iss. 3 , Article 9.

Available at: <http://ideaexchange.uakron.edu/akronlawreview/vol7/iss3/9>

This Article is brought to you for free and open access by Akron Law Journals at IdeaExchange@UAkron, the institutional repository of The University of Akron in Akron, Ohio, USA. It has been accepted for inclusion in Akron Law Review by an authorized administrator of IdeaExchange@UAkron. For more information, please contact [mjon@uakron.edu](mailto:mjon@uakron.edu), [uapress@uakron.edu](mailto:uapress@uakron.edu).

**PLEASE READ THESE INSTRUCTIONS**

Before completing and signing this statement below PLEASE REVIEW all your debts carefully. Be sure you have disclosed ALL YOUR DEBTS of all kinds and that the facts stated in this statement are correct. DO NOT OMIT ANY DEBTS. We rely upon your good faith and the truth of your representations.

For your protection against an over extension of credit, you are requested above to list each and all of your debts, liabilities and claims against you which are in excess of \$25.00. If you have no other debts, liabilities, etc., please initial the box alongside statement below and affix your signature beneath it.

I have no debts and liabilities in excess of \$25.00 other than those listed hereon. I certify that I have not been instructed by the Lender to which Initial I have made an application for a loan to list only certain debts. Instead this box my instructions have been to list all outstanding debts and liabilities.

\_\_\_\_\_ Signature of Borrower

My "take-home" pay is \$ \_\_\_\_\_ per \_\_\_\_\_. My net income from other sources is \$ \_\_\_\_\_ per \_\_\_\_\_. I hereby state, affirm, represent and warrant to you that my total indebtedness and liabilities on this date do not exceed \$ \_\_\_\_\_.

WITNESS: \_\_\_\_\_ Name \_\_\_\_\_  
 \_\_\_\_\_ Address \_\_\_\_\_

**FOR LOAN OFFICE USE ONLY**

Before approving the making of a loan to the above named borrower, I carefully examined this Statement and relied upon it in passing upon the credit worthiness of such borrower.

\_\_\_\_\_ Signer \_\_\_\_\_ Title

BOR 2-1 Ed. Apr. '73

\* This financial statement form provides sufficient space for all groups of creditors; it warns the consumer of the consequences of uttering a false statement; it provides an attestation clause on the statement itself, whereby the loan officer can indicate that he has, in fact, relied upon the statement in granting credit.

● **Corporal Punishment in the Public Schools:  
 The Legal Questions**

**INTRODUCTION**

**P**UBLIC EDUCATION in the United States has come a long way since the one-room schoolhouse days. This phenomenal growth has been paced by the controversy surrounding the use of corporal punishment as a means of enforcing discipline in the schools. From the oldest reported case reaching the issue of corporal punishment<sup>1</sup> back in 1833 down to the present,<sup>2</sup> the proponents of corporal punishment have had to defend their actions in the courts from a wide variety of attacks based on criminal law, tort law, state statutes, school board regulations and, most recently, constitutional guarantees. Although the attacks on corporal punishment have been largely unsuccessful, the recognition by the courts of the substantive and procedural constitutional rights of students who

<sup>1</sup> Commonwealth v. Fell, 11 Haz. Reg. 179 (Pa. Com. Pl. 1833).

<sup>2</sup> Simms v. Waln, Civil No. 4526 (S.D. Ohio, filed Sept. 18, 1973).

attend public schools<sup>3</sup> in the last fifteen years has sparked new constitutional challenges. The early cases generally treated corporal punishment in one of three contexts: (a) in criminal prosecutions by the state against a teacher for assault and battery on a pupil, (b) in civil actions for damages for physical injuries resulting from the use of corporal punishment on a pupil, and (c) in cases where a teacher is a party to an action arising out of his dismissal for use or misuse of corporal punishment.<sup>4</sup> The Supreme Court did not rule directly on the regulation of student behavior per se until *Tinker v. Des Moines School Dist.*<sup>5</sup> in 1969<sup>6</sup> and the first appellate "hairstyle" decision<sup>7</sup> was not decided until 1965.<sup>8</sup> Although the most litigated area recently concerns student expulsions<sup>9</sup> the topic of corporal punishment has been in the courts, and with more litigation pending, needs careful scrutiny.

The first case to attempt a constitutional challenge of corporal punishment was *Murphy v. Kerrigan*,<sup>10</sup> a federal court case in Boston seeking injunctive relief against the use of corporal punishment in the public schools. This case was prompted by the following incidents: For alleged misconduct, Jeannette Watts, a 14-year-old student at a school in Boston, was struck by her teacher on the cheek and fell as a result of the blow. Another teacher grabbed her by the hair, forced her to the floor, and slapped her in the face. In a similar incident, for disciplinary reasons, a teacher took hold of a ninth grader, a girl of 14, punched her in the face, and ripped a pierced earring off her ear. A 13-year-old boy received two blows on the palm of each hand with a bamboo rattan, causing sharp twinges, a welt, and broken blood vessels under the skin. Other instances of corporal punishment were also charged.<sup>11</sup>

Incidents such as these are not restricted to the Boston area. The American Civil Liberties Union reports that

... Dallas teachers ... readily talk about spanking students for

<sup>3</sup> *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (religion and compulsory education); *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969) (free speech and public schools); *Dixon v. Alabama State Bd. of Ed.*, 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961) (due process and expulsion). See generally Note, *Emerging Rights of High School Students: The Law Comes of Age*, 23 U. FLA. L. REV. 349 (1971); Comment, *Procedural Due Process in Secondary Schools*, 54 MARQ. L. REV. 358 (1971); Note, *The Emerging Law of Students' Rights*, 23 ARK. L. REV. & B.A.J. 619 (1970).

<sup>4</sup> Note, *Right of a Teacher to Administer Corporal Punishment to a Student*, 5 WASHBURN L.J. 75, 88 (1965).

<sup>5</sup> 393 U.S. 503 (1969).

<sup>6</sup> E. REUTTER, LEGAL ASPECTS OF CONTROL OF STUDENT ACTIVITIES BY PUBLIC SCHOOL AUTHORITIES 6 (1970) [hereinafter cited as REUTTER].

<sup>7</sup> *Leonard v. School Committee of Attleboro*, 349 Mass. 704, 212 N.E.2d 468 (1965).

<sup>8</sup> REUTTER, *supra* n. 6 at 15.

<sup>9</sup> *Id.* at 50.

<sup>10</sup> Civil No. 69-1174-W (D. Mass., filed Nov. 7, 1969), noted in 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 583 (1971).

<sup>11</sup> Note, 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 583 at n.1 (1971).

misspelling words, inattentiveness and failure to say "sir," among other transgressions. One teacher at Stockard Junior High . . . has what he calls "double stamp day" on Wednesdays. A student's transgressions are punishable on that day by double the number of licks administered during the remainder of the week. "I do what I call 'warming them up' with five or six taps and then give one hard lick," the teacher said. Students are spanked in front of the room at the conclusion of the class for failure to say "sir," entering the class with shirttails out, or throwing at and missing the wastepaper basket, he said.<sup>12</sup>

The same report indicates that similar situations exist in many other cities.<sup>13</sup> Obvious abuses such as these coupled with modern theories of education have prompted over 60 anti-corporal punishment groups, plus the National Education Association [hereinafter cited as NEA] to work for the abolition of authorized aggression in the nation's schools.<sup>14</sup> This has prompted one commentator to state,

Educational writers and speakers, almost as a unified voice, say the prime function of the school is to develop effective citizens for our democracy. It is therefore disquieting to examine the kinds and extent of authority that some school officials will spend energy and tax money to attempt to justify in court.<sup>15</sup>

It is also disquieting to many educators and parents when they examine the conduct of some teachers, especially in light of modern educational and psychological theories on the potential harms of corporal punishment. "Present theories in this area reject the idea that physical punishment is the best method of developing the child's character or that it is the best method of controlling child behavior."<sup>16</sup> "Corporal punishment further has deleterious effects on children. Insofar as it relies on fear, it disrupts the learning process by repressing the natural tendency of children to explore."<sup>17</sup> There is a substantial body of authority in educational research that indicates corporal punishment does more harm than good because of the resentment it causes between teacher and pupil and because the atmosphere it generates is not believed to be

---

<sup>12</sup> A. REITMAN, J. FOLLMAN, E. LADD, *CORPORAL PUNISHMENT IN THE PUBLIC SCHOOLS* 24 (ACLU REPORTS mimeo, 1972) [hereinafter cited as REITMAN].

<sup>13</sup> *Id.* at 25.

<sup>14</sup> Westin, *Should School Spankings Be Outlawed?* *PARADE*, Nov. 11, 1973, at 11.

<sup>15</sup> REUTTER, *supra* n. 6 at 52.

<sup>16</sup> 20 CLEVE. ST. L. REV. 560, 570 n.77 (1971), citing R. AMSTERDAM, *CONSTRUCTIVE CLASSROOM DISCIPLINE AND PRACTICE* 82 (1957); N. CUTTS & N. MOSELEY, *TEACHING THE DISORDERLY PUPIL* 34 (1957); J. HOWARD, *CHILDREN IN TROUBLE* 239 (1970); R. RREIKURS & L. GREY, *LOGICAL CONSEQUENCES: A NEW APPROACH TO DISCIPLINE* (1968); E. PHILLIPS, D. WEINER, N. HARING, *DISCIPLINE, ACHIEVEMENT AND MENTAL HEALTH* (1960); H. DOUGLASS, *MODERN ADMINISTRATION OF SECONDARY SCHOOLS* (1954).

<sup>17</sup> 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 583, 584 (1971) citing Silverman, *Discipline: Its Psychological and Educational Aspects*, 42 *MENTAL HYGIENE* 277 (1958).

conducive to education.<sup>18</sup> Other criticisms of corporal punishment include charges that corporal punishment is a survival of an earlier barbaric age, a carry-over from the days of primitive savagery, ill-becoming the life of present-day civilized man.<sup>19</sup> Falk declared that corporal punishment was evidence of the continuing class struggle. To teach a child to accept discipline by force is to teach him that he must stay within his class, whereas, according to Falk, intelligent Americans are striving to develop a classless society.<sup>20</sup> Keith James in the published version of his Ph.D. dissertation indicates that corporal punishment may really have been an admission of fear and insecurity on the part of those who used and advocated it. "Such persons were incapable of handling pupil's problems in constructive ways. Corporal punishment was used by them in an effort to compensate for their own weaknesses."<sup>21</sup>

Yet, not all educators are against corporal punishment. The NEA reported in 1970 that little change had occurred in the past decade in the generally widespread teacher approval of judicious use of corporal punishment to discipline pupils. A nationwide sample survey of public school classroom teachers, conducted by the NEA Research Division in late 1969 asked the following question: *Do you favor judicious use of corporal punishment as a disciplinary measure in school?* Responses were indicated separately regarding corporal punishment in elementary and in secondary school. Approximately two-thirds of the respondents approved of corporal punishment in elementary school and almost one-half approved of it in secondary school.<sup>22</sup>

It should be clear from this background that there is a wide disparity of opinion regarding the use of corporal punishment even in the education profession itself. It is not the purpose of this comment to resolve that conflict. Clearer, although certainly not easier, questions are presented in a legal context. Most states have a well-settled body of law authorizing some form of physical force as a type of discipline. Further litigation in this area, unless preceded by legislative changes would seem futile. Recent federal cases attacking the constitutionality of the various state policies, although largely unsuccessful, persist. These issues are by no means settled. The sheer number of persons affected daily by these issues merits a detailed analysis of the questions involved in a constitutional challenge of corporal punishment. A brief summary of the state laws, a survey of the recent federal cases and an analysis of constitutional arguments will be discussed in the balance of this comment.

<sup>18</sup> See 20 CLEVE. ST. L. REV. 560, 570 n.78 (1971).

<sup>19</sup> K. JAMES, CORPORAL PUNISHMENT IN THE PUBLIC SCHOOLS 8-9 (1963).

<sup>20</sup> H. FALK, CORPORAL PUNISHMENT: A SOCIAL INTERPRETATION OF ITS THEORY AND PRACTICE IN THE UNITED STATES (1941).

<sup>21</sup> JAMES, *supra* n. 19 at 10.

<sup>22</sup> 48 NEA RESEARCH BULL. 46, 48-49 (1970).

### THE VARIOUS STATE LAW APPROACHES

Early in the development of the common law in the United States, the courts began to use the doctrine of *in loco parentis*. When pupils are under the jurisdiction of the school, teachers are said to stand in the place of the parent in relation to the student. This doctrine developed because it was felt that a teacher, in order to properly carry out the functions of the school, needed authority to direct and discipline students commensurate with the parents' right. This relationship of the teacher to the child was the essential element in establishing the standard of reasonableness in regard to punishment. With this standard the question is: Under similar circumstances, would it be reasonable for a parent to inflict the punishment? The *in loco parentis* doctrine has also been the basis for some state statutory schemes.<sup>23</sup>

#### *The Case Law*

The case law has extended the doctrine of *in loco parentis* to the point that there is now authority for the proposition that the teacher has the right to use corporal punishment and that right cannot be taken away. The American Law Institute is apparently in accord with this position,<sup>24</sup> at least for public schools. In *Indiana State Personnel Board v. Jackson*<sup>25</sup> the Indiana Supreme Court upheld a teacher's actions in striking a student-patient in a state institutional school. In his concurring opinion, Justice Arterburn defined the right of the teacher and declared that this right could not be taken away by stating,

A teacher, and a parent, have not only the right but the obligation to discipline a child, if necessary using corporal punishment, for the good of such child, as well as the protection of third parties offended or injured by the actions of such child.

---

<sup>23</sup> For a discussion of the *in loco parentis* doctrine see generally, E. REUTER & R. HAMILTON, *THE LAW OF PUBLIC EDUCATION* 284-290, 514-515 (1970). For the argument that *in loco parentis* constitutes only a temporary delegation of parental powers with few of the responsibilities and therefore determines neither the teacher's privilege of punishment nor the extent of the privilege and that *in loco parentis* is insufficient grounds on which to base the authority to punish students physically, see Taylor, *With Temperate Rod: Maintaining Academic Order in Secondary Schools*, 56 KY. L. REV. 617, 624 (1970).

<sup>24</sup> RESTATEMENT (Second) OF TORTS § 153 (1965), states: "(2) One who is in charge of the education or training of a child as a public officer is privileged to inflict such reasonable punishments as are necessary for the child's proper education or training, notwithstanding the parent's prohibitions or wishes." In explanation Comment d states:

In such cases, the fact that the parent expresses a desire that the child should not be punished in a particular way or for a particular offense does not restrict the privilege of school authorities. The will of the parent cannot defeat the policy of the State. The school authorities, therefore, have such disciplinary privilege as is reasonably necessary to secure the education of the child irrespective of the wishes of its parent. The same is true where the parent sends the child to a public school as a matter of economy or choice.

Subsection (1) of § 153 states a different rule for private schools. Subsection (2) and Comment d were expressly disapproved by a federal court in *Glaser v. Marietta*, 351 F. Supp. 555, 560 (W.D. Pa. 1972).

≈ 244 Ind. 321, 192 N.E.2d 740 (1963).

....  
 I might further add that I have serious doubts that a teacher confronted with such a situation and responsibility under the law for maintaining order and a respect for authority before a classroom of pupils, can be deprived by a "rule" of the right to use physical force to eliminate such a disturbance. As long as teachers or parents are obligated under the law to educate, teach and train children, they may not be denied the necessary means of carrying out their responsibility as such teachers or parents.<sup>26</sup>

In *City of Macomb v. Gould*,<sup>27</sup> an Illinois appellate court upheld the conviction of a teacher under a city ordinance prohibiting fighting. The majority of the court affirmed, preferring to leave the question of excessiveness (*i.e.*, Did the force used cross the boundary line from permissible force into fighting?) to the jury. However, Justice Stouder in filing a vigorous dissent based on the teacher's right to use corporal punishment stated, "A teacher not only has the right but the duty to discipline children under his tutelage. Failure to do this is tantamount to the failure of a teacher to perform his function, that of teaching."<sup>28</sup> In fairness it should be pointed out that these two cases represent the farthest extent to which the courts have been willing to go and not a majority rule.

### *The Legislation*

There are basically five types of statutes in the United States today. New Jersey<sup>29</sup> is the only state to expressly prohibit corporal punishment in the schools.<sup>30</sup> At the opposite end of the spectrum a few states expressly permit the teacher to use corporal punishment. For example, California's statute allows the governing board of any school district to adopt rules and regulations authorizing the administration of corporal punishment.<sup>31</sup> Florida's law<sup>32</sup> allows the teacher to use corporal punishment but not

<sup>26</sup> *Id.* at 336-37, 192 N.E.2d at 747-48.

<sup>27</sup> 104 Ill. App.2d 361, 244 N.E.2d 634 (1969).

<sup>28</sup> *Id.* at 365, 244 N.E.2d at 636.

<sup>29</sup> N.J. STAT. ANN. § 18A:6-1 (1968) states:

*Corporal punishment of pupils*

No person employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon a pupil attending such school or institution; but any such person may, within the scope of his employment, use and apply such amounts of force as is reasonable and necessary:

- (1) to quell a disturbance, threatening physical injury to others;
- (2) to obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil;
- (3) for the purpose of self-defense; and
- (4) for the protection of persons or property; and such acts, or any of them, shall not be construed to constitute corporal punishment within the meaning and intent of this section. Every resolution, bylaw, rule, ordinance, or other act or authority permitting or authorizing corporal punishment to be inflicted upon a pupil attending a school or educational institution shall be void.

<sup>30</sup> 48 NEA RESEARCH BULL. 46, 47 (1970).

<sup>31</sup> CAL. EDUC. CODE § 10854 (West 1969).

<sup>32</sup> FLA. STAT. ANN. § 231.09(3) (Supp. 1973), § 232.27 (1961).

before consulting with the principal. Montana has a similar statute<sup>33</sup> that requires corporal punishment to be administered only when necessary and in the presence of both the teacher and the principal. Notice to a parent is also required except in cases of flagrant disobedience to authority. Nevada discourages but permits the use of corporal punishment only if it cannot be avoided and if the parents are notified and then only if not ". . . on or about the head of any pupil."<sup>34</sup> In South Dakota teachers are allowed ". . . to administer such physical punishment on an insubordinate or disobedient student that is reasonable and necessary for supervisory control over the students. . . ."<sup>35</sup> Ohio has a similar law.<sup>36</sup> A third type of statute provides that one of the teacher's duties is to maintain order and discipline among his pupils. States with statutes in this category usually have no other statutory authority expressly authorizing or forbidding corporal punishment in carrying out this duty.<sup>37</sup>

A few states have codified the doctrine of *in loco parentis*.<sup>38</sup> None of the statutes specifically refers to corporal punishment but they have been interpreted as creating that right.<sup>39</sup> The fifth type of statute relating to the teacher's authority is found in the penal code and the definition of assault and battery. These statutes typically exempt the teacher from criminal punishment if the force used was not excessive and was used as a legitimate form of discipline.<sup>40</sup> From this brief overview it is apparent that the states are in conflict as to the propriety and legality of the use of corporal punishment. The only state whose statute appears to leave no room for doubt as to permissible conduct is New Jersey which expressly forbids corporal punishment. The daily interpretation of these statutes, which are too often vague, is left not to the courts or the legislature but to the various school boards and ultimately to each classroom teacher. The wide variety of results even under the same statute should be readily apparent. In most states the same child is subjected to different standards in each classroom he or she enters. The statutory standards, in reality are not standards at all and therefore fall far short of their intended goals.

### RECENT FEDERAL CASES

Today there are four reported federal cases directly reaching

<sup>33</sup> MONT. REV. CODES ANN. § 75-6109 (1971).

<sup>34</sup> NEV. REV. STAT. § 392.465 (1971).

<sup>35</sup> S.D. COMPILED LAWS ANN. § 13-32-2 (1967).

<sup>36</sup> OHIO REV. CODE ANN. § 3319.41 (Page 1972).

<sup>37</sup> *E.g.*, IDAHO CODE ANN. § 33-1224 (1963); N.M. STAT. ANN. § 77-8-3(D) (1953);

WASH. REV. CODE ANN. § 28A:67.100 (1970).

<sup>38</sup> The statutory *in loco parentis* states include: Oklahoma, OKLA. STAT. ANN. tit. 70, § 6-114 (1972); Pennsylvania, PA. STAT. ANN. tit. 24, § 13-1317 (Supp. 1973-74); and West Virginia, W. VA. CODE ANN. § 18A-5-1 (1971).

<sup>39</sup> *Guerrieri v. Tyson*, 147 Pa. Super. 505, 24 A.2d 468 (1942).

<sup>40</sup> *E.g.*, MONT. REV. CODES ANN. § 94-3-107 (Supp. pamphlet 1974); N.Y. PENAL LAW § 35.10(1) (McKinney 1967).



constitutional objections to corporal punishment.<sup>41</sup> There is also a case currently pending in the southern district of Ohio.<sup>42</sup> Although the four reported cases all rejected the constitutional arguments, the nature of the cases involved and the language used in the cases does not close off forever other constitutional challenges using the same or similar issues as a basis of attack. A fifth case, *Murphy v. Kerrigan*,<sup>43</sup> was a consent decree whereby both parties agreed that corporal punishment would be banned in the Boston Public Schools so long as the current Boston School Committee was in office. Being a consent decree it can be considered as having little, if any, precedent value.

In *Ware v. Estes*,<sup>44</sup> a federal judge, sitting alone, ruled on the constitutionality of corporal punishment as it was being applied by the Dallas Independent School District. The case was brought as a class action with the plaintiffs claiming to represent "all students . . . in the Dallas Independent School District who are opposed to the use of corporal punishment as a method of discipline."<sup>45</sup> The plaintiffs were granted class action status<sup>46</sup> but that was the extent of their success. They charged that any corporal punishment administered without parental or student consent deprives them of their rights to due process under the fourteenth amendment because any utilization of corporal punishment is arbitrary, capricious and unrelated to any legitimate educational purpose. The school district countered with its rules and policy which authorize principals to administer any reasonable punishment, including corporal punishment.<sup>47</sup> Under this system the principal may delegate any of his punishment duties to the assistant principal. The teachers are not free to use corporal punishment until the student has been referred to a Pupil Personnel Committee for study. The committee can authorize the teacher to use corporal punishment, but only in the presence of another adult and then not without the written consent of the child's parent. After any corporal punishment is administered the principal is required to file a report with the Assistant to the Associate Superintendent for Instruction.<sup>48</sup> The judge treated these arguments by noting that "[f]rom the evidence presented, the Court has no doubt that the practice of corporal punishment has been abused by some of the seven thousand-odd teachers in the

---

<sup>41</sup> *Gonyaw v. Gray*, 361 F. Supp. 366 (D. Vt. 1973); *Glaser v. Marietta*, 351 F. Supp. 555 (W.D. Pa. 1972); *Ware v. Estes*, 328 F. Supp. 657 (N.D. Tex. 1971), *aff'd per curiam*, 458 F.2d 1360 (5th Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972); *Sims v. Bd. of Ed. of Independent School Dist. No. 22*, 329 F. Supp. 678 (D.N.M. 1971).

<sup>42</sup> *Sims v. Waln*, Civil No. 4526 (S.D. Ohio, filed Sept. 18, 1973).

<sup>43</sup> Civil No. 69-1174-W (D. Mass. 1970).

<sup>44</sup> 328 F. Supp. 657 (N.D. Tex. 1970), *aff'd per curiam*, 458 F.2d 1360 (5th Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972).

<sup>45</sup> *Id.* at 658.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

Dallas Independent School District"<sup>49</sup> but holding that abuse does not make the policy itself unconstitutional. By taking this position the Judge seems dangerously close to ignoring reality and only seeing what is supposed to be there.

The parties also presented experts to show that corporal punishment bears no reasonable relation to some purpose within the competency of the State. In this battle of the experts, the Judge chose to believe those aligned with the defendant's point of view and held that it was not shown that the policy was "wholly unrelated to the competency of the state in determining its educational policy."<sup>50</sup> Judge Taylor also rejected any claim of parents' rights being superior by saying that the actions of the school board have only to be reasonable to outweigh any parental rights.<sup>51</sup> For this proposition the judge cited *Cornwell v. State Bd. of Ed.*,<sup>52</sup> a case dealing with who decides what should be included in the curriculum, not whether a child could or could not be beaten without parental consent.

The second part of plaintiff's two-pronged attack was the contention that corporal punishment is a violation of the eighth amendment's ban on cruel and unusual punishments. The judge dismissed this argument by echoing the state statutory and case law scheme that authorizes corporal punishment. Although it is true that laws allowing certain types of punishment bear on the question of what the public sentiment is towards that type of punishment, the eighth amendment was embodied in our Constitution to provide a standard other than current legislative thinking by which to measure the permissibility of a given punishment. By failing to recognize this distinction *Ware v. Estes* failed to effectively deal with the eighth amendment question.

Less than 30 days after the initial *Ware v. Estes* decision, Judge Eubanks, sitting in the New Mexico District Court, rendered a decision on *Sims v. Board of Ed. of the Independent School Dist. No. 22*.<sup>53</sup> This case was also brought as a class action against the school board because of its policy on corporal punishment. Plaintiffs fashioned their claim as a prayer for equitable relief asking for: (1) a declaratory judgment holding that the statewide custom of corporal punishment "is a denial of due process of law and equal protection of the laws, abridges the privileges and immunities of students, and constitutes a cruel and unusual punishment,"<sup>54</sup> (2) both a preliminary and permanent injunction against the defendants prohibiting them from administering corporal punishment, and

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 659.

<sup>51</sup> *Id.* at 660.

<sup>52</sup> 314 F. Supp. 340 (D. Md. 1969), *aff'd*, 428 F.2d 471 (4th Cir. 1970), *cert. denied*, 400 U.S. 942 (1970).

<sup>53</sup> 329 F. Supp. 678 (D.N.M. 1971).

<sup>54</sup> *Id.* at 681.

(3) a mandatory injunction against defendants to adopt and implement a new policy statement with respect to discipline of students which would conform to the Constitution and progressive educational expertise.<sup>55</sup> Plaintiffs based their causes of action on due process and equal protection grounds, on eighth amendment cruel and unusual grounds, on abridgement of the Privileges and Immunities Clause of the fourteenth amendment by imposing on the physical integrity and personal dignity it guarantees, and on first amendment free speech grounds because of the chilling effect of corporal punishment on the exercise of expression.<sup>56</sup> The judge decided these issues by holding that either the rights claimed did not exist or when he found "existing" rights that they were not violated. Lest he be misunderstood the judge, almost sarcastically, delineated his holding:

Let there be no misunderstanding as to the precise holding herein. The role of a federal court in adjudicating claims that state school regulations violate the constitutional rights of pupils is relatively narrow. I do not hold that any school regulation, however loosely formed, is necessarily valid. I do not hold that school authorities have the authority to require a pupil to lay aside any constitutional right when he enrolls. I do not hold that school authorities may act arbitrarily or capriciously in the formulation or in the enforcement of school regulations. I do hold that the defendants have the power to promulgate and to enforce reasonable regulations governing students in attendance with power to impose responsible non-discriminatory corporal punishment for breaches thereof without violating any federally protected constitutional rights of pupils.<sup>57</sup>

The administrative red tape surrounding corporal punishment in New Mexico was substantially less than that confronting the court in *Ware v. Estes*. The Teacher's Handbook in reference to the use of "spanking" mandated that "When this is necessary, the punishment shall be administered by the school principal or if administered by the teacher it should be witnessed by the principal or his delegated representative in his absence."<sup>58</sup> Also in this case the plaintiffs did not allege or attempt to prove the widespread abuse of corporal punishment that was an underlying theme in *Ware v. Estes*. The attack here was more straightforward. After a better reasoned but not exhaustive opinion, the result was the same, and corporal punishment was given the court's constitutional blessing.

The next federal case to be decided offers some hope for the opponents of corporal punishment. *Glaser v. Marietta*,<sup>59</sup> was an action by a student in the Northgate School District of Pennsylvania<sup>60</sup> and his

---

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 690.

<sup>58</sup> *Id.* at 680.

<sup>59</sup> 351 F. Supp. 555 (W.D. Pa. 1972).

<sup>60</sup> Northgate is a suburb of Pittsburgh, Pennsylvania.

mother seeking an injunction against the school district to enjoin it from authorizing corporal punishment. In this case the student (a 12-year-old boy) was given three "medium strokes" on the buttocks with a paddle by an assistant principal after he had interrogated the plaintiff and another student and decided that the plaintiff was responsible for some fisticuffs in the classroom. The judge chose to view this case as offering two questions for decision. First, is the application of corporal punishment unconstitutional per se under the fifth, eighth and fourteenth amendments? Second, is there a violation of parental rights by administering corporal punishment over the objections of the parents?

On the first issue the court reviewed the battle of the experts, declared it a standoff, and then gave the decision to the state but added, "However, it is not for us to choose sides in this battle of the experts because the wisdom or desirability of utilizing corporal punishment as a means of discipline in the schools is not for this court to decide."<sup>61</sup> It is unclear why the court takes this stand. If it had chosen to believe the plaintiffs' experts and found that corporal punishment was harmful to the student and does not aid discipline then there would have been no justification for its use and it would therefore be, if not cruel and unusual, at least a violation of the courts' own reasonableness test.

Still maintaining that it was not taking sides in the battle of the experts the court discussed the special nature of the immaturity of children and then went on to say: "A method of parental control originating in the mists of prehistoric times, commended in Biblical references, sanctioned by Blackstone's Commentaries and defended by many of today's child psychologists, is not lightly to be declared unconstitutional"<sup>62</sup> (emphasis added). The court then reasoned that if the parent could administer corporal punishment (because Blackstone and the Bible tells him so) then the school system could do the same under the legislative grant of *in loco parentis* rights. This reasoning answers the question before asking it. What the plaintiff was attacking here was not the *fact* that the doctrine exists but the *propriety* of that doctrine. In justifying corporal punishment by saying the legislature has given that power to the school authorities Judge Weis never effectively reached the real issue. In these days of growing bureaucracy and big government, administrative arms of the government are getting further and further away from the people. It is not realistic to assume in our urban, mobile society that administrative officials are attuned to the wishes of each parent as they were 100 years ago, when *in loco parentis* was still developing.

Judge Weis impliedly recognized this change in circumstance when he held that the parental rights were superior to the legislatively substituted parental rights of the school administration. Quoting from

---

<sup>61</sup> 351 F. Supp. at 557.

<sup>62</sup> *Id.* at 558 (emphasis added).

*Stanley v. Illinois*,<sup>63</sup> Judge Weis said: "The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential' [citations], 'basic civil rights of man' [citation], and '(r)ights far more precious... than property rights,.'..."<sup>64</sup> In discussing the rights of the parents versus the rights of the school board, the court held that whether the balancing test is one of "reasonably necessary regulation" or that of "powerful countervailing interest" the result would be the same. "The facts in this case demonstrate that the regulation satisfies neither test and that the School District has established no reason why it should prevail over the asserted claim of basic parental right."<sup>65</sup> If the school board could not show any reason why corporal punishment was more important than the parent's right to discipline (in other words there was no compelling interest strong enough) why could it show that there was a compelling interest stronger than the child's physical integrity? Be that as it may, the case does stand for the proposition that school officials cannot administer corporal punishment over the objections of parents. The holding is based on recent Supreme Court pronouncements on parental rights and is good authority for overruling the propositions advanced in *Indiana State Personnel Bd. v. Jackson* and *City of Macomb v. Gould* discussed earlier.<sup>66</sup>

Perhaps the strongest case to date for corporal punishment is *Gonyaw v. Gray*,<sup>67</sup> a district court case ruling on a motion to dismiss a civil rights action brought by parents and students against the local school board. The plaintiffs (two 12-year-olds and their parents) sought damages under 42 U.S.C. section 1983<sup>68</sup> and a declaratory judgment that the Vermont statute authorizing corporal punishment<sup>69</sup> is unconstitutional. The judge prefaced his ruling on the motion by noting that an essential

<sup>63</sup> 405 U.S. 645, 651 (1972).

<sup>64</sup> 351 F. Supp. at 559-60.

<sup>65</sup> *Id.* at 561.

<sup>66</sup> See text accompanying nn. 24-28 *supra*.

<sup>67</sup> 361 F. Supp. 366 (D. Vt. 1973). The companion case *Ladue v. Moffatt*, 361 F. Supp. 366 (D. Vt. 1973), Civil No. 73-2675 (2d Cir., Nov. 27, 1973), was dismissed after appeal because the student's parents separated and moved out of the state. Richard Kohn, who was attorney of record in both cases, has indicated to this author that the American Civil Liberties Union was ready to appeal the *Gonyaw* case but could not obtain the parents' consent. Because of these cases Representative Edward Farrow from Procter, Vt., has introduced a bill in the current session of the state legislature, H.B. 365 (Jan. 1974), which would do away with corporal punishment in the Vermont schools.

<sup>68</sup> This section provides that a person acting under color of state law who deprives another of rights, privileges or immunities secured by the Constitution shall be liable to the injured party in an action at law or suit in equity.

<sup>69</sup> VT. STAT. ANN. tit. 16, § 1161 (1958):

A teacher or principal of a school or a superintendent or a school director on request of and in the presence of the teacher, may resort to any reasonable form of punishment, including corporal punishment, and to any reasonable degree, for the purposes of securing obedience on the part of any child enrolled in such school, or for his correction, or for the purpose of securing or maintaining order in and control of such school.

element to recovery in both cases under section 1983 would be the plaintiff establishing an invasion of federally protected constitutional rights, mere tortious conduct not being enough.<sup>70</sup> After examining eighth amendment, equal protection, due process and vagueness arguments, Chief Judge Holden found no such federally protected constitutional rights. For the first three arguments he relied on *Ware*, *Sims* and *Glaser*. To defeat the vagueness contentions of the plaintiff the criminal statutes were used as a boundary line. "[I]f the punishment is *excessive* or *improper*, the teacher is guilty of assault and battery."<sup>71</sup> This deterrent, the court said, kept the statute from sweeping "unnecessarily broadly" into "the area of protected freedoms." What those protected freedoms are and why "excessive" and "improper" are not vague is not told. The real reason for the court's decision is most probably found in the judge's personal attitude toward paddling in school. "In any event, it [paddling] is a *sanction which simply is not serious enough* to require the prerequisite of a formal hearing."<sup>72</sup> (Emphasis added.) Without so much as an inquiry into the "seriousness" of corporal punishment the motion to dismiss was granted.

Despite (or perhaps because of) these rulings the Ohio American Civil Liberties Union has filed a suit in the Ohio Southern District Court.<sup>73</sup> The case is a damage action against certain teachers and members of the school board. The defendants have filed an answer, there has been one pretrial conference, and the case is currently set for trial on Sept. 23, 1974. According to Leonard Schwartz of the Ohio A.C.L.U.<sup>74</sup> the plaintiffs are basing their claim on four grounds. The first is a due process argument based on *Lopez v. Williams*.<sup>75</sup> That case involved the procedure necessary to expel a student from a public high school. Judge Carl Rubin, who is hearing the *Sims* case, also sat on the three-judge panel that decided *Lopez*. The second basis of attack is that corporal punishment as administered in the Dayton Public Schools is cruel and unusual under the eighth amendment as interpreted by *Jackson v. Bishop*<sup>76</sup> (the corporal punishment in the prisons case), and *Furman v. Georgia*<sup>77</sup> (the death penalty case). The third cause of action is based on interference with parents' rights under *Glaser v. Marietta*.<sup>78</sup> The fourth cause of action however, is the one that will add a new wrinkle to the developing case law in this area. Alleging a violation of equal protection, the plaintiffs hope to prove that corporal punishment in the Dayton Public Schools is racially

<sup>70</sup> 361 F. Supp. at 368.

<sup>71</sup> *Id.* at 370 quoting *Melen v. McLaughlin*, 107 Vt. 111, 115, 176 A. 297, 299 (1934) (emphasis added).

<sup>72</sup> *Id.* at 371 (emphasis added).

<sup>73</sup> *Sims v. Waln*, Civil No. 4526 (S.D. Ohio, filed Sept. 18, 1973).

<sup>74</sup> Per telephone conversations with this author on Nov. 14, 1973, and Jan. 10, 1974.

<sup>75</sup> Civil No. 7167 (S.D. Ohio, Sept. 12, 1973).

<sup>76</sup> 404 F.2d 571 (8th Cir. 1968); see text accompanying nn. 83-94 *infra*.

<sup>77</sup> 408 U.S. 238 (1972); see text accompanying nn. 95 & 96 *infra*.

<sup>78</sup> 351 F. Supp. 555 (W.D. Pa. 1972); see text accompanying nn. 59-66 *supra*.

biased, in that white teachers administer corporal punishment to black students in a proportion so much greater than that of corporal punishment to whites that it is more a reflection of their racial bias than legitimate punishment. Confident that they can overcome the proof problems via discovery, attorneys for the plaintiff are currently assembling the necessary data. Although the outcome of the case cannot be second-guessed at this time, it has at least proceeded further than *Gonyaw v. Gray*. Significantly, at trial, plaintiffs will have the opportunity to prove all their contentions, not just the racial bias claim.

### THE CONSTITUTIONAL ARGUMENTS

As indicated in the previous section, the attacks against corporal punishment based on denial of constitutional rights have been largely unsuccessful. The previous section also pointed out the weaknesses of those decisions. The cases to date have failed to fully develop the eighth and fourteenth amendment considerations relevant to a full and final determination of the rights involved. To date only four district court judges and three appellate judges have reported their opinions on these issues.<sup>79</sup> Although not favorable to anti-corporal punishment advocates they certainly do not close the door to further discussion. The case pending<sup>80</sup> and the day-to-day reality of corporal punishment for many children necessitate a full discussion of the anti-corporal punishment view.

#### *Changing Standards*

"The [8th] amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."<sup>81</sup>

The Supreme Court has approached the cases dealing with eighth amendment violations in two ways. First: whether the punishment itself is cruel and unusual and second: whether it is clearly excessive in comparison to those meted out elsewhere for similar offenses.<sup>82</sup>

The leading case in the area of corporal punishment and the eighth amendment is a circuit court case, *Jackson v. Bishop*.<sup>83</sup> In *Jackson* three inmates of the Arkansas penitentiary brought separate actions to bar the use of the strap as a disciplinary measure in Arkansas' penal institutions. "The straps used in Arkansas vary somewhat but all are similar. Each is of leather and from 3½ to 5½ feet in length, and about 4 inches wide and ¼ inch thick. Each has a wooden handle 8 to 12 inches long."<sup>84</sup> The

<sup>79</sup> Judge Holden in *Gonyaw*, n. 67 *supra*; Judge Weis in *Glaser*, n. 59 *supra*; Judge Eubanks in *Sims*, n. 53 *supra*; Judge Taylor in *Ware*, n. 44 *supra*, and Judges Dyer, Skelton & Ingraham in *Ware*, n. 44 *supra*.

<sup>80</sup> *Sims v. Waln*, Civil No. 4526 (S.D. Ohio, filed Sept. 18, 1973).

<sup>81</sup> Chief Justice Warren in *Trop v. Dulles*, 356 U.S. 86, 101 (1957).

<sup>82</sup> See generally, Comment, *Corporal Punishment in the Public Schools*, 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 583, 586 nn. 27 & 28 (1971) and cases cited therein.

<sup>83</sup> 404 F.2d 571 (8th Cir. 1968).

<sup>84</sup> *Id.* at 574.

whippings were administered by the wardens while the prisoner laid face down on the concrete.<sup>85</sup> The prison system did have an elaborate recently enacted regulation system concerning the use of the strap.<sup>86</sup> Judge, later Justice, Blackmun held that the use of the strap, regardless of the safeguards, violated the eighth amendment.

[W]e have no difficulty in reaching the conclusion that the use of the strap in the penitentiaries of Arkansas is punishment which, in this last third of the 20th century, runs afoul of the eighth amendment; that the strap's use, irrespective of any precautionary conditions which may be imposed, offends contemporary concepts of decency and human dignity and precepts of civilization which we profess to possess; and that it also violates those standards of good conscience and fundamental fairness enunciated by this court in the *Carey* and *Lee* cases.<sup>87</sup>

The court reached that result even though at that time other states had statutes that specifically allowed whippings as a form of punishment.<sup>88</sup> Judge Blackmun quoted from Supreme Court cases where Justices had warned of the difficulty that would attend the effort to define with exactness the extent of the eighth amendment.<sup>89</sup> He was not, however, afraid to wrestle with that difficulty. "A principle to be vital, must be capable of wider application than the mischief which gave it birth."<sup>90</sup> Nor was he afraid to enunciate his reasons and in so doing denounce corporal punishment in a civilized society.

Our reasons for this conclusion include the following: (1) We are not convinced that any rule or regulation . . . however seriously or sincerely conceived or drawn, will successfully prevent abuse . . . (3) Regulations are easily circumvented. . . . (4) Corporal punishment is easily subject to abuse in the hands of the sadistic and the unscrupulous. (5) Where power to punish is granted to persons in lower levels of administrative authority, there is an inherent and natural difficulty in enforcing the limitations of that power. . . . (7) *Corporal punishment generates hate toward the keepers who punish and toward the system which permits it. It is degrading to the punisher and punished alike. . . .*<sup>91</sup> (Emphasis added.)

*Jackson* has received near unanimous support from the other circuits,<sup>92</sup>

<sup>85</sup> *Id.* at 574-75.

<sup>86</sup> *Id.* at 574.

<sup>87</sup> *Id.* at 579.

<sup>88</sup> See 404 F.2d 574 n.4.

<sup>89</sup> 404 F.2d at 577.

<sup>90</sup> *Id.* at 578, quoting *Weems v. United States*, 217 U.S. 349, 373 (1910).

<sup>91</sup> *Id.* at 579, 580 (emphasis added).

<sup>92</sup> Although no other circuit court has decided the merits of a corporal punishment in prison case since *Jackson*, it has been repeatedly cited as a leading case in the areas of prisoners' rights and development of an eighth amendment standard. See, e.g., *Rozecki v. Gaughan*, 450 F.2d 6 (1st Cir. 1972); *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973); *Inmates of Attica Correctional Facility v. Rockefeller*, 453 F.2d 12



favorable comment from the Supreme Court<sup>93</sup> and has recently been suggested as a basis for banning corporal punishment in the public schools.<sup>94</sup>

The Supreme Court has recently ruled on the eighth amendment<sup>95</sup> as it applies to the death penalty. Although the majority were able to agree on a conclusion their reasons were varied (all nine justices filed separate opinions), suggesting that the doctrine emanating from the eighth amendment is by no means settled. Mr. Justice Douglas laid the groundwork for applying the principles of *Furman* to school cases when he said: "There is increasing recognition of the fact that the basic theme of equal protection is implicit in 'cruel and unusual' punishments. A penalty should be considered 'unusually' imposed if it is administered arbitrarily or discriminatorily."<sup>96</sup> If a plaintiff could show that corporal punishment was being administered arbitrarily (for instance, only when the teacher is in a "bad mood") or discriminatorily (i.e., against only one race or sex) then there would be a basis for the court to strike down the punishment even though not willing to hold corporal punishment in the schools cruel and unusual per se. These cases also raise two other points of argument based on the eighth and fourteenth amendments: (1) the effect of showing that corporal punishment has fallen into disuse elsewhere and (2) the real difficulty presented in policing uniform, minimum standards.

### *Corporal Punishment Becoming Obsolete*

It has already been shown that corporal punishment has been abandoned in our prison systems.<sup>97</sup> Corporal punishment once used extensively by sea captains to maintain discipline at sea has been illegal for almost 80 years.<sup>98</sup> Over 150 years ago English military literature advocated the abolishment of corporal punishment in the British Army where it had always been used: "... [T]he various secondary or minor punishments, and the rewards, which are to be considered to be efficient as *substitutes* for corporal punishment, should be adopted without

---

Cir. 1972); *Roberts v. Williams*, 456 F.2d 819 (5th Cir. 1972); *Wheeler v. Glass*, 473 F.2d 983 (7th Cir. 1973); *Mead v. Parker*, 464 F.2d 1108 (9th Cir. 1972).

(2d Cir. 1971); *Hayes v. Secretary of Dept. of Public Safety*, 455 F.2d 798 (4th

<sup>93</sup> *Furman v. Georgia*, 408 U.S. 238, 287-88 (1972).

<sup>94</sup> E.g., Note, *Constitutional Law—School Law—Restrictions on the Infliction of Corporal Punishment: Spoiling the Rod*, 50 N. CAR. L. REV. 911, 913 (1972); Note, *Corporal Punishment in the Public Schools*, 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 583, 588 (1971).

<sup>95</sup> *Furman v. Georgia*, 408 U.S. 238 (1972).

<sup>96</sup> *Id.* at 249 quoting Goldberg and Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1790 (1970).

<sup>97</sup> See text accompanying nn. 83-91 *supra*. See also Goldfarb and Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175, 197-98 (1970); J. PALMER, CONSTITUTIONAL RIGHTS OF PRISONERS § 2.8 (1973).

<sup>98</sup> Cruelty to seamen 18 U.S.C. § 2191 (1970):

Whoever, being the master of a vessel of the United States, on the high seas, or any other waters within the admiralty and maritime jurisdiction of the United

delay. . . ."<sup>99</sup> The use of corporal punishment in other countries as a method of school discipline is also on a steady if not rapid decline. "Corporal punishment is illegal in most western countries outside the British Isles, and indeed has been gradually disappearing from schools, in England at least, to the extent that its use is now uncommon."<sup>100</sup> Corporal punishment has been banned in many major cities and individual school districts even where the state seemingly would allow it. These cities include Washington, D.C., New York, Pittsburgh, Baltimore, Chicago and Grosse Pointe, Michigan, to name a few.<sup>101</sup> If, as has been pointed out,<sup>102</sup> comparison with punishment for similar offenses in other communities is relevant to an eighth amendment determination then the decline in use of corporal punishment in other contexts and the growing list of school districts that have banned it become more and more relevant as the lists grow longer.

### *Minimum Standards*

Although the courts seem to be preoccupied with the problems they fear would be created if corporal punishment were abolished the real problems exist where corporal punishment is used. Even the adoption of minimal standards does not solve the problem. Admittedly the classroom is no place for a full-blown criminal trial over each incident. Beyond that, how few standards can be safely used? Prior permission of the principal or other administrative official, if not used judiciously becomes a mere bureaucratic rubber-stamp. Requiring the presence of another adult does not solve the problem either. After viewing a punishment session the "safety valve" teacher must either place his or her stamp of approval on the action or turn on a co-worker, subjecting the "innocent" teacher to peer pressure for siding *against* a friend. Putting aside for the moment these types of abuses where there may be a question of good faith, consider the quandary of the well-meaning teacher. How far can the individual teacher go in the use of corporal punishment? This uncertainty may deter its use except in the moments of rage that are almost certain to come during a long day. When the teacher is calm and thoughtful, forceful corporal punishment is not used because of the potential civil

---

States, flogs, beats, wounds, or without justifiable cause, imprisons any of the crew of such vessel, or withholds from them suitable food and nourishment, or inflicts upon them any corporal or other cruel and unusual punishment, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

<sup>99</sup> S. NAPIER, *REMARKS ON MILITARY LAW AND THE PUNISHMENT OF FLOGGING* 27 (1836). The author was a major general in the British Army with over 40 years' experience as a regimental officer. Although his book does advocate punishments that would not be accepted today (*i.e.*, blistering), he did advocate the move away from physical force.

<sup>100</sup> Wallington, *Corporal Punishment in Schools*, 1972 *JURID. REV.* 124, 161 (1972) (footnotes omitted). See also, Comment, *Corporal Punishment in Schools: An Infringement on Constitutional Freedoms*, 20 *CLEVE. ST. L. REV.* 560, 570 (1971).

<sup>101</sup> REITMAN, *supra* n. 12 at 32.

<sup>102</sup> *Supra* n. 82 and accompanying text.

and criminal liability that could be incurred. This puts the teacher in the position of using corporal punishment only when "pushed." A time when he or she should use it least.

This uncertainty created by the "reasonableness" standard is being felt today as evidenced by the following statement of a commentator on the subject,

. . . *Harris v. Galilley* certainly has been a factor in deterring teachers from using corporal punishment however necessary it may appear to be. The case seems to stand for the principle that it is always a question of fact for the jury to determine from the attending circumstances whether a punishment inflicted is reasonable and proper or excessive.<sup>103</sup>

Any use of minimum standards to control the use of corporal punishment is subject to one other glaring deficiency. There is a clear analogy here between the teacher administering discipline in the classroom and the trial judge presiding over a contempt hearing. Because tempers often flare in the classroom as in the courtroom, it is important that the accuser, judge, and executioner not be the same person.<sup>104</sup> Along this line it has been stated,

The Supreme Court has recognized that the emotional involvement of the judge who declares a defendant in contempt disqualifies him from presiding when the contempt issue is tried. Similarly, the school official who prescribes corporal punishment, if it is permitted at all, should not be the one who applies it.<sup>105</sup>

### CONCLUSION

Corporal punishment has been a part of our society since recorded history. Modern thinking in the areas of psychology, political science, education, and constitutional law has brought this age-old concept into the arena of doubt. For the past 200 years civilized societies have been eroding away at the power of government to inflict punishment. Incredible as it may seem there are many places in the United States today where it is illegal for the owner of a horse to hit it, while some teachers swat their pupils almost at will. In a representative system of government such as ours the millions of school children who face the paddle daily have no effective voice. On the other hand, crime in the schools has been on the rise with new reports of teachers being assaulted coming almost weekly. Many people fear the breakdown of moral fabric and long for superficial discipline and order. From a legal point of view, if the precedents are to control, most teachers in the United States today are burdened with the

<sup>103</sup> Morgan, *A Look at the Law of Pupil Management*, 39 PA. B.Q. 101, 104 (1967) (footnotes omitted).

<sup>104</sup> See *Mayberry v. Pennsylvania*, 400 U.S. 455, 463-66 (1971).

<sup>105</sup> Note, *Corporal Punishment in the Public Schools*, 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 583, 593 (1971).

right and concomitant responsibility of corporal punishment. Differing statutory schemes augmented by local regulation dot our legal landscape. With state law seemingly entrenched in the traditional views, opponents of corporal punishment are turning to the federal courts and the Constitution for help. So far, they have found little solace there. However, with the recent cases on prisoners' rights, application of due process principles to the schools, and a growing anti-corporal punishment sentiment the day may not be far off when reason rather than fear will reign in the nation's schools, and the last vestiges of corporal punishment in America will be gone.

WILLIAM IRWIN ARBUCKLE, III

## ● Reforming the Mental Health Law of Ohio

### INTRODUCTION

IT WAS A COLD, SNOWY DAY toward the end of November, 1859. C. P. Wolcott, one of Akron's prominent attorneys, bundled up on the seat of his "buckboard," was driving his team all about town, trying to obtain affidavits from various citizens of his community who could testify to his client's mad delusions, and thereby save him from execution for charges arising from his attempt to seize the federal army arsenal at Harper's Ferry, Virginia, the previous October 16th.<sup>1</sup> John Brown, married and the father of 20 children, was sentenced to be hanged on December 2nd.<sup>2</sup> The client sincerely believed that he was given instructions directly by his Creator to take the arsenal and thereby to touch off and to lead the war to free the slaves. His success was to be certain and was divinely promised; and moreover, divine direction as to the employment of the proper means to wage this great struggle were assured. He had a strong strain of madness in his family, possibly descending genetically from his mother.

Governor Wise remained unmoved, and the client and his attorney lost their race against time. John Brown was hanged, only 47 short days after his balloon of fantasy had burst.

His soul goes marching on, though, in perhaps more ways than one. In July, 1972, a stone's throw from where John Brown's home still stands in Akron, Ohio, J. A. Ciocia, a legal aid lawyer at the Hawthornden State Hospital, appeared before Judge Evan Reed, in the Common Pleas Court of Summit County, to argue on a petition for a writ of habeas corpus for the release of the "Hawthornden -7"; a group of hospitalized mental patients on whose behalf he claimed denial of counsel for their commitment proceedings, failure to conduct regular, periodic evaluations of their

<sup>1</sup> 2 H. HOWE, HISTORICAL COLLECTIONS OF OHIO 650 (1907).

<sup>2</sup> 2 WORLD BOOK ENCYCLOPEDIA 534, 5 (1960 ed.).