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Corporal Punishment - Schools and School Districts - Constitutional Law

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Recent Decisions

CORPORAL PUNISHMENT—SCHOOLS AND SCHOOL DISTRICTS—CONSTITUTIONAL LAW—The United States District Court for the Western District of Pennsylvania has held that the infliction of corporal punishment on a child by school authorities against the expressed wishes of a parent is violative of a fundamental right of parental liberty.

Glaser v. Marietta, 351 F. Supp. 555 (W.D. Pa. 1972).

> It can hardly be doubted but that public opinion will in time, strike the ferule from the hands of the teacher leaving him as the true basis of government, only the resources of his intellect and heart. Such is the only policy worthy of the state, and of her otherwise enlightened and liberal institutions. It is the policy of progress. The husband can no longer moderately chastise his wife; nor, according to the more recent authorities, the master his servant or apprentice. Even the degrading cruelties of the naval service have been arrested. Why the person of the school-boy, "with his shining morning face," should be less sacred in the eye of the law than that of the apprentice or the sailor, is not easily explained. It is regretted that such are the authorities,—still courts are bound by them.
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> *Cooper v. McJunkin*, 4 Ind. 290, 292 (1853).

On December 3, 1971, William Glaser and George Espinoza, two twelve year old seventh graders at Bellevue Junior High School, became involved in an altercation in their classroom. The two were taken by their teacher to Assistant Principal Robert Perry, who interviewed the boys together and separately and found William to be at fault. Because the boy had been admonished several times before about this type of behavior and because the school board had received no notice from William's parents that this mode of discipline was not be used,[1] Perry concluded that corporal punishment was in order. Then, according to guidelines set out in the administrative regulations,[2] promulgated by

1. Glaser v. Marietta, 351 F. Supp. 555, 557 (W.D. Pa. 1972). Mr. Perry, the vice-principal, testified that he did not use corporal punishment when parents requested otherwise. Although this appeared to be a de facto school policy, it is important to note that William's parents were not aware of it.

2. The regulation reads as follows:

Corporal punishment must be regarded as a last resort and may be employed only in cases where other means of seeking cooperation from a student have failed. The Bellevue Borough School Board requires that, if it appears that corporal punishment is

the school district pursuant to a statutory codification of the *in loco parentis* doctrine,[3] Perry, in the presence of another adult member of the school staff, inflicted three "medium" strokes on William's buttocks with a paddle. Although the punishment left no physical or psychological scars, its infliction did, in the minds of William and his parents, violate their individual constitutional rights. As a result, an action was brought in district court seeking to enjoin the school board from inflicting corporal punishment. *Glaser v. Marietta*[4] thus became the third recent lawsuit[5] testing the constitutionality of this time-weathered method of school discipline. The district court held that the infliction of corporal punishment by a school district in contravention of expressed parental protestation is a deprivation of a parent's constitutional liberty to raise his children free from state interference. The decision, which upheld the parental claim, but which rejected the student's contention that such punishment is violative of his fifth, eighth, and fourteenth amendments rights under the United States

likely to become necessary, the teacher must confer with the principal or assistant principal. The principal and the teacher must be in agreement on the necessity of corporal punishment, and it is the principal's responsibility to designate time, place, and the person to administer said punishment. In any case, the pupil should understand clearly the seriousnesss of the offense and the reasons for his punishment; however, care should be taken that the period of time between the offense and the punishment is not so long as to cause undue anxiety in the pupil. The punishment must be administered in kindness in the presence of another adult and at a time and under conditions not calculated to hold the child up to ridicule or shame. In administering corporal punishment the teacher and principal must not use any instrument which will produce physical injury to the child and no part of the body above the waist nor below the knees may be struck.

Corporal punishment should never be administered to a child whom school personnel note to be under psychological or physical treatment, without a conference with the psychologist or physician.

Id. at 556-57.

3. PA. STAT. ANN. tit. 24, § 13-1317 (1973), which provides:

Every teacher, vice principal and principal in the public schools shall have the right to exercise the same authority as to the conduct and behavior over the pupils attending his school, during the time they are in attendance, including the time required in going to and from their homes, as the parents, guardians or persons in parental relation to such pupils may exercise over them.

4. 351 F. Supp. 555 (W.D. Pa. 1972).

5. *E.g.*, Sims v. Board of Educ., 329 F. Supp. 678 (D.N.M. 1971); Ware v. Estes, 328 F. Supp. 657 (N.D. Tex. 1971), *aff'd per curiam*, 458 F.2d 1360 (5th Cir.), *cert. denied*, 409 U.S. 1027 (1972). In *Sims*, the court rejected arguments that corporal punishment violated: (a) procedural due process rights of the student in that there was no opportunity afforded for notice, hearing or a right of representation; (b) substantive due process rights on the grounds that corporal punishment was unrelated to the achievement of any educational purpose; (c) the privileges and immunities clause by the imposition of punishment which invades the right to physical integrity and dignity of the person; and (d) the eighth amendment right of a student to be free from cruel and unusual punishment. In *Ware*, the court, as well as rejecting substantive due process and cruel and unusual punishment challenges by the student, also rejected a parent's contention that the infliction of corporal punishment on their child against their wishes violated their substantive due process rights. The rationales behind these decisions will be discussed when pertinent.

Constitution is as notable for its omissions as for the fact that it was the first decision to uphold a constitutional claim against the practice.

The significance of the decision, as well as the merits of the constitutional claims made, can best be understood when contrasted against the long history of corporal punishment and the supportive *in loco parentis* doctrine, both, until recently, seemingly impenetrable by legal attack. The reasonable use of corporal punishment by a parent as a means of child discipline has deep historical roots,[6] and seems to be well entrenched in our judicial tradition.[7] Early at common law, there developed the theory that this parental privilege could be transferred to a teacher by the parent so that the teacher could best fulfill his tutorial responsibilities.[8] The teacher, under this doctrine of *in loco parentis,* attained a limited measure of parental rights,[9] and thus the privilege to inflict justified and reasonable corporal punishment.[10]

Although the original doctrine was predicated upon a consensual transfer of authority by the parent, as the doctrine evolved the consensual nature of the transfer became irrelevant. Teachers were held to be protected by the transferred parental privilege, notwithstanding an expressed parental desire that corporal punishment not be inflicted upon his child.[11] This historical hybrid has been adopted by the Restatement of Torts[12] and will for the purposes of analysis be labeled as the "non-consensual" branch of the doctrine. The doctrine, both in its consen-

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6. Corporal punishment has received sanction dating back to Biblical times. *E.g., Proverbs* 22:15, "Foolishness is bound up in the heart of a child, but the rod of correction shall drive it from him."

7. *E.g.,* Glaser v. Marietta, 351 F. Supp. 555, 558 (W.D. Pa. 1972).

> 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. Nor indeed has any court done so.

8. 1 W. BLACKSTONE, COMMENTARIES 453 (1897).

> [The Father] *may* also delegate part of his parental authority during his life, to the tutor or school master of his children, who is then *in loco parentis,* and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he was employed.

Id. at 453-54 (emphasis added).

9. It should be recognized that the authority derived from the doctrine is not a transfer of parental discretion for all purposes. *E.g.,* Guerrieri v. Tyson, 147 Pa. Super, 239, 24 A.2d 468 (1942) (the doctrine does not extend to a teacher's claim of parental privilege in the exercise of lay judgment as to the treatment of injury and disease).

10. *E.g.,* La Frentz v. Gallagher, 105 Ariz. 255, 462 P.2d 804 (1970).

11. The implications of this evolutionary deviation from the original rationale of the doctrine will be discussed more fully below.

12. RESTATEMENT (SECOND) OF TORTS § 153 (1965).

> (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.*

Id. (emphasis added).

sual and non-consensual form, became firmly embedded in common law classroom litigation.[13] In fact, until 1971, plaintiffs in corporal punishment cases launched no serious attack on the authority of a teacher to inflict corporal punishment or the constitutionality of the punishment itself. Rather, the actions brought were in tort as assault and battery actions which sought to test the parameters of the teacher's privilege either under the common law doctrine,[14] or under a statutory codification of that doctrine.[15] Thus, the key issue in all cases was the reasonableness of the punishment in light of all surrounding circumstances.[16] Reasonableness was held to be a question of fact for the jury,[17] to be determined from such factors as the nature of the punishment,[18] the instrument used,[19] the type of school,[20] previous misconduct,[21] the age and physical condition of the child,[22] and the motivation of the teacher.[23] Some courts raised a presumption of reasonableness,[24] but all recognized that the privilege extended only to good faith attempts at discipline; a showing of malice on the part of the teacher would expose him to liability. These principles have been codified in Pennsylvania both in the statutory *in loco parentis* codification,[25] and in the administrative regulations[26] promulgated by the Northgate School District. It should be noted then, that when Robert Perry paddled William he did so pursuant to an authority and within guidelines that have been continually reaffirmed since the time of Blackstone.

The constitutional challenges by William and his parents to this historically entrenched authority and practice were not, however, without support. In fact, they were very much in keeping with contem-

13. *See generally* M. REMMLEIN, SCHOOL LAW 267-68 (1950); Vernon, *Legality and Propriety of Disciplinary Practices in the Public Schools*, in LEGAL ISSUES IN EDUCATION 43 (1970); 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 583 (1971).
14. *See* Suits v. Glover, 260 Ala. 449, 71 So. 2d 49 (1954); La Frentz v. Gallagher, 105 Ariz. 255, 462 P.2d 804 (1969); People v. Curtiss, 116 Cal. App. 771, 300 P. 801 (1931); Andreozzi v. Rubano, 145 Conn. 280, 141 A.2d 639 (1958); Drake v. Thomas, 310 Ill. App. 57, 33 N.E.2d 889 (1941); Indiana State Personnel Bd. v. Jackson, 244 Ind. 321, 192 N.E.2d 740 (1963); Tinkham v. Kole, 252 Iowa 1303, 110 N.W.2d 258 (1961).
15. *E.g.*, Harris v. Galilley, 125 Pa. Super. 505, 189 A. 779 (1937).
16. *See* La Frentz v. Gallagher, 105 Ariz. 255, 462 P.2d 804 (1969).
17. *See* Tinkham v. Kole, 252 Iowa 1303, 110 N.W.2d 258 (1961).
18. *See* Johnson v. Horace Mann Mutual Ins. Co., 241 So. 2d 588 (La. App. 1970).
19. *See* Chodkowski v. Beck, 106 Pitt. L.J. 115 (Pa. C.P. Alleg. Co. 1957).
20. *See* Drake v. Thomas, 310 Ill. App. 57, 33 N.E.2d 889 (1941) (school for truants and the maladjusted).
21. *Id.*
22. *See* Calway v. Williamson, 130 Conn. 575, 36 A.2d 377 (1944).
23. *See* Suits v. Glover, 260 Ala. 449, 71 So. 2d 49 (1954).
24. *See* Calway v. Williamson, 130 Conn. 575, 36 A.2d 377 (1944).
25. *See* PA. STAT. ANN. tit. 24, § 13-1317 (1973).
26. *See* note 2 *supra*.

porary reappraisal of the propriety of corporal punishment and the doctrine of *in loco parentis,* both by educators[27] and civil libertarians.[28] In the recent outpouring of articles critical of its use, the practice of corporal punishment has been challenged as causing aggressive, defiant behavior resulting in resentment and hostility;[29] as being inconsistent with modern values regarding the beating of inmates at penal and mental institutions by guards, or of wives and servants by civilians;[30] as inconsistent with enlightened educational philosophy;[31] and as being demeaning to both the teacher and the child.[32] In response to the critical re-evaluation of the merits and morality of corporal punishment the National Education Association,[33] the state of Massachusetts,[34] and nine major city school boards have taken steps to eliminate the practice.[35]

It was in this atmosphere of unprecedented challenge to the practice of corporal punishment, both in terms of policy and constitutionality, that the constitutional issues in *Glaser* were framed. Since the court applied different general principles in considering the parent's claim than it did in disposing of William's assertions, the two will be treated separately for the purposes of analysis.

RIGHTS OF THE PARENT

Mrs. Glaser's claim raised the issue of whether her parental right to raise her son as she thought proper outweighed any school board justi-

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27. *E.g.*, Langer, *New Year's Resolution: No More Corporal Punishment,* TEACHER, Jan. 1973, at 12; Pallas, *Corporal Punishment: Ancient Practice in Modern Times,* THE CLEARINGHOUSE, Jan. 1973, at 312; THE EDUCATION DIGEST, Jan. 1973, at 34; TODAY'S EDUCATION, Dec. 1972, at 60; NEWSWEEK, Dec. 4, 1972, at 127; NEWSWEEK, May 17, 1971, at 99.

28. In addition to recent lawsuits testing the constitutionality of corporal punishment (see note 5 *supra*), recently The American Civil Liberties Union and the American Orthopsychiatric Association have joined together in a national drive to challenge the use of corporal punishment. *See* Langer, *New Year's Resolution: No More Corporal Punishment,* TEACHER, Jan. 1973, at 12.

29. *See* Silverman, *Discipline,* 42 MENTAL HYGIENE 274 (1958).

30. *See* TODAY'S EDUCATION, Dec. 1972, at 60.

31. *See* NEWSWEEK, May 17, 1971, at 99.

32. *See* Hentoff, *A Parent-Teacher's View of Corporal Punishment,* TODAY'S EDUCATION, May, 1973, at 18.

33. The NEA's Board of Directors recently adopted the recommendation of its Blue Ribbon Panel on Corporal Punishment that the practice be phased out during the 1972-73 school year. *See* NAT'L EDUC. ASS'N REPORT OF THE TASK FORCE ON CORPORAL PUNISHMENT No. 381-12010 (1972). The task force concluded that neither fact nor reason could support the use of physical pain as a means of school discipline.

34. Massachusetts, MASS. ANN. LAWS ch. 71, § 37G (1973), has joined New Jersey, N.J. STAT. ANN. § 18 A:6-1 (1968), as the only states to abolish the practice by statute.

35. Washington D.C., Boston, Baltimore, New York, Pittsburgh, Chicago, Philadelphia, St. Paul, San Francisco; *see* TODAY'S EDUCATION, Dec. 1972, at 60.

fication for the infliction of corporal punishment on William against her expressed wishes. In essence, the resolution of the issue called for a reconciliation of two competing principles of law that have long received strong judicial recognition—the right of a parent to direct the upbringing of her child and the "non-consensual" form of the *in loco parentis* doctrine approved by the Restatement of Torts.[36]

The parental right to direct the upbringing and education of one's children was first recognized by the courts as a principle of natural law.[37] Man was characterized as having "no higher right"[38] and the parent-child relationship was held to be inviolable except for the strongest of state reasons.[39] This parental natural right was granted constitutional protection by the landmark case of *Meyer v. Nebraska*,[40] which, in striking down a state prohibition on the teaching of a foreign language to any child below the eighth grade, held that the right of the individual to raise his children was encompassed in the "liberty" clause of the fourteenth amendment. *Pierce v. Society of Sisters*[41] gave further substance to the "*Meyer* doctrine" by holding that compulsory public school attendance laws unreasonably interfered with the liberty of a parent to direct the upbringing and education of his children.[42] In so holding, the Court recognized that the rearing of a child is a primary responsibility of his parents, not the state. This parental liberty however, like all liberties, is not absolute and has been held to be subject to reasonable regulations in the public interest.[43]

36. *See* note 12 *supra* and the discussion in the text preceding it.
37. *E.g.*, People v. Turner, 55 Ill. 280 (1870).
38. *E.g.*, Denton v. James, 107 Kan. 729, 193 P. 307 (1920) (adopting parent has all the rights of a natural parent including the right to direct the religious upbringing of the child).
39. *E.g.*, People v. Turner, 55 Ill. 280 (1870).
40. 262 U.S. 390 (1923).
41. 268 U.S. 510 (1925).
42. In *Pierce*, one of the plaintiffs was a religious school which raised claims of interference with a parent's right to direct the religious upbringing of his children. This has prompted some to describe *Pierce* as a first amendment case (*e.g.*, Griswold v. Connecticut, 381 U.S. 479, 482 (1965), Justice Douglas writing the opinion of the court). Such a description of the case, however, is inaccurate. A co-plaintiff in the suit was Hill Military Academy, a non-religious institution, which raised the issue of state interference with parental liberty to direct the upbringing of their children under the liberty clause of the fourteenth amendment. As the holding in the case upholding the parental right applied to both institutions it must be assumed that the case rested upon fourteenth not first amendment principles. *See* School Dist. v. Schempp, 374 U.S. 203, 248 (1962) (Brennan, J., concurring).
43. *E.g.*, Prince v. Massachusetts, 321 U.S. 158 (1944) (upholding a state statute prohibiting minors from selling periodicals on the streets or in other public places against religious and parental liberty claims of a Jehovah Witness parent); Commonwealth v. Bey, 166 Pa. Super. 136, 70 A.2d 693 (1950) (upheld compulsory school attendance law against a parental claim that it violated their right to direct religious upbringing of their children.) Although both cases raised first amendment issues as well, the right to direct

While recent Supreme Court decisions have given the *Meyer-Pierce* principle fresh vitality,[44] they have left the applicability of the principle unclear. Both *Griswold v. Connecticut*[45] and *Roe v. Wade*[46] cited the right to family privacy enunciated by *Meyer* and *Pierce* as a type of fundamental right which can be invaded by the state only upon a showing of compelling state interest. In *Stanley v. Illinois*,[47] the Court, in specifically reaffirming the right to raise one's children free of state interference as a basic civil right of man, held the right could be infringed only upon a showing of a powerful, countervailing interest. While these three cases would appear to stand for the proposition that a *Meyer* parental liberty claim can only be rebuffed upon a showing of a compelling state interest, such was not the test actually applied in *Meyer* or *Pierce*. Both cases applied the "reasonable-relation" test and held parental liberty only to be protected against arbitrary legislation.[48] It is important to note that if the Court intended to change the test applicable to a *Meyer* parental claim, they did so without comment. Further, the Court, in the subsequent case of *Wisconsin v. Yoder*,[49] explicitly recognized that the "*Meyer* doctrine" only required a "reasonable relation" test,[50] and combined the claim to parental liberty with a free exercise claim to justify a more stringent standard. The decision seemed to imply that the reasonable relation test was still applicable to assertions of parental liberty standing alone.[51] This standard was adopted in

religious upbringing of a child is an inexorable part of a parent's fourteenth amendment liberty right.

44. *See* Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235, 248 (1965).

45. 381 U.S. 479, 482, 495, 502 (1965).

46. 410 U.S. 113, 152-53 (1973).

47. 405 U.S. 645, 650-57 (1972). The Court was dealing with the parental rights of an unwed father who was challenging a state statutory scheme which declared the children of unwed fathers to be wards of the state upon death of the mother without any hearing into parental fitness. An automatic custody right was afforded both married fathers and unwed mothers.

48. 268 U.S. at 534-35; 262 U.S. at 399-400.

49. 406 U.S. 205 (1972). In reviewing the conviction of Old Order Amish Dutch parents for violating the state compulsory education law, the Court, taking notice of the unique, firmly embedded cultural demands and patterns of the Amish, upheld the parent's *combined* free exercise and parental liberty claims against the state's interest in compulsory education.

50. *Id.* at 232-33. The Court quoted from Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925), which stated the applicable test:

> As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State.

51. 406 U.S. at 233.

> . . . when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a "reasonable relation to some purpose within the competency of the State" is required . . . .

Ware v. Estes,[52] the only case other than *Glaser* to decide the merits of the parent's constitutional claim against the use of corporal punishment. The court ruled that the "*Meyer* doctrine" required only a showing of reasonable relation and pointing to the split of expert opinions in the area, held that it could not be said that corporal punishment was arbitrary or unreasonable.

The court in *Glaser*, in upholding Mrs. Glaser's assertion of parental liberty, characterized the parental liberty as fundamental and required a showing of some degree of necessity by the school district before that liberty could be curtailed. Although the precise characterization of the test was left undecided by the court, it is clear that the court applied a more stringent test than was adopted in *Ware*.[53] The significance of *Glaser*, however, lies neither in the stringency of the test applied nor in the recognition of the parental liberty as fundamental. Rather, it lies in the court's use of the parental liberty to reject the non-consensual *in loco parentis* doctrine[54] and thus to subject the use of corporal punishment to constitutional limitation for the first time. This breakthrough judicial rejection of *in loco parentis* comes at a time of growing criticism of the doctrine as out-of-place in an era where a parent is compelled to send his child to school by law and thus is frequently given no control over selection of the teacher to whom he delegates his authority.[55] While some courts have joined in the criticism of the doctrine,[56] none until *Glaser* had rejected it.

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52. 328 F. Supp. 657 (N.D. Tex. 1971).

53. *Id.* It is important to note that while the *Ware* court denied the parent's claim upon a showing that the regulation permitting corporal punishment was reasonable on its face, *Glaser* required a more stringent showing. Recognizing that the regulation was reasonable on its face, the court felt that a more searching inquiry was required when the regulations were confronted with an assertion of parental liberty. Looking to the fact that the school board had in the past complied, with no adverse disciplinary effects, with parental protestation against its use (*see* note 1 *supra*), the court ruled that no reason for denying Mrs. Glaser her rights could be found. The court then stated ". . . when the 'balancing' of the respective rights occurs, whether the test is if the regulation is 'reasonably necessary' or that the school must show a 'powerful countervailing interest' the result is the same." 351 F. Supp. at 561. Thus, although the court left open the definitive standard, it is apparent that it required a stricter standard than *Ware*.

54. *See* note 12 *supra* and discussion in the text following.

55. *See* Buss, *Procedural Due Process and School Discipline: Probing the Constitutional Outline*, 119 U. PA. L. REV. 545 (1971).

56. *E.g.*, Johnson v. Horace Mann Mutual Ins. Co., 241 So. 2d 588 (La. App. 1970), an assault and battery case arising out of the infliction of corporal punishment in which the authority for its use was not challenged. The court said by way of dictum:

> It might have been said in days when schooling was a voluntary matter that there was an implied delegation of such authority from the parent to the school and teacher selected by the parent. Such a voluntary educational system like the system of apprenticeship . . . has long since disappeared. Parents no longer have the power to choose either the public school or the teacher in the public school. Without such

Under the *Glaser* rule the school district can no longer use the *in loco parentis* doctrine to justify the infliction of corporal punishment against the expressed wishes of a parent. The court, however, found it unnecessary to invalidate the regulation which authorized the practice,[57] since its application would violate no constitutional right of a parent who had no objection to the use of corporal punishment. Thus, the court held "that the School District may enforce its rules on corporal punishment except as to a child whose parents have notified the appropriate authorities that such disciplinary method is prohibited."[58] In essence, the court, while permitting the original doctrine (based on implicit consent) to stand,[59] rejected the non-consensual branch of the doctrine.

While the holding recognizes that the infliction of corporal punishment against expressed parental wishes is violative of a fundamental constitutional right, it also permits a school district to use the punishment regardless of a parent's wish until notified of an objection. The decision places an affirmative burden on the objecting parent to assert parental rights, while allowing the school district to proceed along the assumption that corporal punishment, in the absence of complaint, violates no rights. This raises a significant problem of waiver, *i.e.*, whether allowing the school district to entertain this assumption sanctions the presumption of a non-knowing, non-intelligent waiver of a fundamental constitutional right.

The leading case of *Johnson v. Zerbst*[60] recognized that a court will engage in every reasonable presumption against the waiver of a fundamental constitutional right,[61] and announced the oft-quoted maxim, "a waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."[62] Subsequent cases have held that in

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power to choose, it can hardly be said that parents intend to delegate the authority to administer corporal punishment by the mere act of sending their child to school. *Id.* at 591.

57. *See* 351 F. Supp. at 556 for the text of the regulation.

58. *Id.* at 561.

59. The court pointed out that the facts did not show a need for a uniform application of the regulation which would preclude the court from harmonizing the interests of those parents who oppose corporal punishment with those who favor its use. Assistant Principal Perry testified that he never inflicted corporal punishment when he had notice from a parent of objection to its use. The court concluded: "The essence of the plaintiff parent's request for an injunction in this case, therefore, is to require the substance of the regulation to conform with the actual practice." *Id.* at 560-61. The holding, therefore, requiring selective application did nothing more than make binding a de facto school policy, which heretofore had resulted in no disciplinary or administrative problems.

60. 304 U.S. 458 (1938).

61. *See also* Emspak v. United States, 349 U.S. 190 (1955) (waiver of protection against self-incrimination); Van Moltka v. Gillies, 332 U.S. 708 (1947) (waiver of right to counsel).

62. 304 U.S. at 464.

order for the presumption against a waiver of a fundamental right to be overcome there must be an *affirmative* showing that the party was made aware of the existence of that right,[63] and made an intentional decision to abandon its protection.[64]

Applying these principles to *Glaser*, it would appear that the court has permitted the school district to presume a non-knowing, non-intelligent waiver of the fundamental constitutional right of parental liberty recognized by the decision. Take, for an example, a parent who objects to the use of corporal punishment on his child, but who is unaware that its use against his wishes is violative of his rights. As to his child the school board is allowed to presume that the use of the punishment is constitutionally permissible. Such a presumption, however, would seem to have to be based upon a parental waiver of objection to its use. Such a waiver could only be procured if the objecting parent were made aware of the existence of his constitutional right to object to its use and thereafter decided to abandon its protection. This would seem,

63. *E.g.*, French v. Henderson, 317 F. Supp. 25 (W.D. La. 1970) (waiver of right to plead not guilty).

64. *E.g.*, Commonwealth v. Barnette, 445 Pa. 288, 285 A.2d 141 (1971) (waiver of right to have independent counsel from co-defendant). Although the Supreme Court has recently deviated from the *Zerbst* standards in Schneckloth v. Bustamonte, 412 U.S. 218 (1973), both the nature of the issue and the carefully limited holding of that case would seem to leave the *Zerbst* standards applicable to the fundamental right protected in *Glaser*. The Court held in *Bustamonte* that the state is not *required* to prove that a defendant was informed of and thereafter waived his fourth amendment right not to be searched, in order to demonstrate a voluntary submission to a pre-custodial search. In resolving the issue of whether consent to a search was voluntarily given the Court reasoned that lack of knowledge of the right to refuse to consent was a factor to be considered, but was not determinative where all other surrounding circumstances indicated voluntariness. In reviewing the *Zerbst* line of cases the Court noted that the judicial standard for waiver emerged in cases which sought to protect the fairness of the trial procedure and that the affirmative burden placed upon the state to show knowledge of the right before waiver will be presumed in that context is not necessarily applicable in a fourth amendment context. Although this rationale will now allow for the argument that the *Zerbst* standards are not necessarily applicable to other fundamental rights not designed to protect the fairness of the trial procedure, such an argument should not succeed in *Glaser*. The Court in *Bustamonte* was very careful to limit its holding to the precise issue decided. Because of the strong public policy in favor of effective law enforcement and citizen cooperation with police, both of which might be hampered by requiring policemen to elicit an intelligent waiver prior to each pre-custodial search where consent is otherwise voluntarily given, the Court's limiting of the holding should be read strictly. Thus, although the *Zerbst* standards might not be applicable to fundamental rights arising in a fourth amendment context, *Bustamonte* should not be read to alter their long presumed applicability to other fundamental rights, especially where the strong public policy reasons against the applicability of the *Zerbst* standards are not present. It is suggested that not only are those policy reasons not present in *Glaser*, but that public policy would seem to dictate that parents be informed of and waive recognized parental liberties before school districts be allowed to presume that their actions do not violate them. Thus it would seem that both the *Bustamonte* decision itself and the reasons for that decision would not preclude the applicability of the *Zerbst* standards to the fundamental right held to be protected in *Glaser*.

of necessity, to place the affirmative burden on the *school district* to inform parents of their right not to have corporal punishment used on their children, and to thus obtain a knowing, intelligent waiver by the parent. To have been consistent with the recognition of this fundamental right of the parent, it is suggested that the court should have placed the affirmative burden on the school district to ensure that its procedures did not violate that right. The effective exercise of a right to not have corporal punishment inflicted upon one's child should not be made to hinge on a parent's chance awareness of that right. Under the court's decision in *Glaser*, however, the parent who is unaware or uninformed has been effectively deprived of the rights granted parents by the decision.

THE RIGHT OF THE CHILD

William Glaser asserted that the infliction of corporal punishment on him was violative of the fifth, eight and fourteenth amendments to the United States Constitution. The district court rejected these contentions. Noting that the school board has the authority to enact necessary regulations to maintain discipline, and that there was no evidence of excessive force or indiscriminate use, the court joined two recent decisions[65] in concluding that the use of corporal punishment is not per se cruel and unusual punishment and therefore not violative of eighth amendment rights.[66] Similarly, the court found the assertion

65. Sims v. Board of Educ., 329 F. Supp. 678 (D.N.M. 1971); Ware v. Estes, 328 F. Supp. 657 (N.D. Tex. 1971).

66. The rationales of the two cases on which the court relies are open to criticism. In the *Ware* case the court dismissed the eighth amendment contention in a sentence without discussion and without citing precedent. It is important to note that this suit was brought in light of continued abuses of the practice, with racial overtones, in the Dallas school system, notwithstanding a "humane" statute and regulation (*see* NEWSWEEK, May 17, 1971, at 99). This would seem to place the case squarely on point with Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968), which held corporal punishment unconstitutional per se as violating the eighth amendment rights of prisoners on whom it was inflicted. Although the cases are distinguishable on their facts (leather straps were used on the prisoners), the court's primary concern was that no regulation, however reasonable, could guarantee ending the abuse of the practice. As the plaintiffs in *Ware* were claiming abuse notwithstanding reasonable regulations, the court should have addressed itself to the issue of whether abusive use of the discipline was cruel and unusual and whether the current regulations could be counted upon to curb such abuse. In the *Sims* case, the second case the court relied upon, the *Jackson* case was distinguished on the facts (*i.e.*, that leather straps were used on the prisoners, paddles on the students). The court, however, failed to recognize that what was determinative in *Jackson* was not what method was used, but that any method used would be subject to abuse. To the extent then that this court did not inquire into the potential for abuse of the method used, it misapplied the *Jackson* case. For an excellent argument urging the use of *Jackson* to eliminate corporal punishment in schools, *see* 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 583 (1971).

that William's procedural due process rights had been violated to be without merit. The court distinguished between the procedural concerns raised in an expulsion or suspension from high school and college and those involved in the spanking of a grade school youngster, and concluded that the procedure adopted by the school district, whereby the student was informed by the principal of the nature of the infraction involved, the principal conducted an informal discussion to determine guilt or innocence, and the punishment swiftly administered, was reasonable in light of the grade school setting. The court pointed out that to grant any further procedural safeguards, *i.e.*, right to counsel, adversary hearing, etc., would "smother the educational process in legalisms and do much to frustrate the beneficial results of speedy chastisement."[67] Finally, the court, rejecting the relevance of evenly divided expert testimony regarding the wisdom or desirability of the policy, dealt with the issue of whether corporal punishment was subject to attack by the child as being unconstitutional per se. The court reasoned that "if corporal punishment administered by a parent is not unconstitutional, then a reasonable utilization of that same form of chastisement by a *properly delegated person* is not prohibited."[68] In other words, the court concluded that the *in loco parentis* doctrine left the child without grounds to constitutionally attack the practice so long as the punishment is reasonable and in compliance with delegated and statutory authority.[69] The use of this rationale answers two constitutional questions. First, it precludes the child from asserting any greater deprivation of constitutional liberty than he could against his parents. Thus, the argument raised in counsel's briefs[70] that corporal punishment inflicted by a school board is a deprivation of a child's constitutional right to the dignity of his body can be disposed of with as little discussion as such a contention would warrant if made against one's parents. Second, given the fact that such punishment is viewed as reasonable when inflicted by a parent, it precludes discussion of whether its use by a school district is arbitrary, capricious or unreasonable and thus violative of substantive due process rights.[71]

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67. 351 F. Supp. at 659.
68. *Id.* at 558 (emphasis added).
69. *See* PA. STAT. ANN. tit. 24, § 13-1317 (1963); note 2 *supra*.
70. Brief for Plaintiff at 5, Glaser v. Marietta, 351 F. Supp. 555 (W.D. Pa. 1972). Brief for Pennsylvania Association of Secondary School Principals as Amicus Curiae at 4, Glaser v. Marietta, 351 F. Supp. 555 (W.D. Pa. 1972).
71. The argument that corporal punishment was violative of substantive due process was made and rejected in Sims v. Board of Educ., 329 F. Supp. 678 (D.N.M. 1971).

The use of this mode of analysis to dispose of William's constitutional assertions is both inappropriate under the facts of the case and undesirable from a theoretical perspective. As has previously been discussed, William's parents *objected* to the use of corporal punishment. The court held, in effect, that such parental objection negated any *in loco parentis* delegation of privilege. As a result it would seem that in this case the school district is not "a properly delegated person" and therefore the constitutionality of its actions cannot be viewed in the same light as those of the parents. The result is that the rationale explaining the denial of William's constitutional rights has no application to the facts of this case, and leaves the court without a basis for calling William's constitutional challenges "groundless."

This basic problem points also to a theoretical objection to this rationale. While a child of a parent who consented to the use of corporal punishment would have no "constitutional grounds to object" because as to him the school district is "a properly delegated" person, with the same constitutional protection as a parent, the child of an objecting parent would seem to have no such barrier to an assertion of his rights because as to him the school board is *not* a properly delegated person. Thus, the threshold inquiry into whether there are grounds for a constitutional challenge to corporal punishment by a child must deal with his parent's attitude towards its use. It is suggested that the soundness of basing this determination on the attitude of the child's parent is open to serious question.[72]

Finally, the court's reasoning loses sight of the fact that William was alleging a violation of his right to the dignity of his body. It is unrealistic to equate the environment and attitude surrounding corporal punishment in a school with that of the home for the purpose of analyzing the effect of the punishment on the dignity of the child. In fact, the *in loco parentis* doctrine has come under recent attack for assuming

72. The issue of the extent to which a parent's desire can supercede constitutional assertions by a child has been specifically left open in three recent Supreme Court decisions. *E.g.*, Roe v. Wade, 410 U.S. 113 (1973) (left open the constitutionality of abortion statute provisions which require written permission from the parents of unmarried mothers. *See id.* at 165 n.67); Wisconsin v. Yoder, 406 U.S. 205 (1972) (specifically left open the question of whether an Amish parent could remove his child from high school in a case where the child asserted his own independent religious choice not to follow the Amish way of life and thus to remain in school. *See* Douglas, J., dissenting, *id.* at 245); Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970) (Brennan & Douglas, JJ., concurring) (expressed concern that the Court's interpretation of a statute permits an addressee to request the Postmaster General to order the sender to cease further mailing might allow the parents to prevent children 18 years old and over from receiving in the mails material which the parents felt was objectionable).

that the parental concern, and the intimacy of the home, which are the bases for this parental privilege, is present in the heart of the teacher and environment of the institution which asserts the "delegated authority."[73] It is interesting to note that the *Glaser* court, while willing to examine the rationality of the doctrine from the perspective of the objecting parent, was unwilling to consider whether a doctrine which had its basis in the intimate tutor-family-parent relationship makes sense from the perspective of the child in this age of large educational institutions.

Because William's assertions were dismissed as groundless and thus left unanswered by the rationale of the court and because, if sustained, they would have an important impact on challenges to corporal punishment, they will now be considered.

At the outset it should be noted that neither William's status as a minor[74] nor his status as a student[75] preclude the recognition of his constitutional rights. It has become well settled that children are protected both by the Bill of Rights and by the fourteenth amendment.[76] Although judicial intervention into the affairs of the classroom continues to be a delicate process marked by great restraint, courts will intervene when basic constitutional issues are sharply implicated.[77] It can be assumed, therefore, that if William can prove a violation of

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73. *See* Van Alstyne, *Judicial Trend Towards Student Academic Freedom*, 20 U. FLA. L. REV. 290 (1968).

> For another thing it is unrealistic to assume that the relatively impersonal and large scale institution can act in each case with the same degree of solicitous concern as a parent reflects in the intimacy of his own home. The parent is doubtless restrained in tempering discipline with parental love and concern. The institution, however, cannot hope to reflect the same intense degree of emotional identification with those in attendance no matter how well it may intend otherwise.

Id. at 294.

74. *E.g.*, *In re* Gault, 387 U.S. 1 (1967). In granting certain procedural safeguards to minor defendants the Court stated, ". . . whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *Id.* at 13.

75. *E.g.*, Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969).

> Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.

Id. at 511.

76. *See In re* Gault, 387 U.S. 1, 13 (1967).

77. *E.g.*, Epperson v. Arkansas, 393 U.S. 97 (1968).

> Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large public education in our Nation is committed to the control of the state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.

Id. at 104.

fundamental constitutional liberties by the school district, it is proper for the courts to intervene.

William's claim to a protected right to the dignity of his body finds support in two distinct lines of Supreme Court cases. The first is a line begun by *Union Pacific Railway Co. v. Botsford*[78] which, in holding that a federal court may not upon application of the defendant in a civil suit order the plaintiff, without his consent, to submit to a physical examination, announced the oft-quoted *Botsford* principle:

> No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person free from all restraints or interferences of others, unless by clear and unquestionable authority of law.[79]

The subsequent development of *Botsford* is not free of confusion. One early Supreme Court ruling[80] limited *Botsford* to its facts, holding that a physical examination could be ordered if a state statute authorized such an examination. A later decision, *Sibbach v. Wilson*,[81] appeared temporarily to put the *Botsford* principle to rest. The Court held that rule 35 of the Federal Rules of Civil Procedure, which authorizes a federal court to order a physical examination, did not abridge preexisting substantive rights. *Botsford* was distinguished as a procedural case that did not deal with substantive laws.

The "substantive" *Botsford* principle, however, was revived by the Supreme Court in a fourth amendment context in *Terry v. Ohio*,[82] which used the case as an example of the Court's "long recognition" of the citizen's right to personal security. The great lengths to which the *Terry* Court went, both in justifying and carefully limiting the intrusion upon one's personal security by the stop and frisk, is indicative of the judicial respect the principle commanded. Further, the use of the principle to support a right to personal security in the context of fourth amendment litigation has given impetus to new and varied uses of the *Botsford* principle in the establishment of a constitutional right to personal integrity.

Thus *Botsford* was used by a district court,[83] in overturning a state

78. 141 U.S. 250 (1891). *See also* Shed, *The Legal Process as a Problem Solving Tool in Education*, 17 VILL. L. REV. 1020 (1972).
79. 141 U.S. at 251.
80. Camden & S. Ry. v. Stetson, 177 U.S. 172 (1900).
81. 312 U.S. 1 (1941).
82. 392 U.S. 1 (1968).
83. *E.g.*, Young Woman's Christian Ass'n v. Kugler, 342 F. Supp. 1048 (D.N.J. 1972).

abortion statute, as the foundation for a ninth and fourteenth amendment "right of an individual to control the use and function of his or her body without unreasonable interference from the state."[84] Further, in the recent outgrowth of "hair cases" the *Botsford* principle has been used to establish a due process "liberty" protection to wear one's hair at a chosen length,[85] a fundamental right retained by the people to govern one's appearance under the ninth and fourteenth amendments,[86] and perhaps most significantly a due process right to be secure in one's person.[87]

This gradual elevation of the *Botsford* principle to constitutional stature by the lower courts was embraced by the Supreme Court in *Roe v. Wade*,[88] which cited *Botsford* as the origin of the Court's recognition of a constitutionally protected "right of personal privacy, or a guarantee of certain areas or zones of privacy."[89]

This use of *Botsford* by the Supreme Court and the federal courts would seem to indicate that certain aspects of personal and physical integrity are to be granted constitutional protection. That the personal and physical integrity of a child on the receiving end of corporal punishment ought to be included within the now constitutionally protected *Botsford* "zone of privacy" is given support by a line of cases manifesting intense judicial concern for the protection of the dignity of the human body from unwarranted physical intrusion by the state.

In *Breithaupt v. Abram*,[90] the Supreme Court, in upholding the constitutionality of drawing blood from an unconscious driver's arm to determine intoxication, showed great concern for *"the right of an individual that his person be held inviolable,* even against so slight an intrusion as is involved in applying a blood test."[91] It was only after balancing this right against the public interest in the successful prosecution of "driving under the influence" offenses and after taking

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In the course of the opinion the court answered arguments that the *Sibbach* case robbed *Botsford* of any effect by stating, "The recent restatement of the *Botsford* principle in the context of a Fourth Amendment case clearly establishes that the principle is very much alive and is not limited to tort actions." *Id.* at 1067 n.80.

84. *Id.* at 1066.
85. Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970).
86. Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971).
87. Massie v. Henry, 455 F.2d 779 (4th Cir. 1972). In contrast to the other hair decisions which established the narrow right to govern one's appearance under varying rationales, the *Massie* case established a broader right to be secure in one's person (of which the right to govern one's appearance is a part).
88. 410 U.S. 113 (1973).
89. *Id.* at 152.
90. 352 U.S. 432 (1957).
91. *Id.* at 439 (emphasis added).

judicial notice that blood tests are routine intrusions upon our bodies that are voluntarily submitted to for various purposes as a matter of course, that the Court found the violation of the person permissible.[92] This principle was given more explicit recognition in *Schmerber v. California*.[93] While upholding the validity of a blood test, taken despite refusal to consent, on the ground that the blood test was necessary to prevent destruction of evidence,[94] the Court announced that "the overriding function of the Fourth Amendment is to *protect personal privacy and dignity* against unwarranted intrusions by the State."[95] The Court then proceeded to carefully limit the opinion, reasserting that *"the integrity of an individual's person* is a cherished value of our society,"[96] and cautioning against it being read so as to permit more substantial intrusions or intrusions under other circumstances.

Although both *Schmerber* and *Breithaupt* dealt with penetration of the skin surface, the underlying rationale of the cases was not the protection of the body from intrusive searches, but rather the protection of the dignity and privacy of the human body from unwarranted government interferences.[97] This analysis is borne out by a series of Ninth Circuit decisions which applied the *Schmerber* rationale in a border search context.[98] The most revealing of these cases is *United States v.*

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92. The entire Court joined in the recognition of the right to the inviolability of the body. The Court split, not on the recognition of the right, but the extent to which it is protected.

> We should, in my opinion, hold that due process means at least that law enforcement officers in their efforts to obtain evidence must stop short of *bruising the body*, breaking the skin, puncturing tissue or extracting body fluids, whether they contemplate doing it by force or by stealth.

Id. at 442 (Warren, C.J., dissenting) (emphasis added).

93. 384 U.S. 757 (1966).

94. The Court was careful to note that this case was limited to instances where there was probable cause to believe evidence would be produced by the search and that "the interest in human dignity and privacy which the Fourth Amendment protects forbids any such intrusion upon the mere chance that desired evidence might be found." *Id.* at 769-70.

95. *Id.* at 767 (emphasis added).

96. *Id.* at 772 (emphasis added).

97. *See* Comment, *Intrusive Border Searches—Is Judicial Control Desirable?*, 115 U. PA. L. REV. 276 (1966).

98. In Rivas v. United States, 368 F.2d 703 (9th Cir. 1966), *cert. denied*, 386 U.S. 945 (1967), the court upheld the use of a gentle rectal probe to discover narcotics, but only after going to great lengths to insure that there was a reasonably clear indication that the evidence would be found, and to explain that rectal probes, like blood tests, are commonly submitted to as part of a routine physical examination. It was further apparent that absent the compelling state interest in stopping the border smuggling of narcotics, such a search would be an impermissible intrusion upon human dignity. In a subsequent decision, Henderson v. United States, 390 F.2d 805 (9th Cir. 1967), the court struck down a visual vaginal search on the ground that the state had not shown that there was any clear indication that such a search would produce evidence. The court pointed out that in light of the indignity the search caused, absent such evident indication, the search would be an unwarranted intrusion upon the defendant's dignity within the meaning of *Schmerber*.

Guadelupe-Garza,[99] which, while recognizing that a brief detention and routine search are reasonable in the border search context, held that because of the indignity involved, no one can be constitutionally subjected to a visual naked skin search without a showing of a compelling reason on the part of the state. This restriction on the use of skin searches, involving no intrusion into the body, was based solely upon the indignity to which it would subject the person.

What seems to emerge from these cases is the principle that a person has a protected interest in the physical integrity of his body,[100] and that the government cannot physically violate that integrity except upon a showing of a compelling reason to do so.[101] While the *Breithaupt-Schmerber* line of cases arose in a fourth amendment context and did not deal directly with the substantive right to bodily integrity, it is important to note that the same human dignity interests were characterized by *Terry v. Ohio*,[102] a leading fourth amendment case, as being encompassed within the *Botsford* principle. Taken together they would seem to indicate that the right not to have the dignity of one's body physically violated is an interest within the *Botsford* zone of privacy, and, therefore, constitutionally protected.

It would further seem that if courts are going to characterize the patting down of one's outer clothing[103] and the injection of a small needle into one's arm[104] as an invasion of the dignity of one's body, the much greater indignity inherent in the receipt of a paddle blow upon a child's buttocks must be afforded the same characterization and with it the same protection. As opposed to other permitted offensive intrusions that have been discussed above, corporal punishment is not a procedure to which people voluntarily submit as a matter of course. Thus, one of the major factors in both the blood test cases and the permissible border search cases is absent. Further, whereas in the aforementioned cases the offensive intrusion was the only method of successfully dealing with the compelling government concern over drunken driving and

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99. 421 F.2d 876 (9th Cir. 1970).

100. *See* 6 Harv. Civ. Rights—Civ. Lib. L. Rev. 583 (1971).

101. It is clear that regardless of the characterization of the right, the government, in the *Breithaupt-Schmerber* line of cases, had the burden of justifying even the slightest of intrusions upon a person's bodily integrity. Where the searches were upheld the Court generally minimized the indignity of the search (blood test and anal probe, both part of routine physical exam) while maximizing the state interest involved (*e.g.*, drunken driving, narcotics smuggling).

102. 392 U.S. 1 (1968).

103. *Id.*

104. Schmerber v. California, 384 U.S. 757 (1966).

narcotics smuggling, no similar showing as to the necessity of corporal punishment has to date been made.

Even a constitutionally protected right to the dignity of the body, however, is not absolute. As has been discussed, overriding considerations will at times warrant intrusion into a person's protected zone of privacy by the state. When a child asserts against a school district an invasion of his right to the dignity of his body, the question will arise as to the proper burden to be placed on the school board to justify the practice. In the absence of an otherwise valid constitutional challenge the school board only need show that its regulation is not arbitrary and unreasonable.[105] Given the fact that there is a body of expert opinion supporting utility of corporal punishment as a means of school discipline, under this standard of review the "reasonableness" of the practice is easily sustained.[106] School districts, therefore, shielded by judicial reluctance to second guess a school board's determination of what disciplinary regulations are needed, have never had to prove the necessity of the practice.[107] What standard of review is applicable when a constitutionally protected personal liberty is at issue, however, is open to question.

An answer might be sought in the recent "hair cases" in which school boards were required to justify dress code regulations in the face of assertions of protected constitutional liberties. All five circuits[108] which recognized a constitutionally protected right of privacy placed an affirmative burden on the school board to justify the curtailment of this liberty. The school board has been required to demonstrate a counter-

105. Board of Directors v. Green, 259 Iowa 1260, 147 N.W.2d 854 (1967) (school board rule barring participation in extracurricular activities by married pupils upheld because rule is not clearly arbitrary and unreasonable); McLean Independent School Dist. v. Andrews, 333 S.W.2d 886. (Tex. Civ. App. 1960) (upheld rule requiring that cars driven to school remain parked until 3:45 P.M. as not being arbitrary).

106. In the *Glaser* decision the court pointed to the evenly divided expert opinions and stated that to choose between them would go to the wisdom and not the reasonableness of the policy.

107. In Sims v. Board of Educ., 329 F. Supp. 678 (D.N.M. 1971), the court well expressed what has been a traditional concern about school board intervention into school affairs:

> This Court will not act as a super school board to second guess the defendants. If acts violative of reasonable school regulations be not discouraged and punished, those acts can result in the disruption of the schools themselves. If our educational institutions are not allowed to rule themselves, within reasonable bounds, as here, experience has demonstrated that others will rule them to their destruction.

Id. at 690.

108. Stull v. School Bd., 459 F.2d 339 (3d Cir. 1972); Massie v. Henry, 455 F.2d 779 (4th Cir. 1972); Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971); Crews v. Cloncs, 432 F.2d 1259 (7th Cir. 1970); Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970).

vailing interest that is self-evident or affirmatively shown;[109] an outweighing state-interest;[110] the necessity for infringing upon a student's personal freedom;[111] and evidence which might reasonably have led school authorities to forecast substantial disruption of, or a material interference with, school activities.[112] It is clear from the opinions that the courts were looking for an affirmative showing that the regulations were necessary to maintain discipline and decorum in the classroom. Unsupported contentions by the school board that such regulations were necessary to maintain a proper academic atmosphere, and unsubstantiated opinions that they were necessary for discipline were rejected by the courts. One author has concluded that the courts would only allow a curtailment of a student's personal liberty upon "a showing of a clear and imminent danger to the educational process."[113]

It is suggested that this burden would be an appropriate one to which a school board should be held in a constitutional challenge to its use of corporal punishment by a student alleging invasion of the dignity of his body. As the student's constitutional interest is not absolute, it must yield to proof that its assertion would lead to a material disruption of the educational process. For the school board to invade this protected zone of bodily integrity upon any less of a showing would be inconsistent with the great lengths to which the Supreme Court has gone to justify less offensive intrusion in *Terry* and *Breithaupt*. Further, such a burden would be consistent with the burden established by a majority of the circuits which have dealt with assertions of student rights to privacy in a classroom context.

CONCLUSION

In overruling the non-consensual branch of the *in loco parentis* doctrine and in holding that the infliction of corporal punishment against the expressed wishes of a parent is violative of a constitutionally protected parental liberty, the *Glaser* decision made sound use of well-established constitutional precedent and a well-entrenched constitutional liberty. In placing an affirmative burden on the parent to assert

109. *E.g.*, Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970).
110. *E.g.*, Stull v. School Bd., 459 F.2d 339 (3d Cir. 1972); Bishop v. Colaw 450 F.2d 1069 (8th Cir. 1971).
111. Massie v. Henry, 455 F.2d 779 (4th Cir. 1972).
112. Crews v. Clones, 432 F.2d 1259 (7th Cir. 1970).
113. Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A NonConstitutional Analysis*, 117 U. PA. L. REV. 373, 422 (1969).

that liberty, however, and in refusing to reach the merits of the child's constitutional claim by characterizing the claim as groundless, the decision demonstrated a lack of internal consistency. While purporting to overrule the non-consensual branch of the *in loco parentis* doctrine, the court allowed the school district to *presume*, until expressly notified to the contrary, a transfer of parental privilege to use corporal punishment regardless of whether a parent desired such a transfer. Aside from the aforementioned issue of waiver, this reasoning would appear to allow the purportedly overruled doctrine "to come in through the back door." By refusing to reach the merits of the child's constitutional claim on the basis of a delegation of parental privilege that the court was subsequently to find non-existent, the court has left us with no indication of the validity of the child's constitutional assertions. It is suggested that further judicial clarification of both the rights of the objecting but unknowing parent, and of child, is needed before the full impact of the *Glaser* rationale on the use of corporal punishment by school districts can be properly assessed.

Alan N. Braverman

LANDLORD-TENANT—A CONTRACTUAL BASIS FOR AN IMPLIED WARRANTY OF HABITABILITY IN RESIDENTIAL LEASES—The Supreme Judicial Court of Massachusetts has held that in the rental of any premises for residential purposes under an oral or written lease, for a specified time or at will, there is an implied warranty of habitability.

Boston Housing Authority v. Hemingway, 293 N.E.2d 813 (Mass. 1973).

Plaintiff, Boston Housing Authority (landlord) brought two actions of summary process against the defendants (tenants)[1] for failure to pay rent. The tenants began to withhold rent on March 3, 1969, after repeatedly requesting the landlord to repair claimed defects such as leaky ceilings, improper heating, wet walls, broken doors and windows, and rodent and vermin infestations. In Massachusetts tenants of premises leased for dwelling purposes are permitted by law to withhold rent if those premises are in violation of the standards of fitness for human

1. The defendant tenants were Ruth Hemingway and Ruth Briggs.