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CORPORAL PUNISHMENT: FORTY WHACKS WITH THE FOURTEENTH AMENDMENT

Ingraham v. Wright, 525 F.2d 909 (5th Cir. 1976)

Plaintiffs, students in the Dade County, Florida, school system, brought a class action[1] alleging that the infliction of corporal punishment[2] deprived them of their constitutional rights under the eighth[3] and fourteenth[4] amendments. Evidence was presented that punishment was administered contrary to the procedures outlined by the school board.[5] The district court dismissed the suit based on its finding that neither of the plaintiffs was deprived of their constitutional rights.[6] The Fifth Circuit reversed and concluded instead that there was substantial evidence to show procedural due process had not been accorded the students.[7] On rehearing *en banc*, however, the court reinstated the district court ruling, and HELD, the infliction of corporal punishment did not subject these students to a grievous loss to which the fourteenth amendment due process standards were applicable.[8]

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1. FED. R. CIV. P. 23(b). Plaintiffs brought three counts. The first two counts were actions by plaintiffs Ingraham and Andrew seeking compensatory and punitive damages for personal injuries. Count three was a class action for declaratory and injunctive relief. On each count, relief was sought under 42 U.S.C. §1983 (1970), which imposes liability on one who, under color of state law, deprives another of his constitutional rights.

2. For the purposes of this comment, corporal punishment is defined as physical punishment administered to a person as a means of discipline.

3. "Excessive bail shall not be required nor excessive fines imposed, or cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

4. U.S. CONST. amend. XIV provides in part that "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

5. Dade County School Board Policy 5144 provides in pertinent part: "Corporal punishment may be used in the case where other means of seeking cooperation from the student have failed. . . . [T]he teacher must confer with the principal. . . . [T]he student should understand clearly the seriousness of the offense and the reason for the punishment. . . . The punishment must be administered in kindness and in the presence of another adult. . . . and no instrument shall be used that will produce physical injury to the student, and no part of the body above the waist or below the knees may be struck."

The evidence was unrefuted that these procedures were consistently ignored. For example, James Ingraham, a student at Drew Junior High School claimed that he was innocent of any wrongdoing and refused to be paddled. Principal Wright administered at least twenty licks to Ingraham who was held struggling face down across a table. This beating produced a painful and serious hematoma on his buttocks, as diagnosed by a physician, that necessitated his absence from school for more than 10 schools days. Daniel Lee was struck four or five times on the hand resulting in a fractured bone. He asked what he had done, but the teacher refused to tell him. After one class member whistled, the teacher began paddling the entire class of thirty to fifty students in an attempt to locate the culprit. After about half the class had been spanked, some students revealed who had whistled; the rest of the class was spared. *See* Ingraham v. Wright, 498 F.2d 248 (5th Cir. 1974).

6. Ingraham v. Wright, 525 F.2d 909, 912 (5th Cir. 1976).

7. Ingraham v. Wright, 498 F.2d 248 (5th Cir. 1974). The court also held that while corporal punishment is not a per se violation, corporal punishment as applied in this case did violate the prohibition against cruel and unusual punishment.

8. Ingraham v. Wright, 525 F.2d 909, 919 (5th Cir.), *cert. granted*, 96 S. Ct. 2200 (1976).

Corporal punishment as a means of discipline has long been practiced by educators.[9] An early English common law doctrine, *in loco parentis*, legitimated corporal punishment by recognizing a partial delegation of parental authority to the pedagogue.[10] Most states presently have statutes that specifically authorize the teacher or principal to administer corporal punishment[11] but only as a last resort in serious disciplinary cases.[12] This authority is generally restricted by state statutes[13] and by common law[14] to the infliction of corporal punishment that is reasonable under the circumstances.[15] The student's common law remedy for excessive or unreasonable punishment is a suit in tort for assault and battery against the punisher.[16] The teacher can also be held criminally liable for his tortious conduct under many state statutes;[17] however, a student's constitutional rights have generally not been addressed in the context of these traditional causes of action.

Constitutional challenges to the practice of corporal punishment were first premised on the theory that corporal punishment violated basic parental rights to raise and discipline one's children free of interference from the state.[18] In 1922 the United States Supreme Court recognized that the parent has a specific right under the fourteenth amendment and penumbras of the Bill of Rights to direct the upbringing and education of his children.[19]

The court also reinstated the district court's holding on the eighth amendment issue, stating that the proscription of cruel and unusual punishment does not apply in a civil context.

9. For a discussion of the utility of corporal punishment, see Note, *Corporal Punishment in the Public Schools*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 583 (1971).

10. See 1 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 453 (T. Cooley ed. 1884).

11. Only two states have statutes expressly prohibiting the use of corporal punishment in the schools. *See* MASS. GEN. LAWS ANN. ch. 71, §37g (Supp. 1974); N.J. STAT. ANN. §18A:6-1 (1968).

12. *See, e.g.*, FLA. STAT. §232.27 (1975). Policy 5144 of the Dade County School Board provides: "Corporal punishment may be used in the case where other means of seeking cooperation from the student have failed."

13. *See, e.g.*, FLA. STAT. §232.27 (1975); N.C. GEN. STAT. §115-146 (1971).

14. *See, e.g.*, Suits v. Glover, 260 Ala. 449, 71 So. 2d 49 (1954); Tinkham v. Kole, 252 Iowa 1303, 110 N.W.2d 258 (1961).

15. All circumstances are to be taken into consideration, including the nature of the offense; the age, sex, and strength of the child; his past behavior; the kind of punishment; and the extent of the harm inflicted. W. PROSSER, LAW OF TORTS §27 (4th ed. 1964). *See* Proehl, *Tort Liability of Teachers*, 12 VAND. L. REV. 723 (1959).

16. *See, e.g.*, Tinkham v. Kole, 252 Iowa 1303, 110 N.W.2d 258 (1961).

17. *See, e.g.*, WASH. REV. CODE ANN. §28A.87.140 (1970).

18. Many suits recently have challenged the right of the state to allow corporal punishment over the objection of the parent. *See, e.g.*, Baker v. Owen, 395 F. Supp. 294 (M.D. N.C. 1975), *aff'd*, 96 S. Ct. 210 (1975) (the state has a legitimate interest in maintaining order and discipline in school, and parental rights in this case are overriden by this state interest). *Contra*, Glasser v. Marietta, 351 F. Supp. 555 (W.D. Pa. 1972) (school district may enforce its rules on corporal punishment unless the parent of the child objects).

19. Meyer v. Nebraska, 262 U.S. 390 (1923), held unconstitutional a state statute forbidding the instruction of a foreign language in public schools to pupils who had not passed the eighth grade. The Court said the state cannot unreasonably interfere with the liberty of parents to direct the upbringing and education of their children. *Id.* at 399.

Although recognized as "rights far more precious than property rights,"[20] parental rights are not without limitation.[21] Thus, a balancing test was implemented to determine the degree to which the state could infringe the fundamental rights of the parent.[22] Generally, if the state was able to show a "compelling countervailing state interest," then the infliction of corporal punishment was upheld.[23]

Only recently has there been a recognition of the student's constitutional right to be free from the infliction of corporal punishment.[24] This development stems from judicial cognizance of the fact that students are "persons" under the Constitution.[25] The assertion of student constitutional rights in the area of corporal punishment is based on three arguments: 1) the student has the right to be free from cruel and unusual punishment;[26] 2) corporal punishment

20. Stanley v. Illinois, 405 U.S. 645, 651 (1972), *quoting* May v. Anderson, 345 U.S. 528, 533 (1953).

21. Prince v. Massachusetts, 321 U.S. 158, 166 (1944). *Accord*, Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (in order for a deprivation of due process under the fourteenth amendment to occur, rules and policies of school districts must bear "no reasonable relation" to some purpose within the competency of the state).

22. *See generally* Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) (the state may not force the children of Amish parents to attend public schools after the eighth grade); Prince v. Massachusetts, 321 U.S. 158 (1944).

23. It is still not settled whether the reasonable relation test developed in Pierce v. Society of Sisters, 278 U.S. 510 (1925) and Baker v. Owen, 395 F. Supp. 294 (M.D.N.C. 1975), or the compelling interest test of Stanley v. Illinois, 405 U.S. 645 (1972), should be employed. The courts have been reluctant to declare corporal punishment wholly unrelated to any legitimate goal, feeling that this is a legislative determination. *See* Ware v. Estes, 328 F. Supp. 657, 659 (N.D. Tex. 1971), *aff'd*, 458 F.2d 1360 (5th Cir. 1972) ("It is not within this Court's function, or competence, to pass judgment on the merits of corporal punishment as an educational tool . . . ."). This attitude may stem from reluctance on the court's part to enter the educational field. As the Supreme Court has noted: "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." Epperson v. Arkansas, 393 U.S. 97, 104 (1968). *But see* note 73 *infra* and accompanying text.

24. *See* Bramlet v. Wilson, 495 F.2d 714 (8th Cir. 1974).

25. *See In re* Gault, 387 U.S. 1 (1967) (landmark case requiring that juveniles charged with criminal offenses be given basic procedural safeguards such as the right to counsel, etc.). *Accord*, Tinker v. Des Moines Community School Dist., 393 U.S. 503 (1969): "It can hardly be argued that either students or teachers shed their constitutional rights . . . at the school house gate." *Id.* at 506. "[Students] are possessed of fundamental rights which the State must respect . . . ." *Id.* at 511. *See* Note, *In Loco Parentis and Due Process: Should These Doctrines Apply to Corporal Punishment?*, 26 BAYLOR L. REV. 678 (1974).

26. Decisions discussing the applicability of the eighth amendment to corporal punishment administered in public schools can be divided into three groups: 1) a case holding that the eighth amendment does apply to corporal punishment in public schools—*see* Bramlet v. Wilson, 495 F.2d 714 (8th Cir. 1974) (the case was remanded for factual determination); 2) cases holding that the eighth amendment does not apply to corporal punishment in public schools—*see* Sims v. Waln, 388 F. Supp. 543 (S.D. Ohio 1974); Gonyaw v. Gray, 361 F. Supp. 366 (D. Vt. 1973); and 3) cases that assume, without deciding, that the eighth amendment applies to the imposition of corporal punishment but that in the instant case the punishment inflicted was not severe enough to constitute cruel and unusual punishment—*see* Baker v. Owen, 395 F. Supp. 294 (M.D.N.C. 1975); Glaser v. Marietta, 351 F. Supp. 555 (W.D. Pa. 1972); Ware v. Estes, 328 F. Supp. 657 (N.D. Tex. 1971).

is arbitrary, capricious, and unrelated to legitimate educational goals and therefore denies the student substantive due process;[27] and 3) the infliction of corporal punishment subjects the student to a loss of certain rights guaranteed by the fourteenth amendment, and therefore procedural due process safeguards should be applied.[28]

Although all three arguments are raised in litigation, procedural due process presents the most viable and consistent means of affording the student protection against the arbitrary infliction of unreasonable punishment.[29] Substantial progress toward protecting the student during the administration of discipline has taken place in the last 15 years. In a landmark decision, *Dixon v. Alabama State Board of Education*,[30] the Fifth Circuit concluded that prior to expulsion[31] from public school the student must be afforded certain safeguards to insure due process rights.[32] Although the court stated that "the nature of the proceeding will vary with the circumstances," the general requirements mandated are a formal or informal hearing and notice.[33]

In 1975 the Supreme Court extended these procedural safeguards to suspensions from public schools. In *Goss v. Lopez*,[34] the Court established a two-tiered analysis to be followed in determining procedural due process that is necessary in school disciplinary cases. The first tier discerns whether the right affected by the school proceeding is a protected right.[35] Under the fourteenth amendment, a protected right is any liberty or property interest

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The basic question on which there is major disagreement among these cases is whether the eighth amendment can apply in a civil context or whether it is applicable only to criminal sanctions. *Compare* Powell v. Texas, 392 U.S. 514, 531-32 (1968) ("The primary purpose of that clause has always been considered to be directed at the method or kind of punishment imposed for the violation of criminal statutes.") *with* Trop v. Dulles, 356 U.S. 86, 100-01 (1958) ("The amendment must draw its meaning from the evolving standards of decency . . . ."). See Note, *Corporal Punishment in Public Schools*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 585 (1971). For treatment of the eighth amendment issue by the *Ingraham* courts, see notes 7, 8 *supra*.

27. However, most courts have held that corporal punishment does not violate substantive due process, finding it difficult to contend that corporal punishment bears no reasonable relation to legitimate educational goals. *See, e.g.*, Baker v. Owen, 395 F. Supp. 294 (M.D.N.C. 1975); Ware v. Estes, 328 F. Supp. 657 (N.D. Tex. 1971). See note 23 *supra*.

28. Baker v. Owen, 395 F. Supp. 294 (M.D.N.C. 1975).

29. The eighth amendment issue necessarily presents a case-by-case approach and provides little real preventive protection for the student. Moreover the eighth amendment defies logical analysis for it lacks any standards to guide the administration of its general proscription of "cruel and unusual punishment." This is the basis for much of the criticism of the death penalty cases decided primarily on eighth amendment grounds. *See* Furman v. Georgia, 408 U.S. 239, 375 (1972) (Burger, J., dissenting). The substantive due process issue is hampered by the courts' reluctance to declare corporal punishment unrelated to any legitimate goal. See note 23 *supra*.

30. 294 F.2d 150 (5th Cir. 1961).

31. Expulsions are distinguished from suspensions in that expulsions impose absence from school for more than 10 days and may be for as long as the remainder of the school term. Goss v. Lopez, 419 U.S. 565, 567 (1975).

32. 294 F.2d 150 (5th Cir. 1961).

33. *Id.* at 158.

34. 419 U.S. 565 (1975).

35. *Id.*

that is greater than de minimis.[36] For example, in *Goss* the Court determined a liberty interest existed that warranted protection because the student's reputation, honor, or integrity could suffer as a result of the suspension.[37] The Court also stated that the student has a substantial property interest since the student is statutorily entitled to a public educaion. Thus, the student must be afforded an informal hearing before being denied his liberty and property interest by suspension.[38]

In determining whether the harm caused by the invasion of these interests amounted to a "grievous loss" within the confines of the fourteenth amendment, the Court in *Goss* echoed the reasoning of Justice Harlan in *Sniadach v. Family Finance Corp.*[39] In *Goss*, as in *Sniadach*, the Court specifically rejected the "grievous loss" standard stating that *any* loss greater than de minimis will warrant due process protection.[40] To ascertain whether a property or liberty interest was protected, the Court focused on the nature of the interest involved, not on the gravity or weight of the injury.[41]

If a right is found that warrants protection, the second tier of the *Goss* test must be utilized to ascertain what procedures are necessary to satisfy due process.[42] Only after a protected right has been found under the first tier will the gravity of the deprivation be examined.[43] In cases involving corporal punishment the state's interest in maintaining order in public schools must be balanced against the student's interest in preserving intact his liberty or property right.

Recently, one federal district court followed the concept of increased protection for the student to its logical conclusion when the court applied procedural safeguards to the infliction of corporal punishment in the case of *Baker v. Owen.*[44] In *Baker* the court utilized the *Goss* analysis and

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36. The courts tend to confuse the usage of the term "de minimis." The *Goss* court recognized two distinct ways to come under the protection of the fourteenth amendment: (1) if there is more than a de minimis deprivation of any right, or 2) if the property or liberty interest itself is greater than de minimis. *Id.* at 576. However, the *Ingraham* majority used neither of these two tests as a basis for invoking fourteenth amendment protection but instead required a *grievous* deprivation of a *substantial* right. 525 F.2d at 918-19. This is a much stricter standard than the Supreme Court used in *Goss*. See text accompanying notes 49-51 and 54-58 *infra*.

37. 419 U.S. at 574-75, *citing* Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

38. Ohio has a compulsory attendance law. OHIO REV. CODE ANN. §3321.04 (Page 1972). As a result of this statute the Court held that a student had a legitimate claim of entitlement to a public education.

39. 395 U.S. 337, 342 (1969) (Harlan, J., concurring).

40. 419 U.S. at 576. This sentence reflects the first usage of the term de minimis. See note 36 *supra*.

41. 419 U.S. at 576-77, *citing* Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972). For a discussion of the grievous loss-de minimis tests, *see* Comment, 12 SAN DIEGO L. REV. 912 (1975).

42. 419 U.S. at 577. "Once it is determined that due process applies, the question remains what process is due." Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

43. 419 U.S. at 577-78. The Court examines the degree of deprivation not to determine whether a right exists but only as a guide to ascertain what kind of protection is necessary.

44. 395 F. Supp. 294 (M.D.N.C.), *aff'd*, 96 S. Ct. 210 (1975).

determined that a liberty interest in personal integrity was invaded by corporal punishment. Since this interest was protected by the fourteenth amendment,[45] certain minimal procedures were mandated to safeguard the liberty interest.[46] The court stated that the expansive concept of fourteenth amendment liberty must include "personal security in the seemingly small things of life as well as in the obviously momentous."[47] The court found that three procedures were absolutely essential: 1) a listing of offenses that could occasion the use of corporal punishment; 2) the presence of a second official at the execution of the punishment who must be informed of the reasons for the punishment; and 3) an explanation of the reasons for the punishment to be given to the parent, if requested.[48]

In the instant case the Fifth Circuit refused to extend procedural due process protection to students corporally punished.[49] The court was cognizant of the *Goss* decision but distinguished it on the basis of an essential difference between suspension and corporal punishment. The court noted that suspension results in exclusion from the educational process and subsequent damage to reputation, whereas the infliction of corporal punishment infringes neither a property nor a liberty interest.[50] Therefore, the court failed to find a violation of student rights substantial enough to warrant constitutional protection. The Fifth Circuit expressly rejected the *Goss* de minimis test in favor of the "grievous loss" analysis stating that the infliction of a paddling does not subject a school child to a grievous loss for which fourteenth amendment due process standards should be applied.[51]

Fearing that the imposition of procedural safeguards would seriously undermine the utility of corporal punishment, the court refused to authorize such procedures.[52] The court erroneously assumed that the procedures used would be formal ones, much like those used in a court of law, and therefore

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45. A recent Supreme Court case, Paul v. Davis, 96 S. Ct. 1155 (1976), expressed some hesitancy concerning the protected nature of the liberty interest in *Goss*. However, *Paul* can be narrowly construed to mean that only a defamation by a state official against an individual without more does not violate a protected liberty interest of the fourteenth amendment.

46. The *Baker* court determined that a liberty interest existed by employing the second usage of de minimis. The court reasoned that if any liberty or property interest greater than de minimis existed, the fourteenth amendment must be invoked to protect it. 395 F. Supp. at 301. See note 36 *supra*.

47. 395 F. Supp. at 301.

48. The procedures were not included in the opinion of the court but rather were listed in the judgment entered two months after the opinion. These procedures can be found in Ingraham v. Wright, 525 F.2d 909 (5th Cir. 1976) (Rives, J., dissenting).

Baker was affirmed without opinion by the Supreme Court, but only that part of the opinion dealing with cruel and unusual punishment was appealed. 96 S. Ct. 210 (1975).

49. 525 F.2d at 917.

50. *Id.* at 918-91. The court felt that a paddling could not deprive one of his property right of entitlement to an education. Nor did a paddling inflict damage to one's reputation, honor, or integrity so as to invade a liberty interest. See notes 36-41 *supra* and accompanying text.

51. 525 F.2d at 918-19.

52. *Id.* at 919. The court also felt that the administrator of the punishment should have the discretion to determine when and to what extent punishment should be inflicted.

the effective administration of these procedures prior to punishment would be impossible.[53]

The use by the majority of the grievous loss standard is more than just a misapplication of *Goss*. Only after careful scrutiny of the latest cases involving procedural due process did the Supreme Court reach its decision in *Goss* to adopt the lesser de minimis standard. Through this evaluation the Supreme Court found the proper focal point to be the nature of the right at stake, not the weight or gravity of the interest.[54] The Supreme Court in *Fuentes v. Shevin*[55] said:

> While the length and consequent severity of deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of the basic right to a prior hearing of some kind.[56]

Thus, the Fifth Circuit thwarted the specific intent of the Supreme Court when it deemed the rights at stake in corporal punishment "not substantial enough"[57] to warrant fourteenth amendment protection.

Additionally, the majority's fearful speculations that the utility of corporal punishment will be undermined by the imposition of procedural safeguards are unwarranted. In *Dixon* the Fifth Circuit stated that "the nature of the hearing should vary depending on the circumstances of the particular case."[58] This statement was based on the view that due process is flexible in its application.[59] The formality and procedural requirements for the hearing can vary depending on the importance of the interests involved and the nature of the subsequent proceeding.[60] Within the limits of practicability, certain minimal procedures can be followed that will protect the student and yet not decrease the effectiveness of corporal punishment.[61]

The majority also unduly emphasized that the policy of the school board was reasonable and purported to establish certain procedures that would afford most students due process.[62] These procedures, however, were not followed by the teachers and principals at the school attended by the

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53. *Id.* at 919, *quoting* Whately v. Pike County Bd. of Educ., C.A. 977 (N.D. Ga. 1971) (unreported).

54. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564 (1972); Morrissey v. Brewer, 408 U.S. 471 (1972); Boddie v. Connecticut, 401 U.S. 371 (1971). See text accompanying note 41 *supra*.

55. 407 U.S. 67 (1972).

56. *Id.* at 86.

57. Justice Harlan concurring in Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), stated: "[I]f the deprivation cannot be characterized as de minimis . . . [then there must be] the usual requisites of procedural due process: notice and a prior hearing." *Id.* at 342. See note 41 *supra*.

58. Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 157 (5th Cir. 1961).

59. *See* Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

60. *See* Boddie v. Connecticut, 401 U.S. 371, 378 (1971).

61. The procedures may be similar to those outlined in *Baker*. See note 48 *supra*. However, increased or more stringent procedures may be necessary under the facts of *Ingraham*.

62. 525 F.2d at 919 n.12.

plaintiffs.[63] Furthermore, the existence of school regulations should not preclude the imposition of constitutional procedures. In *Dixon* the Fifth Circuit stated that "the possibility of arbitrary action is not excluded by the existence of reasonable regulations."[64] Justice Douglas expressed a similar sentiment in his dissent in *Board of Regents v. Roth*. "[T]he protection of the individual against arbitrary action is the very essence of due process."[65]

Judge Rives' dissent in the present case[66] emphasized that the distinction between suspension and corporal punishment is illusory. The appropriate question he posed was whether the plaintiff's loss for more than 10 days of his statutory entitlement to attend school was any less a deprivation of property because it resulted from a beating instead of from a formal suspension.[67]

Framing the issue in terms of the *Goss* test, he noted:

> The initial inquiry must be whether the plaintiff has a liberty or property interest, greater than *de minimis*, in freedom from corporal punishment such that the fourteenth amendment requires some procedural safeguards against its arbitrary imposition. Only if such an interest is found must we proceed to an inquiry as to the type of procedure to be employed.[68]

The dissent further stressed that the facts were sufficient to indicate much more than a de minimis deprivation of both liberty and property rights.[69]

The failure of the court to recognize the need for constitutional protections for the student prior to punishment may have repercussions that are not immediately apparent. The Fifth Circuit fallaciously assumed that there are adequate remedies available to the student at the state level,[70] but the tort and criminal actions[71] against a school official for excessive punishment have proved inadequate to deter abuses.[72] Nor can they restore the student to his

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63. See note 5 *supra*.

64. Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 157 (5th Cir. 1961).

65. Board of Regents v. Roth, 408 U.S. 564, 584 (1972) (Douglas, J., dissenting), *citing* Slochower v. Board of Higher Educ., 350 U.S. 551, 559 (1956).

66. Five judges dissented, two of whom joined in the opinion of Judge Rives. 525 F.2d at 920-27.

67. 525 F.2d at 927. This was a reference to James Ingraham who missed over two weeks of school due to a hematoma resulting from a school paddling. See note 5 *supra*.

68. 525 F.2d at 922, *quoting* Baker v. Owen, 395 F. Supp. 294, 305 (M.D.N.C. 1975).

69. 525 F.2d at 926-27. "The undisputed evidence discloses deprivations of liberty, probability of severe psychological and physical injury, punishment of persons who were protesting their innocence, punishment for no offense whatever . . . and all without the slightest notice or opportunity for any kind of hearing." *Id*. The dissent then relates several of the incidents that took place at Drew Junior High School.

70. 525 F.2d at 919.

71. See text accompanying notes 16, 17 *supra*.

72. A recovery for excessive punishment is difficult to obtain due to the court's protective attitudes toward teachers. For example, many courts condition recovery on the student proving that the teacher acted with actual malice. *See, e.g.*, State v. Pendergrass, 19 N.C. 365 (1837). In Drake v. Thomas, 310 Ill. App. 57, 33 N.E.2d 889, 891 (1941), the court stated: "[T]he presumption is in favor of the correctness of the teacher's action in inflicting corporal punishment upon the pupil . . . . For an error in judgment, although the punishment is unnecessarily excessive, if it is not of a nature to cause lasting injury,

pre-punishment status since a paddling is not compensable.[73] Moreover, recourse to the school board will be equally futile. If the particular school board has procedures established to protect the student and these procedures are not complied with, the student will rarely be able to force the school board to recognize his rights. In any case, a review after the punishment has been inflicted can do little to restore a student wrongfully punished.[74] Only through the enforcement of constitutionally-mandated procedures prior to the infliction of corporal punishment can the student be adequately protected against arbitrary and unreasonable punishment.

The second consequence of this decision is extrapolated from the very nature of a proceeding that inflicts corporal punishment on the student. When such an infliction occurs without prior recourse to protective procedures, the proceeding is similar to a summary process. In *Fuentes v. Shevin*, the Supreme Court expressed concern over the widespread use of summary process in connection with deprivation of property rights and articulated the notion that only under extraordinary circumstances should such summary process be utilized.[75] The burden of demonstrating these circumstances is on the one seeking to invoke the use of the summary process.[76] Applying the *Fuentes* rationale to the instant case, it becomes imperative that only when there is a clear danger that delaying punishment would cause great disruption in the school should resort be made to inflicting corporal punishment without first taking certain precautions. Answering this argument, the Fifth Circuit has asserted in the instant case that the student has no property or liberty right worthy of protection; therefore, the student is subject to continued summary process. The net effect of this decision is to shift the burden to the student to show, after the application of the punishment, that due process procedures should have been implemented, and as a result of this failure he has suffered irreparable harm. The burden the Fifth Circuit has placed on the average student may well prove to be intolerable.[77]

It must be realized that the courts cannot police all aspects of school behavior. However, having found it necessary to impose certain procedural

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and he acts in good faith, the teacher is not liable." *See also* People v. Mummert, 183 Misc. 243, 50 N.Y.S.2d 699 (Sup. Ct. 1944) (conviction for assault reversed on the grounds that the discretion vested in teacher gives him considerable allowance in determining punishment, absent a showing of malice). However, the modern approach, which is followed by a majority of jurisdictions, conditions liability on an external standard of reasonableness. People v. Curtiss, 116 Cal. App. 771, 300 P. 801 (Dist. Ct. App. 1931). *See* Proehl, *Tort Liability of Teachers*, 12 VAND. L. REV. 723, 734-38 (1959).

73. Can money damages ever really compensate for physical injuries, or is the idea of "compensatory damages" a tort fiction?

74. If a student is punished immediately for an alleged wrong without being given a chance to explain, there is no chance that a mistake by the teacher will be discovered before punishment.

75. 407 U.S. 67 (1972).

76. An example of extraordinary circumstances would be when there is a possibility that contaminated food will be sold in commerce and consumers could be harmed. The burden in this situation would be on the agency seeking a summary procedure.

77. The Fifth Circuit is forcing the student to police the very punishment inflicted on him yet stripping him of any power to do so.

safeguards on school expulsion and suspension proceedings,[78] the federal judiciary cannot extricate themselves from the school arena simply because there may be problems of administration. Nor can they abdicate their duty in favor of state remedies, especially when such state remedies are incomplete. Justice Douglas once observed that "it is procedure that marks much of the difference between rule by law and rule by fiat."[79] It is encumbent on courts to recognize that a student's claim to protection from arbitrary corporal punishment through the implementation of procedural safeguards cannot be deemed to be wholly insignificant.[80]

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78. *See, e.g.*, Tinker v. Des Moines Community School Dist., 393 U.S. 503 (1969).

79. Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971).

80. In the 1976 regular session of the Florida legislature, a bill was passed that set up some general guidelines for student discipline. Specifically, FLA. STAT. §232.27 was amended to incorporate the following procedures: "If a teacher feels that corporal punishment is necessary, at least the following procedures shall be followed: (1) The use of corporal punishment shall be approved in principle by the principal before it is used, but approval is not necessary for each specific instance in which it is used. (2) A teacher or principal may administer corporal punishment only in the presence of another adult who is informed beforehand, and in the student's presence, of the reason for the punishment. (3) A teacher or principal who has administered punishment shall, upon request, provide the pupil's parent or guardian with a written explanation of the reason for the punishment and the name of the other teacher or principal who was present." Fla. Laws 1976, ch. 76-236, §5, *to be codified as* FLA. STAT. §232.27. These safeguards are identical to two of the three procedural requirements imposed by a federal district court in *Baker v. Owen*. See text accompanying note 48 *supra*.