

SPARE THE ROD, SAVE A CHILD: WHY THE  
SUPREME COURT SHOULD REVISIT *INGRAHAM V.  
WRIGHT* AND PROTECT THE SUBSTANTIVE DUE  
PROCESS RIGHTS OF STUDENTS SUBJECTED  
TO CORPORAL PUNISHMENT

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## INTRODUCTION

Trey Clayton was an eighth-grade student in his first year at Independence High School in Coldwater, Mississippi.<sup>1</sup> His grades were satisfactory, and he had no attendance issues. Upon arriving at his morning English class, Clayton saw another student in his assigned seat and took another seat instead. Because he was not in his assigned seat, the teacher sent him to the library. While he sat in the library, the school's Assistant Principal, Jerome Martin, approached Clayton and told the student that his alleged bad behavior was going to stop. Martin took Clayton to his office, and in the presence of another Assistant Principal, Martin used a paddle to strike the student three times on the buttocks. Martin used such "excessive and great force" that the paddling left visible bruising and welts on the student's body. Additionally, the paddling was so severe that immediately after being struck, Clayton fainted and fell on his face onto the concrete floor.

Clayton eventually regained consciousness, but he was still bleeding and five of his teeth were shattered. Although the student was visibly in pain and sustained serious injuries, Martin and other school personnel declined to call emergency services and instead contacted Clayton's mother, Dana Hamilton, and without detailing the nature of her son's injuries, asked her to pick him up from school. Upon her arrival, Hamilton immediately took her son to a hospital where a CT scan showed that Clayton's chin had been split and that he suffered a broken jaw. Clayton's chin required ten stitches, and he was transferred to another out-of-state hospital for surgery. His jaw was wired shut for two weeks, and he could consume only liquid meals through a straw. Clayton's injuries caused him to miss school for four weeks.<sup>2</sup>

Although this episode of corporal punishment sounds like a story from the colonial period, the event took place in 2014 in a public school in Mississippi. The events described may appear to be an extreme

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<sup>1</sup> Clayton *ex rel.* Hamilton v. Tate Cty. Sch. Dist., 560 F. App'x 293, 295–97 (5th Cir. 2014) (per curiam) (holding that circuit precedent foreclosed the student's substantive due process claim). Unless otherwise noted, all background related to Clayton's story comes from the court's opinion or the Complaint. See Complaint, Clayton *ex rel.* Hamilton v. Tate Cty. Sch. Dist., 560 F. App'x 293, 295–97 (5th Cir. 2014) (No. 11CV181-P-V).

<sup>2</sup> Complaint, *supra* note 1.

example of a school administrator abusing his authority; however, Clayton's case is an example of the type of corporal punishment used in many school districts in the United States.<sup>3</sup> Additionally, this case illustrates the inability of many students to seek redress for actions that intrude on their constitutionally protected right to bodily integrity.<sup>4</sup>

The history of corporal punishment in an academic setting must be understood in the context of the development of the American public school system and compulsory education for children. The Framers of the Constitution recognized the importance of an educated electorate.<sup>5</sup> Although the Constitution makes no reference to education or to the right of children to attend schools, the critical role of the educated citizen was never overlooked.<sup>6</sup> Having a knowledgeable, sophisticated constituency was understood to be essential for maintaining a democratic republic.<sup>7</sup> Parents and guardians send their children to school trusting that educators and school administrators will do their part to help develop students into productive citizens who will make positive contributions to society and who will contribute to a shared, workable democracy.<sup>8</sup>

The American public school system dates back to 1779 when Thomas Jefferson proposed the "Bill for the More General Diffusion of

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<sup>3</sup> See *Corporal Punishment in Schools and Its Effect on Academic Success*, HUMAN RIGHTS WATCH (April 15, 2010, 6:52 PM), <https://www.hrw.org/news/2010/04/15/corporal-punishment-schools-and-its-effect-academic-success-joint-hrw/aclu-statement>; see also *Kirkland ex rel. Jones v. Greene Cty. Bd. of Educ.*, 347 F.3d 903 (11th Cir. 2003) (high school principal struck student with a metal cane); *Hale v. Pringle*, 562 F. Supp. 598 (M.D. Ala. 1983) (third-grade student who fought with another student was spanked with a paddle three-to-five times, resulting in visible bruising of his buttocks and hand); *Booker v. Bd. of Educ.*, 65 N.E.3d 380 (Ill. App. Ct. 2016) (holding that an elementary school teacher was properly dismissed after incidents where the teacher slapped and grabbed students); *Crews v. McQueen*, 358 S.E.2d 712 (Ga. Ct. App. 1989) (eight-year-old student spanked for failing to turn in a homework assignment).

<sup>4</sup> *Clayton*, 560 F. App'x at 297–98 (holding that the student's procedural and substantive due process claims were foreclosed by precedent and that the student failed to state a claim for a violation of the Equal Protection Clause).

<sup>5</sup> Denise A. Hartman, *Constitutional Responsibility to Provide A System of Free Public Schools: How Relevant Is the States' Experience to Shaping Governmental Obligations in Emerging Democracies?*, 33 SYRACUSE J. INT'L L. & COM. 95, 96 (2005) (noting that although the constitutional framers believed that an educated electorate was vital to maintaining the Republic, they also understood that "they lacked the experience and judgment to impose national responsibility for public education"; therefore, this responsibility was left to the states).

<sup>6</sup> *Id.* at 95.

<sup>7</sup> *Id.*; see also *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 230 (1963) (Douglas, J., concurring) ("Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government.").

<sup>8</sup> See *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (accepting the State's propositions that compulsory education is "necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence" and that "education prepares individuals to be self-reliant and self-sufficient participants in society"); see also *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925) ("No question is raised concerning the power of the state reasonably to regulate all schools . . . to require . . . that certain studies plainly essential to good citizenship must be taught . . .").

Knowledge.”<sup>9</sup> Jefferson recognized that the success of the newly-formed democratic republic depended on a structured scheme of publicly available education. He proposed a system of free schools that would be operated and funded by the government.<sup>10</sup> In this system, every child would have access to a basic, foundational education that would set him up to be a successful contributor to society. The proposed bill did not pass; however, it foreshadowed the development of state responsibility for free, public education.<sup>11</sup> Initially, public education was inseparable from religious teachings; however, American society began to value a common public school system, and ultimately religious teachings were conducted in the home and at places of worship while schools focused on more foundational skills.<sup>12</sup> Legislatures began enacting laws that required municipalities to establish and run schools, which reflected the mainstream ideology that freely-accessible education would benefit the state.<sup>13</sup> However, the policies of public school systems have not been free of criticism. In particular, the use of corporal punishment on misbehaving children—a practice that was once celebrated and used regularly<sup>14</sup>—has come under harsh scrutiny.

Since its decision in *Ingraham v. Wright*, the United States Supreme Court has silenced constitutional challenges to school-based corporal punishment.<sup>15</sup> The Court held that the Eighth Amendment prohibition on cruel and unusual punishment does not apply in the public school setting thereby barring use of the Eighth Amendment as a legal foundation for educational corporal punishment claims.<sup>16</sup> Additionally, the Court declined to find a violation of the Fourteenth Amendment’s Due Process Clause where a state’s statute governing

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<sup>9</sup> Hartman, *supra* note 5, at 96–97.

<sup>10</sup> *Id.* at 96.

<sup>11</sup> *Id.* at 96–97.

<sup>12</sup> *Id.* at 97.

<sup>13</sup> *Id.* American society has historically recognized the importance of education and its critical role in maintaining a democratic society. See *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (noting that American society has historically understood education as a matter of “supreme importance which should be diligently promoted” and that “[r]eligion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged” (quoting Northwest Ordinance of 1787, ch. 8, n.(a), 1 Stat. 50, 52 (1789))); see also *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (observing the importance of education in maintaining basic, American institutions and the extent to which “education provides the basic tools by which individuals might lead economically productive lives to the benefits of us all”).

<sup>14</sup> See Philip K. Piele, *Neither Corporal Punishment Cruel nor Due Process Due: The United States Supreme Court’s Decision in Ingraham v. Wright*, 7 J.L. & EDUC. 1, 9 (1978).

<sup>15</sup> See *Ingraham v. Wright*, 430 U.S. 651 (1977) (holding that the Eighth and Fourteenth Amendments did not present constitutional limits on the practice of corporal punishment in public schools); see also 20 AM. JUR. PROOF OF FACTS 2D *Teacher’s Use of Excessive Corporal Punishment* 511 (1979) [hereinafter POF].

<sup>16</sup> *Ingraham*, 430 U.S. at 671 (“We conclude that when public school teachers or administrators impose disciplinary corporal punishment, the Eighth Amendment is inapplicable.”).

corporal punishment in public school provides adequate protection against the use of unjustified and unnecessary physical punishment.<sup>17</sup> The implications of this decision cannot be understated. By foreclosing the use of Eighth and Fourteenth Amendment constitutional claims, the Court's decision in *Ingraham* made it extremely difficult for students to bring claims against teachers or school administrators for use of corporal punishment in a public school setting. Circuit courts have relied on the *Ingraham* rule and have stripped students of judicial recourse when they are confronted with dangerous punishments.<sup>18</sup> Although *Ingraham* seemingly symbolizes society's endorsement of violence as a method of behavior correction, in recent years, corporal punishment has been severely criticized by parents,<sup>19</sup> educators,<sup>20</sup> medical professionals,<sup>21</sup> and activist and human rights organizations.<sup>22</sup>

This Note considers the constitutionality of corporal punishment in public schools and proposes that the Supreme Court revisit the issue given the evolution of society's attitude toward the practice and the medical and scientific advancements this country has experienced since 1977. This Note does not propose a complete ban on corporal

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<sup>17</sup> *Id.* at 682 (“We conclude that the Due Process Clause does not require notice and a hearing prior to the imposition of corporal punishment in the public schools, as that practice is authorized and limited by the common law.”).

<sup>18</sup> See David W. Frank, *Inhuman Violence: Indiana's Nineteenth Century View of Physical Punishment in Public Schools*, 70 NAT'L LAW. GUILD REV. 41, 47 (2013) (“The U.S. Supreme Court laid a near-complete bar to student protection from the abuses of physical punishment in the leading federal case on the issue, 1977's *Ingraham v. Wright*.”); see also Lewis M. Wasserman, *Corporal Punishment in K-12 Public School Settings: Reconsideration of Its Constitutional Dimensions Thirty Years After Ingraham v. Wright*, 26 TOURO L. REV. 1029, 1029 (2011) (noting that the *Ingraham* decision “implicitly approved the infliction of corporal punishment on public school students”).

<sup>19</sup> Melinda D. Anderson, *Where Teachers Are Still Allowed to Spank Students*, ATLANTIC (Dec. 15, 2015), <http://www.theatlantic.com/education/archive/2015/12/corporal-punishment/420420>.

<sup>20</sup> *Id.*

<sup>21</sup> See *Corporal Punishment in Schools and Its Effect on Academic Success: Hearing Before the Subcomm. on Healthy Families and Communities of the H. Comm. on Education and Labor*, 111th Cong. 2 (2010); see also Comm. on Sch. Health, *Corporal Punishment in Schools*, 106 PEDIATRICS 2, 343 (2000), <http://pediatrics.aappublications.org/content/pediatrics/106/2/343.full.pdf> (“The American Academy of Pediatrics urges parents, educators, school administrators, school board members, legislators, and others to seek the legal prohibition by all states of corporal punishment in schools and to encourage the use of alternative methods of managing student behavior.”); *Policy Statement*, AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY, [https://www.aacap.org/aacap/policy\\_statements/1988/Corporal\\_Punishment\\_in\\_Schools.aspx](https://www.aacap.org/aacap/policy_statements/1988/Corporal_Punishment_in_Schools.aspx) (last visited Sept. 12, 2017) (“The American Academy of Child and Adolescent Psychiatry opposes the use of corporal punishment in schools and takes issue with laws in some states legalizing such corporal punishment and protecting adults who use it from prosecution for child abuse. The Academy joins with the National Congress of Parents and Teachers, the American Medical Association, the National Education Association, the American Bar Association, the American Academy of Pediatrics, and other groups calling for an end to this form of punishment.”).

<sup>22</sup> See Anderson, *supra* note 19; Human Rights Watch, *A Violent Education: Corporal Punishment of Children in U.S. Public Schools*, ACLU (Feb. 2009), [https://www.aclu.org/files/pdfs/humanrights/aviolenteducation\\_execsumm.pdf](https://www.aclu.org/files/pdfs/humanrights/aviolenteducation_execsumm.pdf).

punishment nor does it attempt to address the laws of specific states where corporal punishment is legal.<sup>23</sup> Instead, this Note focuses on the constitutionality of the practice and action the Supreme Court can take to curtail this form of punishment. This Note argues that the use of corporal punishment against students violates their substantive due process rights, and thus, the Court should, for the first time in forty years, explicitly address this issue.<sup>24</sup>

This Note proceeds in four parts. Part I describes the Supreme Court's reasoning and holding in *Ingraham* and provides background information about the history of corporal punishment in the United States. Part II examines the present-day state of corporal punishment in America and discusses whether the *Ingraham* decision is still reflective of our current society. Part II will also elaborate on medical and scientific research that has shed light on the nature of corporal punishment and its downstream, detrimental effects on children's health and well-being. Part III discusses the post-*Ingraham* landscape and analyzes how the circuit courts have addressed substantive due process challenges to corporal punishment without guidance from the Supreme Court. Specifically, Part III describes and evaluates the standard announced by the Fourth Circuit in *Hall v. Tawney*,<sup>25</sup> which has served as a model for most circuits. Part IV recommends that the Court revisit its decision in *Ingraham* and explicitly hold that school-based corporal punishment implicates students' substantive due process rights. Additionally, Part IV proposes that the Court reject the Fourth Circuit's standard and announce a new standard that takes into account the shift in the societal understanding of corporal punishment, the relatively new data on the negative effects of corporal punishment that has emerged since *Ingraham*, and actions taken by state legislatures to eradicate the practice.

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<sup>23</sup> Corporal punishment in public schools is currently legal in nineteen states: Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Wyoming. See Corey Adwar, *These Are the 19 States That Still Let Public Schools Hit Kids*, BUS. INSIDER (Mar. 28, 2014, 11:55 AM), <http://www.businessinsider.com/19-states-still-allow-corporal-punishment-2014-3>; Gundersen Center for Effective Discipline, *Discipline at School: Nineteen States Have Laws Permitting Corporal Punishment in Schools*, GUNDERSEN HEALTH, <http://www.gundersenhealth.org/ncptc/center-for-effective-discipline/discipline-at-school> (last visited Sept. 12, 2017). Whether states should be able to permit the use of corporal punishment in their public schools is beyond the scope of this Note.

<sup>24</sup> This Note does not propose a complete ban on corporal punishment nor does it attempt to address the laws of specific states where corporal punishment is legal. Instead, this Note focuses on the constitutionality of the practice and action the Supreme Court can take to curtail this form of punishment.

<sup>25</sup> *Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980).

## I. BACKGROUND

Currently, there is no federal law outlawing corporal punishment in the United States. The practice was held constitutional in *Ingraham v. Wright* when the Supreme Court reaffirmed the common law privilege enjoyed by public school educators and administrators to inflict corporal punishment on students when reasonably necessary to ensure proper education and discipline.<sup>26</sup> *Ingraham* was decided in 1977. In the past forty years since that decision, the Court has not spoken on the constitutionality of corporal punishment in public schools.

A. *The Ingraham Case and the Court's Decision*

The question of the constitutionality of corporal punishment in public schools was last before the Supreme Court forty years ago. In a 5-4 decision, the Court held that subjecting public school students to violence as a means of punishment was constitutional.<sup>27</sup> In 1971, James Ingraham and Roosevelt Andrews were eighth and ninth-grade students enrolled in the Charles R. Drew Junior High School in Dade County, Florida.<sup>28</sup> On the day in question, Ingraham did not respond to his teacher's instructions with the desired promptness.<sup>29</sup> As punishment, he was beaten over twenty times with a paddle while being pinned down over a table in the principal's office.<sup>30</sup> The resulting injury was severe. Ingraham suffered a hematoma<sup>31</sup> and required medical attention, which forced him to miss school for several days.<sup>32</sup> Similarly, and contrary to

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<sup>26</sup> See *Ingraham v. Wright*, 430 U.S. 651, 671 (1977).

<sup>27</sup> *Id.* at 683.

<sup>28</sup> *Id.* at 653.

<sup>29</sup> *Id.* at 657.

<sup>30</sup> *Id.* During the 1970-1971 school year, when Ingraham and Andrews were paddled, Florida legislation and a local school board regulation allowed the use of disciplinary corporal punishment at Charles R. Drew Junior High School in Dade County, Florida. *Id.* at 655 ("The statute then in effect authorized limited corporal punishment by negative inference, proscribing punishment which was 'degrading or unduly severe' or which was inflicted without prior consultation with the principal or the teacher in charge of the school." (quoting FLA. STAT. § 232.27 (1961))). The school board regulation that authorized corporal punishment, Dade County School Board Policy 5144, permitted such punishment where "the failure of other means of seeking cooperation from the student made its use necessary." *Ingraham*, 430 U.S. at 656 n.7. Per the regulation, a student could be paddled "on the buttocks with a flat wooden paddle measuring less than two feet long, three to four inches wide, and about one-half inch thick. The normal punishment was limited to one to five 'licks' or blows with the paddle and resulted in no apparent physical injury to the student." *Id.* at 656-57.

<sup>31</sup> Stedman's Medical Dictionary defines a hematoma as "[a] localized mass of extravasated blood that is relatively or completely confined within an organ or tissue, a space, or a potential space; the blood is usually clotted (or partly clotted), and, depending on its duration, may manifest various degrees of organization and decolorization." *Hematoma*, STEDMAN'S MEDICAL DICTIONARY (5th ed. 2005).

<sup>32</sup> *Ingraham*, 430 U.S. at 657.

the local school board regulation, Andrews was also paddled multiple times for “minor infractions.”<sup>33</sup> After being paddled on his arms, Andrews was unable to use his arm for a week.<sup>34</sup>

In their class action complaint against the Principal of the school, the Assistant Principal, the assistant to the Principal, and the Dade County School System Superintendent, Ingraham and Andrews maintained that the school’s use of corporal punishment violated the Eighth Amendment prohibition of cruel and unusual punishment<sup>35</sup> and the substantive and procedural elements of the Fourteenth Amendment’s Due Process Clause.<sup>36</sup> The district court held that although corporal punishment could violate the Eighth Amendment, the actions of the Dade County school administrators did not rise to the level of a constitutional violation.<sup>37</sup> The Fifth Circuit Court of Appeals voted to reverse, noting that “the punishment was so severe and oppressive as to violate the Eighth and Fourteenth Amendments, and that the procedures outlined in Policy 5144 failed to satisfy the requirements of the Due Process Clause.”<sup>38</sup> However, on rehearing en banc, the court reversed course and affirmed the judgment of the lower court, rejecting both Fourteenth Amendment claims as well as the Eighth Amendment claim.<sup>39</sup> The Supreme Court granted certiorari but limited the inquiry to two questions: (1) whether the corporal punishment exercised by the Dade County school violated the constitutional ban on cruel and unusual punishment and (2) whether corporal punishment in public schools violates a student’s right to procedural due process.<sup>40</sup> The Court declined to address the question of whether corporal punishment infringed on a student’s substantive due process rights.<sup>41</sup>

## 1. The Constitutional Claims Under the Eighth and Fourteenth

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

<sup>36</sup> *Ingraham*, 430 U.S. at 653. The Fourteenth Amendment states in part:

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

U.S. CONST. amend. XIV.

<sup>37</sup> *Ingraham*, 430 U.S. at 658.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 658–59.

<sup>40</sup> *Id.* at 659.

<sup>41</sup> *Id.*



## Amendments

The students conceded that the Cruel and Unusual Punishment Clause of the Eighth Amendment was originally meant to limit criminal punishments; however, they maintained that the Court should extend the spirit of the Amendment to the use of disciplinary violence against children in public schools.<sup>42</sup> The Court rejected the Eighth Amendment as a legal foundation for educational corporal punishment claims and held that the “[t]he schoolchild has little need for the protection of the Eighth Amendment.”<sup>43</sup> In reaching this conclusion, the Court made two general observations: (1) the use of corporal punishment in public schools is not unreasonable and (2) the Eighth Amendment is not applicable in non-criminal circumstances.<sup>44</sup> First, the Court looked at the country’s historical use of corporal punishment<sup>45</sup> and concluded that since it was widespread throughout the United States, corporal punishment was not understood by American society to be an unreasonable method of classroom discipline.<sup>46</sup> At the time of the opinion, only two states—Massachusetts and New Jersey—had taken legislative action to outlaw all forms of corporal punishment in public schools.<sup>47</sup> Second, after reviewing the history of the Eighth Amendment, the Court found no reason to “wrench[] the Eighth Amendment from its historical context and extend[] it to traditional disciplinary practices in the public schools.”<sup>48</sup> According to the Court, the primary purpose of the Amendment was to protect against harsh punishments levied by judges and the legislature, just as the drafters of the 1686 English Bill of Rights—on which the Amendment was based—feared the overstepping of English judges.<sup>49</sup> Given this context, the Court observed that all of its previous jurisprudence addressing whether a punishment was “cruel and unusual” within the meaning of the Eighth Amendment was limited

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<sup>42</sup> *Id.* at 668. The Petitioners questioned whether the Framers of the Amendment intended to provide stricter protection to criminals than to schoolchildren. *Id.* at 669 (“It would be anomalous, they say, if schoolchildren could be beaten without constitutional redress, while hardened criminals suffering the same beatings at the hands of their jailers might have a valid claim under the Eighth Amendment.”).

<sup>43</sup> *Id.* at 670.

<sup>44</sup> *Id.* at 659–71; see Wasserman, *supra* note 18, at 1036; see also Deana Pollard Sacks, *State Actors Beating Children: A Call for Judicial Relief*, 42 U.C. DAVIS L. REV. 1165, 1183–84 (2009) (“In determining the Eighth Amendment issue, the Court relied on the ‘tradition’ of school corporal punishment, which dates back to the colonial period, and found that, although professional and public opinion was ‘sharply divided,’ it could ‘discern no trend toward its elimination’ because only two states had outlawed school paddling at that time.” (quoting *Ingraham*, 430 U.S. at 660–61)).

<sup>45</sup> See discussion *infra* Section I.A.2.

<sup>46</sup> *Ingraham*, 430 U.S. at 660 (“[T]he practice continues to play a role in the public education of school children in most parts of the country.”).

<sup>47</sup> *Id.* at 663.

<sup>48</sup> *Id.* at 669.

<sup>49</sup> *Id.* at 664–65.

to criminal contexts.<sup>50</sup> The Court disagreed with the petitioners and found that a comparison between criminals and students was unpersuasive<sup>51</sup> and stated that where prisoners have the protection of the Eighth Amendment, schoolchildren are protected by common law restrictions and safeguards built into local regulations.<sup>52</sup>

With reference to the petitioners' second claim under the Fourteenth Amendment, the Court held that the procedural requirements of the Fourteenth Amendment Due Process Clause were satisfied by Florida's common law remedies.<sup>53</sup> The Court engaged in a two-step inquiry, asking first whether the use of corporal punishment in public schools implicates an interest protected by the Fourteenth Amendment, and second, if such interests exist, what process must be given.<sup>54</sup> The Court noted that the boundaries of the Fourteenth Amendment liberty interest had not yet been well-defined; however, the Court recognized a liberty interest where "school authorities, acting under color of state law, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain . . ."<sup>55</sup> Despite recognition of a constitutionally protected liberty interest, the Court held that procedural due process did not require parental notice or a hearing prior to the administration of corporal punishment because traditional common law remedies provided students with adequate due process.<sup>56</sup> The Court assumed that where common law provided a vehicle for civil or criminal proceedings when corporal punishment was inflicted excessively or unnecessarily, teachers and school administrators were unlikely to engage in such behavior and thus students' liberty interests were sufficiently protected.<sup>57</sup>

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<sup>50</sup> *Id.* at 666.

<sup>51</sup> *Id.* at 669 ("The prisoner and the schoolchild stand in wholly different circumstances . . .").

<sup>52</sup> *Id.* at 670.

Public school teachers and administrators are privileged at common law to inflict only such corporal punishment as is reasonably necessary for the proper education and discipline of the child; any punishment going beyond the privilege may result in both civil and criminal liability. As long as the schools are open to public scrutiny, there is no reason to believe that the common-law constraints will not effectively remedy and deter excesses such as those alleged in this case.

*Id.* (citation omitted). Although the majority voted that corporal punishment is not unconstitutional under the Eighth Amendment, it is instructive to note that four Justices agreed that the Eighth Amendment does apply in the school context, and that some—although not all—forms of disciplinary corporal punishment constitute "cruel and unusual punishment" within the meaning of the Eighth Amendment. *Id.* at 685 (White, J., dissenting).

<sup>53</sup> *Id.* at 672 (majority opinion).

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

<sup>55</sup> *Id.* at 674.

<sup>56</sup> *Id.* at 678–79 (explaining that while prior notice and hearings could further protect against intrusions into a student's Fourteenth Amendment liberty interest, administrative safeguards are not necessary where common law remedies are already in place).

<sup>57</sup> *Id.* at 672; see Leonard P. Edwards, *Corporal Punishment and the Legal System*, 36 SANTA CLARA L. REV. 983, 1014 (1996) ("The Court also pointed out that potential criminal and civil

Additionally, the Court determined that any benefits of prior notice or hearings were outweighed by the cost and burden that the school would incur in providing the procedures.<sup>58</sup> Specifically, the Court was concerned that a universal constitutional requirement of prior notice would significantly burden the use of corporal punishment as a disciplinary measure in public schools.<sup>59</sup>

## 2. The Court's Focus on Societal Norms of the 1970s and Lack of Legislative Action

In *Ingraham*, the Court placed much emphasis on how the nation traditionally viewed corporal punishment.<sup>60</sup> At the time of the decision, the Court correctly observed that the use of corporal punishment as a disciplinary tool in public schools was common and showed no signs of abatement.<sup>61</sup> Part of the Court's assessment that corporal punishment in public schools is reasonable and not "cruel and unusual" stemmed from the Court's understanding that the majority of states—all but two—not only authorized the practice but used it consistently.<sup>62</sup> The Court devoted a significant amount of time to discussing the extent to which states had declined to address the use of academic corporal punishment through legislation.<sup>63</sup> According to the Court, its analysis of the constitutional questions brought by the petitioners was conducted within a context of "historical and contemporary approval of reasonable corporal punishment," which suggests that had the context been different, so too would the Court's final vote.<sup>64</sup>

Today, although thirty-one states have banned corporal

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proceedings would further protect a child from excessive punishment.").

<sup>58</sup> *Ingraham*, 430 U.S. at 680 ("Hearings even informal hearings require time, personnel, and a diversion of attention from normal school pursuits.").

<sup>59</sup> *Id.* at 680–81 (noting that rather than managing the likely disruption prior notice or a hearing would cause, teachers might opt to use less effective disciplinary measures).

<sup>60</sup> *Id.* at 659 ("[T]his Court has found it useful to refer to '[t]raditional common-law concepts,' and to the 'attitude[s] which our society has traditionally taken.'" (quoting *Powell v. Texas*, 392 U.S. 514, 531, 535 (1968))).

<sup>61</sup> *Id.* at 660–61 ("Despite the general abandonment of corporal punishment as a means of punishing criminal offenders, the practice continues to play a role in the public education of school children in most parts of the country . . . . [W]e can discern no trend toward its elimination.").

<sup>62</sup> *Id.* at 676 ("The concept that reasonable corporal punishment in school is justifiable continues to be recognized in the laws of most States . . . . It represents 'the balance struck by this country,' between the child's interest in personal security and the traditional view that some limited corporal punishment may be necessary in the course of a child's education." (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting))).

<sup>63</sup> *Id.* at 662 (noting that of the twenty-three states that have enacted some kind of legislation related to corporal punishment in public schools, twenty-one allow for "moderate use" of the practice).

<sup>64</sup> *Id.* at 663.

punishment, the practice is not only legal in the remaining nineteen<sup>65</sup> states, but it is enforced regularly.<sup>66</sup> Each year, over one-hundred thousand public school students are subjected to corporal punishment in an educational setting.<sup>67</sup>

### B. *Corporal Punishment: A Historical Context*

Child corporal punishment is largely understood to encompass various forms of physical punishment intentionally inflicted on the body of a student.<sup>68</sup> Physical punishment in schools includes but is not limited to spanking and paddling.<sup>69</sup> It is important to distinguish between using corporal punishment to modify student behavior and circumstances where a teacher or school administrator must use force to restrain a student or to protect members of the school community.<sup>70</sup>

Corporal punishment cannot be analyzed in a vacuum. It is necessary to understand the historical context of this practice. Adults

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<sup>65</sup> Corporal punishment in public schools is legal in: Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Wyoming. See Gundersen Center for Effective Discipline, *supra* note 23; see also Adwar, *supra* note 23; Alasdair Wilkins, *Teachers in the U.S. Can Still Hit Kids—And Black Kids Suffer Most*, VOCATIV (Oct. 5, 2016, 10:03 AM), <http://www.vocativ.com/364885/corporal-punishment-school>.

<sup>66</sup> Anderson, *supra* note 19 (“In the 19 states—mainly in the South, Southwest, and Midwest—where corporal punishment is legal, teachers and school officials have wide discretion in how and when to apply such discipline.”).

<sup>67</sup> The U.S. Department of Education’s Office for Civil Rights most recently published Civil Rights Data Collection (CRDC) estimates that during the 2011–2012 academic school year, 166,807 public school students were subjected to corporal punishment. See U.S. DEP’T. EDUC., CIVIL RIGHTS DATA COLLECTION, 2011–12 STATE AND NATIONAL ESTIMATIONS, [http://ocrdata.ed.gov/StateNationalEstimations/Estimations\\_2011\\_12](http://ocrdata.ed.gov/StateNationalEstimations/Estimations_2011_12) [hereinafter OCR]. The CRDC is a survey conducted every other school year by the U.S. Department of Education’s Office for Civil Rights. See *Civil Rights Data Collection: Overview*, ED.GOV, <http://ocrdata.ed.gov/Overview> (last visited Sept. 12, 2017).

<sup>68</sup> Ending Corporal Punishment in Schools Act of 2011, H.R. 3027, 112th Cong. § 12(1) (2011) (“The term ‘corporal punishment’ means paddling, spanking, or other forms of physical punishment, however light, imposed upon a student.”). Black’s Law Dictionary defines corporal punishment as “punishment that is inflicted on the body . . .” *Corporal Punishment*, BLACK’S LAW DICTIONARY (10th ed. 2014); see Edwards, *supra* note 57, at 983 (“Corporal punishment is the intentional infliction of physical force by a parent or parent figure upon a child with the purpose of correcting the child’s behavior.”); Diane Heckman, *Fourteenth Amendment Substantive Due Process and Academic Corporal Punishment in the First Decade of the Twenty-First Century*, 271 ED. LAW REP. 509, 509 (2011) (“Corporal punishment has been defined as ‘the infliction; or causing the infliction of physical pain [to] a student as a means of discipline.’” (quoting VA. CODE ANN. § 22.1-279.1 (West 2010))).

<sup>69</sup> See H.R. 3027, § 12(1).

<sup>70</sup> *Corporal Punishment in Schools and Its Effect on Academic Success: Hearing Before the Subcomm. on Healthy Families and Communities of the H. Comm. on Education and Labor*, 111th Cong. 1–2 (2010) (statement of Hon. Carolyn McCarthy, Chairwoman, Subcommittee on Healthy Families and Communities) (“Corporal punishment refers to the application of physical pain as a method of behavior change. We are not talking about situations where a school official may need to restrain a student, nor are we talking about using physical force as a means of protecting members of the school community subject to danger.”).

have used corporal punishment as a method of discipline throughout history.<sup>71</sup> The use of physical force against children as a form of punishment has deep roots in American society and can be traced to the country's puritanical beginnings.<sup>72</sup> The use of physical punishment against criminals and insubordinate children alike reflects the puritanical reverence for authority and the demand for strict obedience.<sup>73</sup> This belief comes from the notion that humans are intrinsically evil and full of sin by nature and therefore incapable of independent moral action.<sup>74</sup> These principles were entrenched in the Puritan school system and established the rationale for corporal punishment as a method necessary to properly train children.<sup>75</sup> Although not all people of the time approved or utilized this form of punishment to the extent the Puritans did,<sup>76</sup> the practice has found its way into modern public school disciplinary practices.

## II. THE COUNTRY HAS CHANGED SINCE *INGRAHAM*

In *Ingraham*, the Supreme Court correctly noted that the use of corporal punishment as a disciplinary tool has persisted despite the

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<sup>71</sup> See POF, *supra* note 15; see also *Ingraham v. Wright*, 430 U.S. 651, 660 (1977).

<sup>72</sup> See POF, *supra* note 15; see also *Ingraham*, 430 U.S. at 661 (“At common law a single principle has governed the use of corporal punishment since before the American Revolution: Teachers may impose reasonable but not excessive force to discipline a child.”). “The use of corporal punishment in this country as a means of disciplining school children dates back to the colonial period.” *Id.* at 660.

<sup>73</sup> See Piele, *supra* note 14, at 9 (“Puritan belief in the sanctity of authority and the virtue of obedience was amply evident in their attitude toward children, who were hardly held in high esteem. . . . Thus, children were regarded as ‘young vipers and infinitely more hateful than vipers,’ who must have the devil beaten out of them.” (quoting P. FORD, *THE NEW-ENGLAND PRIMER* 1 (1879))).

<sup>74</sup> See Piele, *supra* note 14, at 8–9; see also Edwards, *supra* note 57, at 988 (“Since a child’s original nature was considered evil, corporal punishment enabled the child to become a fit person, and any failure was seen as a matter of inadequate application.”).

<sup>75</sup> See Piele, *supra* note 14, at 10 (“[A]ccording to John Calvin, whose theology formed a basis for Puritan beliefs, ‘Children are inherently evil and must be trained rigorously in developing good habits. Education is to be a complete regimentation of the child to suppress his evil nature and build good living and thinking.’ The instrument for the realization of Calvin’s proposition concerning the goal and method of education was the rod. Rules drawn up for the Free Town School of Dorchester in 1645 established the rationale and procedure for the logical extension of rod-enforced training of children in the home by parents to that same but more formalized purpose in the school by the master *in loco parentis*.” (quoting W. WALKER, *JOHN CALVIN* 211 (1906))).

<sup>76</sup> See Piele, *supra* note 14, at 11 (“Although corporal punishment was used in Quaker schools, it was not assigned the importance that it received in Puritan schools, probably because the Quakers were not so inclined to view children as essentially depraved and therefore did not see as much need to govern them by fear—of God and of authority. The school overseers recommended (in 1796) that ‘the children under your care be governed, as much as possible [by love]. This will make the use of the Rod in a good degree unnecessary, and will induce the Children to love and respect rather than to fear.’” (quoting J. Straub, *Quaker School Life in Philadelphia Before 1800*, 89 PENN. MAG. HIST. & BIOGRAPHY 451 (1965))).

advancement of primary and secondary education since the colonial era.<sup>77</sup> However, the Court's observation that the practice remains in use "in most parts of the country"<sup>78</sup> is no longer applicable.

A. *Corporal Punishment in America Today: A Distinct Change from the Time of Ingraham*

Although nearly 170,000<sup>79</sup> students receive some form of corporal punishment annually, the practice is mostly concentrated in the nineteen states where it is legal. Arkansas, Mississippi, and Texas account for nearly forty-eight percent of the reported cases of public school corporal punishment in the 2011–2012 school year.<sup>80</sup> Therefore, although the practice hardly has been eliminated, it is not as widespread as it was when *Ingraham* was decided in 1977.

Since the Supreme Court's decision in *Ingraham*, there has been a distinct shift in societal thinking about corporal punishment. At the time of the 1977 decision, twenty-three states addressed the issue through their state legislatures, and of those, twenty-one authorized a "moderate" use of corporal punishment against students.<sup>81</sup> In the twenty-five remaining states where legislation had not been enacted, the common law rule stood and allowed teachers to use "reasonable force" to discipline children.<sup>82</sup> Evaluating the issue against this backdrop, the Court in *Ingraham* believed it was being asked to review the legislative judgment that was ingrained in the laws of all states but two.<sup>83</sup> Taken together, the context of the *Ingraham* decision was an overwhelming belief, as evidenced by the laws of the states themselves, that violence as a tool of discipline served important educational interests and deserved the Court's deference to the legislatures.<sup>84</sup>

Over the past forty years, societal views on corporal punishment in public schools have changed drastically. This is reflected in the purposeful steps taken by many state legislatures to prohibit corporal punishment in their public school systems.<sup>85</sup> Currently thirty-one states and the District of Columbia outlaw the practice.<sup>86</sup>

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<sup>77</sup> *Ingraham*, 430 U.S. at 660.

<sup>78</sup> *Id.*

<sup>79</sup> OCR, *supra* note 67. As of January 9, 2016, data for the 2013–2014 school year was not available. *Id.*

<sup>80</sup> *Id.* (showing that of the 166,807 students in the United States who received corporal punishment in the 2011–2012 school year, 79,888 were enrolled in school in Arkansas, Mississippi, or Texas).

<sup>81</sup> *Ingraham*, 430 U.S. at 662.

<sup>82</sup> *Id.* at 663.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 681.

<sup>85</sup> Anderson, *supra* note 19.

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

In a marked change from 1977, not only has a majority of states passed legislation banning corporal punishment, but efforts have been made to enact a federal ban. In 1991, New York Congressman Major Owens proposed a bill that would eliminate federal funding for any school that authorized corporal punishment.<sup>87</sup> Although the bill was not passed, it has inspired several legislative attempts to ban corporal punishment in any school that receives funding from the federal government.<sup>88</sup> A more recent version of the 1991 bill, entitled the Ending Corporal Punishment Act of 2015, was introduced by Congressman Alcee Hastings of Florida and is currently under consideration by a congressional committee.<sup>89</sup>

### B. *Today, Corporal Punishment is Less Popular but Still Prevalent*

While the use of corporal punishment in public schools is trending downward, the context for this movement is important. Today, there are fewer instances of corporal punishment in educational settings than at the time *Ingraham* was decided. However, the United States has much ground to cover before the practice is eradicated. Data reported by the Children's Defense Fund in 2014 estimates that on average, 927 students are corporally punished each day.<sup>90</sup> While corporal punishment is less widespread today than it was forty years ago, the practice is far from

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<sup>87</sup> See Jerry R. Parkinson, *Federal Court Treatment of Corporal Punishment in Public Schools: Jurisprudence That Is Literally Shocking to the Conscience*, 39 S.D. L. REV. 276, 279 n.27 (1994).

<sup>88</sup> In 2014, Carolyn McCarthy, a former New York Congresswoman and Chairwoman of the Subcommittee on Healthy Families and Communities, introduced a bill into Congress that would ban any form of corporal punishment in any public or private school that received federal funding. Liane Membis, *To Paddle or Not to Paddle Students*, CNN (Aug. 5, 2010, 9:14 AM), <http://www.cnn.com/2010/LIVING/08/05/corporal.punishment>. The bill, the Ending Corporal Punishment in Schools Act of 2014, was introduced in the 113th Congress on June 26, 2014 but was not enacted. See H.R. 5005, 113th Cong. (2014).

<sup>89</sup> Alcee L. Hastings, *Ending Corporal Punishment in Schools*, HOUSE.GOV, <http://alceehastings.house.gov/legislation/corporalpunishment.htm> (last visited Sept. 12, 2017) ("My legislation would prohibit any educational institutions that allow school personnel to inflict corporal punishment on students from receiving federal funding. It also creates grants to encourage climate and culture improvements in schools which promote positive behaviors."); see also Ending Corporal Punishment in Schools Act of 2015, H.R. 2268, 114th Cong. (2015); Peter Zampa, *Stalled in Congress: A Bill to Ban Corporal Punishment in Schools Has Moved Once in Eight Months*, WRDW-TV (Jan. 19, 2016, 6:10 PM), <http://www.wrdw.com/home/headlines/Stalled-in-Congress-a-bill-to-ban-corporal-punishment-in-schools-has-moved-once-in-eight-months-365831581.html>.

<sup>90</sup> *Each Day in America*, CHILD. DEF. FUND, <http://www.childrensdefense.org/library/each-day-in-america.html> (last visited Sept. 12, 2017). The data is based on a 180-day school year, meaning 150,840 occurrences of corporal punishment each year. See Valerie Strauss, *19 States Still Allow Corporal Punishment in School*, WASH. POST (Sept. 18, 2014), <https://www.washingtonpost.com/news/answer-sheet/wp/2014/09/18/19-states-still-allow-corporal-punishment-in-school>.

outdated.<sup>91</sup> Even in states where this form of discipline is illegal, instances of corporal punishment arise. For example, Maryland outlawed the use of corporal punishment in public schools in 1993.<sup>92</sup> However, as recently as 2015, reports of a teacher spanking a kindergarten student made national headlines.<sup>93</sup>

Additionally, national polls consistently show that most Americans endorse corporal punishment—such as spanking—as an appropriate method of discipline.<sup>94</sup> Although the view that physical punishment is an acceptable form of correction has decreased over time, seventy percent of parents still generally support spanking children.<sup>95</sup> As recently as September 2016, parents and community members lobbied a school board in Cheatham County, Tennessee to vote to permit corporal punishment in the classroom.<sup>96</sup> Despite progress since the time *Ingraham* was decided, physical punishment remains a fundamental element of discipline in American homes.<sup>97</sup>

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<sup>91</sup> *Corporal Punishment of Children Remains Common Worldwide, UNC Studies Find*, UNC SCH. MED. (Aug. 9, 2010), <http://www.med.unc.edu/www/newsarchive/2010/august/corporal-punishment-of-children-remains-common-worldwide-unc-studies-find> (“[T]racked corporal punishment and physical abuse trends for three-to-11-year-old children in the U.S. as demonstrated by four separate surveys conducted in 1975, 1985, 1995 (all national surveys) and 2002 (in North Carolina and South Carolina). . . . [M]ost preschool-aged children are spanked (79 percent), and nearly half of children ages eight and nine in the 2002 survey were hit with an object such as a paddle or switch.”).

<sup>92</sup> See Katharine Webster, *Schools Taking the Paddle out of Discipline: Education: But Some Principals Still View Corporal Punishment as More Effective Than Any Lecture*, L.A. TIMES (June 20, 1993); see also U.S. DEP’T OF EDUC., MARYLAND COMPILATION OF SCHOOL DISCIPLINE LAWS AND REGULATIONS (2016) Section 7-306 of the Maryland state code of discipline on Corporal punishment states that “[c]orporal punishment [is] prohibited. Notwithstanding any bylaw, rule, or regulation made or approved by the State Board, a principal, vice principal, or other employee may not administer corporal punishment to discipline a student in a public school in the State.” *Id.* Regulation 13A.08.01.11, on disciplinary action, states that “[c]orporal punishment may not be used to discipline a student in a public school in the State.” *Id.*

<sup>93</sup> Donna St. George, *Parents Allege Corporal Punishment at Blue Ribbon School in Maryland*, WASH. POST (Dec. 6, 2015), [https://www.washingtonpost.com/local/education/parents-allege-corporal-punishment-at-blue-ribbon-school-in-maryland/2015/12/06/cc022852-8897-11e5-be8b-1ae2e4f50f76\\_story.html](https://www.washingtonpost.com/local/education/parents-allege-corporal-punishment-at-blue-ribbon-school-in-maryland/2015/12/06/cc022852-8897-11e5-be8b-1ae2e4f50f76_story.html).

<sup>94</sup> Harry Enten, *Americans’ Opinions on Spanking Vary by Party, Race, Region and Religion*, FIVETHIRTYEIGHT (Sept. 15, 2014, 4:49 PM), <http://fivethirtyeight.com/datalab/americans-opinions-on-spanking-vary-by-party-race-region-and-religion>; see also Edwards, *supra* note 57, at 990. Many parents and educators who received corporal punishment when they were children see it as a productive way to discipline and cite themselves as success stories. See Anderson, *supra* note 19 (noting that Tulsa, Oklahoma Public Schools Superintendent Mike Campbell finds paddling “useful ‘for some children’ and points to himself as an example. ‘I know I was paddled as a child, and I grew up to be a productive citizen’”).

<sup>95</sup> See Enten, *supra* note 94 (“Since 1986, the University of Chicago’s General Social Survey (GSS) has asked respondents, ‘Do you strongly agree, agree, disagree or strongly disagree that it is sometimes necessary to discipline a child with a good, hard spanking?’”).

<sup>96</sup> Paige Hill, *Cheatham County Votes to Keep Corporal Punishment in Classrooms*, WKRN.COM (Sept. 21, 2016, 6:55 AM), <http://wkrn.com/2016/09/21/cheatham-county-votes-to-keep-corporal-punishment-in-classrooms>.

<sup>97</sup> See Edwards, *supra* note 57, at 990; see also Gene Demby, *Is Corporal Punishment Abuse? Why That’s A Loaded Question*, NPR: CODE SWITCH (Sept. 19, 2014, 10:03 AM), <http://www.npr.org/sections/codeswitch/2014/09/19/349668828/a-decision-about-your-children->



Notwithstanding local efforts to ban academic corporal punishment, the United States is one of only a few countries that allows violence against children in public schools.<sup>98</sup> American use of corporal punishment against children is unparalleled among industrialized nations.<sup>99</sup> Corporal punishment is “nearly universally condemned in the international community.”<sup>100</sup> Countries such as Sweden, Israel, Kenya, Costa Rica, and most countries in Europe have banned the practice and still manage to leverage appropriate discipline techniques.<sup>101</sup>

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thats-also-about-your-parents (“[T]hree-quarters of parents spank their children at least once a year. . . . While those numbers are pretty strongly pro-spanking, the polls show that support for the practice has been on a very slow decline for a while across all groups. That’s probably not too surprising—the idea of *not* spanking is actually a historically novel idea, and many of our modern conventions of childhood have come into shape over the past 150 years or so.”). The debate regarding the use of corporal punishment by parents came into the public arena in 2014 when NFL running back Adrian Peterson was indicted for disciplining his four-year-old son with a tree branch, which he referred to as a “switch.” Eric Prisbell & Brent Schrotenboer, *Adrian Peterson Avoids Jail Time in Child Abuse Case*, U.S.A. TODAY (Nov. 4, 2014, 8:46 P.M.), <http://www.usatoday.com/story/sports/nfl/vikings/2014/11/04/adrian-peterson-minnesota-vikings-child-abuse-plea-deal-misdemeanor/18466197>. This case is an example of the kind of corporal punishment that exists in homes across the country today, and sheds light on a societal view of corporal punishment that may be a minority but is certainly not non-existent. The Peterson case and data on social perceptions of corporal punishment provide insight into why efforts to ban corporal punishment in public schools in the holdout states which continue to allow the practice have been fruitless. Efforts to abolish corporal punishment in schools have failed in Louisiana and Texas. Bills presented to each respective state legislature did not pass. See Anderson, *supra* note 19.

<sup>98</sup> Efforts to abolish corporal punishment in schools have failed in Louisiana and Texas. Bills presented to each respective state legislature did not pass. See Anderson, *supra* note 19; see also Parkinson, *supra* note 87, at 278.

<sup>99</sup> Deana Pollard, *Banning Child Corporal Punishment*, 77 TUL. L. REV. 575, 576–77 (2003); see also Parkinson, *supra* note 87, at 278 n.22. (“Besides the United States, corporal punishment is still permitted in parts of Australia and Canada, but nearly every other developed nation forbids teachers from striking children.”); Sacks, *supra* note 44, at 1170 (“Although nearly the entire industrialized world has rejected the concept that subjecting school children to physical pain and violence results in good behavior and desirable social skills, nearly half of the United States continue to ‘paddle’ public students as young as three years of age and as old as eighteen years of age.”).

<sup>100</sup> Parkinson, *supra* note 87, at 278. The United States is the only country that has not ratified the United Nations Convention of the Rights of the Child (CRC), which went into force in September 1990. Sarah Mehta, *There’s Only One Country That Hasn’t Ratified the Convention on Children’s Rights: U.S.*, ACLU (Nov. 20, 2015, 1:30 PM), <https://www.aclu.org/blog/speak-freely/theres-only-one-country-hasnt-ratified-convention-childrens-rights-us>. The CRC requires countries to “take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child’s human dignity and in conformity with the present Convention” and demands that parties “protect the child from all forms of physical or mental violence, injury or abuse . . . .” United Nations Convention on the Rights of the Child, art. 19, 28, Sept. 2, 1990, 1577 U.N.T.S. 3. Previously, the United States was joined by Somalia and South Sudan as non-signatories, however, both nations have since ratified the convention. See Mehta, *supra* note 100; see also Karen Attiah, *Why Won’t the U.S. Ratify the U.N.’s Child Rights Treaty?*, WASH. POST (Nov. 21, 2014), [https://www.washingtonpost.com/blogs/post-partisan/wp/2014/11/21/why-wont-the-u-s-ratify-the-u-n-s-child-rights-treaty/?utm\\_term=.41b5b24c6eb7](https://www.washingtonpost.com/blogs/post-partisan/wp/2014/11/21/why-wont-the-u-s-ratify-the-u-n-s-child-rights-treaty/?utm_term=.41b5b24c6eb7).

<sup>101</sup> Lisa Belkin, *Why Does Everyone Pretend There’s a ‘Spanking Debate?’*, HUFFINGTON POST, [http://www.huffingtonpost.com/lisa-belkin/spanking-is-wrong\\_b\\_1659964.html](http://www.huffingtonpost.com/lisa-belkin/spanking-is-wrong_b_1659964.html) (last updated Sept. 8, 2012).

Overall, the United States has made significant progress in eradicating the use of corporal punishment in public schools; nonetheless, nineteen fringe states allow the practice, and violence against children as a disciplinary tool occurs at an alarming rate. State legislatures in the majority of the country have spoken, and it is now time for the Supreme Court to interpret the Constitution in line with current societal norms and expectations.

### C. *A Need for Constitutional Protection for Students*

Much of the *Ingraham* decision relied on the notion that corporal punishment can be reasonable; however, scientific research since the 1970s has demonstrated that this is not true.<sup>102</sup> The current American law is at odds with a basic belief held by most in the scientific community: corporal punishment is harmful to children.<sup>103</sup> The effects of corporal punishment on children go beyond visible, physical injuries.<sup>104</sup> Scientists have documented the feared long-term effects of subjecting children to corporal punishment, including violence, drug abuse, and failed interpersonal relationships.<sup>105</sup> Evidence shows a correlation between the rate of spanking children and overall societal violence.<sup>106</sup> Research has shown that child corporal punishment “leads to children’s increased anger, aggression, and tolerance for violence, and ultimately, a more violent society.”<sup>107</sup> Despite the availability of these

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<sup>102</sup> The Supreme Court in *Ingraham* stated that “[t]he concept that reasonable corporal punishment in school is justifiable continues to be recognized in the laws of most States.” *Ingraham v. Wright*, 430 U.S. 651, 676 (1977). Putting aside the fact that this is no longer the case—the majority of states no longer justify the use of corporal punishment—the Court based much of its decision on the belief that corporal punishment can be viewed as “reasonable.” *Id.* at 663.

<sup>103</sup> *A Violent Education: Corporal Punishment of Children in U.S. Public Schools*, ACLU (Feb. 2009), [https://www.aclu.org/files/pdfs/humanrights/aviolenteducation\\_execsumm.pdf](https://www.aclu.org/files/pdfs/humanrights/aviolenteducation_execsumm.pdf) (“The Society for Adolescent Medicine has documented serious medical consequences resulting from corporal punishment, including severe muscle injury, extensive blood clotting (hematomas), whiplash damage, and hemorrhaging.”); Tracie O. Afifi et al., *Physical Punishment and Mental Disorders: Results from a Nationally Representative U.S. Sample*, 130 PEDIATRICS 2 (2012), <http://pediatrics.aappublications.org/content/early/2012/06/27/peds.2011-2947>; Keith Brannon, *Despite Court Ruling, Survey Finds Child Welfare Advocates Oppose Corporal Punishment*, TUL. U. (July 23, 2015), <http://www2.tulane.edu/news/releases/despote-court-ruling-survey-finds-child-welfare-advocates-oppose-corporal-punishment.cfm> (“Almost 75 percent of respondents said spanking is harmful for children and a majority believe it is a bad disciplinary technique; leads to the child being more, not less, aggressive; seldom or never leads to better self-control and sometimes leads to the child being physically abused.”).

<sup>104</sup> See Wilkins, *supra* note 65 (noting that corporal punishment often leaves children with increased aggression, mental health problems, and a lower cognitive ability).

<sup>105</sup> See Sacks, *supra* note 44.

<sup>106</sup> See Pollard, *supra* note 99, at 577.

<sup>107</sup> *Id.*

findings and the weight of professional health care organizations<sup>108</sup> and professional medical associations who vehemently oppose corporal punishment,<sup>109</sup> erroneous and dangerous<sup>110</sup> jurisprudence continues to govern federally and in nineteen states.

The Court in *Ingraham* decided that public school children, regardless of age, have “little need for the protection of the Eighth Amendment.”<sup>111</sup> However, times have changed, and the great weight of the authority tells us that, to the contrary, children are desperately in need of protection.<sup>112</sup> Previously, the far-reaching consequences of disciplinary methods were unknown; thus, the Court concluded that the Eighth and Fourteenth Amendments were not applicable.<sup>113</sup> Since then, individual states have made progress, but that momentum has ceased, and a strong minority of states allow this dangerous practice to continue. It is time for the Supreme Court, now armed with more knowledge and undeniable data, to revisit its decision in *Ingraham*. The Court must reconsider the notion of “reasonable corporal punishment” and determine if the practice is offensive to the substantive due process rights of all public school students.

### III. LIFTING CONSTITUTIONAL LIMITS ON CHALLENGES TO CORPORAL PUNISHMENT IN THE NATION’S PUBLIC SCHOOLS

The *Ingraham* Court expressly declined to address the question of whether corporal punishment in public schools implicates substantive due process concerns.<sup>114</sup> The initial refusal to rule on the Fifth Circuit’s substantive due process analysis<sup>115</sup> and the reluctance to address this

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<sup>108</sup> See Sacks, *supra* note 44, at 1165 (observing that child welfare and health organizations collectively oppose school corporal punishment).

<sup>109</sup> “School corporal punishment is thus uniformly rejected by professional health care organizations and professional educational associations, including the American Academy of Pediatrics, the American Medical Association, the American Psychiatric Association, the American Psychology Association, and the National Education Association.” *Id.* at 1196.

<sup>110</sup> *Id.* at 1165 (“[M]ost scientists believe that many of the social ills that plague the United States, including violence, drug abuse, and failed interpersonal relationships, result from or are exacerbated by violence directed at children, including corporal punishment.”).

<sup>111</sup> *Ingraham v. Wright*, 430 U.S. 651, 670 (1977).

<sup>112</sup> Elizabeth T. Gershoff & Andrew Grogan-Kaylor, *Spanking and Child Outcomes: Old Controversies and New Meta-Analyses*, 30 J. FAM. PSYCHOL. 453 (2016) (“Among the outcomes in childhood, spanking was associated with more aggression, more antisocial behavior, more externalizing problems, more internalizing problems, more mental health problems, and more negative relationships with parents. Spanking was also significantly associated with lower moral internalization, lower cognitive ability, and lower self-esteem. The largest effect size was for physical abuse; the more children are spanked, the greater the risk that they will be physically abused by their parents.”).

<sup>113</sup> *Ingraham*, 430 U.S. 651 at 683.

<sup>114</sup> *Id.* at 659 (noting that the Court granted certiorari but limited its inquiry to the questions of the Cruel and Unusual Punishment Clause of the Eighth Amendment and the procedural element of the Due Process Clause of the Fourteenth Amendment); see *id.* at 659 n.12, 679 n.47.

<sup>115</sup> *Id.* at 658 (stating that the Fifth Circuit rejected the students’ substantive due process

issue over the ensuing decades has resulted in a lack of guidance to the lower courts and has made this issue “the principal battleground for constitutional challenges to the use of corporal punishment.”<sup>116</sup> Although the Supreme Court has not spoken on whether corporal punishment in an educational setting violates a student’s substantive rights, federal circuit courts have had to confront this question numerous times in just the past ten years.<sup>117</sup>

A. *The Post-Ingraham Landscape: The Fourth Circuit Hall Standard*

In the 1980 decision in *Hall v. Tawney*,<sup>118</sup> the Fourth Circuit was the first jurisdiction, outside of the Fifth Circuit’s decision in *Ingraham*, to specifically address the question of whether subjecting public school students to corporal punishment gives rise to a cause of action for violation of substantive due process rights under the Fourteenth Amendment.<sup>119</sup> The cause of action in *Hall* arose from events that occurred in 1974.<sup>120</sup> The case concerned a grade-school student who was paddled by her teacher against her parents’ wishes.<sup>121</sup> The parents of the child challenged the use of corporal punishment as a violation of the child’s procedural and substantive due process rights under the Fourteenth Amendment and her right to be free from cruel and unusual punishment under the Eighth Amendment.<sup>122</sup> While the action was pending, the Supreme Court issued its decision in *Ingraham* and effectively foreclosed the procedural due process and Eighth

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arguments). The Fifth Circuit agreed with the district court that corporal punishment in concept or as a policy was neither arbitrary nor capricious and that the practice was related to a legitimate state purpose of educational policy. *Ingraham v. Wright*, 525 F.2d 909, 917 (5th Cir. 1976), *aff’d*, 430 U.S. 651 (1977) (“Only if the regulation bears no reasonable relation to the legitimate end of maintaining an atmosphere conducive to learning can it be held to violate the substantive provision of the due process laws. Paddling of recalcitrant children has long been an accepted method of promoting good behavior and instilling notions of responsibility and decorum into the mischievous heads of school children. We do not here overrule it.”).

<sup>116</sup> Parkinson, *supra* note 87, at 281.

<sup>117</sup> See Heckman, *supra* note 68, at 514; see also Sacks, *supra* note 44, at 1168.

<sup>118</sup> *Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980).

<sup>119</sup> *Id.* at 610–11 (noting that “[t]he Supreme Court’s denial of review to the substantive due process issue in *Ingraham* presents an initial awkwardness to decision here that must frankly be recognized at the outset of our discussion.”); see Heckman, *supra* note 68, at 547; Parkinson, *supra* note 87, at 287; see also Lewis M. Wasserman, *Students’ Freedom from Excessive Force by Public School Officials: A Fourth or Fourteenth Amendment Right?*, 21 KAN. J.L. & PUB. POL’Y 35, 56 (2011) [hereinafter Wasserman, *Freedom from Excessive Force*].

<sup>120</sup> *Hall*, 621 F.2d at 609.

<sup>121</sup> The teacher, “without apparent provocation,” repeatedly struck the child with a five-inch paddle in the presence of the school principal. *Id.* at 614. The teacher continued to shove the student against a desk and grabbed and twisted her arm. The student was hospitalized for ten days. *Id.*

<sup>122</sup> *Id.* at 609.

Amendment claims.<sup>123</sup> On appeal, the student's parents alleged only a substantive due process violation, and the Fourth Circuit allowed the claim to proceed.<sup>124</sup> The court justified this decision by noting that the Supreme Court's decision not to address the substantive due process issue in *Ingraham* did not imply that corporal punishment would never rise to the level of a substantive due process violation.<sup>125</sup> Rather, the *Hall* court inferred that the Supreme Court's explicit reservation meant only that the question was open and unsettled.<sup>126</sup>

The Fourth Circuit concluded that although corporal punishment in public schools is not *per se* unconstitutional, there are circumstances where the use of corporal punishment by state school officials infringes on a student's substantive due process rights.<sup>127</sup> Although the court accepted corporal punishment as constitutional, it recognized that the practice implicated a student's protectable liberty interest.<sup>128</sup> In defining the interest in question, the *Hall* court rejected the notion that the interest is akin to rights outlined in state assault and battery laws.<sup>129</sup> Instead, the Fourth Circuit found that students' liberty interests paralleled the constitutional rights, protected by substantive due process, given to pre-trial detainees in police brutality cases.<sup>130</sup> The court defined this right as "the right to be free of state intrusions into realms of personal privacy and bodily security . . ."<sup>131</sup> Additionally, the court characterized this right as "unmistakably established in our constitutional decisions as an attribute of the ordered liberty that is the concern of substantive due process."<sup>132</sup> Given that the liberty interest triggered by corporal punishment was held to be a substantive due process right, the Fourth Circuit announced a standard to use to

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<sup>123</sup> The district court dismissed the action on the authority of the Supreme Court's holding in *Ingraham*. *Id.*

<sup>124</sup> *Id.* at 609–10.

<sup>125</sup> *Id.* at 611 (noting that the *Ingraham* decision could be read to include an implicit holding that no substantive due process violation occurred but that "this implication is not compelled" due to the fact that the Court expressly chose not to address this issue).

<sup>126</sup> According to the *Hall* court, the *Ingraham* decision had two definitive holdings regarding disciplinary corporal punishment: first, that procedural due process is afforded to students by state civil and criminal remedies and second, that the use of corporal punishment in public school does not implicate the Eighth Amendment. Thus, the *Hall* court chose to construe the Court's refusal to speak to the substantive due process question not as an explicit holding but rather as a statement that the Court purposely left this question unresolved. *Id.*

<sup>127</sup> *Id.* at 611–12.

<sup>128</sup> See *Ingraham v. Wright*, 430 U.S. 651, 672 (1977).

<sup>129</sup> *Hall*, 621 F.2d at 613.

<sup>130</sup> *Id.* The *Hall* court drew upon three police brutality cases where the courts have recognized a right to bodily security. *Id.* (citing *Rochin v. California*, 342 U.S. 165 (1952) (holding that forcible use of a stomach pump violated arrestee's due process rights); *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973) (asserting that a pre-trial detainee stated a cognizable claim for violation of a constitutionally protected right against a corrections officer who beat him without cause); *Jenkins v. Averett*, 424 F.2d 1228 (4th Cir. 1970) (finding that excessive use of force was reckless and deprived suspect of a protected right to personal security)).

<sup>131</sup> *Hall*, 621 F.2d at 613.

<sup>132</sup> *Id.*

determine whether an instance of corporal punishment crosses the constitutional line.<sup>133</sup> The court stated that in school corporal punishment cases, the substantive due process inquiry should be: “whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.”<sup>134</sup> The court outlined three factors to consider when applying the “shocks the conscience” standard to corporal punishment: (1) the severity of the injury; (2) the nature of the force in relation to the need for discipline; and (3) the state of mind of the offending party.<sup>135</sup> The *Hall* standard implies that the Fourth Circuit viewed students under the authority of teachers and school officials as comparable with pre-trial detainees in custody of police officers or prison officials and believed that both categories of people share a right to “ultimate bodily security.”<sup>136</sup>

While most jurisdictions followed the Fourth Circuit’s lead and chose to interpret *Ingraham* as leaving the door open to substantive due process challenges to corporal punishment, the standards used to analyze these cases are varied.

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<sup>133</sup> *Id.*; see Lynn Roy, *Corporal Punishment in American Public Schools and the Rights of the Child*, 30 J.L. & EDUC. 554, 561 (2001) (“The *Hall* court held that the student’s interest in bodily security could not be violated by the mere imposition of corporal punishment.”).

<sup>134</sup> *Hall*, 621 F.2d at 613. In announcing the “shocks the conscience” standard for corporal punishment cases, the court described the requisite level of severity in language borrowed from an earlier line of police brutality cases. See, e.g., *Rochin v. California*, 342 U.S. 165, 172, 175 (1952) (“[W]e are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience.”).

<sup>135</sup> *Hall*, 621 F.2d at 613. In establishing these three factors, the court turned to the *Johnson* opinion for guidance. See *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973) (stating that to determine whether a constitutional line has been breached, courts must inquire into the “the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm”); see also Wasserman, *Freedom from Excessive Force*, *supra* note 119, at 57 (noting that the *Hall* court looked to the language used by the *Johnson* court to develop the elements of a cognizable substantive due process claim).

<sup>136</sup> *Hall*, 621 F.2d at 613. (“Clearly recognized in persons charged with or suspected of crime and in the custody of police officers, we simply do not see how we can fail also to recognize [the right to ultimate bodily security] in public school children under the disciplinary control of public school teachers.”). The comparison is particularly interesting given the refusal of the Supreme Court in *Ingraham* to extend the protection of the Eighth Amendment to public schoolchildren. *Ingraham v. Wright*, 430 U.S. 651, 669 (1977) (“[W]e find it an inadequate basis for wrenching the Eighth Amendment from its historical context and extending it to traditional disciplinary practices in the public schools. The prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration.”). The Court spent considerable time discussing the history of the Eighth Amendment and distinguishing the prisoner from the student. *Id.* at 664–69. The Fourth Circuit did not provide much explanation as to why it chose to analogize corporal punishment of public school students to incidents of police brutality. See *Hall*, 621 F.2d at 613.

B. *A Split Among Courts: How Circuit Courts Have Addressed Substantive Due Process Challenges Without Guidance from the Supreme Court*

A majority of circuits allow claims for a violation of substantive due process based on the use of corporal punishment, and all of these jurisdictions apply some version of the *Hall* standard.<sup>137</sup> Jurisdictions that recognize a substantive due process claim fall into two categories: those that apply the *Hall* standard and those that have accepted the *Hall* analysis but have developed a modified variation.

In addition to the Fourth Circuit, two other circuit courts of appeals—the Sixth and Tenth Circuits—have adopted the *Hall* standard. The Sixth Circuit explicitly embraced the *Hall* inquiry in *Saylor v. Board of Harland Co.*,<sup>138</sup> which involved the paddling of a high school student who engaged in a physical fight with another student.<sup>139</sup> The issue was addressed by the Tenth Circuit in *Garcia ex rel. Garcia v. Miera*,<sup>140</sup> where the court unambiguously agreed with the Fourth Circuit’s approach in *Hall*.<sup>141</sup>

Four circuits of the courts of appeals borrow language from the *Hall* standard but slightly modify the analysis. The Third Circuit faced a substantive due process challenge to corporal punishment in *Metzger v. Osbeck*.<sup>142</sup> The district court in this case cited the standard in *Johnson v.*

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<sup>137</sup> See Wasserman, *supra* note 18, at 1043 (noting that the *Hall* standard has been largely followed in the Second, Third, Sixth, Eighth, Tenth, and Eleventh Circuit courts). Circuits that allow for substantive due process challenges to corporal punishment followed the lead of the Fourth Circuit, adopting or modifying the court’s approach, making *Hall* the leading case in this area of the law as seven of the twelve federal circuit courts apply some version of the *Hall* standard. See Gottlieb *ex rel. Calabria v. Laurel Highlands Sch. Dist.*, 272 F.3d 168, 173 (3d Cir. 2001) (noting that the *Hall* standard is “the most commonly cited test for claims of excessive force in public schools”); C.C. Swisher, *Constitutional Abuse of Public School Students: An Argument for Overruling Ingraham v. Wright*, 8 WHITTIER J. CHILD & FAM. ADVOC. 3, 14–34 (2008) (reviewing the standards adopted by each circuit for addressing constitutional challenges to school-based corporal punishment). Only two federal courts of appeals, the District of Columbia Circuit and the First Circuit, have yet to speak on this issue.

<sup>138</sup> *Saylor v. Bd. of Educ.*, 118 F.3d 507 (6th Cir. 1997), *cert. denied*, 522 U.S. 1029 (1997).

<sup>139</sup> The eighth-grade student was paddled five times, which resulted in swelling and bruising. *Id.* at 508–11. This case was the first time the Sixth Circuit expressly adopted the *Hall* standard for cases involving corporal punishment in public schools. See *id.* at 514 (“We take it, nonetheless, that the substantive due process inquiry prescribed in *Hall* . . . is the appropriate inquiry to make in the case now before us.”); see also Swisher, *supra* note 137, at 22.

<sup>140</sup> *Garcia v. Miera*, 817 F.2d 650 (10th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988). This case involved the brutal paddling of a nine-year-old student as she was suspended upside down by her ankles, leaving a two-inch scar on her leg. *Id.* at 652–53.

<sup>141</sup> *Id.* at 655 (“[A]t some point of excessiveness or brutality, a public school child’s substantive due process rights are violated by beatings administered by government-paid school officials. We accept and agree with the Fourth Circuit’s definition of the constitutional tort . . .”).

<sup>142</sup> *Metzger ex rel. Metzger v. Osbeck*, 841 F.2d 518 (3d Cir. 1988) (finding that the district court erred in granting summary judgment where a high school student was disciplined by being placed in a chokehold by a teacher).

*Glick*,<sup>143</sup> from which the Fourth Circuit drew inspiration for the *Hall* standard.<sup>144</sup> The Third Circuit agreed with the standard employed by the district court but disagreed with the lower court's dismissal of the action.<sup>145</sup> The Third Circuit again faced this issue in *Gottlieb ex rel. Calabria v. Laurel Highlands School District*<sup>146</sup> and took the opportunity to clarify the court's apparent adoption of the shocks the conscience model in *Metzger*.<sup>147</sup> The *Gottlieb* court cited language from both *Johnson* and *Hall* and re-stated both standards employing a four-factor variation of the *Hall* standard.<sup>148</sup> The Second and Eighth Circuits articulated a test similar to the Third Circuit's formulation.<sup>149</sup> The Eleventh Circuit uses a two-factor analysis when considering whether school-based corporal punishment is a substantive due process violation.<sup>150</sup>

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<sup>143</sup> *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973).

<sup>144</sup> *Metzger*, 841 F.2d at 520.

<sup>145</sup> *Id.* at 521.

<sup>146</sup> *Gottlieb ex rel. Calabria v. Laurel Highlands Sch. Dist.*, 272 F.3d 168 (3d Cir. 2001) (holding that a school official's pushing of a student did rise to the level of a substantive due process violation).

<sup>147</sup> *Id.* at 172 (explaining that in *Metzger*, the Third Circuit "did not explicitly adopt the shocks the conscience standard, but rather did so impliedly, stating that the offending conduct must be inspired by malice or sadism").

<sup>148</sup> *Id.* at 173-75 (outlining the following four factors: (1) was there a pedagogical justification for the use of force?; (2) was the force utilized excessive to meet the legitimate objective in this situation?; (3) was the force applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm?; and (4) was there a serious injury?). The *Gottlieb* court explained this variation on the *Hall* standard as necessary "[t]o avoid conflating the various elements of the shocks the conscience test into a vague impressionistic standard . . ." *Id.* at 173.

<sup>149</sup> See *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246 (2d Cir. 2001) (finding that the use of unprovoked excessive corporal punishment by a gym teacher against an eighth-grade student intruded on the student's substantive due process rights). Citing the *Johnson v. Glick* language as quoted in the Third Circuit's *Metzger* opinion, the Second Circuit stated that the factors to consider include "the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Id.* at 251-52; see also *Wise v. Pea Ridge Sch. Dist.*, 855 F.2d 560 (8th Cir. 1988) (using a four-prong test to find that a coach's use of corporal punishment did not violate a student's substantive due process rights). Similarly, the *Wise* court's decision turned on an inquiry of the same four factors articulated by the Second Circuit in *Johnson v. Newburgh. Id.* at 564.

<sup>150</sup> *Neal ex rel. Neal v. Fulton Cty. Bd. of Educ.*, 229 F.3d 1069 (11th Cir. 2000) (holding that when a high school teacher and football coach struck a student in the eye with a metal weight lock he violated the student's substantive due process rights). The Eleventh Circuit's standard requires that "the plaintiff must allege facts demonstrating that (1) a school official intentionally used an amount of force that was obviously excessive under the circumstances, and (2) the force used presented a reasonably foreseeable risk of serious bodily injury." *Id.* at 1075. Notably, the Supreme Court's denial of certiorari of the *Ingraham* issue of whether corporal punishment implicates substantive due process rights left the Fifth Circuit's holding as binding precedent in that circuit, which also included the future Eleventh Circuit. When the Eleventh Circuit was formed by separating from the Fifth Circuit in 1981, the Eleventh Circuit accepted all of the decisions of the former Fifth Circuit, as it existed on September 30, 1981, as binding precedent. See *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981). However, the



Two circuits have considered analyzing constitutional challenges to academic corporal punishment under the Fourth Amendment<sup>151</sup> rather than the Fourteenth Amendment. Although the Ninth Circuit has engaged in the *Hall* inquiry in the past,<sup>152</sup> the court held that constitutional claims involving the excessive use of force in a school setting are properly analyzed under the Fourth Amendment.<sup>153</sup> Similarly, in *Wallace ex rel. Wallace v. Batavia School District 101*, the Seventh Circuit noted that school-based corporal punishment cases may be more appropriately analyzed as unreasonable seizures than as violations of substantive due process.<sup>154</sup> However, while the Seventh Circuit has not spoken on this issue in recent years, the district courts have interpreted the *Wallace* analysis as limited to the facts of that case.<sup>155</sup>

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*Neal* court rejected the Fifth Circuit's holding in *Ingraham* and explicitly stated that corporal punishment in a school setting may be actionable under the substantive element of the due process clause. *See Neal*, 229 F.3d at 1074 (“[T]he former Fifth Circuit’s opinion in *Ingraham* does not control this appeal.”).

<sup>151</sup> The Fourth Amendment states,

[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. There is growing support for challenging the use of corporal punishment in schools under the Fourth Amendment rather than the Fourteenth Amendment. *See, e.g.,* Kathryn R. Urbonya, *Public School Officials’ Use of Physical Force as a Fourth Amendment Seizure: Protecting Students from the Constitutional Chasm Between the Fourth and Fourteenth Amendments*, 69 GEO. WASH. L. REV. 1 (2000); Wasserman, *supra* note 119.

<sup>152</sup> *See P.B. v. Koch*, 96 F.3d 1298, 1303–04 (9th Cir. 1996) (holding that a teacher’s use of force against students violated their substantive due process rights).

<sup>153</sup> *See Doe ex rel. Doe v. Haw. Dep’t of Educ.*, 334 F.3d 906 (9th Cir. 2003) (finding that a teacher’s use of disciplinary force, including taping a student’s head to a tree, implicated the student’s Fourth Amendment right to be free from unreasonable seizure). While the *Doe* court clarified that the Fourth Amendment restriction on unreasonable seizures extends to a school environment, the court did not entirely foreclose the possibility of raising a substantive due process challenge, and the court has heard cases on this issue in the past. *See id.* at 909 (“We recognize that it may be possible for a school official to use excessive force against a student without seizing or searching the student, and that the Fourth Amendment would not apply to such conduct.”); *see also Corales v. Bennett*, 567 F.3d 554 (9th Cir. 2009) (holding that a principal’s verbal statements to students were not considered a threat of corporal punishment and did not constitute a substantive due process violation).

<sup>154</sup> *See Wallace ex rel. Wallace v. Batavia Sch. Dist. 101*, 68 F.3d 1010, 1015 (7th Cir. 1995) (“[W]e do not believe that the Fourteenth Amendment’s Due Process Clause affords [students] any greater protection than the Fourth Amendment from unwarranted discipline while in school.”).

<sup>155</sup> *See B.B. v. Appleton Area Sch. Dist.*, No. 12-C-115, 2013 WL 3972250, at \*11 (E.D. Wis. July 31, 2013) (“In this court’s view, *Wallace*’s rejection of the plaintiff’s substantive due process claim was limited to the facts of that case and was not intended as a general rejection of substantive due process as the rubric under which excessive force claims against school officials are to be analyzed. Indeed, most of the circuits have held that corporal punishment of students by public school officials may violate substantive due process.”). Although an unpublished opinion, *Appleton* suggests that without more affirmative guidance, Seventh Circuit district courts may continue to hear and rule on substantive due process challenges to corporal

The Fifth Circuit is an outlier and has refused to recognize that corporal punishment may violate substantive due process rights.<sup>156</sup> Since the court's ruling in *Ingraham* in 1977, which remains precedent because the Supreme Court chose not to grant certiorari on the substantive due process issue, the Fifth Circuit has yet to recognize a cause of action alleging corporal punishment as a substantive due process violation.<sup>157</sup> The Fifth Circuit has been consistent in its holding that due process violations do not exist when adequate state remedies for the student's injury are present and when the severity of the injury has no bearing on the constitutional claim.<sup>158</sup>

While the *Hall* standard, or variations of it, is widely used among the federal circuit courts, the 1980 framework is not without flaws and has left many students unable to seek constitutional redress even after the severe use of force by school officials.<sup>159</sup> Two main flaws make *Hall* an imperfect standard and limit its ability to protect children. First, the *Hall* standard bars substantive due process claims unless the resulting injury is "severe," is "inspired by malice or sadism," and amounts to "brutal and inhumane abuse of official power."<sup>160</sup> This does little to open up the channels for effective constitutional challenges against corporal punishment and makes it very difficult for students to successfully argue violations of their substantive due process rights.<sup>161</sup>

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punishment.

<sup>156</sup> See Parkinson, *supra* note 87, at 295; Swisher, *supra* note 137, at 14.

<sup>157</sup> See sources cited *supra* note 156.

<sup>158</sup> See *Moore v. Willis Indep. Sch. Dist.*, 233 F.3d 871, 874 (5th Cir. 2000) ("We have held consistently that, as long as the state provides an adequate remedy, a public school student cannot state a claim for denial of substantive due process through excessive corporal punishment, whether it be against the school system, administrators, or the employee who is alleged to have inflicted the damage."). This holding was affirmed as recently as 2014 when the Fifth Circuit, in an unpublished opinion, held that a teacher's use of corporal punishment did not violate the student's substantive due process rights because the available state remedies were sufficient. *Marquez v. Garnett*, 567 F. App'x 214, 217–18 (5th Cir. 2014).

<sup>159</sup> See *Roy*, *supra* note 133, at 562 (describing the *Hall* standard as inadequate to properly protect public school children in states where corporal punishment is legal).

<sup>160</sup> *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980).

<sup>161</sup> Across the federal circuit courts of appeals, courts employing the *Hall* standard, or a modified version of it, have failed to find objectively reprehensible behavior. See, e.g., *Smith ex rel. Smith v. Half Hollow Hills Cent. Sch. Dist.*, 298 F.3d 168, 173 (2d Cir. 2002) (holding that a teacher's open-handed slap to a student's face did not violate the child substantive due process rights because such protections are "available only against egregious conduct which goes beyond merely 'offend[ing] some fastidious squeamishness or private sentimentalism'" (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973))); *Gottlieb ex rel. Calabria v. Laurel Highlands Sch. Dist.*, 272 F.3d 168 (3d Cir. 2001) (finding no substantive due process violation where an assistant principal pushed a student, resulting in chronic back pain, without any pedagogical objective because the official did not intend to harm the student); *Harris v. Robinson* 273 F.3d 927 (10th Cir. 2001) (holding that a teacher who made a student clear out a clogged toilet with his bare hands did not rise to the level of a constitutional violation because the teacher lacked the requisite state of mind and the child did not suffer a severe injury); *London v. Dirs. of the DeWitt Pub. Schs.*, 194 F.3d 873, 877 (8th Cir. 1999) (concluding that a case where a teacher forcibly removed a student from the cafeteria and subsequently banged his head against a metal pole "is not the kind of truly egregious and extraordinary case for which

This is due, in part, to the subjective nature of the standard.<sup>162</sup> Rather than a pure balancing of the state's interest against those of the student, the *Hall* standard invites courts to compare the injuries of the student bringing the action against those of students where courts found that the corporal punishment rose to the level of a substantive due process violation.<sup>163</sup> Second, implicit in the standard is the assumption that corporal punishment can be a reasonable means to achieving a constitutionally permissive state objective, which the *Hall* court notes is an essential element of the substantive due process analysis.<sup>164</sup> The *Hall* standard prevents schoolchildren from moving forward with a constitutional claim if schools can show that the force used on the child was reasonable and proportional to the educator's need to maintain order in the classroom.<sup>165</sup> In this sense, although *Hall* provides an avenue for constitutional challenges unavailable in *Ingraham*, the *Hall* court's deference to the school and the relatively low burden placed on the teacher and school officials is reminiscent of *Ingraham*.<sup>166</sup> Like the *Ingraham* Court, the *Hall* standard condones the belief that corporal punishment can be reasonable.<sup>167</sup> However, by definition, corporal punishment is the use of physical violence against a child for purposes of behavior modification<sup>168</sup> and as such is unreasonable. This is especially true given the amount of recent research that warns of the

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the theory of substantive due process is properly reserved"); *Saylor v. Bd. of Educ.*, 118 F.3d 507, 514–15 (6th Cir. 1997) (holding that while a teacher's decision to paddle a student five times to the point of bruising "may well reflect carelessness or an unwise excess of zeal," it did not rise to the level of shocking to the conscience under *Hall*); *Archey v. Hyche*, Nos. 90-5631, 90-5863, 1991 WL 100586, at \*3 (6th Cir. June 11, 1991) (concluding that a teacher's paddling a fifth grader five times for humming, which lead to severe bruising, did not constitute a substantive due process violation); see also *Parkinson*, *supra* note 87, at 289 ("It is difficult to imagine a harsher standard. Certainly it suggests that a child in public school will have to be severely beaten before a court will consider that child's constitutional claim. In practice, that is precisely what the standard has meant; it has been extremely difficult to shock the collective conscience of the federal judiciary.").

<sup>162</sup> *Heckman*, *supra* note 68, at 540.

<sup>163</sup> See, e.g., *Harris v. Robinson*, 273 F.3d 927, 931 (10th Cir. 2001) (holding that a teacher who made a student clean out a clogged toilet with his bare hands did not rise to the level of a constitutional violation because the court did not believe that the student's injuries shocked the conscience to the same degree as the injuries presented before the court in earlier cases).

<sup>164</sup> *Hall v. Tawney*, 621 F.2d 607, 612 (4th Cir. 1980) (stating that the liberty interest found by the Court in *Ingraham* "admits of some corporal punishment, which in turn is based upon a recognition that corporal punishment as such is reasonably related to a legitimate state interest in maintaining order in the schools . . .").

<sup>165</sup> *Id.* at 613.

<sup>166</sup> *Ingraham v. Wright*, 430 U.S. 651 (1977). The *Ingraham* Court held schoolteachers and administrators to a low bar, noting that corporal punishment in the classroom was lawful as long as it was "reasonably necessary 'for the proper education of the child and for the maintenance of group discipline.'" *Id.* at 662 (quoting 1 F. HARPER & F. JAMES, LAW OF TORTS § 3.20 (1956)).

<sup>167</sup> *Hall*, 621 F.2d at 612.

<sup>168</sup> See *Edwards*, *supra* note 57, at 983 ("Corporal punishment is the intentional infliction of physical force by a parent or parent figure upon a child with the purpose of correcting the child's behavior.").

negative consequences of corporal punishment and that questions the effectiveness of corporal punishment as a disciplinary technique.<sup>169</sup>

The inconsistency among the federal circuit courts and the flawed standard used by a majority of the circuits necessitates that the Supreme Court address substantive due process challenges to corporal punishment and provide the lower courts with a comprehensive standard that remedies the shortcomings of *Hall*.

#### IV. PROPOSAL: RECOGNIZING SUBSTANTIVE DUE PROCESS AS A VALID CONSTITUTIONAL CHALLENGE TO CORPORAL PUNISHMENT

To protect the rights of children, which are so often overlooked, the Supreme Court should revisit *Ingraham* and explicitly and unequivocally hold that students may maintain substantive due process challenges against the use of school-based corporal punishment. Although the majority of jurisdictions recognize that corporal punishment implicates substantive due process rights, the jurisdictions in which students are most vulnerable to the use of force in public schools do not, as the practice is not only legal but prevalent as well.<sup>170</sup> Unless the Supreme Court addresses this issue directly, it is unlikely that the Fifth Circuit will change course. Clarifying *Ingraham* and unambiguously stating that corporal punishment may violate a student's protected substantive due process rights is a small but important step in rectifying the Court's detrimental holding in *Ingraham*.<sup>171</sup>

Additionally, the Court should announce a definitive standard to replace the flawed *Hall* analysis. The new standard should reject the "conscience shocking" language from *Hall* and *Johnson v. Glick* and instead direct courts to engage in the following inquiries: first, what purpose was served by the use of force? Second, was the use of force absolutely necessary to achieve this purpose? Forcing schools to articulate a justification for the use of corporal punishment beyond maintaining order and discipline indicates the Court's understanding that corporal punishment is damaging to students. This revised standard is reflective of modern research and contemporary societal values that shun the use of corporal punishment and recognize the harmful nature of the practice.<sup>172</sup> Thus, a standard that relaxes the burden on students by doing away with the "malice" or "sadism" requirement<sup>173</sup> and imposes a higher burden on schools to justify the

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<sup>169</sup> See Sacks, *supra* note 44, at 1197–1209.

<sup>170</sup> See OCR, *supra* note 67.

<sup>171</sup> See *Ingraham*, 430 U.S. 651.

<sup>172</sup> See discussion *supra* Section II.A.

<sup>173</sup> See *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980) (requiring students to show that "the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it

use of corporal punishment with a more compelling state interest better serves the rights of students.

If the Supreme Court had revisited its opinion in *Ingraham* and set out the above-described new standard to replace *Hall*, the Fifth Circuit's opinion in *Clayton ex rel. Hamilton v. Tate County School District*<sup>174</sup> would have been very different. First, the Fifth Circuit would not be able to deny Clayton's substantive due process claim on the basis of adequate state remedies. Further, under the proposed two-step inquiry the Court would consider whether the student's conduct necessitated corporal punishment. Because maintaining classroom order would no longer be an adequate justification, the state would need to show something more, such as the student posed a harm to himself or others. In Clayton's case, it would be difficult for the state to argue that Clayton's failure to sit in his own seat required discipline through violence. While classroom order and student obedience are important, Clayton's infraction was minor and did not justify the use of excessive force.<sup>175</sup> Second, the availability of other effective disciplinary methods weighs against the state as numerous other behavior modification techniques could have been employed to correct the student's behavior.<sup>176</sup>

Applying a modified standard would not only avoid inconsistencies across the federal circuit courts but would also provide some form of redress to students living in the nineteen states where corporal punishment is legal.

#### A. Possible Objections

A decision by the Court that holds that corporal punishment violates substantive due process rights may raise separation of powers concerns. It could be argued that education has historically been the domain of the states and that a Supreme Court ruling on this issue intrudes on the states' rights to make decisions regarding public education. However, while there is no dispute that education is the

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amounted to a brutal and inhumane abuse of official power literally shocking to the conscience").

<sup>174</sup> *Clayton ex rel. Hamilton v. Tate Cty. Sch. Dist.*, 560 F. App'x 293, 294–97 (5th Cir. 2014) (finding that a student, who was subjected to brutal corporal punishment for a minor infraction, was foreclosed from raising a substantive due process challenge due to circuit precedent).

<sup>175</sup> *Id.* at 295 (When Clayton, an eighth-grade student, took a different seat because another student was sitting in his seat, Clayton was corporally punished for not being in his assigned seat.).

<sup>176</sup> Alternatives to corporal punishment include using words to give clear instructions instead of physical force, listening to the students to better understand their feelings, or using positive reinforcement. See Paul C. Holinger, *Effective Alternatives to Physical Punishment: The View From Psychoanalysis and Infant and Child Development*, PSYCHOL. TODAY (Sept. 2, 2009), <https://www.psychologytoday.com/blog/great-kids-great-parents/200909/effective-alternatives-physical-punishment-the-view>.

province of the states, there is precedent for rulings by the Supreme Court on constitutional issues related to education.<sup>177</sup> Additionally, while the Court must respect that education is a state issue, the Court also has a duty to determine whether the use of corporal punishment against students “offend[s] those canons of decency and fairness which express the notions of justice of English-speaking peoples . . . .”<sup>178</sup>

It may also be submitted that by relaxing the burden on students who challenge corporal punishment on a substantive due process basis, the Supreme Court is effectively outlawing academic corporal punishment, as the standard imposes a very high burden that state officials will often not be able to meet. Opponents of this standard may claim that such an issue is better left to the legislature to decide and that by addressing the issue the Supreme Court has effectively discounted the beliefs of those who have voted to keep corporal punishment legal in their states. There are two responses to this critique: first, the proposed new standard does increase the burden on the state; however, it does not mean that all instances of corporal punishment will by default be held to violate substantive due process rights. The proposed standard recognizes instances where the use of force in a public school setting may be necessary and thus allows for a balancing of interests. Second, although the number of states that allow school-based corporal punishment is not insignificant, a much larger majority of voters have voiced their distaste for the practice. A standard that makes it more difficult to constitutionally justify corporal punishment does not ignore the electorate but rather pushes a fringe minority of states to keep pace with the rest of the country.

#### CONCLUSION

Corporal punishment of children strongly deviates from the implicit values central to the fundamental American concept of liberty<sup>179</sup> and yet forty years have passed since the Supreme Court last

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<sup>177</sup> See e.g., *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (recognizing a student’s legitimate expectation of privacy when in school and extending the Fourth Amendment prohibition on unwarranted searches and seizures to academic environments); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (holding that a school forbidding students from wearing armbands to show their disapproval of the war in Vietnam intruded on the students’ right to expression of opinion and was therefore unconstitutional); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), *supplemented sub nom.*, *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (holding that segregation of public school students on the basis of race deprives students in the minority of equal education opportunities and is thus unconstitutional).

<sup>178</sup> *Rochin v. California*, 342 U.S. 165, 169 (1952). The Court in *Rochin* recognized the responsibility given to the States to enforce criminal laws; however, Justice Frankfurter noted the responsibility imposed on the Court by the Fourteenth Amendment. *Id.* at 168–69.

<sup>179</sup> *Id.* at 169 (“Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are ‘so rooted in the traditions and conscience of our people as to be ranked as fundamental,’ or are

spoke on the constitutionality of the practice. Since then, the American population has gravitated away from the use of corporal punishment, and social norms now question the efficacy and reasonableness of using violence to discipline children.<sup>180</sup> However, corporal punishment remains legal and while in most jurisdictions students may file a cause of action against school officials on the theory that the use of corporal punishment violates their constitutionally protected right to substantive due process, the standards are not uniform and impose an unnecessarily high threshold.

The current state of our law fails to effectively protect the constitutional rights of some of the most vulnerable members of society. As long as the Supreme Court refuses to explicitly accept substantive due process challenges to school-based corporal punishment, students who are subjected to violence at the hands of their teachers face an uphill battle in their attempts to seek constitutional redress. The historical justifications for corporal punishment are no longer applicable, and the moral values of our society have shifted. In a number of states where corporal punishment is lawful and practiced regularly, students suffer physical and psychological consequences when educators and school officials abuse the scope of their authority. These students must navigate the amorphous shock the conscience standard applied by most courts and often are denied constitutional protection. While education has historically been a matter best regulated by the states, the Court has a duty to protect against intrusions into a child's liberty.

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'implicit in the concept of ordered liberty.'" (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934))).

<sup>180</sup> See discussion *supra* Section II.A.