CORPORAL PUNISHMENT IN THE PUBLIC SCHOOLS: AN ANALYSIS OF FEDERAL CONSTITUTIONAL CLAIMS

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I
INTRODUCTION

Victims of corporal punishment in public schools have challenged the infliction of their resulting injuries under a variety of constitutional provisions, specifically, the Eighth Amendment, the procedural-due-process clause of the Fourteenth Amendment, the substantive-due-process clause of the Fourteenth Amendment, and the Fourth Amendment. In *Ingraham v. Wright*,[1] the Supreme Court foreclosed the Eighth Amendment argument and minimized the possibilities for a successful procedural-due-process claim.[2] Yet because the Court denied certiorari of the *Ingraham* plaintiffs' substantive-due-process claim,[3] later litigants turned to substantive due process for protection against excessive corporal punishment. With no guidance from the Supreme Court, the majority of the circuit courts[4] confronted with these claims determined that excessive corporal punishment *can* violate substantive due process, but only if the punishment meets an exceptionally high standard.

Recently, in several cases challenging excessive corporal punishment, the Seventh and Ninth Circuits strayed from the substantive-due-process framework and evaluated the school officials' conduct under the Fourth Amendment's "reasonableness" standard, which was developed and applied to the public-school setting in *New Jersey v. T.L.O.*[5] This note will document the deficiencies of a substantive-due-process challenge to excessive corporal

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1. 430 U.S. 651 (1977).

2. *Id.* at 683.

3. *Id.* at 679 n.47.

4. Only the First and D.C. Circuits have yet to settle the issue of if and at what point excessive corporal punishment is constitutionally impermissible.

5. 469 U.S. 325 (1985).

punishment and offer support for the emerging Fourth Amendment analysis that may provide litigants with an infrequently received remedy.

II
FEDERAL CONSTITUTIONAL CLAIMS

A. *Ingraham*, the Eighth Amendment, and Procedural Due Process

In 1971, James Ingraham and Roosevelt Andrews, two Florida junior-high-school students, challenged the use of disciplinary corporal punishment in the Dade County public schools.[6] Ingraham was subjected to more than twenty "licks" with a paddle after he was slow to respond to a teacher's instructions.[7] The beating was so severe that he suffered a hematoma and missed several days of school after the incident. Andrews was paddled several times, and, after being struck on his arms, he was unable to use one of his arms for a full week.

Their case challenging corporal punishment, *Ingraham v. Wright*,[8] was ultimately heard by the United States Supreme Court.[9] Noting that the instances of paddling were "exceptionally harsh,"[10] the Court nevertheless denied the students' constitutional claims.[11] In response to the plaintiffs' Eighth Amendment challenge,[12] the Court reviewed the Amendment's historical roots and determined that its protection was limited to those convicted of crimes; thus, school children paddled as a means of maintaining discipline could not avail themselves of Eighth Amendment protection.[13] Additionally, the Court held that the procedural safeguards available under Florida common law[14] "considered in light of the openness of the school environment" were sufficient to afford procedural due process.[15] Further procedural safeguards, such as prior notice or a hearing, were not required by the due-process clause because "[s]uch a universal constitutional requirement would significantly burden the

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6. *Ingraham*, 430 U.S. at 653.

7. *Id.* at 657.

8. 430 U.S. 651 (1977).

9. *Id.* at 683. The plaintiffs challenged the corporal punishment on Eighth Amendment, procedural-due-process, and substantive-due-process grounds. See discussion *infra* II.B.1 for a brief summary of the distinction between a procedural-due-process challenge and a substantive-due-process challenge.

10. *Id.* at 657.

11. *Id.* at 683.

12. The Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor *cruel and unusual punishments inflicted*." U.S. CONST. amend. VIII (emphasis added).

13. *Ingraham*, 430 U.S. at 664.

14. Under Florida law, the teacher and the principal must first decide "whether corporal punishment is reasonably necessary under the circumstances in order to discipline a child who has misbehaved." However, the teacher and the principal "must exercise prudence and restraint" because if the punishment inflicted "is later found to have been excessive—not reasonably believed at the time to be necessary for the child's discipline or training—the school authorities inflicting it may be held liable," both civilly and criminally. *Id.* at 676–77.

15. *Id.* at 678, 682.

use of corporal punishment as a disciplinary measure."[16] Finally, the Court denied certiorari on the issue of "whether or under what circumstances" such punishment of a public-school child could give rise to a substantive-due-process claim.[17] Consequently, the circuit courts were left to resolve this question.

B. Substantive Due Process

1. Substantive Due Process and Section 1983

The Due-Process Clause of the Fifth and Fourteenth Amendments provides that neither the United States nor state governments shall deprive any person of "life, liberty, or property, without due process of law."[18] This clause imposes two separate limits on the government: procedural due process and substantive due process. Procedural due process "refers to the procedures that the government must follow before it deprives a person of life, liberty, or property."[19] One example of a procedural-due-process issue concerns the type of notice that is required before a government takes a particular action.[20] In contrast, the substantive component of the due-process clause "asks whether the government has an adequate reason for taking away a person's life, liberty, or property."[21] Thus, substantive due process protects the individual against arbitrary government action.[22] While procedural due process and substantive due process implicate different concerns and provide different protections, both are triggered when a denial of life, liberty, or property is at issue.[23] In cases involving corporal punishment in public schools, the child's liberty interest is implicated.[24]

A plaintiff bringing a substantive-due-process challenge must proceed under Section 1983 of Title 42 of the United States Code. Section 1983 provides,

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[25]

Section 1983 provides a federal forum to individuals seeking to remedy violations of the federal Constitution and laws committed under "the claimed

16. *Id.* at 680.

17. *Id.* at 679 n.47.

18. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

19. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 545 (2006).

20. *Id.* Thus, in *Ingraham*, the Court concluded that prior to the imposition of corporal punishment in the Dade County schools, notice was not required because the "practice [wa]s authorized and limited by the common law." *Ingraham*, 430 U.S. at 682; *see* discussion *supra* II.A.

21. CHEMERINSKY, *supra* note 19, at 546.

22. County of Sacramento v. Lewis, 523 U.S. 833, 845 (1998).

23. CHEMERINSKY, *supra* note 19, at 547.

24. *Ingraham*, 430 U.S. at 672.

25. 42 U.S.C. § 1983 (2008).

authority of state law."[26] In enacting § 1983, Congress designated the federal courts as the primary guarantors of civil rights and substantially altered the relationship between the states and the nation.[27] Accordingly, Congress intended to provide a federal remedy for civil-rights violations regardless of the state remedies available. "It is no answer that the State has a law which if enforced would give relief. The federal remedy is *supplementary* to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."[28] Thus, overlapping state remedies are generally irrelevant to the availability of § 1983. A plaintiff might, for example, bring a § 1983 action for an unlawful search and seizure, even though the search and seizure violated the state's constitution or statutes, and even though common-law remedies might be available for trespass and conversion.[29]

2. The "Shock-the-Conscience" Standard

In 1980, in *Hall v. Tawney*,[30] the Fourth Circuit became the first circuit court to recognize a claim under 42 U.S.C. § 1983 for a substantive-due-process violation when a school official abuses his or her official power through the unauthorized use of force on a public-school child.[31] Adopting the standard used in police-brutality cases, the Fourth Circuit decided that

> the substantive due process inquiry in school corporal punishment cases must 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*.[32]

Hall became an influential case in the corporal-punishment context. To date, the Second,[33] Third,[34] Fourth,[35] Sixth,[36] Eighth,[37] Tenth,[38] and Eleventh[39] Circuits evaluate public-school corporal-punishment cases under the substantive-due-process framework and have adopted *Hall's* shock-the-conscience standard, or something very similar to it.[40] The First and D.C. Circuits have yet to resolve the issue, and the Seventh and Ninth Circuits

26. Mitchum v. Foster, 407 U.S. 225, 239 (1972).
27. *Id*. at 242.
28. Monroe v. Pape, 365 U.S. 167, 183 (1961) (emphasis added), *overruled in part not relevant here by* Monell v. New York City Dep't of Soc. Servs. 436 U.S. 658, 664–89 (1978).
29. Zinermon v. Burch, 494 U.S. 113, 124–35 (1990) (quoting *Monroe*, 365 U.S. at 183).
30. 621 F.2d 607 (4th Cir. 1980).
31. *Id.* at 613.
32. *Id.* (emphasis added).
33. Smith *ex rel.* Smith v. Half Hollow Hills Cent. Sch. Dist., 298 F.3d 168, 170, 173 (2d Cir. 2002).
34. Metzger v. Osbeck, 841 F.2d 518, 520 (3d Cir. 1988).
35. *Hall*, 621 F.2d at 611.
36. Saylor v. Bd. of Educ., 118 F.3d 507, 514 (6th Cir. 1997).
37. Wise v. Pea Ridge Sch. Dist., 855 F.2d 560, 564 (8th Cir. 1988).
38. Garcia *ex rel.* Garcia v. Miera, 817 F.2d 650, 653–54 (10th Cir. 1987).
39. Neal *ex rel.* Neal v. Fulton County Bd. of Educ., 229 F.3d 1069, 1075 (11th Cir. 2000).
40. Brown *ex rel.* Brown v. Ramsey, 121 F. Supp. 2d 911, 918 (E.D. Va. 2000).

recently shifted from a substantive-due-process analysis to assessment under the Fourth Amendment.[41] The Fifth Circuit remains isolated in its position that excessive corporal punishment does not violate substantive due process as long as adequate state remedies are available.[42] The Fifth Circuit has consistently held that "injuries sustained incidental[] to corporal punishment—irrespective of their severity or the sensitivity of the student—do not implicate the due-process clause if the forum state affords adequate post-punishment civil or criminal remedies for the student to vindicate legal transgressions."[43] The rationale for this rule is that state criminal and tort remedies provide "all the process constitutionally due."[44]

a. Cases failing to shock the conscience. Several examples illustrate the application of the shock-the-conscience standard in the various circuit courts. When a fifth grader sustained "severe bruises on the buttocks and an impaired gait" after being struck five times with a wooden paddle for humming in the bathroom, the Sixth Circuit concluded that although the teacher's conduct was "unwise," it was not "shocking to the conscience."[45] Similarly, a nine-year-old girl who was left "severely bruised" after being struck seven times within thirty minutes, did not rise to the level of "shocking the conscience," even though both a doctor and a policewoman concluded that the blows she received were excessive.[46] Nor was a teacher's slapping a fourteen-year-old across the face "shocking to the conscience" even if the slap was "made for no legitimate purpose."[47] A teacher's choking of an eighth-grade student "until [he] couldn't breath[e]," though "inappropriate" and "untraditional," did not rise to the level of a constitutional violation because "the extent of the student's injury was no worse than that suffered under more traditional forms of corporal punishment like paddling . . . ."[48] Another court characterized a teacher's punching an eighth-grade student in the chest to be "overzealous," yet the conduct did not amount to "shocking to the conscience."[49] Nor did a teacher's jabbing a straight pin into a child's arm, requiring the child to seek medical attention, "even suggest a substantive due process claim."[50]

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41. *See infra* II.C.

42. Moore v. Willis Indep. Sch. Dist., 233 F.3d 871, 879–80 (5th Cir. 2000) (Wiener, J., concurring); Cunningham v. Beavers, 858 F.2d 269, 272 (5th Cir. 1988).

43. Pruitt v. Waco Indep. Sch. Dist., 136 F.3d 1329, 1329 (5th Cir. 1998).

44. Fee v. Herndon, 900 F.2d 804, 808 (5th Cir. 1990). Notably, the Fifth Circuit has not addressed the adequacy of the alternative state remedies available when denying children's excessive-corporal-punishment claims. Many of the defendant school districts and school officials may be immune from suit, likely leaving injured plaintiffs with no remedy at all. *See Moore*, 233 F.3d at 878 (Wiener, J., concurring).

45. Archey v. Hyche, Nos. 90-5631, 90-5863, 1991 WL 100586, at *1, *3 (6th Cir. June 11, 1991).

46. Brown *ex rel.* Brown v. Johnson, 710 F. Supp. 183, 186–87 (E.D. Ky. 1989).

47. Lillard v. Shelby County Bd. of Educ., 76 F.3d 716, 719, 726 (6th Cir. 1996).

48. Peterson v. Baker, 504 F.3d 1331, 1334–35, 1337–38 (11th Cir. 2007).

49. Kurilla v. Callahan, 68 F. Supp. 2d 556, 557, 564 (M.D. Pa. 1999).

50. Brooks v. Sch. Bd. of Richmond, 569 F. Supp. 1534, 1535, 1536 (E.D. Va. 1983).

b. Cases that shock the conscience. The degree of corporal punishment required to successfully shock the conscience is considerably more brutal. In *Hall*, the Fourth Circuit refused to dismiss a child's substantive-due-process claim when her complaint alleged that "without apparent provocation" the teacher struck her with a "homemade paddle, made of hard[,] thick rubber and about five inches in width . . . across her left hip and thigh."[51] The teacher then "violently shoved" her against a desk where she was "repeatedly and violently" paddled.[52] As a result of this assault, the child was taken to the emergency room and admitted into the hospital for ten days to treat the "traumatic injury to the soft tissue of the left hip and thigh, trauma to the skin and soft tissue of the left thigh, and trauma to the soft tissue with ecchyniosis of the left buttock."[53] She also received treatment by specialists for "possible permanent injuries to her lower back and spine." She "suffered and [] continue[d] to suffer severe pain and discomfort."[54]

Similarly, in *Webb v. McCullough*, the Sixth Circuit found that summary judgment for the defendant principal was "inappropriate" when the principal, after discovering that the plaintiff and her three roommates had violated the school rules on a trip, became "quite angry" at the plaintiff's refusal to let him into a locked bathroom.[55] The principal tried to "jimmy the bathroom door lock," but the plaintiff refused to open the door.[56] He then "slammed the door three or four times with his shoulder."[57] When the door finally sprang open, it knocked the plaintiff against the wall. Then, the principal "thrust the door open again, and it struck [plaintiff] again, throwing her to the floor."[58] The principal "grabbed [plaintiff] from the floor, threw her against the wall, and slapped her."[59] In addressing the plaintiff's substantive-due-process claim, the Sixth Circuit concluded that a trier of fact could find that "the alleged blows were a brutal and inhumane abuse of [the principal's] official power, literally shocking to the conscience."[60]

In *Garcia ex rel. Garcia v. Miera*, the Tenth Circuit likewise denied the defendants' summary judgment motion after a nine-year-old girl suffered two beatings at the hands of her school principal and a teacher.[61] The teacher held her "upside down by her ankles while [the principal] struck [her] with a wooden paddle" five times on the front of her legs.[62] When she returned to class, her

51. Hall v. Tawney, 621 F.2d 607, 614 (4th Cir. 1980).
52. *Id.*
53. *Id.*
54. *Id.*
55. 828 F.2d 1151, 1153–54, 1159 (6th Cir. 1987).
56. *Id.* at 1154.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 1159.
61. 817 F.2d 650, 652–53 (10th Cir. 1987).
62. *Id.* at 653.

teacher noticed blood soaking through her clothes and discovered a "welt" and a "two-inch cut" on her leg that would leave "a permanent scar."[63] The next school year, the principal again struck the child with the paddle. After receiving two blows, the principal found it necessary to summon an administrative associate who "pushed [the child] toward a chair over which she was to bend and receive three additional blows." A physician who treated the child commented, "I've done hundreds of physicals of children who have had spankings . . . and I have not seen bruises on the buttocks as [plaintiff] had, from routine spankings . . . [T]hey were more extensive, deeper bruises . . . ."[64] A nurse who examined her likewise remarked that she "would have called [the police department's] Protective Services" had a child received those injuries at home.[65]

C. The Fourth Amendment

In 1989, the Supreme Court directed courts to analyze excessive-force claims under the Fourth Amendment's "reasonableness" standard instead of under the Fourteenth Amendment's substantive-due-process approach.[66] "Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."[67] In *Wallace ex rel. Wallace v. Batavia School District 101*, the Seventh Circuit was the first to apply the Fourth Amendment's protection to a teacher's use of force against a student.[68]

In *Wallace*, a teacher, while trying to break up a fight between Wallace and another student, grabbed Wallace by the wrist to "speed her exit [from the classroom]," and when Wallace "bent over the desk," the teacher "grasped her right elbow to move her out."[69] Wallace sued the teacher and the school district, alleging injury to her elbow in violation "of her Fourth Amendment right against unreasonable seizures and her Fourteenth Amendment right to substantive due process."[70]

The Seventh Circuit first noted that although the Fourth Amendment pertains primarily to the law-enforcement context, the Supreme Court in *New Jersey v. T.L.O.*[71] had applied its protection to searches of public-school students

63. *Id.*
64. *Id.*
65. *Id.* (bracketed addition in original).
66. Graham v. Connor, 490 U.S. 386, 395 (1989).
67. *Id.*
68. 68 F.3d 1010, 1016 (7th Cir. 1995).
69. *Id.* at 1011.
70. *Id.*
71. 469 U.S. 325 (1985).

by school officials, albeit under a different standard.[72] In *T.L.O.*, the Court recognized that due to the school's "substantial interest" in "maintaining discipline in the classroom and on school grounds," a search of a student's property would require a lesser degree of suspicion than appropriate in the criminal context.[73] Thus, strict adherence to the probable-cause standard is not required, and the legality of a search of a public-school student hinges on the search's reasonableness.[74]

Next, the circuit court in *Wallace* observed that although *T.L.O.* involved the Fourth Amendment's protection against unreasonable *searches*, several circuits had applied *T.L.O.*'s holding to unreasonable *seizures* of public-school students.[75] Thus, *T.L.O.*'s reasoning was instructive—the Fourth Amendment seizure of a public-school student should be examined under the reasonableness standard "evaluated in the context of the school environment, where restricting the liberty of students is a *sine qua non* of the educational process."[76] In application, the reasonableness test is objective, determining "whether under the circumstances presented and known the seizure was objectively unreasonable."[77] The court explained that the reasonableness standard provides an acceptable middle ground, enabling teachers to deal with disruptive students while protecting students against the potentially excessive use of state power.[78]

In applying this standard to the facts of *Wallace*, the Seventh Circuit held that the plaintiff did not suffer a constitutional deprivation of her liberty interest.[79] The teacher's grabbing Wallace's elbow and wrist in order to expedite her departure from the classroom during a fight was "hardly . . . unreasonable."[80]

Turning to Wallace's claim that her Fourteenth Amendment right to substantive due process was violated by use of excessive corporal punishment, the Seventh Circuit held that the "Fourteenth Amendment's Due Process Clause [does not] afford[] Wallace any greater protection than the Fourth Amendment from unwarranted discipline while in school."[81] Excessive corporal punishment may be assessed under the Fourth Amendment "because a student is at least as much *seized* when a school official administers corporal

72. *Wallace*, 68 F.3d at 1012.

73. *T.L.O.*, 469 U.S. at 339–40.

74. *Id.* at 340–41 (holding that Fourth Amendment restrictions placed on searches by public authorities were unsuitable for searches by school officials and that, consequently, school officials need not obtain a warrant before conducting a search of a student).

75. *Wallace*, 68 F.3d at 1012 (citing Edwards *ex rel.* Edwards v. Rees, 883 F.2d 882, 884 (10th Cir. 1989); Hassan *ex rel.* Hassan v. Lubbock Indep. Sch. Dist., 55 F.3d 1075 (5th Cir. 1995)).

76. *Id.* at 1013–14.

77. *Id.* at 1014–15.

78. *Id.* at 1014.

79. *Id.* at 1015.

80. *Id.*

81. *Id*.

punishment as Wallace was here."[82] Thus both Wallace's Fourth and Fourteenth Amendment claims were rejected.

The Ninth Circuit has likewise applied the Fourth Amendment's reasonableness standard to a teacher's use of force against a public-school child.[83] In *Preschooler II vs. Clark County School Board of Trustees*, a special education teacher grabbed the four-year-old disabled plaintiff's hands and forced him to slap himself repeatedly in the head and face and slammed him into a chair.[84] The Ninth Circuit found the teacher's conduct "unreasonable in light of the child's age and disability."[85] Furthermore, the court emphasized that he "posed no danger to anyone nor was he disruptive in the classroom."[86] Thus, the teacher's conduct violated his Fourth Amendment right to be free from excessive force by public-school teachers.

In 2005, a Tennessee district court also concluded that the Fourth Amendment could apply to a "school teacher's use of force or other displays of disciplinary authority to 'seize' her students."[87] The plaintiff, who was assigned to the special-education classroom, alleged that her teacher had hit her with "flyswatters, yardsticks, and hands," had pulled her hair, and had required her to "drink water from a toilet."[88] The court concluded that the allegations could "justify a finding that [the teacher] used her official authority to intentionally acquire physical and disciplinary control over [the plaintiff] in a manner that was objectively unreasonable" under the Fourth Amendment.[89]

III

ANALYSIS

Because *Ingraham* foreclosed an Eighth Amendment challenge to excessive corporal punishment and severely limited the possibility of a successful procedural-due-process challenge, litigants turned to substantive due process for protection. However, the adoption and frequent misapplication of the rigorous shock-the-conscience standard, combined with judicial hostility toward § 1983 and criticism of the "amorphous"[90] nature of the substantive-due-process clause, left many deserving children without a constitutional remedy. Yet the recent application of the Fourth Amendment to excessive-corporal-punishment challenges may provide victims with a reliable constitutional remedy.

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82. *Id.* at 1016 (emphasis added).

83. Preschooler II v. Clark County Sch. Bd. of Trs., 479 F.3d 1175, 1180 (9th Cir. 2007); *see also* Doe *ex rel.* Doe v. State of Haw. Dep't of Educ., 334 F.3d 906, 908–09 (9th Cir. 2003).

84. 479 F.3d at 1178.

85. *Id.* at 1180.

86. *Id.*

87. Rhodes *ex rel.* Rhodes v. Wallace, No. 1:05 CV 1020, 2005 WL 2114080, at *6 (W.D. Tenn. Aug. 26, 2005).

88. *Id.* at *1.

89. *Id.* at *6.

90. Fagan v. City of Vineland, 22 F.3d 1296, 1308 (3d Cir. 1994).

A. Prisoners and Children: Unlikely Counterparts

Subsequent to the Fourth Circuit's *Hall* decision, most of the circuits confronted with substantive-due-process challenges to excessive-corporal-punishment cases adopted *Hall*'s shock-the-conscience standard—that is, excessive corporal punishment violates substantive due process only when the official's conduct shocks the conscience. The Fourth Circuit's unexplained choice to analogize corporal punishment in public schools to such incidents as the forcible use of a stomach pump,[91] an officer's "reckless" shooting of a suspect,[92] and the unprovoked beating of a detainee by a prison guard[93] was particularly surprising since the Supreme Court, in refusing to extend Eighth Amendment protection to the public-school context in *Ingraham*, had gone to great lengths to emphasize the differences between prisoners and school children.[94] The Court had explained, "[t]he prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration."[95]

Since the *Ingraham* decision, the Supreme Court has continued to stress the substantial differences between prisoners and public-school students. In *New Jersey v. T.L.O.*,[96] the Court stated that they were "not yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment."[97] After recognizing that the Fourth Amendment principles developed in law-enforcement cases were unworkable in the school arena, the Court created a new reasonableness standard for searches of public-school students by school officials.[98]

Other courts, recognizing the drastic disparity between public-school children and prisoners, have similarly refused to apply the same standard to such different populations. In *Wallace ex rel. Wallace v. Batavia School District 101*,[99] the Seventh Circuit noted the difficulties in applying the Fourth Amendment framework developed in the law-enforcement context to the public-school environment because of the stark differences between the two fields.[100]

> Deprivations of liberty in schools serve the end of compulsory education and do not inherently pose constitutional problems.
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> This premise of a general constitutionally permissible liberty restriction is, of course, not the case in the law enforcement context. Seizures of individuals by police are

91. Rochin v. California, 342 U.S. 165, 206 (1952).
92. Jenkins v. Averett, 424 F.2d 1228, 1231–32 (4th Cir. 1970).
93. Johnson v. Glick, 481 F.2d 1028, 1029–30 (2d Cir. 1973).
94. Ingraham v. Wright, 430 U.S. 651, 669–70 (1977).
95. *Id.* at 669.
96. 469 U.S. 325 (1985).
97. *Id.* at 338–39.
98. *Id.* at 339–42; *see* discussion *supra* II.C.
99. 68 F.3d 1010 (7th Cir. 1995).
100. *Id.* at 1014.

> premised on society's need to apprehend and punish violators of the law. As such, they inherently threaten individuals' liberty to live free of the criminal justice process. There is no analogous liberty for students to live free of the educational process.
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> . . .
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> There is little parallel . . . between the school and law enforcement situations when there is a seizure of the person. The basic purpose for the deprivation of a student's personal liberty by a teacher is education, while the basic purpose for the deprivation of liberty of a criminal suspect by a police officer is investigation or apprehension. The application of the Fourth Amendment is necessarily different in these situations.[101]

Thus, the circuit courts in both *T.L.O.* and *Wallace* recognized that the disparity between public education and law enforcement was too great to justify blind application of the same analytical framework. Although *Hall* predates both *T.L.O.* and *Wallace*, acknowledging the differences between public-school children and prisoners in constitutional analysis is hardly novel. But the Fourth Circuit's adoption of the strict police-brutality standard for substantive-due-process challenges to disciplinary corporal punishment guaranteed that very few of those claims would succeed.

B. Hostility Surrounding § 1983 and Substantive Due Process

The considerable inconsistencies among courts evaluating § 1983 excessive-corporal-punishment claims may be a product of the unwillingness of some judges to "constitutionalize" these seemingly state-law torts. Section 1983 is frequently criticized as a vehicle for bringing frivolous claims, and, consequently, it is cited as a source of the mounting pressure on the federal docket.[102]

Additionally, federal judges may feel uneasy "about the prospect of federal courts sitting in judgment of state officials or implementing decrees compelling state officials to take or refrain from certain actions."[103] This concern has been expressed repeatedly by judges unwilling to pass judgment on the actions of school officials.[104]

A third popular criticism of § 1983 is what it implies for federalism values—specifically, the erosion of state lawmaking authority.[105] Because a § 1983 action

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101. *Id.*

102. Michael G. Collins, *'Economic Rights,' Implied Constitutional Actions, and the Scope of Section 1983*, 77 GEO. L.J. 1493, 1493 (1989); Henry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 2 (1985).

103. Susan N. Herman, *Beyond Parity: Section 1983 and the State Courts*, 54 BROOK. L. REV. 1057, 1073 (1989).

104. *See*, *e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) ("[E]ducation . . . is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges."); Fee v. Herndon, 900 F.2d 804, 809 (5th Cir. 1990) (avoiding "having student discipline, a matter of public policy, shaped by the individual predilections of federal jurists rather than by state lawmakers and local officials").

105. *See, e.g.*, Blackmun, *supra* note 102, at 2 (noting increasing condemnation of § 1983 actions as "inconsistent with the thesis that federal courts not interfere with state affairs unless absolutely necessary"); Herman, *supra* note 103, at 1073 ("[F]ederal court adjudication of section 1983 claims is frequently seen as potentially or actually intrusive upon the states' power."); Christina Whitman,

is frequently redundant of a state tort suit, dismissing the federal cause of action may be an attractive option for a federal court and a signal to future litigants to pursue these claims under state law (hence, presumably in state court). This is seemingly the approach the Fifth Circuit has adopted.[106]

Furthermore, substantive due process is often denounced as being "amorphous and imprecise,"[107] composed of vague standards that permit irresponsible decisionmaking.[108] Likewise, the shock-the-conscience standard is notoriously ambiguous and difficult to apply.[109] "Because [the shock-the-conscience standard] is so subjective, its application will change as one federal judge after another struggles to apply it."[110] As described by Justice Douglas in his concurring opinion in *Rochin v. California*,[111] "the rule turn[s] not on the Constitution but on the idiosyncrasies of the judges who sit here."[112]

Consequently, criticism surrounding § 1983, together with the vague notion of substantive due process and the haphazard application of the shock-the-conscience standard, shrink the success rate of substantive-due-process challenges to excessive corporal punishment.[113]

C. The Misapplication of the Shock-the-Conscience Standard

1. An Arbitrary Comparative Exercise

Although *Hall*'s shock-the-conscience standard calls for balancing the severity of the injury with the need presented, courts tend to focus only on the severity of the plaintiff's injury. Thus, courts are simply comparing the seriousness of the beatings with those suffered by previous plaintiffs. Due to the "unduly restrictive standard"[114] adopted by the circuits, this comparative exercise results in successful constitutional claims for only the most viciously attacked children.

Notably, several courts have used the punishment inflicted in *Ingraham*, in which one child was held over a table and struck more than twenty times with a two-foot long wooden paddle, as a benchmark in determining whether certain punitive conduct is shocking to the conscience.[115] Doing so is clearly incorrect,

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Constitutional Torts, 79 MICH. L. REV. 5, 30 (1980) (arguing that actions under § 1983 actions "results inevitably in the displacement of state lawmaking authority by the federal government").

106. *See* Fee v. Herndon, 900 F.2d 804, 808 (5th Cir. 1990).

107. Fagan v. City of Vineland, 22 F.3d 1296, 1308 (3d Cir. 1994).

108. Collins v. Harker Heights, 503 U.S. 115, 125 (1992).

109. Radecki v. Barela, 945 F. Supp. 226, 230 (D.N.M. 1996).

110. *Id.*

111. 342 U.S. 165 (1952).

112. *Id.* at 179 (Douglas, J. concurring).

113. *See* cases cited *supra* II.B.2.a.

114. *See* Rosalie Berger Levinson, *Reining in Abuses of Executive Power through Substantive Due Process*, 60 FLA. L. REV. 519, 575 (2008).

115. Brooks v. Sch. Bd. of Richmond, 569 F. Supp. 1534, 1536 (E.D. Va. 1983) ("[T]wenty licks with a two-foot-long paddle causing a severe hematoma and loss of the use of an arm for a week did not shock the conscience of the United States Supreme Court in *Ingraham*."); *see also* Brown *ex rel.* Brown

for in *Ingraham* the Supreme Court addressed neither a substantive-due-process standard nor whether the punishment was shocking to the conscience.[116] The Fifth Circuit in *Ingraham*—without employing a shock-the-conscience standard—had concluded that the plaintiffs were not deprived of their substantive-due-process rights,[117] and the Supreme Court denied certiorari on that issue.[118] So one cannot conclude that the Court agreed with the Fifth Circuit's analysis.[119] Indeed, the Sixth Circuit has recognized that a district court comparing corporal-punishment facts to those in *Ingraham* erred in doing so:

> [T]he court [in *Brown v. Johnson*] repeatedly suggested that in *Ingraham v. Wright* "the Supreme Court found that a severe beating [20 licks with a paddle] and the resulting hematoma [which required the plaintiff to miss 11 days of school] did not shock its conscience." [T]he *Brown* court's reading of *Ingraham v. Wright* seems incorrect; the Supreme Court did not address the "conscience shocking" question in *Ingraham*.[120]

Although comparison to the facts of *Ingraham* may be inappropriate, courts nevertheless continue to use the facts of the few cases that *have* managed to "shock the conscience" as a benchmark for measuring the brutality of the punishment in a case before them. Three cases that often serve as the standard to which courts judge the seriousness of a plaintiff's injury, *Hall v. Tawney*,[121] *Webb v. McCullough*,[122] and *Garcia ex rel. Garcia v. Miera*,[123] are examples of the level of egregiousness required to sufficiently shock a court's conscience.[124]

Using the extreme cases of *Hall*, *Webb*, and *Garcia* as benchmarks for when a school official's conduct shocks the conscience leaves children suffering severe injury at the hands of overzealous school officials without a cognizable substantive-due-process claim because they were not treated "as brutally."[125] In *Darden ex rel. Darden v. Watkins*, the plaintiff's fourth-grade homeroom teacher paddled him for failing to turn in a homework assignment.[126] When the child told the teacher he could not find his homework, the teacher brought him

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v. Johnson, 710 F. Supp. 183, 186 (E.D. Ky. 1989) (characterizing plaintiff's injury as "much milder" than the "severe beating" that did not shock the conscience in *Ingraham*); Honaker v. Beverage, No. 87-13, 1989 WL 517, at *11 (E.D. Ky. Jan. 4, 1989) ("In *Ingraham*, the Supreme Court found that a severe beating and the resulting hematoma did not shock its conscience. In this case, [the teacher's] conduct is much milder.").

116. Ingraham v. Wright, 430 U.S. 651, 689 n.5 (1977) (White, J., dissenting).

117. *See* Ingraham v. Wright, 525 F.2d 909, 917 (5th Cir. 1976), *aff'd*, 430 U.S. 651 (1977).

118. Ingraham v. Wright, 430 U.S. at 689 n.5 (White, J., dissenting).

119. NLRB v. Lannom Mfg. Co., 243 F.2d 304, 307 (6th Cir. 1957) ("Having in mind the oft repeated admonition that denial of certiorari is not to be considered as an affirmance of the ruling on the merits . . .").

120. Saylor v. Bd. of Educ. 118 F.3d 507, 513 n.9 (6th Cir. 1997) (quoting Brown v. Johnson, 710 F. Supp. 183, 186 (E.D. Ky. 1989)) (internal citation omitted) (bracketed addition in original).

121. 621 F.2d 607 (4th Cir. 1980).

122. 828 F.2d 1151 (6th Cir. 1987).

123. 817 F.2d 650 (10th Cir. 1987).

124. *See* discussion *supra* II.B.2.b.

125. Darden *ex rel.* Darden v. Watkins, No. 87-5331, 1988 WL 40083, at *5 (6th Cir. Apr. 28, 1988).

126. *Id.* at *1–2.

up to the front of the classroom, bent him over his own desk, and struck him.[127] He cried and returned to his desk. The child testified that the teacher then brought him up to the front of the classroom again and "gave me another lick and he hit me so hard he hurt my leg and I limped and bumped my back and I begged him not to hit me anymore, and he hit me again."[128] Later that evening, the child's mother discovered the bruises and took him to the emergency room where the physician observed "a three-to-four-inch area of reddish-blue discoloration over the fleshy part of plaintiff's left buttock."[129] In holding that the district court properly granted the defendants' motion for summary judgment on the substantive-due-process issue, the Sixth Circuit explained that "the events of the present case are easily distinguishable from both *Hall* and *Webb* by comparison to the level of force . . . inflicted upon plaintiff."[130] Although the teacher's paddling of the child may have been "unwise," the court conceded, the child had not been "treated as brutally as were the plaintiffs in *Hall* and *Webb*."[131]

Similarly, a Pennsylvania district court dismissed a child's substantive-due-process claim after his history teacher, whose breath smelled of alcohol, "forcefully punched" him "with a closed fist" in his upper chest for failing to turn in a homework assignment.[132] The teacher punched the child so hard "that the [other] students were able to hear the impact [of the blow] from their seats."[133] The court reasoned that the use of force in *Webb* had been "far more severe, and sustained for a longer time, than in the instant case."[134]

Furthermore, a Kentucky district court dismissed a middle-school special-education student's substantive-due-process claim after she was struck three times with a twenty-inch long paddle.[135] The twelve-year-old, who had an I.Q. of forty-two, was "emotionally out of control" when the principal administered the first paddling.[136] After the blow, she ran across the room, and when the principal attempted to strike her again, she covered her buttocks with her hands. Two teachers took each one of her hands and held them on the desk as the principal paddled her two more times. Later that day, the child complained to her father that her backside hurt and the father observed a "blood red [welt] across both cheeks of her butt."[137] Her father took her to the Kentucky Cabinet for Health and Family Services; an investigator took pictures of her injuries and concluded that abuse had occurred. A criminal charge against the principal was presented

127. *Id.* at *2.
128. *Id.*
129. *Id.*
130. *Id.* at *5.
131. *Id.*
132. Thomas v. Bd. of Educ. 467 F. Supp. 2d 483, 487 (W.D. Pa. 2006).
133. *Id.*
134. *Id.* at 490.
135. C.A. *ex rel.* G.A. v. Morgan County Bd. of Educ., 577 F. Supp. 2d 886, 888 (E.D. Ky. 2008).
136. *Id.*
137. *Id.* at 889.

to the grand jury. Still, in the child's suit under § 1983, the court held that the principal's conduct did not shock the conscience and distinguished the allegations in *Garcia* and *Hall* as "significantly more serious than those in this case."[138]

By simply comparing a present plaintiff's injury with those suffered by the plaintiffs in the extreme cases of *Hall*, *Webb*, and *Garcia*, courts are arbitrarily denying constitutional protection to many deserving children.

2. Misapplication of the *Hall* Standard

Hall's shock-the-conscience standard requires balancing the severity of the inflicted injury with the need presented.[139] By focusing merely on the seriousness of the harm inflicted, courts are completely ignoring the second part of the equation-analysis of the circumstances prompting the punishment.

For example, in *Archey v. Hyche*, the Sixth Circuit denied the plaintiff's substantive-due-process claim as not "shocking to the conscience" because the plaintiff "received [only] five 'licks'" and the teacher was "working in a school context with a legitimate purpose for administering the paddlings."[140] The court concluded simply that the plaintiff's allegation did not "describe excessive force at the level of brutality required"[141] without having considered whether it "was so disproportionate to the need presented."[142] The Sixth Circuit overlooked the fact that the supposed offense that triggered such punishment was merely "humming in the boys' bathroom."[143] Considering the nature of the plaintiff's offense in relation to his punishment, it is only reasonable to conclude that the need for punishment presented by a fifth-grade child humming in the bathroom is minimal. If the need for punishment presented by the offense is negligible, nearly any degree of corporal punishment will be "disproportionate to the need presented."[144] If the Sixth Circuit had properly employed the *Hall* standard, it would have concluded that administering five "licks" with a wooden paddle[145] was "so disproportionate to the need [for punishment] presented"[146] by a child humming in the bathroom[147] that it would have "amounted to a brutal and inhumane abuse of official power literally shocking to the conscience."[148]

Other courts employing the shock-the-conscience standard have similarly failed to assign proper weight to the need-for-application-of-force factor, some

138. *Id.* at 892–93.
139. Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980).
140. Nos. 90-5631, 90-5863, 1991 WL 100586, at *3 (6th Cir. June 11, 1991).
141. *Id.*
142. *Hall*, 621 F.2d at 613.
143. *Archey*, 1991 WL 100586, at *1.
144. *Hall*, 621 F.2d at 613.
145. *Archey*, 1991 WL 100586, at *1, *3.
146. *Hall*, 621 F.2d at 613.
147. *Archey*, 1991 WL 100586, at *1.
148. *Hall*, 621 F.2d at 613.

even opining that hitting or slapping a child "for no legitimate purpose"[149] does not violate the child's constitutional rights. By ignoring the "need presented" prong of the *Hall* test, a court examining a substantive-due-process claim for excessive corporal punishment is left comparing the severity of a particular plaintiff's beating with that of a previous plaintiff. A court merely assessing the level of brutality inflicted is not functioning as a court charged with evaluating a substantive-due-process claim, but is rather functioning as a trial court charged with resolving a state-law tort claim.[150]

D. A Solution in the Fourth Amendment

Because courts are misusing the shock-the-conscience standard, the Fourth Amendment's reasonableness standard may be a better fit for courts analyzing excessive-corporal-punishment cases. Both the Seventh[151] and Ninth[152] Circuits have embraced the use of the Fourth Amendment's reasonableness test in excessive-corporal-punishment cases.

The Supreme Court's Fourth Amendment jurisprudence in the public-school arena recognizes that because the school setting "requires some modification of the level of suspicion of illicit activity needed to justify a search," a standard of reasonableness is more appropriate than the typical probable-cause standard available in other contexts.[153] *T.L.O.* counsels that in order for a search to be acceptable, it must be "reasonably related in scope to the circumstances which justified the interference in the first place":[154] the scope of the search is acceptable when it is "not excessively intrusive in light of the age and sex of the student and *the nature of the infraction*."[155]

In a footnote to *T.L.O.*, the Supreme Court suggested that its reference to "the nature of the infraction" did not suggest that judges should evaluate "the relative importance of various school rules."[156] Yet in the Supreme Court's most recent public-school Fourth Amendment case, *Safford Unified School District No. 1 v. Redding*,[157] the Court went to great lengths to assess the gravity of the

149. Lillard v. Shelby County Bd. of Educ., 76 F.3d 716, 726 (6th Cir. 1996); *see also, e.g.*, Gonzales *ex rel.* Gonzales v. Passino, 222 F. Supp. 2d 1277, 1282 (D.N.M. 2002).

150. *See Archey*, 1991 WL 100586, at *3 (emphasizing that the resolution of a state tort claim "may well turn on whether 'ten licks rather than five' were excessive" but the resolution of a substantive-due-process claim is "of so different an order of magnitude that [it] simply need not start at the level of concern these distinctions imply) (quoting *Hall*, 621 F.2d at 613).

151. *See* Wallace *ex rel.* Wallace v. Batavia School Dist. 101, 68 F.3d 1010, 1015 (7th Cir. 1995) (holding that a teacher who grabbed the plaintiff's elbow and wrist in order to hasten her departure from the classroom following a fight did not unreasonably seize the plaintiff under the Fourth Amendment).

152. *See* P.B. v. Koch, 96 F.3d 1298, 1303 n.4, 1304 (9th Cir. 1996) (suggesting that students are protected from excessive force under either the Fourth Amendment or the Due Process clause).

153. New Jersey v. T.L.O., 469 U.S. 325, 340–41 (1985).

154. *Id.* at 341.

155. *Id.* at 342 (emphasis added).

156. *Id.* at 342 n.9.

157. 129 S. Ct. 2633 (2009).

plaintiff's infraction. In *Safford*, an administrative assistant and the school nurse conducted a strip-search of a thirteen-year-old girl suspected of bringing prescription and over-the-counter drugs into school.[158] The school's policy prohibited "the nonmedical use, possession, or sale of any drug on school grounds, including '[a]ny prescription or over-the-counter drug.'"[159] The assistant principal had received reports that the plaintiff was providing fellow students with prescription and over-the-counter pain-relief pills; he found several knives, lighters, a permanent marker, and a cigarette in the plaintiff's day planner.[160] When the plaintiff denied knowledge of pills confiscated from another student, the assistant principal directed an administrative assistant to take the plaintiff to the nurse's office so she could be strip-searched for pills.[161]

In declaring this strip-search unreasonable, the Court highlighted the "nature and limited threat of the specific drugs," and described the drugs as "nondangerous school contraband."[162] Furthermore, the Court declared that the facts lacked "any indication of danger to the students from the power of the [plaintiff's] drugs or their quantity."[163] If the Court is willing to discriminate between types of drugs according to their "nature" and "threat" level, as well as to distinguish between dangerous and nondangerous contraband, the Court is clearly willing to evaluate "the relative importance of various school rules."[164] Under a Fourth Amendment analysis, then, courts can assign what they consider a proper weight to the magnitude of a student's wrongdoing.

Excessive-corporal-punishment cases should be analyzed under the Fourth Amendment's reasonableness standard, in which consideration of the nature of the triggering infraction has historically been an important part of the analysis.[165] Both circuits that have used the Fourth Amendment to analyze excessive-corporal-punishment cases have properly balanced the nature and circumstances of the student's infraction with the severity of the punishment inflicted. In *Wallace*, the Seventh Circuit held that the teacher's action in grabbing the plaintiff's elbow and wrist to force her out of the classroom was reasonable because the teacher was attempting to break up a fight between the plaintiff and another student.[166] In *P.B. v. Koch*, the Ninth Circuit held a principal's conduct unreasonable because "there was no need for force" when

158. *Id.* at 2638.
159. *Id.* at 2639–40.
160. *Id.* at 2640.
161. *Id.* at 2640–41.
162. *Id.* at 2642.
163. *Id.* at 2642–43.
164. *See T.L.O.*, 469 U.S. at 342 n.9.
165. *E.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995); Gray *ex rel.* Alexander v. Bostic, 458 F.3d 1295, 1306 (11th Cir. 2006); Bell v. Marseilles Elementary Sch., 160 F. Supp. 2d 883, 889 (N.D. Ill. 2001); Kennedy v. Dexter Consol. Sch., 10 P.3d 115, 122 (D. N.M. 2000).
166. Wallace *ex rel.* Wallace v. Batavia Sch. Dist. 101, 68 F.3d 1010, 1015 (7th Cir. 1995).

he hit a fifteen-year-old student across the face and squeezed the student's neck after hearing the student utter the words "Heil Hitler."[167]

When the need for the corporal punishment imposed is properly considered, an offense implicating the safety of students or teachers presents a greater need for punishment than a nonthreatening offense. For example, under the Fourth Amendment analysis, the teacher in *Wallace* acted reasonably when he grabbed the plaintiff in order to deflate a violent situation,[168] whereas the principal in *Koch* acted unreasonably when he slapped and squeezed the plaintiff in response to a nonviolent one.[169] Similarly, in *Doe ex rel. Doe v. State of Hawaii Department of Education*, the Ninth Circuit concluded that because the eight-year-old plaintiff's "only offense" was "'horsing around' and refusing to stand still" and because there was "no indication that [the plaintiff] was fighting or that he posed a danger to other students," the teacher's conduct in taping his head to a tree for five minutes was "objectively unreasonable in violation of the Fourth Amendment."[170]

In responding to an imminent, violent threat, a school official must immediately act to resolve the conflict. The immediacy of the situation does not permit the official to carefully consider the most appropriate punishment, whereas an official responding to a nonviolent offense, for example, a child humming in the bathroom, can reflect on the appropriateness of a certain punishment. Because courts are reluctant to judge the actions of state officials,[171] taking the nature of the threat presented into account allows courts to acknowledge the gravity of an emergency encounter while protecting children from overzealous officials.

Finally, analyzing excessive-corporal-punishment cases under the Fourth Amendment will allow the Fifth Circuit to retreat from its isolated position without having to disrupt its strict rule of *stare decisis*.[172] In fact, the Fifth Circuit has already concluded that the Fourth Amendment's prohibition against unreasonable seizures protects students from improper disciplinary actions.[173] Additionally, when it was confronted with a case alleging excessive corporal punishment in violation of both the Fourth Amendment and the Fourteenth Amendment substantive-due-process clause, the court noted that because it did not find a constitutional violation under either standard, there was "no occasion to address . . . whether, under *Graham*, . . . the Fourth Amendment, rather than

167. 96 F.3d 1298, 1299–1300, 1303 n.4 (9th Cir. 1996).

168. *Wallace*, 68 F.3d at 1015.

169. *Koch*, 96 F.3d at 1299–1300, 1303 n.4.

170. 334 F.3d 906, 909–10 (9th Cir. 2003); *see also* Preschooler II v. Clark County Sch. Bd. of Trs., 479 F.3d 1175, 1177, 1180 (9th Cir. 2007) (holding that the teacher's slapping the four-year-old disabled plaintiff was unreasonable because he "*posed no danger to anyone* nor was he disruptive in the classroom") (emphasis added).

171. *See* discussion *supra* III.B.

172. *See* Moore v. Willis Indep. Sch. Dist., 233 F.3d 871, 876–77 (5th Cir. 2000) (Wiener, J., concurring).

173. *See* Hassan *ex rel.* Hassan v. Lubbock Indep. Sch. Dist., 55 F.3d 1075 (5th Cir. 1995).

the Due Process Clause, protects a student from the use of excessive force."[174] Thus, a public-school student in the Fifth Circuit who brings an excessive-force claim under the Fourth Amendment might avoid the long line of unfavorable substantive-due-process precedent in that circuit and find redress in a Fourth Amendment challenge.

Admittedly, the Fourth Amendment and excessive-corporal-punishment cases are not a perfect fit; courts so noting cite the amendment's historical application to law-enforcement cases.[175] The two circuits that have analyzed excessive-corporal-punishment cases under the Fourth Amendment disagree as to whether the Fourth Amendment will always be available to redress these injuries. The Ninth Circuit noted that there may be instances in which a teacher uses excessive force against a student without "seizing or searching" the student—rendering the Fourth Amendment inapplicable.[176] In contrast, the Seventh Circuit concluded that "[b]ecause a student is at least as much *seized* when a school official administers corporal punishment," the Fourth Amendment is clearly the proper vehicle to address these excessive-force claims.[177]

Unlike substantive due process, the Fourth Amendment provides an explicit textual source of constitutional protection and has a strong historical foundation in the public-school context. The widespread acceptance of a public-school student's Fourth Amendment rights, in which a search or seizure is analyzed "in light of the age and sex of the student and *the nature of the infraction*,"[178] provides courts with a sound analytical framework and may supply the victims of excessive corporal punishment with an infrequently received remedy.

E. Retreat from the Corporal-Punishment "Norm"

The Supreme Court has repeatedly emphasized that the touchstone of the Fourth Amendment is reasonableness.[179] Thirty-three years ago, at the time of the *Ingraham* decision, the administration of corporal punishment was more socially acceptable—that is, more reasonable—than it is today. For example, in *Ingraham*, the Court noted that its analysis was set "[a]gainst [a] background of historical and contemporary approval of reasonable corporal punishment."[180] The Court noted that only two states, Massachusetts and New Jersey, had

174. Campbell v. McAlister, No. 97-20675, 1998 WL 770706, at *3 (5th Cir. Oct. 20, 1998) (quoting P.B. v. Koch, 96 F.3d 1298, 1030 n.4 (9th Cir. 1996)).

175. *See* Gottlieb *ex rel.* Calabria v. Laurel Highlands Sch. Dist., 272 F.3d 168, 172 (3d Cir. 2001); *see also* Wallace *ex rel.* Wallace v. Battavia Sch. Dist. 101, 68 F.3d 1010, 1014 (7th Cir. 1995).

176. *Clark County Sch. Bd. of Trs.*, 479 F.3d at 1181 n.5.

177. *See Wallace*, 68 F.3d at 1016 (emphasis added).

178. New Jersey v. T.L.O., 469 U.S. 325, 342 (1985) (emphasis added).

179. *E.g.*, United States v. Knights, 534 U.S. 112, 118 (2001).

180. Ingraham v. Wright, 430 U.S. 651, 663 (1977).

wholly prohibited the use of corporal punishment in public schools.[181] Conversely, according to statistics from the 2006–2007 school year released by the United States Department of Education's Office for Civil Rights, twenty-nine states (plus the District of Columbia) have banned the use of corporal punishment in public schools.[182] Additionally, the number of students corporally punished in the United States has declined from 1,521,896 in 1976 to 223,190 in 2006—an eighty-five-percent decrease.[183] Notably, only a handful of states were responsible for the bulk of the punishments in 2006.[184] Because the central inquiry under the Fourth Amendment is reasonableness, society's diminished tolerance of corporal punishment in our public schools will be a significant factor in the Fourth Amendment analysis.

IV

CONCLUSION

The historical justifications for permitting corporal punishment seemingly no longer hold much weight. While incidences of corporal punishment are decreasing, they are hardly a problem of the past. Thus, some adjustment in the constitutional analysis of these claims is necessary because many children are suffering at the hands of overzealous school officials without a federal remedy. So long as judicial hostility to § 1983 remains, plaintiffs may find more receptiveness under the Fourth Amendment because it offers an explicit textual source of constitutional protection, rather than the "amorphous and imprecise"[185] nature of the shock-the-conscience inquiry. Additionally, the Fourth Amendment has strong support in the public-school context, recently reaffirmed in *Safford Unified School District No. 1 v. Redding*,[186] unlike the "indefinite and vague"[187] character of substantive due process.

The Fourth Amendment's reasonableness standard instructs courts to evaluate the search or seizure in light of the child's age, sex, and the nature of the triggering infraction.[188] These considerations provide judges more flexibility to distinguish between official action executed in a dangerous situation and action executed after further reflection. Although the shock-the-conscience test of substantive due process calls for an analysis of the need for the punishment presented, courts have neglected to engage in this scrutiny and have instead

181. *Id.*

182. The Center for Effective Discipline, *available at* http://www.stophitting.com/index.php?page=statesbanning (last visited July 1, 2009).

183. *Id.*

184. Rick Lyman, *In Many Public Schools, the Paddle is No Relic*, N.Y. TIMES, Sept. 30, 2006 (noting that in 2002, nearly three-quarters of all corporal punishment in the United States took place in Texas, Arkansas, Mississippi, Tennessee and Alabama).

185. Fagan v. City of Vineland, 22 F.3d 1296, 1308 (3d Cir. 1994).

186. 129 S. Ct. 2633 (2009).

187. Rochin v. California, 342 U.S. 165, 172 (1952).

188. New Jersey v. T.L.O., 469 U.S. 325, 342 (1985).

fixated on how badly a child was beaten—regardless of his or her alleged offense—resulting in only the severest beatings' succeeding to shock the conscience. At a minimum, the Fourth Amendment jurisprudence in the public-school context instructs that, though this environment warrants a high degree of judicial deference to school officials, there are still limits, and the degree of intrusion on a child's liberty must correspond with the nature of the child's infraction.