

CURBING VIOLENCE OR TEACHING IT: CRIMINAL IMMUNITY FOR TEACHERS WHO INFLICT CORPORAL PUNISHMENT

Children have never been very good at listening to their elders, but they have never failed to imitate them.

—James Baldwin*

I. INTRODUCTION

On July 31, 1995, Alabama became the third state¹ to grant criminal as well as civil immunity to teachers who inflict corporal punishment.² The law does not establish a threshold of force to determine liability, but rather states that teachers are immune as long as they act in accord with school board policy and the punishment is appropriate.³ The law also grants school board members absolute immunity⁴ for these acts while shifting the full cost of

* JAMES BALDWIN, *NOBODY KNOWS MY NAME: MORE NOTES OF A NATIVE SON* (1961), quoted in *BLOOMSBURY TREASURY OF QUOTATIONS* 132 (1994).

1. The other states that have expressly exempted teachers from criminal liability are Florida and Georgia. FLA. STAT. ch. 232.275 (Supp. 1996); GA. CODE ANN. § 20-2-732 (1996). The Florida corporal punishment law states that “[e]xcept in case of excessive force or cruel and unusual punishment, a teacher . . . shall not be civilly or criminally liable for any action carried out in conformity with state board and district school board rules regarding the control, discipline, suspension, and expulsion of students.” FLA. STAT. ch. 232.275 (Supp. 1996). This immunity law has been in place at least since 1976. *See* *Ingraham v. Wright*, 430 U.S. 651, 657 n.6 (1977).

The Georgia corporal punishment law provides:

No principal or teacher who shall administer corporal punishment . . . in conformity with the policies and regulations . . . shall be held accountable or liable in any criminal or civil action based upon the administering of corporal punishment where the corporal punishment is administered in good faith and is not excessive or unduly severe.

GA. CODE ANN. § 20-2-732 (1996).

2. The law states that

[t]eachers are hereby given the authority and responsibility to use appropriate means of discipline up to and including corporal punishment as may be prescribed by the local board of education. So long as teachers follow approved policy in the exercise of their responsibility to maintain discipline in their classroom, such teacher [sic] shall be immune from civil or criminal liability.

1995 Ala. Acts 539, § 1. Although the criminal immunity provision of section 1 incorporates criminal child abuse laws, section 2 of the law specifically exempts teachers from liability under the child abuse statute, ALA. CODE tit. 26 (1975).

3. 1995 Ala. Act 539, § 1. Although the law states that the means of discipline must be “appropriate,” the law does not specify how one assesses appropriateness. Punishment could be appropriate with regard to the act committed, the age of the child, the characteristics of the child, and/or some other objective measure of appropriateness.

4. *Id.* Although the immunity granted teachers is not similarly designated “absolute,”

litigation against teachers to the school boards.⁵ The proponents of this law claim that criminal immunity will help protect teachers from law suits⁶ and improve the educational environment⁷ without increasing the severity of corporal punishment;⁸ a close analysis of the law indicates otherwise. Although only three states currently grant criminal immunity, other states have recently begun serious attempts to pass laws that grant immunity or otherwise expand teachers' authority to impose corporal punishment.⁹ The

Representative Howard Hawk of the Alabama State Legislature stated that given the broad protection intended by the passage of the bill, the immunity provided teachers was probably intended to be absolute. Telephone Interview with Howard Hawk, Representative, Alabama State Legislature (Sept. 29, 1995) [hereinafter Hawk Interview].

5. 1995 Ala. Acts 539, § 1.

It shall be the responsibility of the local [school] boards of education and the administrators employed by them to provide legal support to each teacher exercising his or her authority and responsibility to maintain order and discipline in his or her classroom as long as the teacher follows local board of education's policy.

Id.

6. See *infra* notes 33-34 and accompanying text.

7. The Alabama legislature discussed the educational environment, saying:

It is the finding of the Alabama Legislature that the people of Alabama have two basic expectations of their public schools: (1) that students be allowed to learn in a safe classroom setting where order and discipline are maintained; and (2) that students learn at the level of their capabilities and achieve accordingly. The Legislature finds further that every child in Alabama is entitled to have access to a program of instruction which gives him or her the right to learn in a non-disruptive environment. No student has a right to be unruly in his or her classroom to the extent that such disruption denies fellow students of their right to learn. The teacher in each classroom is expected to maintain order and discipline.

1995 Ala. Act 539, § 1.

8. Attached to a copy of the corporal punishment law sent to the Author was a letter which read: "It is important to note that this law is not an unfettered license for teachers to distribute corporal punishment to students. The law offers protection to students and teachers by requiring them to adhere to local policy governing such issues." Letter from Jeff Courtney, Information and Communications Division, State of Alabama Department of Education, to the Author (Sept. 29, 1995) (on file with author).

9. On March 10, 1992, Michigan amended its corporal punishment statute. MICH. COMP. LAWS ANN. § 380.1312 (West Supp. 1996). The new statute amended 1988 Mich. Pub. Acts 521, which banned the use of corporal punishment. The current law provides for the use of "reasonable physical force upon a pupil as necessary to maintain order and control" while giving "deference . . . to reasonable good-faith judgments made by that [teacher or school employee]." MICH. COMP. LAWS ANN. § 380.1312(4), (7) (West Supp. 1996) (The new law left the prohibition against corporal punishment in place, apparently distinguishing between the use of force to maintain order and control and that used only for punitive purposes.). A provision which was part of the Senate Bill as introduced but which was dropped in debate and joint house compromise would have immunized teachers and administrators from both civil and criminal actions. See James Papakirk, Comment, *Michigan's New Corporal Punishment Amendment: Where the Good Act Giveth, Did the Amendment Taketh Away?* 10 COOLEY L. REV. 383, 397, 399-400 (1993); see also ARK. CODE ANN. § 6-17-112 (Michie Supp. 1995) (excluding the reasonable use of corporal punishment from the definition of "abuse"); OKLA.

reception that such laws receive judicially and politically, as well as the public's response to the impact of these laws, will help determine if such measures will be emulated in other states not only within the public education setting but also in other fields, such as law enforcement.

Part II of this Note briefly discusses the foundation of corporal punishment and the evolution of attitudes towards it. As part of this historical review, the Note will also examine the opposing and supporting arguments of key groups during the passage of the Alabama criminal immunity law. Part III discusses how laws like Alabama's may, in application, violate the Due Process Clause of the U.S. Constitution and, short of a violation, how such laws afford fewer procedural protections. Next, Part III analyzes the substantive due process protection afforded school children and compares it to the protection provided by the state. In light of this analysis, this Note argues that the criminal immunity law reduces the protections afforded students while not providing teachers with as much security as its proponents assert. Part III also addresses policy implications, such as the disparity between parents' and teachers' authority to discipline children, as well as some of the political inconsistencies inherent in the law. Finally, Part IV recommends a "model" corporal punishment law that would address many of the problems presented.¹⁰

II. HISTORY

A. Evolution of Corporal Punishment

Corporal punishment as a means of discipline in school has existed in North America since colonization.¹¹ Traditionally, corporal punishment

STAT. ANN. tit. 70, § 6-114 (West Supp. 1996) (prohibiting the State Board of Education from proscribing corporal punishment in the public schools or otherwise prescribing student discipline policies for school districts); Assembly 101, 1995-96 Cal. Sess. (attempting to repeal provisions of a law that prohibits the infliction of corporal punishment upon a pupil); S.612, 79th Leg., 1996 Minn. Sess. (clarifying that the ban on corporal punishment does not prohibit the use of authorized reasonable force). Such changes and the proposals behind them demonstrate the trend toward more permissive corporal punishment laws.

10. This Note does not support the use of physical force against students in any case except when necessary for self-defense or the defense of others. However, the model statute provides a less destructive means of implementing corporal punishment for the many states that still do have a corporal punishment law and will not be receptive to a ban in the near future.

11. RODGER W. BYBEE & E. GORDON GEE, *VIOLENCE, VALUES, AND JUSTICE IN THE SCHOOLS* 25 (1982); see also *Ingraham v. Wright*, 430 U.S. 651, 660 (1977); IRWIN A. HYMAN, *READING, WRITING, AND THE HICKORY STICK: THE APPALLING STORY OF PHYSICAL AND PSYCHOLOGICAL*

within the schools was justified under the doctrine of *in loco parentis*.¹² This doctrine views school officials as parental substitutes who assume parental responsibilities regarding discipline during the school day.¹³ The doctrine is based on the theory that the state has “broader authority to regulate the activities of children than [to regulate the activities] of adults.”¹⁴ The justification for the use of corporal punishment has changed, however, and now rests less on the idea of a parental substitute and more on the framework of compulsory education laws.¹⁵ Based on the theory that schools have independent authority to maintain discipline and educate effectively,¹⁶ states grant schools a direct (as opposed to derivative) right to impose reasonable corporal punishment.

Despite the long marriage between corporal punishment and public education, the last couple of decades have demonstrated a trend away from the imposition of such punishment.¹⁷ For example, when the landmark

ABUSE IN AMERICAN SCHOOLS 30, 34 (1990) (finding that the use of corporal punishment in education “appears early in the recorded history of Western cultures” and “had firm roots in colonial America”).

12. 1 WILLIAM BLACKSTONE, COMMENTARIES *453-*454:

The power of a parent . . . [to] lawfully correct his child, being under age, in a reasonable manner; for this is for the benefit of his education. . . . He may also delegate part of his parental authority, during his life, to the tutor or schoolmaster, of his child; who is then *in loco parentis* (in the place of a parent), and has such a portion of the power of the parent committed to his charge, viz., that of restraint and correction, as may be necessary to answer the purposes for which he is employed.

13. Kathleen K. Bach, Comment, *The Exclusionary Rule in the Public School Administrative Disciplinary Proceeding: Answering the Question After New Jersey v. T.L.O.*, 37 HASTINGS L.J. 1133, 1138-39 (1986); Cynthia D. Sweeney, Note, *Corporal Punishment in Public Schools: A Violation of Substantive Due Process?*, 33 HASTINGS L.J. 1245, 1246-47 (1982).

14. *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) (rejecting the state’s use of the *in loco parentis* doctrine to justify a requirement of consent by the parent or a person *in loco parentis* as a condition precedent to a minor obtaining an abortion).

15. Sweeney, *supra* note 13, at 1247.

16. *Ingraham v. Wright*, 430 U.S. 651, 662 (1977) (asserting that “[a]lthough the early cases viewed the authority of the teacher as deriving from the parents, the concept of parental delegation has been replaced by the view, more consonant with compulsory education laws, that the State itself may impose such corporal punishment as is reasonably necessary ‘for the proper education of the child and for the maintenance of group discipline’” (quoting 1 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 3.20, at 292 (1956) (footnote omitted)).

17. Estimates based on U.S. Department of Education data indicate that between 1980 and 1990, the number incidents of corporal punishment in elementary schools across the country dropped from 1.5 million to approximately 614,000. Katharine Webster, *Schools Taking the Paddle Out of Discipline*, L.A. TIMES, June 20, 1993, at 16A, available in LEXIS News Library, Lat File. The number of incidents dropped further in 1991-92 to approximately 555,531. *End Legal Child Abuse; Stop School Paddlings*, USA TODAY, July 18, 1994, at 14A, available in LEXIS, News Library, Usatdy File. Mirroring this national trend, data collected in the Indianapolis Public Schools system demonstrates that the use of corporal punishment declined from 926 incidents in 1987-88 to 542 in 1990-91. Mary Francis, *Paddling Is Option in IPS, But Not a Popular One*, INDIANAPOLIS STAR, Feb.

corporal punishment case, *Ingraham v. Wright*,¹⁸ was decided in 1977, only two states had banned corporal punishment.¹⁹ Today over twenty-five forbid it.²⁰ In addition, national surveys indicate that a majority of American parents favor the abolition of corporal punishment in public schools²¹ and numerous organizations are on record as opposing the practice.²² The United States

15, 1995 at A6, available in 1995 WL 3044780; see also *infra* notes 18-21 and accompanying text.

18. 430 U.S. 651 (1977).

19. *Id.* at 663.

20. As of the end of 1994, 27 states had statewide bans on corporal punishment, either by statute (California, Connecticut, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, North Dakota, Oregon, Vermont, Virginia, Washington, West Virginia, and Wisconsin), by state regulation (Alaska, New Hampshire, New York, and Utah), or by school board policies (Rhode Island and South Dakota). NATIONAL CTR. FOR THE STUDY OF CORPORAL PUNISHMENT AND ALTERNATIVES, STATES WHICH HAVE ABOLISHED CORPORAL PUNISHMENT AS A MEANS OF DISCIPLINE IN THE SCHOOLS (1994); NATIONAL COALITION TO ABOLISH CORPORAL PUNISHMENT IN SCHS., CORPORAL PUNISHMENT FACT SHEET (1994) [hereinafter FACT SHEET]. It should be noted, however, that several of these states are proposing to repeal these bans, see, e.g., Assembly 101, 1995-96 Cal. Sess., and some "official" bans are not as meaningful as they seem, see, e.g., Mich. Comp. Laws Ann. § 380.1312 (West Supp. 1996).

In addition, some states listed as having bans on corporal punishment by statute have either amended the relevant statutes or the term "corporal punishment" was construed narrowly by the compiling organizations. A narrow construction distinguishes the use of force to maintain control and order in the classroom from the use of force to punish. See, e.g., ALASKA STAT. § 11.81.430 (Michie 1995) (permitting teachers to use "reasonable and appropriate nondeadly force upon a student . . . [w]hen and to the extent reasonably necessary and appropriate to maintain order and to . . . [promote] the welfare of the students"); MICH. COMP. LAWS ANN. § 380.1312 (West Supp. 1996); MONT. CODE ANN. § 20-4-302 (1995 & Supp. 1996) (allowing "physical restraint . . . in a manner that is reasonable and necessary to . . . quell a disturbance"); OR. REV. STAT. § 339.250 (1995) (stating that a teacher, administrator, or school employee may use "reasonable physical force upon a student when and to the extent the individual reasonably believes it necessary to maintain order in the school or classroom"); VT. STAT. ANN. tit. 16, § 1161a (1995) (also prohibiting the intentional infliction of physical pain as a disciplinary measure but allowing the use of "reasonable and necessary force . . . to quell a disturbance"); VA. CODE ANN. § 22.1-279.1 (Michie 1993 & Supp. 1996) (simultaneously proscribing corporal punishment and allowing the use of "incidental, minor or reasonable physical contact or other actions designed to maintain order and control").

21. HYMAN, *supra* note 11, at 56 (citing a 1989 Harris poll which found that 54% of parents were against corporal punishment in school); see also Anne H. Cohn, *The Shifting Public Mood on Spanking*, CHI. TRIB., May 19, 1990, at C10 (citing National Public Opinion Survey finding that "92 percent of the [American] public believes that corporal punishment should not occur in schools . . . [while] a decade ago less than half of the public was opposed to corporal punishment in the schools."). For a discussion of various factors or characteristics that influence whether a person will oppose the use of such force, see HYMAN, *supra* note 11, at 56-57; Tim Bogert, *World Up Close: Spare Rod, Spoil Child Works for Some*, DAYTON DAILY NEWS, May 31, 1995, at 4A.

22. Examples of such organizations are the American Academy of Pediatrics, American Association for Counseling & Development, National Association of Elementary School Principals, Council for Exceptional Children, American Bar Association, American Humanist Association, American Psychological Association, American Psychiatric Association, Association of Junior Leagues, National Association of State Boards of Education, National Education Association, National Mental Health Association, National Committee to Prevent Child Abuse, National Association of

actually remains one of the few industrialized nations that permit teachers to strike children.²³

Despite this general trend, violence in the schools between students²⁴ and against teachers²⁵ has begun to shift attitudes back to a more punitive framework, causing some states to reconsider, and in some cases modify, their bans on corporal punishment.²⁶ This regressive shift is strongly reflected in Alabama's new criminal immunity law. Although most states that allow corporal punishment have recognized the common-law principle of qualified *civil immunity*,²⁷ these states have still permitted criminal remedies.²⁸ The criminal immunity law,²⁹ however, dismantles many of the remaining checks

School Psychologists, National Association of Social Workers, and the American Medical Association. See FACT SHEET, *supra* note 20.

23. Except for South Africa, Canada, the United States, and part of Australia, every other industrialized nation prohibits corporal punishment. *See id.*

24. *See, e.g.,* Richard Seven, *Teen Gets 14 1/2 Years for High-School Murder*, SEATTLE TIMES, Jan. 20, 1996, at A7 (discussing the murder of one student by another at a school dance); Peter Applebome, *For Youths, Fear of Crime Is Pervasive and Powerful*, N.Y. TIMES, Jan. 12, 1996, at A12 (citing a Harris poll study of 2,000 youths which found that in high crime neighborhoods, one in three youths reported staying home from school or cutting classes to avoid violence); DeNeen L. Brown & Hamil R. Harris, *Sadness Hits Close to Home: Youths Try to Cope with School Slaying*, WASH. POST, Jan. 21, 1996, at B1 (discussing the killing of a 14-year-old at school); Laura M. Kirk, *Fear of Crime Pervasive Among Teens, Poll Finds*, DALLAS MORNING NEWS, Jan. 21, 1996, at 8F (citing a national poll of 2,000 youths in grades 7 through 12, conducted by the National Crime Prevention Council and the National Institute for Citizen Education in the Law, which found that one in nine youths stays home from school or cuts class because the student is afraid).

25. *See, e.g.,* Michael D. Sorkin, *Two Students Punch, Kick Teacher as Class Cheers and Applauds*, ST. LOUIS POST-DISPATCH, Mar. 18, 1995, at 1A (describing an incident in which students kicked and punched a teacher for confiscating a compact disc player); Rob Thomas, *'No Magic Wand' on School Violence: Conference in Chicago Looks for Answers*, ST. LOUIS POST-DISPATCH, Jan. 27, 1995, at 11A (reviewing a conference in Chicago on school violence, which discussed the killing of a student by another student at McCluer North High School in Florissant, Missouri).

26. *See supra* notes 9, 20 and accompanying text.

27. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 131, at 975-76, 980 (4th ed. 1971); *see also* Lawrence A. Alexander & Paul Horton, *Ingraham v. Wright: A Primer for Cruel and Unusual Jurisprudence*, 52 S. CAL. L. REV. 1305, 1330-31 (1979).

Usually a civil claim rests on an alleged assault and battery or negligence. *See, e.g.,* Fee v. Herndon, 900 F.2d 804, 806 (5th Cir. 1990), *cert. denied*, 498 U.S. 908 (1990) (involving claims of negligence and excessive force). Some states have codified the common-law civil immunity. *See, e.g.,* ARK. CODE ANN. § 6-17-112 (Michie 1993 & Supp. 1995); MICH. COMP. LAWS ANN. § 380.1312 (West Supp. 1996).

28. *See infra* note 146 and accompanying text; *see, e.g.,* ARK. CODE ANN. § 6-17-112 (Michie 1993 & Supp. 1995) (providing teachers and administrators immunity only from civil liability for administering corporal punishment to students in a way that substantially complies with the district's written student discipline policy); MICH. COMP. LAWS ANN. § 308.1312 (West Supp. 1996); (providing only civil immunity to a school official who exercises necessary, reasonable force).

29. Criminal immunity laws are consistent with society's increasingly punitive approach towards people who defy authority to any degree, as exemplified by Alabama's criminal justice laws. Alabama

on teachers' imposition of corporal punishment.

B. The Debates Surrounding the Enactment of the Law

Governor James proposed the Alabama corporal punishment law in response to an allegedly greater need for classroom discipline and order.³⁰ The law was sponsored by Representative Perry Hooper³¹ and supported by the Alabama Educational Association ("AEA").³² The proponents of the law argued that control over the classroom would be furthered by removing another layer of teachers' potential liability.³³ This conclusion was based on

is one of only a few states that has re-established the use of chain gangs, referred to as manual labor camps. ALA. CODE ANN. § 14-5-30 (Michie Supp. 1995); *see also* H.1193, 143rd Assembly, 1995-96 Ga. Sess. (repealing the prohibitions against corporal punishment and the use of handcuffs, leg chains, and other restraints as a means of punishment, and authorizing the department of state or county correctional units to force inmates who are able and are not under maximum security "to labor on public roads"); H. Concurrent Res. 18, 1995 Miss. Sess. (authorizing the use of caning and other forms of corporal punishment in appropriate criminal cases).

30. *See supra* note 7 and accompanying text; *see also* Charles Laurence, *Teachers Told Not to Spare the Rod*, DAILY TELEGRAPH (London), Aug. 5, 1995, at 12 (stating that a "spokesman for the Alabama Board of Education said [Governor] James had introduced the law as part of his law-and-order campaign"). According to Representative Howard Hawk, however, there were no known lawsuits related to corporal punishment or incidents of violence mentioned by any of the law's supporters as evidence in support of the bill. Instead, the corporal punishment bill, part of a series of dramatic "accountability" laws, was directly and strongly connected to a court decision ordering a remedy for unequal public funding for poorer, predominantly black school districts. As a result of the concurrence of these events and the Governor's overtly angry response to what he perceived as the court's unjust assertion of control over him, members of the community assert that the corporal punishment law was not a response to any true determination of need. Instead, many people feel the corporal punishment law was a rebellious attempt by the Governor to respond to the court's mandate under a cloak of extreme independence and a larger anti-violence/pro-education platform. Hawk Interview, *supra* note 4.

31. According to Representative Howard Hawk, Representative Hooper's father was running for Chief Judge of the Alabama Supreme Court during the sponsorship and passage of the corporal punishment bill. During the election, a dispute arose concerning whether the absentee ballots should be counted; the result of the debate determined the outcome of the election. Alabama Governor James advocated against counting them. Because his position prevailed and the absentee ballots were not counted, Representative Hooper's father won the position of Chief Judge. Hawk Interview, *supra* note 4.

32. Dubbed the "*Takeover of the State Department of Education Bill*" by Representative John Knight, the *Corporal Punishment Bill Passed on a 78-20 Vote*, LEG-ALERT (Alabama Association of School Boards) June 2, 1995 at 1 [hereinafter AASB, LEG-ALERT]. The AEA gained significant monetary benefit from the series of accountability laws passed. Telephone Interview with Julie Cumuze, Alabama Association of School Boards (Sept. 29, 1995) [hereinafter Cumuze Interview].

33. The AEA claims that a fear of lawsuits prevents teachers from exercising their authority to impose corporal punishment. Cumuze Interview, *supra* note 32 (Cumuze works with the Alabama Association of School Boards.); *see also supra* notes 2, 7 and accompanying text (indicating an assumed correlation between criminal immunity and effective discipline).

the theory that a fear of lawsuits prevented teachers from imposing corporal punishment.³⁴

The Alabama Association of School Boards (“AASB”) and the Alabama Parents and Teachers Association (“APTA”) refuted these justifications. The AASB supports the primary use of alternatives to corporal punishment and the APTA completely opposes the imposition of corporal punishment.³⁵ These organizations asserted, first, that corporal punishment is at best an ineffective means of disciplining children and at worst actually harmful to children.³⁶ In addition, these opponents of the law charged that if corporal

34. See *supra* note 33 and accompanying text; see also Laurence, *supra* note 30 (stating that an Alabama Board of Education spokesperson commented that Governor James “had feared that the threat of lawsuits against teachers was undermining their will to keep order”).

The theory that reduced liability will increase teachers’ comfort with imposing corporal punishment strongly suggests that the proponents of the bill anticipate a resulting increase in the use of corporal punishment. If the law were not designed to allow for at least the more frequent use, if not greater severity, of corporal punishment, it would not achieve a change in discipline and subsequent control. In addition, if discipline did not increase, there would appear to be no rational relationship between the means employed by the state—avoidance of penalty for teachers—and the alleged state interest—*increasing* control and discipline. While the greater frequency of corporal punishment is seriously problematic, this Note will focus on the greater severity of punishment that will likely result from this law.

35. Memorandum from Sandra Sims-deGraffenried, AASB Executive Director, and Michael Black, President of the Alabama PTA to Members of the Alabama Legislature (on file with author) [hereinafter Memorandum].

36. The AASB and the APTA expressed concern about the psychological impact of corporal punishment, the frequent targeting of the most vulnerable students (e.g., the disabled, minorities, elementary school pupils), and the evidence that frequent physical punishment actually increases aggression and “other anti-social behaviors” in children. *Id.* at 2.

For further discussion on the disproportionate impact of corporal punishment on special education and minority students, see Wilma Norton, *Florida Schools Rank High on Corporal Punishment: Black Students Much More Likely to Be Spanked Than White Students, Says School Punishment Study*, ST. PETERSBURG TIMES, Oct. 4, 1987, at 3B (citing a survey of approximately 20% of the nation’s school districts, conducted by the National Coalition of Advocates for Students, which found that among the 10 districts that used corporal punishment on the greatest percentage of its students, Montgomery, Alabama ranked sixth and paddled black students at almost twice the rate of white students); Diane Rado, *Race, Gender Tied to School Discipline*, ST. PETERSBURG TIMES, January 20, 1995, at 1B (reporting a recent study of Florida schools that shows that black students often receive harsher punishments than white students for the same bad behavior), available in LEXIS, News Library, Stpete File; and Alan Sverdlik, *Around the South: Plank for School Spanking*, ATLANTA J.-CONST., May 30, 1995, at B5 (stating that, according to the National Coalition of Advocates for Students, “[b]lack students are twice as likely as whites to be paddled”). See also *Coleman v. Franklin Parish Sch. Dist.*, 702 F.2d 74 (5th Cir. 1983) (per curiam) (remanding for a determination on the equal protection claim alleging racial discrimination in the application of corporal punishment because the white child involved in the “horseplay” was not reprimanded in any way while the black child was struck by the teacher with a coffee cup); *Rhynne v. Childs*, 359 F. Supp. 1085, 1087 (N.D. Fla. 1973) (an action seeking declaratory and injunctive relief from alleged discrimination in the application of disciplinary practices).

punishment were the solution to discipline problems, the prevalence of its use in Alabama schools³⁷ would have already curtailed the problems.³⁸ Moreover, these organizations argued that teachers will still be sued³⁹ and that the law merely shifts the monetary burden to the school boards⁴⁰ while generating litigation between teachers and school boards themselves.⁴¹ According to the AASB, the law will serve as an incentive for “teachers and school boards [to sue] each other to determine if the teacher followed [school] board policy” because that judgment determines which party bears the financial responsibility.⁴² Despite the apparent strength of these arguments against the new law, the Alabama legislature passed the law by a vote of seventy-eight to twenty⁴³ with little debate as to its merits or its potential impact.⁴⁴

37. One hundred twelve school boards out of 121 school systems have policies that permit corporal punishment, according to the Alabama Association of School Boards. See Memorandum, *supra* note 35; see also Sverdlik, *supra* note 36 (citing U.S. Department of Education’s statistics on the number of incidents of corporal punishment during the 1991-92 school year in the 11 southern states, showing that Alabama has the highest number of incidents—53,443 (range begins at 11,660 not counting Virginia which has 0 incidents because it bans corporal punishment)—and the third highest percentage for the entire student population—7.7% (the range, excluding Virginia’s 0 percentage, is 1.2%-11.7%)).

38. See Memorandum, *supra* note 35, at 1. This challenge by the AASB and the APTA regarding the ineffectiveness of corporal punishment is aimed at the law’s safety goal as opposed to the educational goal. *Id.*; see *supra* note 7 and accompanying text. In support of this challenge, research has found that most corporal punishment takes place at “primary and intermediate school levels,” where the threat of violence is the least. HYMAN, *supra* note 11, at 62, 198. In addition, corporal punishment is most commonly inflicted due to minor student misbehavior, not to protect against violence. *Id.* at 64-65 (citing study showing 80.3% of offenses leading to corporal punishment were nonviolent).

39. See Memorandum, *supra* note 35. Although the provision for criminal immunity may lead to fewer convictions, the law does not preclude the instigation of suits. Consequently, there may be just as many cases going to court over corporal punishment, but fewer cases may survive a motion for summary judgment or a directed verdict. *Id.* (stating that “[m]ost litigation results from determining whether or not the teacher was properly administering corporal punishment”).

40. According to previous AASB policy, the AASB liability coverage for teachers already provided monetary support once the teacher had been determined to be acting within school board policy. The new law, however, shifts to the AASB the additional burden of litigation costs leading to the determination of whether the teacher was properly administering corporal punishment. The cost associated with this latter litigation is supposedly very high. Consequently, the AASB bears the cost from the moment the claim is filed, which increases considerably its potential financial burden. See Memorandum, *supra* note 35; Cumuze Interview, *supra* note 32.

41. *Parents, School Boards Urge Legislature to Defeat Corporal Punishment Legislation*, News Release (Alabama Association of School Boards, Montgomery, Alabama), May 17, 1995, at 2.

42. *Id.* (quoting Dr. Sandra Sims-deGraffenried, AASB executive director).

43. AASB, LEG-ALERT, *supra* note 32.

44. According to Representative Howard Hawk, some legislators did raise concerns regarding the absence of an adequate standard for punishment and a resulting potential for abuse, as well as the possible adverse effects on the groups of children who disproportionately receive corporal punishment,

III. APPLICATION AND IMPACT OF THE LAW

Because students and parents still have a criminal remedy against a teacher who is determined to have acted *outside* of school board policy,⁴⁵ the law's impact has to be assessed through its effects on the remedies available to students and parents when a teacher is determined to have acted *within* school board policy. In such a situation, a parent will be afforded no state remedy because Alabama grants civil immunity to teachers under the common law and grants criminal immunity under the new statute. Consequently, a parent may only pursue a federal remedy,⁴⁶ which will afford children less procedural and substantive protection than state criminal laws.⁴⁷ As a result, by restricting parents to a federal cause of action, the State essentially eliminates any meaningful remedy. At the same time, this shift to a federal claim still presents the teacher with the stigma and burden of a lawsuit.⁴⁸

In a situation in which a teacher is determined to have acted within school board policy, a parent, on behalf of the child, would file a civil action in federal court⁴⁹ against the teacher, superintendent, and/or school board.⁵⁰

such as black and disabled students. *See supra* note 36 and accompanying text. Nevertheless, Representative Hawk said that these concerns were dismissed quickly and without meaningful discussion. He attributed the brevity of the debate to the political pressure to vote for the law. Although there did not seem to be any recent publicity surrounding school violence in Alabama or lawsuits against teachers and the Governor's motivations for the bill were questionable, there was general political pressure, particularly in Alabama, to take a hard-line position against violence in all forms. Hawk Interview, *supra* note 4.

45. *See supra* note 2 and accompanying text.

46. It is unclear how many claims will still be pursued in state court on the theory that the teacher acted outside of board policy, and how many will be initiated in federal court. Nevertheless, to determine the critical issue, which is what relief will be available when the state determines that a teacher was acting within board policy, one must compare the possible remedies under the former state law and what the child or teacher may now face with a federal remedy. Although parent-initiated § 1983 actions could be heard by state courts, this Note will assume that § 1983 actions will be pursued in federal court. *See infra* notes 49, 50 and accompanying text. The standards applied in § 1983 actions should not differ because both courts must apply federal law.

47. *See infra* notes 90, 94, 126-28 and accompanying text.

48. Although federal lawsuits, especially in this context, may be dismissed early in the proceedings, the initiation of litigation will still take its toll. *See infra* note 144 and accompanying text. In addition, the state may attempt to prosecute in state court until the determination is made as to whether the act was within school policy. As a result, the teacher could go through the first stages of the state litigation process until the parent pursues an independent federal cause of action.

49. 42 U.S.C. § 1983 (1994). Section 1983 provides in pertinent part:

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,*

Parents in this situation would argue a violation of their child's procedural or substantive due process rights under the Fourteenth Amendment.⁵¹ The weaknesses of these procedural and substantive due process protections are presented in turn.

A. Procedural Due Process

Criminal immunity statutes like the one passed by Alabama significantly reduce the already limited procedural due process available to students who have been subjected to corporal punishment. The Supreme Court has determined that reasonable corporal punishment does not constitute a deprivation of a constitutionally protected right⁵² and, consequently, does not warrant procedural due process.⁵³ Although the Court has held that unreasonable or excessive punishment does implicate the Due Process Clause,⁵⁴ the Court has concluded that common law civil and criminal remedies,⁵⁵ as well as other factors involved in the disciplining of students,⁵⁶

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.

Id. (emphasis added); see also *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979) (stating that § 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by" the Constitution and other federal statutes).

Furthermore, in addition to the weaknesses of a § 1983 action in the context of corporal punishment discussed at length in this Note, there are limitations in the remedial value of a § 1983 action as compared to a state criminal remedy. First, a student or a parent is less likely to be aware of a federal remedy, especially in the Eleventh Circuit where no substantive due process standard has been established. See *infra* notes 119, 121 and accompanying text. Second, unlike a criminal remedy pursued by the state, parents may not be able to afford a federal civil action. See *Bach, supra* note 13, at 1142-43. Third, it may be difficult to prove that the official acted "under color of state law." See *Monell v. Department of Social Servs.* 436 U.S. 658 (1978), construed in *Bach, supra* note 13, at 1142-43.

50. Public school officials are state officials within the meaning of § 1983. See *Monell*, 436 U.S. at 690-91. School boards, as well as teachers and superintendents, are also considered persons for purposes of § 1983. *Id.* (holding local government officials are "persons"). Moreover, school boards and superintendents may be liable for teachers' allegedly unconstitutional actions if the teachers' actions complied with an official policy or unofficial custom that was made by the lawmakers "or by those whose edicts or acts may fairly be said to represent official policy." *Id.* at 690-91, 694.

51. The Fourteenth Amendment provides in pertinent part:

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, § 1 (emphasis added).

52. See *infra* note 71 and accompanying text.

53. See *infra* note 71 and accompanying text.

54. See *infra* note 71 and accompanying text.

55. See *infra* note 75 and accompanying text.

afford adequate due process in such circumstances. Unfortunately, criminal immunity laws may remove those state remedies for cases in which a teacher uses force that exceeds the federal reasonableness standard but does not violate the school board's policy.⁵⁷ If that protection has been removed, then the law may be unconstitutional in application.⁵⁸ Furthermore, immunity laws like the one at issue may eliminate any means of redress for students who are erroneously blamed for an incident and subjected to reasonable corporal punishment.⁵⁹ Finally, regardless of the outcome of these issues, one conclusion is clear: criminal immunity laws are intended to and do limit the opportunities for students and their parents to remedy an injustice.⁶⁰

The landmark Supreme Court case on corporal punishment is *Ingraham v. Wright*.⁶¹ *Ingraham* involved a Florida high school's disciplinary practice that the Supreme Court characterized as "exceptionally harsh."⁶² One plaintiff's punishment involved being subjected to more than "20 licks with a paddle . . . [b]ecause he was slow to respond to his teacher's instructions."⁶³ This beating was so severe that the student suffered a hematoma,⁶⁴ which demanded medical attention and required several days' absence from school.⁶⁵ The other plaintiff was paddled several times for minor infractions, depriving him on one occasion of the use of his arm for a week.⁶⁶

In granting certiorari to *Ingraham*, the Supreme Court restricted its analysis to two issues: whether disciplinary corporal punishment of public school students violates the Eighth Amendment's proscription against cruel and unusual punishment, and whether procedural due process requires notice and an opportunity to be heard prior to the imposition of corporal punishment.⁶⁷ The Court explicitly declined to address the question of whether the case presented a substantive due process violation.⁶⁸ With regard

56. See *infra* notes 73-74 and accompanying text.

57. See *infra* text accompanying note 90.

58. See *infra* text accompanying notes 92-94.

59. See *infra* notes 95-98 and accompanying text.

60. See *infra* text accompanying note 100.

61. 430 U.S. 651 (1977).

62. *Id.* at 657.

63. *Id.*

64. A hematoma is a "tumor or swelling containing blood." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 563 (9th ed. 1985).

65. *Ingraham*, 430 U.S. at 657.

66. *Id.*

67. *Id.* at 653.

68. *Ingraham*, 430 U.S. at 658-59. The substantive due process question presented to the Court was whether "severe corporal punishment upon public school students [is] arbitrary, capricious and

to the Eighth Amendment claim, the Court concluded that the amendment was designed to protect criminal prisoners and should not be extended to public school children.⁶⁹

With respect to the procedural due process question, the Court recognized that freedom from bodily restraint and punishment is within the Fourteenth Amendment liberty interest in personal security, and is therefore protected from state deprivation without due process of law.⁷⁰ The Court held, however, that this liberty interest is only implicated (i.e., there is a deprivation) when public “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.”⁷¹

Furthermore, the Court held in *Ingraham* that even when the Due Process Clause is implicated by excessive punishment, prior notice and hearing are unnecessary.⁷² The Court reasoned that corporal punishment has “always been the law of the land,”⁷³ the incidence of abuse is low, and the schools are

unrelated to achieving any legitimate educational purpose and therefore violative of the Due Process Clause of the Fourteenth Amendment.” *Id.* at 659 n.12. The Court did not explain why it denied certiorari on this issue.

69. *Id.* at 668-69. Given the Court’s apparently complete rejection of the Eighth Amendment claim, this Note will not address the application of the Eighth Amendment in relation to the Alabama statute. For a criticism of the Court’s holding regarding the application of the Eighth Amendment, see Alexander & Horton, *supra* note 27, at 1339 (stating that the Court’s Eighth Amendment decision “ignored two hundred years of American history, misconstrued key [E]ighth [A]mendment decisions, and engaged in highly suspect armchair sociology”); Gerard J. Clark, *Ingraham v. Wright and the Decline of Due Process*, 12 SUFFOLK U. L. REV. 1151, 1157-60 (1978) (concluding that the Court construed both the Eighth Amendment and the constitutional question too narrowly); and Irene M. Rosenberg, *Ingraham v. Wright: The Supreme Court’s Whipping Boy*, 78 COLUM. L. REV. 75, 76-86 (1978) (arguing that in interpreting the Eighth Amendment, the Court erroneously read clarity into an “equivocal” constitutional history, selectively used case precedent, and unrealistically portrayed the freedom and openness of the school setting).

70. *Ingraham*, 430 U.S. at 673-74.

71. *Id.* at 674. The Court held that, because of the long history of corporal punishment and its acceptance in the common law, “reasonable” corporal punishment does not implicate the Due Process Clause because it does not constitute a deprivation within the meaning of that clause. *Id.* at 676. The Court stated that there is no “‘corporal insult’ for a teacher to inflict ‘moderate correction’ on a child in his care.” *Id.* at 661 (citing BLACKSTONE, *supra* note 12, at *134). Additionally, the teacher or other public official does not need parental permission before inflicting the reasonable correction. *See id.* (citing RESTATEMENT (SECOND) OF TORTS §§ 153(2), 147(2) (1965)).

72. *Id.* at 682. The Court also held that although “additional administrative safeguards,” *id.*, might reduce the “risk of wrongful punishment and provide for the resolution of disputed questions of justification,” *id.* at 676, this allegedly “minimal” reduction was outweighed by the “significant intrusion into an area of primary educational responsibility,” *id.* at 682.

73. *Id.* at 679 (citing *United States v. Barnett*, 376 U.S. 681 (1964)). The Court stated:

Were it not for the common-law privilege permitting teachers to inflict reasonable corporal punishment on children in their care, and the availability of the traditional remedies for abuse, the

open to public scrutiny.⁷⁴ The Court then emphasized that when these factors are coupled with the provision of common-law safeguards, specifically civil and criminal penalties, the risk of error and excessive or unreasonable force is minimal.⁷⁵

In addition to assessing the risk of a violation, the Court ascertained whether the benefits that would derive from imposing administrative safeguards could justify the costs.⁷⁶ The Court determined that even a brief, informal hearing would “significantly burden the use of corporal punishment as a disciplinary measure”⁷⁷ and would subvert the discretion that local and state authorities have traditionally exercised over disciplinary matters.⁷⁸ The Court distinguished this position from its holding in a case involving school suspensions⁷⁹ by noting the allegedly low incidence of abuse and the availability of judicial remedies in the case of corporal punishment.⁸⁰ In light of its determinations that the risk of deprivation is low, that schools are open

case for requiring advance procedural safeguards would be strong indeed. But here we deal with a punishment—paddling—within that tradition, and the question is whether the common-law remedies are adequate to afford due process.

Id. at 674-75 (footnote omitted).

74. *Id.* at 682.

75. *Id.*

76. *Id.* at 680; *see also* Clark, *supra* note 69, at 1168-69 (stating that the Court’s balancing of “the social value of the private claim against the social cost of added procedural safeguards” is flawed because it ignores the purpose of due process—protecting the individual).

77. *Ingraham*, 430 U.S. at 680; *see also supra* note 72 and accompanying text. The *Ingraham* Court stated that in the case of corporal punishment, informal hearings would divert time, personnel, and attention away from normal school activities. 430 U.S. at 680.

78. *Inraham*, 430 U.S. at 681-82. The Court concluded that

[a]ssessment of the need for, and the appropriate means of maintaining, school discipline is committed generally to the discretion of school authorities subject to state law. “The Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.”

Id. (quoting *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 507 (1969)).

79. *Goss v. Lopez*, 419 U.S. 565 (1975). The Court held in *Goss*, four years before *Ingraham*, that a hearing prior to suspension would *not* prevent the school from “operat[ing] with acceptable efficiency.” *Id.* at 581.

80. *Ingraham*, 430 U.S. at 678 n.46. The Court distinguishes corporal punishment from suspensions when discussing the intrusiveness of hearings, but the Court’s reasoning appears to be incomplete or unsupported. Although there are state judicial remedies available in response to corporal punishment that are not available in response to suspensions, there is no evidence provided for the claim that the allegedly low incidence of abuse in cases of corporal punishment distinguishes these cases from those involving suspension, thereby requiring fewer safeguards. *Id.* For additional criticism of the Court’s distinction between *Goss* and *Ingraham*, *see* Clark, *supra* note 69, at 1171 (commenting that the liberty interest in *Ingraham* should have been given at least as much weight, if not more, as the property interest in *Goss* and that the *Ingraham* children were also deprived of a property interest).

to the community, and that the benefits of additional procedures are outweighed by the costs, the Court held that the availability of post-deprivation, common-law remedies is sufficient to satisfy the due process standard demanded by corporal punishment in the schools.⁸¹

Given *Ingraham*'s holding that there is no federal procedural due process claim as long as there are adequate state remedies when punishment is unreasonable or excessive,⁸² the constitutionality of the Alabama statute rests on whether the Court finds that the law affords such a remedy. This determination rests on the answers to two questions. First, does the new law⁸³ nullify⁸⁴ the old corporal punishment law?⁸⁵ If so, then the new law's "appropriate means of discipline"⁸⁶ standard for corporal punishment replaces the "appropriate" and "reasonable" standard of the previously existing corporal punishment law.⁸⁷ Presuming Alabama's application of its former "reasonable" standard was consistent with the Supreme Court's

81. *Ingraham*, 430 U.S. at 678 (concluding that "[t]eachers and school authorities are unlikely to inflict corporal punishment unnecessarily or excessively when a possible consequence of doing so is the institution of civil or criminal proceedings against them").

This holding and its reasoning affirmed the Fifth Circuit's decision, *Ingraham v. Wright*, 525 F.2d 909 (5th Cir. 1976), and serve as the standard for due process analysis in cases involving corporal punishment in public schools. For a critique of the Court's reasoning, particularly with regard to the low incidence of abuse and the protection, or lack thereof, afforded by the openness of the schools and the availability of civil and criminal remedies, 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, 283-86 (1994).

82. See *supra* note 81 and accompanying text.

83. 1995 Ala. Acts 539; see *supra* notes 2-7 and accompanying text (setting forth various provisions of the law).

84. The new law states that "[a]ll laws or parts of laws which conflict with this act are hereby repealed." 1995 Ala. Acts. 539, § 7. According to Representative Howard Hawk, there was no discussion concerning which laws would be affected or in what ways laws would be affected by this section of the Alabama law. Hawk Interview, *supra* note 4.

85. See *infra* note 87 and accompanying text.

86. See *supra* note 3 and accompanying text.

87. Alabama's corporal punishment law prior to the enactment of the new statute was actually in the form of a criminal justification and excuse law regarding the use of force. The old corporal punishment laws read in part:

The use of force upon another person is justified under any of the following circumstances:

- (1) A parent, guardian or other person responsible for the care and supervision of a minor . . . and a teacher or other person responsible for the care and supervision of a minor for a special purpose, may use *reasonable and appropriate* physical force upon the minor or incompetent person *when and to the extent that he reasonably believes* it necessary and appropriate to maintain discipline or to promote the welfare of the minor or incompetent person.

ALA. CODE § 13A-3-24 (1994) (emphasis added).

“reasonableness” standard in *Ingraham*,⁸⁸ the old law would have afforded an adequate remedy even given criminal immunity: if the punishment were unreasonable or excessive (i.e., if the teacher acted outside of local school board policy) the teacher would be liable. If the new law nullifies and replaces the old law, however, teachers are immune from liability as long as they conform to a school board’s definition of “appropriate,” if a definition is even given. Thus, teachers may be able to invoke immunity regardless of whether or not they conform to the traditional “reasonableness” standard.⁸⁹

If the new law nullifies and replaces the old law, then the second question is: Do the new “appropriate” standard and the policies written in conformity with it allow for more severe punishment than that which the Court considers reasonable? If so, then the criminal immunity law would permit a teacher to use force beyond the federal reasonableness standard and still receive immunity from criminal liability. The teacher would escape such liability because the state’s new law affords a remedy only when the teacher acts outside of the policy (i.e., inappropriately).⁹⁰ If applied in this permissive manner, the Alabama law would permit teachers to violate the *Ingraham* “test” for adequate procedural due process,⁹¹ by providing a student no procedural due process in some cases of unreasonable punishment.⁹² A state actively permitting unreasonable uses of force seems counterintuitive. However, the reasonable use of force was already permitted under the state’s prior criminal justification law⁹³ and the legislature passed the criminal immunity law to give teachers *more* latitude in their imposition of corporal punishment.⁹⁴

In addition to changing the *standard* of legally acceptable force, the new criminal immunity law eliminates⁹⁵ the requirement that the determination to use *any* force must be reasonable.⁹⁶ The majority in *Ingraham* ignored the

88. See *supra* notes 71, 73 and accompanying text. It is possible that Alabama’s standard of reasonableness differs from that of the Court, in which case even the old law, in its application, could violate the Court’s standards for procedural due process.

89. *Id.*

90. See *supra* notes 2, 3 and accompanying text.

91. See *supra* notes 80-81 and accompanying text.

92. See *supra* notes 75, 81 and accompanying text.

93. See *supra* note 87 and accompanying text.

94. See *supra* notes 33, 34 and accompanying text.

95. See *supra* note 87 and accompanying text.

96. Compare ALA. CODE § 13A-3-24 (1994), *supra* note 87, with 1995 Ala. Acts 539, *supra* notes 2-7. Although the wording is unclear, it appears that the former law provides an objective determination of whether the *belief* in the need for force was reasonable. The new Alabama law

issue of the reasonableness of the decision to impose corporal punishment.⁹⁷ Nevertheless, the *Ingraham* dissent vehemently protested the gap left by the majority's oversight, especially given the minimal post-remedy protections that were available.⁹⁸ As a result, while this specific reduction in safeguards potentially caused by the new Alabama law would not be unconstitutional according to *Ingraham*, it would be a significant reduction in protection. Consequently, serious questions should be raised about the Alabama Educational Association's claim that the new law is "not an unfettered license for teachers to distribute corporal punishment to students."⁹⁹

Finally, regardless of the law's constitutionality with respect to procedural due process, the law is clearly intended to reduce the number of avenues through which a parent, on behalf of a child, can be heard concerning this constitutionally protected liberty interest. In order to reduce fear on the part of the teachers and subsequently increase the use of corporal punishment,¹⁰⁰ the Alabama legislature must have intended the criminal immunity provision to preclude actions that would have otherwise gone to court. As a result, the law affords students less procedural protection.

B. Substantive Due Process

Although the Court in *Ingraham v. Wright* declined to decide whether the imposition of corporal punishment can violate a student's substantive due process liberty interest in bodily security,¹⁰¹ a significant amount of federal case law has developed around this issue.¹⁰² Although the Eleventh Circuit, in which Alabama sits, has not ruled on this issue, an analysis of the other

imposes no validity requirements at all on the imposition of corporal punishment. The Florida statute at issue in *Ingraham* provided little protection by deferring to the "good faith" of the teacher "on the reports and advice of others." *Ingraham* 430 U.S. at 694 (White, J., dissenting).

97. *Ingraham*, 430 U.S. at 694 n.11 (White, J., dissenting) (stating that the "majority appears to agree that the damages remedy is available only in cases of punishment unreasonable in light of the misconduct charged").

98. *Id.* at 694-95 (White, J., dissenting). Justice White stated that the student had "no remedy at all for punishment imposed on the basis of mistaken facts, at least as long as the punishment was reasonable from the point of view of the disciplinarian . . ." *Id.* Consequently, the state's remedies did nothing to protect the student from the danger that concerned the court in *Goss*—the risk of reasonable, good-faith mistake in the school disciplinary process. See *Goss v. Lopez*, 419 U.S. 565 (1975).

99. See Courtney, *supra* note 8; see also *supra* note 8.

100. See *supra* notes 4, 7, 33, 34 and accompanying text.

101. See *supra* note 79 and accompanying text.

102. See *infra* notes 103, 109-10 and accompanying text.

circuits' positions provides meaningful guidance in determining how the Eleventh Circuit may respond to the new criminal immunity law.

When *Ingraham v. Wright* was decided in 1977, the case of *Hall v. Tawney*¹⁰³ was pending in the Fourth Circuit. Without Supreme Court guidance on the substantive due process rights afforded to recipients of corporal punishment,¹⁰⁴ the Fourth Circuit first determined that the imposition of corporal punishment could violate a child's constitutional right to substantive due process irrespective of any state remedy available to the student.¹⁰⁵ The court reasoned that if punishment were so extreme that it could no longer be considered related to the state's interest in maintaining order, then the schools violated the student's substantive due process rights.¹⁰⁶ Using a framework drawn from police brutality standards regarding suspects and prisoners,¹⁰⁷ the court established the following test:

[W]hether 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 inhuman abuse of official power literally shocking to the conscience.¹⁰⁸

Since the decision of the Fourth Circuit, many of the remaining circuits have addressed the substantive due process issue and have held, consistent with *Hall*, that excessive corporal punishment may give rise to a substantive due process violation.¹⁰⁹ Although not all of these circuits have adopted the

103. 621 F.2d 607 (4th Cir. 1980) (finding a potential substantive due process violation where a teacher struck a grade schooler with a thick paddle without apparent reason, shoved her against a desk, and twisted her right arm, such that she was hospitalized for 10 days because of traumatic injury to the soft tissue on various areas of her body and possible permanent injury to her back).

104. As a result of the *Ingraham* decision, both the Eighth Amendment and procedural due process claims were dropped from the appeal. *Id.* at 609-10.

105. *Id.* at 612 (stating that "[i]t is of course settled that relief under § 1983 does not depend upon the unavailability of state remedies, but is supplementary to them") (construing *Monroe v. Pape*, 365 U.S. 167 (1961)).

106. See *Hall*, 621 F.2d at 613.

107. *Id.* The court relied on *Rochin v. California*, 342 U.S. 165 (1952), in which the Supreme Court held that the forced pumping of a suspect's stomach was a clear violation of Fourteenth Amendment due process because it "shock[ed] the conscience" of the court. *Id.* at 172.

The *Hall* court reasoned that if the right to protection of one's "bodily security" against abuses of official power in the context of persons charged or suspected of a crime is a substantial due process right, then the court did "not see how [it could] fail also to recognize [that right] in public school children under the disciplinary control of public school teachers." *Hall*, 621 F.2d at 613.

108. *Hall*, 621 F.2d at 613 (construing *Johnson v. Glick*, 481 F.2d 1028, 1033 (2nd Cir. 1973)).

109. See, e.g., *Metzger v. Osbeck*, 841 F.2d 518, 520-21 (3d Cir. 1988) (swimming teacher placed

Hall standard, those who have adopted their own standard have generally established a framework that affords protection similar to that granted in *Hall*.¹¹⁰

The Fifth Circuit, however, is the only circuit that has completely rejected the validity of a substantive due process claim against teachers.¹¹¹ In the appellate court decision of *Ingraham v. Wright*,¹¹² the Fifth Circuit held that, given the long history of corporal punishment as an accepted means of discipline in schools,¹¹³ the traditional state and local control over the issue,¹¹⁴ and the existence of state remedies in cases of excessive force,¹¹⁵ it would be a "misuse of judicial power" to examine the severity of individual cases of punishment.¹¹⁶ Despite the intervening, contrary decision in *Hall* and its

student in a stranglehold for using foul language, rendering the student unconscious and causing him to fall, breaking his nose and fracturing several teeth); *Wise v. Pea Ridge High Sch. Dist.*, 855 F.2d 560, 562, 564 (8th Cir. 1988) (student received two blows on the buttocks with a wooden paddle for playing dodge ball); *Garcia v. Miera*, 817 F.2d 650, 652-53, 656 (10th Cir. 1987) (elementary student held by her ankles and hit with a split board on the front of her legs until they bled, leaving a scar), *cert. denied*, 485 U.S. 959 (1988); *Thrasher v. General Casualty Co.*, 732 F. Supp. 966, 967, 972 (W.D. Wis. 1990) (teacher threw student into blackboard for refusing to solve problem); *Brooks v. School Bd. of Richmond, Va.*, 569 F. Supp. 1534, 1535, 1536 (E.D. Va. 1983) (teacher "pierced [student's] upper left arm with a straight pin").

110. *Garcia* and *Brooks* explicitly adopted the *Hall* standard. *Garcia*, 817 F.2d at 658; *Brooks*, 569 F. Supp. at 1538. *Wise* cited *Hall* but used a slightly modified four-factor test:

1) the need for the application of corporal punishment; 2) the relationship between the need and the amount of punishment administered; 3) the extent of injury inflicted; and 4) whether the punishment was administered in a good faith effort to maintain discipline or maliciously and sadistically for the very purpose of causing harm.

Wise, 855 F.2d at 564. *Thrasher* cited and applied a combination of the *Hall* and *Wise* tests. *Thrasher*, 732 F. Supp. at 970-71. *Metzger* applied the same four-factor test as *Wise* but relied on *Johnson v. Glick*, 481 F.2d 1028, 1033 (2nd Cir. 1973), *cert. denied*, 414 U.S. 1033 (1973). *Metzger*, 841 F.2d at 520.

111. See *infra* notes 112-14, 116, 118 and accompanying text.

112. 525 F.2d 909 (5th Cir. 1976), *aff'd*, 430 U.S. 651 (1977).

113. *Id.* at 917 (stating that the "[p]addling 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").

114. *Id.* (stating that "it is not this court's duty to judge the wisdom of particular school regulations governing matters of internal discipline").

115. *Id.* (stating "[w]e note again the possibility of a civil or criminal action in state court against a teacher who has excessively punished a child"). Despite the court's use of state remedies to respond to substantive as well as procedural due process arguments, the Supreme Court and lower courts have stated that state remedies do not preclude the availability of relief under § 1983 but rather are supplemental to it. See *supra* note 105 and accompanying text.

116. *Ingraham*, 525 F.2d at 917 (refusing to examine the arbitrariness or capriciousness of the punishment in a given case). The court further stated that it was "a misuse of [its] judicial power to determine, for example, whether a teacher has acted arbitrarily in paddling a particular child for certain behavior or whether in a particular instance of misconduct five licks would have been a more

strong following by several other circuits,¹¹⁷ the Fifth Circuit has steadfastly adhered to this position through subsequent cases¹¹⁸ that have challenged it.

Although the Eleventh Circuit has not addressed the issue of substantive due process in the context of corporal punishment in public schools, it seems probable that the Eleventh Circuit would follow the Fifth Circuit.¹¹⁹ This adherence would be based on two facts. First, the Eleventh Circuit split from the Fifth Circuit in 1981. Second, *Ingraham v. Wright*, decided by the Fifth Circuit in 1976, dealt with the constitutionality of a corporal punishment policy in Florida, which is now part of the Eleventh Circuit.¹²⁰ If the Eleventh Circuit adheres to Fifth Circuit precedent and sends all substantive due

appropriate punishment than ten licks." *Id.*

Because the Supreme Court refused to hear this issue on appeal, *Ingraham v. Wright*, 430 U.S. 651, 659 n.12 (1977), this holding has effectively remained good law. The circuit court acknowledged, however, its authority to assess the arbitrariness, capriciousness, or relatedness of the concept of corporal punishment, how corporal punishment was authorized by the school board, or how it was applied throughout the school system. See *Ingraham*, 525 F.2d at 916. Since the evidence was insufficient to grant relief on these issues, however, the court dismissed them. *Id.*

The Fifth Circuit decided in another case that it would consider whether corporal punishment was imposed by the *district* in a way that was "arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning." *Fee v. Herndon*, 900 F.2d 804, 808 (5th Cir. 1990) (quoting *Woodard v. Los Fresnos Indep. Sch. Dist.*, 732 F.2d 1243, 1246 (5th Cir. 1984)), *cert. denied*, 498 U.S. 908 (1990). Nevertheless, the court severely tempered its statement when it reiterated the Fifth Circuit's position that "no arbitrary state action exists, by definition, where states affirmatively impose reasonable limitations upon corporal punishment and provide adequate criminal or civil remedies for departures from such laws." *Id.* at 806; see also *Coleman v. Franklin Parish Sch. Bd.*, 702 F.2d 74, 76 (5th Cir. 1983) (*per curiam*) (stating that corporal punishment cannot be arbitrary or capricious because the statute requires that the punishment be reasonable and "for good cause").

117. See *supra* notes 104-110 and accompanying text for discussion of *Hall* and related cases.

118. See, e.g., *Fee*, 900 F.2d at 806-807, 810 (refusing to recognize a substantive due process claim in a case in which a sixth-grade special education student was beaten so excessively for misbehaving in class that he was forced to remain in psychiatric rehabilitation for six months); *Cunningham v. Beavers*, 858 F.2d 269 (5th Cir. 1988) (reaffirming *Ingraham* and holding that the availability of state court remedies precluded a substantive due process claim where kindergarten students received five blows from a paddle for snickering, resulting in severe bruising which was deemed to be excessive by a social worker and doctor); *Woodard*, 732 F.2d at 1245-46 (quoting *Hall* but refusing to reconsider *Ingraham* because the paddling of a high school student three times for allegedly using abusive language with the bus driver would not present the kind of shocking abuse of official power raised in *Ingraham* even if such a claim were allowed); *Coleman*, 702 F.2d at 76 (rejecting a substantive due process claim based on *Ingraham* after a teacher struck a six-year-old in the head with a coffee cup, causing a wound requiring stitches, for engaging in horseplay).

119. See *Parkinson*, *supra* note 81, at 298 n.181. Because Alabama is in the Eleventh Circuit, see *infra* note 122 and accompanying text, precedent from both the Fifth and the Eleventh Circuit could have an impact on the interpretation of the new Alabama law.

120. See *Parkinson*, *supra* note 81, at 298.

process claims back to the state, a student will have no remedy¹²¹ when a teacher inflicts corporal punishment as long as the teacher is determined to have acted within school board policy. Given the deference traditionally shown teachers¹²² when determining whether they were acting within board policy and the often vague nature of board policies,¹²³ a state will rarely find that a teacher has exceeded the boundaries of a policy and subject the teacher to state action.

Although the *Ingraham* court was willing to consider a potential substantive due process violation by the school board and the superintendent based on the school board policy,¹²⁴ such a violation is difficult to prove.¹²⁵ Furthermore, the superintendent and school board can insulate themselves from a policy-based charge by using constitutional standards in the policy itself.¹²⁶ Of course, the school board standard then simply reduces the

121. The Eleventh Circuit may determine, as the *Ingraham* court did in the Florida case, that Alabama's new law, while affording less protection than before, will still afford a state remedy when punishment is excessive—i.e., that acting excessively is synonymous with being outside of school board policy. Such a finding would be constitutional but detrimental to students whose claims will be sent back to the states with no available course of action. See *supra* notes 45-51 and accompanying text. If, however, punishment considered excessive in federal court were inside board policy, then the student would have a constitutional right without a remedy, which is a violation of § 1983.

122. See *supra* note 78 and accompanying text.

123. See, e.g., Sylacauga City Board of Education, Handbook—Rules and Regulations (Aug. 2, 1979) (corporal punishment policy that “recognizes the importance of reasonable control over the conduct of pupils under its jurisdiction”); Jefferson County Board of Education, Discipline Policy 4 (Aug. 22, 1985) (stating that “[c]orporal punishment shall be defined as bodily punishment, by use of a paddle or a facsimile on the buttocks” and providing no other guidance about the degree of force). A corporal punishment policy, which was provided by the AASB and was taken from an actual school board's policy handbook but has no county identification, permits a teacher to inflict corporal punishment “to the extent to which such punishment would be administered by a parent in the proper upbringing of his own children.” Discipline of Pupils § 5:05(a) (on file with author); see also DeKalb County, Discipline (on file with author) (recognizing the necessity for reasonable control and discipline”). This DeKalb County policy references § 1983 and a constitutional rights case, *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969), but the case deals with First Amendment rights.

124. *Ingraham v. Wright*, 525 F.2d 909, 916-917 (5th Cir. 1976), *aff'd*, 430 U.S. 651 (1977). Given the nebulous standards of both the state law and many local policies, *supra* note 123 and accompanying text, as well as the deference accorded to local and state authorities in the area of education, see *supra* notes 78, 114 and accompanying text, courts will rarely find such liability. See Bach, *supra* note 13, at 1134-35.

125. See, e.g., *Fee v. Herndon*, 900 F.2d 804, 810 n.9 (5th Cir. 1990) (stating that even if no post-punishment relief were available, plaintiffs would have to demonstrate “that these government defendants fostered an official policy or custom to batter children . . . [and] that excessive [corporal] punishment occurred within the school district as a matter of well-established custom”).

126. Some of the Alabama school boards have already done this. See, e.g., Athens City Board of Education Discipline 1 (Oct. 5, 1978) (stating that such policies shall “demonstrate recognition of . . . individual student constitutional rights,” and that disciplinary measures shall “reflect a fair and

protection afforded children to that granted by the Constitution,¹²⁷ a standard that is less protective than state law standards.¹²⁸

Moreover, plaintiffs in the Eleventh Circuit may have the limited relief available to them further undermined by the doctrine of qualified civil immunity.¹²⁹ This doctrine is a defense available to government officials charged with a constitutional violation in a civil rights action for damages.¹³⁰ Under this defense, officials performing discretionary functions are immune as long as their conduct “does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”¹³¹ Because the constitutional standard for a substantive due process violation in the context of corporal punishment has not been established in the Eleventh Circuit and because the Fifth Circuit’s *Ingraham* decision provides no standard at all, a teacher or school official in those circuits would be immune.¹³² Therefore, qualified immunity in federal civil rights suits would

reasonable exercise of authority, being neither arbitrary, capricious, discriminatory, or otherwise unreasonable”) (on file with author). Furthermore, courts will probably not find a vague policy to be unconstitutional on its face because of the deference afforded local authorities in this area. *See supra* notes 78, 114 and accompanying text. As a result, courts will usually find that a given policy did not authorize unconstitutional behavior.

127. *See supra* note 108 and accompanying text.

128. *See infra* notes 146 and accompanying text; *see also* *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980). *Hall* concluded:

In the context of disciplinary corporal punishment in the public schools, we emphasize once more that the substantive due process claim is quite different than a claim of assault and battery under state tort law. In resolving a state tort claim, decision [sic] may well turn on whether “ten licks rather than five” were excessive But substantive due process is concerned with violations of personal rights of privacy and bodily security of so different an order of magnitude that inquiry in a particular case simply need not start at the level of concern these distinctions imply. . . . Not every violation of state tort and criminal assault laws will be a violation of this constitutional right, but some of course may.

Id. (citations omitted).

129. *See infra* notes 132-33 and accompanying text.

130. *Harlow v. Fitzgerald*, 457 U.S. 800, 815-818 (1982) (barring claims that do not involve “clearly established” rights, even if the defendant acted maliciously). Qualified civil immunity is designed to mitigate the social costs of litigation against officials. *See infra* note 135.

131. *Harlow* at 818 (citing *Pronuncier v. Navarette*, 434 U.S. 555, 565 (1978); *Wood v. Strickland*, 420 U.S. 308, 322 (1975)). This issue is treated by the court as a matter of law before discovery is allowed. *Id.*

132. *See* Abraham Chayes, *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 62, 234 (1982) (asserting that in “ambiguous or uncharted areas,” *Harlow* provides “immunity for even the most egregious abuses of office”); Mayer G. Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and a Critique*, 72 NW. U. L. REV. 526, 558-562 (1977) (stating that the qualified immunity standard of “settled” law effectively precludes liability in many cases because, among other reasons, public officials’ knowledge of and access to the law are considered by the courts).

undermine the ability of plaintiffs to recover damages from teachers or board members for the infliction of corporal punishment.¹³³

Even if the Eleventh Circuit elects to follow the majority of circuits and permits a substantive due process claim,¹³⁴ the federal courts will offer students little protection. The standard established by the circuits following *Hall v. Tawney*¹³⁵ renders federal substantive protection inherently inadequate and inconsequential in comparison to a state's criminal substantive protections. The standard¹³⁶ is so strict "that a child in public school will have to be severely beaten before a court will consider that child's constitutional claim."¹³⁷ Thus, case law shows only a few findings for the plaintiff and only in particularly extreme cases.¹³⁸ For example, in *Garcia v. Miera*,¹³⁹ the court of appeals reversed the district court's grant of summary judgment against Teresa, a nine-year-old girl who had hit a boy because he had kicked her. As punishment for this infraction, Teresa was held upside down by her ankles while she received a severe paddling on the front of her legs with a split wooden paddle, causing a serious laceration that bled through her pants and

The existence of a state corporal punishment statute or local board policy that establishes guidelines will still not serve as a basis for claiming that the teacher or board member should have known about a Fourteenth Amendment due process right if that right was not clearly established in that circuit. *Davis v. Scherer*, 468 U.S. 183 (1984) (holding that state officials were entitled to immunity despite their violation of administrative regulations and a state statute because there was no clearly established constitutional standard).

133. See Stephanie E. Balcerzak, *Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation*, 95 YALE L.J. 126, 127-129 (1985) (asserting that plaintiffs' ability "to recover damages from a government official is severely restricted by the law of qualified immunity, which protects officials from liability for constitutional violations in all but the most egregious cases") (footnotes omitted). See generally Freed, *supra* note 132 and accompanying text.

134. In addition to the weight of the majority opinion in the circuits, the Supreme Court's suggestion that a certain degree of excessive punishment would implicate procedural due process protection, see *supra* note 71 and accompanying text, may lead the Eleventh Circuit to find that excessive corporal punishment violates substantive due process rights. This possibility is supported by the fact that the existence and definition of a constitutionally protected right does not vary between substantive and procedural due process analysis.

135. *Hall*, 621 F.2d 607; see *supra* notes 108-10 and accompanying text.

136. See *supra* note 108.

137. Parkinson, *supra* note 81, at 289.

138. See, e.g., *Metzger v. Osbeck*, 841 F.2d 518, 519-520 (3rd Cir. 1988); *Webb v. McCullough*, 828 F.2d 1151, 1154 (6th Cir. 1987) (involving a high school trip during which a teacher broke into a bathroom in which a student had locked herself, knocked her down, threw her against the wall, and slapped her, because the teacher had caught a boy in the room with her and her friends; *Hall*, 621 F.2d at 614.

139. 817 F.2d 650 (10th Cir. 1987).

left a scar.¹⁴⁰ On another occasion, the teacher subjected Teresa to several blows on her buttocks as punishment for telling an alleged lie about a teacher.¹⁴¹ The resulting bruises were severe enough that a nurse who examined the child commented that she “would have called [the police department’s] Protective Services” had Teresa received the injury from someone at home.¹⁴² Unfortunately, extreme cases like this then serve as a standard against which future judges determine the constitutional threshold for brutality.¹⁴³

In addition, the “application of the *Hall* standard often operates as a jurisdictional bar because the substantive due process issue invariably is raised in a pretrial defense motion, either for dismissal of the claim or for summary judgment.”¹⁴⁴ Unfortunately, several problems are inherent in making a meaningful determination based on a limited pretrial record. One such problem was exemplified by a federal judge who stated: “We can only determine shock, vel non, after a trial. Only after a trial . . . can we determine whether we had jurisdiction to try the case. If we are not shocked we didn’t have jurisdiction. That is a heck of a way to run a Constitution.”¹⁴⁵ As a result,

140. *Id.* at 652-53.

141. *Id.* at 653.

142. *Id.*

143. See Parkinson, *supra* note 81, at 292 (explaining that cases that involve “truly abhorrent abuses” then serve as a “benchmark” so that “if the actions of school officials in a particular case do not rise to the level of brutality exhibited by the defendants in [other cases that did not shock the judges], the plaintiffs’ claims [in the case at issue] apparently are not worthy of consideration by the federal courts”); see also, e.g., *Brown v. Johnson*, 710 F. Supp. 183, 185-87 (E.D. Ky. 1989) (concluding, after discussing *Hall*, *Woodard*, *Brooks*, *Garcia*, and *Webb*, see *supra* notes 109, 118, 138 and accompanying text, that a claim regarding the striking of Gloria Brown seven times for laughing in class could not survive a motion for summary judgment because “[a]lthough Gloria Brown was severely bruised [and her doctor concluded the punishment was excessive], she was not physically injured to the extent that the students in the other cases cited were”); *Brooks v. School Bd. of Richmond, Va.*, 569 F. Supp. 1534, 1536 (E.D. Va. 1983) (concluding that because sticking a student with a straight pin is not as bad as the paddling suffered by the *Ingraham* children and because the paddling did not shock the Supreme Court, the use of a straight pin is constitutional). The *Brooks* court seemed to ignore the fact that the Supreme Court in *Ingraham* never addressed the substantive due process issue. See *supra* note 69 and accompanying text.

144. Parkinson, *supra* note 81, at 290 n.97. Also see *supra* notes 109, 118 and accompanying text for examples of cases in which defendants’ motions to dismiss or for summary judgment were granted at the district court level.

In addition, if a state court decides that a teacher has acted within a school board policy that utilizes the constitutional standard and a parent proceeds in federal court, there is a question of whether the federal court will consider the state court’s holding in its determination of whether to hear the case and/or whether the act was unconstitutional. Such a consideration would further undermine the strength of this civil remedy.

145. *Brooks*, 569 F. Supp. at 1539.

even the *Hall* standard, while affording greater protection and being more desirable than the complete bar presented by the Fifth Circuit, offers almost meaningless protection.

The detrimental effects of criminal immunity statutes may be illustrated by comparing the minimal federal protection on which a plaintiff must now rely with the greater protection state criminal remedies previously afforded.¹⁴⁶ For example, the child abuse law of Alabama allows for a conviction when there is a finding of willful abuse or willful maltreatment.¹⁴⁷ Therefore, this law provides a lower threshold of force for finding a violation than the *Hall* "shocking to the conscience" federal standard. An example of the lower threshold can be seen in *State Department of Human Resources v. Funk*¹⁴⁸ in which the Alabama Supreme Court reversed a finding of abuse by the

146. Most state criminal proceedings surrounding corporal punishment involve charges of battery or child abuse. *See, e.g.*, *Rhodus v. Dumiller*, 552 F. Supp. 425 (M.D. La. 1982) (involving battery claim); *Meyer v. Litwiller*, 749 F. Supp. 981 (W.D. Mo. 1990) (involving battery claim); *Deal v. Hill*, 619 So. 2d 1347 (Ala. 1993) (involving claims of assault and battery); *State Dep't of Human Resources v. Funk*, 651 So. 2d 12 (Ala. Civ. App. 1994) (involving claim of child abuse by elementary school teacher).

The fact that the protection afforded by state remedies is generally greater than that provided by federal substantive due process is stated directly by numerous cases. *See supra* note 128 and accompanying text; *see also, e.g.*, *Rubek v. Barnhart*, 814 F.2d 1283, 1285 (8th Cir. 1987) (acknowledging that "it is well established that not every violation of state tort or criminal assault laws committed by a state official results in a constitutional violation cognizable under § 1983" (citing *Davis v. Forrest*, 768 F.2d 257, 258 (8th Cir. 1985)); *Woodard v. Los Fresnos Indep. Sch. Dist.*, 732 F.2d 1243, 1244 (5th Cir. 1984) (asserting that "[t]he [F]ourteenth [A]mendment did not make every trespass by a state government a deprivation of federal constitutional rights").

Alabama's definition of assault and battery, like the child abuse law, affords greater protection than the federal substantive due process standard. Alabama's criminal code states that, "(a) A person commits the crime of assault in third degree if: (1) With intent to cause physical injury to another person, he causes physical injury to any person; or (2) He recklessly causes physical injury to another person . . ." ALA. CODE § 13A-6-22 (1975). Physical injury is defined as the "[i]mpairment of physical condition or substantial pain." *Id.* § 13A-1-2(8).

The application of the assault and battery law in the context of corporal punishment within the school system, however, still reflects courts' deference to state and local authorities to control the discipline of students. In a landmark case of the Alabama Supreme Court, the court reasoned that because a schoolmaster is "standing in *loco parentis* and has the authority to administer moderate [corporal punishment] . . . the teacher must not only inflict on the child immoderate chastisement [to be guilty of assault and battery,] but he must do so with legal malice or wicked motives or he must inflict some permanent injury." *Suits v. Glover*, 71 So. 2d 49, 50 (Ala. 1954); *see also Deal*, 619 So. 2d at 1348 (applying the *Glover* test and finding that the punishment involved did not exceed this threshold).

147. ALA. CODE § 26-15-3 (1975).

148. 651 So. 2d 12 (Ala. Civ. App. 1994). Although the Department of Human Resources also found that the teacher had violated the board of education's policy and interpretative guidelines, the charge of abuse did not depend upon this finding but rather was independent of it. *Id.* at 13.

Department of Human Resources for the infliction of corporal punishment in a school.¹⁴⁹

Although the court in *Funk* made a passing reference to the sufficiency of the evidence, the court erroneously based its decision on state and federal standards that are stricter than the standard provided by the relevant child abuse law.¹⁵⁰ First, despite the fact that the plaintiff's claim was based on state law, the court relied on *Ingraham's* holding that the Eighth Amendment protections against cruel and unusual punishment do not apply to students.¹⁵¹ Second, the court inexplicably turned to the assault and battery standard and held that the conduct did not meet that higher standard.¹⁵² Third, the court relied on the Fifth Circuit's statement in *Ingraham* regarding the history of corporal punishment to justify both a liberal reading of applicable laws and a strong deference to state and local discretion.¹⁵³ The court failed to address the fact that by using the constitutional standard to exonerate the defendant, it was creating a vicious cycle whereby the state laws that allegedly justified the Fifth Circuit's refusal to hear substantive due process claims were themselves being stripped of their protective weight.¹⁵⁴ By resorting to stricter federal standards in order to exculpate the defendant from a claim of child abuse, however, the court illustrated the disparity between state and federal standards. Furthermore, child abuse and other laws from several states¹⁵⁵ confirm that state standards generally afford greater protection than the federal "shocking to the conscience" *Hall* standard.¹⁵⁶

149. *Id.*

150. ALA. CODE § 26-15-3 (1975); *see also supra* note 146-47 and accompanying text.

151. *Funk*, 651 So. 2d at 18-19; *see supra* note 68 and accompanying text.

152. *Funk*, 651 So. 2d at 18 (citing *Deal v. Hill*, 619 So. 2d 1347 (Ala. 1993) and *Suits v. Glover*, 71 So. 2d 49 (Ala. 1954)).

153. *Id.* at 19.

154. *See supra* notes 111-18 and accompanying text.

155. *See, e.g.*, CAL. PENAL CODE § 242 (West 1988) (defining battery as "any willful and unlawful use of force or violence upon the person of another"); IDAHO CODE § 18-1501 (1987 & Supp. 1996) (defining injury to children as willfully causing or permitting the person or health of such child to be injured); IND. CODE ANN. § 35-42-2-1 (West 1995 & Supp. 1996) (defining battery as "knowingly or intentionally touch[ing] another person in a rude, insolent, or angry manner"); MICH. COMP. LAWS ANN. § 750.136b(4) (West 1991) (defining third degree child abuse as "knowingly or intentionally causing physical harm to a child"); MISS. CODE ANN. § 43-21-105 (1972 & Supp. 1996) (defining an abused child as one who has been subjected to "mental injury, nonaccidental physical injury or other maltreatment").

156. *See supra* note 108 and accompanying text.

C. Additional Policy Problems

It is sadly ironic that teachers who violate child abuse statutes but act within board policy will not be held liable,¹⁵⁷ while parents who violate the same statutes with regard to their own children will be held liable. Although parents are exempt from liability as long as they are using reasonable force,¹⁵⁸ the old law afforded teachers the same exemption.¹⁵⁹ Consequently, the new law offers one of two conclusions.

First, the legislature considered the “appropriate means of discipline” standard in the new law equivalent to the “reasonable and appropriate standard” of the old law. As a result, the new law was intended to provide teachers no more latitude with regard to child abuse and other criminal statutes than the pre-existing corporal punishment law (i.e., no more latitude than parents).¹⁶⁰ This conclusion renders the law meaningless with regard to two of its primary purposes—reducing the potential for litigation and affording greater latitude in the imposition of corporal punishment.¹⁶¹

Second, the legislature intended to allow greater control and latitude in disciplining while shielding teachers from liability. This interpretation means that teachers who act within board policy but exceed parental authority in disciplining a child are immune from child abuse statutes.¹⁶² In these cases, which will be heard, if at all, through a federal cause of action, the disparity between the parents’ threshold for guilt and that of the teachers will be significant. The difference results from the gap between the state child abuse law standard and the federal substantive due process standard.¹⁶³

157. See *supra* notes 90-94 and accompanying text.

158. See *supra* note 87 and accompanying text.

159. See *supra* note 87 and accompanying text.

160. See *supra* notes 96 and accompanying text.

161. See *supra* notes 2, 4, 33, 34 and accompanying text. Although the new law also shifts some of the fiscal burden of litigation to the school boards and requires the promulgation of policies on corporal punishment, the main focus of the law is granting teachers immunity from criminal laws, especially child abuse laws, when the teachers act within board policy. *Id.*; see also discussion *supra* Part III.

Furthermore, the new law prevents liability *after* a teacher is determined to have acted within a given policy. Consequently, there is no less litigation under the new law because the determination of whether a teacher acted within board policy occurs at the same point in the proceeding as the determination of reasonableness, which is the standard for immunization under the old law. See discussion *supra* Part II.B.

162. See *supra* note 148-49 and accompanying text.

163. See *supra* notes 128, 142, 146 and accompanying text. See also cases cited in notes 142 and 146, *supra*, in which there was a finding of abuse or a statement that abuse would have been reported had the incident occurred at home. See, e.g., *Garcia v. Miera*, 817 F.2d 650, 653 (10th Cir. 1987); *State*

Compulsory education laws¹⁶⁴ and the independent authority granted by them may support the argument that school authorities should be able to decide for themselves whether the decision to inflict corporal punishment and the severity of that punishment are appropriate. Nevertheless, even if a teacher should be able to act independent of parental preference,¹⁶⁵ the *level* of authority or discretion should be no more than that afforded parents.¹⁶⁶ As stated by the Alabama legislature when it passed the child abuse reporting law, child abuse is a “social evil” and “society receives a great benefit in having children protected from abuse and neglect.”¹⁶⁷ The Alabama legislature considered this premise so strong and obvious that it “need[ed] no amplification.”¹⁶⁸ How this finding could apply to parents more than teachers is truly vexing.

Not only does allocating greater authority over children to teachers than to parents undermine the state’s claimed goal of protecting children from harm,¹⁶⁹ but it also directly contravenes some of the basic conservative¹⁷⁰ notions regarding the family’s primary control and authority over the upbringing and discipline of children. For example, conservative national leaders have begun to assert, not only through rhetoric but also through proposed legislation,¹⁷¹ the “fundamental authority of the family” in the

Dept. of Human Resources v. Funk, 651 So.2d 12, 13(Ala. Civ. App. 1994).

164. See *supra* notes 15-16 and accompanying text.

165. See Baker v. Owen, 395 F. Supp. 294, 298-301 (M.D.N.C. 1975), *aff’d*, 423 U.S. 907 (1975) (holding that parental permission is not required prior to the infliction of corporal punishment despite parents’ constitutional rights to the custody and control of their children).

166. The State of Delaware recognizes the anomaly of granting teachers more disciplinary authority than that granted to parents. See DEL. CODE ANN. tit. 14, § 701 (1974) (explicitly granting teachers the same authority regarding the control and discipline of students as that granted to their parents).

167. Harris v. City of Montgomery, 435 So. 2d 1207, 1213 (Ala. 1983) (discussing constitutionality of Alabama’s statutes regarding the reporting of child abuse).

168. *Id.*

169. *Id.*

170. The criminal immunity law was promulgated under a strongly conservative governor and legislature.

171. One such legislative proposal is the currently pending U.S. Senate bill known as the Parental Rights and Responsibilities Act, proposed by Senator Charles Grassley and mirrored in a House bill proposed by Representative Steve Largent. See S. 984, 104th Cong., 1st Sess. (1995); Cheryl Welzstein, *House, Senate Bills Arm to Guard Parents’ Rights*, WASH. TIMES, June 28, 1995, at A1. This Act’s purpose is to protect the fundamental “right of a parent to direct the upbringing of a child,” including, but not limited to, the right to “discipline the child.” H.R. 1946, 104th Cong., 1st Sess. § 3(4)(A) (1995) (version 1). Although the proposed Act allows for the use of “reasonable corporal punishment,” *id.*, it subjects this “right” to child abuse and neglect laws, *id.* § 3(4)(C).

upbringing of children.¹⁷² Instead of giving greater authority to teachers than to parents, legislators should be looking for ways to strengthen families and address problems without violence.

IV. PROPOSAL

Corporal punishment should be banned. The entrenchment of such practices in certain states, however, calls for a realistic alternative that does not present the weaknesses of current laws. *First, criminal immunity should not be a part of any corporal punishment law.* Criminal immunity for teachers is destructive to children because it allows for a greater use of force¹⁷³ while it provides limited procedural and substantive protection.¹⁷⁴ With respect to the fear generated by violence among students and the recent, isolated incidents against teachers,¹⁷⁵ teachers are already afforded the same legal protection as other citizens with regard to self-defense and the defense of others.¹⁷⁶ For the remaining cases, there should be no need for criminal immunity if teachers exercise reasonable force,¹⁷⁷ and there should be no need

172. See *supra* note 170 and accompanying text. Even though the focus of the proposed Act is on governmental intrusions directly into the home, such as when the government removes a child, the law also addresses the government making choices for parents in areas that are key to the upbringing of the child. For example, the materials for the act published by Rep. Largent's office critically cite to *Cornwell v. State Board of Education*, 314 F. Supp. 340 (D. Md. 1969), *aff'd*, 428 F.2d 471 (4th Cir. 1970), *cert. denied*, 400 U.S. 942 (1970), which allowed family life and sex education to be taught in elementary and secondary schools as part of health education. Office of Representative Largent, Rep. Largent Announces "Parental Rights & Responsibilities Act of '95": Receives Strong Support from Members of Senate, House, & Major Pro-Family Organizations (June 28, 1995). Arguably, issues of discipline are as fundamental to the family unit as issues of education, a contention supported by the fact that the Parental Rights and Responsibilities Act addressed four areas of traditional and fundamental parental control—education, discipline, health, and religion. H.R. 1946, 104th Cong., 1st Sess. § 3(4)(A) (1995) (version 1).

173. See *supra* notes 90-92 and accompanying text.

174. See *supra* notes 72, 90-92, 128, 146 and accompanying text.

175. See *supra* notes 24-25 and accompanying text; see also Sharon L. Jones, *Teen Drugs Up, Weapons Are Down*, SAN DIEGO UNION TRIB., April 26, 1996, at B1 (reporting that teens are less likely than a few years ago to be carrying a weapon to school and that the percentage of students who reported being in a fight on school property dropped from 15.6 percent in 1993 to 13.7 percent in 1995); *Shoves Most Common Violence in School; Use of Classroom Firearms Rare, Survey Finds*, ST. LOUIS POST-DISPATCH, Dec. 17, 1993, at 3A (stating that "violence is more likely to involve pushing, shoving, grabbing, slapping, insulting or stealing than using a firearm or committing a serious assault" and that 77 percent of public school teachers surveyed said they felt "very safe" in or around schools), available in LEXIS, News Library, Slpd File.

176. ALA. CODE § 13A-3-23 (1975) (granting generally the right of self-defense).

177. *Id.*

for force greater than that which would be deemed reasonable.¹⁷⁸

Also, despite claims to the contrary, such immunity would not necessarily prevent lawsuits.¹⁷⁹ If the state is concerned about the financial burden of litigation on teachers, the state can simply shift the costs to the local school boards without providing such immunity.¹⁸⁰

Moreover, criminal immunity will not effectively address the youth violence allegedly being targeted¹⁸¹ because the recipients of corporal punishment¹⁸² are usually young children who commit only minor transgressions.¹⁸³ Arguing that the absence of corporal punishment in schools promotes violence by students ignores the complex factors—such as poverty,¹⁸⁴ drugs,¹⁸⁵ mental illness,¹⁸⁶ and, ironically, child abuse¹⁸⁷—that

178. Federal courts have found that the imposition of corporal punishment is rationally related to the goal of maintaining discipline and order in schools. *See, e.g.,* *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988), *cert. denied*, 489 U.S. 1067. However, it is arguable that criminal immunity is unconstitutional because it is not rationally related to the goal of effectively imposing corporal punishment. As this Note has discussed, such immunity is either redundant by virtue of already existing protections or a potential violation of procedural due process. Because the law does not seem either to allow for the more “effective” use of a teacher’s authority to inflict corporal punishment or to reduce the burden of litigation, the criminal immunity law is arguably not rationally related to the goal of order in the schools, thereby failing the lowest level of scrutiny under the Equal Protection Clause. Courts sometimes argue that children in school are not comparable to children at home and, therefore, that children in school should be able to receive greater discipline there. However, neither the old doctrine of *in loco parentis* nor the more modern concept of independent authority explicitly grants schools greater control over children than that granted parents by the state. *See supra* notes 12-16 and accompanying text.

179. *See supra* note 48 and accompanying text.

180. *See supra* note 2 and accompanying text.

181. *See supra* notes 24-25 and accompanying text.

182. *See supra* note 38 and accompanying text.

183. *See supra* note 38 and accompanying text; *supra* note 181 and accompanying text; *see also, e.g.,* *Cunningham v. Beavers*, 858 F.2d 269, 271 (5th Cir. 1988), *cert. denied*, 489 U.S. 1067; *Wise v. Pea Ridge Sch. Dist.*, 855 F.2d 560, 562 (8th Cir. 1988) (playing dodge ball); *Metzger v. Osbeck*, 841 F.2d 518, 519 (3rd Cir. 1988) (using foul language with another student); *Coleman v. Franklin Parish Sch. Bd.*, 702 F.2d 74, 75 (5th Cir. 1983) (engaging in horseplay with another student).

184. MURIEL S. KARLIN & REGINA BERGER, *DISCIPLINE AND THE DISRUPTIVE CHILD* 139 (1992); DEBORAH PROTHROW-STITH, *DEADLY CONSEQUENCES* 64-79 (1991); J. JEFFRIES MCWHIRTER ET AL., *AT RISK YOUTH: A COMPREHENSIVE RESPONSE* 21-31 (1993).

185. *See* KARLIN & BERGER, *supra* note 183 at 151-54; MCWHIRTER ET AL., *supra* note 183, at 116-35 (1993); PROTHROW-STITH, *supra* note 183, at 111-29. *See also* Kirk, *supra* note 24 (discussing a poll of over 2,000 youths in grades 7 to 12 in public, private, and parochial schools across the country” which indicated that 61% of teenagers blame teenage violence on drugs).

186. *See* KARLIN & BERGER, *supra* note 183, at 26-27, 225-38; HILL M. WALKER ET AL., *ANTISOCIAL BEHAVIOR IN SCHOOL: STRATEGIES AND BEST PRACTICES* 2-17 (1995). *See generally* DONALD J. SHOEMAKER, *THEORIES OF DELINQUENCY: AN EXAMINATION OF EXPLANATIONS OF DELINQUENT BEHAVIOR* (1990); DENNIS STOTT, *DELINQUENCY: THE PROBLEM AND ITS PREVENTION* (1982).

contribute to violent behavior. Extensive research shows that the experience of corporal punishment, as a model of aggression, may actually lead to aggressive or violent delinquent behaviors.¹⁸⁸ Short of generating additional aggression, the stronger the corporal punishment, the greater the danger of psychological as well as physical harm.¹⁸⁹

Second, although the Supreme Court has ruled that the right of parents to have control and custody of their children does not mandate parental permission prior to the infliction of corporal punishment,¹⁹⁰ *parental permission should be required by state law*.¹⁹¹ The recent national efforts to bring back respect for and deference to parental choices regarding a child's upbringing, including discipline,¹⁹² support the argument that the government should not interfere in those decisions without compelling justification.¹⁹³ In light of this framework and the fact that courts have held that maintaining order and control in the classroom is not a compelling interest but rather only a legitimate interest,¹⁹⁴ states should require parental permission. In addition, receiving prior parental permission should address one of the primary goals of

187. See DAVID E. BRANDT & S. JACK ZLOTNICK, *THE PSYCHOLOGY AND TREATMENT OF THE YOUTHFUL OFFENDER* (1988); Paul Glasser & Charles Garvin, *A Framework for Family Analysis Relevant to Child Abuse, Neglect and Juvenile Delinquency*, in *EXPLORING THE RELATIONSHIP BETWEEN CHILD ABUSE AND DELINQUENCY* 100, 110-113 (R.J. Hunner and Y.E. Walker eds., 1981); C.M. Mouzakitis, *An Inquiry into the Problem of Child Abuse and Juvenile Delinquency*, in *EXPLORING THE RELATIONSHIP BETWEEN CHILD ABUSE AND DELINQUENCY* 220-231, *supra*; T.J. Reidy, *The Aggressive Characteristics of Abused and Neglected Children*, 33 *J. CLINICAL PSYCHOL.* 1140, 1145 (1977).

188. See Stuart Vexler, *Social Learning Theory and Child Abuse Interventions*, in *EXPLORING THE RELATIONSHIP BETWEEN CHILD ABUSE AND DELINQUENCY* 166-173, *supra* note 186. See generally ALBERT BANDURA & RICHARD H. WALTERS, *SOCIAL LEARNING AND PERSONALITY DEVELOPMENT* (1963); ALBERT BANDURA, *PRINCIPLES OF BEHAVIOR MODIFICATION* (1969).

189. See generally ADAH MAURER, *PADDLES AWAY: A PSYCHOLOGICAL STUDY OF PHYSICAL PUNISHMENT IN SCHOOLS* (1981).

190. See *Baker v. Owen*, 395 F. Supp. 294, 298-301 (M.D.N.C.) (stating that parents' interest in the upbringing of their children is not absolute and states have a legitimate and substantial interest in maintaining order and discipline), *aff'd*, 423 U.S. 907 (1975).

191. Some states have already recognized the importance of parental permission. See, e.g., B.R. 77, 1996 Reg. Ky. Sess. (new bill which proposed a requirement that corporal punishment be permitted only with parental consent). One Alabama local school board, while not requiring such permission, does respect written requests by parents to refrain from such action. Jefferson County Board of Education, *supra* note 123 at 4, § A(4).

192. See *supra* notes 170-71 and accompanying text.

193. See H.R. 1946, 104th Cong., 1st Sess., § 2(a)(6) (1995) (Parental Rights and Responsibilities Act).

194. *Ingraham v. Wright*, 525 F.2d 909, 917 (5th Cir. 1970) (concluding that the corporal punishment "regulation bears [a] reasonable relation to the legitimate end of maintaining an atmosphere conducive to learning"), *aff'd*, 430 U.S. 651 (1977).

the criminal immunity provision—significantly reducing the frequency of litigation around corporal punishment in schools.¹⁹⁵

*Third, corporal punishment laws should clearly state that the use of corporal punishment must be a means of last resort.*¹⁹⁶ In addition to requiring the promulgation of a written policy on student discipline and behavior,¹⁹⁷ the law should also mandate the dissemination of a list of alternative means of punishment.¹⁹⁸ If less destructive and invasive means of discipline effectively correct a given problem, then there is no justification for corporal punishment. In such situations, states cannot assert that their need for and interest in corporal punishment as a method of controlling behavior overrides their alleged interest in protecting children from undue harm.¹⁹⁹ Furthermore, reducing the frequency of corporal punishment would be the most rational and effective way for local school boards to avoid litigation²⁰⁰ and protect teachers from liability.²⁰¹

Fourth, a state's corporal punishment law should require more than the existence of a written policy on corporal punishment,²⁰² it should delineate as clear a standard as possible to help prevent the abuse of this privilege. The standard should offer more than just a label of "appropriate" or even "reasonable;" it should provide a benchmark consisting of factors that a teacher must consider. For example, the discipline should be appropriate and reasonable not just with reference to the nature of the child's infraction but also with reference to such factors as the child's age, the child's physical condition, and the circumstances surrounding the act (e.g., provocation by

195. See *supra* notes 4, 33-34 and accompanying text; see also *Baker v. Owen*, 395 F. Supp. 294, 295 (M.D.N.C.) (involving a parent who sued because she was opposed to the imposition of corporal punishment as a means of discipline in the absence of parental permission), *aff'd*, 423 U.S. 907 (1975).

196. Although the new law allows corporal punishment as the only or primary means of discipline if the teacher so chooses, one local board of education had such a "last resort provision." *Jefferson County Board of Education*, *supra* note 123, at 4, § A(1); see also *Ingraham v. Wright*, 430 U.S. 651, 662 (1977) (stating that among the factors to be considered in determining whether the punishment was reasonable is the "availability of less severe but equally effective means of discipline").

197. *But see* 1995 Ala. Acts 539, § 3.

To fully implement the provisions of this act, the State Board of Education shall require each local board of education to develop a written policy on student discipline and behavior and to broadly disseminate them following its adoption. Copies of the student discipline and behavior policy shall be given to all teachers, staff, parents and students.

Id.

198. See *infra* note 222 and accompanying text.

199. See *supra* note 166.

200. See *supra* notes 5, 40 and accompanying text.

201. See *supra* notes 33, 34 and accompanying text.

202. See *supra* note 195 and accompanying text.

other students, involvement of other students, certainty of guilt).²⁰³ Furthermore, while it is impossible for the state to prescribe a specific punishment for every conceivable transgression, especially given the variability of the factors to be considered, a state can impose some limitations to confine the application of corporal punishment. Although such limitations cannot prevent abuse by teachers,²⁰⁴ it seems likely that the majority of teachers would adhere to them, either in good faith or in the interest of protecting themselves from a potential lawsuit.

Fifth, in addition to addressing the substantive due process issues raised by corporal punishment, legislatures should ensure adequate due process²⁰⁵ by affording more procedural protection than that required constitutionally.²⁰⁶ For example, providing a brief, informal opportunity to dispute one's guilt and offer a competing explanation²⁰⁷ would help ensure that punishment will be enforced fairly with respect to both the charge and the determination of guilt.²⁰⁸ Because teachers and administrators may act on the reports of others,²⁰⁹ determinations of conduct violations will often be made

203. See e.g., *Ingraham v. Wright*, 430 U.S. 651, 662 (1977) (stating that among the most important considerations when determining if punishment was reasonable are "the seriousness of the offense, the attitude and past behavior of the child, the nature and severity of the punishment, [and] the age and strength of the child . . ."); *Deal v. Hill*, 619 So. 2d 1347, 1348 (Ala. 1993) (stating that in determining the reasonableness of the punishment, courts should consider "the instrument used and the nature of the offense committed by the child, the age and physical condition of the child, and the other attendant circumstances") (quoting *Suits v. Glover*, 71 So. 2d 49, 50 (Ala. 1954)).

204. See, e.g., *Ingraham*, 430 U.S. at 656 n.7, 657 (School board policy limited paddling to a maximum of 5 licks although the teacher had imposed 20.).

205. See notes 90-92 and accompanying text.

206. See *supra* notes 72, 82 and accompanying text.

207. One unidentified school board's policy provided by the Alabama Association of School Boards from their file of voluntarily submitted policies actually has a section called "Due Process Guidelines for Corporal Punishment." _____ Board of Education 304 (available from AASB) (on file with author). This section states that "[i]n cases where a student protests innocence of the offense or ignorance of the rule, a brief but adequate opportunity should be provided for the student to explain his side of the situation." *Id.* at 304, § C.

208. See *Goss v. Lopez*, 419 U.S. 565, 583-84 (1975) (holding that an "informal give-and-take between student and disciplinarian" to "permitt[] the student to give his version of the events will provide a meaningful hedge against erroneous action"); see also Clark, *supra* note 69, at 1166 (discussing the superiority of due process hearings over criminal or civil proceedings as a means of vindicating rights because the former is prospective while the latter two are retrospective); David L. Kirp, *Proceduralism and Bureaucracy: Due Process in the School Setting*, 28 STAN. L. REV. 841, 848 (1976) (stating that a due process hearing guards against injustice caused by "deprivation or misallocation") (citation omitted).

209. *Goss*, 419 U.S. at 580 ("Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial."). Although teachers may rely on

with less than complete information, compounding the need for an informal hearing. Although such a procedure will certainly add some constraints to the disciplinary process,²¹⁰ this Note's proposed changes would limit the use of corporal punishment, thereby reducing the frequency of such hearings and rendering the requirement less burdensome than it might otherwise be.²¹¹

The importance of an opportunity to be heard is magnified by cases in which a teacher punishes a student short of excess for a transgression the student did not commit.²¹² Criminal immunity laws like Alabama's leave such a student with no remedy at all, but the student involved deserves procedural due process.²¹³ Due process is important not only because the truth is more difficult to obtain with only partial information²¹⁴ but also because it would be ironic if an *educational* institution did not inform students of their violations and allow them to tell their side of the story.²¹⁵ Furthermore, as with the other remedies proposed, the hearing would reduce the need for corporal punishment and the potential for litigation.

Trust between students and school officials is critical to learning because it helps motivate students to learn independently and comply with

second-hand information more often in suspension situations, which were at issue in *Goss*, than in situations triggering corporal punishment, a teacher does not and cannot see every act of every student.

210. See *supra* note 77 and accompanying text. Corporal punishment is arguably imposed with greater frequency than the penalty of expulsion, at issue in *Goss*; therefore, hearings would potentially be even more burdensome. This Note argues that, when coupled with the other changes proposed, the burden of a hearing will be outweighed by the benefit of one.

211. See *supra* note 77 and accompanying text.

212. See, e.g., *Brown v. Johnson*, 710 F. Supp. 183, 187 (E.D. Ky. 1989) (stating that "[e]ven if [the teacher] was incorrect in ascertaining the need to discipline [the student], because her punishment was not excessive, the reasons for the discipline are immaterial").

213. *Goss*, 419 U.S. at 580. The *Goss* Court stated

that it would be a strange disciplinary system in an educational institution if no communication was sought by the disciplinarian with the student in an effort to inform him of his dereliction and to let him tell his side of the story in order to make sure that an injustice is not done.

Id.; see also *Clark*, *supra* note 69, at 1167 (commenting that informal due process hearings would not only help avoid error but would also promote equality by helping detect and control the discriminatory imposition of discipline).

214. *Goss*, 419 U.S. at 580 (stating that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . ." and "[s]ecrecy is not congenial to truth-seeking") (quoting *Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring)).

215. *Goss*, 419 U.S. at 580; see *supra* notes 212-13; see also *Kirp*, *supra* note 207, at 845 (stating that due process is a principle so "fundamental to a civilized society" that its "vitality is confirmed by, rather than dependent upon, its presence in a written constitution") (citation omitted); Traci B. Edwards, Note, *Shedding Their Rights at the Schoolhouse Gate: Recent Supreme Court Cases Have Severely Restricted the Constitutional Rights Available to Public School Children*, 14 OKLA. CITY U. L. REV. 97, 97 (1989) (discussing the conflict that results from educating students about democratic values while limiting the constitutional protections available to them).

instructions, without coercion.²¹⁶ A hearing may help foster that trust because the opportunity to have some role in the determination of punishment would likely create a greater respect for the disciplinarian.²¹⁷

MODEL STATUTE

1. Declaration

The Legislature finds and declares that the degree of protection afforded children against corporal punishment while they are under the control of public schools should be at least equal to that afforded to them while they are under the control of their primary caregivers. Children of school age are at the most vulnerable and impressionable period of their lives, and it is wholly reasonable that the safeguards to the integrity and sanctity of their bodies in school should be, at this tender age, at least equal to those afforded them in their primary care environment.²¹⁸

2. Corporal Punishment in an Educational Environment Defined

A. For the purposes of this section, "corporal punishment" means the willful infliction of physical pain or willfully causing the infliction of physical pain on a pupil,²¹⁹ or the physical restraint of a pupil, for educational, disciplinary, control, or order purposes.

B. "Corporal punishment" shall not include:

- 1) physical pain or discomfort caused by athletic competition or other such recreational activity;²²⁰
- 2) the use of reasonable and necessary force:

216. Kirp, *supra* note 207, at 855-56.

217. *See id.* at 864-65. Kirp argues that

at its core, due process expresses a recognition that individuals are entitled to have some control over events that ultimately shape their lives, and that this control can be meaningful only if they are permitted to reveal their version of the truth, and to know in the end what has happened to them and why.

Id.

218. A portion of the language for this section was drawn from the CAL. EDUC. CODE § 49000 (1993).

219. CAL. EDUC. CODE § 49001 (1993).

220. *Id.*

- a) to quell a disturbance that threatens physical injury to any person;
- b) to obtain possession of a weapon or other dangerous object within a student's control;
- c) to defend oneself or the person of another, including the student himself, from physical harm; or
- d) to escort a disruptive student who refuses to go voluntarily with the proper authorities.²²¹

3. Guidelines

The local school board shall prepare guidelines for administering corporal punishment. The guidelines shall include the following: a list of punishable offenses; the conditions under which the punishment shall be administered; the specific personnel on the school staff authorized to administer the punishment; disciplinary proceedings, such as procedures assuring due process, including but not limited to a hearing; procedures pertaining to discipline of students with special needs; the disciplinary measures to be taken in cases involving the possession or use of illegal substances or weapons; the degree of force allowed; and a list of alternatives that must be attempted before corporal punishment may be used.

A teacher or principal may administer corporal punishment only in the presence of another adult who is informed beforehand, and in the student's presence, of the reason for the punishment.²²²

Both the policy and guidelines on corporal punishment shall be reviewed at least every other year and, where appropriate, modified.

4. Training

Teachers and other school officials shall receive forty hours of extra-school professional training on age-appropriate alternatives²²³ to

221. Section (2) is a modified version of NEV. REV. STAT. § 392.465 (1991).

222. Section (3) is derived mostly from FLA. STAT. ANN. § 232.27 (West 1989 & Supp. 1996) and MASS. GEN. LAWS ANN. ch. 71, § 37H (West 1982 & Supp. 1996).

223. See Joan Ball, *The National PTA's Stand on Corporal Punishment*, EDUC. DIG., Apr. 1989, at 23 (finding that more than 70% of teachers surveyed wanted to learn disciplinary methods that were more effective than corporal punishment). See generally KARLIN & BERGER, *supra* note 184, at 138-49

corporal punishment at the beginning of the school year. Such training shall include an overview of how to deal with specific behavior problems, such as those that may arise from children who are hyperactive. Training shall also include how to detect potential causes of conflict, such as physical abuse or neglect and drug or alcohol abuse.

5. Parental Permission

If a local school board adopts a district-wide policy permitting the infliction of corporal punishment on students, the policy must require affirmative, written parental consent. Parental consent may only be obtained after teachers have provided language-appropriate materials or, if necessary, have read materials to parents regarding the local school board's rules and guidelines on corporal punishment. The distribution of such information must occur during the week prior to the first day of school or during the first week of school, and school officials may not impose corporal punishment until written consent is received.

6. Student Awareness

Students in grades seven through twelve shall be provided, on the first day of school, a handbook with the rules and guidelines regarding the school's policy on corporal punishment. Students in kindergarten through grade six shall be provided a simplified version of the rules and guidelines and shall be told on the first day of class what behaviors may lead to corporal punishment. In addition, when an individual case arises in which a school official determines that the next method of discipline utilized will be corporal punishment, the teacher must notify the student that such action will be taken if the conduct continues.

(discussing methods to work with handicapped and/or poor students).

For example, for young children, techniques discussed in CHARLES H. WOLFGANG & MARY E. WOLFGANG, *THE THREE FACES OF DISCIPLINE FOR EARLY CHILDHOOD* (1995) would be appropriate. For older children, the techniques explored in WALKER ET AL., *supra* note 185, at 306-355 would be more appropriate. For a general source applicable to all ages, see CHARLES H. WOLFGANG, *SOLVING DISCIPLINE PROBLEMS* (1995). For a range of age-specific alternatives, see Daniel H. Tingstrom et al., *Acceptability of Alternative School-Based Interventions: The Influence of Reported Effectiveness and Age of Target Child*, 123 J. PSYCHOL. 133 (1989).

7. Corporal Punishment as a Last Alternative

Corporal punishment shall always be the last means of discipline utilized. The punishment may occur only after the teacher has attempted at least two other disciplinary methods—alternatives approved by the local school board—of stopping the misbehavior. A school official, even after determining that corporal punishment is necessary and acceptable, may not administer the punishment until ten minutes after the determination has been made, to help insure no action is taken in anger.

As indicated in section 2 of this act, physical force may be used as a first means of response in cases where a person is threatening the safety of himself or herself or of someone else.

8. Opportunity for a Hearing

When a teacher or other school official determines that corporal punishment is necessary, the official shall provide the student an opportunity to explain the student's side of the story. Students may either refute the charge or mitigate the severity of the charge through their own testimony and the testimony of other students immediately involved in the incident.

9. Filing of Reports

When a teacher or other school official imposes corporal punishment or reasonable and necessary force as defined by section 2, such official shall file a detailed report. The report shall describe the type and degree of force used, the reason for such force, and the name of the adult present. This report shall be filed with the individual school and a copy shall be sent to the parents of the student on whom the force was used.

V. CONCLUSION

Criminal immunity for teachers who inflict corporal punishment is destructive to children, affords only minimal improvement in the protection provided to teachers, and undermines the primary role of parents in children's lives. Furthermore, there are significantly less harmful means of reducing the threat of litigation and maintaining control in the classroom. State and local authorities should create responsive solutions on the basis of meaningful

debate. Criminal immunity laws merely generate more problems by creating the illusion that these issues have a “quick fix.” Although youth violence must be addressed, the educational system should teach conflict resolution by methods other than violence; it should not serve as a model of such violence.

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