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**CORPORAL PUNISHMENT IN K-12 PUBLIC SCHOOL  
SETTINGS: RECONSIDERATION OF ITS CONSTITUTIONAL  
DIMENSIONS THIRTY YEARS AFTER *INGRAHAM V. WRIGHT***

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**I. INTRODUCTION**

Since 1977, when the United States Supreme Court implicitly approved the infliction of corporal punishment on public school students in *Ingraham v. Wright*,<sup>1</sup> controversy over the case has continued unabated.<sup>2</sup> Federal statistics for the most recent school year for which data are available, reveal that 223,190 children were corporally punished in public schools in 2006-2007, usually with wooden paddles.<sup>3</sup> The punishments have led to injuries prompting approximately 10,000 to 20,000 students to seek medical treatment each year.<sup>4</sup> Although 223,190 children represent a small fraction of

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<sup>1</sup> 430 U.S. 651 (1977).

<sup>2</sup> See Alice Famer & Kate Stinson, *Failing the Grade: How the Use of Corporal Punishment in U.S. Public Schools Demonstrates the Need for U.S. Ratification of the Children's Rights Convention and the Convention on the Rights of Persons with Disabilities*, 54 N.Y.L. SCH. L. REV. 1035, 1040-41 (2009/10); Craig Goodmark, *A Tragic Void: Georgia's Failure to Regulate Restraint & Seclusion in Schools*, 3 J. MARSHALL L. J. 249, 252-53 (2010); Andre R. Imbrogno, *Corporal Punishment in America's Public Schools and the U.N. Convention on the Rights of the Child: A Case for Nonratification*, 29 J.L. & EDUC. 125, 134 (2000); Deana A. Pollard, *Banning Corporal Punishment: A Constitutional Analysis*, 52 AM. U. L. REV. 447, 448-51 (2002).

<sup>3</sup> See *Discipline at School (NCACPS)*, THE CTR. FOR EFFECTIVE DISCIPLINE, <http://www.stophitting.com/index.php?page=statesbanning> (last visited Oct. 13, 2010) [hereinafter *Discipline at School*] (predicating the statistic on data from the United States Department of Education's Office for Civil Rights).

<sup>4</sup> Donald E. Greydanus et al., *Corporal Punishment in Schools: Position Paper of the*

this country's school-age population,<sup>5</sup> the use of corporal punishment can hardly be considered insignificant, particularly when children's constitutional interests are implicated.<sup>6</sup>

"Corporal punishment" has numerous definitions. Corporal punishment "may be defined as . . . the use of physical force upon a child with the intention of causing the child to experience bodily pain so as to correct or punish the child's behavior."<sup>7</sup> In determining whether the force applied is corporal punishment, one court has said the inquiry is not what form the use of force takes, but whether the use of force is "related to [the student's] misconduct at school and was for the purpose of discipline."<sup>8</sup> Another definition refers to corporal punishment as a necessary means to maintain discipline and order in the public schools, and a prerequisite to establishing the most effective atmosphere for learning and, as such, constitutes a proper object for state and school board regulation.<sup>9</sup> However, corporal

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*Society for Adolescent Medicine*, 32 J. ADOLESCENT HEALTH 385, 386 (2003), available at <http://download.journals.elsevierhealth.com/pdfs/journals/1054-139X/PIIS1054139X03000429.pdf>.

<sup>5</sup> See Julie Meyer, *Census 2000 Brief: Age: 2000*, U.S. CENSUS BUREAU, 4 (Oct. 2001), <http://www.census.gov/prod/2001pubs/c2kbr01-12.pdf> (noting that the 2000 Census revealed that there were 61,297,467 children between the ages of five and nineteen living in the United States at that time).

<sup>6</sup> See *Discipline at School*, *supra* note 3. The use of corporal punishment is predominately a practice sanctioned in the southeastern United States. See *id.* The ten highest states, rank ordered as a percentage of students struck by educators during 2006-07 are: Mississippi (7.5%), Arkansas (4.7%), Alabama (4.5%), Oklahoma (2.3%), Louisiana (1.7%), Tennessee (1.5%), Texas (1.1%), Georgia (1.1%), Missouri (0.6%) and Florida (0.3%). *Id.* "Almost 40% of all the cases of corporal punishment occur in . . . Texas and Mississippi, and if we add Arkansas, Alabama and Georgia, these five states account for almost three quarters of all the nation's school paddlings." *Id.* "African-American students comprise . . . 36% of those who [are subjected to] corporal punishment" although they form only 17% of the school population in the United States. *Id.* Notably, there has been a significant decline in the overall use of corporal punishment in public schools between the late 1970s and today. See *Discipline at School*, *supra* note 3. The total students hit in 1976 was 1,521,896 or about 3.5% of the population, whereas in 2006, approximately 223,190 students were hit, representing about 0.46% of the population. *Id.*

<sup>7</sup> See, e.g., Susan H. Bitensky, *The Poverty of Precedent for School Corporal Punishment's Constitutionality Under the Eighth Amendment*, 77 U. CIN. L. REV. 1327, 1332 (2009) [hereinafter Bitensky, *Poverty of Precedent*] (citing SUSAN H. BITENSKY, CORPORAL PUNISHMENT OF CHILDREN: A HUMAN RIGHTS VIOLATION xix (Transnational 2006)).

<sup>8</sup> *Neal v. Fulton Cnty. Bd. of Educ.*, 229 F.3d 1069, 1073 (11th Cir. 2000).

<sup>9</sup> See *Ingraham*, 430 U.S. at 655-57 & n.6 (explaining the rationale of the Florida statute at issue); see also *Saylor v. Bd. of Educ. of Harlan Cnty., Ky.*, 118 F.3d 507, 513 (6th Cir. 1997); *Wise ex rel. Wise v. Pea Ridge Sch. Dist. No. 109*, 675 F. Supp. 1524, 1528 (W.D. Ark. 1987), *aff'd*, 855 F.2d 560, 566 (8th Cir. 1988).

punishment “excludes physically restraining children to prevent them from imminently injuring themselves or others or from imminently damaging property,”<sup>10</sup> an exclusion often recognized in state laws outlawing school corporal punishment.<sup>11</sup> Further, the definitions exclude “[p]hysical restraint [a]s a type of aversive behavioral control tool involving the forced restriction or immobilization of the child’s body or parts of the body depending on the behavior being addressed by the technique.”<sup>12</sup> Also excluded are “school based seclusions.”<sup>13</sup> This has been defined as “[t]he involuntary confinement of a student alone in a room or area from which the student is physically prevented from leaving.”<sup>14</sup> “This includes situations where a door is locked as well as where the door is blocked by other objects or held by staff.”<sup>15</sup>

In Part II-A of this Article, *Ingraham*, the seminal United States Supreme Court case on corporal punishment, is reviewed.<sup>16</sup> *Ingraham* held that although infliction of considerable physical pain upon students implicated Fourteenth Amendment liberty interests, the procedural component of the Due Process Clause was satisfied when adequate post-deprivation state law procedures, such as tort and criminal proceedings, were available to hold the defendant responsible for his or her conduct.<sup>17</sup> Moreover, *Ingraham* held that the Eighth Amendment’s Cruel and Unusual Punishment provision was not applicable in school matters, since the Eighth Amendment applies only in criminal settings.<sup>18</sup> Part II-B considers what rights, if any, parents have in the meting out of corporal punishment upon their children in public school settings.

Part III examines the Fourth Circuit’s *Hall ex rel. Hall v. Tawney*,<sup>19</sup> the leading post-*Ingraham* United States Court of Appeals

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<sup>10</sup> See Bitensky, *Poverty of Precedent*, *supra* note 7, at 1333.

<sup>11</sup> See, e.g., CONN. GEN. STAT. § 53a-18(6) (2010); MASS. GEN. LAWS ch. 71, § 37G(a)-(b) (2010); MICH. COMP. LAWS § 380.1312(3)-(4) (2010).

<sup>12</sup> Goodmark, *supra* note 2, at 253.

<sup>13</sup> *Id.* at 257-59.

<sup>14</sup> *Id.* at 257-58.

<sup>15</sup> *Id.* at 258.

<sup>16</sup> See, e.g., Deana Pollard Sacks, *State Actors Beating Children: A Call for Judicial Relief*, 42 U.C. DAVIS L. REV. 1165, 1178 (2009) (referring to *Ingraham* as a seminal case in this area of law).

<sup>17</sup> *Ingraham*, 430 U.S. at 683.

<sup>18</sup> *Id.*

<sup>19</sup> 621 F.2d 607 (4th Cir. 1980).

case on whether a federal substantive due process cause of action exists for application of excessive force/corporal punishment in public school settings.<sup>20</sup> *Hall* attempted to answer the question left unanswered by *Ingraham* on this issue and held that it does.<sup>21</sup>

Part IV parses the case law from the Courts of Appeals of the Tenth, Third, Sixth, Eighth, Second, and Eleventh Circuits, all of which have expressly recognized a substantive due process cause of action for the application of excessive force by public school officials upon students for disciplinary purposes.<sup>22</sup>

Part V analyzes the Fifth Circuit's decisions, which failed to recognize a substantive due process cause of action for excessive force/corporal punishment.<sup>23</sup> Additionally, the Seventh and Ninth Circuits' decisions, which recognized a cause of action for such conduct, albeit under the Fourth Amendment's seizure provisions, are analyzed.<sup>24</sup>

Part VI considers the impact of *Graham v. Connor*,<sup>25</sup> a United States Supreme Court case, on public school corporal punishment cases. *Graham* arose in a Fourth Amendment criminal procedure context. Some circuits, like the Seventh and Ninth Circuits, relied on *Graham* to hold that excessive corporal punishment cases in public schools should be analyzed under the Fourth Amendment's Seizure provision, rather than the Fourteenth Amendment's more general substantive due process component.<sup>26</sup>

Part VII attempts to harmonize the differences among the circuits which recognize a cause of action for excessive force-corporal punishment-substantive due process cases, and suggests that a more workable approach to this type of claim would employ an objective test. This is counter-majoritarian, since the circuits are fairly consistent in requiring specific proof of bad faith, manifested by a brutal and inhumane application of force which shocks the conscience, as an element of claims of excessive corporal punishment.<sup>27</sup> Based on the test I propose, satisfaction of the

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<sup>20</sup> *Id.* at 610-11, 613.

<sup>21</sup> *Id.*

<sup>22</sup> See *infra* notes 94-211 and accompanying text.

<sup>23</sup> See *infra* notes 212-237 and accompanying text.

<sup>24</sup> See *infra* notes 238-279 and accompanying text.

<sup>25</sup> 490 U.S. 386 (1989).

<sup>26</sup> See *infra* notes 280-300 and accompanying text.

<sup>27</sup> See *infra* notes 301-361 and accompanying text.

objective elements would lead to a presumption of such bad faith. This would shift the burden of proof to the defendant to offer a reasonable explanation supported by concrete facts that the alleged excessive force conduct served a legitimate educational purpose.

Part VIII examines qualified immunity law developments in the Supreme Court. Qualified immunity protects public officials from individual liability, even when their conduct is unconstitutional, if the law, which they violated, was not well established at the time the violation occurred, and a reasonable person in the defendant's position would have acted as the defendant did.<sup>28</sup> I argue that the trend in the Supreme Court is to expand this form of immunity, thereby exacerbating the already formidable hurdles faced by plaintiffs in obtaining relief for constitutional injuries, and that such steps erode civil liberties.<sup>29</sup>

Part IX argues that *Ingraham* erroneously concluded that post-deprivation due process in state judicial proceedings, where tort or criminal statutes circumscribe the conduct, is sufficient constitutionally. I suggest that the provision of minimal due process to students, prior to infliction of corporal punishment, as is presently required in connection with student suspensions,<sup>30</sup> is far more consistent with existing constitutional interpretation than the rule in *Ingraham*, and would pose no threat to maintaining order in the public schools.

In Part X, adoption of the objective substantive due process test, for which I have advocated, and the Seventh and Ninth Circuits' Fourth Amendment objective seizure tests on qualified immunity practice, are considered.

Part XI summarizes the foregoing arguments and attempts to present them in a manner consistent with present Supreme Court interpretation.

Part XII concludes with some observations from existing social science literature and its relevance to the foregoing arguments.

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<sup>28</sup> See *Lackey v. Cnty. of Bernalillo*, 166 F.3d 1221 (10th Cir. 1999) (unpublished table decision).

<sup>29</sup> See *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2644 (2009).

<sup>30</sup> *Ingraham*, 430 U.S. at 678 n.46.

## II. *INGRAHAM V. WRIGHT* AND *BAKER V. OWEN*: THE CONSTITUTIONAL LANDSCAPE

The principal cause of action for raising claims that public officials or municipalities have violated an individual's Federal Constitutional rights, including school districts, is 42 U.S.C. § 1983.<sup>31</sup> This statute authorizes claims for relief against any person who, acting under color of state law, violated an individual's federally protected rights.<sup>32</sup> The Supreme Court has determined that there are two elements of a § 1983 claim.<sup>33</sup> The plaintiff must allege: (1) a deprivation of a federal right; and (2) "that the person who has deprived him of that right acted under color of state . . . law."<sup>34</sup> Under *Monell v. Department of Social Services of the City of New York*,<sup>35</sup> a municipality is subject to liability under § 1983 only when the violation of the plaintiff's federally protected rights was caused by enforcement of a municipal policy, custom, or practice, or a decision of a final policy maker.<sup>36</sup> Additionally, when a plaintiff attempts to establish municipal liability, the plaintiff must show that the deprivation of the federal right was attributable to the enforcement of the municipal custom or policy.<sup>37</sup> Furthermore, liability may be imposed on defendants in their personal capacity irrespective of any showing that the violation of federally protected

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<sup>31</sup> 42 U.S.C.A. § 1983 (2010).

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

*Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Gomez v. Toledo*, 446 U.S. 635, 640 (1980).

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

<sup>35</sup> 436 U.S. 658 (1978).

<sup>36</sup> *Id.* at 694.

<sup>37</sup> *Id.*

rights was caused by enforcement of a policy or practice.<sup>38</sup> Municipal defendants subject to personal capacity suits may assert they are qualifiedly immune from suit.<sup>39</sup> Qualified immunity is discussed extensively in Part VIII of this Article.

**A. *Ingraham v. Wright***

*Ingraham* was precipitated by the severe paddling of two students at a Florida public junior high school.<sup>40</sup> One student, James Ingraham, while being pinned atop a table in the principal's office, was given more than twenty whacks because he did not "respond to his teacher's instructions" with the desired alacrity.<sup>41</sup> "The paddling was so severe that he suffered a hematoma requiring medical" intervention and he was absent from "school for several days."<sup>42</sup> The other student, "[Roosevelt] Andrews[,] was paddled several times for minor infractions. On two occasions he was struck on his arms, once depriving him of the full use of his arm for a week."<sup>43</sup> Notably, the punishments were administered summarily, that is, without notice or a hearing.<sup>44</sup>

In their complaint, the students asserted that the application of force upon them, under the circumstances of the case, violated the Eighth Amendment's proscription against cruel and unusual punishment, and the substantive and procedural components of the Due Process Clause.<sup>45</sup> The Supreme Court limited its grant of certiorari "to the questions of cruel and unusual punishment and procedural due process."<sup>46</sup> Notably, it declined to review whether

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<sup>38</sup> *Hafer v. Melo*, 502 U.S. 21, 31 (1991).

<sup>39</sup> *Id.* at 28-29.

<sup>40</sup> *Ingraham*, 430 U.S. at 657. At the time that petitioners were paddled, Florida legislation and a local school board regulation authorized the use of disciplinary corporal punishment on students in petitioners' public school. *Id.* at 655. The state statute's authorization was by negative inference inasmuch as the statute prohibited corporal punishment which was "degrading or unduly severe" or which was carried out in the absence of prior discussion with the principal or teacher in charge of the school. *Id.* at 655-57 & n.6 (quoting FLA. STAT. § 232.27 (1977), *repealed by* 2002 Fla. Laws 1058).

<sup>41</sup> *Id.* at 657.

<sup>42</sup> *Id.*

<sup>43</sup> *Ingraham*, 430 U.S. at 657.

<sup>44</sup> *See id.* ("Contrary to the procedural requirements of the statute and regulation, teachers often paddled students on their own authority without first consulting the principal.").

<sup>45</sup> *Id.* at 653.

<sup>46</sup> *Id.* at 659.

“the infliction of severe corporal punishment upon public school students [was] arbitrary, capricious and unrelated to achieving any legitimate educational purpose and therefore violative of [public school pupils’ substantive rights under] the Due Process Clause of the Fourteenth Amendment.”<sup>47</sup>

The Court held that the students had no viable claim under the Cruel and Unusual Punishment Clause of the Eighth Amendment.<sup>48</sup> The majority’s rationale was that the Eighth Amendment applied only to convicted criminals.<sup>49</sup> As part of a four-judge dissent, Justice White observed, “[t]oday the Court holds that corporal punishment in public schools, no matter how severe, can never be the subject of the protections afforded by the Eighth Amendment.”<sup>50</sup> The majority, Justice White stated, would afford the student no protection no matter how inhumane and barbaric the punishment inflicted on him might be.<sup>51</sup> He stated, “I only take issue with the extreme view of the majority.”<sup>52</sup>

The *Ingraham* Court also held that the Due Process Clause of the Fourteenth Amendment does not necessitate notice and a hearing prior to administering corporal punishment on a child in a public elementary or secondary school.<sup>53</sup> Nevertheless, the Court stated that “where school authorities, acting under color of state law, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain, we hold that Fourteenth Amendment liberty interests are implicated.”<sup>54</sup> Notwithstanding this recognition, the Court concluded as a matter of law “that the traditional common-law remedies are fully adequate to afford due process.”<sup>55</sup>

The Due Process Clause of the Fourteenth Amendment

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<sup>47</sup> *Id.* at 659 n.12.

<sup>48</sup> *Ingraham*, 430 U.S. at 668-69.

<sup>49</sup> *Id.* at 671 n.40 (“Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.”).

<sup>50</sup> *Id.* at 683 (White, J., dissenting).

<sup>51</sup> *Id.* at 692.

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

<sup>53</sup> *Ingraham*, 430 U.S. at 682 (majority opinion).

<sup>54</sup> *Id.* at 674.

<sup>55</sup> *Id.* at 672. In light of the substantial protection afforded school personnel in Florida, this conclusion is arguably incorrect. These and other weaknesses in the *Ingraham* majority’s views are examined in Part IX.

asserts: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”<sup>56</sup> *Ingraham*’s 5-4 decision requires some pause, especially in light of *Goss v. Lopez*,<sup>57</sup> a student suspension case decided by the Supreme Court two years earlier.<sup>58</sup> In *Goss*, the Supreme Court held that where state law creates a property interest in a student’s right to attend public school, the state could not deprive the student of that entitlement without an adequate pre-deprivation hearing, even for short-term suspensions of ten days or less.<sup>59</sup> The hearing compelled by *Goss* only required informal procedures whereby the student receives “oral or written notice of the charges against him” and is afforded an opportunity to be heard.<sup>60</sup> Moreover, under *Goss* there need not be any delay between notice and the hearing.<sup>61</sup> The implication of *Goss* and *Ingraham* for procedural due process purposes is that a school official may constitutionally inflict upon a student severe physical punishment without notice or the opportunity to be heard, but may not violate a student’s procedural due process rights by imposing even a one-day suspension without notice and a hearing.<sup>62</sup> The *Ingraham* majority distinguished that case from *Goss*, in part, as follows:

Unlike *Goss*, this case does not involve a state-created property interest in public education. The purpose of corporal punishment is to correct a child’s behavior without interrupting his education. That corporal punishment may, in a rare case, have the unintended effect of temporarily removing a child from school affords no basis for concluding that the practice itself deprives students of property protected by the Fourteenth Amendment. Nor does this case involve any state-created interest in liberty going beyond the Fourteenth Amendment’s protection of freedom from

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<sup>56</sup> U.S. CONST. amend. XIV, § 1.

<sup>57</sup> 419 U.S. 565 (1975).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 574.

<sup>60</sup> *Id.* at 581.

<sup>61</sup> *Id.* at 582. The *Goss* Court recognized an exception to this mandate where a student’s “presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process,” then such students may be summarily removed. *Goss*, 419 U.S. at 582.

<sup>62</sup> Compare *Goss*, 419 U.S. 565, with *Ingraham*, 430 U.S. 651.

bodily restraint and corporal punishment.<sup>63</sup>

The *Ingraham* Court concluded that the necessities of running a school may demand quick action in connection with the application of force, and when a school official exceeds permissible boundaries of reasonable force, state tort or penal law furnishes an adequate remedy for due process purposes.<sup>64</sup> Undeniably, the *Ingraham* Court weighed the instrumental value of minimizing judicial interference with school operations more heavily than affording students minimal notice and opportunity to be heard prior to the infliction of corporal punishment.<sup>65</sup> The soundness of *Ingraham*'s holding, with particular emphasis to the dissenters' argument, is examined in Part IX below.

The question of "whether or under what circumstances corporal punishment of a public school child may give rise to an independent federal cause of action to vindicate substantive rights under the Due Process Clause" was left unanswered in *Ingraham*.<sup>66</sup> The circuit courts' reactions to the gap left by *Ingraham* are examined in Parts III, IV, and V below.

## B. *Baker v. Owen*

In *Baker v. Owen*,<sup>67</sup> the Supreme Court affirmed the judgment of a three-judge district court panel that held school officials' deference to parental preference as to the imposition of corporal

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<sup>63</sup> *Ingraham*, 430 U.S. at 674 n.43.

<sup>64</sup> *Id.* at 677.

If the punishment inflicted is later found to have been excessive—not reasonably believed at the time to be necessary for the child's discipline or training—the school authorities inflicting it may be held liable in damages to the child and, if malice is shown, they may be subject to criminal penalties.

*Id.* The correctness of this conclusion is challenged in Part IX below.

<sup>65</sup> *Id.* at 682.

<sup>66</sup> *Id.* at 679 n.47. See also *Sandin v. Conner*, 515 U.S. 472, 485 (1995) ("*Ingraham* . . . addressed the rights of schoolchildren to remain free from arbitrary corporal punishment. . . . [T]he Due Process Clause historically encompassed the notion that the state could not 'physically punish an individual except in accordance with due process of law' and so found schoolchildren sheltered." (quoting *Ingraham*, 430 U.S. at 674)). There are two types of substantive due process violations. The first occurs when the state actor's conduct is such that it "shocks the conscience." See *Rochin v. California*, 342 U.S. 165, 172-73 (1952). The second occurs when the state actor violates an identified liberty or property interest protected by the Due Process Clause. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>67</sup> 395 F. Supp. 294 (M.D.N.C. 1975), *aff'd*, 423 U.S. 907 (1975).

punishment on their child at school was not constitutionally required.<sup>68</sup> In *Baker*, the plaintiff's parents told officials that they did not want their child spanked.<sup>69</sup> Despite this request, the child was given two licks with a drawer divider that was slightly thicker than a ruler.<sup>70</sup> The district court panel agreed that a parent's constitutional rights included the right to control means of discipline used upon his or her child, but that such rights were not absolute and sometimes must yield to state interests.<sup>71</sup> In discussing the countervailing interest of the state, the court stated:

[O]pinion on the merits of the rod is far from unanimous. On such a controversial issue, where we would be acting more from personal preference than from constitutional command, we cannot allow the wishes of a parent to restrict school officials' discretion in deciding the methods to be used in accomplishing the not just legitimate, but essential purpose of maintaining discipline.<sup>72</sup>

*Baker* makes evident that parents asserting violations of their constitutionally based due process interests in the disciplining of their children cannot state a cause of action based on a school official's decision to inflict corporal punishment on their children, even when that punishment is severe.<sup>73</sup>

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<sup>68</sup> *Id.* at 296.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Baker*, 395 F. Supp. at 301.

<sup>73</sup> *See, e.g., Hall*, 621 F.2d at 610.

We do not believe, however, that any constitutional right of parents to choose the means by which their child should be disciplined can be made to turn on the severity of the punishment. The reasons advanced in *Baker* for finding no parental constitutional rights implicated apply alike to all degrees of punishment.

*Id.*

**III. HALL V. TAWNEY: THE FOURTH CIRCUIT RECOGNIZES A SUBSTANTIVE DUE PROCESS CAUSE OF ACTION FOR APPLICATION OF EXCESSIVE FORCE/CORPORAL PUNISHMENT IN PUBLIC SCHOOL SETTINGS**

In *Hall v. Tawney*,<sup>74</sup> the Fourth Circuit became the first post-*Ingraham* United States Court of Appeals to decide the question left unanswered in *Ingraham*: “ ‘Is the infliction of severe corporal punishment upon public school students arbitrary, capricious and unrelated to achieving any legitimate educational purpose and therefore violative of the Due Process Clause of the Fourteenth Amendment?’ ”<sup>75</sup>

In 1974, Naomi Hall, who was a student at Left Hand Grade School at the time, was paddled by her teacher, G. Garrison Tawney, and thereafter received an additional paddling from her teacher, which was approved and supervised by the school principal.<sup>76</sup> Tawney allegedly gave Naomi a beating with a homemade paddle, “without apparent provocation,” violently striking her so severely that she was admitted and kept in a nearby hospital for “ten . . . days for the treatment of traumatic injury to the soft tissue of the left hip[,] . . . thigh, . . . and . . . buttock.”<sup>77</sup> The district court dismissed the

<sup>74</sup> 621 F.2d 607 (4th Cir. 1980).

<sup>75</sup> *Id.* at 610 (quoting *Ingraham*, 430 U.S. at 659 n.12).

<sup>76</sup> *Id.* at 609, 614.

<sup>77</sup> *Id.* at 614.

Tawney “without apparent provocation” struck the minor plaintiff “with a homemade paddle, made of hard thick rubber and about five inches in width . . . across her left hip and thigh”; that in an ensuing struggle with [her], he “violently shoved the minor plaintiff against a large stationary desk”; that he then “vehemently grasped and twisted the plaintiff’s right arm and pushed her into” the presence of the defendant Claywell who then granted permission to Tawney to “again paddle the minor plaintiff”; that “the minor plaintiff was again stricken repeatedly and violently by the defendant Tawney with the rubber paddle, under the supervision and approval of defendant Claywell”; that as a result of this application of force “the minor plaintiff was taken that afternoon to the emergency room of (a nearby hospital) where she was admitted and kept for a period of ten (10) days for the treatment of traumatic injury to the soft tissue of the left hip and thigh, trauma to the skin and soft tissue of the left thigh, and trauma to the soft tissue with ecchymosis of the left buttock”; that for the injuries inflicted the minor plaintiff was “receiving the treatment of specialists for possible permanent injuries to her lower back and spine and has suffered and will continue to suffer severe pain and discomfort, etc.”

case for failure to state a claim, asserting *Ingraham* as its authority.<sup>78</sup>

On appeal, the plaintiffs pressed only Naomi's and the parents' substantive due process claims.<sup>79</sup> With regard to Naomi's due process rights, the court stated, "disciplinary corporal punishment does not per se violate the public school child's substantive due process rights."<sup>80</sup> The court stated, however, that "substantive due process rights might be implicated in school disciplinary punishments even though procedural due process is afforded by adequate state civil and criminal remedies."<sup>81</sup> The court concluded "there may be circumstances under which specific corporal punishment administered by state school officials gives rise to an independent federal cause of action to vindicate substantive due process rights under 42 U.S.C. § 1983."<sup>82</sup> Since the case came to the court on an appeal from a Rule 12(b)(1) and (6) dismissal,<sup>83</sup> and because the district court held that the facts stated in the complaint were directed toward state tort law rather than a constitutional violation, the court of appeals could not determine whether in this instance the plaintiffs' constitutional substantive due process rights were violated.<sup>84</sup> This necessitated a remand to the district court for fact finding.<sup>85</sup>

The court emphasized that "relief under [§] 1983 does not depend on the unavailability of state remedies, but is supplementary to them."<sup>86</sup> It explained that the existence of the federal "right to ultimate bodily security[,] the most fundamental aspect of personal privacy[,] is unmistakably established in our constitutional decisions as an attribute of the ordered liberty that is the concern of substantive

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*Id.*

<sup>78</sup> *Hall*, 621 F.2d at 609. Although Hall had asserted procedural due process and Eighth Amendment Cruel and Unusual Punishment claims in the district court, she conceded on appeal that *Ingraham* effectively foreclosed those causes of action. *Id.* at 609-10.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 611.

<sup>81</sup> *Id.*

<sup>82</sup> *Hall*, 621 F.2d at 611. Notably, the court observed that, notwithstanding *Ingraham*'s holding, a Cruel and Unusual Punishment Clause claim was inapposite to the infliction by public school officials of corporal punishment, and the case was not dispositive of whether the same conduct may not violate the same individual's substantive due process rights. *Id.*

<sup>83</sup> *Id.* at 609.

<sup>84</sup> *Id.* 609-10, 613.

<sup>85</sup> *Id.* at 611.

<sup>86</sup> *Hall*, 621 F.2d at 612 (citing *Monroe v. Pape*, 365 U.S. 167, 183 (1961)).

due process.”<sup>87</sup> The court asserted “that a cognizable claim based upon an episodic application of force not authorized by state law or policy may be stated under the substantive due process standard.”<sup>88</sup> The court then framed a “shocking to the conscience” of a court test for corporal punishment cases based largely on the one which had been previously used in police brutality cases.<sup>89</sup> The cause of action stems from “the right to be free of state intrusions into realms of personal privacy and bodily security through means so brutal, demeaning, and harmful as literally to shock the conscience of a court.”<sup>90</sup> In framing the test to be applied on remand, the court stated:

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 may well turn on whether “ten licks rather than five” were excessive, so that line-drawing this refined may be required. 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. As in the cognate police brutality cases, the substantive due process inquiry in school corporal punishment cases must be whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience. Not every violation of state tort and criminal assault laws will be a violation of this constitutional right, but some of course may.<sup>91</sup>

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<sup>87</sup> *Id.* at 613.

<sup>88</sup> *Id.* at 614.

<sup>89</sup> *Id.* at 613.

<sup>90</sup> *Id.*

<sup>91</sup> *Hall*, 621 F.2d at 613 (citing *Ingraham v. Wright*, 525 F.2d 909, 917 (5th Cir. 1976);

Thus, the *Hall* standard for establishing a viable substantive due process claim requires severe injury, disproportionate to the need, and malice or sadism, rather than negligence or poor judgment (unwise zeal).<sup>92</sup> Such transgressions must equal “brutal and inhumane abuse” of power that shocks the conscience.<sup>93</sup>

#### IV. HALL’S PROGENY

The *Hall* “shocks the conscience” standard, composed of the foregoing elements, has been followed in substantial part by the Second, Third, Sixth, Eighth, Tenth, and Eleventh Circuits in evaluating whether the force applied to students by public school officials violates their Fourteenth Amendment liberty interests.<sup>94</sup> These cases will be separately reviewed chronologically in order to depict the application of the “shock the conscience” standard over time.

##### A. Tenth Circuit: *Garcia ex rel. Garcia v. Miera*

In a 1987 case, *Garcia ex rel. Garcia v. Miera*,<sup>95</sup> the Tenth Circuit stated: “[W]e believe that *Ingraham* requires us to hold that, at some point, excessive corporal punishment violates the pupil’s substantive due process rights.”<sup>96</sup> *Garcia* involved two incidents concerning Teresa Garcia, a nine-year-old elementary school student.<sup>97</sup> In the first incident, school principal Theresa Miera allegedly beat Teresa with a wooden paddle while she was being held “upside down by her ankles” by teacher J.D. Sanchez, creating a two-inch cut along her leg and causing her to bleed.<sup>98</sup> The incident that

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Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> See *T.W. ex rel. Wilson v. Sch. Bd. of Seminole Cnty., Fla.*, 610 F.3d 588 (11th Cir. 2010); see also *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246 (2d Cir. 2001); *Neal*, 229 F.3d 1069; *Saylor*, 118 F.3d 507; *Archev ex rel. Archev v. Hyche*, Nos. 90-5631, 90-5863, 1991 WL 100586 (6th Cir. June 11, 1991); *Wise*, 855 F.2d 560; *Metzger ex rel. Metzger v. Osbeck*, 841 F.2d 518 (3d Cir. 1988); *Webb v. McCulloch*, 828 F.2d 1151 (6th Cir. 1987); *Garcia ex rel. Garcia v. Miera*, 817 F.2d 650 (10th Cir. 1987).

<sup>95</sup> 817 F.2d 650.

<sup>96</sup> *Id.* at 653. See also *Ingraham*, 430 U.S. at 674.

<sup>97</sup> *Garcia*, 817 F.2d at 652.

<sup>98</sup> *Id.* at 653.

precipitated this punishment was that Teresa hit a boy who had kicked her.<sup>99</sup> “Miera hit Garcia [with the paddle] five times on the front of the leg.”<sup>100</sup> After Garcia was beaten, Garcia’s teacher saw blood on her clothes and found a welt on Garcia’s leg.<sup>101</sup> The remnants of the cut left a two-inch permanent scar on Garcia’s leg.<sup>102</sup> “Shortly after this incident, Garcia’s mother and father told Miera ‘not to spank Teresa again unless [they] were called, to make sure it was justified, and [Miera] said okay, no problems.’”<sup>103</sup>

The second incident occurred after Garcia had been summoned to Miera’s office for saying that a female chaperone had been seen kissing another student’s father on a school bus during a field trip.<sup>104</sup> Miera struck Garcia twice on the buttocks with the paddle.<sup>105</sup> “Garcia then refused to be hit again [and] Miera responded by calling defendant Edward Leyba, an administrative associate . . . [who] pushed Garcia toward a chair over which she was to bend and receive three additional blows.”<sup>106</sup> “The beating caused severe bruises on Garcia’s buttocks, which did not stop hurting for . . . weeks.”<sup>107</sup> Notably, Garcia was held against her will throughout this incident.<sup>108</sup> Garcia repeatedly asked Principal Miera to call her mother, but Miera refused.<sup>109</sup>

The court, in applying the objective components of the *Hall* test, concluded Garcia had raised sufficient facts to go to trial on her substantive due process claims against the principal, administrative assistant, teacher, and others.<sup>110</sup> Although the *Garcia* court borrowed substantially from *Hall*, it varied from that test as follows:

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<sup>99</sup> *Id.* at 652.

<sup>100</sup> *Id.* at 653.

<sup>101</sup> *Id.*

<sup>102</sup> *Garcia*, 817 F.2d at 653.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Garcia*, 817 F.2d at 653.

<sup>108</sup> *See id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 655. The *Garcia* court parsed corporal punishment into three categories: (1) “[p]unishments that do not exceed the traditional common law standard of reasonableness are not actionable;” (2) “punishments that exceed the common law standard without adequate state remedies violate procedural due process rights; and” (3) “punishments that are so grossly excessive as to be shocking to the conscience violate substantive due process rights, without regard to the adequacy of state remedies.” *Id.* at 656.

While this standard incorporates a subjective intent element of “malice or sadism,” this element is largely redundant, because whenever “the force applied caused injury so severe, was so disproportionate to the need presented, and . . . amounted to a brutal and inhumane abuse of official power literally shocking to the conscience,” we should presume that the defendant had the requisite state of mind.<sup>111</sup>

Moreover, the court concluded that as long as the punishment was not excessive as a matter of law, and was a reasonable response to the student’s misconduct, the intent of the person who administers the punishment is irrelevant.<sup>112</sup>

**B. Third Circuit: *Metzger ex rel. Metzger v. Osbeck and Gottlieb ex rel. Calabria v. Laurel Heights School District***

In 1988, the Third Circuit in *Metzger v. Osbeck*<sup>113</sup> stated, “[a] decision to discipline a student, if accomplished through excessive force and appreciable physical pain, may constitute an invasion of the child’s Fifth Amendment liberty interest in his personal security and a violation of substantive due process prohibited by the Fourteenth Amendment.”<sup>114</sup> *Metzger* arose from a poolside disciplinary encounter between teacher Richard Osbeck and student Charles Metzger at a junior high school in Pennsylvania.<sup>115</sup> Plaintiff “Metzger was enrolled in a swimming class taught by . . . Osbeck.”<sup>116</sup> During a recreational swim from which Metzger had been excused due to flu symptoms and a swollen leg, Metzger was trading baseball cards with classmates on the pool deck.<sup>117</sup> “Osbeck overheard

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<sup>111</sup> *Garcia*, 817 F.2d at 655 n.7 (quoting *Hall*, 621 F.2d at 613). *Garcia*’s elimination of a state-of-mind test and focus on objective criteria seems eminently more reasonable than requiring assessment of defendant’s motives in determining whether a cause of action for a substantive due process exists. *See infra* Part VII.

<sup>112</sup> *See Garcia*, 817 F.2d at 655 n.7.

<sup>113</sup> 841 F.2d 518.

<sup>114</sup> *Id.* at 520.

<sup>115</sup> *See id.* at 519.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

Metzger using inappropriate language” with a female student.<sup>118</sup> Osbeck then walked over to Metzger and “placed his arms around Metzger’s neck and shoulder area” to question him about his use of “foul language.”<sup>119</sup> Osbeck’s contact with Metzger forced Metzger to stand up on his toes to alleviate the pressure applied to his neck.<sup>120</sup> When Osbeck released him, “Metzger, who had lost consciousness . . . , fell face down onto the pool deck.”<sup>121</sup> “Metzger suffered lacerations to his lower lip, a broken nose, fractured teeth and other injuries requiring hospitalization.”<sup>122</sup>

The court opined that:

In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.<sup>123</sup>

Thus, the court in *Metzger* did not establish a bright line test for determining whether a substantive due process violation occurred, but merely articulated factors to be considered.<sup>124</sup> The court ruled that a reasonable jury could find “the restraints employed by Osbeck . . . exceeded the degree of force needed to correct Metzger’s” behavior, and that no legitimate disciplinary purpose was served from the injuries sustained by Metzger.<sup>125</sup> Therefore, the case was remanded to the trial court.<sup>126</sup>

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<sup>118</sup> *Metzger*, 841 F.2d at 519.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 519-20.

<sup>123</sup> *Metzger*, 841 F.2d at 520.

<sup>124</sup> *See Gottlieb ex rel. Calabria v. Laurel Highlands Sch. Dist.*, 272 F.3d 168, 172 (3d Cir. 2001) (stating that the Third Circuit recognized the uncertainty it had created in *Metzger* and explicitly adopted a “shocks the conscience” test for public school corporal punishment cases).

<sup>125</sup> *Metzger*, 841 F.2d at 520.

<sup>126</sup> *Id.* at 520-21 (“If the jury is persuaded that Osbeck employed those restraints with the intent to cause harm, Osbeck will be subject to liability for crossing the ‘constitutional line’ separating a common law tort from a deprivation of substantive due process.”).

Whatever ambiguity the Third Circuit created in *Metzger* was clarified in its 2001 decision, *Gottlieb ex rel. Calabria v. Laurel Highlands School District*.<sup>127</sup> Here, the court held that it would apply the “shocks the conscience” test to evaluate the conduct of school officials.<sup>128</sup> The critical incident in the case, as described by the court, occurred as follows, after a school security officer escorted Gottlieb to the principal’s office.

Gottlieb stood in the doorway of assistant principal Michael Carbonara’s office while he spoke with a teacher. Carbonara then allegedly began yelling at Gottlieb and spoke a few words to another principal, Robert Raho. Raho then told Gottlieb that he had just been on the phone with Gottlieb’s mother and that Gottlieb was not allowed in school until a parent-teacher conference took place. According to Gottlieb, Carbonara then told her to “shut up, because he didn’t want to hear nothing [sic] [s]he had to say” and pushed her shoulder with his hand, propelling her backwards into a door jam. As a result of this contact, Gottlieb’s lower back struck the door jam.<sup>129</sup>

In explaining its version of the “shocks the conscience” test, the Third Circuit required that four questions be answered:

[First, w]as there a pedagogical justification for the use of force?; [second, w]as the force utilized excessive to meet the legitimate objective in this situation?; [third, w]as the force applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm?; [and fourth, w]as there a serious injury?<sup>130</sup>

Regarding the first element, the court observed that the force

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<sup>127</sup> 272 F.3d at 172.

<sup>128</sup> *Id.* at 173. “[T]he substantive component of the Due Process Clause is violated by [state conduct] when it ‘can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.’” *Lewis*, 523 U.S. at 847.

<sup>129</sup> *Gottlieb*, 272 F.3d at 170-71.

<sup>130</sup> *Id.* at 173.

used “must be capable of being construed as an attempt to serve pedagogical objectives.”<sup>131</sup> Since Carbonara had offered no explanation for his treatment of Gottlieb, the grant of summary judgment to him on the pedagogical objective prong was inappropriate.<sup>132</sup> This compelled the same conclusion on the second prong—the application of any force in this case was necessarily excessive because no objective was stated for application of the same.<sup>133</sup> With respect to the third prong, the court explained, “*it is the harm, and not the contact, that must be intended.*”<sup>134</sup> Here, the facts worked conclusively against Gottlieb on this element of intended harm. Carbonara merely “place[d] his hand on Gottlieb’s shoulder and push[ed] her back inches to the door jam.”<sup>135</sup> Even if injuries resulted from the contact, it could not be inferred “that Carbonara *intended* to act maliciously and sadistically so as to constitute a constitutional violation.”<sup>136</sup> Moreover, Gottlieb stated during her deposition that Carbonara did not intend to injure her, thus, no reasonable jury could find that Carbonara intended to harm Gottlieb.<sup>137</sup> Accordingly, the court dismissed Gottlieb’s substantive due process claim.<sup>138</sup>

**C. Sixth Circuit: *Webb v. McCullough* and *Archev ex rel. Archev v. Hyche***

*Webb v. McCullough*,<sup>139</sup> a 1987 Sixth Circuit case, arose from the application of force by a principal during a school trip to Hawaii.<sup>140</sup> Because of suspected alcohol consumption and other infractions Thomas McCullough, the principal, entered the students’

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<sup>131</sup> *Id.* at 174.

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

<sup>133</sup> *Id.* (“[S]chool officials risk federal constitutional liability claims if they subject their students to force that does not serve any appropriate pedagogical objective.”).

<sup>134</sup> *Gottlieb*, 272 F.3d at 174-75 (emphasis added).

<sup>135</sup> *Id.* at 175.

<sup>136</sup> *Id.* (emphasis added).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 175-76 & n.2 (“We base our conclusion on Carbonara’s lack of intent to injure Gottlieb, and therefore do not need to determine whether the alleged injury was sufficient to support a constitutional claim.”).

<sup>139</sup> 828 F.2d 1151.

<sup>140</sup> *Id.* at 1153-54.

hotel room.<sup>141</sup> Wendy Webb, a female student, “locked herself in the bathroom.”<sup>142</sup> McCullough became very angry when he realized Webb had retreated to the bathroom.<sup>143</sup> “He tried to jimmy the bathroom door lock, but Webb would not let him in.”<sup>144</sup> McCullough then slammed the door with his shoulder until the door finally swung open, causing Webb to hit the wall.<sup>145</sup> “McCullough then thrust the door open again, and it struck Webb again, throwing her to the floor.”<sup>146</sup> McCullough “then grabbed Webb from the floor, threw her against the wall, and slapped her.”<sup>147</sup> Webb “then broke away and ran to her roommates.”<sup>148</sup>

The court noted that the alleged blows were not committed in the school setting, where the need for immediate disciplinary control is at its greatest, and that McCullough was acting *in loco parentis*.<sup>149</sup> Moreover, the court concluded “it [was] possible that the blows were not disciplinary in nature.”<sup>150</sup> Under such circumstances, “a trier of fact could find that . . . McCullough’s need to strike Webb was so minimal or non-existent that the alleged blows were a brutal and inhumane abuse of McCullough’s official power, literally shocking to the conscience.”<sup>151</sup> Although the court recognized that this case might result in liability for a substantive due process violation, it did not expressly specify the elements of the claim on its remand to the district court.<sup>152</sup> However, in 1991 in *Archev ex rel. Archev v. Hyche*,<sup>153</sup> the court adopted the Fourth Circuit’s *Hall* test for determining whether a substantive due process violation occurred in the application of corporal punishment.<sup>154</sup>

The claim in *Archev* arose when a teacher at Fairview Elementary School, Edward “Hyche, struck Archev, then a fifth

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<sup>141</sup> *Id.* at 1153.

<sup>142</sup> *Id.* at 1154.

<sup>143</sup> *Id.*

<sup>144</sup> *McCullough*, 828 F.2d at 1154.

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

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *McCullough*, 828 F.2d at 1157.

<sup>150</sup> *Id.* at 1159.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 1159-60.

<sup>153</sup> 1991 WL 100586.

<sup>154</sup> *Id.* at \*3.

grader . . . , with a wooden paddle five times for humming in the boys' bathroom."<sup>155</sup> "Archey allege[d] that Hyche's acts, and the other defendants' ratification of Hyche's acts," resulted in his need to seek medical attention and an impaired gait.<sup>156</sup> He sought injunctive relief and damages from Hyche and others.<sup>157</sup> The district court "denied defendants' motion to dismiss in its entirety."<sup>158</sup>

The Sixth Circuit held that "[t]he substantive due process inquiry in school corporal punishment cases [is] whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism . . . that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience."<sup>159</sup> Applying this standard, the Sixth Circuit had to determine whether the allegations of the plaintiff's complaint warranted a claim for "brutal and inhumane" treatment which was "literally shocking to the conscience."<sup>160</sup> The court found that they did not.<sup>161</sup> It reasoned that even if "Hyche's action in paddling Archey may have been unwise, there [was] no evidence to suggest that [his] action was 'brutal and inhumane,' 'inspired by malice or sadism,' or 'shocking to the conscience.'"<sup>162</sup> Notably, the court did not define actual malice.<sup>163</sup>

In 1997, the Sixth Circuit decided *Saylor v. Board of Education of Harlan County, Kentucky*.<sup>164</sup> *Saylor* involved teacher-imposed punishment following a fourteen-year-old, eighth-grader's fight with another student and the case went to the circuit court on an interlocutory appeal from a denial of qualified immunity.<sup>165</sup> The teacher gave each student "five licks with a paddle."<sup>166</sup> Notably, Plaintiff Saylor had previously "been spanked by five different teachers" before the current issue arose.<sup>167</sup> The court, applying *Hall's*

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<sup>155</sup> *Id.* at \*1.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Archey*, 1991 WL 100586, at \*1.

<sup>159</sup> *Id.* at \*3.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at \*4.

<sup>162</sup> *Id.* at \*3.

<sup>163</sup> *See Archey*, 1991 WL 100586.

<sup>164</sup> 118 F.3d 507.

<sup>165</sup> *Id.* at 508.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

substantive due process analysis, concluded that the teacher's actions did not shock the conscience,<sup>168</sup> and reversed and remanded the case for dismissal on its finding of qualified immunity for each defendant.<sup>169</sup>

**D. Eighth Circuit: *Wise v. Pea Ridge School District***

The Eighth Circuit's leading excessive force case involving a school official and a student is *Wise v. Pea Ridge School District*.<sup>170</sup> In *Wise*, the court adopted a four-part test to evaluate such claims.<sup>171</sup> The court considered:

- 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.<sup>172</sup>

*Wise* involved a sixth-grade student, Daniel Wise, who "was playing 'dodge ball' with six other boys."<sup>173</sup> Coach Larry Walker twice "told the boys not to play the game . . . and when he saw them continuing to play the game he required [them] to sit out for the remainder of the physical education class."<sup>174</sup> Subsequently, "Walker gave each of the boys two 'licks' on the buttocks with a wooden paddle [that] was approximately one-half inch thick, three inches wide, and twenty-two inches long."<sup>175</sup>

The court was quick to point out that it did not believe the conduct even came close to the point where Daniel's substantive due process rights were violated.<sup>176</sup> It concluded that Coach Walker's use

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<sup>168</sup> *Id.* at 514 (citing *Hall*, 621 F.3d at 613).

<sup>169</sup> *Saylor*, 118 F.3d at 516.

<sup>170</sup> 855 F.2d 560.

<sup>171</sup> *Id.* at 564.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 562.

<sup>174</sup> *Id.*

<sup>175</sup> *Wise*, 855 F.2d at 562.

<sup>176</sup> *Id.* at 566. It expressly rejected the plaintiff's argument that since the court could not evaluate Walker's good faith on the papers submitted, it was required to remand to the

of corporal punishment under the circumstances was reasonable because the students “did not heed the Coach’s warning” to stop playing dodge ball.<sup>177</sup> Moreover, the court found that “the need to use force and the amount of force” applied was reasonable, notwithstanding the fact that the student’s buttocks reddened and resulted in discomfort.<sup>178</sup> Finally, the court concluded that the force applied was neither “excessive [n]or administered for improper reasons.”<sup>179</sup>

**E. Second Circuit: *Johnson v. Newburgh Enlarged School District***

*Johnson v. Newburgh Enlarged School District*,<sup>180</sup> a 2001 Second Circuit case, arose from an assault by a gym teacher named Nicholas Bucci upon an eighth grade student who was attending Bucci’s class.<sup>181</sup> The facts, as described by the court were as follows:

On February 20, 1996, after T.J. and his classmates had finished playing dodge ball, Bucci asked T.J. to hand in the ball. T.J. threw the ball towards Bucci from a distance of about twenty feet. The ball landed near Bucci without hitting him.

In response, Bucci threw two balls back at T.J. and then yelled “you think that’s funny, you think that’s funny!” as he walked over to T.J. Bucci grabbed T.J. by the throat, shouted “I’ll kick the shit out of you!” lifted him off the ground by his neck and

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district court for a trial. *Id.* at 564. The court instead concluded that since the quantum of force applied was insufficient as a matter of law to establish an actionable substantive due process claim, Walker’s subjective state was irrelevant for purposes of evaluating the claim. *Id.* at 563-64.

<sup>177</sup> *Id.* at 564.

<sup>178</sup> *Wise*, 855 F.2d at 564.

<sup>179</sup> *Id.* Indeed, the court found that Walker acted in “good faith . . . to maintain discipline in the gymnasium and not for the malicious or sadistic purpose of causing harm.” *Id.* In reaching this conclusion the court was influenced by the fact that Walker administered the corporal punishment at the end of the academic period, thereby affording himself time to cool-off and allowing the students time to reflect upon their behavior; applied punishment uniformly to all students involved in the dodge ball game; and inflicted the punishment in the presence of two witnesses as mandated by the district’s policy. *Id.*

<sup>180</sup> 239 F.3d 246.

<sup>181</sup> *Id.* at 249.

dragged him across the gym floor to the bleachers. Bucci then choked T.J. and slammed the back of T.J.'s head against the bleachers four times. Bucci also rammed T.J.'s forehead into a metal fuse box located on the gym wall and punched him in the face. During much of the attack, Bucci prevented T.J. from escaping by placing one of his arms across the boy's chest. Bucci only stopped his assault after another student threatened to intervene.<sup>182</sup>

Among the causes of action asserted by Johnson was a constitutional claim under the Due Process Clause for the application of excessive force.<sup>183</sup> The court set forth the factors to be considered in determining the merits of the claim stating:

Factors to be considered in excessive force claims "in determining whether the constitutional line has been crossed" include "the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."<sup>184</sup>

The court wrote that:

With respect to the last factor, if the force was "maliciously or sadistically [employed] for the very purpose of causing harm" in the absence of any legitimate government objective and it results in substantial emotional suffering or physical injury, then the conduct is presumptively unconstitutional. This presumption follows from the fact that the substantive due process guarantee of the Fourteenth Amendment protects individuals from "conscience-shocking" exercises of power by government actors.<sup>185</sup>

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<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 251.

<sup>184</sup> *Id.* at 251-52 (quoting *Metzger*, 841 F.2d at 520).

<sup>185</sup> *Johnson*, 239 F.3d at 252.

The court upheld the lower court's denial of qualified immunity to Bucci and others, while dismissing the rest of the appeal for lack of jurisdiction.<sup>186</sup>

**F. Eleventh Circuit: *Neal v. Fulton County Board of Education***

The leading Eleventh Circuit excessive force case involving public school officials and their students is *Neal v. Fulton County Board of Education*,<sup>187</sup> decided in 2000. The case arose from an incident when high school football coach, Tommy Ector, allegedly struck Durante Neal “with a metal weight lock, blinding [Neal] in one eye, as a form of punishment for [his] involvement in a fight with another student.”<sup>188</sup> This punishment stemmed from the altercation between the two students where Neal used a weighted lock to hit his teammate in the head.<sup>189</sup> Coach Ector dumped “the contents of [Neal’s] bag on the ground, shouting repeatedly ‘what did you hit him with; if you hit him with it, I am going to hit you with it.’”<sup>190</sup> Subsequently, in the presence of the school principal, Herschel Robinson, Ector took Neal’s weight lock and struck Neal in the left eye.<sup>191</sup> “As a result of the blow, [Neal’s] eye ‘was knocked completely out of its socket,’ leaving it ‘destroyed and dismembered.’”<sup>192</sup>

Neal “claimed that Ector’s use of corporal punishment was so excessive as to shock the conscience and violate his Fourteenth Amendment substantive due process rights.”<sup>193</sup> Neal “also claimed that the School Board, Superintendent, and Principal were liable for failing to train, instruct properly, and supervise Ector, and that this failure established a custom within the school district which resulted in the violation of [Neal’s] rights.”<sup>194</sup>

The Eleventh Circuit observed that the vast majority of

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<sup>186</sup> *Id.* at 256.

<sup>187</sup> 229 F.3d 1069.

<sup>188</sup> *Id.* at 1071.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Neal*, 229 F.3d at 1071.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

circuits had concluded that substantive due process principles established by the Supreme Court protect a student from corporal punishment that is intentional, obviously excessive, and that creates a foreseeable risk of serious injury.<sup>195</sup> The court stated that it had “not precisely defined ‘corporal punishment.’”<sup>196</sup> However, it recognized that “[m]any corporal punishment cases involve what might be called traditional applications of physical force, such as where school officials, subject to an official policy or in a more formal disciplinary setting, mete out spankings or paddlings to a disruptive student.”<sup>197</sup> The court observed that “[n]ot all corporal punishment cases arise” where traditional corporal punishment is applied, and some “may involve less traditional, more informally-administered, and more severe punishments.”<sup>198</sup> It stated, “[w]ith those decisions in mind, we think that, in the circumstances of this case, Ector’s conduct—as alleged by the plaintiff—does amount to corporal punishment.”<sup>199</sup>

The court held that excessive corporal punishment “may be actionable under the Due Process Clause when it is tantamount to arbitrary, egregious, and conscience-shocking behavior.”<sup>200</sup> It asserted that “[t]he punishment must objectively be obviously excessive and the teacher must subjectively intend to use that obviously excessive amount of force in circumstances where it was

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<sup>195</sup> *Id.* at 1075 (citing *London v. Dirs. of the Dewitt Pub. Schs.*, 194 F.3d 873, 876-77 (8th Cir. 1999); *Saylor*, 118 F.3d at 514; *P.B. v. Koch*, 96 F.3d 1298, 1304 (9th Cir. 1996); *Metzger*, 841 F.2d at 520; *Garcia*, 817 F.2d at 653; *Hall*, 621 F.2d at 613).

<sup>196</sup> *Neal*, 229 F.3d at 1072.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* Contrariwise, in an unpublished case, the court in *Mahone v. Ben Hill County School System* found that the facts alleged by Plaintiff Gregory Mahone did not amount to infliction of “corporal punishment.” *Mahone v. Ben Hill Cnty. Sch. Sys.*, 377 F. App’x 913, 916 (11th Cir. 2010). Gregory was a sixth grade special education student who was attending a physical education class during which horseplay typically occurred. *Id.* at 914. The teacher, Sammy Reynolds, “allegedly shoved Gregory’s head in[to] a trash can” and then pulled him out by his feet. *Id.* Gregory allegedly suffered post-traumatic stress disorder as a result. *Id.* at 916. The court concluded that “Reynolds’s actions did not constitute corporal punishment” because “Reynolds had no legitimate purpose for allegedly shoving Gregory into [the] trash can,” and his actions were neither arbitrary nor conscience shocking. *Id.* Moreover, the court concluded that the resulting injuries were insufficient to be actionable as substantive due process violations, and there was no evidence that Reynolds acted to punish the student. *Mahone*, 377 F. App’x at 916. Finally, the court concluded that a constitutional claim of excessive force, as applied in a school setting, could only arise under the Fourteenth Amendment. *Id.*

<sup>200</sup> *Neal*, 229 F.3d at 1075.

foreseeable that serious bodily injury could result.”<sup>201</sup> In deciding whether a constitutional violation occurred, the Eleventh Circuit also required an examination of: “(1) the need for the application of corporal punishment, (2) the relationship between the need and amount of punishment administered, and (3) the extent of the injury inflicted.”<sup>202</sup> Finally, the *Neal* court stated, “[w]e do not open the door to a flood of complaints by students objecting to traditional and reasonable corporal punishment. On the facts of this case, and consistent with the logic of almost all courts considering the subject, we conclude that the plaintiff has stated a claim.”<sup>203</sup>

The most recent Eleventh Circuit pronouncement involving substantive due process claims and corporal punishment in public schools arose in *T.W. ex rel. Wilson v. School Board of Seminole County, Florida*.<sup>204</sup> *T.W.* involved a series of harsh actions over a several month period by a 300-pound teacher named Kathleen Garrett, toward a fourteen-year-old student with a pervasive developmental disorder.<sup>205</sup> These incidents included the teacher: verbally provoking T.W. on multiple occasions; restraining T.W. by sitting on him after he refused to go to the cool down room; tripping T.W. “causing him to stumble”; restraining T.W. after he refused to follow her instructions; pinning T.W.’s arms behind his back while she was leading him to the cool down room; and using other inappropriate restraints on T.W. such as forcing him to the floor then pulling his leg back; and forcing him against a table with her weight while holding his arms behind his back.<sup>206</sup>

Of the specific incidents examined by the court, all but one were found to be “‘capable of being construed as an attempt’ to restore order, maintain discipline, or protect T.W. from self-injurious behavior,”<sup>207</sup> although the court found Garrett’s “straddling technique” for restraining T.W. “inappropriate.”<sup>208</sup> Concerning the remaining incident, which occurred “when Garrett tripped T.W. as he left the cool down room, [the court found] the evidence support[ed] a

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<sup>201</sup> *Id.* at 1075 n.3.

<sup>202</sup> *Id.* at 1075.

<sup>203</sup> *Id.* at 1076.

<sup>204</sup> 610 F.3d 588.

<sup>205</sup> *Id.* at 593-96.

<sup>206</sup> *Id.* at 595-96.

<sup>207</sup> *Id.* at 600 (quoting *Gottlieb*, 272 F.3d at 174).

<sup>208</sup> *Id.* at 601.

reasonable inference that Garrett's use of force was unrelated to T.W.'s disruptive behavior and lacked a disciplinary purpose."<sup>209</sup> Significantly, the court found "T.W. suffered only minor physical injuries" over the course of events.<sup>210</sup> The court held that "[a]fter considering the totality of circumstances, including T.W.'s psychological injuries, . . . Garrett's conduct was not so arbitrary and egregious as to support a complaint of a violation of substantive due process."<sup>211</sup>

## V. THE CIRCUIT OUTLIERS

### A. Fifth Circuit: *Fee v. Herndon* and the Problem of Post-Deprivation Remedies as Providing Adequate Due Process

The Fifth Circuit agrees that "corporal punishment in public schools 'is a deprivation of substantive due process when it is arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning.'"<sup>212</sup> Nevertheless, the Fifth Circuit has refused to recognize a cause of action for such violations *when there are adequate state remedies*.<sup>213</sup> No other circuit court has adopted this reasoning.<sup>214</sup>

The Fifth Circuit's view is best exemplified by the 1990 case, *Fee v. Herndon*.<sup>215</sup> In *Fee*, "[a] sixth-grade special education student, [Tracy Fee], became disruptive during classroom instruction, prompting the use of corporal punishment by the school's principal to

<sup>209</sup> *T.W.*, 610 F.3d at 599.

<sup>210</sup> *Id.* at 601.

<sup>211</sup> *Id.* at 602. In dissent, one judge found the record "more than adequately support[ing] a conclusion that Garrett's repeated physical restraints and excessive force against T.W. 'shock[ed] the conscience' and thus violated his constitutional rights." *Id.* at 605 (Barkett, J., dissenting).

<sup>212</sup> *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)).

<sup>213</sup> *Id.* at 806.

<sup>214</sup> *See, e.g.*, *Rutherford v. City of Berkeley*, 780 F.2d 1444, 1448 (9th Cir. 1986) (noting that the plaintiff alleged a substantive due process violation asserting that "the availability of state court relief does not bar federal relief under § 1983"); *McRorie v. Shimoda*, 795 F.2d 780, 785 (9th Cir. 1986).

<sup>215</sup> 900 F.2d 804.

restore discipline.”<sup>216</sup> “School officials admit[ted] that the principal paddled Tracy three times on the buttocks . . . as punishment for his disruptive behavior during a history class, but . . . insist[ed] that the punishment comported with official school policy, which provided for *reasonable* corporal punishment.”<sup>217</sup>

The Fifth Circuit concluded that “*reasonable* corporal punishment is not at odds with the [F]ourteenth [A]mendment and does not constitute arbitrary state action.”<sup>218</sup> However, the Fifth Circuit stated that when corporal punishment is applied in an arbitrary or capricious manner, or is “wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning,” there is then “a deprivation of substantive due process” rights.<sup>219</sup> It held “that injuries sustained incidentally to corporal punishment, irrespective of the severity of the injuries or the sensitivity of the student, do not implicate the [D]ue [P]rocess [C]ause *if* the forum state affords adequate post-punishment civil *or* criminal remedies for the student to vindicate legal transgressions.”<sup>220</sup> The court said that “[t]he rationale for this rule, quite simply, is that such states have provided all the process constitutionally due.”<sup>221</sup> The Fifth Circuit thus affirmed the district court’s dismissal of the § 1983 claims against all defendants.<sup>222</sup>

In another Fifth Circuit decision, the court in *Moore v. Willis Independent School District*,<sup>223</sup> the court again refused to recognize a claim under substantive due process, stating: “[A]s long as the state provides an adequate remedy, a public school student cannot state a claim for denial of substantive due process through excessive corporal punishment, whether it be against the school system, administrators, or the employee who is alleged to have inflicted the damage.”<sup>224</sup> In *Moore*, a physical education teacher observed Aaron Moore, an eighth-grade fourteen-year-old male student in middle school, talking to another student during the roll call in an elective

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<sup>216</sup> *Id.* at 805.

<sup>217</sup> *Id.* at 806.

<sup>218</sup> *Id.* at 808.

<sup>219</sup> *Id.* (quoting *Woodard*, 732 F.2d at 1246).

<sup>220</sup> *Fee*, 900 F.2d at 808 (emphasis added).

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 810.

<sup>223</sup> 233 F.3d 871 (5th Cir. 2000).

<sup>224</sup> *Id.* at 874.

gym class in violation of a class rule.<sup>225</sup> Moore had been “on the school’s basketball team and was” planning to try-out for the track team.<sup>226</sup> The instructor ordered Moore “to do 100 ‘ups and downs,’ also known as squat-thrusts.”<sup>227</sup> The student had never been punished before, but apparently understood that if he stopped before reaching 100, he would be required to restart the counting or would have to report to the principal’s office.<sup>228</sup> Moore “then participated in [about] twenty to twenty-five minutes of weight lifting” activity, which was part of the day’s curriculum.<sup>229</sup> The student indicated that he did not complain of pain or fatigue for fear of further repercussions.<sup>230</sup>

Soon thereafter, Moore was diagnosed with rhabdomyolysis, “a degenerative disease of the skeletal muscle,” and renal (kidney) failure, requiring hospitalization, causing him to miss three weeks of school.<sup>231</sup> According to Moore’s mother, the physical education teacher told her: “With junior high kids, you have to inflict pain or they don’t remember.”<sup>232</sup> She also reported that the athletic director told her, “‘the coaches at the junior high were out of control and they did their own thing.’”<sup>233</sup>

The court rejected Moore’s complaint based on its conclusion that an adequate state remedy existed for the instructor’s conduct, since Texas law provides for adequate traditional common law remedies for students who have been subjected to excessive disciplinary force.<sup>234</sup>

Notably, Judge Wiener in a concurring opinion commented: “In recent years, this circuit has become increasingly isolated in our position that substantive due process cannot be implicated by injuries that students suffer incidental to disciplinary corporal punishment as long as the state affords adequate civil or criminal remedies. I now

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<sup>225</sup> *Id.* at 873.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Moore*, 233 F.3d at 873.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 873 & n.4.

<sup>232</sup> *Id.* at 873.

<sup>233</sup> *Moore*, 233 F.3d at 873.

<sup>234</sup> *Id.* at 874.

perceive our isolation to be total.”<sup>235</sup> While Judge Wiener was constrained to concur with the majority by what he described as a strict rule of *stare decisis*, he nevertheless emphasized that the Supreme Court in *Ingraham* “did not proclaim that an adequate remedy provided by state law or procedure constitutes a *per se* bar to a student’s ability to state a substantive due process claim based on excessive corporal punishment.”<sup>236</sup> Moreover, he questioned whether an adequate state remedy existed in fact due to the governmental immunity for the school districts and qualified immunity provided to teachers pursuant to Texas state law.<sup>237</sup> In advancing his argument, Judge Wiener could have added the observation that the Fifth Circuit rule, providing that due process is satisfied if a civil *or* criminal remedy exists under Texas law, furnishes little consolation to a plaintiff who cannot be made whole for his or her injuries. Moreover, except in theory, the discretionary nature of criminal prosecution creates vast uncertainty as to whether a remedy exists.

**B. Seventh Circuit: *Wallace ex rel. Wallace v. Batavia School District 101* and the Recognition of a Fourth Amendment Claim for the Application of Excessive Force on Students**

*Wallace ex rel. Wallace v. Batavia School District 101*<sup>238</sup> is the leading Seventh Circuit case on the application of excessive corporal punishment to public school students.<sup>239</sup> In *Wallace*, the student plaintiff asserted claims under both the Fourth Amendment and the substantive component of the Due Process Clause of the Fourteenth Amendment.<sup>240</sup> The action arose from an incident involving sixteen-year-old students, Heather Wallace and Kim Fairbanks, who were fighting when business teacher, James Cliffe, returned to his “classroom after a few minutes’ absence.”<sup>241</sup> With both girls screaming and trying to hit one another, Cliffe told Wallace

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<sup>235</sup> *Id.* at 876-77 (Wiener, J., concurring).

<sup>236</sup> *Id.* at 877.

<sup>237</sup> *Id.* at 878.

<sup>238</sup> 68 F.3d 1010 (7th Cir. 1995).

<sup>239</sup> *Id.* at 1016.

<sup>240</sup> *Id.* at 1011.

<sup>241</sup> *Id.*

to leave the room.<sup>242</sup> She began to slowly walk out of the classroom and to expedite the process, “Cliffe reached over another student’s desk and took Wallace by her left wrist to speed her exit.”<sup>243</sup> “As Cliffe pulled Wallace, she bent over the desk.”<sup>244</sup> “Cliffe told Wallace to hurry up and grasped her right elbow to move her out of the classroom.”<sup>245</sup>

In analyzing Wallace’s Fourth Amendment claim, the court observed at the outset that students under the supervision of public school authorities enjoy “less than the full constitutional liberty protection afforded those persons not in school.”<sup>246</sup> The court found it basic that “law compels students to attend school, which deprives them of a level of freedom of mobility. Once under the control of the school, students’ movement and location are subject to the ordering and direction of teachers and administrators . . . including . . . the right to come and go at will.”<sup>247</sup>

Thus, Wallace’s freedom to come and go as she pleased was restricted, regardless of whether she violated school rules, and she could not reasonably claim a constitutional infringement based on such restrictions.<sup>248</sup> Significantly, the court said:

The reasonableness of a *Fourth Amendment* seizure of a public school student by a teacher must be evaluated in the context of the school environment, where restricting the liberty of students is a *sine qua non* of the educational process. Deprivations of liberty in schools serve the end of compulsory education and do not inherently pose constitutional problems.<sup>249</sup>

The court went on to contrast the foregoing infringements on liberty with those which occur outside of the school setting in connection with law enforcement:

Seizures of individuals by police are premised on

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<sup>242</sup> *Id.*

<sup>243</sup> *Wallace*, 68 F.3d at 1011.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 1013.

<sup>247</sup> *Id.*

<sup>248</sup> *Wallace*, 68 F.3d at 1013.

<sup>249</sup> *Id.* at 1013-14.

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society's need to apprehend and punish violators of the law. As such, they inherently threaten individuals' liberty to live free of the criminal justice process. There is no analogous liberty for students to live free of the educational process.

...  
... With regard to school searches, or even school seizures of students' property [the goals are congruent]: to detect aberrant behavior and to retrieve property.

[But] there is little parallel . . . between the school and law enforcement situations when there is a seizure of the person. The basic purpose for the deprivation of a student's personal liberty by a teacher is education, while the basic purpose for the deprivation of liberty of a criminal suspect by a police officer is investigation or apprehension. The application of the Fourth Amendment is necessarily different in these situations.<sup>250</sup>

Thus, any claim by a student who alleges that his or her liberty interest under the Fourth Amendment was violated by public school officials must identify how the interest was burdened in light of the inherently higher threshold to find such infringement.<sup>251</sup> Establishing the unreasonableness of the restriction must be weighed against the broad range of methods employed by teachers and administrators to effectively operate a school.<sup>252</sup> The court then held:

[I]n the context of a public school, a teacher or administrator who seizes a student does so in violation of the Fourth Amendment only when the restriction of liberty is unreasonable under the circumstances then existing and apparent. Therefore, in seeking to maintain order and discipline, a teacher or administrator is simply constrained to taking

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<sup>250</sup> *Id.* at 1014.

<sup>251</sup> *Id.* See *infra* Part VIII for a discussion on Fourth Amendment principles in the context of school searches, including as espoused in *New Jersey v. T.L.O.* and *Safford Unified School District No. 1 v. Redding*.

<sup>252</sup> *Wallace*, 68 F.3d at 1013-14.

reasonable action to achieve those goals. Depending on the circumstances, reasonable action may certainly include the seizure of a student in the face of provocative or disruptive behavior.<sup>253</sup>

Additionally, Wallace asserted “that Cliffe violated her substantive due process rights under the Fourteenth Amendment by [applying] excessive corporal punishment when he seized [Wallace] to escort her from the classroom.”<sup>254</sup> The court observed that it has never acknowledged such a right for students who have undergone corporal punishment and refused to do so there.<sup>255</sup> Although it recognized the division among the circuits, especially between the Third, Fourth, Sixth, Eighth, and Tenth Circuits on the one hand, and the Fifth Circuit on the other hand, the court found it unnecessary to resolve the conflict.<sup>256</sup> Instead, the Seventh Circuit concluded that it would evaluate the students’ claims under the Fourth Amendment only.<sup>257</sup> The court reasoned: “Because a student is at least as much seized when a school official administers corporal punishment[,] as Wallace was here, corporal punishment may be evaluated under the Fourth Amendment standard.”<sup>258</sup>

Without conceding Wallace’s treatment amounted to corporal punishment, the court stated that even if the subject actions constituted corporal punishment, it did “not believe that the Fourteenth Amendment’s Due Process Clause afford[ed] Wallace any greater protection than the Fourth Amendment from unwarranted

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<sup>253</sup> *Id.* at 1014. The court made clear that the test it applied was an objective one as required by *Graham v. Connor*. *Id.* at 1014-15. That test “does not ask what the teacher’s intentions were, and it does not ask if the particular student thought the conduct was out of bounds. It asks, at bottom, whether under the circumstances presented and known the seizure was objectively unreasonable.” *Id.* at 1015.

<sup>254</sup> *Id.*

<sup>255</sup> *Wallace*, 68 F.3d at 1015. In referring to *Ingraham*, the court pointed out the Supreme Court has expressly “refused to address whether a separate federal constitutional right protects students from excessive corporal punishment.” *Id.* Moreover, the circuit expressed “no opinion [on] whether the Fourteenth Amendment provides students with a remedy for non-disciplinary deprivations of liberty at the hands of school officials under a theory that school officials promoted school policies that facilitated a climate where children were deprived of their constitutional rights.” *Id.* at 1016 n.4.

<sup>256</sup> *Id.* at 1015 & n.3, 1016 n.4.

<sup>257</sup> *Id.* at 1016.

<sup>258</sup> *Wallace*, 68 F.3d at 1016.

discipline while in school.”<sup>259</sup> Finally, the court expressed “no opinion as to whether the Fourteenth Amendment provides students with a remedy for non-disciplinary deprivations of liberty at the hands of school officials under a theory that school officials promoted school policies that facilitated a climate where children were deprived of their constitutional rights.”<sup>260</sup>

**C. The Ninth Circuit and *P.B. ex rel. N.B. v. Koch and Doe ex rel. Doe v. State of Hawaii Department of Education: The Fourth Amendment Prevails over Substantive Due Process***

In *P.B. ex rel. N.B. v. Koch*,<sup>261</sup> an interlocutory appeal from the district court’s denial of qualified immunity to the defendants in their personal capacity, three students alleged in a § 1983 action that a high school principal separately applied unconstitutional force against them.<sup>262</sup> Their allegations included acts of “slapping, punching, and choking” the students, which they asserted bore “no reasonable relation to the need,” and were taken for the purpose of causing harm, including significant “pain, bruising, and emotional injury.”<sup>263</sup> Although the court considered using substantive Due Process and Fourth Amendment analyses,<sup>264</sup> it ultimately chose to apply Fourth Amendment review under that provision’s “objective reasonableness” standard.<sup>265</sup>

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<sup>259</sup> *Id.* at 1015.

<sup>260</sup> *Id.* at 1016 n.4. The court in *Wilson v. Cahokia School District No. 187* recently applied *Wallace*. No. 06-cv-0369-MJR, 2007 WL 1752150 (S.D. Ill. June 18, 2007). In *Wilson*, a student talked in the hallway, knowing that there was a rule that prohibited such conduct, and spoke again when she was directed by the principal to stop talking. *Id.* at \*3. In response, the principal “grabbed and pulled [the student] upright, which caused her to strike her head on a glass window, and [then] threw [her] into a conference room, which caused her to strike her leg.” *Id.* The court treated the student’s Fourth and Fourteenth Amendment claims together and concluded that there were sufficient questions of fact as to the reasonableness of the principal’s conduct to deny him summary judgment. *Id.* at \*2-4.

<sup>261</sup> 96 F.3d 1298.

<sup>262</sup> *Id.* at 1300-01.

<sup>263</sup> *Id.* at 1304.

<sup>264</sup> *Id.* at 1302-03.

<sup>265</sup> *Id.* at 1303 n.4. The court stated, however, that to analyze a substantive due process claim for application of excessive force required the court to consider: “the need for governmental action in question, the relationship between the need and the action, the extent of harm inflicted, and whether the action was taken in good faith or for the purpose of causing harm.” *P.B.*, 96 F.3d at 1303-04 (quoting *Sinaloa Lake Owners Ass’n v. City of*

Koch's actions as alleged by the students were found objectively *unreasonable*, even under the more relaxed Fourth Amendment standard which is applied in school settings, since no force was needed.<sup>266</sup> In light of the procedural posture of the case, the court concluded it "need not and d[id] not resolve the question of whether the Fourth Amendment, rather than the Due Process Clause, protects a student from the use of excessive force by a school official."<sup>267</sup> The court then affirmed the district court's denial of summary judgment.<sup>268</sup>

In *Doe ex rel. Doe v. State of Hawaii Department of Education*,<sup>269</sup> however, the Ninth Circuit finally held that the Fourth Amendment, rather than the Fourteenth Amendment's Due Process Clause, applied to a disciplinary excessive force claim asserted by a public school student.<sup>270</sup> In *Doe*, the plaintiff was an eight-year-old second grader.<sup>271</sup> "Doe's teacher sent him to the defendant, Vice Principal David Keala, to be disciplined for fighting."<sup>272</sup> "Doe then refused to stand still against a wall for his time-out punishment" as Keala had directed.<sup>273</sup> The court found:

Keala followed through on his threat to take Doe outside and tape him to a nearby tree if he did not stand still. The vice principal used masking tape to tape Doe's head to the tree. The record is unclear as to whether Doe's face was pressed against the bark. The tape remained for about five minutes until a fifth-grade girl told Keala that she did not think he should be doing that. He instructed the girl to remove the tape, which she did.<sup>274</sup>

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Simi Valley, 882 F.2d 1398, 1409 (9th Cir. 1989), *cert. denied sub nom.*, *Doody v. Sinaloa Lake Owners Ass'n, Inc.*, 494 U.S. 1016 (1990), *overruled in part by* *Armendariz v. Penman*, 75 F.3d 1311, 1325 (9th Cir. 1996)) (internal quotation marks omitted).

<sup>266</sup> *Id.* at 1304.

<sup>267</sup> *Id.* at 1303 n.4.

<sup>268</sup> *Id.* at 1305.

<sup>269</sup> 334 F.3d 906 (9th Cir. 2003).

<sup>270</sup> *Id.* at 908.

<sup>271</sup> *Id.* at 907.

<sup>272</sup> *Id.* at 907-08.

<sup>273</sup> *Id.* at 908.

<sup>274</sup> *Doe*, 334 F.3d at 908.

The court held that “Doe’s claim [wa]s appropriately brought under the Fourth Amendment, not the Due Process Clause.”<sup>275</sup> It reasoned that the Fourth Amendment applied to conduct propelled by “investigatory or administrative purposes.”<sup>276</sup> Since Keala was disciplining a student for misconduct for the purpose of maintaining order in the school, clearly administrative functions, his conduct fell within the Fourth Amendment’s ambit.<sup>277</sup> Notwithstanding this pronouncement, the *Doe* court recognized that excessive force against a student might occur without an actual search or seizure and that “the Fourth Amendment would not apply to such conduct.”<sup>278</sup> On this basis, the court would not foreclose the possibility that under some scenarios, an actionable excessive force claim by students could be brought pursuant to the Due Process Clause of the Fourteenth Amendment rather than the Fourth Amendment.<sup>279</sup>

#### VI. THE IMPACT OF *GRAHAM V. CONNOR* AND *COUNTY OF SACRAMENTO V. LEWIS* ON ANALYSIS OF PUBLIC SCHOOL CORPORAL PUNISHMENT CASES

In 1989, the Supreme Court held in *Graham v. Connor*<sup>280</sup> that all claims “that law enforcement officials [have] used excessive force”—deadly or not—“in the course of making an arrest, investigatory stop, or other ‘seizure’ ” of a free citizen “are properly analyzed under the Fourth Amendment’s ‘objective reasonableness’ standard, rather than under a substantive due process standard.”<sup>281</sup>

In *Graham*, the plaintiff was a diabetic who asked his friend William Berry to drive him to a convenience store to purchase orange juice to counteract the onset of an insulin reaction.<sup>282</sup> Because the store was crowded when he entered, Graham hurried out and “asked Berry to drive him to a friend’s house instead.”<sup>283</sup> A police officer,

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<sup>275</sup> *Id.* at 909.

<sup>276</sup> *Id.* (quoting *United States v. Attson*, 900 F.2d 1427, 1430-31 (9th Cir. 1990)) (internal quotation marks omitted).

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Doe*, 334 F.3d at 909.

<sup>280</sup> 490 U.S. 386.

<sup>281</sup> *Id.* at 388.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 388-89.

having observed Graham enter and exit the store quickly, became suspicious, followed Berry's car, and made an investigative stop, ordering the pair to wait while he found out what happened in the store.<sup>284</sup> Back-up police officers then arrived on the scene, handcuffed Graham, and ignored or rebuffed Berry's pleas for the officers to treat Graham's condition.<sup>285</sup> During the encounter, Graham sustained multiple injuries, including "a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder," among other injuries.<sup>286</sup>

At the outset, the *Graham* Court expressly "reject[ed] th[e] notion that all excessive force claims brought under § 1983 are governed by a single generic [due process] standard."<sup>287</sup> Instead, courts must identify "the specific constitutional right allegedly infringed by the challenged application of force," and then judge the claim "by reference to the specific constitutional standard which governs that right."<sup>288</sup> The Court determined "that *all* claims that law enforcement officials have used excessive force . . . in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen" are properly characterized as invoking the protections of the Fourth Amendment; it guarantees citizens the right against the "sort of physically intrusive governmental conduct presented in *Graham*, and must be judged by reference to the Fourth Amendment's "reasonableness" standard.<sup>289</sup> Moreover, the Fourth Amendment "reasonableness" inquiry "is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, *without regard to their underlying intent or motivation*."<sup>290</sup> The Court also noted that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene," and its calculus "must embody [an] allowance for the fact that police officers are often forced to make split-second" decisions "about the amount of force that is necessary

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<sup>284</sup> *Id.* at 389.

<sup>285</sup> *Graham*, 490 U.S. at 389.

<sup>286</sup> *Id.* at 390.

<sup>287</sup> *Id.* at 393.

<sup>288</sup> *Id.* at 394 (citing *Baker v. McCollan*, 443 U.S. 137, 140 (1979); *Tennessee v. Garner*, 471 U.S. 1, 7 (1985)).

<sup>289</sup> *Id.* at 395.

<sup>290</sup> *Graham*, 490 U.S. at 397 (emphasis added) (citing *Scott v. United States*, 436 U.S. 128, 137-38 (1978); *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968)).

in a particular situation.”<sup>291</sup>

Thus, *Graham* seems to compel the application of the Fourth Amendment standard in pre-arrest or during-arrest, excessive force “seizures” by police officers and Eighth Amendment analysis for citizens convicted of crimes.<sup>292</sup> *Graham* does not clarify what clause, if any, anchored in the Bill of Rights, governs the application of force to prisoners already in custody, that is, in “post-seizure” circumstances between arrest and pre-trial detention or during the detention itself.<sup>293</sup> Moreover, it does not indicate what analysis will apply when the Bill of Rights does not supply text which corresponds to the circumstances giving rise to an excessive force claim in the post-arrest-pre-conviction window. The Supreme Court has subsequently clarified *Graham* in *County of Sacramento v. Lewis*,<sup>294</sup> indicating that *Graham*

“does not hold that all constitutional claims relating to physically abusive government conduct must arise under either the Fourth or Eighth Amendments; rather, *Graham* simply requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.”<sup>295</sup>

The issue in *Lewis* was “whether a police officer violates the Fourteenth Amendment’s guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender.”<sup>296</sup> The Court said it did not, and held “that in such

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<sup>291</sup> *Id.* at 396-97. To determine the reasonableness, courts must consider “the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” *Id.* at 396.

<sup>292</sup> *Id.* at 395 & n.10. Moreover, the *Graham* Court made clear that subjective motivations, such as good faith or malice, have no place in Fourth Amendment analysis, but they do in Eighth Amendment cases. *Id.* at 397-98.

<sup>293</sup> *Graham*, 490 U.S. at 395 n.10.

<sup>294</sup> 523 U.S. 833 (1998).

<sup>295</sup> *Id.* at 843 (quoting *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997)).

<sup>296</sup> *Id.* at 836.

circumstances[,] only *a purpose to cause harm* unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation.”<sup>297</sup> Since the facts revealed no intent to harm the suspects physically, the claim could not give rise to liability under the Fourteenth Amendment.<sup>298</sup> The mere allegation that police pursuit was undertaken with deliberate indifference to the passenger’s survival was insufficient to state a substantive due process claim.<sup>299</sup>

Under *Graham*, then, the Fourth Amendment standard requires officers’ actions be “objectively reasonable” under the circumstances, “without regard to their underlying intent or motivation.”<sup>300</sup>

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<sup>297</sup> *Id.* (emphasis added).

<sup>298</sup> *Id.* at 855 (holding that Smith’s behavior “does not shock the conscience, and petitioners are not called upon to answer for it under § 1983” because Smith’s intention “was to do his job as a law enforcement officer, not to induce Willard’s lawlessness, or to terrorize, cause harm, or kill”).

<sup>299</sup> See *Lewis*, 523 U.S. at 854. The *Lewis* Court explained that

in *California v. Hodari D.*, . . . a police pursuit in attempting to seize a person does not amount to a “seizure” within the meaning of the Fourth Amendment. And in *Brower v. County of Inyo*, [the Court] explained that “a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual’s freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual’s freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement *through means intentionally applied*.”

*Id.* at 843-44 (quoting *California v. Hodari D.*, 499 U.S. 621, 626 (1991); *Brower v. County of Inyo*, 489 U.S. 593, 596-97 (1989)). Simply stated, a pursuit, which causes a crash, is not freedom terminated through intentional action. *Id.*

<sup>300</sup> *Graham*, 490 U.S. at 397 (citing *Scott*, 436 U.S. at 137-38; *Terry*, 392 U.S. at 21-22). The use of the term “reasonableness” in the Fourth Amendment context may lead to confusion since defendants are protected by two layers of “reasonableness.” Compare *Beck v. Ohio*, 397 U.S. 89, 91 (1964) (citing *Henry v. United States*, 361 U.S. 98, 102 (1959); *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949)) (stating that “[t]he constitutional validity of the search . . . must depend upon the constitutional validity of the . . . arrest . . . [which] depends in turn upon whether . . . the officers had probable cause”), with *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (stating that the issue was “whether a reasonable officer could have believed [the] warrantless search to be lawful, in light of clearly established law and the information searching officers possessed”). The first layer of reasonableness is on the constitutionality of the search itself and whether it was objectively reasonable. See generally *Anderson*, 483 U.S. 635; *Brinegar*, 338 U.S. 160. The second layer is whether the public official acted reasonably for immunity purposes, which, for example, would ask whether a reasonable official in defendant’s shoes could have mistakenly believed probable cause existed. See generally *Anderson*, 483 U.S. 635;

**VII. DISCERNING A FEDERAL CONSTITUTIONAL CAUSE OF ACTION FOR EXCESSIVE FORCE-CORPORAL PUNISHMENT IN SCHOOL SETTINGS**

The paradigmatic majority approach to substantive due process analysis for school corporal punishment cases is articulated in the Eleventh Circuit's *Neal v. Fulton County Board of Education*.<sup>301</sup> Under *Neal*, and its sister Second, Third, Fourth, Sixth, and Eighth Circuit precedents, plaintiffs are required to satisfy both objective and subjective tests before they may recover for constitutional injuries resulting from excessive corporal punishment.<sup>302</sup> Under the objective test, plaintiffs must show that the punishment inflicted was "obviously excessive."<sup>303</sup> This determination is based on the totality of the circumstances.<sup>304</sup> Especially weighty in *Neal*'s objective analysis are: "the need for the application of force[;] the relationship between the need and the amount of force that was used[;] [and] the extent of injury inflicted."<sup>305</sup> *Neal* explained that the extent of the injury is "simply one factor," and that "minor injur[ies] suffered . . . during the administration of traditional corporal punishment will rarely . . . support a federal due process claim."<sup>306</sup>

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*Brinegar*, 338 U.S. 160; see also *infra* Part VIII for a fuller discussion of qualified immunity.

<sup>301</sup> 229 F.3d at 1071, 1073, 1076 (holding that a coach's act of striking a student was "corporal punishment" and that this conduct supported a claim of a substantive due process violation).

<sup>302</sup> *Id.* at 1075 n.3 (citing *Wise*, 855 F.2d at 563 n.4).

<sup>303</sup> *Id.*

<sup>304</sup> *Id.* at 1075.

<sup>305</sup> *Id.* at 1076 (quoting *Metzger*, 841 F.2d at 520).

<sup>306</sup> *Neal*, 229 F.3d at 1076. In this regard, the Eleventh Circuit concluded that choking a student, until he lost his breath and sustained bruises and "a scratch on his neck," was not obviously excessive because "the extent of the student's bodily injury was not serious." *Peterson v Baker*, 504 F.3d 1331, 1335, 1337 (11th Cir. 2007). In *T.W. ex rel. Wilson v. School Board of Seminole County, Florida*, the same court concluded that where a "student suffered only minor physical injuries" and perhaps some bruises, but experienced only "transient pain as a result of" restraint applied by his teacher, and "never received medical treatment for any physical injuries[.]" excessive force in the constitutional sense was not applied. *T.W.*, 610 F.3d at 601, 603 (citing *Peterson*, 504 F.3d at 1337). By contrast, hitting a student in the eye with a metal weight lock, permanently destroying the eye as in *Neal*, and striking a student "with a metal cane in the head, ribs, and back" with sufficient force to cause a large knot and continuing migraine headaches, as in *Kirkland ex rel. Jones v. Greene County Board of Education*, were each excessive. *Neal*, 229 F.3d at 1076; *Kirkland ex rel. Jones v. Greene Cnty. Bd. of Educ.*, 347 F.3d 903, 904-05 (11th Cir. 2003).

On the subjective prong, the *Neal* court held that for a student to demonstrate that he or she was subjected to a conscience-shocking application of excessive force the student must, at a minimum, “allege facts demonstrating that (1) a school official intentionally used an amount of force that was obviously excessive under the circumstances, and (2) the force used presented a reasonably foreseeable risk of serious bodily injury.”<sup>307</sup> *Neal* built upon its own circuit precedents and others’, especially *Hall* which was analyzed extensively above.<sup>308</sup> It should be recalled that *Hall* used excessive force police brutality cases as the cognate for analyzing applications of excessive force by school officials, emphasizing that to prevail on substantive due process ground the perpetrator must be “inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.”<sup>309</sup>

Contrary to the majority view, I contend that retaining a subjective component as a requirement, at least as applied in the majority of the circuits, is unnecessary and ultimately self-defeating in advancing the liberty interest in bodily integrity recognized in *Ingraham* and its progeny. The authority in excessive force school cases that comes closest to recognizing the approach I suggest is the Tenth Circuit’s 1987 case, *Garcia*.<sup>310</sup> *Garcia* arose on appeal from “a district court’s grant of summary judgment” to the two individual defendants.<sup>311</sup> In reversing the judgment, the *Garcia* court asserted that it “accept[ed] and agree[d] with the Fourth Circuit’s definition of the constitutional tort.”<sup>312</sup> It was “the right to be free of state intrusions into realms of personal privacy and bodily security through means so brutal, demeaning, and harmful as literally to shock the conscience of a court.”<sup>313</sup>

As discussed in Part IV above, the *Garcia* court retained the objective part of the test inspired by *Hall*,<sup>314</sup> but appeared to jettison *Hall*’s subjective intent component of “ ‘malice or sadism,’ ”

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<sup>307</sup> *Neal*, 229 F.3d at 1075.

<sup>308</sup> See generally *Hall*, 621 F.2d 607.

<sup>309</sup> *Id.* at 613.

<sup>310</sup> 817 F.2d 650.

<sup>311</sup> *Id.* at 652.

<sup>312</sup> *Id.* at 655.

<sup>313</sup> *Id.* (quoting *Hall*, 621 F.2d at 613) (internal quotation marks omitted).

<sup>314</sup> See *id.*

concluding that it was “largely redundant.”<sup>315</sup> In essence, the court in *Garcia* reasoned that upon establishing that “the force applied caused injury so severe, was so disproportionate to the need presented, and . . . amounted to a brutal and inhumane abuse of official power literally shocking to the conscience[,]” the plaintiff *ipso facto*, should benefit from the presumption that he established the requisite constitutional intent.<sup>316</sup>

Although *Garcia* has not been widely followed outside of the Tenth Circuit, its approach is sound. It would seem irrefutable that when a school official applies force substantially disproportionate to the need presented, causing severe injury, and when under the circumstances such treatment was manifestly brutal and inhumane and shocks the judicial conscience, no further subjective analyses should be required. The intent element can be *presumed* under the established facts.

The presumption would operate when the objective elements cannot be credibly refuted<sup>317</sup> or are undisputed. During the course of discovery, the defendant (through deposition, affidavits and documentary evidence) could attempt to overcome the presumption of his or her subjective intent.<sup>318</sup> If this approach were applied to the controlling cases examined above which survived appellate review, from the Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits, it would have resulted in judgment for the plaintiff, or at least narrowed the factual issues for trial on remand, and simplified trial of the cases on remand, including preparation of jury instructions. This approach would not unduly burden most defendants because these cases are at the extreme end of the

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<sup>315</sup> *Garcia*, 817 F.2d at 655 n.7.

<sup>316</sup> *Id.* at 655 (quoting *Hall*, 621 F.2d at 613) (internal quotation marks omitted).

<sup>317</sup> *See id.* at 655 n.7.

<sup>318</sup> In *Atlanta Independent School System v. S.F. ex rel. M.F.*, the court applied *Neal v. Fulton County Board of Education*, where a teacher applied physical force upon student suffering from autism. *Atlanta Indep. Sch. Sys. v. S.F. ex rel. M.F.*, No. 1:09-CV-2166-RWS, 2010 WL 3731114, at \*2 (N.D. Ga. Sept. 16, 2010). The incident was precipitated by the student’s crying in class as a result of emotional and mental abuse by the teacher. *Id.* at \*15. In *Atlanta*, the teacher allegedly lifted the student by his pants and beat him. *Id.* This resulted in what the court described as “severe physical injury” and “increasing behavioral and emotional regression.” *Id.* at \*16. What makes this case notable is that the court applied *Neal* in the non-corporal punishment context. *Id.* at \*15-16. It concluded that the plaintiff stated a cause of action since the teacher’s conduct was not supported by any governmental interest and the conduct alleged was “conscience-shocking.” *Atlanta*, 2010 WL 3731114, at \*16.

continuum, as required by Supreme Court and circuit court precedent, and the outcome on liability will usually be obvious. Arguably, this approach would aid defendants as well, since this sorting device would result in dismissal of unsound constitutional claims and save defendants unnecessary costs and the vexation of litigation.<sup>319</sup>

The Seventh Circuit, as evidenced by *Wallace*, used a Fourth Amendment analysis to assess the validity of a student's excessive force claim, rather than applying the Fourteenth Amendment, although the student had pleaded counts under both constitutional theories.<sup>320</sup> It will be recalled that in *Wallace*, the student was merely held and escorted out of a classroom in a non-corporal punishment context.<sup>321</sup> The force applied did not remotely approach the kind of excessive force that would seriously be considered as a substantive due process claim.<sup>322</sup> Moreover, under controlling Fourth Amendment principles, the "seizure" was obviously reasonable in the constitutional sense, and therefore no cause of action was stated under the Fourth Amendment.<sup>323</sup> *Wallace* suggests that the Seventh Circuit prefers a Fourth Amendment framework in such cases, but said little about the parameters of such claims because of the weakness of the case.<sup>324</sup>

In *Doe*, the Ninth Circuit concluded that the Fourth, rather than Fourteenth Amendment analysis applies to disciplinary applications of excessive force upon school children.<sup>325</sup> The court reasoned that the Fourth Amendment applied to conduct propelled by " 'investigatory or administrative purposes.' "<sup>326</sup> Since the student in *Doe* was disciplined for what amounted to insubordination and the

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<sup>319</sup> The Fifth Circuit, which has consistently refused to recognize such a cause of action, has reached its conclusion from *Ingraham's* language respecting the availability of state law remedies as providing adequate due process. See *Moore*, 233 F.3d 871. As stated by Judge Weiner in his concurring opinion in *Moore*, the Fifth Circuit stands in virtual, if not complete, isolation relative to the other circuits. *Id.* at 878-80 (Wiener, J., concurring). I believe this result stems from its failure to distinguish liberties emanating from the United States Constitution and the procedures for vindicating such rights. Moreover, I suggest the Fifth Circuit's analysis violates fundamental precepts of federalism by subordinating constitutional rights to state criminal codes and common law torts.

<sup>320</sup> See *Wallace*, 68 F.3d 1010.

<sup>321</sup> *Id.* at 1015.

<sup>322</sup> *Id.* at 1015-16.

<sup>323</sup> *Id.* at 1014-15.

<sup>324</sup> See *id.* at 1014, 1016.

<sup>325</sup> *Doe*, 334 F.3d at 908.

<sup>326</sup> *Id.* at 909 (quoting *Attson*, 900 F.2d at 1430-31).

need for maintaining order, the Ninth Circuit concluded that the administrator's conduct fell within the Fourth Amendment's ambit.<sup>327</sup> Notably, the *Doe* court recognized that excessive force against a student might occur without an actual seizure "and that the Fourth Amendment would not apply to such conduct."<sup>328</sup> Arguably, the Ninth Circuit's approach is more generous to putative plaintiffs, since an "objective reasonableness" standard applies to such claims rather than the much more rigorous *Hall* standard for substantive due process claims, operating in the Second, Third, Fourth, Sixth, Eighth, and Eleventh Circuits. It is certainly easier to prove "unreasonableness" of a seizure than wanton and extreme applications of force motivated by bad faith.<sup>329</sup>

The methodological mandate of *Graham* and *Lewis* is that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.<sup>330</sup> Nevertheless, plaintiffs should plead their excessive force claims under the Fourth and Fourteenth Amendments, specifying clearly the facts supporting each claim. This is because it may be unclear when an action is commenced whether a school official's conduct was initiated for valid investigative or administrative purposes. The foregoing

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<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> *Cf. Wallace*, 68 F.3d at 1014-15 (adopting a standard of reasonableness for Fourth Amendment analysis which allows for a wide range of acceptable behavior by the administrator or teacher and does not take into account the administrator's or teacher's intentions). Although the approach I have suggested in substantive due process analysis for excessive force claims is different than the Ninth Circuit's under the Fourth Amendment's seizure provision, it is not inconsistent with it. After all, the claims asserted arise from different constitutional sources.

<sup>330</sup> *Lewis*, 533 U.S. at 842. Plaintiffs who believe they have been subject to excessive force-corporal punishment at school, would be wise to first search for the precipitating events leading to the application of force and ascertain whether it was driven by investigatory or administrative needs, and if so, reassess their initial conclusion that the force was excessive, under an objectively reasonable standard. If they conclude that both elements obtain, they should be prepared to describe those facts concerning the specific investigatory or administrative function served, why, in a school environment the force was excessive. Such steps could be taken, at least initially, through informal discovery through persons known to the student and parents and lower level school employees, possibly teachers and classroom aids and others similarly situated. For reasons discussed more fully below, this might help avoid the adverse impact of *Ashcroft v. Iqbal*. See *infra* Part VII.

analysis is complicated by *Ashcroft v. Iqbal*,<sup>331</sup> a recent United States Supreme Court case filed as a *Bivens* action.<sup>332</sup>

*Iqbal* concerned the basic question of what pleading standard applies when a court entertains a 12(b) motion to dismiss for failure to state a claim upon which relief could be granted.<sup>333</sup> After the district court denied defendants' motion to dismiss on qualified-immunity grounds, they invoked the collateral order doctrine to file an interlocutory appeal.<sup>334</sup> *Iqbal*'s claims were based on constitutional violations.<sup>335</sup> In affirming the lower court's decision, the Second Circuit assumed without discussion that it had jurisdiction and focused on the standard set forth in *Bell Atlantic Corp. v. Twombly*,<sup>336</sup> an antitrust case, for evaluating whether a complaint is sufficient to survive a motion to dismiss.<sup>337</sup> The court concluded that *Twombly*'s "flexible plausibility standard[]" . . . oblige[d] a pleader to amplify a claim with some factual allegations" where necessary to render it plausible, was inapplicable in the context of petitioners' appeal.<sup>338</sup> The circuit court held that *Iqbal*'s complaint was "adequate to allege petitioners' personal involvement in discriminatory decisions which, if true, violated clearly established constitutional law."<sup>339</sup> The Supreme Court reversed.<sup>340</sup> It held that *Iqbal* "must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies [complained of,] not for a neutral, investigative reason[,] but for the purpose of discriminating on account of race, religion, or national origin."<sup>341</sup>

The *Iqbal* Court observed that under Federal Rule of Civil Procedure 8(a)(2), a complaint "must contain a 'short and plain statement of the claim showing that the pleader is entitled to

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<sup>331</sup> 129 S. Ct. 1937 (2009).

<sup>332</sup> *Id.* at 1943. See also *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

<sup>333</sup> *Iqbal*, 129 S. Ct. at 1942-43.

<sup>334</sup> *Id.* at 1944.

<sup>335</sup> *Id.*

<sup>336</sup> 550 U.S. 544 (2007).

<sup>337</sup> *Iqbal*, 129 S. Ct. at 1942, 1944.

<sup>338</sup> *Id.* at 1944 (quoting *Iqbal v. Hasty*, 490 F.3d 143, 157-158 (2d Cir. 2007)) (internal quotation marks omitted).

<sup>339</sup> *Id.* at 1944.

<sup>340</sup> *Id.* at 1954.

<sup>341</sup> *Id.* at 1948-49.

relief.’”<sup>342</sup> The Court explained that “detailed factual allegations” are not required under the *Twombly* precedent,<sup>343</sup> but the Rule does call for “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”<sup>344</sup> “A claim has facial plausibility when the . . . plead[ed] factual content . . . allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”<sup>345</sup> The Court emphasized that two working principles undergird *Twombly*. “First, the tenet that a court must accept [a complaint’s allegations] as true . . . is inapplicable to . . . [t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements.”<sup>346</sup> Second, “[d]etermining whether a complaint states a plausible claim . . . [is] context-specific[,] . . . requir[ing] the reviewing court to draw on its . . . experience and common sense.”<sup>347</sup> “[A] court considering a motion to dismiss [may] . . . begin by identifying [allegations] that, because they are [mere] . . . conclusions, are not entitled to the assumption of truth.”<sup>348</sup> “While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.”<sup>349</sup> “When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.”<sup>350</sup> The Supreme Court concluded that *Iqbal*’s pleadings did not comply with Rule 8 under *Twombly*.<sup>351</sup>

Significantly, the *Iqbal* court held that Rule 8’s pleading requirements need not be relaxed based on the Second Circuit’s instruction that the district court cabin discovery to preserve

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<sup>342</sup> *Iqbal*, 129 S. Ct. at 1949 (quoting FED. R. CIV. P. 8(a)(2)).

<sup>343</sup> *Twombly*, 550 U.S. at 555.

<sup>344</sup> *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570).

<sup>345</sup> *Id.* (citing *Twombly*, 550 U.S. at 556).

<sup>346</sup> *Id.* (citing *Twombly*, 550 U.S. at 555).

<sup>347</sup> *Id.* at 1950.

<sup>348</sup> *Id.*

<sup>349</sup> *Iqbal*, 129 S. Ct. at 1950.

<sup>350</sup> *Id.*

<sup>351</sup> *Id.* at 1952. Several of his allegations—that petitioners agreed to subject him to harsh conditions as a matter of policy, solely on account of discriminatory factors and for no legitimate penological interest; that Ashcroft was that policy’s “principal architect;” and that FBI Director Mueller was “instrumental” in its adoption and execution—were conclusory and not entitled to be assumed true. *Id.* at 1951. Moreover, the factual allegations that the FBI, under Mueller, arrested and detained thousands of Arab Muslim men, and that he and Ashcroft approved the detention policy, do not plausibly suggest that petitioners purposefully discriminated on prohibited grounds. *Id.* at 1952.

petitioners' qualified immunity defense in anticipation of a summary judgment motion.<sup>352</sup> Instead, the Court asserted "the question presented by a motion to dismiss for insufficient pleadings does not turn on the controls placed upon the discovery process."<sup>353</sup> Since *Iqbal's* "complaint [wa]s deficient under Rule 8," the Court held he was "not entitled to discovery, cabined or otherwise."<sup>354</sup> Finally, the Court held that on remand the Second Circuit "should decide in the first instance whether to remand to the [d]istrict [c]ourt" to allow *Iqbal* to "seek leave to amend his deficient complaint."<sup>355</sup> *Iqbal's* holdings were at the very least surprising, if not stunning.

For more than a half-century, *Conley v. Gibson*<sup>356</sup> set the standard to be applied in deciding motions to dismiss for failure to state a claim.<sup>357</sup> *Conley* held that a complaint should not be dismissed unless the defendant demonstrates "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."<sup>358</sup> *Twombly*, reinforced by *Iqbal*, has now ensured *Conley's* demise. The implications of the Court's abrogation of *Conley* will very likely be profound. Although it is still too early, the impact of *Iqbal* will turn on how district courts treat the question of whether the allegations are "plausible."

*Iqbal* seems to afford district courts broad discretion in deciding whether to dismiss cases. Since 12(b) motions, as in *Iqbal*, typically arise prior to commencement of formal discovery proceedings, the *Iqbal* rule creates significant hurdles in excessive force school disciplinary cases, especially with early elementary school children and special education students with significant communication difficulties. Without the ability to gain access to school officials who may have witnessed the application of excessive force upon alleged victims and the attendant circumstances leading up to the punishment itself, as well as the alleged perpetrator(s) and the opportunity to ensure document production before confronting a motion to dismiss under *Iqbal's* plausibility standard, putative

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<sup>352</sup> *Iqbal*, 129 S. Ct. at 1953-54.

<sup>353</sup> *Id.* at 1953 (citing *Twombly*, 550 U.S. at 559).

<sup>354</sup> *Id.* at 1954.

<sup>355</sup> *Id.*

<sup>356</sup> 355 U.S. 41 (1957), overruled by *Twombly*, 550 U.S. 544.

<sup>357</sup> The Court in *Twombly* departed from its prior rule for pleading standards set out in *Conley*. See *Twombly*, 550 U.S. at 563.

<sup>358</sup> *Conley*, 355 U.S. at 45-46.

plaintiffs will be extremely disadvantaged. When notice pleading prevailed under *Conley*, summary judgment became the primary vehicle for ascertaining the merits of the case.<sup>359</sup> This enabled the parties to see each other's cards, so-to-speak, and for courts to assess whether there were sufficient issues of fact to warrant a trial.<sup>360</sup> The end result, due to *Iqbal*, will be to prematurely terminate some meritorious claims. Notably, *Twombly* and *Iqbal* arose without Congress amending Rule 8 of the Federal Rules of Civil Procedure and none of the parties asked the Court to make this change.<sup>361</sup> The new rules upset settled expectations concerning Rule 8, are decidedly defendant friendly, and exacerbate an already bleak landscape for civil rights plaintiffs.

## VIII. QUALIFIED IMMUNITY ISSUES IN RESPECT OF EXCESSIVE FORCE-CORPORAL PUNISHMENT IN PUBLIC SCHOOL SETTINGS

### A. The Qualified Immunity Doctrine

The doctrine of qualified immunity protects government officials “from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>362</sup> The qualified immunity doctrine applies to suits for monetary damages, not to suits for injunctive relief.<sup>363</sup> “Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.”<sup>364</sup> The protection of “qualified immunity . . . applies regardless of whether the [government official’s] error is a mistake of

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<sup>359</sup> See, e.g., *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168-69 (1993) (“In the absence of such an amendment [to the Federal Rules], federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims . . .”).

<sup>360</sup> See *id.*

<sup>361</sup> See *Hamilton v. Palm*, 621 F.3d 816, 817 (8th Cir. 2010) (stating that “*Twombly* and *Iqbal* did not abrogate the notice pleading standard of Rule 8(a)(2)”).

<sup>362</sup> *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

<sup>363</sup> See, e.g., *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1051 n.1 (5th Cir. 1997); *Gan v. City of New York*, 996 F.2d 522, 531, 535 (2d Cir. 1993).

<sup>364</sup> *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009).

law, a mistake of fact, or a mistake based on mixed questions of law and fact.”<sup>365</sup> Because qualified immunity is “an *immunity from suit* rather than a mere defense to liability[,] . . . it is effectively lost if a case is erroneously permitted to go to trial.”<sup>366</sup> The *raison d’être* for the qualified immunity doctrine is to ensure that “ ‘insubstantial claims’ against government officials [will] be resolved prior to discovery.”<sup>367</sup> Accordingly, the Supreme Court has emphasized that immunity questions should be resolved “at the earliest possible stage in litigation.”<sup>368</sup> School officials may enjoy qualified immunity.<sup>369</sup>

The Supreme Court has described the *Harlow v. Fitzgerald* test as embodying a “fair warning standard[;]” that is, if the federal law was clearly established, the official is on notice that violation of that law may lead to personal monetary liability.<sup>370</sup> Normally, controlling precedent of the United States Supreme Court, the particular circuit court, or the highest court of the particular state is necessary to clearly establish the federal law.<sup>371</sup> Moreover, for federal law to be clearly established there must be a fairly close factual correspondence between the prior precedents and the case at hand.<sup>372</sup> Usually, decisions outside the controlling jurisdiction do not clearly establish federal law absent “a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.”<sup>373</sup>

*Harlow’s* “clearly established” test has been especially

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<sup>365</sup> Groh v. Ramirez, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting) (citing Butz v. Economou, 438 U.S. 478, 507 (1978)).

<sup>366</sup> Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

<sup>367</sup> Anderson, 483 U.S. at 640 n.2 (citing *Harlow*, 457 U.S. at 818-19).

<sup>368</sup> See, e.g., Hunter v. Bryant, 502 U.S. 224, 227 (1991) (per curiam).

<sup>369</sup> See *Wood v. Strickland*, 420 U.S. 308, 322 (1975). At the time of the *Wood* decision this immunity was better known as “good faith” immunity. See *id.* at 315. Under *Wood*, liability could be established either by demonstrating that the officer acted unreasonably in that “he knew or reasonably should have known that the action . . . would violate the constitutional rights of the student affected” or cause other injury with impermissible intent. *Id.* at 322. *Harlow v. Fitzgerald* discarded the subjective component of the test. See *Harlow*, 457 U.S. at 817-18. As indicated, *Harlow* is still the controlling test for determining whether public officials are qualifiedly immune from liability.

<sup>370</sup> Hope v. Pelzer, 536 U.S. 730, 739-40 & n.10 (2002) (applying *Harlow*); United States v. Lanier, 520 U.S. 259, 270-71 (1997) (applying *Harlow*).

<sup>371</sup> See *Wilson v. Layne*, 526 U.S. 603 (1999).

<sup>372</sup> See *Anderson*, 483 U.S. at 639.

<sup>373</sup> *Wilson*, 526 U.S. at 617.

difficult to apply in practice. *Hope v. Pelzer*<sup>374</sup> and *Brosseau v. Haugen*<sup>375</sup> illustrate this point. In *Hope*, a prisoner was shackled shirtless to a hitching post in the hot sun for seven hours.<sup>376</sup> During this time, he was given no access to a bathroom and was “given water only once or twice.”<sup>377</sup> Officers taunted him by pouring water on the ground.<sup>378</sup> The *Hope* Court ruled, in a 6-3 decision, that the officers who tied Hope to the hitching post were not entitled to qualified immunity.<sup>379</sup> The Court first found that the conduct of tying Hope to the hitching post was “punitive treatment [which] amount[ed] to gratuitous infliction of ‘wanton and unnecessary’ pain that our [constitutional] precedent clearly prohibits.”<sup>380</sup> Most significantly, the *Hope* Court made clear that “‘the very action in question . . . [need not have] been held unlawful’ ” in order for the plaintiff to show the existence of clearly established law.<sup>381</sup> In determining whether qualified immunity applied, the critical question was “whether the state of the law in 1995 gave [the officers] fair warning that their alleged treatment of Hope was unconstitutional.”<sup>382</sup> On its review of existing precedent as of 1995, the Court concluded that the officers had fair warning that their conduct was unconstitutional, notwithstanding the absence of cases precisely on point.<sup>383</sup>

In contrast to *Hope*, the *Brosseau* Court stressed the absence of cases *on point* in determining whether the law at the time of the incident was well established.<sup>384</sup> In *Brosseau*, a police officer was chasing a suspect, Haugen, who was wanted on a warrant.<sup>385</sup> Haugen got into a Jeep and began driving out of a driveway to get away from the officer.<sup>386</sup> Brosseau raised her gun “and ordered [Haugen] to get

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<sup>374</sup> 536 U.S. 730.

<sup>375</sup> 543 U.S. 194 (2004).

<sup>376</sup> *Hope*, 536 U.S. at 734-35.

<sup>377</sup> *Id.* at 735.

<sup>378</sup> *Id.*

<sup>379</sup> *Id.* at 745-46.

<sup>380</sup> *Id.* at 738. The Court found that there had been an Eighth Amendment cruel and unusual punishment violation. *Hope*, 536 U.S. at 738.

<sup>381</sup> *Id.* at 739 (quoting *Anderson*, 483 U.S. at 640).

<sup>382</sup> *Id.* at 741.

<sup>383</sup> *Id.* at 741-42.

<sup>384</sup> *Brosseau*, 543 U.S. at 201.

<sup>385</sup> *Id.* at 194-95.

<sup>386</sup> *Id.* at 196.

out of the vehicle.”<sup>387</sup> When Haugen continued to drive, Brosseau shot Haugen in the back and seriously injured him.<sup>388</sup> In an 8-1 decision, the Supreme Court held that Brosseau was entitled to qualified immunity.<sup>389</sup> In *Brosseau*, the Court asked whether the law was clearly established in the *particularized* sense that Brosseau was violating Haugen’s Fourth Amendment rights.<sup>390</sup> The Court commented that “[t]he parties point[ed] us to only a handful of cases relevant to the ‘situation [Brosseau] confronted’: whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight.”<sup>391</sup> Based on the limited authority then available from the circuits, the Brosseau Court concluded:

These . . . cases taken together undoubtedly show that this area is one in which the result depends very much on the facts of each case. None of them squarely governs the case here; they do suggest that Brosseau’s actions fell in the “‘hazy border between excessive and acceptable force.’” The cases by no means “clearly establish” that Brosseau’s conduct violated the Fourth Amendment.<sup>392</sup>

While it is possible to distinguish *Hope* and *Brosseau*, in light of the highly unusual sequence of events in *Brosseau* and, among other facts, the remarkably brutal and wanton treatment of the prisoner in *Hope*, the Court’s methodology is more difficult to harmonize, particularly since the *Brosseau* Court distinguished *Hope*, without analysis, as simply “an obvious case” of an Eighth Amendment violation.<sup>393</sup> Since *Hope* concluded that there need not be a case on point to overcome qualified immunity and *Brosseau*’s grant of immunity was based on the *absence* of specific cases on point, the two cases seem irreconcilable. Arguably, this may mean the Court in *Brosseau* intended to broaden the protection public

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<sup>387</sup> *Id.*

<sup>388</sup> *Id.* at 196-97.

<sup>389</sup> *Brosseau*, 543 U.S. at 201.

<sup>390</sup> *Id.* at 199.

<sup>391</sup> *Id.* at 200.

<sup>392</sup> *Id.* at 201 (quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001), *overruled by Pearson v. Callahan*, 129 S. Ct. 808 (2009)).

<sup>393</sup> *Id.*

officials receive in constitutional cases and perhaps even abandon *Hope*, albeit without the formality of overruling precedent. There is some evidence for this conclusion based on the Supreme Court's post-*Brosseau* qualified immunity cases.<sup>394</sup>

In 2009, the United States Supreme Court in *Pearson v. Callahan*<sup>395</sup> reformulated its prior rule enunciated in *Saucier v. Katz*<sup>396</sup> regarding the step-wise procedure for analyzing the merits of a qualified immunity defense, while maintaining the essential elements of the defense itself.<sup>397</sup> In *Saucier*, the Supreme Court mandated a two-step sequence for resolving the qualified immunity claims of government officials.<sup>398</sup> The Court required that a court first decide whether the facts a plaintiff has alleged make out a violation of a constitutional right.<sup>399</sup> Where a plaintiff satisfied this first step, a court was then directed to decide whether the right at issue was "clearly established" at the time of the defendant's alleged misconduct.<sup>400</sup> Under the second prong, qualified immunity would apply "unless the official's conduct violated a clearly established constitutional right."<sup>401</sup>

The *Pearson* Court concluded:

[W]hile the sequence set forth there [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the

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<sup>394</sup> See, e.g., *Pearson*, 129 S. Ct. at 818 (removing a step in a court's analysis of whether a public officer had qualified immunity, resulting in more discretion being given to the judge).

<sup>395</sup> 129 S. Ct. 808.

<sup>396</sup> 533 U.S. 194.

<sup>397</sup> *Pearson*, 543 U.S. at 818.

<sup>398</sup> *Saucier*, 533 U.S. at 201.

<sup>399</sup> *Id.* The *Saucier* Court dictated that whether "the facts alleged show the officer's conduct violated a constitutional right . . . *must* be the initial inquiry" in every qualified immunity case. *Id.* (emphasis added). Only after completing this first step, the Court said, may a court turn to "the next, sequential step," namely, "whether the right was clearly established." *Id.*

<sup>400</sup> *Id.*

<sup>401</sup> *Pearson*, 543 U.S. at 816 (citing *Anderson*, 483 U.S. at 640).

particular case at hand.<sup>402</sup>

*Pearson* arose in the context of an arrestee who brought a § 1983 action alleging that police officers violated his Fourth Amendment right to be free from unreasonable searches and seizures by entering his home without a warrant.<sup>403</sup> The Court applied *Saucier's* second prong first, determining that the law regarding the search was not clearly established at the time the incident arose and granted the defendant police officer immunity.<sup>404</sup> The *Pearson* Court determined that in the absence of controlling circuit precedent, defendants asserting qualified immunity were entitled to rely on out-of-circuit federal courts of appeals that had approved the ground for the search in issue.<sup>405</sup> This is because reliance on such cases is reasonable in determining the defendants' beliefs about the lawfulness of their conduct.<sup>406</sup> *Safford Unified School District No. 1 v. Redding*,<sup>407</sup> decided by the United States Supreme Court on June 25, 2009, further illustrates the difficulty in determining whether law is well established.

The *Safford* Court examined a qualified immunity claim in a Fourth Amendment context.<sup>408</sup> The case involved a strip search of a thirteen year old female public school student.<sup>409</sup> In 1985, the Supreme Court held in *New Jersey v. T.L.O.*,<sup>410</sup> that the scope of a permissible search under the Fourth Amendment is subject to a reasonableness test "in light of the age[,] and sex of the student[,] and the nature of the infraction"<sup>411</sup> In *Safford*, the Court held that a middle school student's Fourth Amendment rights were violated

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<sup>402</sup> *Id.* at 818.

<sup>403</sup> *Id.* at 813.

<sup>404</sup> *Id.* at 822-23. The answer to the second prong inquiry depends on the "objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." *Id.* at 822 (quoting *Wilson*, 526 U.S. at 614).

<sup>405</sup> *Pearson*, 543 U.S. at 823. In *Pearson*, that ground was the so-called "consent-once-removed doctrine." *Id.*

<sup>406</sup> *Id.* This conclusion merely built on the Court's prior analyses in *Wilson*, where the Court opined that when there is a split in the circuits on a constitutional question, it would be unfair to subject a defendant to personal "money damages for picking the losing side of the controversy." *Wilson*, 526 U.S. at 618.

<sup>407</sup> 129 S. Ct. 2633.

<sup>408</sup> *Id.* at 2638.

<sup>409</sup> *Id.*

<sup>410</sup> 469 U.S. 325 (1985).

<sup>411</sup> *Id.* at 342.

under all of the circumstances.<sup>412</sup> The Court found that although there was reasonable suspicion that the student was distributing drug contraband, thereby justifying a search at its inception, the circumstances (suspicion of possessing and distributing ibuprofen and naproxen) did not justify the scope of the search, and was therefore unconstitutional.<sup>413</sup> On the qualified immunity issue, the Court observed:

A number of judges have read *T.L.O.* as the en banc minority of the Ninth Circuit did here. [Nevertheless] [t]he Sixth Circuit [has] upheld a strip search of a high school student for a drug, without any suspicion that drugs were hidden next to her body. And other courts considering qualified immunity for strip searches have read *T.L.O.* as “a series of abstractions, on the one hand, and a declaration of seeming deference to the judgments of school officials, on the other,” which made it impossible “to establish clearly the contours of a Fourth Amendment right . . . [in] the wide variety of possible school settings different from those involved in *T.L.O.*” itself.

We think these differences of opinion from our own are substantial enough to require immunity for the school officials in this case. We would not suggest that entitlement to qualified immunity is the guaranteed product of disuniform views of the law in the other federal, or state, courts, and the fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically render the law unclear *if we have been clear*. That said, however, the cases viewing school strip searches differently from the way we see them are numerous enough, with well-reasoned majority and dissenting opinions, to counsel doubt that we were sufficiently clear in the prior statement of law. We conclude that qualified immunity is warranted.<sup>414</sup>

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<sup>412</sup> *Safford*, 129 S. Ct. at 2637.

<sup>413</sup> *Id.* at 2641-42.

<sup>414</sup> *Id.* at 2643-44 (emphasis added) (citations omitted).

*Safford* followed the Supreme Court's decision about six months earlier in *Pearson*, and about five years after *Brosseau*. As indicated above, *Safford* asserted that where the Supreme Court has spoken with sufficient clarity, notwithstanding differences among the circuits, a qualified immunity defense may be defeated where an adequate constitutional violation has been alleged.<sup>415</sup>

The *Safford* court relied heavily on the divergence of post-*T.L.O.* applications of the case, as well as the strength of the divergent reasoning in its grant of qualified immunity to the defendants.<sup>416</sup> Notwithstanding the Supreme Court's statement that when it has spoken with sufficient clarity its rule will override "disuniform" interpretations of that rule,<sup>417</sup> it seems more likely than not that its yardstick for determining whether law is clearly established will depend more on the diversity of interpretation manifested in the circuits and the power of the circuits' interpretive analysis of the Supreme Court's decisions, rather than on the Court's independent assessment of its own clarity. Indeed, the Court's reasoning is somewhat circular since if diversity of interpretation exists, especially when supported by strong arguments, the particular issue may nearly always be construed as lacking the necessary clarity to deem the law well established. This methodology runs the risk that in close cases like *T.L.O.* (five-to-four majority), where a constitutional violation has occurred, the victim's rights will be effectively dismembered by the Court's broadening of public officials' immunity for constitutional violations.<sup>418</sup> This very point was emphasized in dissenting Justices Stevens' and Ginsburg's analyses in *Safford*:

Nothing the Court decides today alters this basic [*T.L.O.*] framework. It simply applies *T.L.O.* to declare unconstitutional a strip search of a [thirteen]-year-old honors student that was based on a groundless suspicion that she might be hiding medicine in her underwear. This is, in essence, a case

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<sup>415</sup> *Id.* at 2644.

<sup>416</sup> *Id.* at 2643-44.

<sup>417</sup> *Safford*, 129 S. Ct. at 2644.

<sup>418</sup> *Contra id.* at 2646-47 (Thomas, J., concurring in part and dissenting in part) (recommending strongly that school administrators be given broad authority to retain order and protect students by returning to the common law doctrine of *in loco parentis*).

in which clearly established law meets clearly outrageous conduct. I have long believed that “ ‘[i]t does not require a constitutional scholar to conclude that a nude search of a [thirteen]-year-old child is an invasion of constitutional rights of some magnitude.’ ” The strip search of Savana Redding in this case was both more intrusive and less justified than the search of the student’s purse in *T.L.O.*<sup>419</sup>

Justice Stevens continued:

The Court reaches a contrary conclusion about qualified immunity based on the fact that various Courts of Appeals have adopted seemingly divergent views about *T.L.O.*’s application to strip searches. *But the clarity of a well-established right should not depend on whether jurists have misread our precedents.* And while our cases have previously noted the “divergence of views” among courts in deciding whether to extend qualified immunity, we have relied on that consideration only to spare officials from having “ ‘to predict the *future course* of constitutional law[.]’ ” In this case, by contrast, we chart no new constitutional path. We merely decide whether the decision to strip search Savana Redding, on these facts, was prohibited under *T.L.O.* Our conclusion leaves the boundaries of the law undisturbed.<sup>420</sup>

The majority’s qualified immunity analysis in cases like *Safford* and *Brosseau* may have a significant impact on an injured party’s ability to vindicate constitutional infringements in *any manner whatsoever*. The reason for this is illustrated by *Safford* itself. Since under *Safford* no individual liability could be imposed on the school administrator who conducted or directed the unlawful search, the only other constitutional remedy that remained was against the school district.<sup>421</sup> Under the Supreme Court’s long

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<sup>419</sup> *Id.* at 2644 (Stevens, J., concurring in part and dissenting in part) (citations omitted).

<sup>420</sup> *Id.* at 2644-45 (emphasis added) (citations omitted).

<sup>421</sup> *Id.* at 2644 (majority opinion) (concluding that qualified immunity for the school

established *Monell* doctrine,<sup>422</sup> the Court's resolution of the qualified immunity issue did not determine whether the school district was liable for the unconstitutional strip search, since such liability is based on whether the injury resulted from a custom, policy, or usage implemented by the district's decision makers.<sup>423</sup> Since the Ninth Circuit did not address the *Monell* liability of the district, the Supreme Court remanded the case for this question to be examined.<sup>424</sup> If the lower court(s) determine that the unconstitutional search resulted from conduct not sanctioned by the school district, then Redding would have suffered a constitutional injury without a federal remedy. Although the existence of such a gap was always possible even before *Safford* and *Brosseau*, that likelihood has now materially increased, thereby diminishing students' rights when they enter the schoolhouse.<sup>425</sup>

Arguably, qualified immunity may be the most important issue in § 1983 litigation. It is almost always used as a defense in personal capacity law suits. It disposes of a high percentage of suits and relieves the defendant from the burden of having to defend the litigation.<sup>426</sup> The Court's recent qualified immunity holdings do not bode well for student plaintiffs in constitutional cases.<sup>427</sup>

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official was warranted and remanding the case to decide the liability of the school district).

<sup>422</sup> *Monell v. Dep't of Soc. Servs. of the City of New York*, 436 U.S. 658 (1978).

<sup>423</sup> *Id.* at 694; *Safford*, 129 S. Ct. at 2644.

<sup>424</sup> *Safford*, 129 S. Ct. at 2644.

<sup>425</sup> Even if, in cases like *Safford*, the Court finds the law is well established, it is conceivable that the current Court might find, based on out-of-circuit results which were contrary to the clearly established law, the public official's conduct was reasonable, since it was consistent with what one or more circuits had declared as lawful. A broad reading of this approach would further expand the scope of qualified immunity. For a recent application of *Safford*, see *Pendelton v. Fasset*. No. 08-227-C, 2009 WL 2849542 (W.D. Ky. Sept. 1, 2009). There, notwithstanding the Fourth Amendment unreasonableness of the search by police officers of a student for cigarettes and marijuana, the court concluded the officers were entitled to qualified immunity protection. *Id.* at \*6, \*8. "[T]he court [found] that the [officers] involved did not have fair warning that their alleged conduct was unconstitutional." *Id.* at 7. This was based on the fact the student was significantly older than the students in comparable cases where searches did violate Fourth Amendment strictures, that some case law supported the instant search, and the student attended an alternative high school where many of its attendees had significant disciplinary difficulties. *Id.* at \*8.

<sup>426</sup> See, e.g., *Hunter v. Bryant*, 502 U.S. 224, 227(1991); *Scott v. Harris*, 550 U.S. 372, 380 n.7 (2007).

<sup>427</sup> See *Safford*, 129 S. Ct. at 2644 (holding school administrators were protected from liability for constitutional violations under the guise of qualified immunity).

## B. Interlocutory Appeals from Orders Denying Defendants Qualified Immunity

A district court's decision denying a Government officer's claim of qualified immunity may fall within the narrow class of appealable interlocutory orders despite "the absence of a final judgment."<sup>428</sup> This rule developed under the so-called "collateral order" doctrine, as articulated in *Cohen v. Beneficial Industrial Loan Corp.*<sup>429</sup> This doctrine allows for interlocutory review of certain issues within a case where those issues "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."<sup>430</sup> There are three criteria for *Cohen's* collateral order exception to apply: the order over which review is sought " 'must conclusively determine the disputed questions, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.' "<sup>431</sup> In *Mitchell*, the Court found that a denial of qualified immunity meets all three of the *Cohen* collateral order criteria.<sup>432</sup>

The applicability of the collateral order doctrine to qualified immunity claims is well established, and the Supreme Court has been careful to say that a district court's rejection of qualified immunity at the motion-to-dismiss stage of a proceeding is a "final decision" within the meaning of 28 U.S.C. § 1291 (defining final orders for purposes of appellate review) where it is based on a question of law.<sup>433</sup>

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<sup>428</sup> *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

<sup>429</sup> 337 U.S. 541, 546 (1949).

<sup>430</sup> *Id.*

<sup>431</sup> *Mitchell*, 472 U.S. at 543 (Brennan, J., dissenting) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

<sup>432</sup> *Id.* at 524-30.

<sup>433</sup> See, e.g., *Behrens v. Pelletier*, 516 U.S. 299, 307 (1986). *But cf.* *Jones v. City of Jackson*, 203 F.3d 875, 878 (5th Cir. 2000) (" 'If disputed factual issues material to summary judgment are present, the district court's denial of summary judgment on the basis of immunity is not appealable.' " (quoting *Lampkin v. City of Nacogdoches*, 7 F.3d 430, 431 (5th Cir. 1993))).

### C. Qualified Immunity for Inflicting Corporal Punishment on Public School Students

In light of cases like *Safford* and *Brosseau*, the circumstances under which qualified immunity will be available to personal capacity defendants in corporal punishment cases remains uncertain.<sup>434</sup> Arguably, under *Ingraham*, a school official would be on notice of the possibility of violating a clearly established constitutional right, since the *Ingraham* Court stated expressly that “where school authorities, acting under color of state law, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain, we hold that Fourteenth Amendment liberty interests are implicated.”<sup>435</sup> Nevertheless, the *Ingraham* Court concluded, as a matter of law, “that the traditional common-law remedies are fully adequate to afford due process.”<sup>436</sup> It was obvious from the context of the Court’s analysis and its grant of certiorari that the “due process” to which *Ingraham* referred was the *procedural* rather than the substantive component of the Fourteenth Amendment.<sup>437</sup> Indeed, the Court expressly refused to examine, on the merits, whether the substantive component of due process applied in school discipline excessive force cases.<sup>438</sup> This state of affairs, which remains the same as it did in 1977, enhances the qualified immunity argument for defendants.<sup>439</sup> This is because under *Ingraham*, § 1983 liability for a constitutional violation of a student’s bodily integrity liberty interest arising from the application of corporal punishment was not established, let alone clearly established.<sup>440</sup>

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<sup>434</sup> See *Brosseau*, 543 U.S. at 194, 201 (holding a police officer who shot a fleeing suspect was entitled to qualified immunity); *Safford*, 129 S. Ct. at 2644 (holding school administrators who violated a student’s Fourth Amendment rights were entitled to qualified immunity).

<sup>435</sup> *Ingraham*, 430 U.S. at 674. Although *Ingraham* did recognize a constitutionally protected interest in personal bodily integrity, the meaning of this right is hard to discern in *Ingraham* since the Court did not review this issue on appeal. *Id.*

<sup>436</sup> *Id.* at 672.

<sup>437</sup> See *id.* at 659-60.

<sup>438</sup> *Id.* at 679 n.47.

<sup>439</sup> See *Ingraham*, 430 U.S. at 695 (White, J., dissenting).

<sup>440</sup> It is not inconceivable that the current Supreme Court could grant immunity to personal capacity defendants based on such a thin reed, notwithstanding clear circuit precedent to the contrary. Moreover, in *Davis v. Scherer*, the United States Supreme Court held that the only relevant inquiry for determining whether statutory or constitutional law is

Moreover, the presence of outlying circuit decisions, especially those in the Fifth Circuit, which has expressly refused to recognize excessive force-corporal punishment substantive due process claims based on the availability of state criminal codes and tort law,<sup>441</sup> enhance arguments as to how well established the law really is. This uncertainty is increased by the divergence in the circuits as to whether students' constitutional protections from excessive force by school officials are housed in the Fourth Amendment, as recognized by the Seventh and Ninth circuits,<sup>442</sup> or the Fourteenth Amendment, as recognized by the Second, Third, Fourth, Sixth, Eighth, Tenth, and Eleventh circuits.<sup>443</sup> The grant of immunity to the *Safford* defendant certainly lays the groundwork for such an argument. In the same vein, some defendants seeking refuge in qualified immunity could argue that a claim brought for the application of excessive force under the Due Process Clause's substantive component was pleaded incorrectly and should have been brought as a Fourth Amendment seizure violation.<sup>444</sup>

Finally, adding substantial fuel to the qualified immunity fire is *Ashcroft v. Iqbal*. Since qualified immunity determinations are predicated on whether a constitutional claim has been stated and whether the law was clearly established, *Iqbal* clearly invites

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clearly established is whether the federal law "rights were clearly established." 468 U.S. 183, 197 (1984). It is not necessary that the public official simultaneously violated clearly established state statutes or regulations. *Id.* at 194. Although it may be true that a state official who violates well-settled state law may be said not to act in an objectively reasonable manner, the *Scherer* Court viewed such an approach as impermissibly expanding officer liability since recovery could be had any time the constitutional infringement also involved a violation of state law. *Id.* at 195-96. In other words, violations of clearly established state law could be used to pierce the veil of qualified immunity protections for government officials in the absence of a clearly established federal constitutional or statutory right. *Id.* at 194. Moreover, the defendant could argue that, at most, the notice he received from the Supreme Court relative to the school setting is that there *might* be a constitutional right embedded in the substantive component of the Due Process Clause which the Supreme Court refused to define in *Ingraham*.

<sup>441</sup> See, e.g., *Moore*, 233 F.3d 871.

<sup>442</sup> See *Terry v. Richardson*, 346 F.3d 781 (7th Cir. 2003); *Forrester v. City of San Diego*, 25 F.3d 804 (9th Cir. 1994).

<sup>443</sup> See *Wise*, 855 F.2d 560; *Metzger*, 841 F.2d 518; *McCullough*, 828 F.2d 1151; *Garcia*, 817 F.2d 650; *Hall*, 621 F.2d 607.

<sup>444</sup> In the Seventh Circuit, for example, the plaintiff in *Wallace v. Batavia School District 101* happened to plead both Fourth and Fourteenth Amendment claims. 68 F.3d at 1011. Although both were dismissed, in addressing the latter, the Court said it had "never acknowledged . . . a substantive due process right" "to be free from excessive corporal punishment." *Id.* at 1015.

defendants sued under §1983 to exploit that case by asserting the complaint's allegations are implausibly based on the paucity of facts supporting the claim.<sup>445</sup> Since no discovery will have been conducted, *Iqbal* will afford an additional layer of defense beyond the formidable ones already supplied by *Safford* and *Brosseau* in the case of personal capacity defendants, and *Monell* and its progeny as to school district defendants.

### IX. RECONSIDERING THE MERITS OF *INGRAHAM V. WRIGHT'S* PROCEDURAL DUE PROCESS DETERMINATION

*Ingraham* unequivocally recognized that the deliberate application of physical restraint and infliction of appreciable physical pain on students by public school authorities implicates Fourteenth Amendment liberty interests.<sup>446</sup> Among the interests “ ‘long recognized at common law as essential to the orderly pursuit of happiness by free men’ ” is “the right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security.”<sup>447</sup> Moreover, *Ingraham* makes clear that such freedoms are *fundamental*.<sup>448</sup>

Where due process is mandated, the government must supply certain basic safeguards such as notice of the charges or issue,<sup>449</sup> the opportunity for a meaningful hearing,<sup>450</sup> and an impartial decision maker.<sup>451</sup> In *Mathews v. Eldridge*,<sup>452</sup> the Supreme Court articulated a balancing test for deciding what procedures are required when there has been a deprivation of life, liberty, or property and due process.<sup>453</sup> The *Mathews* Court announced three factors which must be balanced:

<sup>445</sup> *Iqbal*, 129 S. Ct. at 1949.

<sup>446</sup> *Ingraham*, 430 U.S. at 674.

<sup>447</sup> *Id.* at 672-73 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

<sup>448</sup> *Id.* at 674 (“It is fundamental that the state cannot hold and physically punish an individual except in accordance with due process of law.”).

<sup>449</sup> See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (discussing notice as a requirement of due process).

<sup>450</sup> See *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970) (holding that a hearing is required before termination of welfare benefits).

<sup>451</sup> See *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (prohibiting judges from adjudicating cases in which there is a potential to personally gain from their decision).

<sup>452</sup> 424 U.S. 319 (1976).

<sup>453</sup> *Id.* at 335.

First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>454</sup>

Thus, the more important the interest is to the individual, the more in the way of procedural safeguards the Court will require.<sup>455</sup> In considering the second factor, the Court must assess whether additional or substitute procedures will lead to better, more accurate, and fewer erroneous decisions by the government.<sup>456</sup> In applying the third factor, the Court must examine the burdens imposed on the government if enhanced or different procedures were imposed on it.<sup>457</sup> This analysis would include elements of cost and administrative time that must be devoted to these procedures.<sup>458</sup>

*Goss v. Lopez's* requirement that students receive minimal procedural due process prior to their suspension from public school programs<sup>459</sup> might be criticized as disrupting the smooth flow of school operations, especially as to interfering with school discipline. *Goss's* minimalist approach could also be viewed as affording too little protection to students. The Court's decision in *Ingraham* seems to sympathize with the former concern, since it expressly declared no pre-deprivation proceedings were required before school officials could inflict corporal punishment upon students.<sup>460</sup> Indeed, *Ingraham* gave overriding weight to *Matthew's* third prong. It emphasized that "[h]earings—even informal hearings—require time, personnel, and a diversion of attention from normal school pursuits. School authorities may well choose to abandon corporal punishment rather than incur the burdens of complying with the procedural

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<sup>454</sup> *Id.*

<sup>455</sup> *Id.* at 348.

<sup>456</sup> *Id.* at 343.

<sup>457</sup> *Matthews*, 424 U.S. at 347.

<sup>458</sup> *Id.*

<sup>459</sup> *Goss*, 419 U.S. at 574.

<sup>460</sup> *Ingraham*, 430 U.S. at 682.

requirements.”<sup>461</sup> *Ingraham*, issued in 1977, is a decided retreat from *Goss*, a case decided a mere two years earlier.<sup>462</sup>

I believe *Ingraham*'s ruling on the applicability of the Fourteenth Amendment's procedural due process component should be reconsidered by the Court. This review should examine its factual assumptions about school discipline and its application of the *Mathews* criteria.

The four *Ingraham* dissenters made cogent arguments which bear repeating. At the outset, they reminded us that there was no dispute that constitutional liberty interests were at stake.<sup>463</sup> Indeed, they pointed out that the dispute was over “what process [wa]s due.”<sup>464</sup> They stated that under *Mathews*, “[t]he reason that the Constitution requires a State to provide ‘due process of law’ when it punishes an individual for misconduct is to protect the individual from erroneous or mistaken punishment that the State would not have inflicted had it found the facts in a more reliable way.”<sup>465</sup> This was the very rationale the Court applied to student suspensions in *Goss v. Lopez*.<sup>466</sup> Moreover, the dissenters noted that in practice “‘[d]isciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others.’”<sup>467</sup> The risk of error under such circumstances should be guarded against, especially when it “‘may be done without prohibitive cost or interference with the educational process.’”<sup>468</sup> *Goss* recognized the efficacy of minimal procedural due process in the case of public school student suspensions.<sup>469</sup>

<sup>461</sup> *Id.* at 680 (noting that “even if the need for advance procedural safeguards were clear, the question would remain whether the incremental benefit could justify the cost”).

<sup>462</sup> The *Ingraham* decision represents a decided deference to school authorities respecting constitutional liberties. *Id.* at 681-82 (stating that an “[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”).

<sup>463</sup> *Id.* at 692 (White, J., dissenting).

<sup>464</sup> *Id.*

<sup>465</sup> *Ingraham*, 430 U.S. at 692 (citing *Mathews*, 424 U.S. at 335, 344).

<sup>466</sup> *Id.* (citing *Goss*, 419 U.S. 565).

<sup>467</sup> *Id.* (quoting *Goss*, 419 U.S. at 580).

<sup>468</sup> *Id.* at 692-93 (quoting *Goss*, 419 U.S. at 580).

<sup>469</sup> *Id.* at 695 n.10 (citing *Goss*, 419 U.S. at 580-81 & n.9). It seems inconceivable that the *Ingraham* majority could not have realized that the very conduct which subjects students to corporal punishment might, in addition, result in a student's suspension which would compel a hearing under *Goss v. Lopez* or, alternatively, result in a suspension only. Thus, there is a very strong argument for extension of *Goss* principles to *Ingraham* situations. Uniform rules

The *Ingraham* dissenters also looked to the post-deprivation process provided by tort remedies and found them unlikely to reliably furnish adequate relief.<sup>470</sup> This conclusion was based on the broad protections afforded school employees under Florida's immunity statutes<sup>471</sup> and on the fact that the lawsuit occurred after the punishment was imposed.<sup>472</sup> This latter point was especially disconcerting to the dissenters. The dissenters complained that under the majority's "novel theory [of due process] the State may punish an individual without giving him any opportunity to present his side of the story, as long as he can later recover damages from a state official if he is innocent."<sup>473</sup> On this point, the dissenters observed: "There is, in short, no basis in logic or authority for the majority's suggestion that an action to recover damages for excessive corporal punishment 'afford(s) substantially greater protection to the child than the informal conference mandated by *Goss*.'"<sup>474</sup> The dissenters further noted that there was a lack of factual basis in the record for the majority's assertion that the risk of error without due process was slight, since paddlings are usually inflicted by the teachers who witnessed the conduct.<sup>475</sup> Finally, the dissenters pointed out that the "'rudimentary precautions'" mandated by *Goss* would impose no greater administrative burdens for decisions regarding infliction of corporal punishment than they do for student suspensions.<sup>476</sup>

In the wake of *Ingraham*, many states picked up the gauntlet

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of procedural due process applied to students' violations of school rules would, in fact, make school administration much easier since there would not be one set of rules for corporal punishment and another for student suspensions.

<sup>470</sup> *Ingraham*, 430 U.S. at 693 (White, J., dissenting).

<sup>471</sup> *Id.* at 693-94.

<sup>472</sup> *Id.* at 695.

<sup>473</sup> *Id.* at 696.

<sup>474</sup> *Id.* at 699 (quoting *Ingraham*, 430 U.S. at 678 n.46).

<sup>475</sup> *Ingraham*, 430 U.S. at 700 n.17 (White, J., dissenting).

<sup>476</sup> *Id.* at 700 (quoting *Goss*, 419 U.S. at 581). Justice White further asserted that like *Goss*, the procedures he advocated here were the constitutional minimum. *Id.* Like in *Goss*, the mandated minimal procedures would be dictated by the severity of the corporal punishment in a manner similar to the length of the suspension. *Id.* at 700 n.18. In 1950, the Supreme Court in *Mullane v. Central Hanover Bank*, declared that an essential principle of due process is that a "deprivation of life, liberty, or property . . . be preceded by notice and opportunity for hearing appropriate to the nature of the case." 339 U.S. at 313 (emphasis added). A "root requirement" of the Due Process Clause is "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (emphasis added). This root requirement was ignored in *Ingraham*. See *Ingraham*, 430 U.S. at 683-84 (White, J., dissenting).

of reform and expressly prohibited the infliction of corporal punishment.<sup>477</sup> Nevertheless, based on the data cited earlier, its use is still quite widespread.<sup>478</sup> For the reasons set forth in *Ingraham* and those I have advanced, the time has come for the United States Supreme Court to reconsider the merits of its 1977 holding and overrule itself.

Under *Mathews*' criteria, the *Ingraham* dissenters' position seems irrefutable. Basic notice of the charges or issue, the opportunity for a meaningful hearing proportional to the possible punishment, and an impartial decision maker would cause no disruption to the sound operation of the nation's public schools.<sup>479</sup> The broad legislative reaction in most states forbidding infliction of corporal punishment in their schools, coupled with the uniform post-*Ingraham* social science research condemning its use,<sup>480</sup> counsel for

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<sup>477</sup> These States include: Alaska (1989); California (1986); Connecticut (1989); Delaware (2003); District of Columbia (1977); Illinois (1993); Iowa (1989); Maryland (1993); Michigan (1989); Minnesota (1989); Montana (1991); Nebraska (1988); Nevada (1993); New Hampshire (1983); New York (1985); North Dakota (1989); Ohio (2009); Oregon (1989); Pennsylvania (2005); Rhode Island (2002); South Dakota (1990); Utah (1992); Vermont (1985); Virginia (1989); Washington (1993); West Virginia (1994); and Wisconsin (1988). *Discipline at School*, *supra* note 3. The manner in which corporal punishment is banned varies with the state and can be implemented through statutory enactments, regulations passed by state boards of education, or by the legislature taking away statutory permission for it. *Id.*

<sup>478</sup> Indiana and Arkansas grant broad authority to educators for use of corporal punishment. *Id.* States which grant authority to school boards to permit corporal punishment within statutory guidelines include: Arizona, Florida, Georgia, Kentucky, Louisiana, Missouri, New Mexico, North Carolina, South Carolina, and Tennessee. *Id.* Other ways to sanction corporal punishment implicitly include conferral of powers on "school boards for control of discipline or through [the grant of] immunity from suit for educators using corporal punishment." *Id.* Such states include: Alabama, Colorado, Kentucky, Idaho, Kansas, Mississippi, and Wyoming. *Discipline at School*, *supra* note 3. Such enactments may or may not overlap with express grants of authority to inflict corporal punishment. *Id.* In Arizona, Kansas, Texas, Missouri, and Oklahoma, the use of ordinary but not excessive force as a means of discipline is not prohibited. *Id.* Alabama, Arkansas, Colorado, Georgia, Indiana, Mississippi, North Carolina, Missouri, Texas, and Wyoming provide immunity for educators for use of corporal punishment within school policy. *Id.*

<sup>479</sup> See *Ingraham*, 430 U.S. at 700 (White, J., dissenting). Notably, as indicated in Part II above, *Goss* allowed for extraordinary circumstances where a student's harm to himself or others was imminent, such that a post-deprivation hearing would be adequate under the Due Process clause. *Goss*, 419 U.S. at 582-83. There is no reason a similar rule could not apply in corporal punishment cases.

<sup>480</sup> Indeed, I could locate no literature which held a contrary view. For an excellent reference list of this research in the context of an appellate proceeding, see the Amicus Curiae Brief on behalf of the Center for Effective Discipline in *Hunter v. Hunter*. Brief for The Center for Effective Discipline et al. as Amici Curiae Supporting Appellant, at 6-16,

reexamination of *Ingraham*.

Although it appears that the use of corporal punishment on school children is at best unhelpful, and perhaps even destructive, it seems unlikely that any federal court today will forbid the practice. In light of the longstanding deference to states in educational matters and issues of federalism, time may be the only balm for abolition of this unfortunate practice. Perhaps, if the Supreme Court reconsidered *Ingraham* and adopted a pre-deprivation procedural due process mandate for corporal punishment, as it did in *Goss v. Lopez* for student suspensions, that decision might, in the long run, be the most effective way to educate educators and state legislators about the practice. Moreover, if corporal punishment is abolished by state legislatures where the practice still exists, it will be more likely to be accepted locally since the rule was not compelled from outside the jurisdiction. If nothing else, affording students pre-deprivation process should reduce the incidence of corporal punishment based on erroneous factual determinations. Further, students and parents will respect school officials more, even when it is applied, since punishment will not have been meted out unless fundamentally fair procedures preceded the official's action.

**X. OBJECTIVE FOURTH AND FOURTEENTH AMENDMENT TESTS  
AS AIDING IN QUALIFIED IMMUNITY DETERMINATIONS**

Developments in the Supreme Court on qualified immunity standards under *Brosseau* and *Safford*, and in its revision of Rule 8's pleading standards under *Iqbal*, make more urgent the need for a definitive statement from the Court on whether the Fourth or Fourteenth Amendments determine public school students' excessive force-corporal punishment claims. If the Court determines that both Amendments apply it should define the reach of each Amendment. By filling this gap, the Court would greatly simplify qualified immunity determinations. The Court's adoption of the standard promoted in Part VII for substantive due process claims or the Fourth Amendment seizure theory, as the Seventh and Ninth Circuits have done, embody objective criteria and would therefore have similar advantages in terms of qualified immunity practice. By the Supreme Court providing the definitive answer called for here, the Court

would go a long way in giving the clearly established notice mandated by its precedents for qualified immunity determinations.

## XI. SUMMARY

### A. *Ingraham* and Procedural Due Process

*Ingraham's* import is that as a federal constitutional matter, it has been left within the political discretion of the states whether or not to prohibit corporal punishment practices.<sup>481</sup> Its effect, as a matter of constitutional doctrine, is that the *Ingraham* majority ranked students' property interest in short-term school removals above the infliction of physical pain and bodily injury upon students, since pre-deprivation due process applies to the former, but not the latter.<sup>482</sup> Moreover, the Supreme Court also ranked the liberty interest in reputation resulting from a school suspension [recognized in *Goss v. Lopez*], above the liberty interest [recognized by the *Ingraham* Court itself] in being free from "bodily restraint and punishment" inflicted by persons acting under color of state law.<sup>483</sup>

It is difficult to see how affording a student the *minimal* due process required by *Goss v. Lopez* would interfere with the efficiency of school operations when applied to situations where corporal punishment might result from students' misconduct. Moreover, there is a strong argument that the liberty interest emanating from the Federal Constitution itself is more fundamental as a constitutional right than the entitlement created by state law. This is because the right to attend school between certain ages is created by state law and

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<sup>481</sup> Kandice K. Johnson, *Crime or Punishment: The Parental Corporal Punishment Defense—Reasonable and Necessary, or Excused Abuse?*, 1998 U. ILL. L. REV. 413, 427 (1998). See also Tamar Ezer, *A Positive Right to Protection for Children*, 7 YALE HUM. RTS. & DEV. L.J. 1, 18 (2004) (referring indirectly to *Ingraham's* impact as relegating school corporal punishment to the states).

<sup>482</sup> Compare *Goss*, 419 U.S. at 574 ("[T]he State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause."), with *Ingraham*, 430 U.S. at 679 (stating that an argument for notice and a hearing prior to the performance of corporal punishment is less compelling in an area which "has always been the law of the land" (quoting *United States v. Barnett*, 376 U.S. 681, 692 (1964))).

<sup>483</sup> Compare *Goss*, 419 U.S. at 574 (holding that the Due Process Clause must be satisfied when one's reputation is on the line due to actions of the government), with *Ingraham*, 430 U.S. at 673-74 (recognizing a liberty interest in one's personal security).

presumably can be withdrawn by state constitutional or legislative enactments, whereas those stemming from the United States Constitution may not be trampled upon by state constitutions or statutory enactments,<sup>484</sup> and may only be lost through the cumbersome process of constitutional amendment. Moreover, as the *Ingraham* dissent suggests, it must be little consolation to a student subjected to severe corporal punishment to receive a post-deprivation hearing [in state court or otherwise], especially when the governmental action is constitutionally barred and the harm is irreparable.<sup>485</sup>

### B. Source of the Right to be Free from Excessive Force Corporal Punishment

Notwithstanding *Ingraham's* recognition of a constitutional liberty interest of public school students' in being free from excessive corporal punishment, the Supreme Court's failure to address the existence of a federal constitutional substantive due process cause of action, let alone the elements of such a claim, has left lower courts in a constitutional limbo for more than thirty years.<sup>486</sup> As a result,

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<sup>484</sup> Moreover, both student suspensions and application of corporal punishment result from alleged student misconduct and, conceivably, a suspension and corporal punishment, could result from a violation of the same school rules. This could lead to an odd, if not inconsistent set of constitutional doctrines when applied to the identical infraction. Nevertheless, the *Ingraham* majority observed:

But even if the need for advance procedural safeguards were clear, the question would remain whether the incremental benefit could justify the cost. Acceptance of petitioners' claims would work a transformation in the law governing corporal punishment in Florida and most other states. Given the impracticality of formulating a rule of procedural due process that varies with the severity of the particular imposition, the prior hearing petitioners seek would have to precede any paddling, however moderate or trivial.

*Ingraham*, 430 U.S. at 680. This view manifests a remarkable regression from the insight the Court demonstrated in *Goss* relative to the imposition which would obtain and the benefits which would accrue to the school system and its students.

<sup>485</sup> *Id.* at 693-95. Nine years after *Ingraham*, in *Daniels v. Williams*, the Supreme Court explained that the Due Process Clause of the Fourteenth Amendment bars "certain government actions regardless of the fairness of the procedures used to implement them." 474 U.S. 327, 331 (1986).

<sup>486</sup> Compare *Doe*, 334 F.3d 906, and *Wallace*, 68 F.3d 1010 (taking a Fourth Amendment approach), with *Johnson*, 239 F.3d 246; *Neal*, 229 F.3d 1069; *Saylor*, 118 F.3d 507; *Wise*, 855 F.2d 560; *Metzger*, 841 F.2d 518; *Garcia*, 817 F.2d 650; *Hall*, 621 F.2d 607 (taking a substantive due process approach requiring both objective and subjective elements).

courts of appeal have had to fend for themselves in developing law on this issue. Not surprisingly, they have developed divergent approaches to resolving such claims.<sup>487</sup> An important post-*Ingraham* development has been the use of the Fourth Amendment seizure clause, rather than the Fourteenth Amendment Due Process Clause, to evaluate excessive force cases.<sup>488</sup> The Fourth Amendment approach, favored by the Seventh and Ninth Circuits, at least as to certain applications of force upon public school students, contrasts with the view espoused in the Second, Third, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits, which still employ substantive due process tests.<sup>489</sup>

Fourth Amendment seizure analysis rests on the premise that when school officials administer corporal punishment, the student will not feel “ ‘free to leave.’ ”<sup>490</sup> This view builds upon the fact that students’ mobility is already severely limited once they enter the schoolhouse.<sup>491</sup> From a Fourth Amendment seizure perspective, the question becomes whether the further limitation imposed, including the application of force, was reasonable in light of the needs of the school environment, especially to maintain order and advance the pedagogical mission of the agency.<sup>492</sup> Significantly, this test is an objective one,<sup>493</sup> and therefore would be easier for plaintiffs to establish when they assert, in § 1983 litigation, that the force applied to them was excessive.

I argue that where the substantive due process test is applied, retaining a subjective component to that test is unnecessary, and ultimately self-defeating in advancing public school students’ liberty interest in bodily integrity recognized in *Ingraham* and its progeny. I suggest adoption, with minor variation, of the Tenth Circuit’s 1987 case, *Garcia*, as the standard for determining liability for such violations. I take this position because it seems irrefutable that when a school official applies force substantially disproportionate to the

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<sup>487</sup> See cases cited *supra* note 486.

<sup>488</sup> See *id.*

<sup>489</sup> See *id.*

<sup>490</sup> Kathryn R. Urbonya, *Public School Officials’ Use of Physical Force as a Fourth Amendment Seizure: Protecting Students From the Constitutional Chasm Between the Fourth and Fourteenth Amendments*, 69 GEO. WASH. L. REV. 1, 54 (2000).

<sup>491</sup> *Wallace*, 68 F.3d at 1013.

<sup>492</sup> *Metzger*, 841 F.2d at 520.

<sup>493</sup> *Doe*, 334 F.3d at 909 (citing *Santos v. Gates*, 287 F.3d 846, 853 (9th Cir. 2002)).

need presented, causing severe injury, and when under the circumstances such treatment was manifestly brutal and inhumane and shocks the judicial conscience, no further subjective analysis should be required. The intent element can be *presumed* under the established facts.

The abolition of the subjective component to substantive due process analysis will bring closer, but not completely harmonize, identical cases to which Fourth Amendment analysis is applied. This is because even when the subjective component of substantive due process analysis is eliminated, the test still requires very extreme behavior shocking to the conscience to state a claim,<sup>494</sup> whereas the Fourth Amendment only demands objective “unreasonableness.”<sup>495</sup> If the Supreme Court should eventually clarify when the Fourth rather than the Fourteenth Amendment is the source of right in corporal punishment-excessive force cases, that would still not resolve the question of how to apply substantive due process in a school setting when no pedagogical or administrative purpose was served by the application of force. Although claims based on such conduct would not, by definition, constitute corporal punishment, it presumably would be subject to the same analytic criteria as applied in corporal punishment cases, including, for example, use of force disproportionate to the need and the shocking of the judicial conscience.

### C. Qualified Immunity in Excessive Force Claims Against School Officials

Finally, I assert that in the wake of the Supreme Court expansion of immunity to personal capacity defendants in cases like *Pearson v. Callahan* and *Brosseau v. Haugen*, followed closely by its explosive determination in *Iqbal*, the Supreme Court’s review of *Ingraham*’s procedural due process holding has become more pressing if the protections embedded in the Fourteenth Amendment’s Liberty Clause are not to be more severely eroded for school children. Moreover, the Supreme Court’s clarification of the manner in which the Fourth Amendment and Substantive Due Process Clauses operate in excessive force corporal punishment cases would

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<sup>494</sup> *Hall*, 621 F.2d at 613.

<sup>495</sup> *Wallace*, 68 F.3d at 1014-15.

go a long way in helping school officials to understand what the clearly established law is on a national basis and how that law operates in practice. Such developments would somewhat ameliorate the harsh effects of *Pearson*, *Brosseau*, and *Iqbal* on students' constitutional liberties. So too, it would assist interested parties and the inferior courts in developing a clearer roadmap for establishing such claims and more stability in law and practice.

## XII. CONCLUSION

Recent decisions from the United States Supreme Court have been decidedly defendant-friendly and raise a serious threat to civil liberties.<sup>496</sup> In the context of § 1983, this has occurred not so much in its direct attack on core constitutional principles, but through its application of the Federal Rules of Civil Procedure.<sup>497</sup> Its imposition of rigorous standards through its new plausible fact pleading requirement in *Iqbal* under Rule 8 upset more than five decades of law based on *Conley*.<sup>498</sup> Its expansion of qualified immunity protections for personal capacity defendants through *Pearson*, *Brosseau*, and finally *Safford*, has accomplished more in curtailing civil liberties than it could have done by attacking directly constitutional or statutory protections in a piecemeal fashion.<sup>499</sup> Because of the currency of these cited cases, understanding of their impact will take time to absorb and measure. In the meantime, the steps I have suggested, that is, revisiting *Ingraham* at the Supreme Court for the purpose of establishing a requirement for pre-deprivation hearings, prior to the application of corporal punishment and declaring with specificity when the Fourth or Fourteenth Amendment applies when excessive force corporal punishment is administered to public school students, will go a long way toward ameliorating these regrettable developments.

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<sup>496</sup> See, e.g., *Iqbal*, 129 S. Ct. 1937 (implementing a plausibility standard that disadvantages plaintiffs).

<sup>497</sup> *Id.* (reinforcing *Twombly*'s standard for pleadings to comply with Rule 8 of the Federal Rules of Civil Procedure).

<sup>498</sup> *Id.* at 1944.

<sup>499</sup> See *Safford*, 129 S. Ct. 2633 (allowing divergent views of circuit courts in interpreting Supreme Court precedent to constitute doubt as to the clarity of the law); *Pearson*, 129 S. Ct. 808 (allowing courts to skip straight to the second prong of the *Saucier* procedure to find qualified immunity without having to first determine the constitutional issue); *Brosseau*, 543 U.S. 194 (allowing qualified immunity where there was an absence of cases on point).