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# BEATING JUSTICE: CORPORAL PUNISHMENT IN AMERICAN SCHOOLS AND THE EVOLVING MORAL CONSTITUTION

## ABSTRACT

This Note will discuss the Supreme Court's holding in *Ingraham v. Wright*, and the subsequent developments in public school corporal punishment practices. Rather than focus exclusively on the case law, this Note will dive into the statistical data outlining which students are most often subjected to corporal punishment. Often, it is Black students and Autistic students who are subject to the harshest treatment.

This Note will outline the different avenues that courts could and should take to overrule *Ingraham*. Because a circuit split exists—on the issue of how to resolve these claims—overturning *Ingraham* and declaring corporal punishment per se unconstitutional would provide much needed relief to public school students across the country. There are viable Eighth, Fourteenth, and Fourth Amendment challenges. Each will be discussed in turn. In a time where public education is dealing with residual issues related to the coronavirus pandemic, teacher shortages, and severe underfunding, corporal punishment needs to be removed from the disciplinary toolkits of teachers and administrators. Fundamental fairness demands that *Ingraham* be seen as what it is—a sign of times long past. Our evolving standards of decency demand a rejection of public-school corporal punishment.

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I. *INGRAHAM V. WRIGHT*

The seminal case dealing with corporal punishment in America's public schools is *Ingraham v. Wright*.<sup>1</sup> The dispute stemmed from two Florida high school students alleging that they were being deprived of their constitutional rights when they were paddled at school.<sup>2</sup> James Ingraham was "subjected to more than 20 licks with a paddle while being held over a table in the principal's office."<sup>3</sup> His offense: "he was slow to respond to his teacher's instructions."<sup>4</sup> The paddling caused Mr. Ingraham, then in eighth grade, to develop a hematoma.<sup>5</sup> Mr. Andrews, the other plaintiff, was struck so many times on one of his arms that he could not use the arm for an entire week.<sup>6</sup>

The Court made a clear statement about which challenges would no longer be available to students looking to bring abuse claims against their teachers.<sup>7</sup> The majority opinion by Justice Lewis Powell "foreclosed the Eighth Amendment argument and minimized the possibilities for a successful procedural-due-process claim."<sup>8</sup>

The Court discussed the long-standing use of physical discipline in the American education system.<sup>9</sup> With that in mind, the Court would not rule directly on if substantive due process rights were implicated by teachers using physical discipline on students.<sup>10</sup> Powell noted that to implicate substantive due process would enmesh the Court in impermissible line drawing, where the justices—and presumably lower courts hearing claims—would have to rule on the appropriateness of a given punishment.<sup>11</sup>

To the disappointment of many scholars and students' rights advocates, the Court entirely foreclosed Eighth Amendment challenges to corporal punishment in public schools.<sup>12</sup> Time and time again, the Supreme Court has held that the "primary purpose of that clause has always been considered, and properly so, to be directed

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1. See *Ingraham v. Wright*, 430 U.S. 651, 653 (1977).

2. *Id.*

3. *Id.* at 657.

4. *Id.*

5. *Id.*

6. *Id.*

7. See Courtney Mitchell, Note, *Corporal Punishment in the Public Schools: An Analysis of Federal Constitutional Claims*, 73 L. & CONTEMP. PROBS. 321, 321 (2010).

8. *Id.*

9. *Ingraham v. Wright*, 430 U.S. 651, 659–60 (1977).

10. See *id.*

11. See *id.* at 659 ("We think it a misuse of our judicial power to determine, for example, whether a teacher has acted arbitrarily in paddling a particular child for certain behavior or whether in a particular instance of misconduct five licks would have been a more appropriate punishment than ten licks." (quoting *Ingraham v. Wright*, 525 F.2d 909, 917 (5th Cir. 1976))).

12. See *id.* at 671.

at the method or kind of punishment imposed for the violation of criminal statutes; the nature of the conduct made criminal is ordinarily relevant only to the fitness of the punishment imposed.”<sup>13</sup> The *Ingraham* Court noted as much, writing that the Eighth Amendment exclusively refers to the imposition of punishments on defendants who have been convicted of crimes, prevents punishment disproportionate to the offense committed, and imposes limits on what offenses can be classified as crimes.<sup>14</sup>

The Court found that corporal punishment does implicate a constitutionally protected liberty interest, but that common law remedies are generally sufficient to give parents and students adequate due process protection.<sup>15</sup> The Court also found that corporal punishment could be implemented without notice or a proper hearing, provided common law remedies were available to help parents push back against overreach.<sup>16</sup>

## II. § 1983 AND THE CIRCUIT SPLIT

Students injured after being subjected to corporal punishment in school would bring a § 1983 claim into federal court.<sup>17</sup> To prevail in a § 1983 claim, “a plaintiff must (1) allege a violation of a right secured by the Constitution or laws of the United States and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law.”<sup>18</sup> Because the Supreme Court in *Ingraham* foreclosed the application of the Eighth Amendment—and arguably any real substantive challenge—to the practice of corporal punishment in public schools,<sup>19</sup> students who bring claims today have a very narrow window to prevail on the merits.<sup>20</sup>

The circuits are divided on how to handle these suits. At present, seven of eleven courts of appeals look at corporal punishment claims under the substantive due process framework.<sup>21</sup>

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13. *Powell v. Texas*, 392 U.S. 514, 531–32 (1968) (citing *Trop v. Dulles*, 356 U.S. 86 (1958)).

14. *Ingraham*, 430 U.S. at 667.

15. *See id.* at 682.

16. *See id.*

17. *See* 42 U.S.C. § 1983 (West).

18. *Whitley v. Hanna*, 726 F.3d 631, 638 (5th Cir. 2013) (quoting *James v. Tex. Collin Cnty.*, 535 F.3d 365, 373 (5th Cir. 2008)).

19. *Mitchell*, *supra* note 7, at 329.

20. *See, e.g., T.O. v. Fort Bend Indep. Sch. Dist.*, 2 F.4th 407, 414 (5th Cir. 2021). These suits are filed semi-regularly. *See* ELIZABETH T. GERSHOFF, KELLY M. PURTELL & IGOR HOLAS, *CORPORAL PUNISHMENT IN U.S. PUBLIC SCHOOLS* 91 (2015).

21. *Mitchell*, *supra* note 7, at 324.

*Hall v. Tawney* represented the first time that a circuit court viewed a corporal punishment claim as a substantive due process violation.<sup>22</sup> The Fourth Circuit equated school-based § 1983 claims to police brutality claims.<sup>23</sup> The injuries sustained, and the force by the school employee, must “shock the conscience” of the court for a claimant to prevail.<sup>24</sup>

Mitchell discussed some of the more egregious examples of cases that “fail[ed] to shock the conscience.”<sup>25</sup> These included instances where elementary schoolers had received bruises on their buttock, and another where an eighth grader was put in a chokehold and unable to breathe.<sup>26</sup> This last case provides an apt example to explore further.

Jonathon Peterson was an eighth-grade student who arrived late to class.<sup>27</sup> Peterson entered late alongside his friend, who was reprimanded immediately and told to enter the hallway.<sup>28</sup> Seeing as the two had entered together and committed the same transgression, Jonathon figured that the verbal reprimand was for both of them, and he got out of his seat and walked toward the door.<sup>29</sup> When the teacher told him to sit down, he did not comply.<sup>30</sup> This led to an altercation by the door, which ended with the teacher placing her hand around Jonathon’s neck until he began to have problems breathing.<sup>31</sup>

The Eleventh Circuit found that “the teacher’s use of force was not obviously excessive,” and laid out the test that the circuit would use to evaluate corporal punishment § 1983 claims against teachers and school staff.<sup>32</sup>

To show that “excessive corporal punishment is conscience-shocking, a plaintiff must prove at a minimum that ‘(1) a school official intentionally used an amount of force that was obviously excessive under the circumstances, and (2) the force used presented

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22. *Id.*

23. *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980).

24. *Id.*

25. Mitchell, *supra* note 7, at 325 (emphasis omitted).

26. *Id.* (“A teacher’s choking of an eighth-grade student ‘until [he] couldn’t breath[e],’ though ‘inappropriate’ and ‘untraditional,’ did not rise to the level of a constitutional violation because ‘the extent of the student’s injury was no worse than that suffered under more traditional forms of corporal punishment like paddling . . . .’”) (alteration in original) (quoting *Peterson v. Baker*, 504 F.3d 1331, 1334–35, 1337–38 (11th Cir. 2007)).

27. *Baker*, 504 F.3d at 1334.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 1334–35.

32. *Id.* at 1337.

a reasonably foreseeable risk of serious bodily injury.”<sup>33</sup> The court would use a totality of the circumstances test to determine if a physical reprimand was obviously excessive.<sup>34</sup> Among other things, the court must evaluate “(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>35</sup>

Even after using the “shock the conscience” standard, the court was not persuaded that the choking episode was a violation of Peterson’s civil rights.<sup>36</sup>

The Fifth Circuit has its own unique standard of review. Instead of affording plaintiffs even an opaque standard by which a jury could review punishment methods and injuries, the Fifth Circuit held that if a state provides students with traditional common law remedies, then the federal courts do not need to provide further redress.<sup>37</sup> The circuit is uniquely focused on the constitutional floor; decisions have discussed the minimum amount of legal protection that students and parents are owed.<sup>38</sup> By failing to recognize an independent cause of action for a substantive due process violation, the Fifth Circuit places litigants in a precarious situation.<sup>39</sup> Since common law remedies vary from state to state, this approach runs the risk of making legal rights dependent solely on where a child lives.<sup>40</sup>

*Ingraham* was wrong on the day it was decided and is wrong today. It is also the duty of the Supreme Court to step in when circuit splits threaten the legal interests of litigants across the country.<sup>41</sup> Using the Eighth Amendment, the Equal Protection Clause of the Fourteenth Amendment, or the Fourth Amendment, the Court could and should overturn *Ingraham*, and declare public school corporal punishment per se unconstitutional.<sup>42</sup>

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33. *Baker*, 504 F.3d at 1337 (quoting *Neal ex rel. Neal v. Fulton Cnty. Bd. of Educ.*, 229 F.3d 1069, 1075 (11th Cir. 2000)).

34. *Id.*

35. *Id.* (quoting *Neal*, 229 F.3d at 1075).

36. *See id.*

37. *Woodard v. Los Fresnos Indep. Sch. Dist.*, 732 F.2d 1243, 1245 (5th Cir. 1984).

38. *See, e.g., id.*

39. *Id.* (“Although the Supreme Court has not yet determined whether corporal punishment of a public school child may give rise to an independent cause of action to vindicate substantive rights under the due process clause, we have held that it does not.”) (footnote omitted).

40. *See* Carolyn Peri Weiss, *Curbing Violence or Teaching It: Criminal Immunity for Teachers Who Inflict Corporal Punishment*, 74 WASH. U. L.Q. 1251, 1261–62 (1996); *see, e.g.*, GA. CODE ANN. § 20-2-732 (West).

41. *Circuit Split*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/circuit\\_split](https://www.law.cornell.edu/wex/circuit_split) [<https://perma.cc/235V-Q2WT>] (last visited Apr. 13, 2023).

42. *See Ingraham v. Wright*, 430 U.S. 651, 692 (1977) (White, J., dissenting) (“I only take issue with the extreme view of the majority that corporal punishment in public

### III. CORPORAL PUNISHMENT IN PUBLIC SCHOOLS

Anyone who has gone through America's public school system has likely witnessed or been subject to discipline at the hands of teachers or administrators. But for students in nineteen states, largely in the American South, discipline can take on another form—corporal punishment.<sup>43</sup>

Corporal punishment is vaguely defined as a form of “physical punishment.”<sup>44</sup> The practice was commonplace in the home, with parents often using it on children to instill discipline and respect for authority.<sup>45</sup> The practice itself has biblical roots, and still finds widespread support from Conservative Protestant denominations.<sup>46</sup> The use of corporal punishment in the sanctity of one's home is not altogether unsurprising. After all, our society has often given parents wide latitude to make choices about child-rearing and development.<sup>47</sup> What may come as a shock is how frequently the practice is *still* used in public schools.<sup>48</sup> Over 160,000 American students attend schools that permit the practice, with the majority of those being in the southeastern United States.<sup>49</sup> The demographics of the American South, where Protestants “dominate,” may explain why abolition of the practice has been slow-moving and largely unsuccessful.<sup>50</sup> This

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schools, no matter how barbaric, inhumane, or severe, is never limited by the Eighth Amendment. Where corporal punishment becomes so severe as to be unacceptable in a civilized society, I can see no reason that it should become any more acceptable just because it is inflicted on children in the public schools.”); Mitchell, *supra* note 7, at 337–40.

43. Valerie Strauss, *19 states still allow corporal punishment in school*, WASH. POST (Sept. 18, 2014, 2:51 PM), <https://www.washingtonpost.com/news/answer-sheet/wp/2014/09/18/19-states-still-allow-corporal-punishment-in-school> [<https://perma.cc/2JHB-BWZA>]; see also Christina Caron, *In 19 States, It's Still Legal to Spank Children in Public Schools*, N.Y. TIMES (Dec. 13, 2018), <https://www.nytimes.com/2018/12/13/us/corporal-punishment-school-tennessee.html> [<https://perma.cc/4UWE-7ESA>].

44. Maddie Utter, *Opposing Viewpoints: Corporal Punishment in the Home and Its Affects on Children*, 39 CHILD. LEGAL RTS. J. 310, 310 (2019).

45. See *id.*

46. *Id.*; see also Elizabeth T. Gershoff, *More Harm Than Good: A Summary of Scientific Research on the Intended and Unintended Effects of Corporal Punishment on Children*, 73 L. & CONTEMP. PROBS. 31, 32–33 (2010); Elizabeth T. Gershoff, Pamela C. Miller & George W. Holden, *Parenting Influences from the Pulpit: Religious Affiliation as a Determinant of Parental Corporal Punishment*, 13 J. FAM. PSYCH. 307, 308–09 (1999).

47. See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (affirming the right of parents to make educational choices for their children); see also *Wisconsin v. Yoder*, 406 U.S. 205, 213–14, 232–34 (1972) (finding a fundamental right to religious freedom that permits Amish parents to pull children out of public school).

48. See Elizabeth T. Gershoff & Sarah A. Font, *Corporal Punishment in U.S. Public Schools: Prevalence, Disparities in Use, and Status in State and Federal Policy*, 30 SOC. POL'Y REP. 1, 3 (2016).

49. *Id.* at 7.

50. *The Religiously Distinct States of America*, GALLUP (Feb. 9, 2018), <https://news.gallup.com/poll/226844/religiously-segregated-states-america.aspx> [<https://perma.cc/4UWE-7ESA>].

Note will discuss the troubling variations in utilization, both with regards to where and how corporal punishment is used, and against whom it is most frequently perpetrated. The datapoints all lead to the same conclusion: under the Eighth, Fourteenth, or Fourth Amendments, corporal punishment in schools is incompatible with constitutional guarantees.

#### IV. VARIATION IN CORPORAL PUNISHMENT POLICIES AND PRACTICES

The disparities in punishment methods and discretion afforded to teachers and staff have perpetuated differences in corporal punishment policies. In some Missouri districts, students are struck in the buttocks with a paddle.<sup>51</sup> In Texas, the state's education code permits "hitting, paddling, spanking, slapping, or any other physical force."<sup>52</sup> Some school districts also provide their staff with instruments for implementing the punishment, including paddles, leather straps, and switches.<sup>53</sup> In a particularly harrowing story, an eighteen-year-old female high school student in Texas reported being held down by two assistants while a male teacher repeatedly struck her with a four-foot-long wooden plank.<sup>54</sup> She ended up in tears, bleeding profusely.<sup>55</sup>

State policies are not uniform. In Missouri, for example, the state's corporal punishment policy specifies that spanking is not child abuse, as well as simply defining corporal punishment as that which is not physical abuse.<sup>56</sup> This open-ended policy affords local school boards wide discretion to formulate and implement policies. This is

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/CN6H-GF2B]; see, e.g., *Louisiana House rejects bill banning corporal punishment in public schools*, KATC NEWS (May 4, 2021 11:30 PM), <https://www.katc.com/news/covering-louisiana/louisiana-house-rejects-bill-banning-corporal-punishment-in-public-schools> [https://perma.cc/K9M8-9JAB].

51. Michael Levenson, *Paddling Makes a Comeback in a Missouri School District*, N.Y. TIMES (Aug. 27, 2022), <https://www.nytimes.com/2022/08/27/us/corporal-punishment-schools.html> [https://perma.cc/72XE-TSMB]; see, e.g., Utter, *supra* note 44, at 312.

52. TEX. EDUC. CODE ANN. § 37.0011 (West 2011).

53. David R. Dupper & Amy E. Montgomery Dingus, *Corporal Punishment in U.S. Public Schools: A Continuing Challenge for School Social Workers*, 30 CHILD. & SCHS. 243, 243 (2008).

54. Deana Pollard Sacks, *State Actors Beating Children: A Call for Judicial Relief*, 42 U.C. DAVIS L. REV. 1165, 1167 (2009).

55. *Id.*

56. MO. REV. STAT. § 160.261 (2022); MO. REV. STAT. § 210.110(1) (2019); see also Gershoff & Font, *supra* note 48, at 16. This situation described in the text is troublesome for multiple reasons. If a primary concern is an abuse of discretion, any teacher could just say, "I've never abused a child, because I was exercising my state-protected right to corporally punish the student."



compounded by the discretion given to the school staff themselves. These public servants, with (presumably) little to no training in behavioral psychology, are left to perform whatever disciplinary measure they deem appropriate.<sup>57</sup>

What also stands out is the wide range of offenses that cause students to receive punishments. Some acts are undeniably in a bucket of more serious offenses, such as “fighting with fellow students, setting off fireworks in school, or getting drunk on a field trip.”<sup>58</sup> But sometimes, students who were using their cell phone during class, or cursing out loud in front of a staff member would receive physical punishment.<sup>59</sup> The same data cited by Gershoff and Font also notes that students have been paddled or hit for offenses like forgetting to turn in their homework, doing poorly in school, or using the bathroom without receiving permission from their teachers.<sup>60</sup> Students have been paddled for making noise while using the bathroom, playing dodgeball after being instructed to stop, using bad language when conversing with the bus driver, or breaking an egg during an in-class lab experiment.<sup>61</sup>

Students have also been physically disciplined for wearing untucked shirts, running in the hallway, sleeping in class, sitting in someone else’s seat, or failing an exam.<sup>62</sup> State policies have allowed for nearly unfettered discretion from school officials.<sup>63</sup> Without legal restraints, what is punishable by paddling in one district could be a mere lunch detention or verbal reprimand in another. And by allowing corporal punishment in schools at all, what could be punishment by force for students in a given state might be nothing more than a minor infraction somewhere else.<sup>64</sup>

Perhaps the most troubling part of state corporal punishment policies are how these policies diverge from those undertaken by

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57. “*Corporal Punishment in Schools and Its Effect on Academic Success*” Joint HRW/ACLU Statement, HUM. RTS. WATCH (Apr. 15, 2010, 6:52 PM), <https://www.hrw.org/news/2010/04/15/corporal-punishment-schools-and-its-effect-academic-success-joint-hrw/aclu> [https://perma.cc/5ZJA-LPDW] (“Corporal punishment places parents and teachers in positions where they may have to choose between educational advancement and students’ physical well-being.”).

58. Gershoff & Font, *supra* note 48, at 3.

59. *See id.* at 3–4.

60. *See id.*

61. *See* Sacks, *supra* note 54, at 1173–74.

62. *See* S. POVERTY L. CTR. & CTR. FOR C.R. REMEDIES AT UCLA, THE STRIKING OUTLIER: THE PERSISTENT, PAINFUL AND PROBLEMATIC PRACTICE OF CORPORAL PUNISHMENT IN SCHOOLS 7, 18 (June 11, 2019), <https://www.civilrightsproject.ucla.edu/research/k-12-education/school-discipline/the-striking-outlier-the-persistent-painful-and-problematic-practice-of-corporal-punishment-in-schools> [https://perma.cc/9VTB-NBTG].

63. *See* Sacks, *supra* note 54, at 1181.

64. *See* *Ingraham v. Wright*, 430 U.S. 651, 682–83 (1977).

juvenile delinquent facilities in the same states. In Alabama, Florida, Georgia, Louisiana, and Mississippi, staff at juvenile detention centers cannot strike students, while public school officials can.<sup>65</sup> Adult prisoners in those states could not legally be beaten by prison staff, but elementary school students could be paddled or smacked for minor disciplinary infractions.<sup>66</sup>

When it comes to issues of bodily autonomy and dignity, the Supreme Court has traditionally been willing to step in and ensure that treatment across the country was uniform. In 2005, the Court held unconstitutional a death sentence for any human being under the age of eighteen.<sup>67</sup> What the Court spotted was the inconsistent application of the juvenile death penalty across the country; they cited this evidence as a reflection of the evolving standards of decency that our society has come to recognize.<sup>68</sup> The Court's change was not arbitrary.<sup>69</sup> Rather, a majority of the Court recognized that state policymakers and law enforcement authorities were more often than not finding the death penalty to be unworthy of utilization against adolescents, who were not as culpable as fully developed, adult criminal offenders.<sup>70</sup>

While the trend lines have not moved as quickly with respect to corporal punishment in schools, the data show that many states that banned corporal punishment in public schools did so prior to 1971.<sup>71</sup> As more research comes to the forefront, reflecting the long-term effects on students, the Supreme Court should take up another challenge to the policy.<sup>72</sup>

## V. PROPORTIONALITY: THE EIGHTH AMENDMENT AVENUE

The macro-level variation in corporal punishment policies speaks directly to the Eighth Amendment's pertinence in the constitutional

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65. S. POVERTY L. CTR. & CTR. FOR C.R. REMEDIES AT UCLA, *supra* note 62, at 18.

66. *Id.*

67. *See Roper v. Simmons*, 543 U.S. 551, 578–79 (2005).

68. *See id.* at 562–64.

69. *See* Maureen Carroll, *Transgender Youth, Adolescent Decisionmaking, and Roper v. Simmons*, 56 UCLA L. REV. 725, 725, 729–30 (2009).

70. *See id.* The Court looked at data reflecting that 30 states prohibited the juvenile death penalty. *Roper*, 543 U.S. at 564. This alone was not determinative. Justice Kennedy noted that since the previous seminal case on the subject, only six states had executed offenders for crimes committed as juveniles. *Id.* at 564. Additionally, only three states had done so in the 10 years before *Roper* was heard. *Id.*

71. *See* Gershoff & Font, *supra* note 48, at 4.

72. *See* Donald E. Greydanus, Helen D. Pratt, C. Richard Spates, Anne E. Blake-Dreher, Marissa A. Greydanus-Gearhart & Dilip R. Patel, *Corporal Punishment in Schools: Position Paper of the Society for Adolescent Medicine*, 32 J. ADOLESCENT HEALTH 385, 388 (2003).

analysis.<sup>73</sup> The Eighth Amendment should not be restricted only to the criminal justice system.<sup>74</sup> The Amendment reads, “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>75</sup>

The language of the Eighth Amendment does not refer exclusively to criminal punishments; thus, the Amendment can and should be interpreted to apply anytime the state imposes a penalty upon a citizen.<sup>76</sup> The power imbalance in favor of school officials demands accountability.<sup>77</sup> Students, like prisoners who bring claims against guards for alleged physical abuse, are under the custodial supervision of the state.<sup>78</sup> The theory that schools possess *in loco parentis* power over students has been used to justify corporal punishment countless times in courts of law.<sup>79</sup> This line of thinking gives undue deference to school officials, in a time where the rights of parents and students have become a large part of the culture wars themselves.<sup>80</sup>

The *Ingraham* Court acknowledged that the Eighth Amendment has been used outside of the criminal sentencing process.<sup>81</sup> Notably, the Supreme Court itself applied the Eighth Amendment in a prisoner’s rights case just one year before *Ingraham*.<sup>82</sup> In *Estelle*, Justice Thurgood Marshall wrote for the majority that the

73. See *Roper*, 543 U.S. at 589 (O’Connor, J., dissenting).

74. See *Ingraham v. Wright*, 430 U.S. 651, 685, 688 (1977) (White, J., dissenting).

75. U.S. CONST. amend. VIII.

76. See *Ingraham*, 543 U.S. at 685 (White, J., dissenting) (“Yet the constitutional prohibition is against cruel and unusual *punishments*; nowhere is that prohibition limited or modified by the language of the Constitution. Certainly, the fact that the Framers did not choose to insert the word ‘criminal’ into the language of the Eighth Amendment is strong evidence that the Amendment was designed to prohibit all inhumane or barbaric punishments . . .” (emphasis in original)).

77. See Susan Stuart, *In Loco Parentis in the Public Schools: Abused, Confused, and in Need of Change*, 78 U. CIN. L. REV. 969, 976–77 (2010).

78. See Flyn L. Flesher, *Cross-Gender Supervision in Prisons and the Constitutional Right of Prisoners to Remain Free from Rape*, 13 WM. & MARY J. WOMEN & L. 841, 865 (2007); Stuart, *supra* note 77, at 975.

79. See Stuart, *supra* note 77, at 975.

80. See, e.g., Anya Kamenetz, *Why education was a top voter priority this election*, NPR (Nov. 4, 2021, 6:00 AM), <https://www.npr.org/2021/11/04/1052101647/education-parents-election-virginia-republicans> [<https://perma.cc/62KX-ADBX>].

81. See *Ingraham v. Wright*, 430 U.S. 651, 668–70 (1977). “Though attendance may not always be voluntary, the public school remains an open institution. Except perhaps when very young, the child is not physically restrained from leaving school during school hours; and at the end of the school day, the child is invariably free to return home.” *Id.* at 670. This would seem to ignore the *in loco parentis* doctrine, as well as common knowledge about modern public schools. Students are not free to leave whenever they want. Especially for those without a driver’s license, they are confined to the building without parental supervision, subject to the protection of school staff alone.

82. See *Estelle v. Gamble*, 429 U.S. 97, 98, 101 (1976).

Eighth Amendment prohibited “punishments” that were not compatible with society’s evolving views on decency.<sup>83</sup> Marshall discussed how prisoners in state custody “rely on prison authorities to treat [their] medical needs,” because the government is “punishing [these individuals] by incarceration.”<sup>84</sup> Students are not unlike prisoners in this regard. Because students in the classroom are subject to the control of their teacher, the power imbalance and demand for obedience places these students in state custody.<sup>85</sup> Accordingly, they should be able to bring Eighth Amendment challenges to corporal punishment policies that are a detriment to their psychological, physical, and educational well-being.<sup>86</sup>

Besides resolving the circuit split on the issue, the Court could clarify the evolving bounds of the Eighth Amendment itself by definitively holding that the Amendment applies outside of the criminal sentencing context. It should also declare that students and their parents can utilize the Amendment’s protections. The Eighth Amendment is the best vehicle to overturn *Ingraham*, and it is long past time for the Court to do so.

## VI. PROTECTED CLASS: THE DISPARATE IMPACT ON STUDENTS OF COLOR

Students of color are much more likely to be subject to corporal punishment than their white peers.<sup>87</sup> This fact alone, and the data that accompanies it, should lead any fact-finder to hold that the practice violates the Fourteenth Amendment’s Equal Protection Clause. A 2016 Brookings study looking at Department of Education data found that, “Black students are twice as likely to be struck as white students in North Carolina and Georgia, 70 percent more likely in Mississippi, 40 percent more likely in Louisiana, and 40 percent more likely in Arkansas.”<sup>88</sup> This phenomenon is not limited to the Deep South.<sup>89</sup> In fact, despite not being major practitioners of corporal punishment, school officials who do utilize the practice in Michigan and Pennsylvania are “nearly twice as likely to beat [B]lack children

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83. *Id.* at 102.

84. *Id.* at 103.

85. *See* Stuart, *supra* note 77, at 970.

86. *See* *Ingraham*, 430 U.S. at 669–70.

87. *See* Dick Startz, *Schools, black children, and corporal punishment*, BROOKINGS INST. (Jan. 14, 2016), <https://www.brookings.edu/blog/brown-center-chalkboard/2016/01/14/schools-black-children-and-corporal-punishment> [<https://perma.cc/LW5B-4U5N>].

88. *Id.*

89. *See id.*

as white . . . .”<sup>90</sup> In Maine,<sup>91</sup> Black students are eight times as likely as their peers to be struck during the schoolday.<sup>92</sup>

The frequency of corporal punishment used against Black students must be viewed in the context of larger societal trends. Black students in public schools face all kinds of discipline at higher rates than their white counterparts.<sup>93</sup> Some scholars have accused the in-school disciplinary practices of public schools, namely corporal punishment, as contributing to the “school-to-prison pipeline” that has harmed the Black community and contributed to the racial disparity in mass incarceration.<sup>94</sup>

One scholar called the use of corporal punishment against Black students “a holdover from slavery and from slavery’s ugly legacy of racial discrimination, and thus a particularly grave insult to African American students’ human dignity.”<sup>95</sup>

In Texas, the data reflect a disparate impact on students of color unlike anywhere else in the country.<sup>96</sup> A Child Development Research Center study, conducted at Texas Tech University, found that Black males are punished physically at the highest rate of any group of students.<sup>97</sup> Black girls “experience corporal punishment at a higher rate than female students of other races and at a higher rate than some male groups.”<sup>98</sup>

90. *Id.*

91. Maine is an interesting example of a state without a large conservative Protestant population that still utilizes corporal punishment. In fact, Maine is one of the least religious states in the nation. See Judy Harrison, *Got faith? Maine the least-religious state in the nation*, BANGOR NEWS DAILY (May 18, 2012), <https://bangordailynews.com/2012/05/18/news/got-faith-maine-the-least-religious-state-in-the-nation> [https://perma.cc/3L96-SZW3].

92. See Startz, *supra* note 87.

93. See Travis Riddle & Stacy Sinclair, *Racial disparities in school-based disciplinary actions are associated with county-level rates of racial bias*, 116 PNAS 8255, 8255 (April 2, 2019), <https://www.pnas.org/content/116/17/8255> [https://perma.cc/9ME8-Y9DF] (outlining that Black students are seven percent more likely than white peers to face in-school suspension).

94. See James L. Moore III, Donna Y. Ford & Fred A. Bonner II, *Prejudice ‘Strikes’ Again: Corporal Punishment is Hitting Black Students the Most*, DIVERSE EDUC. (June 23, 2019), <https://www.diverseeducation.com/demographics/african-american/article/15104937/prejudice-strikes-again-corporal-punishment-is-hitting-black-students-the-most> [https://perma.cc/65TP-7AB4].

95. Susan H. Bitensky, *The Poverty of Precedent for School Corporal Punishment’s Constitutionality under the Eighth Amendment*, 77 U. CIN. L. REV. 1327, 1408 (2009) (“The sorrow of children’s dehumanization by corporal punishment is scandalously exacerbated for African American students.”).

96. See Morgan Craven, *Stopping Harmful Corporal Punishment Policies in Texas*, 1 INTERCULTURAL DEV. RSCH. ASS’N 1, 2 (2021).

97. See *id.* at 3.

98. *Id.* (emphases omitted).

Consider the dignity and self-worth of these students. It is the duty of the Court to step in and mitigate the discrepancy in treatment. Both Congress and the Court have recognized that racial minorities are protected classes.<sup>99</sup> In the United States, race has often permeated culture wars; this is especially true in schools.<sup>100</sup> Today, debates over affirmative action in higher education, and how the country's history—from slavery, Jim Crow, to the modern Civil Rights Movement—have defined elections and divided communities.<sup>101</sup> All that said, the Court's jurisprudence on the issue of race had remained steadfast: to discriminate on the basis of racial identity, a governing body or official must have a compelling reason.<sup>102</sup> It would be a fairly rudimentary argument for the state to argue that they had a compelling interest in orderly schools. It would be a nearly impossible feat to successfully argue that the policy has been narrowly tailored, especially considering the many data points that indicate that Black students are far more likely to be hit or paddled in schools than their white peers.<sup>103</sup>

Equal protection claims would be dependent on the plaintiff in each case. For a claim to succeed, a plaintiff would have to overcome the high bar set by the Court in *Washington v. Davis*.<sup>104</sup> In *Davis*, the Court made clear that “our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.”<sup>105</sup> Any claimant would have to point out the history of racial oppression, and the lack of political power that students, particularly young students of color, have in comparison to the school officials that are charged with their care.<sup>106</sup>

99. 42 U.S.C. § 2000e (1964); *see also* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

100. *See* Jay Caspian Kang, *Can We Talk About Critical Race Theory?*, N.Y. TIMES (Nov. 11, 2021), <https://www.nytimes.com/2021/11/11/opinion/critical-race-theory.html> [<https://perma.cc/R42B-Z86C>].

101. *See, e.g.*, Anemona Hartocollis, *The Supreme Court Tactic That Aims to Kill Affirmative Action*, N.Y. TIMES (Nov. 11, 2021), <https://www.nytimes.com/2021/11/11/us/affirmative-action-harvard-unc.html> [<https://perma.cc/57C7-NAEF>]; *see also* Lisa Lerer, *Rough Nights for Democrats Exposes the Party's Weakness*, N.Y. TIMES (Nov. 14, 2021), <https://www.nytimes.com/2021/11/03/us/politics/democrats-virginia-governor-race.html> [<https://perma.cc/HDL3-ZJAV>] (“Perhaps most strikingly, the crushing setbacks for Democrats in heavily suburban Virginia and New Jersey hinted at a conservative-stoked backlash to the changing mores around race and identity championed by the party, as Republicans relentlessly sought to turn schools into the next front in the country's culture wars.”).

102. *See Johnson v. California*, 543 U.S. 499, 505 (2005) (holding that California Department of Corrections policy for racially segregating prisoners is subject to strict scrutiny).

103. *See Startz*, *supra* note 87; *see also* Harrison, *supra* note 91.

104. *See* 426 U.S. 229, 239 (1976).

105. *Id.* (emphasis omitted).

106. *See* Madeline Will, *Still Mostly White and Female: New Federal Data on the Teaching Profession*, EDUC. WEEK (Apr. 14, 2020), <https://www.edweek.org/leadership/still>

The totality of circumstances would make an equal protection claim the second-best avenue for overturning *Ingraham*.

## VII. PROTECTED CLASS: SPECIAL EDUCATION STUDENTS

Students with special needs already face daily struggles related to social development and learning in the classroom.<sup>107</sup> Corporal punishment not only humiliates students, but also has the potential to worsen physical and psychological conditions that many students already grapple with.<sup>108</sup>

Just as corporal punishment methods and offenses varied, students with disabilities have also been subjected to a wide range of physical reprimands.<sup>109</sup> This includes being hit with rulers, being pinched, being forcibly thrown to the floor, or being restrained in a way that causes serious bodily injury and bruising.<sup>110</sup> Injuries from corporal punishment have resulted in hospitalization, as well as other severe medical conditions like extensive blood clotting and whiplash.<sup>111</sup>

As if the health and psychological impacts were not enough, students with disabilities have been found to face corporal punishment more than the general student population.<sup>112</sup> In one Texas school district, corporal punishment was used exclusively on students with disabilities.<sup>113</sup>

For Autistic students, the danger of corporal punishment is similarly sinister.<sup>114</sup> Research on the long-term effects of corporal punishment on Autistic students shows the tendency of these students to become more aggressive in the school environment or even to become more prone to self-harm.<sup>115</sup> Parents have reported their Autistic children being forcibly restrained and then secluded in a

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-mostly-white-and-female-new-federal-data-on-the-teaching-profession/2020/04 [https://perma.cc/88W6-GNW5].

107. See Katherine Schaeffer, *As schools shift to online learning amid pandemic, here's what we know about disabled students in the U.S.*, PEW RSCH. (Apr. 23, 2020), https://www.pewresearch.org/fact-tank/2020/04/23/as-schools-shift-to-online-learning-amid-pandemic-heres-what-we-know-about-disabled-students-in-the-u-s [https://perma.cc/KX7R-GY4K].

108. See HUM. RTS. WATCH, IMPAIRING EDUCATION: CORPORAL PUNISHMENT OF STUDENTS WITH DISABILITIES IN U.S. PUBLIC SCHOOLS 5 (2009), https://www.hrw.org/report/2009/08/10/impairing-education/corporal-punishment-students-disabilities-us-public-schools# [https://perma.cc/S4WB-Q6TR].

109. *Id.* at 3.

110. *Id.*

111. *Id.* at 4.

112. *Id.* at 6 (“In Tennessee, for example, students with disabilities are paddled at more than twice the rate of the general student population.”).

113. S. POVERTY L. CTR. & CTR. FOR C.R. REMEDIES AT UCLA, *supra* note 62, at 28.

114. HUM. RTS. WATCH, *supra* note 108, at 5.

115. *Id.*

windowless room, as well as countless paddling episodes, smacking, regression in potty training, or instances where the children are thrown against walls.<sup>116</sup>

Children with autism often have communicative issues.<sup>117</sup> The Human Rights Watch study noted that “[a]ll children on the autistic spectrum demonstrate some degree of qualitative impairment of communication and reciprocal social interaction. Parents [they] spoke with felt physical trauma caused their children to regress developmentally.”<sup>118</sup> Many parents even pulled their children out of school, fearful that they would be unable to protect them from the violence inflicted by school officials.<sup>119</sup>

The intersection of race and disability status also highlights just how harmful public school corporal punishment practices are. In Texas, students with disabilities are subjected to corporal punishment at twice the rate of their general education classmates, while Black students with disabilities were punished at an even higher rate than similarly situated white students.<sup>120</sup>

To summarize, across the country, corporal punishment is not applied equally. It is used in nineteen states and outlawed in thirty-one.<sup>121</sup> Black students are spanked and paddled more often than white students, and students with disabilities are struck more often than their general education counterparts.<sup>122</sup> Besides the fact that the disparate use of the policy against certain segments of the student population treats similarly situated public school students quite differently, the potential effects of corporal punishment are long-lasting.<sup>123</sup> The American Academy of Pediatrics warned that students subjected to the practice may suffer from adverse self-image issues

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116. See Campbell F. Scribner, *School discipline has been controversial for centuries. But there is a solution.*, WASH. POST (Aug. 9, 2021, 6:00 AM), <https://www.washingtonpost.com/outlook/2021/08/09/school-discipline-has-been-controversial-centuries-there-is-solution/> [<https://perma.cc/JWR7-E5VZ>]; see also HUM. RTS. WATCH, *supra* note 108, at 6, 31, 43, 46.

117. See HUM. RTS. WATCH, *supra* note 108, at 19 n.43.

118. *Id.* at 46.

119. *Id.* at 50–51.

120. See Craven, *supra* note 96, at 3.

121. See Christian Spencer, *Spanking schoolchildren is legal in many parts of US—and some kids get hit more often*, THE HILL (May 19, 2021), <https://thehill.com/changing-america/enrichment/education/554426-spanking-schoolchildren-is-legal-in-many-parts-of-us/> [<https://perma.cc/BGD8-43Z6>].

122. See *id.* (noting that many Louisiana educators violated the state ban on corporal punishment as applied to students with special needs); see also HUM. RTS. WATCH, *supra* note 108, at 68; Craven, *supra* note 96, at 3.

123. See AM. ACAD. OF PEDIATRICS COMM. ON SCH. HEALTH, *Corporal Punishment in Schools*, 106 PEDIATRICS 343, 343 (2000), <https://publications.aap.org/pediatrics/article-abstract/106/2/343/62836/Corporal-Punishment-in-Schools> [<https://perma.cc/S49R-A7ES>].



and could become more prone to use violent or disruptive behavior in the classroom.<sup>124</sup> Researchers have found that children subjected to corporal punishment reflect higher levels of antisocial behavior.<sup>125</sup> These young people are more likely to lie, bully peers, break items, and intentionally disobey teachers.<sup>126</sup> Besides the individual effects prevalent for each of these students, the disruption to the schoolday and the potentially toxic school environment that results should also draw the concern of judges and policymakers.

Scholars have noted a causal link between corporal punishment and violent behavior.<sup>127</sup> This is similar to how children who view violent television or are raised in a home with domestic abuse are also more likely to exhibit higher levels of violent behavior later in life.<sup>128</sup> Corporal punishment has harmful effects when it is administered in the home; when it is carried out in school, in front of one's peers, this degradation is even more humiliating.<sup>129</sup> Hague writes, "[t]eachers are an example to children; children rely on and trust them."<sup>130</sup> Physical reprimands can damage the trust formed between teacher and pupil.<sup>131</sup>

What the Court must do is recognize the dignitary harms at stake. In *Lawrence v. Texas*, while declaring a Texas law criminalizing same-sex sodomy to be unconstitutional, the Supreme Court recognized that members of the LGBTQ+ community needed to have their dignitary interests, as free persons in a free society, protected.<sup>132</sup>

In upholding the Civil Rights Act of 1964, Justice Goldberg's concurrence discussed "the deprivation of personal dignity" that was threatened when Black Americans could not enter establishments in the South and receive public accommodations on equal footing with their white peers.<sup>133</sup>

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124. *Id.*

125. Deana Pollard, *Banning Child Corporal Punishment*, 77 TUL. L. REV. 575, 603–06 (2003).

126. *Id.*

127. David R. Hague, Comment, *The Ninth Amendment: A Constitutional Challenge to Corporal Punishment in Public Schools*, 55 U. KAN. L. REV. 429, 433–34 (2007).

128. *Id.* at 433.

129. Dupper & Montgomery Dingus, *supra* note 53, at 245 ("The humiliation that accompanies the experience of corporal punishment in schools may reduce a child's ability to problem solve rationally; make a child more aggressive, defiant, and oppositional; and further inhibit a child's ability to solve problems effectively." (citation omitted)).

130. Hague, *supra* note 127, at 434.

131. *See id.* at 435.

132. *See Lawrence v. Texas*, 539 U.S. 558, 567 (2003) ("It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.").

133. *See Heart of Atlanta Motel v. United States*, 379 U.S. 241, 291–92 (1964) (Goldberg, J., concurring).

Personal dignity also made appearances in cases protecting a person's right to choose to terminate their pregnancy,<sup>134</sup> as well as the Supreme Court ruling eliminating state prohibitions on same-sex marriage.<sup>135</sup>

With the plethora of rulings recognizing the potential harms, the time has come for the Court to overturn *Ingraham* and recognize the dignitary harms faced by public school students who are subject to corporal punishment. Until now, “[t]he Court has not fully appreciated that corporal punishment, compelled administration of antipsychotic medication, forced blood drawing, and body-cavity searches all involve the same violation: the state using its power to commit an invasion of a person's body that under the common law would clearly be a tort.”<sup>136</sup> Children are the most vulnerable members of society and are worthy of dignitary protection.<sup>137</sup> Students

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134. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992). While this Note does not address abortion or the Court's ruling in *Dobbs v. Jackson Women's Health Organization*, the dissenters in that decision pointedly noted that by overturning *Roe v. Wade* and *Casey*, women “will experience the profound loss of autonomy and dignity that coerced pregnancy and birth always impose.” 597 U.S. \_\_\_, 40 (2022) (Breyer, J., Kagan, J., Sotomayor, J., dissenting). This Note alludes to the Fourteenth Amendment analysis utilized in *Lawrence* and *Obergefell v. Hodges*, which is no longer the prevailing view of the Court. See *Dobbs*, 597 U.S. at 5 (2022) (“The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be ‘deeply rooted in this Nation's history and tradition’ and ‘implicit in the concept of ordered liberty.’ The right to abortion does not fall within this category. Until the latter part of the 20th century, such a right was entirely unknown in American law.”) (citation omitted); see also *id.* at 3 (Thomas, J., concurring) (“For that reason, in future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is ‘demonstrably erroneous,’ we have a duty to ‘correct the error’ established in those precedents.”) (citation omitted). That reality is why the Equal Protection Clause is a vehicle for overturning *Ingraham* as applied but would make a facial challenge tougher under the substantive due process framework the Court has enunciated.

135. See *Obergefell v. Hodges*, 576 U.S. 644, 666 (2015). But see Jeffrey Rosen, *The Dangers of a Constitutional ‘Right to Dignity’*, THE ATLANTIC (Apr. 29, 2015), <https://www.theatlantic.com/politics/archive/2015/04/the-dangerous-doctrine-of-dignity/391796> [<https://perma.cc/J9GM-JN2N>] (noting that Justice Kennedy often uses the dignitary language in decisions as sweeping as *Casey* and *Obergefell*, but warning about what the creation of a right to dignity could be used to create next with the propensity for judicial discretion by the Supreme Court).

136. Caitlin Borgmann, *The Constitutionality of Government Imposed Bodily Intrusions*, 4 U. ILL. L. REV. 1060, 1061 (2014).

137. See *Maryland v. Craig*, 497 U.S. 836, 852, 857–58 (1990) (limiting the Sixth Amendment's Confrontation Clause when the witness was a child and the accused had perpetuated a severe harm on the child); see also *New York v. Ferber*, 458 U.S. 747, 757 (1982) (“[W]e have sustained legislation aimed at protecting the physical and emotional

with disabilities are already more susceptible to these dignitary harms.<sup>138</sup> In the eyes of federal law, individuals with physical and mental disabilities have been classified as a protected class.<sup>139</sup> Since students with disabilities face corporal punishment more often than their peers, and the short and long-term ramifications are more detrimental, a claimant would have a strong case to make that, under strict scrutiny, corporal punishment policies should accordingly be struck down.<sup>140</sup> Because both Equal Protection challenges are dependent on claimant demographics,<sup>141</sup> the Eighth Amendment remains the strongest argument for *Ingraham*'s overturning. That said, the Fourteenth Amendment exists to ensure equal protection of the law and equal treatment by state actors.<sup>142</sup> Section 1983 claims by students of color or students with disabilities should trigger strict scrutiny, and at a minimum could lead to district policies being struck down.<sup>143</sup> Better yet, it could lead the Court to see that—considering the changing times—*Ingraham* is no longer good law. In a new, post-coronavirus world, students in the public education system are already grappling with serious issues.<sup>144</sup> Stress from virtual learning protocols, socialization issues, fears of gun violence, learning loss, and a shortage of qualified teachers all threaten to leave irreparable harm on the students who depend on public education to give them the building blocks for a successful life.<sup>145</sup> The threat of physical discipline needs to be removed once and for all, to make schools not

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well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights.” (citation omitted)).

138. See HUM. RTS. WATCH, *supra* note 108, at 26–27.

139. See, e.g., 20 U.S.C.A. § 1400 (West); 42 U.S.C. § 12101 (West).

140. See AM. ACAD. OF PEDIATRICS COMM. ON SCH. HEALTH, *supra* note 123, at 343; see also HUM. RTS. WATCH, *supra* note 108, at 4 (denoting that students with disabilities became more aggressive or prone to self-harm after corporal punishment in school).

141. See James B. Miller, Note, *The Disabled, the ADA, and Strict Scrutiny*, 6 ST. THOMAS L. REV. 393, 395 (1994).

142. See *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (“The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.”) (citation omitted).

143. See Miller, *supra* note 141, at 395–96; see also *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 467 (1985) (Marshall, J., concurring in part) (“Heightened judicial scrutiny of action appearing to impose unnecessary barriers to the [disabled] is required in light of increasing recognition that such barriers are inconsistent with evolving principles of equality embedded in the Fourteenth Amendment.”). For a discussion of the denial of suspect classification status, see Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. PA. J. CONST. L. 739, 778 (2014).

144. See Laura Meckler, *Public education is facing a crisis of epic proportions*, WASH. POST (Jan. 30, 2022, 6:00 AM), <https://www.washingtonpost.com/education/2022/01/30/public-education-crisis-enrollment-violence> [<https://perma.cc/JV3P-X2LP>].

145. See *id.*; see also *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. \_\_\_, 4–5 (2022) (Breyer, J., dissenting) (discussing mass shootings at elementary schools in Uvalde, Texas, and Newtown, Connecticut).

a place that students fear attending—but one that helps them develop and succeed.

### VIII. HOW WE GOT HERE: UNDERFUNDED RURAL SCHOOLS AND CORPORAL PUNISHMENT POLICIES

While punishment is administered by school officials with a degree of subjectivity, the context in which our public education system has developed in this country cannot simply be ignored.

America's public schools are underfunded.<sup>146</sup> This problem is particularly acute in states where corporal punishment is most frequently utilized.<sup>147</sup> Accordingly,

[p]overty and [a] lack of resources help create conditions that lead to corporal punishment in schools. Teachers may have overcrowded classrooms and lack resources such as counselors to assist with particularly disruptive students or classroom dynamics. These conditions do not facilitate effective discipline, and they may explain why teachers feel it is necessary to subject students to beatings, but they do not excuse such actions.<sup>148</sup>

Some students in underperforming (often rural) schools are already subject to poor conditions, such as a lack of ventilation, a shortage of certified teachers, and materials that are not suitable for modern curricular standards.<sup>149</sup> While these students are already facing headwinds in the way of their success, corporal punishment serves as another hurdle. In a statement before the U.S. House Education and Labor Subcommittee on Healthy Families and Communities, the ACLU noted that school districts that paddled students the most saw the least amount of improvement from their high schoolers taking the ACT.<sup>150</sup> States that had long eliminated the practice saw disproportionately better ACT scores from their students.<sup>151</sup>

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146. THE CENTURY FOUND., *CLOSING AMERICA'S EDUCATION FUNDING GAPS* (2020), <https://tcf.org/content/report/closing-americas-education-funding> [<https://perma.cc/T4GD-FJPJ>].

147. *See id.*

148. HUM. RTS. WATCH, *A VIOLENT EDUCATION: CORPORAL PUNISHMENT OF CHILDREN IN U.S. PUBLIC SCHOOLS* 8–9 (2008), [https://www.aclu.org/sites/default/files/field\\_document/2008.08\\_a\\_violent\\_education\\_report\\_0.pdf](https://www.aclu.org/sites/default/files/field_document/2008.08_a_violent_education_report_0.pdf) [<https://perma.cc/37DR-RSRN>].

149. *See* Casey Parks, *The Tragedy of America's Rural Schools*, N.Y. TIMES (Sept. 9, 2021), <https://www.nytimes.com/2021/09/07/magazine/rural-public-education.html> [<https://perma.cc/8JZU-F96Y>].

150. LAURA W. MURPHY, DEBORAH J. VAGINS & ALISON PARKER, ACLU & HUM. RTS. WATCH, *STATEMENT BEFORE THE HOUSE EDUCATION AND LABOR SUBCOMMITTEE ON HEALTHY FAMILIES AND COMMUNITIES* 5 (2010), [https://www.hrw.org/sites/default/files/related\\_material/CorpPunishStatement\\_041510.pdf](https://www.hrw.org/sites/default/files/related_material/CorpPunishStatement_041510.pdf) [<https://perma.cc/AU84-6933>].

151. *Id.*

Many school districts across the country are already feeling the financial pinch of tight budgets and an unwillingness by legislators to raise teacher pay or place an emphasis on public education in rural communities.<sup>152</sup> To the contrary, many state funding formulas leave these districts without the necessary resources for them to provide students with an adequate education.<sup>153</sup> Corporal punishment only exacerbates the problems that already undergird the entire public education system in this country.<sup>154</sup> Studies indicate that in some rural communities, corporal punishment policies are actually a response to a perceived lower aspirational drive on behalf of the student body.<sup>155</sup> Rather than boost their self-esteem or encourage them to work to improve their situation, being paddled, struck, and beaten only creates a hostile learning environment. When students constantly fear physical reprisal, they may see their future academic aspirations extinguished.<sup>156</sup> While the data are not entirely conclusive, reporting from state departments of education across the South reflect a general trend that rural districts utilize paddling and corporal punishment more than their suburban, urban, and exurban counterparts.<sup>157</sup>

To summarize, corporal punishment is used against Black students more than their white counterparts, against students with disabilities more than their non-classified peers, in nineteen states primarily in the South, and in rural districts more than their neighbors.<sup>158</sup> Corporal punishment has an adverse effect on the social, mental, and emotional development of children.<sup>159</sup> It has been linked

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152. See Parks, *supra* note 149.

153. See *id.*

154. Seunghye Han, *Corporal Punishment and Student Outcomes in Rural Schools*, 13 EDUC. RSCH. FOR POL'Y & PRAC. 221, 229 (2014).

155. *Id.*

156. *Id.*

157. *Corporal Punishment in Southern Schools: Good News, Bad News, and News That's Pretty Ugly*, *Teachers College Record*, NC CHILD (Aug. 2013), <https://ncchild.org/corporal-punishment-southern-schools-good-news-bad-news-news-thats-pretty-ugly-teachers-college-record> [<https://perma.cc/QVZ9-QS9G>].

158. See Bitensky, *supra* note 95, at 1408; Spencer, *supra* note 121; HUM. RTS. WATCH, *supra* note 108, at 2; NC CHILD, *supra* note 157.

159. See Han, *supra* note 154, at 229; Randolph Kip Becker, Note, *The Eighth Amendment and Our Evolving Standards of Decency: A Time for Re-Evaluation*, 3 SUFFOLK U. L. REV. 616, 626–27 (1969) (“The *Trop* test is a necessary test to be applied to all statutes and amendments. As our societal standards evolve, so must the laws by which we live. One cannot go forward without the other.”); see also Tara García Mathewson, *Reporter's notebook: Taking a deeper look at corporal punishment data*, HECHINGER REP. (June 14, 2022), <https://hechingerreport.org/reporters-notebook-taking-a-deeper-look-at-corporal-punishment-data> [<https://perma.cc/NJ7T-YBSE>] (noting that “Black students . . . and students with disabilities are overrepresented among those hit” in public schools).

to both alcohol and drug abuse.<sup>160</sup> This alone, in line with the evolving morality and standards of decency that constitutional law has recognized, should be enough to overturn *Ingraham*.<sup>161</sup> That certain demographic groups face the punishment more frequently only strengthens that case.<sup>162</sup>

#### IX. THE FINAL OPTION: THE FOURTH AMENDMENT'S RECOURSE

For the few scholars who have argued for *Ingraham*'s repudiation, the Fourth Amendment has been offered as a potentially valuable device.<sup>163</sup> Mitchell writes that the Court's Fourth Amendment jurisprudence in public schools provides a more favorable standard for claimants. In *New Jersey v. TLO*, the Court acknowledged that teachers and administrators were state actors when performing searches of students under their control.<sup>164</sup> This cut a hole in the *in loco parentis* doctrine's application in schools.<sup>165</sup> More notably, the Court stated that any search of a student should be conducted only if it is reasonable.<sup>166</sup> A reasonableness test will evaluate if the search was "reasonably related" to the suspicion that the school official had that the student was committing a wrong.<sup>167</sup>

The Fourth Amendment has already been found to apply in corporal punishment cases. Both the Seventh and Ninth Circuits have used a reasonableness analysis under the Fourth Amendment to rule on § 1983 excessive corporal punishment claims.<sup>168</sup> The Fourth Amendment analysis provides one obvious advantage: it seems to account for proportionality.<sup>169</sup> This is in sharp contrast to the Court's Eighth Amendment jurisprudence, which has largely cast aside proportionality as a factor in the analysis of any constitutional violation.<sup>170</sup>

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160. Hague, *supra* note 127, at 434.

161. See CONG. RSCH. SERV., R45129, MODES OF CONSTITUTIONAL INTERPRETATION 15–16 (2018).

162. See HUM. RTS. WATCH, *supra* note 108, at 2.

163. See Mitchell, *supra* note 7, at 328–30.

164. 469 U.S. 325, 336 (1985).

165. See *id.* ("If school authorities are state actors for purposes of the constitutional guarantees of freedom of expression and due process, it is difficult to understand why they should be deemed to be exercising parental rather than public authority when conducting searches of their students.").

166. *Id.* at 341.

167. *Id.*

168. Mitchell, *supra* note 7, at 337–38.

169. See *id.*

170. Harmelin v. Michigan, 501 U.S. 957, 981 (1991) ("The early commentary on the Clause contains no reference to disproportionate or excessive sentences, and again indicates that it was designed to outlaw particular *modes* of punishment."). This Note

The shortcomings of the Fourth Amendment argument are clear: the Amendment would provide a strong vehicle for as applied challenges but not facial challenges.<sup>171</sup> An Eighth Amendment challenge could account for evolving standards of decency in society and progress in the research and data in the field of child psychology. A Fourteenth Amendment Equal Protection Clause challenge would be largely data driven. Such a claim would allow courts to look at demographic data, cultural and societal trends, and the overall long-term ramifications for students of color, girls of color, and special education students.<sup>172</sup>

A Fourth Amendment challenge, and a “reasonableness” test, would still afford judges too much discretion on a case-by-case basis. Mitchell also acknowledges that the text of the Fourth Amendment does confine it more to situations involving law enforcement and criminal investigations.<sup>173</sup> The Eighth Amendment contains no explicit text linking the amendment to criminal punishments.<sup>174</sup> Thus, judges would not have to be as creative in justifying its use. The Fourth Amendment is a viable, if not ideal, mechanism for challenging corporal punishment in public schools. The textual and factual shortcomings make it the third best option, behind the Eighth and Fourteenth Amendments.

### CONCLUSION

Constitutional law, the culture wars, race relations, and bodily autonomy surround the debate over corporal punishment in America’s public schools. In recent years, we have seen the public school system come under more scrutiny from Congress,<sup>175</sup> the media,<sup>176</sup> and from parents in communities across the United States.<sup>177</sup> In a

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argues that this is incorrect as a matter of constitutional interpretation. See Scott K. Petersen, Note, *The Punishment Need Not Fit the Crime: Harmelin v. Michigan and the Eighth Amendment*, 20 PEPP. L. REV. 747, 789–92 (1993).

171. See David L. Faigman, *Defining Empirical Frames of Reference in Constitutional Cases: Unraveling the As-Applied Versus Facial Distinction in Constitutional Law*, 36 HASTINGS CONST. L. Q. 631, 651 (2009).

172. See HUM. RTS. WATCH, *supra* note 108, at 26–28.

173. See Mitchell, *supra* note 7, at 339.

174. See *Ingraham v. Wright*, 430 U.S. 651, 685–88 (1977) (White, J., dissenting).

175. See Susan Ferris, *Harsh school discipline gets more scrutiny in Congress*, CTR. FOR PUB. INTEGRITY (Mar. 14, 2014), <https://publicintegrity.org/education/harsh-school-discipline-gets-more-scrutiny-in-congress> [https://perma.cc/8RPW-7VCT].

176. See Erica L. Green, *The Students Returned, but the Fallout From a Long Disruption Remained*, N.Y. TIMES (Dec. 24, 2021), <https://www.nytimes.com/2021/12/24/us/politics/covid-school-reopening-teen-mental-health.html> [https://perma.cc/68KD-6FNJ].

177. Brad Wilcox & Max Eden, *Youngkin Makes the GOP the Parents’ Party*, WALL ST. J. (Nov. 3, 2021, 12:21 PM), <https://www.wsj.com/articles/youngkin-parents-critical-race>

federalist country, where states and localities retain significant power to forge education policy, issues can vary. Some states have higher high school graduation rates.<sup>178</sup> Some cities have higher drop-out rates.<sup>179</sup> There is a debate on the role of public money in private education, namely in the realm of religious schools.<sup>180</sup> States have been left to their own devices in many areas of public policy; corporal punishment in schools should not fall into that category.

The Supreme Court has the duty to step in when a circuit split emerges.<sup>181</sup> On an issue like corporal punishment, where state level changes have been slow-moving, that need is even more pervasive.<sup>182</sup> *Ingraham* was decided in 1977.<sup>183</sup> It is out of date and should be overturned.

Positive discipline can achieve the same goals of a more orderly and safe school environment, without the long term emotional and psychological ramifications for students.<sup>184</sup> Disciplinary actions “teach[] children what is proper and expected; trains and equips them with the knowledge, skills[,] and abilities to make appropriate choices; and guides them in making those choices using consistent, loving, respectful[,] and age-appropriate consequences.”<sup>185</sup>

In *Tinker v. Des Moines*, the Supreme Court made clear that students do not shed their constitutional rights when they enter the schoolhouse gates.<sup>186</sup> In *TLO*, the Court said that the *in loco parentis* doctrine did not preclude a finding that teachers and administrators

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178. See Emma Kerr & Ilana Kowarski, *See High School Graduation Rates By State*, U.S. NEWS & WORLD REP. (Apr. 26, 2022), <https://www.usnews.com/education/best-high-schools/articles/see-high-school-graduation-rates-by-state> [https://perma.cc/QCB4-G7NJ].

179. Sam Dillon, *Large Urban-Suburban Gap Seen in Graduation Rates*, N.Y. TIMES (Apr. 22, 2009), <https://www.nytimes.com/2009/04/22/education/22dropout.html> [https://perma.cc/NR89-X62U].

180. See Adam Liptak, *Supreme Court Seems Wary of Ban on State Aid to Religious Schools*, N.Y. TIMES (Dec. 8, 2021), <https://www.nytimes.com/2021/12/08/us/politics/supreme-court-religious-schools-maine.html#:~:text=The%20case%2C%20Carson%20v.,to%20students%20attendin%20private%20schools> [https://perma.cc/2V22-EFTL].

181. See LEGAL INFO. INST., *supra* note 41.

182. See Gershoff & Font, *supra* note 48, at 18 (noting that corporal punishment bans have virtually ceased post-2011).

183. *Ingraham v. Wright*, 430 U.S. 651, 651 (1977).

184. See Allison Stevens, *Positive Discipline as a Part of Effective Classroom Management* 8 (Apr. 27, 2018) (Honors Thesis, Western Michigan University), [https://scholarworks.wmich.edu/honors\\_theses/2973?utm\\_source=scholarworks.wmich.edu%2Fhonors\\_theses%2F2973&utm\\_medium=PDF&utm\\_campaign=PDFCoverPages](https://scholarworks.wmich.edu/honors_theses/2973?utm_source=scholarworks.wmich.edu%2Fhonors_theses%2F2973&utm_medium=PDF&utm_campaign=PDFCoverPages) [https://perma.cc/JD45-ECR6].

185. Theresa Slim, *Positive discipline: Punishment v. discipline*, MICH. STATE UNIV. EXTENSION (Aug. 30, 2013), [https://www.canr.msu.edu/news/positive\\_discipline\\_punishment\\_vs\\_discipline](https://www.canr.msu.edu/news/positive_discipline_punishment_vs_discipline) [https://perma.cc/HH8V-N4ES].

186. 393 U.S. 503, 506 (1969).



are state actors.<sup>187</sup> Thus, corporal punishment in schools is state-perpetuated violence.<sup>188</sup> It bears noting, that “[s]chools are the only public, tax-payer funded institution that allows legal physical punishment; it is illegal in prisons, the military, child care programs[,] and mental health facilities. It is illegal to hit an animal, but many school personnel are provided with immunity in the instance of physical punishment.”<sup>189</sup>

It is long past time for the Court’s holding in *Ingraham* to be re-examined and repudiated.<sup>190</sup> Whatever constitutional avenue is taken, all should lead to the Court’s recognition that corporal punishment has no place in America’s public schools.

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187. *New Jersey v. T.L.O.*, 469 U.S. 325, 336 (1985) (“If school authorities are state actors for purposes of the constitutional guarantees of freedom of expression and due process, it is difficult to understand why they should be deemed to be exercising parental rather than public authority when conducting searches of their students.”).

188. See Susan H. Bitensky, *An Analytical Ode to Personhood: The Unconstitutionality of Corporal Punishment of Children under the Thirteenth Amendment*, 53 SANTA CLARA L. REV. 1, 33–35 (2013).

189. UNIV. OF MO. CTR. FOR FAM. & POL’Y RSCH., CORPORAL PUNISHMENT IN SCHOOLS (2011), <https://hdfs.missouri.edu/wp-content/uploads/2020/07/corporalpunishment.pdf> [<https://perma.cc/9WUA-F4WJ>].

190. Mark Walsh, *Appeals Court Rejects Latest Challenge to Corporal Punishment*, EDUC. WEEK (Mar. 27, 2014), <https://www.edweek.org/education/appeals-court-rejects-latest-challenge-to-corporal-punishment/2014/03> [<https://perma.cc/5BG8-TP9S>] (quoting the Fifth Circuit in a 2014 decision, “[t]o the extent that *Ingraham* left open an escape hatch, it is available for the Supreme Court, and not this court, to use . . .”). See *Clayton ex rel. Hamilton v. Tate Cnty. Sch. Dist.*, No. 13-60608, 2014 WL 1202515, at \*4 (5th Cir. Mar. 25, 2014).

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