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EIGHTH AMENDMENT-CORPORAL PUNISHMENT

Ingraham v. Wright, 97 S. Ct. 1401 (1977).

In *Ingraham v. Wright*,[1] the Supreme Court held that the paddling of school children, without notice or hearing, was not violative of either the eighth amendment's prohibition against cruel and unusual punishment[2] or the fourteenth amendment's[3] requirements for due process of law. In reaching this decision, the Court limited the scope of the eighth amendment to instances of *criminal* punishment. Furthermore, although the Court found that a fourteenth amendment "liberty interest" was implicated,[4] it held that the openness of the school environment, along with the availability of subsequent civil and/or criminal remedies,[5] was sufficient to meet the requirements of due process.

I.

James Ingraham and Roosevelt Andrews,[6] two junior high school students, charged various school administrators[7] with violations of their constitutional rights under 42 U.S.C. §§ 1981–88. The suit arose as the result of corporal punishment inflicted upon both students by school personnel. Ingraham had been paddled more than twenty times because he was slow to respond to his teacher's instructions.[8] As a result of the paddling, he was severely bruised and was forced to miss eleven days of school. Andrews was likewise paddled for minor infractions. Twice he was struck on his arms, once so severely that he lost full use of his arm for a week.

The students filed a three count complaint against the school officials. Counts one and two were for individual damages resulting from the paddlings. Count three was a class action seeking declaratory and injunctive relief against the use of corporal punishment in the Dade County public schools.[9]

After hearing the students' evidence,[10] the district court granted the school administrators' motion to dismiss on all three counts. Although the court assumed the credibility of the students' testimony, it found no constitutional basis for relief.[11] The court held that the eighth

[1] 97 S. Ct. 1401 (1977).

[2] U.S. CONST. amend. VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[3] U.S. CONST. amend. XIV: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

[4] 97 S. Ct. at 1413–14. The Court cites Rochin v. California, 342 U.S. 165 (1962), for the proposition that freedom from bodily restraint and punishment has long been viewed as a fundamental right which the state cannot deprive without due process of law.

[5] A teacher may be subject to criminal penalties if corporal punishment is administered maliciously. FLA. STAT. ANN. § 827.03(3) provides: "Whoever maliciously punishes a child shall be guilty of a felony." *See* 97 S. Ct. at 1408 n.28 for a review of state tort actions.

[6] The petitioners were students at Charles R. Drew Junior High School in Dade County, Florida. Ingraham was an eighth grade student, and Andrews was in the ninth grade. *Id.* at 1403. Because the students were minors, the complaint was filed in the names of Eloise Ingraham (James's mother) and Willie Everett (Roosevelt's father). *Id.* at 1403 n.1.

[7] The administrators were Willie J. Wright, principal at Drew Junior High School, Lemmie Deliford, assistant principal, Solomon Barnes, assistant to Wright, and Edward L. Whigham, superintendent of the Dade County School System. The Dade County School Board had also been named as a defendant, but the court of appeals dismissed that part of the suit for want of jurisdiction because the Board was not amenable to suit under 42 U.S.C. §§ 1981–88. 525 F.2d 909, 912 (5th Cir. 1976) (en banc).

[8] The paddling occurred in the principal's office while Ingraham was held over a table. 97 S. Ct. at 1405.

[9] The district court certified the class under FED. R. CIV. P. 23(b)(2) and (c)(1) as follows: "All students of the Dade County School system who are subject to the corporal punishment policies issued by the Defendant, Dade County School Board. . . . " One student was specifically exempted from the class by request.
Id. at 1403 n.2.

[10] Sixteen other students also testified that the regime at Drew Junior High School was exceptionally harsh. 97 S. Ct. at 1405. For a summary of these student's experiences, see 498 F.2d 248, 255–59 (5th Cir. 1974).

[11] Counts one and two were dismissed because the evidence was insufficient to go to a jury. Count three was dismissed under FED. R. CIV. P. 41(b) on the

amendment was applicable to corporal punishment in schools. The case was dismissed only because the court found that these specific paddlings were neither too severe, nor sufficiently arbitrary to reach the constitutional level of cruel and unusual punishment.

On appeal, the circuit court reversed.[12] In reaching its decision, the circuit court also found the eighth amendment to be applicable to corporal punishment in schools. This conclusion was based on a "purposive" analysis of the eighth amendment's scope which hinged the application of the eighth amendment to a finding that a punishment is *penal*, regardless of whether it is also criminal.[13] Although the court concluded that the eighth amendment was applicable, it refused to hold that corporal punishment in the schools was a per se violation of that amendment.[14] Rather, the court found that the school district's Policy 5144[15] violated the eighth amendment as applied,[16] and that the paddlings were cruel and unusual punishment because they were grossly disproportionate to the offense charged.[17]

The circuit court also found that the administration of corporal punishment to Ingraham and Andrews violated the fourteenth amendment's due process requirements. The court noted that Policy 5144 contained the sufficient advance procedural safeguards of notice and investigation of disputed charges.[18] However, in application, the court found that neither the letter nor the spirit of 5144 had been followed.

Upon rehearing, the circuit court en banc reinstated the judgement of the district court.[19]

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ground that the facts and law presented no right to relief. *Id.* at 253.

[12] 498 F.2d 248 (5th Cir. 1974).

[13] *See id.* at 259 n.20 (quoting Trop v. Dulles, 356 U.S. 86, 96 (1958)). This approach was followed by Justice White in his dissenting opinion in *Ingraham*. 97 S. Ct. at 1419 (White, J., dissenting).

[14] 498 F.2d at 260. The court found that the widespread use of corporal punishment in schools indicates that it is acceptable to contemporary society. *See* Trop v. Dulles, 356 U.S. 86 (1958) (the eighth amendment draws its meaning from "evolving standards of decency").

[15] Policy 5144 provided:

> Punishment: Corporal Punishment: Punishment in the general sense is the inflicting of a penalty for an offense. Corporal punishment is generally applied to the body of the offender or is physical punishment . . . and is administered as a means of changing the behavior of the student. Therefore, it is important to analyze whether or not this goal will be accomplished by such action.
>
> Corporal punishment may be used in the case where other means of seeking cooperation from the student have failed. If it appears that corporal punishment is likely to become necessary, the teacher must confer with the principal. The principal will determine the necessity for corporal punishment and designate the time, place, and the person to administer said punishment. In any case, the student should understand clearly the seriousness of the offense and the reason for the punishment. Care should be taken that the period of time between the offense and the punishment is not so long as to cause undue anxiety in the pupil. The punishment must be administered in kindness and in the presence of another adult, at a time and under conditions not calculated to hold the student up to ridicule or shame.
>
> In the administering of corporal punishment, no instrument shall be used that will produce physical injury to the student, and no part of the body above the waist or below the knees may be struck. The person administering the corporal punishment must realize his own personal liabilities if the student being given corporal punishment is physically injured.
>
> Corporal punishment should never be administered to a student whom school personnel know to be under psychological or medical treatment unless there has been a pre-conference with the school psychologist or the physician.

498 F.2d at 254 n.5.

[16] The court adopted similar reasoning to that of Justice (then Judge) Blackmun in Jackson v. Bishop, 404 F.2d 571, 579–80 (8th Cir. 1968), where he recognized that no rule or regulation could successfully prevent abusive corporal punishment of prisoners, no matter how it is drawn, because these rules are frequently not observed, and are easily circumvented. All these problems exist to a lesser degree in schools, but there is always the danger of a teacher acting in the heat of anger. *Id.* at 264. *See also* Note, 6 HARV. C.R.-C.L.L. REV. 583, 585 (1971).

[17] *Id. See* Weems v. United States, 217 U.S. 349 (1910) (15 years imprisonment and other penalties were excessive for falsifying an official document). This was the first case to hold that the eighth amendment prohibits excessive punishments as well as tortuous, barbaric punishments.

[18] *Id.* at 268. The relevant portions of 5144 provided:

> If it appears that corporal punishment is likely to become necessary, the teacher must confer with the principal. . . . In any case, the student should understand clearly the seriousness of the offense and the reason for the punishment. . . . The punishment must be administered in kindness and in the presence of another adult . . . .

[19] 525 F.2d 909 (5th Cir. 1976) (en banc). In a jurisdictional question, the school board was dismissed from the suit. See note 7 *supra*.

Initially, the court concluded on the basis of history and judicial interpretations, that the scope of the eighth amendment has been limited to instances of criminal punishment.[20] Because corporal punishment in schools is not criminal in nature, the court concluded that the eighth amendment was inapplicable in a school setting.

The court also held that the due process clause does not require schools to conduct prepaddling hearings. It was said that the openness of the school environment prevents abuse of corporal punishment to such an extent, that the cost of any judicially imposed hearing requirement would greatly outweigh the benefits.

II.

The Supreme Court granted certiorari to address both the eighth amendment and fourteenth amendment issues. The Court's majority opinion reiterated the reasoning of the whole circuit court, and it affirmed the dismissal of the suit.

Mr. Justice Powell's majority opinion[21] initially addressed the eighth amendment issue. He began with a review of the history of the acceptance of corporal punishment in schools. He noted that despite the unconstitutionality of corporal punishment as a means of maintaining prison discipline,[22] it was still widely utilized in schools. Although professional and public opinion has been sharply divided on the practice of corporal punishment in the schools, Justice Powell found no trend toward its elimination.[23] He observed that the prevailing rule allowed a teacher or administrator to use any reasonable force.[24] If the force exerted is excessive or unreasonable, however, the teacher is subject to civil and/or criminal liability in most states.[25] Justice Powell concluded from his survey of corporal punishment in the schools that there is both historical and contemporary approval of reasonable corporal punishment.[26]

Justice Powell then considered whether the eighth amendment's scope was limited to criminal punishment, thereby precluding its application in the non-criminal school setting. First, he looked at the text of the amendment itself,[27] and concluded that because bail, fines and punishments are traditionally associated with the criminal process, application of the amendment should be limited to criminal punishments. Justice Powell also believed that the history of the amendment supported the criminal punishments limitation. The origins of the eighth amendment date back to at least seventeenth century England and the English Bill of Rights of 1689.[28] Justice Powell concluded from the language of that document and judicial commentaries that the English Bill of Rights

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[20] *Id.* at 913. This is the criminal/non-criminal distinction which was adopted by Justice Powell's majority decision in *Ingraham*. This distinction arises from the fact that the eighth amendment's protection has usually been invoked in criminal cases only. The Fifth Circuit refused to accept the "purposive" analysis as controlling because it had only been applied in cases involving *criminal* punishments. *Id.* at 913 n.2.

[21] Joining Justice Powell in the majority were Chief Justice Burger, and Justices Rhenquist, Blackmun and Stewart.

[22] *See* Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968).

[23] 97 S. Ct. at 1407 nn.16–18.

[24] *Id.* at 1407–08, 1412. *See, e.g.*, FLA. STAT. ANN. § 232.27:

> Each teacher or other member of the staff of any school shall assume such authority for the control of the pupils as may be assigned to him by the principal and shall keep good order in the classroom and in other places in which he is assigned to be in charge of pupils, but he shall not inflict corporal punishment before consulting the principal or teacher in charge of the school, and in no case shall such punishment be degrading or unduly severe in its nature.

See generally RESTATEMENT (SECOND) OF TORTS §§ 7(2), 153(2); 1 F. HARPER & F. JAMES, THE LAW OF TORTS 290 (1956); W. PROSSER, LAW OF TORTS 136–37 (4th ed., 1971); Proehl, *Tort Liability of Teachers*, 12 VAND. L. REV. 723, 734–38 (1959). Many states have preserved the common law privlege to use reasonable force. *See* 97 S. Ct. at 1408 nn.23 & 28. Only Massachusetts and New Jersey have totally prohibited all corporal punishment. *See* MASS. GEN. LAWS ANN. ch. 71, § 37G (West 1976–77 Supp.); N.J. STAT. ANN. § 18A: 6-1 (West 1968)!

[25] See note 5 *supra*.

[26] 97 S. Ct. at 1407–08.

[27] *Id.* at 1408; *see* note 2 *supra*.

[28] The preamble of the English Bill of Rights mentions that the imposition of excessive bail, excessive fines, and "illegal and cruel" punishment in *criminal* cases must be prevented. R. PERRY, SOURCES OF OUR LIBERTY 246 (1959). Historians differed as to the reasons which prompted the drafting of the Bill of Rights. One view holds that the eighth amendment was largely a reaction to the "Bloody Assize," the treason trials and mass executions of 1685. *See* I. BRANT, THE BILL OF RIGHTS 155 (1965). Another view looks to the perjury conviction of, and substantial sentence levied upon Titus Oates, Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 852–60 (1969).

expressed the English concern about judicial enforcement of criminal laws.[29]

It was the English prohibition against illegal and cruel punishment which was eventually adopted as our eighth amendment. Therefore, Justice Powell looked to the records of the Constitutional Convention to determine if the American Framers also intended to limit the eighth amendment to judicial enforcement of criminal laws. He reviewed the scanty debates about the eighth amendment[30] and concluded that although the Framers intended to extend the scope of the amendment to include the legislature, as well as the judiciary, there was no expressed intention to extend the amendment's scope beyond criminal punishments.[31]

Justice Powell then looked to earlier court decisions, which considered whether punishments were cruel and unusual, to determine if precedent supported the conclusion that the eighth amendment's scope is limited to criminal punishments.[32] Because all of these cases involved some kind of criminal punishment, he concluded that the scope of the eighth amendment was clearly limited to criminal punishments. In further support of this conclusion, Justice Powell cited cases which he interpreted as rejecting eighth amendment challenges to non-criminal punishments.[33]

In accepting this criminal/non-criminal analysis of the eighth amendment's scope, Justice Powell specifically rejected the "purposive" analysis urged by Justice White in his dissent.[34] The "purposive" analysis, based on the underlying motivation for the punishment, would require the application of the eighth amendment wherever the reason for the punishment was *penal,* regardless of whether the context was criminal or non-criminal. Justice Powell relied on his interpretation of the eighth amendment's origins to reject this approach. He stated: "The applicability of the Eighth Amendment always has turned on its original meaning, as demonstrated by its historical derivation."[35]

Justice Powell also rejected a request to extend the scope of the eighth amendment to a non-criminal setting in order to prevent the seemingly anamolous situation in which prisoners, but not students, receive the eighth amendment's protections against excessive corporal punishment.[36] Justice Powell first noted that prison brutality is part of a prisoner's criminal punishment, and therefore a proper subject for eighth amendment scrutiny. Secondly, Justice Powell concluded that the openness of the school environment and the available common law remedies provide students with the same protection that the eighth amendment affords prisoners incarcerated in an oppressive environment. Therefore, Justice Powell found no compelling reasons for extending the scope of the eighth amendment to non-criminal corporal punishment in schools.

In the second half of his majority opinion, Justice Powell sought to determine whether the due process clause required any kind of hearing before corporal punishment could be inflicted upon students. He employed the Court's traditional two stage analysis in addressing the due process question.[37] This required the Court first to determine whether the asserted individ-

[29] 97 S. Ct. at 1409.

[30] *Id. See* Furman v. Georgia, 408 U.S. 238, 258–63, 316–22 (1972), for a summary of the Framers' debates.

[31] 97 S. Ct. at 1409.

[32] *Id.* at 1410, *citing* Estelle v. Gamble, 97 S. Ct. 285 (1976) (incarceration without medical care); Gregg v. Georgia, 428 U.S. 153 (1976) (execution for murder); Furman v. Georgia, 408 U.S. 238 (1972) (execution for murder); Powell v. Texas, 392 U.S. 514 (1968) ($20 fine for public drunkenness); Robinson v. California, 370 U.S. 660 (1962) (incarceration as a criminal for addiction to narcotics); Trop v. Dulles, 356 U.S. 86 (1958) (expatriation for desertion); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947) (execution by electrocution after a failed first attempt); Weems v. United States, 217 U.S. 349 (1910) (15 years imprisonment and other penalties for falsifying a document); Howard v. Fleming, 191 U.S. 126 (1903) (10 years imprisonment for conspiracy to defraud); *In re* Kemmler, 136 U.S. 436 (1890) (execution by electrocution); Wilkerson v. Utah, 99 U.S. 130 (1879) (execution by firing squad); and Pervear v. Commonwealth, 5 Wall. 475 (1867) (fine and imprisonment at hard labor for bootlegging).

[33] *Id.* at 1410–11. Uphaus v. Wyman, 360 U.S. 72 (1959) (eighth amendment did not bar incarceration for civil contempt); Mahler v. Eby, 264 U.S. 32 (1924) (deportation is not punishment for crime); Bugajewitz v. Adams, 278 U.S. 585 (1913) (deportation is not punishment for crime); Fong Yue Ting v. United States, 149 U.S. 698 (1893) (eighth amendment inapplicable to noncriminal deportation proceeding).

[34] 97 S. Ct. at 1412 n.39.

[35] *Id.*

[36] *Id.* at 1411, *citing* Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968) (prison's use of a strap to maintain discipline was unconstitutionally cruel punishment).

[37] 97 S. Ct. at 1413. The Court cites Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

ual interest falls within the fourteenth amendment's protection of "life, liberty or property." If such an interest is implicated, the Court must then decide on the necessary procedural safeguards.

Justice Powell had no trouble finding that freedom from unjustified intrusions on personal security is an historic liberty, dating back at least to the Magna Carta.[38] Therefore, he concluded that corporal punishment in schools, involving physical restraint, and the infliction of pain, clearly implicated fourteenth amendment "liberty" interests.[39] Since Justice Powell found that the infliction of corporal punishment was not a *de minimis* deprivation of liberty,[40] it was necessary for him to confront the second stage of the analysis and determine what procedural safeguards would be necessary to afford due process.

Justice Powell first noted that the student's liberty interest in avoiding corporal punishment is subject to limitations. It must be balanced against the state's interest in maintaining order in the schools. He found that Florida's statutory procedures, as well as the school board's policies, greatly minimized the risk of erroneous or excessive corporal punishment.[41] Also, any requirement of advance hearings would be quite costly in terms of time, money and personnel, and therefore would greatly limit the use of corporal punishment in schools.[42]

Finally, Justice Powell noted that common law tort remedies were available for students who had been subjected to unreasonable corporal punishment.[43] Concluding that the cost of any advance procedural safeguards far outweighed the minimal risk of erroneous or excessive punishment, Justice Powell held that the due process clause does not compel a hearing before administering corporal punishment to students.

Mr. Justice White authored a powerful dissenting opinion[44] which disagreed with the majority on both the eighth and fourteenth amendment issues.

Initially, Justice White arrived at a different conclusion regarding the Framers' intent in drafting the eighth amendment. He believed that the absence of the word "criminal" in the amendment was strong evidence of an intent to prohibit all barbaric punishments, regardless of the nature of the offense.[45]

In order to determine the proper scope of the eighth amendment, Justice White focused on the Court's earlier decisions instead of reviewing the amendment's historical derivation. Specifically, he examined the Court's decisions in *Trop v. Dulles*,[46] and *Kennedy v. Mendoza-Martinez*.[47] At issue in both cases was the applicability of the eighth amendment to the non-criminal sanction of denationalization. Justice White contended that the Court applied a "purposive" analysis in those cases and held that the eighth amendment's scope was not limited to criminal punishment. Rather, the eighth amendment extended to any sanction which was penal in nature. Consequently, he said that the relevant inquiry in the instant case should revolve around the *penality* of corporal punishment,[48] rather than its non-criminality. Corporal punishment in schools is a penal sanction according to Justice White, because its primary purposes are retribution, rehabilitation and deterrence of future offenses by others.[49] Therefore, Justice White concluded that the eighth amendment was applicable to the penal sanction of corporal punishment in schools. However, in his view, the eighth

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[38] 97 S. Ct. at 1413, *citing* Magna Carta, art. 39; 1 W. BLACKSTONE, COMMENTARIES 134 (15 ed. 1809); Shattuck, *The True Meaning of the Term "Liberty,"* 4 HARV. L. REV. 365, 372-73 (1891). Also see note 4 *supra*.

[39] 97 S. Ct. at 1413.

[40] *Id.* at 1414.

[41] *Id.* at 1415-16.

[42] *Id.* at 1417.

[43] *Id.* at 1415.

[44] *Id.* at 1419 (White, J., dissenting). Mr. Justice White's opinion was joined by Justices Brennan, Marshall and Stevens.

[45] *Id.* at 1420.

[46] *Id., citing* 356 U.S. 86 (1958).

[47] 372 U.S. 144 (1963).

[48] Justice White relied upon the holding in *Trop* that:

> In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose.

97 S. Ct. at 1421 n.3. (quoting 356 U.S. 86, 96) (White, J., dissenting). *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963).

[49] 97 S. Ct. at 1420.

amendment does not prohibit all corporal punishment, but rather only punishment that is so severe as to offend contemporary standards.[50]

Finally, Justice White did not agree with Justice Powell's conclusion that the availability of a state tort remedy should affect the applicability of the eighth amendment. He relied upon *Estelle v. Gamble*[51] to refute Justice Powell's contention. In *Estelle*, the Court held that the eighth amendment prevents intentional deprivation of a prisoner's medical care. According to Justice White, the availability of a state tort remedy in that case was irrelevant in determining the scope of the eighth amendment. Therefore, he concluded that Justice Powell's reliance on the state tort remedy to provide safeguards in *Ingraham* was improper.

Justice White also disagreed with the Powell analysis of the due process issue. He found that freedom from bodily restraint was a protected liberty and he concluded that the fourteenth amendment required some type of informal hearing before corporal punishment could be administered.

According to Justice White, the purpose of the due process requirement was to prevent the good faith mistake which results in deprivation of an individual's protected liberty and property interests. He cited *Goss v. Lopez*[52] in support of this view. In *Goss*, the Court mandated that notice and an informal hearing precede a student's suspension from school because there was a geniune risk of error in a school's disciplinary process.[53] After noting that there was the same risk of error in the instant case,[54] Justice White concluded that some sort of informal give and take should also precede the administration of corporal punishment.

Secondly, Justice White was unwilling to accept Justice Powell's assertion, that the availability of a state tort remedy distinguished Ingraham's liberty deprivation from the property deprivation of school suspension in *Goss*. He found the tort remedy insufficient for several reasons. First, Justice White believed that the student is left without a remedy if punishment is imposed on the basis of mistaken facts where the teacher, without a prior hearing, acts reasonably.[55] Thus, there is no remedy for the reasonable, good faith mistake which the Court was so concerned with in *Goss*.[56] Second, Justice White believed that the infliction of physical pain is final and irreparable. Monetary damages, awarded after the paddlings, could not undo the harm already inflicted by mistaken or excessive corporal punishment.[57] Third, Justice White was not convinced that a common law tort action for excessive corporal punishments really existed in Florida. He noted that there had yet to be such a case reported in Florida and that all of the cases from other jurisdictions cited by the majority[58] only provided remedies for excessive rather than mistaken punishment.[59] Finally, Justice White observed that the student's potential remedy in a Florida tort action was further limited by the school board's sovereign immunity.[60]

In summary, Justice White concluded that

[50] Justice White believed that these beatings were so severe as to be violative of the eighth amendment. 97 S. Ct. at 1419–20. Justice White also found it anamolous that Justice Powell's holding in this case leaves school children with no eighth amendment protection from corporal punishment, while prisoners, the more culpable offenders, receive the full protection of the amendment. *Id.* at 1421.

[51] *Id.* at 1423, *citing* 97 S. Ct. 285 (1976).

[52] *Id.* at 1423–25, *citing* 419 U.S. 565 (1975).

[53] As the Court said in *Goss*:

> The concern would be mostly academic if the disciplinary process were a totally accurate, unerring process, never mistaken and never unfair. Unfortunately, that is not the case, and no one suggests that it is. Disciplinarians, although proceeding in utmost good-faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process.

Id. at 579–80.

[54] 97 S. Ct. at 1424 n.10 (citing the findings of the circuit court panel, 498 F.2d at 256–58, that there were "numerous instances of students punished despite claims of innocence").

[55] 97 S. Ct. at 1423–25 & n.10.

[56] See note 53 *supra*.

[57] *Id.* at 1425 (White, J., dissenting). Justice White cited G. M. Leasing Corp. v. United States, 97 S. Ct. 619 (1977), to illustrate that the case for advance procedural safeguards is stronger when the government inflicts an injury that cannot be repaired (*i.e.*, invasion of privacy) than when the injury is only temporary and can be undone (*i.e.*, seizure of property).

[58] *See* 97 S. Ct. at 1408 n.28.

[59] 97 S. Ct. at 1424–25 n.11.

[60] *Id.*, *citing* Buck v. McLean, 115 So. 2d 764 (Fla. Dist. Ct. App. 1959). Thus the student can only recover from the personal assets of school officials, which may amount to considerably less than the student is entitled to.

advance procedural safeguards were required here because of the risk of mistaken punishment, as well as the lack of a sufficient civil remedy. He did recognize that advance procedural safeguards would impose a burden upon the schools, but he felt that the risk of error was sufficiently large enough to outweigh the costs. Although Justice White did not specifically outline the necessary procedural safeguards, he would have required some kind of informal give and take between student and teacher, before corporal punishment could be inflicted.

III.

Justice Powell's decision on the eighth amendment issue raises more questions than it answers. At first glance, it appears that the Court is finally and definitively holding that the eighth amendment will be applied only in cases of criminal punishment.[61] Justice Powell relied heavily upon the history of the eighth amendment in reaching the conclusion that its scope is confined to criminal punishments.[62] He first looked to seventeenth century England, as well as our own constitutional Framers' debates to determine the original scope of the eighth amendment.[63] He concluded that the Framers' primary concern was to limit cruel and unusual criminal punishments, whether administered by the judiciary or the legislature.[64]

Justice Powell's analysis of the Framers' intent is not complete. The primary focus of the debates related to the *types* of punishment to which the eighth amendment should be applicable,[65] not whether the eighth amendment should be limited to criminal punishments. Because the applicability of the eighth amendment in a non-criminal setting is the pertinent inquiry here, the Framers' debates shed little light for us in this area. Furthermore, the wording of the amendment itself does little to clarify its scope of applicability.[66]

Justice Powell also relied upon numerous cases to support his contention that the eighth amendment limits only criminal punishments.[67] A closer review of these cases reveals that the applicability of the eighth amendment was never at issue there. Rather, the issue in those cases involved the meaning of the eighth amendment as applied to the particular punishment inflicted. Thus, in the death penalty cases, *Gregg v. Georgia*,[68] *Furman v. Georgia*[69] and *Louisiana ex rel Francis v. Resweber*,[70] the question was whether the death penalty was cruel and unusual punishment. The Court in all those cases merely assumed the applicability of the eighth amendment *without discussion*. The same can be said for all the other cases cited by Justice Powell[71] except *Trop*.[72] In *Trop*, the Court held the eighth amendment applicable to denationalization of a military deserter. The Government had contested the applicability of the eighth amendment to denationalization because it was not penal in nature. The Court faced the issue and concluded that the label "non-penal" attached to a statute or punishment has no effect. Rather, the Court said: "In deciding whether or not a law is penal, this Court has generally based its determination upon the *purpose* of the statute."[73] The Court noted that disabilities imposed for the purpose of punishment are penal if the purpose is to reprimand the wrongdoer or deter others. A statute would not be penal, however, if it im-

[61] 97 S. Ct. at 1410.

[62] See text accompanying notes 27-31 *supra*.

[63] See note 30 *supra*.

[64] 97 S. Ct. at 1409.

[65] *See* Furman v. Georgia, 408 U.S. 238, 258-63, 316-22 (1972), for a summary of the Framers' debates.

[66] The majority contends that bail, fines and punishments are normally associated with the criminal process, thereby showing an intent that the amendment's scope be limited to criminal punishments. 97 S. Ct. at 1408-09. However, Mr. Justice White's construction of the language is equally compelling. He contends that the absence of the word "criminal" in the amendment, is strong evidence of the Framers' intention that the eighth amendment apply to all barbaric punishments, regardless of the nature of the offense for which it was imposed. 97 S. Ct. at 1420.

[67] See note 32 *supra*. Specifically the Court seemed to rely upon an earlier statement in Powell v. Texas, 392 U.S. 514, 531-32 (1968), that: "The *primary* purpose of that clause has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of *criminal* statutes." 97 S. Ct. at 1410 (emphasis added).
Note, however, the Court's use of the word *primary* rather than *sole*. This implies that there are other purposes for the eighth amendment.

[68] 428 U.S. 153 (1976).

[69] 408 U.S. 238 (1972).

[70] 329 U.S. 459 (1947).

[71] See note 32 *supra*.

[72] 356 U.S. 86 (1958).

[73] *Id.* at 96 (emphasis added). *See* 97 S. Ct. 1420-21 n.3.

posed a disability for some other valid governmental purpose. Applying that test to the facts in *Trop,* the Court found a penal purpose. This opened the way for an eighth amendment analysis in which denationalization was found to be cruel and unusual punishment.[74] The Court refined this test when it applied the eighth amendment to denationalization in *Kennedy v. Mendoza-Martinez,*[75] again finding a penal purpose. It is therefore undisputable that, in *Kennedy* and *Trop,* the only two cases to date questioning the applicability of the eighth amendment to a particular punishment, the Court has employed a "purposive" approach to determine the applicability of the eighth amendment. Therefore, Justice White was clearly correct when he urged this analysis upon the Court.[76]

Presumably, Justice Powell attempted to blunt the force of the *Trop* and *Kennedy* decisions by citing cases in which the eighth amendment was held inapplicable to deportation[77] and civil contempt.[78] He concluded that the eighth amendment challenges were denied in those cases because there were no criminal penalties involved. However, in actuality, the claims were rejected because the disabilities were imposed for legitimate governmental purposes and were therefore non-penal. In *Fong Yue Ting v. United States,*[79] deportation was viewed not as punishment, but rather as a method of enforcing compliance with the alien laws for the valid governmental purpose of regulating aliens. Similarly, in *Uphaus v. Wyman,*[80] a civil contempt penalty was viewed not as punishment, but rather as a method of enforcing compliance with judicial decrees, a valid governmental interest.

As Justice White indicated in *Ingraham,*[81] our society has advanced to the point that the types of punishments which implicate the eighth amendment are not normally administered without first affording the procedural safeguards of the criminal process. As a consequence, the eighth amendment's protection is usually claimed in criminal cases. This coincidence however, does not mean that the eighth amendment's scope must be limited to instances of criminal punishment. Indeed, the dividing line between criminal and non-criminal punishment is often arbitrary and irrational.[82] A decision based upon the penal/non-penal distinction was mandated by both precedent and logic.[83]

Justice Powell also relied upon the openness of the school environment, and the available

[74] Although the judgment of the Court was only announced in a plurality opinion, an analysis reveals that Justice Brennan in his concurrence, and Justice Frankfurter in his dissent, also apply a "purposive" analysis to the statute. Justice Brennan finds that the statute is *penal* and therefore beyond the power of Congress to enact here. 356 U.S. at 105–14 (Brennan, J., concurring). Justice Frankfurter believes that the same "purposive" analysis reveals a *non-penal* purpose, *i.e.*, there was a valid governmental interest in regulating the military forces. *Id.* at 124–25 (Frankfurter, J., concurring). Since all the Justices were involved in at least one of these three opinions, one can say that all nine Justices applied a purposive analysis here. Furthermore, in Robinson v. California, 370 U.S. 660, 676–77 (1962) (Douglas, J., concurring) and *id.* at 679–81 (Clark, J., dissenting), each applies a "purposive" analysis in reaching opposite conclusions.

[75] 372 U.S. 144, 168–69 (1963). The penality of a statute depends upon whether there is an affirmative disability or restraint, whether it has been historically regarded as punishment, whether there must be a finding of scienter before the punishment can be imposed, whether it operates to promote the traditional aim of punishment—retribution and deterrence—and whether the behavior to which it applies is already a crime. Furthermore, if a statute appears to have both a penal and non-penal effect, we must look for a legislative purpose. Trop v. Dulles, 356 U.S. 86, 96 (1958).

[76] The majority apparently misunderstood the dissent's position when it stated that not *all* punishments are subject to eighth amendment scrutiny. 97 S. Ct. at 1412 n.39. The dissent never took the position that all punishments should receive eighth amendment protection, but rather only those punishments inflicted for a penal purpose.

[77] *Id.* at 1410–11; Mahler v. Eby, 264 U.S. 32 (1924); Bugajewitz v. Adams, 228 U.S. 585 (1913); Fong Yue Ting v. United States, 149 U.S. 698 (1893).

[78] 97 S. Ct. at 1411; Uphaus v. Wyman, 360 U.S. 72 (1959).

[79] 149 U.S. 698 (1893).

[80] 360 U.S. 72 (1959).

[81] 97 S. Ct. at 1420.

[82] *See generally* Robinson v. California, 370 U.S. 660, 680 (1962) (Clark, J., dissenting) for a discussion of the lack of distinction between civil and criminal committment for drug addiction.

[83] See notes 46–50, 65, and 72–80 *supra,* and accompanying text. If the Court had accepted the "purposive" test, it then would have had to determine the purpose of corporal punishment in schools. Justice White was of the opinion that there was a penal purpose and therefore he would have found the eighth amendment applicable to corporal punishment in schools. 97 S. Ct. at 1421 (White, J., dissenting).

state tort remedy to provide the students the same protection, which could also have been afforded by the eighth amendment.[84] This indicates that the Court's criminal/non-criminal distinction in regard to eighth amendment applicability is not a hard and fast rule. Rather, the Court left open the possibility that the eighth amendment could be applicable in certain non-criminal settings if the available safeguards would not provide sufficient protection.[85] Therefore, it is not wise to assume that the Court would patently reject any future eighth amendment challenges in "non-criminal" areas.

Another problem with Justice Powell's opinion is its apparent desire to ignore the particular facts in front of the court in order to set down broader constitutional principles. Justice Powell noted that the regime at Drew Junior High School was "exceptionally harsh,"[86] and that teachers frequently ignored the procedural requirements contained in the corporal punishment statute,[87] and the school board regulation.[88] Yet, he still believed that excessive punishment was an aberration, and that the risk of erroneous punishment is insignificant because it is normally only administered for conduct directly observed by a teacher.[89] Not only do these two findings conflict with each other, but they also conflict with the Court's conclusion in *Goss v. Lopez*,[90] that the risk of error in the school disciplinary process is far from trivial. Based upon the facts in *Ingraham*, it does seem that Justice Powell looked beyond the specific facts of the case in order to set down his desired eighth amendment ruling.

The future ramifications of the eighth amendment holding are not altogether clear. It does seem unlikely that the Court would sustain any future challenge against corporal punishment in schools, since this case contained evidence of very severe beatings, and yet the challenge was denied. However, it would not be proper to conclude that the Court will never apply the eighth amendment in a non-criminal situation.[91] If a case was presented in which an administrative board handed down an excessive sanction or fine, the Court might be willing to modify the criminal/non-criminal distinction. However, based upon *Ingraham*, it will be difficult to convince the Court to drop its criminal/non-criminal distinction entirely in favor of the penal/non-penal analysis.

This case also represents an additional piece in the never ending puzzle of procedural due process cases involving the right to a hearing. By only requiring a showing that a loss is not *de minimis*,[92] the Court has made it easier to show that a deprivation of liberty has occurred. Yet, at the same time, the Court has made it more difficult to show that advance procedural safeguards are required. It seems anamolous that there must be some informal give and take between the student and school authorities before a student is suspended from school, but not before the teacher can administer a paddling. Yet, this is exactly the position the Court has left us in considering *Goss* and *Ingraham*. Obviously the Court believes that suspension from school is more severe than corporal punishment.

Of course, Justice Powell did rely upon the post-deprivation tort remedy to provide the student with due process. But, Justice White presented several compelling arguments to show that the state tort remedy may be insufficient if it exists at all.[93]

The Court's decision on both the eighth and fourteenth amendment issues may be more understandable if viewed in the light of the Court's desire to avoid interference with schools,[94] rather than in terms of legal precedent or principle. But the most significant aspect of the decision is the Court's apparent desire to eventually foreclose application of the eighth amendment outside of the criminal process.

[84] *Id.* at 1412.

[85] Specifically, the Court left open the question of the eighth amendment's applicability to persons involuntarily incarcerated in mental or juvenile institutions. *Id.* at 1411 n.37. In Vann v. Scott, 467 F.2d 1235, 1240 (7th Cir. 1972), Justice (then Judge) Stevens said that the eighth amendment protects runaway children confined in juvenile institutions. Furthermore, in *In re* Gault, 387 U.S. 1 (1967), the Court noted that although juvenile proceedings and punishments are not labelled criminal, they are sufficiently analogous to require application of the eighth amendment.

[86] 97. S. Ct. at 1405.

[87] See note 24 *supra*.

[88] See note 15 *supra*.

[89] 97 S. Ct. at 1416.

[90] 419 U.S. 565 (1975). See notes 52–53 *supra* and accompanying text.

[91] See text accompanying notes 84 & 85 *supra*.

[92] 97 S. Ct. at 1414.

[93] See text accompanying notes 55–60 *supra*.

[94] *See* Epperson v. Arkansas, 393 U.S. 97, 104 (1968).