DISORDERLY AND DISRUPTIVE: CORPORAL PUNISHMENT LAWS AND THE ABUSE OF STUDENTS WITH DISABILITIES

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I. INTRODUCTION

The corporal punishment of students by teachers in school inflicts profound harms on children and undermines educational success.[1] Most directly, corporal punishment can lead to serious physical pain and injury. It can also lead to mental health issues including mood, anxiety, and other personality disorders and severe antisocial behavior.[2] It can significantly impair academic achievement.[3] For children with disabilities, the harms of corporal punishment are far worse as it exacerbates medical conditions, increases incidents of self-injurious behaviors, increases incidents of aggressive behaviors directed at others, and increases the likelihood of the student dropping out of school.[4] The harms of corporal punishment are long-term and may cause the student to suffer from trauma-associated anxiety for years.[5] Despite the fact that scientific evidence consistently shows that corporally punishing students in school serves no educational purpose and causes serious harms, corporal punishment is still legal in

1. Mandy A. Allison et al., *Corporal Punishment in School*, 152 PEDIATRICS, no. 3, 2023, at 1, 2. ("Corporal punishment by parents or caregivers is associated with a range of negative effects among children and adolescents, including a higher incidence of behavior and mental health problems, impaired cognitive development, poor educational outcomes, impaired social-emotional development, problems with the ongoing relationship between parents and children, a higher risk for physical abuse, increased aggression and perpetration of violence, antisocial behavior, and decreased moral internalization of appropriate behavior. A meta-analysis of studies regarding spanking and child outcomes found that being spanked as a child was associated with adult antisocial behavior, adult mental health problems, and adult support for physical punishment.").

2. Miguel A. Cardona, *Letter from Secretary Cardona Calling for an End to Corporal Punishment in Schools*, U.S. DEP'T OF EDUC. (Mar. 24, 2023), https://www.ed.gov/laws-and-policy/education-policy/key-policy-letters-signed-by-the-education-secretary-or-deputy-secretary/march-24-2023--letter-from-secretary-cardona-calling-for-an-end-to-corporal-punishment-in-schools [https://perma.cc/Z7VG-9NT9].

3. *Id.* "Research indicates that preschoolers subjected to corporal punishment measure lower on academic achievement and social competence, when compared to peers who have not received physical punishment as a means of discipline." *Id.*

4. HUM. RTS. WATCH, IMPAIRING EDUCATION: CORPORAL PUNISHMENT OF STUDENTS WITH DISABILITIES IN US PUBLIC SCHOOLS 4 (2009), https://www.hrw.org/sites/default/files/reports/us0809web_0.pdf [https://perma.cc/2VR8-SLHR].

5. *Corporal Punishment and Health*, WORLD HEALTH ORG. (Nov. 23, 2021), https://www.who.int/news-room/fact-sheets/detail/corporal-punishment-and-health [https://perma.cc/W74P-TLGV].

seventeen states.[6] And school districts that have not had corporal punishment incidents for decades have recently revived the practice, claiming an increased need to "control" disorderly and disruptive students.[7]

Studies consistently show that teachers are more likely to use corporal punishments on children with disabilities than on children who do not have disabilities.[8] In fact, in one school district, corporal punishment is used *only* on students with disabilities.[9] And, among children with disabilities, teachers and administrators are up to five times more likely to hit, spank, paddle, and slap autistic children than they are children with other kinds of disabilities.[10] Autistic children are especially likely to exhibit aggressive and self-injurious behaviors at school after teachers have subjected them to corporal punishment—which often prompts further incidents of teacher inflicted corporal punishment creating a vicious cycle.[11] Parents have reported that their autistic children attempted suicide after being corporally punished by teachers.[12]

Largely because of children's and disability rights activism, there is an increasing demand for federal legislation that prohibits corporal punishment in public schools as well as a push for the Supreme Court to declare public school corporal punishment *per se* unconstitutional.[13] However, so far, Congressional efforts to pass laws prohibiting corporal

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6. Aniya Greene-Santos, *Corporal Punishment in Schools Still Legal in Many States*, NEA TODAY (May 20, 2024), https://www.nea.org/nea-today/all-news-articles/corporal-punishment-schools-still-legal-many-states [https://perma.cc/U86G-9KNU].

7. Tara García Mathewson, *Missouri District Brings Back Corporal Punishment—at the Urging of Parents, It Says*, THE HECHINGER REP. (Sep. 1, 2002), https://hechingerreport.org/missouri-district-brings-back-corporal-punishment-at-the-urging-of-parents-it-says/ [https://perma.cc/M8B6-9LLF] ("[P]arents can be pressured into choosing corporal punishment. Cassville's student handbooks set up corporal punishment as an alternative to suspension for a number of violations. The second time high schoolers show disrespect or defiance, for example, they face either five days of in-school suspension or one round of corporal punishment.").

8. *See, e.g.*, HUM. RTS. WATCH, *supra* note 4, at 3.

9. Timothy D. Intelisano, *Beating Justice: Corporal Punishment in American Schools and the Evolving Moral Constitution*, 29 WM. & MARY J. RACE, GENDER & SOC. JUST. 745, 758 (2023).

10. HUM. RTS. WATCH, *supra* note 4, at 26–32.

11. *Id.* at 42 ("The American Academy of Pediatrics, in taking a position against corporal punishment, observes that 'corporal punishment may adversely affect a student's self-image and school achievement and that it may contribute to disruptive and violent behavior.'").

12. *Id.* ("According to the Society for Adolescent Medicine, victims of corporal punishment may endure psychological harm, including difficulty sleeping, suicidal thoughts, anxiety, increased anger, feelings of resentment, and outbursts of aggression."); *see also id.* at 6, 31, 43, 46.

13. Intelisano, *supra* note 9, at 749.

punishment in public schools have failed to gain support and the Court just recently declined to take up a challenge to the use of corporal punishment on students with disabilities in public schools.[14]

Tragically, even if the use of corporal punishment in public schools were prohibited at the federal level, it is reasonable to suppose teachers would still use corporal punishment on children with disabilities. This is because current case law and state legislation prohibiting corporal punishment nonetheless protect the common law tradition of granting teachers the privilege to use "reasonable physical force" on students.[15] Courts have consistently concluded that reasonable physical force includes hitting students—even with paddles and even to the point of causing serious injury—if the teacher claims that doing so was necessary to maintain order and discipline.[16] The effect of granting teachers the power to exercise reasonable force in the face of "disorder" is that the students perceived as disorderly will be subjected to frequent and excessive

14. Mark Walsh, *Supreme Court Declines Case on Corporal Punishment for Students With Autism*, EDUC. WEEK (Jan. 8, 2024), https://www.edweek.org/policy-politics/supreme-court-declines-case-on-corporal-punishment-for-student-with-autism/ [https://perma.cc/UK48-BLV6] ("The lawsuit alleges that in 2020, S.B. was slapped by her special education teacher on two occasions and her special needs paraprofessional once, after the student had emotional outbursts . . . . A federal district court dismissed all of her claims, and a panel of the [Fifth] Circuit court affirmed the lower court's decision before the family appealed to the Supreme Court solely on the constitutional issues surrounding corporal punishment. The Jefferson Parish school district, near New Orleans, told the Supreme Court in a brief that S.B.'s allegations involved 'minor incidents' that were not likely to rise to the level of a lawsuit that would be permitted under any constitutional standard. 'The incidents alleged by [S.B.] fail to shock the conscience for purposes of the substantive component of the [D]ue [P]rocess [C]lause of the Fourteenth Amendment,' the school district said."); *see* S.B. on behalf of S.B. v. Jefferson Par. Sch. Bd., No. 22-30139, 2023 WL 3723625 (5th Cir. May 30, 2023), *cert. denied*, 144 S. Ct. 562 (2024).

15. Courts rely on the "shocks the conscience" standard to determine whether or not a teacher's action uses reasonable force or excessive force. In Gonzales v Passino, 222 F. Supp. 2d 1277 (D.N.M. 2002), a judge declared that a teacher striking a student on their arm with a bat did not "shock the conscience" and so did not meet the excessive force standard. In Golden v. Anders, 324 F.3d 650 (8th Cir. 2003) the judge decided that a teacher who had held a student down until she "surrendered," thereby causing serious nerve damage that required medical treatment, did not act either sadistically or maliciously and so the action did not shock the conscience and, therefore, did not use excessive force. In Gottlieb v Laurel Highlands School Distract, 272 F.3d 168 (3d Cir. 2001), a judge decided that a principal who had shoved a student into a door jam, causing permanent injury to their back, did not use excessive force. Although the act caused a serious, life-long injury, the court asserted that the act itself—a shove—was "so minor" that it could be inferred that the principal did not act maliciously or sadistically. The court suggested that, while possibly tortious, the principal's act was not unreasonable.

16. Ingraham v. Wright, 430 U.S. 651, 676 (1977).

physical force.[17] And the students most likely to be perceived as disorderly will be those with disabilities, with autistic children among those perceived as the *most* disorderly.[18] And while the courts and legislators can delineate between corporal punishment and physical force, to the non-verbal three-year-old autistic student, the physical force inflicted on them by their teachers causes exactly the same harms that corporal punishment does: it causes trauma, regression, an increase in self-injurious behaviors, depression, and it significantly reduces their chances of educational success.

A federal level prohibition of corporal punishment in public schools is long overdue. But prohibiting corporal punishment as it is typically conceived by legislators and the courts will not stop teachers from using physical force on students with disabilities. Instead, such legislation must prohibit all acts of *physical force* expressly prohibiting the use of physical force on students with disabilities. Until courts and legislators prioritize the well-being of students with disabilities over a teacher's desire for control and order, teachers will continue to use physical force on students with disabilities and so will continue to undermine the well-being and educational successes of those students.

In this article, I provide a critical analysis of the Supreme Court's decision in *Ingraham v. Wright*,[19] the landmark case addressing the use of corporal punishment in public schools. I also consider various state laws concerning corporal punishment enacted in response to *Ingraham*. I argue that state efforts to regulate the use of corporal punishment by teachers to protect children from unreasonable physical harms have unwittingly granted teachers *carte blanche* to inflict profound harms onto children with disabilities and it is autistic children who are suffering the most.

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17. Schools disproportionately apply corporal punishment to boys, black children and to children with disabilities. *See* Elizabeth Gershoff & Sarah Font, *Corporal Punishment in U.S. Public Schools: Prevalence, Disparities in Use, and Status in State and Federal Policy*, 30 SOC. POL'Y REP., no. 1, 2016, at 1.

18. Jasper Gingrich, *Sanctioned Abuse: Corporal Punishment, Restraint, and Seclusion of Children in Public Schools*, 9 PUB. INT. L. REP. 36, 39 (2023) ("Disparities [of hitting children at school] based on disability are also extremely common, with disabled children being fifty percent more likely to face corporal punishment. Judges have consistently upheld school officials' rights to physically punish disabled students, even when their behavior stems from disabilities such as autism, Tourette syndrome, or obsessive-compulsive disorder.")

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

II. LANGUAGE: CORPORAL PUNISHMENT, REASONABLE FORCE, AND UNREASONABLE FORCE

Before going further, it is important to clarify language. In *theory*, terms such as "corporal punishment," "reasonable force," and "unreasonable force" refer to distinct behaviors. In practice, the lines distinguishing these acts from one another are blurred.

Consider the following events:

- a school officer "repeatedly" tased a student with disabilities to stop him from going through a door and, even after the student stopped struggling, continued to tase the student causing him to urinate, defecate and vomit, and later develop post-traumatic stress disorder;[20]

- a teacher threw a student with disabilities against a wall and choked him for asking a question;[21]

- an aide grabbed, shoved, and "repeatedly kicked" a physically disabled, non-verbal autistic seven-year-old student for sliding a CD back and forth across a table;[22]

- a principal paddled a student with a disability with such force the student needed to be hospitalized;[23]

- a teacher's aide whipped a non-verbal autistic student with an extension cord;[24]

- an eleven-year-old non-verbal autistic student was repeatedly slapped after failing to follow instructions;[25]

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20. J.W. v. Paley, 81 F.4th 440 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 2658 (2024).

21. Flores v Sch. Bd. Of DeSoto Parish, 116 Fed. App'x 504, 506–07 (5th Cir. 2004). The school brought expulsion proceedings against the student and forbade him to call any witnesses. *Id.*

22. Marquez v. Garnett, 567 Fed. App'x 214, 215 (5th Cir. 2014).

23. Fee v. Herndon, 900 F. 2d 804, 806–08 (5th Cir. 1990).

24. Amelia Jones, *DeSoto School Aide Charged with Hitting Student With Autism*, FOX 4 KDFW (Oct. 27, 2023), https://www.fox4news.com/news/gloria-lowe-desoto-special-needs-student-injured [https://perma.cc/4V8U-ACYJ].

25. S.B. on behalf of S.B. v. Jefferson Par. Sch. Bd., No. 22-30139, 2023 WL 3723625, at *1–4 (5th Cir. May 30, 2023), *cert. denied*, 144 S. Ct. 562 (2024).

- a teacher hit a four-year-old autistic student and then threw the student against a wall when he tried to run away from the teacher;[26]

- a teacher hit and cursed at her students with disabilities, then yelled at them "the longer you cry, the longer I will hit you";[27]

- a teacher orchestrated a "fight club," where he encouraged and instigated non-disabled students to beat and kick a student with disabilities as the disabled student laid on the floor crying;[28]

- a teacher forced a first-grade autistic child into a trashcan and said to him that "if he acted like trash, [she] will treat him like trash"[29]

- a teacher grabbed a student with a disability by the neck, threw him to the floor, and held him in a chokehold while yelling at him that he "needed to keep his hands to himself."[30]

Were these children corporally punished? Not likely. They were, however, subjected to physical force. Was that physical force unreasonable? According to most schoolboards and courts, probably not.

The U.S. Department of Education (DOE) defines *corporal punishment* as "paddling, spanking, or other forms of physical punishment

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26. Elina Tarkazikis, *Teacher Arrested After Hitting 4-Year-Old Student Who Has Autism*, SCRIPPS NEWS (Jul. 24, 2024), https://www.scrippsnews.com/us-news/crime/teacher-arrested-after-hitting-4-year-old-student-who-has-autism [https://perma.cc/CY4J-4VCF].

27. Julia Marnin, *Teacher Told Special Needs Kids "I Will Hit You" The Longer They Cried, IL Suit Says*, THE KAN. CITY STAR (Mar. 17, 2023), https://www.kansascity.com/news/nation-world/national/article273291145.html [https://perma.cc/2SBD-BPX2].

28. Lee V. Gaines, *Lawsuit: IPS Teacher Encouraged Students to Beat Up 7-Year-Old with Disabilities*," NPR WFYI (Apr. 18, 2024), https://www.wfyi.org/news/articles/indianapolis-public-schools-ips-lawsuit-flight-club-school-87-student-attacked [https://perma.cc/6LRK-UTCM].

29. R.A. v. Johnson, 36 F.4th 537, 540 (4th Cir. 2022). The teacher pled guilty to misdemeanor assault on a disabled person. *Id.* at 541. The district court dismissed all claims against the school officials, except two on state law negligence grounds. *Id.* at 540. As to those two claims, the school officials filed an interlocutory appeal, asserting that they are entitled to public official immunity under North Carolina law. *Id.* The Fourth Circuit agreed, and held that their immunity requires that the state law claims against them be dismissed. *Id.* at 546.

30. T.O. v. Fort Bend Indep. Sch. Dist., 2 F.4th 407, 412–18 (5th Cir. 2021).

imposed on a child."[31] Some state laws identify specific examples of actions that count as corporal punishment, such as pinching and slapping.[32] Other states define corporal punishment broadly to include any physical act of punishment.[33] Regardless of how restrictively or expansively corporal punishment is defined by the states, the key elements of corporal punishment are that it is (1) a physical act that touches the child and (2) the act is intended as a means to discipline the child or to maintain discipline.

Reasonable force is any physical act that touches a child not undertaken to punish a child, but is intended to control a child or to prevent harm.[34] All states that prohibit the corporal punishment of students permit teachers to use reasonable force.[35] Typical examples of permissible uses of reasonable force are actions taken to prevent or stop a child from harming themselves, a classmate, or teacher, to prevent or stop the destruction of school property, or to take a weapon from a child.[36]

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31. U.S. DEP'T OF EDUC. OFF. FOR C.R., MASTER LIST OF 2017–2018 CRDC DEFINITIONS 8 (2018), https://civilrightsdata.ed.gov/assets/downloads/2017-18_Master_List_of_CRDC_Definitions.pdf [https://perma.cc/JND2-W8FN].

32. *See, e.g.*, TEX. EDUC. CODE §37.0011(a) (2011). Texas law defines corporal punishment as "the deliberate infliction of physical pain by hitting, paddling, spanking, slapping, or any other physical force used as a means to discipline." *Id.*

33. *See, e.g.*, FLA. STAT. 1003.01(6) (2003). Florida law defines corporal punishment as "the moderate use of physical force or physical contact by a teacher or principal *as may be necessary* to maintain discipline or to enforce school rule." *Id.* (emphasis added).

34. Kathryn R. Urbonya, *Determining Reasonableness Under the Fourth Amendment: Physical Force to Control and Punish Students*, 10 CORNELL J.L. & PUB. POL'Y, 397, 440 (2001) ("When school officials use physical force to control unruly students and restore peace to the school environment, they have broad discretion to act under what the Supreme Court labels their 'custodial' and 'tutelary' powers. However, the use of physical force to punish students is *per se* unreasonable under the Fourth Amendment.").

35. *See infra* note 155. Some states, such as Michigan, explicitly permit the use of reasonable force to maintain order. MICH. COMP. LAWS § 380.1312(4) (1977). Other states profess a zero tolerance for any use of physical force. Nonetheless, even in those states there are occasions in which a teacher is permitted to use reasonable force. For example, if a teacher can prove that physical force was necessary to defend themselves and/or a third party *and* that the physical force did not "disfigure the student, or inflict injuries requiring medical treatment," courts are likely to find that the teacher acted permissibly. Donald Henderson et al., *The Use of Force by Public School Teachers as a Defense Against Threatened Harm*, 54 ED. L. REP. 773, 778 (1989).

36. Wisconsin law explicitly prohibits corporal punishment but permits the use of "reasonable and necessary force." WIS. STAT. ANN. § 118.31(2) (West 1987) states "Except as provided in sub[section] (3), no official, employee or agent of a school board may subject a pupil enrolled in the school district to corporal punishment." Yet, WIS. STAT. ANN § 118.31(3) (West 1987) states Subsection 2 does not prohibit an official, employee or agent of a school board from:

Unreasonable force is either the use of force solely for the purpose of punishing a child or it is the use of *excessive* physical force for the purposes of controlling a child or preventing harm.[37] Thus distinguishing corporal punishment, reasonable force, and unreasonable force comes down to determining whether the teacher intended to punish or control a student and whether or not the severity of the physical force used in that specific situation was excessive to the point of being unreasonable.

III. HOW MANY, HOW OFTEN?

It is difficult to determine exactly how many children are subjected to corporal punishment or force (either reasonable or unreasonable) each day in public schools because not all states require schools to report incidents, not much happens to those schools required to report but that fail to, and some states that do enforce reporting lack systematic, state-wide protocols

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> (a) Using reasonable and necessary force to quell a disturbance or prevent an act that threatens physical injury to any person.
> (b) Using reasonable and necessary force to obtain possession of a weapon or other dangerous object within a pupil's control.
> (c) Using reasonable and necessary force for the purpose of self-defense or the defense of others . . .
> (d) Using reasonable and necessary force for the protection of property . . .
> (e) Using reasonable force to remove a disruptive pupil from a school premises . . .
> (f) Using reasonable and necessary force to prevent a pupil from inflicting harm on himself or herself.
> (g) Using reasonable and necessary force to prevent a pupil from inflicting harm on himself or herself.
> (g) Using reasonable and necessary force to protect the safety of others.
> (h) Using incidental, minor or reasonable physical contact designed to maintain order and control.

Id.

37. States that permit corporal punishment typically expressly prohibit the use of unreasonable or excessive force. North Carolina permits corporal punishment but not excessive force. N.C GEN. STAT. ANN. § 115C-390.4(b)(5) (West 2011) ("In no event shall excessive force be used in the administration of corporal punishment. Excessive force includes force that results in injury to the child that requires medical attention beyond simple first aid."). Mississippi distinguishes corporal punishment "administered in a reasonable manner" from child abuse:

> Corporal punishment administered in a reasonable manner, or any reasonable action to maintain control and discipline of students taken by a public school teacher, assistant teacher, principal or assistant principal acting within the scope of his employment or function and in accordance with any state or federal laws or rules or regulations of the State Board of Education or the local school board or governing board of a charter school does not constitute negligence or child abuse.

MISS. CODE ANN. § 37-11-57(2) (West 2019).

for reporting corporal punishment incidents.[38] Many incidents go unreported because teachers and parents (mistakenly) believe that the incident is not corporal punishment as defined by law.[39] Conservative estimates suggest that about 160,000 students are subjected to corporal punishment each year.[40]

To further muddy the numbers, the federal government requires public schools and preschools to report the *number of students* who receive physical punishment but does not require schools to report all *instances* of corporal punishment.[41] So if a small number of teachers inflict corporal punishment on a small number of students, then that school's corporal punishment report numbers will be low regardless of how many times those teachers hit those students. For example, one teacher corporally punished one student *more than one hundred times in a single day*.[42] But, if recorded, that would count as a single incident. Because of the lax, inconsistent, and counterintuitive reporting systems, it is impossible to know how many students are being corporally punished how many times on any given day.[43]

Corporal punishment starts young: it is estimated that 900 preschoolers (students aged two–five) are subjected to corporal punishment every single year.[44] Students aged three and four are more likely to be corporally punished than any other age group.[45] The vast

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38. James Papakirk, *Michigan's New Corporal Punishment Amendment: Where The Good Act Giveth, Did the Amendment Taketh Away?*, 10 T.M. COOLEY L. REV. 383, 384 (1993).

39. *Id.*

40. Gershoff & Font, *supra* note 17, at 1.

41. *Id.* ("The little that is known about corporal punishment in U.S. public schools comes from data collected periodically by the [Office of Civil Rights (OCR)] . . . . It is important to note that the OCR data track the number of children, not the instances of discipline; multiple instances of corporal punishment of the same child are not represented in the data.").

42. Jon Bylsma, *Hands Off! New North Carolina General Statues Section 115C-390 Allows Local Schools Boards to Ban Corporal Punishment*, 70 N.C.L. REV. 2058, 2058 (1992) ("[A first-grade teacher] hit 6-year-old Jerry . . . more than 100 times Thursday with a yardstick on the backs of his legs, bottom, and hands . . . . [The *teacher*] told them she would give them five licks for each problem they got wrong . . . . He doesn't want to go [to school] . . . .").

43. *K-12 Education: Education Should Take Immediate Action to Address Inaccuracies in Federal Restraint and Seclusion Data*, U.S. GOV'T ACCOUNTABILITY OFF. (Jul. 11, 2019), https://www.gao.gov/products/gao-19-551r#: [https://perma.cc/D8SB-REG2].

44. *2017-18 State and National Estimations, Preschool Discipline*, C.R. DATA COLLECTION, https://ocrdata.ed.gov/estimations/2017-2018 [https://perma.cc/D8SB-REG2].

45. *Id.* States that permit corporal punishment grant schools the power to inflict corporal punishment on all students, including seniors in high school who may be eighteen years old and so legal adults. However, those cases are rare. *Id.*

majority of students who are physically punished are in kindergarten through eighth grade.[46]

How did we get to the point where teachers[47] are legally permitted to physically harm their youngest and most vulnerable students? Answering that question requires going back to 1977, when the Supreme Court addressed the corporal punishment of students in public schools for the first time.

IV. INGRAHAM V WRIGHT[48]

In 1971, James Ingraham and Roosevelt Andrews were students at Charles R. Drew Junior High School in Dade County, Florida. Because he was "slow to respond to his teacher's instructions,"[49] the principal gave Ingraham "more than 20 'licks' with a paddle" while he was held over a table in the principal's office.[50] The paddling was so severe Ingraham suffered a hematoma that required medical treatment and kept him out of school for several days.[51] Andrews was paddled on several separate occasions, each for "minor infractions."[52] On one occasion, he received defensive wounds on his arm from the paddling that were so severe he lost the use of that arm for a week.[53]

Writing for the majority,[54] Justice Powell's decision considers two issues: first, "whether the paddling of students as a means to maintain school discipline constitutes cruel and unusual punishment in violation of the Eighth Amendment" and, second, "to the extent that paddling is constitutionally permissible, whether the Due Process Clause of the Fourteenth Amendment requires prior notice and an opportunity to be

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46. Donald Greydanus et al., *Corporal Punishment in Schools*, 32 J. ADOLESCENT HEALTH 385, 386 (2003).

47. Principals, administrators, staff, teachers aides and school board members also hit students but for simplicity's sake I will consistently refer to teachers only since the vast majority of cases involve teachers hitting their students and teachers typically initiate the decision to corporally punish students.

48. Ingraham v. Wright, 430 U.S. 651, 676 (1977).

49. *Id.* at 657.

50. *Id.* at 656–58. Ingraham's punishment violated school policy which limited the number of "licks" a student could receive to no more than five. *Id.* The paddle used was made of wood, "less than two feet long, 3 to 4 inches wide, and about one-half inch thick." *Id.*

51. *Id.* at 657.

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

53. *Id.*

54. *Ingraham*, 430 U.S. at 651, was a 5–4 split, with Justice White filing a dissenting opinion in which Justices Brennan, Marshall, and Stevens joined. Justice Stevens wrote a separate dissenting opinion.

heard."[55] Although Powell's opinion in *Ingraham* is relatively brief, there is much packed into it and it is worth untangling his reasoning.

A. Eighth Amendment

The Court's answer to whether or not corporal punishment is "cruel and unusual" and so a violation of the Eighth Amendment is straightforward: no, corporal punishment does not violate the Eighth Amendment.[56] In fact, according to Powell, the Eighth Amendment is "inapplicable" to the question of whether or not teachers can punish students.[57] The Court offers three reasons to support this conclusion, each of which is worth considering.

(i) Common Law Privilege of Using Corporal Punishment to Discipline Students

One reason corporal punishment does not violate the Eighth Amendment is the U.S. has a well-established tradition of permitting teachers to use corporal punishment to discipline students that dates back to the American colonies. The common law principle that guided such punishments then was that "[t]eachers may impose *reasonable but not excessive force* to discipline a child."[58] According to the Court, this "basic doctrine" has not changed and the "prevalent rule in this country today" is that a teacher or administrator may use physical force he or she "*reasonably believes* to be necessary for [the child's] proper control, training or education."[59]

At the time *Ingraham* was decided, only two states prohibited corporal punishment.[60] In contrast, twenty-one states had passed legislation expressly permitting corporal punishment, each building the common law doctrine of reasonable force into their laws.[61] In states with no legislation

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55. *Id.* at 653.
56. *Id.* at 659.
57. *Id.*
58. *Id.* at 662. (emphasis added).
59. *Id.* at 661.
60. *Ingraham*, 430 U.S. at 663 ("Only two States, Massachusetts and New Jersey, have prohibited all corporal punishment in their public schools.").
61. *Ingraham*, 430 U.S. at 663. Eighteen states either expressly permit corporal punishment or have no legislation banning its use. Mandy A. Allison et al., *supra* note 1. Wyoming's statutory language permitting corporal punishment is typical:

> Each board of trustees in each school district within the state may adopt rules for reasonable forms of punishment and disciplinary measures. Subject to such rules, teachers, principals, and superintendents in such district may impose reasonable

addressing corporal punishment, the courts uniformly relied on the common law doctrine of reasonable force to settle cases concerning the reasonableness of a teacher's use of corporal punishment to discipline a student.[62] Given the widespread *continued* use of the reasonable force doctrine throughout this country, the Court concluded that there continued to be strong support for permitting teachers the privilege to use corporal punishment to discipline students.[63]

This line of reasoning by the Court relies on the questionable assumption that the education of children has not significantly changed since the colonial days. Yet changes in attitudes about public schooling, laws regarding the attendance of school and the governance of public schools are very different now from what they were in the 17th century.

Several centuries ago it was generally accepted that children who misbehaved were exhibiting moral vices and physical discipline was the only effective means to morally correct them.[64] Today, there is

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> forms of punishment and disciplinary measures for insubordination, disobedience, and other misconduct. (b) Teachers, principals and superintendents in each district shall be immune from civil and criminal liability in the exercise of *reason corporal discipline* of a student as authorized by board policy.

Wyo. Stat. Ann. § 21-4-308(a) (West 1977) (emphasis added); *see also* Letter from U.S. Secretary of Education, Miguel Cardona, Calling For An End to Corporal Punishment In Schools to Governors, Chief State School Officers, and School District and School Leaders, at n.6 (March 24, 2023), https://www.ed.gov/laws-and-policy/education-policy/key-policy-letters-signed-by-the-education-secretary-or-deputy-secretary/march-24-2023--letter-from-secretary-cardona-calling-for-an-end-to-corporal-punishment-in-schools [https://perma.cc/W7QE-YMHU] ("According to a review of laws and policies by the Department of Education, depending on the state, corporal punishment remains legal because state law either expressly allows corporal punishment in at least some circumstances or does not expressly prohibit it. The following states expressly allow corporal punishment in schools: Alabama, Arkansas, Arizona, Florida, Georgia, Idaho, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Wyoming. Some states that expressly allow corporal punishment also expressly prohibit it for students with disabilities, e.g., Kentucky, Louisiana, Mississippi, Oklahoma, and Tennessee. Other states do not expressly prohibit corporal punishment in schools, those states are: Colorado (prohibits only for students with disabilities), Connecticut, Kansas, Indiana, Maine, New Hampshire, and South Dakota.").

62. *Ingraham*, 430 U.S. 651, 663 ("Where the legislatures have not acted, the state courts have uniformly preserved the common-law rule permitting teachers to use reasonable force in disciplining children in their charge.").

63. *Id.*

64. *See* ELIZABETH GERSHOFF, REPORT ON PHYSICAL PUNISHMENT IN THE UNITED STATES: WHAT RESEARCH TELLS US ABOUT ITS EFFECTS ON CHILDREN 11 (2008), https://endcorporalpunishment.org/wp-content/uploads/key-docs/Gershoff-US-report-2008.pdf [https://perma.cc/5ZKD-P7W4]. But this belief was by no means universally accepted. *Id.* The history of New Jersey's legislation prohibiting the corporal punishment

overwhelming evidence that so-called misbehaviors of children are age-appropriate normal behaviors and that all forms of corporal punishment are highly traumatizing to children and *undermine* their moral development.[65]

Every state has adopted a compulsory school attendance law that requires children to attend school for at least nine years.[66] And, while parents certainly have the right to home school or send their children to private schools, the majority of American parents —81.9%—elect to send their children to public schools.[67] The number of students attending public schools is tremendous. In 2022, almost fifty million students attended public schools in the United States.[68] Thus the number of children impacted by corporal punishment laws is significant, roughly thirteen times the population of the entire United States at its first census.[69]

Finally, for purposes of this discussion, it is important to consider that children with disabilities had no right to a public education in the United States until just a few decades ago.[70] In the early 1970s, U.S. public

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of students by their teachers shows that many parents were vehemently opposed to allowing teachers to take it upon themselves to physical discipline their children. *Id.*

65. Elizabeth Gershoff, *More Harm Than Good: A Summary of Scientific Research on the Intended and Unintended Effects of Corporal Punishment on Children*, 73 LAW CONTEMP. PROBS. 31, 38 (2010) ("Taken together . . . results indicate that corporal punishment is not better than other discipline methods at promoting long-term compliance or moral internalization (that is, the child's internalizing positive moral values), and in fact may be worse by decreasing these positive behaviors, thus having an effect on child behavior that is opposite of what parents intended.").

66. *Age Range for Compulsory School Attendance and Special Education Services, and Policies on Year-Round Schools and Kindergarten Programs, by State: Selected Years, 2000 Through 2020, Table 234.10.*, DIG. OF EDUC. STAT., https://nces.ed.gov/programs/digest/d20/tables/dt20_234.10.asp [https://perma.cc/9FU8-KLQD]. The starting age varies from age five to age eight, and the upper age limit is between sixteen and eighteen years old. The least number of years required is nine years, and the most is thirteen years. *Id.*

67. JACOB FABINA ET AL., SCHOOL ENROLLMENT IN THE UNITED STATES: 2021 AMERICAN COMMUNITY SURVEY REPORTS 3 (2023), https://www.census.gov/content/dam/Census/library/publications/2023/acs/acs-55.pdf [https://perma.cc/5SC2-Z3R7].

68. NAT'L CTR. FOR EDUC. STAT., PUBLIC SCHOOL ENROLLMENT 1 (2024), https://nces.ed.gov/programs/coe/indicator/cga/public-school-enrollment#: [https://perma.cc/2TQF-59EU]. In 2022, 34.1 million attended public school for grades K–8 and 15.5 million attended public schools for grades 9–12. *Id.*

69. *Decennial Census Historical Facts*, U.S. CENSUS BUREAU (Oct. 8, 2021), https://www.census.gov/programs-surveys/decennial-census/decade/decennial-facts.1790.html#list-tab-1813000050 [https://perma.cc/C7FL-2DZY]. The first U.S. Census was taken in 1790 and the total U.S. population was recorded as 3,929,214. *See id.*

70. Section 504 of the Rehabilitation Act of 1973 states in part:

schools accommodated only one out of five children with disabilities, typically those with the least severe impairments.[71] The 3.5 million children with disabilities that were then permitted to attend public schools were isolated in segregated facilities that were little more than holding cells and those children received no effective instruction.[72] The majority of states had laws that explicitly *excluded* children with certain types of disabilities from attending public school, including children who were blind and deaf.[73] Children diagnosed as being "emotionally disturbed" or "mentally retarded," labels that were certainly attached to children diagnosed as autistic, were expressly forbidden from attending public schools.[74] Many of the more than one million children excluded from the public school system lived at state managed total institutions where they received extremely limited or no educational or rehabilitation services whatsoever.[75] In contrast, today approximately 15% of all children attending public schools, around 7.5 million, are students with disabilities.[76]

Given how different public education is now from schooling in the American colonies and how harmful corporal punishment has been shown to be to all children, let alone those with disabilities, there is ample reason to conclude the common law privilege of using corporal punishment to discipline students has no place in a modern public school.

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C § 794. *See also* KYRIE DRAGOO & ABIGAIL GRABER, CONG. RSCH. SERV., R48068, THE RIGHTS OF STUDENTS WITH DISABILITIES UNDER THE IDEA, SECTION 504, AND THE ADA, at ii (2024) ("Section 504 protects individuals from disability discrimination in programs and activities that receive federal financial assistance (as well as in federal executive branch programs). As Section 504 is linked to federal funding, it applies to all public elementary and secondary schools, as well as some private ones, and most colleges and universities.").

71. US DEP'T OF EDUC., HISTORY: TWENTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA 2 (2007).

72. *Id.* at 4.

73. *Id.* at 2.

74. *Id.*; JANE WEST, NAT'L COUNCIL ON DISABILITY, BACK TO SCHOOL ON CIVIL RIGHTS: ADVANCING THE FEDERAL COMMITMENT TO LEAVE NO CHILD BEHIND 6 (2000).

75. *Id.* at 6, 26.

76. NATIONAL CENTER FOR EDUCATION STATISTICS, STUDENTS WITH DISABILITIES (2024), https://nces.ed.gov/programs/coe/indicator/cgg/students-with-disabilities [https://perma.cc/9MZK-8P7Y].

(ii) The Eighth Amendment is Inapplicable to Students

The second reason the Court offered to support their conclusion that the Eighth Amendment is inapplicable to the corporal punishment of school children is that the Eighth Amendment was intended to address the state punishment of convicted criminals, not the punishment of school children.[77] Indeed, according to Powell, every previous decision by the Court that considered whether a punishment was "cruel and unusual" concerned criminal punishment.[78] Further, the Court reasoned, the punishment of criminals is nothing like the punishment of students as the "prisoner and the schoolchild stand in wholly different circumstances."[79] One difference is that, unlike prisoners, the schoolchild is "invariably free to return home" at the end of the day.[80] And, "[e]ven while at school, the child brings with him the support of family and friends and is rarely apart from teachers and other pupils who may witness and protest any instances of mistreatment."[81] Because the convicted criminal is effectively isolated from all social supports, the Eighth Amendment is their only protection.[82] In contrast, because students have social supports both inside and outside school, the Court concludes that "[t]he schoolchild has little need for the protection of the Eighth Amendment."[83]

The claim that children and prisoners "stand in wholly different circumstances" to the point that the Eighth Amendment is entirely inapplicable to the matter of corporal punishment in public schools is uncompelling. Yes, children are "free to return home" at the end of the day, but they are not free to leave during the day when they are at risk of being physically hit. Nor is it credible that a child's classmates are ready-to-hand witnesses to the events. And given that the child most likely to be physically disciplined by a teacher is a *preschooler*,[84] the idea that their classmates are their social supports and protectors is dubious. Indeed, this line of reasoning by the Court is particularly cruel when we remember that a disproportionate number of corporal punishment acts are inflicted on young children with disabilities, often autistic students who are either non-

77. Ingraham v. Wright, 430 U.S. 651, 664 (1977).
78. *Id.* at 666.
79. *Id.* at 669.
80. *Id.* at 670.
81. *Id.*
82. *See id.* at 669.
83. *Ingraham*, 430 U.S. at 670.
84. *See supra* Part III.

verbal or have language impairments.[85] I would argue that, during their time at school, such students are as alone and vulnerable as any adult prisoner.

Finally, the fact that public schools, unlike prisons, are "open institutions" is simply beside the point. In his dissenting opinion, Justice White states:

> We are told that schools are open institutions, subject to constant public scrutiny . . . . How any of these policy considerations got into the Constitution is difficult to discern, for the Court has never considered any of these factors in determining the scope of the Eighth Amendment . . . if a punishment is so barbaric and inhumane that it goes beyond the tolerance of a civilized society, its openness to public scrutiny should have nothing to do with its constitutional validity.[86]

The dissent correctly points out that, though the majority claims that the Eighth Amendment applies only to the punishment of criminals, it does not provide a justification for limiting the scope of the Eighth Amendment to criminal punishments.[87] As Justice White observes, just as the punishment of criminals is within the scope of the Eighth Amendment because it is an "institutionalized response to the violation of some official rule or regulation proscribing certain conduct" imposed for punitive purposes so should acts of corporal punishment of students—which is also an institutionalized response to the violation of an official rule proscribing certain conduct—fall within the scope of the Eighth Amendment.[88] This seems right: the essential purpose of the Eighth Amendment is to ensure that state inflicted punishments are fair and realize legitimate social purposes.[89] Ensuring that the punishment of a student by a public teacher

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85. *ACLU: Teachers Abuse Kids With Disabilities*, GREAT SCHOOLS (Aug. 9, 2023), https://www.greatschools.org/gk/parenting/learning-differences/abuse-of-kids-with-disabilities/ [https://perma.cc/C48G-JK5Y] ("Children diagnosed with autism, Asperger's syndrome, or attention-deficit hyperactivity disorder are the most likely to receive such physical discipline from teachers and school officials . . . ."). In one study, 68% of the children with disabilities subjected to aversives were autistic or had Aspergers. JESSICA BUTLER, THE COUNCIL OF PARENT ATT'YS & ADVOCS., INC. (COPAA), UNSAFE IN THE SCHOOLHOUSE: ABUSE OF CHILDREN WITH DISABILITIES 5 (2009), https://web.archive.org/web/20211129000126/https://cdn.ymaws.com/www.copaa.org/resource/collection/662B1866-952D-41FA-B7F3-D3CF68639918/UnsafeCOPAAMay_27_2009.pdf [https://perma.cc/M6G5-QVZG].

86. *Ingraham*, 430 U.S. at 689–90 (White, J., dissenting).

87. *Id.*

88. *Id.* at 685–86.

89. *Id.* at 664.

is fair and serves legitimate purposes is as important as, if not more important than, ensuring the state punishment of criminals is fair and serves legitimate purposes.

(iii) The Eighth Amendment is Unnecessary Given the Common Law Restraints in Place

Finally, the Court claims that schools already provide "significant safeguards" to protect schoolchildren from abuses and so Eighth Amendment protection is unnecessary.[90] The "legal restraints of the common law" allow teachers to inflict only those punishments "reasonably necessary for the proper education and discipline of the child" and any teacher inflicting *unreasonable* punishments may face both "civil and criminal liability."[91] The Court added that "as long as schools are open to public scrutiny, *there is no reason to believe that the common-law restraints will not effectively remedy and deter excesses* such as those alleged in this case."[92]

While the Court asserts that adequate "common-law restraints" exist,[93] at this point in the opinion it provides no analysis of what exactly these "common-law restraints" are, or how they provide "significant safe guards" to protect schoolchildren from abuses. To find the Court's discussion of these common-law safeguards, we must turn to the Court's analysis of the Fourteenth Amendment right to procedural due process.

B. Fourteenth Amendment Due Process Considerations

The second issue the Court addresses in *Ingraham* is whether disciplinary corporal punishment as it is imposed implicates a student's Fourteenth Amendment procedural due process rights to prior notice and to an opportunity to be heard.[94] The Court's response to this question is two-fold. On the one hand, the Court states that it is true that "corporal punishment in public schools implicates a constitutionally protected liberty interest" but, on the other, "traditional common-law remedies are fully adequate to afford due process."[95] Let us look at these claims in turn.

90. *Id.* at 670.
91. *Id.*
92. *Ingraham*, 430 U.S. at 670 (emphasis added).
93. *Id.* at 672.
94. *Id.* at 653.
95. *Id.* at 672.

(i) Liberty Interests Are Implicated

As to the liberty interest, the Court states:

> It is *fundamental that the state cannot hold and physically punish* an individual except in accordance with due process of law. This constitutionally protected liberty interest is at stake in this case . . . where *school authorities, acting under color of state law*, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain, we hold that Fourteenth Amendment liberty interests are implicated.[96]

Here Justice Powell asserts that disciplinary corporal punishment of students is a state act—teachers are "acting under color of state law."[97] And it is in virtue of being state actors that they implicate a student's Fourteenth Amendment liberty interests.[98] Yet earlier we saw that this very same claim, that the punishment of a student by a school employee is a state act, was used by Justice White in his dissent to support his conclusion that such acts thereby implicate Eighth Amendment protections.[99] Unfortunately, the majority does not explain why acts under the color of state law necessarily implicate the Fourteenth Amendment but not the Eighth Amendment. So, having established that Fourteenth Amendment liberty interests *are* implicated, the Court considers the question of what process is due.[100]

The Court stresses that the discussion of procedural safeguards against the corporal punishment of students must take place squarely "within that tradition" of the common-law privilege that permits teachers to inflict "reasonable corporal punishment on children in their care" and "the availability of the traditional remedies for abuse."[101] So again we see that the Court's analysis rests on the undefended claim that, because teachers have been granted the common law privilege to inflict disciplinary physical punishments, they should still be granted that privilege—a claim that I argued earlier is highly dubious. Below I argue that the Court's second assumption, that "traditional remedies" for unreasonable physical punishments are available and adequate—vital to the Court's argument—is equally questionable.

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96. *Id.* at 674 (emphasis added).
97. *Id.*
98. *Ingraham*, 430 U.S. at 674.
99. *Id.* at 691–93 (White, J., dissenting).
100. *Id.* at 694.
101. *Id.* at 674–75.

Still, the Court concedes that, were there are *no* traditional remedies for abuse, "the case for requiring advance procedural safeguards would be strong indeed."[102] However, since remedies *are* available the only question for the Court to settle is whether existing remedies are *adequate*. To answer *that* question, the Court claims that the analysis must consider competing interests "viewed against the background of 'history, reason, [and] the past course of decisions.'"[103] The competing interests are: (i) the private interest affected; (ii) the "risk of erroneous deprivation of such interest . . . and the probable value, if any, of additional or substitute procedural safeguards;" and (iii) "the [state] interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[104]

As to the private liberty interest concerned, the Court states that the child's "liberty interest in avoiding corporal punishment" is *limited* because teachers traditionally have been granted the privilege to use corporal punishment to maintain discipline.[105] So again, we see the common law privilege to physically discipline doing the heavy lifting for the Court's argument.

(ii) Procedural Safeguards Are Sufficient

Although the child's liberty interest is limited, the Court acknowledges that the child has a "strong interest in procedural safeguards that minimize the risk of wrongful punishment."[106] What sort of procedural safeguards would be sufficient?

According to the Court, Florida law provided sufficient procedural safeguards: not only were teachers and administrators who punished unreasonably possibly liable for damages but both criminal and civil sanctions "afford[ed] significant protection against unjustified corporal punishment."[107]

And, the Court reminds us that the school setting itself provides significant protection to each student, greatly reducing the risk of them being unreasonably punished:

> [B]ecause paddlings are usually inflicted in response to conduct directly observed by teachers in their presence, the risk that a child

102. *Id.* at 674.
103. *Id.* at 675 (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).
104. *Ingraham*, 430 U.S. at 675.
105. *Id.*
106. *Id.* at 652.
107. *Id.*

> will be paddled without cause is *typically insignificant*. In the ordinary case, a disciplinary paddling neither threatens seriously to violate any substantive rights nor condemns the child "to suffer grievous loss of any kind."[108]

The scenario the Court paints in this passage is telling: Justice Powell assumes that the primary concern—perhaps the only concern worth considering—is that a teacher might corporally punish a student who did not, in fact, commit the transgression for which they are being disciplined. Yet, apparently, we need not concern ourselves overly with this because the open nature of the school ensures that teachers will "usually" know who is the guilty party. Plus, it seems, we can rest easy knowing that all teachers, fully aware that they may face criminal sanctions if they punish students unwisely, will work to ensure they only punish guilty students. And in the "insignificant" chance the teacher does discipline an innocent student, the Court tells us that the student's liberty interests are nonetheless protected because the student can later fully recover losses by litigating.[109]

This entire line of reasoning is unsatisfying. In his dissent, Justice White offers this criticism:

> The majority's conclusion that a damages remedy for excessive corporal punishment affords adequate process rests on the novel theory that the State may punish an individual without giving him any opportunity to present his side of the story, as long as he can later recover damages from a state official if he is innocent. The logic of this theory would permit a State that punished speeding with a one-day jail sentence to make a driver serve his sentence first without a trial and then sue to recover damages for wrongful imprisonment . . . . There is no authority for this theory, nor does the majority purport to find any.[110]

Given that the majority has acknowledged that all students have a Fourteenth Amendment liberty interest in not being physically punished,[111] then it follows that students have a right to a hearing prior to being punished to ensure they are not being punished unjustly. Even if that liberty interest is limited, as the Court claims, the Court has not established

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108. *Id.* at 677–78 (quoting Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 168 (1951)) (emphasis added).

109. *Ingraham*, 430 U.S. at 678.

110. *Id.* at 696 (White, J., dissenting).

111. *Id.* at 674.

why it would be that the "limited nature" of that right entirely undercuts a student's right to an informal hearing to protect that liberty interest.

Going beyond White's criticism, even if a student with a disability, severely injured by a corporal punishment incident, successfully sued for losses, why would we accept this as justice? Surely we should design procedural processes, such as the requirement for an informal hearing or an intervention by a student advocate to *prevent* wrongful and excessive punishments, to preempt the infliction of unjust and injurious punishments rather than satisfy ourselves with monetary damages that cannot possibly undo the harms suffered by particularly vulnerable children.

The Court acknowledges that a child's liberty interest may be "better protected if common-law remedies were supplemented by the administrative safeguards of prior notice and a hearing."[112] An example of a simple administrative safeguard would be "'an informal give-and-take between student and disciplinarian,' which gives the student 'an opportunity to explain his version of the facts.'"[113] But, according to the Court, such safeguards would impose costs to the state that cannot be justified.[114] First, requiring a hearing prior to *every* paddling would require "time, personnel, and a diversion of attention from normal school pursuits."[115] In fact, the Court speculated, faced with such costs "[s]chool authorities may well choose to abandon corporal punishment rather than incur the burdens of complying with the procedural requirements."[116] The Court concludes: "At some point the benefit of an additional safeguard to the individual affected . . . and to society in terms of increased assurance that the action is just, may be outweighed by the cost' . . . . We think that point has been reached in this case."[117]

It is disturbing to see Ingraham's injuries, severe enough that he required medical attention and missed five days of school, outweighed by the administrative cost of a conversation among school officials. Why does the Court so easily dismiss the harms inflicted on children? Perhaps because the Court does not believe that children are being harmed. Powell writes:

> Although students have testified in this case to specific instances of abuse, there is every reason to believe that such mistreatment is an aberration . . . . In the ordinary case, a disciplinary paddling

112. *Id.* at 678.
113. *Id.* at 693 (White, J., dissenting) (quoting Goss v. Lopez, 419 U.S. 565, 584 (1975)).
114. *Ingraham*, 430 U.S. at 681.
115. *Id.*
116. *Id.* at 680.
117. *Id.* at 682 (quoting Mathews v. Eldridge, 424 U.S. 319, 348 (1976)).

> neither threatens seriously to violate any substantive rights nor condemns the child to "suffer grievous loss *of any kind*."[118]

I wish I shared the Court's optimism that the use of excessive physical force on students is an aberration and that injuries suffered by preschoolers are so rare they are not worth the cost of preventing. But evidence proves otherwise, particularly when it comes to students with disabilities. While the Court is correct that requiring school authorities to comply with due process safeguards before inflicting corporal punishment would incur administrative costs, those costs are nominal when compared to the physical, psychological, and emotional costs that children with disabilities are currently expected to bear.

V. MCL 380.1213

Parental attitudes about physically disciplining children vary widely in the United States. Scientific evidence overwhelmingly shows that corporal punishments of children not only fail to morally improve children but actually severely harm them and the number of Americans opposed to teachers using corporal punishment on their children has continued to grow since *Ingraham* was decided.[119] As parental attitudes have shifted, more states enact laws to prohibit corporal punishments in school. Since *Ingraham*, twenty-nine states and the District of Columbia enacted laws prohibiting the use of corporal punishment in public schools. Nonetheless, of those states that permit the use of corporal punishment in schools, only two have passed legislation expressly prohibiting teachers from using corporal punishment on children with disabilities.[120]

Despite the growing intolerance for teachers using corporal punishment on students, an increasing number of states—both those that prohibit corporal punishment and those that expressly permit corporal punishment in schools—are passing legislation granting criminal and civil

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118. *Ingraham*, 430 U.S. at 677–78 (emphasis added).

119. Patrick C. Kelly et al., *A Survey of Parental Opinions on Corporal Punishment in Schools*, 6 J. DEV. & BEHAV. PEDIATRICS 143 (1985) (finding that, in 1985, 37% of parents opposed teachers using corporal punishments); *Poll: Most Approve of Spanking Kids*, ABC NEWS (Nov. 7, 2002, 6:02 PM), https://abcnews.go.com/US/story?id=90406&page=1 [https://perma.cc/M63Q-JWD7] (reporting that, in 2002, 72% of parents were opposed to teachers spanking their children); *see also Education; Parents And Teachers Split on Spanking*, N.Y. TIMES (Aug. 16, 1989), https://www.nytimes.com/1989/08/16/us/education-parents-and-teachers-split-on-spanking.html [https://perma.cc/J8W5-8WX3].

120. Kate Plummer, *Oklahoma Debates Slapping Children at School*, NEWSWEEK (Apr. 25, 2024, 10:06 AM), https://www.newsweek.com/oklahoma-children-slapping-school-disabilities-1894092 [https://perma.cc/J62J-RTSU].

immunity to teachers who use unreasonable physical force on their students.[121] For example, Wyoming law does not expressly prohibit corporal punishment in schools, so it is understood by its courts to permit corporal punishment.[122] And Wyoming law expressly grants both civil and criminal immunity to its teachers who punish students: "Teachers, principals and superintendents in each district shall be immune from civil and criminal liability in the exercise of reasonable corporal discipline of a student as authorized by board policy."[123]

Missouri recently "revived" the practice of corporal punishment[124] and provides teachers a further layer of protection by expressly excluding school corporal punishment from its child abuse statutes and by explicitly prohibiting the state's child protective services department from having jurisdiction to investigate claims of child abuse arising from school corporal punishment.[125]

Once teachers have immunity, the "traditional safeguards" the Court in *Ingraham* claimed adequately protect a student's Fourteenth Amendment right to procedural due process no longer exist, and since *Ingraham* did not guarantee students the Fourteenth Amendment right to administrative due process procedures, in most states, students have no guaranteed procedural due process safeguards at all.

To see how a state both prohibits corporal punishment, yet protects teachers who use physical force, it is useful to look at Michigan's corporal punishment legislation as a case study.

In 1988, Michigan passed Public Act 521,[126] which banned corporal punishment in public schools. Specifically, the law prohibited the "deliberate infliction of *physical pain by any means* upon the whole or any part of a pupil's body as a penalty or punishment for a pupil's offense."[127] Interestingly, it also prohibited teachers from threatening to use corporal punishment on students.[128] The law did allow teachers to use "reasonable

121. *See infra* notes 140–48 and accompanying text.

122. WYO. STAT. § 21-4-308(a) (2024) reads, "Each board of trustees in each school district within the state may adopt rules for reasonable forms of punishment and disciplinary measures. Subject to such rules, teachers, principals, and superintendents in such district may impose reasonable forms of punishment and disciplinary measures for insubordination, disobedience, and other misconduct." *Id.*

123. *Id.* § 21-4-308(b).

124. 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/SYT9-XNBW].

125. MO. REV. STAT. § 160.261.8 (2022).

126. 1988 Mich. Legis. Serv. 521 (West).

127. MICH. COMP. LAWS ANN. § 380.1312(1) (West 1988) (emphasis added).

128. *Id.* § 380.1312(2).

physical force" to protect themselves or another student from physical injury, to take a weapon from the student, or to protect school property.[129]

Although enthusiastically supported when it was proposed, the law came under intense criticism almost immediately after it was enacted. Teachers claimed that the law "hinder[ed] teachers' ability to control unruly students and to defuse potentially dangerous situations in the classroom."[130] A *Detroit News* article reported that "attacks on teachers" by students had increased by over 900% in Detroit schools since the anti–corporal punishment law came into effect.[131] The Detroit schoolboard claimed that the news stories were alarmist and reflected racist prejudice as they focused exclusively on urban black schools. In fact, the Detroit schoolboard insisted, there had been *no increase* in violent acts and the jump in numbers was the result of improved reporting procedures.[132] Regardless, riled up by the image of students terrorizing teachers, Michigan legislators set to work on undermining Public Act 521. Senate Bill 338, which drastically amended Public Act 521, was signed into law March 10, 1992, just three years after the original corporal punishment law had gone into effect.[133] MCL 380.1312, Michigan's amended anti–corporal punishment law, has several notable features: first, it radically narrows the definition of "corporal punishment"; second, it permits the broad use of "necessary reasonable force"; third, it grants total immunity to teachers from all civil liability for the use of unreasonable force; and, fourth, it adds a "good faith judgement" clause that ensures that all physical force is assumed to be necessary and reasonable.[134] Let us look more closely at MCL 380.1312.

A. Definition of "Corporal Punishment"

Whereas the original anti–corporal punishment law prohibited the "deliberate infliction of physical pain *by any means*," MCL 380.1312(1) defines corporal punishment as "the deliberate infliction of physical pain by hitting, paddling, spanking, slapping, or *any other physical force* used as a means of discipline."[135] So teachers who use non-forceful ways to cause pain to their students, such as pulling a chair out from under the

129. *Id.*

130. Papakirk, *supra* note 38, at 395 (quoting William Celis III, *Michigan Eases Ban on Force*, N.Y. Times, Mar. 11, 1992, at B8).

131. Ron Russell, *Attacks on Teachers Skyrocket*, DET. NEWS, June 20, 1991, at 1A.

132. Papakirk, *supra* note 38.

133. S.B. 338, 86th Leg., Reg. Sess. (Mich. 1992).

134. MICH. COMP. LAWS ANN. § 380.1312 (West 1988).

135. *Id.*

student so they fall backwards and crack their heads against the floor,[136] were inflicting corporal punishment under the original Michigan law, but are not inflicting corporal punishment under the new law. Significantly, the amendment also removed the original language that prohibited teachers from threatening to use corporal punishment on their student.[137] Now, teachers may threaten, intimidate, and bully students—a punitive technique particularly effective when used on young students with disabilities—yet are no longer violating state law. By narrowing what counts as corporal punishment, Michigan's law incentivizes teachers to be creative.

B. Necessary Reasonable Force

MCL 380.1312(4) permits school officials to use "reasonable force . . . as necessary to maintain order and control"[138] and provides six non-exhaustive examples of occasions in which "reasonable force" may be used:

> (a) To restrain or remove a pupil whose behavior *is interfering with the orderly exercise and performance* of school district or public school academy functions within a school or at a school-related activity, if that pupil has *refused to comply with a request to refrain from further disruptive acts*.
>
> (b) For self-defense or the defense of another.
>
> (c) To prevent a pupil from inflicting harm on himself or herself.
>
> (d) To quell a disturbance that *threatens physical injury* to any person.
>
> (e) To obtain possession of a weapon *or other dangerous object* upon or within the control of a pupil.

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136. Charles Montgomery & Andrew McMunn, *Teacher Charged for Pulling Chair Out From Under Autistic Student, Police Say*, FOX 8 NEWS (Mar. 30, 2023, 7:38 PM) https://www.fox8live.com/2023/03/30/teacher-charged-pulling-chair-out-under-autistic-student-police-say/ [https://perma.cc/GR52-LKDY].

137. § 380.1312.

138. *Id.* § 380.1312(4) (defining a school official as a "person employed by or engaged as a volunteer or contractor by a local or intermediate school board or public school academy").

(f) To protect property.[139]

Teachers are free to use physical force on children with disabilities since virtually any interference with classroom orderliness justifies physical force. Students that rock or fidget in their seat, bump into other students when walking through the hallways, or cry in class are all disrupting orderliness. Students with impaired motor control are likely to damage property (ripping pages of books, dropping things) and so are perpetually at risk of being subjected to physical force.[140] And, given that the list is non-exhaustive, the so-called disorderly behaviors that justify the use of physical force are unlimited.

C. Civil Immunity

MCL 380.1312(5) states that teachers who exercise "necessary reasonable force" are immune to civil liability:

> A person employed by or engaged as a volunteer or contractor by a local or intermediate school board or public school academy who exercises necessary reasonable physical force upon a pupil . . . is not liable in a civil action for damages arising from the use of that physical force *and is presumed not to have violated subsection (3)* [which prohibits corporal punishment] by the use of that physical force.[141]

So do teachers risk any consequences for hitting their students? MCL 380.1312(6) states: "A person who willfully or through gross negligence [inflicts corporal punishment] or who willfully or through gross negligence violates subsection (4) [which permits the use of force that is both 'necessary' and 'reasonable'] *may be* appropriately disciplined by his or her school board or public school academy."[142]

School boards may, but are not required to, discipline teachers but only if the level of forcefulness of the teacher's action rises to the level of gross negligence—a standard that we shall see is very difficult for students to meet.

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139. *Id.* (emphasis added).

140. HUM. RTS. WATCH, *supra* note 4, at 33.

141. § 380.1312(5) (emphasis added). *See also id.* § 380.1312(3). Subsection 3 reads "[a] person employed by or engaged as a volunteer or contractor by a local or intermediate school board or public school academy shall not inflict or cause to be inflicted corporal punishment upon any pupil under any circumstances." *Id.*

142. *Id.* § 380.1312 (6).

D. Good Faith Judgment of the Teacher

MCL 380.1312 includes a "good faith" clause: "In determining whether an employee, volunteer, or contractor has acted in accordance with subsection (4), [which permits the use of force that is both 'necessary' and 'reasonable'] deference shall be given to *reasonable good-faith* judgments made by that person."[143]

Taken together, sections (4) and (5) are particularly cruel. Given that corporal punishments are prohibited, it would seem reasonable to presume that any time a teacher uses physical force on a student that that act is corporal punishment and it is the teacher who should bear the burden of proving that their action—which ought to be an anomaly—was both necessary and reasonable given the (one would hope) unusual circumstances. However, all acts of force are presumed to be both reasonable and necessary and it is assumed that the teacher made a "good faith judgment" when they chose to inflict force on their student.[144]

VI. MICHIGAN CORPORAL PUNISHMENT CASELAW

There is scant caselaw interpreting Michigan's corporal punishment law.[145] The few cases that do exist make clear it is very difficult for a student to establish that a teacher's use of physical force violated law.

The general framework for analyzing Michigan's corporal punishment law first appears in *Willoughbey v. Lehrbass*,[146] a case of first impression for analyzing physical discipline in schools. The court stated:

> We think that in Michigan, as well, the Legislature intended that a teacher might be guilty of assault and battery when his or her conduct *exceeds the parameters of the statute*. MCL § 380.1312. The statute was not intended to abrogate the common-law torts of assault and battery but, rather, was intended to carve a limited exception into the common-law doctrine in order to provide educators with the necessary means of maintaining discipline in the classroom.[147]

Three years later, in *Atkinson v. DeBraber*,[148] the court develops that framework: "The language of the statute plainly evidences a legislative

143. *Id.* § 380.1312 (7).
144. *Id.*
145. Papakirk, *supra* note 38.
146. Willoughbey v. Lehrbass, 388 N.W.2d 688 (1986).
147. *Id.* at 697–98 (emphasis added).
148. Atkinson v. DeBraber, 446 N.W.2d 637 (1989).

intent to protect educators from civil liability except where their conduct meets or exceeds the level of 'gross abuse and disregard for the health and safety of the pupil.' A claim of simple negligence certainly falls well below that threshold."[149]

Acts of physical force by teachers that would otherwise be cases of assault and battery torts are permissible so long as they do not exceed the parameters of the corporal punishment statute. What exactly are the parameters of the statute?

A. Reasonable Force Analysis

We saw earlier that that MCL 380.1312(4) expressly permits a teacher to use "reasonable force upon a student as necessary to maintain order and control." How do the courts conceptualize "reasonable force"? The *Willoughbey* court did not define "reasonable force." Instead, it stated that the law "expressly permits a certain degree of willful and intentional touching of a student by a teacher" and that "[f]actors to consider in assessing the reasonableness of the punishment are *the nature of the punishment*, the child's age and physical condition, and the teacher's motive in inflicting the punishment."[150] Thus determining whether or not a teacher's action is reasonable or unreasonable must be settled on a case by case basis.

In the cases decided since the 1992 Amendment, courts have found that even extremely forceful actions do not rise to the level of unreasonable force. In *Cabrera v. Werley*,[151] physical education teacher Mark Werley "grabbed Lisa from behind and fell backward . . . Lisa struck the gym floor on the right side of her face. The impact caused a broken nose and dislocated jaw."[152] Despite Lisa's serious injury, the court concluded that, since Werley intended to maintain order and control by breaking up a fight between Lisa and another student, his action—though certainly forceful—was not unreasonably forceful.[153] In *Coker v. Lukes*,[154] dean of students Brandon Lukes "grabbed QC from behind, lifted her into the air, twisted and used his body to drop her (and himself) onto the ground."[155] Again,

149. *Id.* at 640.

150. *Willoughbey*, 388 N.W.2d at 697 (emphasis added).

151. Cabrera v. Werley, No. 226183, 2001 WL 1464635 (Mich. App. Nov. 16, 2001).

152. *Id.* at *1.

153. *Id.* at *2. In fact, the Cabrera court found no error in the trial court's statement that "the use of reasonable force in the School Code is akin to the reasonable force that police officers are allowed to use." *Id.*

154. Coker v. Lukes, No. 366791, 2024 WL 4757824 (Mich. App. Nov. 12, 2024).

155. *Id.* at *1.

despite the use of force and the possibility of the student being seriously injured, the court concluded that:

> In light of the circumstances facing Lukes, which required immediate action to quell a large, on-going and chaotic situation . . . his grabbing and "taking down" QC . . . was a reasonable, good faith judgement to use this physical force. No reasonable juror could conclude otherwise given these facts, particularly so because of the required deference that must be given to Lukes under MCL 380.1312(7) ("deference shall be given to reasonable good-faith judgment made by that person").[156]

Michigan caselaw has not identified a forceful physical act by a teacher that was unreasonable.

B. Good Faith Judgment Analysis

How are we to assess a teacher's judgment in order to determine whether or not it was made in good faith? According to *Coker*, the good faith judgment test is a subjective test.[157] Relying on *Oliver v. Smith*[158] and *Latits v. Phillips*,[159] the court stated that "[a]s long as defendant can show that he had a good-faith belief that he was acting properly in using deadly force, he is entitled to the protections of governmental immunity regardless of whether he was correct in that belief."[160] And "[w]hether Lukes was acting in good faith is a subjective test."[161] Lukes testified that he "decided to intervene to restrain QC" to prevent her from attacking other students, to protect her safety and the safety of other students, and to "deescalate the situation."[162] The court found that, because Lukes "held the belief that he was properly using physical intervention . . . therefore reasonable minds could not differ as to whether Lukes was acting in good faith."[163] Because Lukes acted in good faith, he has the right to governmental immunity to claims of assault and battery.[164]

Michigan caselaw has not identified a teacher's belief that their use of physical force was not the result of a good faith judgment.

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156. *Id.* at *5.
157. *Id.* at *7.
158. Oliver v. Smith, 810 N.W.2d 57 (2010).
159. Latis v. Phillips, 826 N.W.2d 190 (2012).
160. *Coker*, 2024 WL 4757824, at *7.
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*

C. Gross Negligence as Proximate Cause of Injury Analysis

A teacher who makes a good faith judgment to use reasonable physical force on a student for maintaining order and control is granted immunity but only if the act "does not amount to gross negligence that is the proximate cause of the [student's] injury,"[165] What acts of physical force by a teacher would amount to gross negligence? *Coker* offers two definitions of "gross negligence": "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results"[166] and "a willful disregard of safety measures and a singular disregard for substantial risks."[167]

Relying on *Maiden v. Rozwood*,[168] a case in which a care aid and a nurse restrained a resident at a mental health facility thereby causing the resident's death yet were found not to have acted with gross negligence, the court in *Coker* stated that a gross negligence analysis must focus on the actions of the teacher, not the student's injuries that resulted from those actions. The court stated:

> Although it is true that Lukes could have used other means to restrain QC, "the failure to employ those alternatives" was not "so reckless as to demonstrate a substantial lack of concern for whether an injury results" . . . . A focus on Lukes's *actions*, rather than the *result* of those actions, leads to the conclusion that Lukes's conduct did not constitute gross negligence . . . .[169]

If we are not to concern ourselves with *either* the student's injuries that result from a teacher's actions *or* the fact that the actions chosen were more forceful—perhaps far more forceful—than other possible means a teacher could have chosen to maintain order and control, what factors are we to consider when determining whether the teacher's actions amounted to gross negligence? Michigan caselaw on corporal punishment does not tell us.

As to establishing that the teacher's act was the proximate cause of injury, the student must establish both that the injury was significant and that the teacher's action was the sole cause of the student's injury. In *Widdoes v. Detroit Public Schools*,[170] the student testified that the teacher

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165. *Id.* at *5 (quoting MICH. COMP. LAWS ANN. § 691.1407(2)(c) (West 1965)).

166. *Coker*, 2024 WL 4757824, at *5 (quoting § 691.1407(8)(a)).

167. *Coker*, 2024 WL 4757824, at *5 (quoting Oliver v. Smith, 810 N.W.2d 57, 62 (2010).

168. Maiden v. Rozwood, 597 NW 2d 817, 820–21 (1999).

169. *Coker*, 2024 WL 4757824, at *6.

170. Widdoes v. Detroit Public Schools, 553 N.W.2d 688, 690 (1996).

"grabbed him by the arm and pulled him toward the door . . . [but] did not use 'real bad force' or 'hurt him in any way.'"[171] Although the teacher had used physical force on the student, the fact that the teacher had not injured the student meant that the teacher's action did not "ris[e] to the level of corporal punishment."[172]

Yet, even if a student is seriously injured by a teacher's action, the student still has to establish that those injuries were the result of the teacher's actions *only*. Quoting *Oliver*,[173] the court in *Coker* stated:

> [T]he defendant, a police officer, arrested the plaintiff after he was disruptive and uncooperative. The plaintiff filed a complaint, alleging that he was injured during the arrest because the officer used excessive force . . . . This Court reversed the trial court's ruling that denied the officer's motion for summary disposition, holding that the plaintiff's "wrist and hand injury is not clearly attributable to [the officer] alone and instead may just as fairly be attributed to plaintiff" because the "facts as developed clearly indicate that plaintiff was actively resisting arrest and the record indicates that plaintiff's injuries were just as likely caused by his own efforts to thwart the officers'" attempts to restrain him.[174]

Using this same reasoning, the court in *Coker* stated that, because QC:

> struggled against Lukes's attempts to stop her from getting into a physical fight . . . . QC's injury was not clearly attributable to Lukes *alone*, but may "just as fairly" be attributed to QC . . . . If QC had complied with Lukes's original verbal commands to leave the scene, or stopped resisting once Lukes grabbed her, her injury would not have occurred.[175]

So far, Michigan caselaw has not identified a teacher's physically forceful action as amounting to gross negligence.

171. *Id.*
172. *Id.* at 691.
173. Oliver v. Smith, 810 N.W.2d 57, 62 (2010).
174. *Coker*, 2024 WL 4757824, at *6 (quoting *Oliver*, 810 N.W.2d at 63).
175. *Coker*, 2024 WL 4757824, at *6.

VII. FEDERAL EFFORTS TO PROHIBIT CORPORAL PUNISHMENT

There have been repeated efforts to pass federal legislation to prohibit corporal punishments in public schools but none have succeeded.[176]

A. Federal Statutes

In 2020, Protecting Our Students in School was introduced in both the House and Senate.[177] Had it been enacted, this bill would have:

- prohibited the use of corporal punishment in schools that receive federal funding;
- established enforcement provisions, including a private right of action for a student who has been subjected to corporal punishment;
- created a grant program for state educational agencies to implement positive behavioral interventions and supports to address student behavior and reduce exclusionary and aversive discipline practices.

Neither the House nor the Senate voted on the bill. It was reintroduced in 2021. Neither chamber voted on the bill. It was reintroduced again in

176. The following are failed legislative efforts to end corporal punishment in public schools: To Deny Funds to Educational Programs That Allow Corporal Punishment, H.R. 1522, 102nd Cong. (1991); *Hearing on H.R 1522 Before the Subcomm. On Educ. & Labor*, 102nd Cong. (1992); To Deny Funds to Educational Programs That Allow Corporal Punishment, H.R. 627, 103rd Cong. (1993); To Deny Funds to Educational Programs That Allow Corporal Punishment, H.R. 2918,104th Cong. (1996); To End the Use of Corporal Punishment in Schools, and for Other Purposes, H.R. 5628, 111th Cong. (2010); To End the Use of Corporal Punishment in Schools, and for Other Purposes, H.R.3027, 112th Cong. (2011); To End the Use of Corporal Punishment in Schools, and for Other Purposes, H.R.5005, 113th Cong. (2014); To End the Use of Corporal Punishment in Schools, and for Other Purposes, H.R.2268, 114th Cong. (2015); To End the Use of Corporal Punishment in Schools, and for Other Purposes, H.R.160, 115th Cong. (2017); Ending Corporal Punishment in Schools Act of 2019, H.R.727, 116th Cong. (2019); Protecting Our Students in Schools Act of 2020, S.4936, 116th Cong. (2020); Protecting Our Students in Schools Act of 2020, H.R.8460, 116th Cong. (2020); Protecting Our Students in Schools Act of 2021, S.2029, 117th Cong. (2021); Protecting Our Students in Schools Act of 2021, H.R.3836, 117th Cong. (2021); Ending Corporal Punishment in Schools Act of 2021, H.R.1234, 117th Cong. (2021); Protecting Our Students in Schools Act of 2023, S.1762, 118th Cong. (2023); Protecting Our Students in Schools Act of 2023, H.R.3596, 118th Cong. (2023).

177. H.R 8460; S. 4936.

2023.[178] That year, civil rights organizations such as the National Association for the Advancement of Colored People (NAACP) and the American Civil Liberties Union (ACLU), disability rights organizations such as the National Down Syndrome Congress (NDSC), National Disability Rights Network (NDRN), and Autistic Self Advocacy Network, as well as educator organizations such as the National Association of Secondary School Principals (NASSP), National Education Association (NEA), and the American Federation of Teachers (AFT) endorsed the Protecting Our Students in School Act.[179] Yet, again, neither chamber voted on the bill.

B. IDEA and IEPs

Although the Federal Individuals with Disabilities Education Act (IDEA) ensures that children with disabilities who attend public schools receive more support and assistance than children without disabilities, IDEA does not prohibit the use of corporal punishment on children with disabilities.[180] Unless expressly prohibited by state law, states that permit the use of corporal punishment on the general population students thereby permit the use of corporal punishment on children with disabilities.[181] Judges have upheld this right even when the corporal punishment resulted in the child needing psychiatric hospitalization.[182]

North Carolina and Texas permit parents to submit a signed form that states their child is not to receive corporal punishment.[183] In both states, the failure to submit that form is *de facto* permission to administer corporal punishment.[184] In Georgia, parents must submit to the school a form signed by a state-licensed doctor stating that "corporal punishment would be detrimental to the child's mental health or emotional stability."[185]

178. S. 2029; S. 1762.

179. Morgan Craven, *Support the Protecting our Students in Schools Act – Why the Federal Government Must Act Now to End Corporal Punishment*, INTERCULTURAL DEV. RSCH. ASS'N (Oct. 2023), https://www.idra.org/resource-center/support-the-protecting-our-students-in-schools-act-why-the-federal-government-must-act-now-to-end-corporal-punishment/ [https://perma.cc/V8GL-R9UD].

180. Gershoff & Font, *supra* note 17, at 12.

181. *See id.*

182. Sharon Lohrmann-O'Rourke & Perry Zirkel, *The Case Law on Aversive Interventions for Students with Disabilities*, 65 EXCEPTIONAL CHILDREN 1, 111 (1998).

183. Gershoff & Font, *supra* note 17, at 18.

184. *Id.* at 16.

185. *Id.*

If a child with a disability misbehaves, their teachers are not necessarily permitted to punish the child because of that misbehavior.[186] When teachers use traditional forms of punishment, such as corporal punishment, on a student with a disability, the concern is raised that the child is being punished for an action that is "a manifestation of their disability."[187] The Individualized Education Plan (IEP) team (which should include the child's parent(s))[188] must make a "manifestation determination," that is, they must determine whether or not the misbehavior was caused by the child's disability.[189] If the misbehavior was caused by the disability, then the IEP team should devise a plan to lessen that behavior that does not include punishment.[190] If the team determines that the misbehavior was not caused by the child's disability, then the

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186. *See, e.g.*, 34 C.F.R. §300.324(a)(2)(i) (2006) ("In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.").

187. Randy Chapman, *Using the IEP to Get Appropriate Services for Students with Disabilities*, 31 COLO. LAW. 29, 31 (2002) ("[A]ll students with disabilities under the IDEA have a right to a free, appropriate public education. This includes children with disabilities who may misbehave, violate school rules, and be subject to suspension or expulsion. Moreover, children with disabilities may not be punished for conduct that violates a school rule and appears to be misbehavior, but is really a manifestation of their disability. For example, a student who has a disability such as Tourette's syndrome may prevent the student from controlling certain behaviors that ordinarily might be the subject of the disciplinary process. Thus, the IDEA includes in the IEP process guidelines for determining whether the misbehavior is related to the student's disability."). *See also* 20 U.S.C. § 1415(k)(4); 34 C.F.R. § 300.523 (2006).

188. 20 U.S.C. § 1414(d)(1)(B)(i). The IDEA identifies the types of individuals who make up the IEP team. § 1414; 34 C.F.R. § 300.344 (2006). In 1997, the IDEA was amended to add the student's parents to the team. *Id.*

189. 34 C.F.R. §300.530(e) (2006).

190. § 300.530 (f)(1)(i)–(ii).

> If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must—
>
> **(1)** Either—
>
> **(i)** Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or
>
> **(ii)** If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior . . . .

Id.; Chapman, *supra* note 187, at 32 ("If the student's behavior is a "manifestation" of the student's disability, the student may not be expelled *or punished* for that behavior. This does not mean the IEP team cannot change the student's IEP/educational placement to provide services to deal with the behavior, but the student may not be punished for the behavior.") (emphasis added). *See* 34 C.F.R. §§ 300.524 (2003), 300.121(d) (2006).

school may punish the student in the same way they would a child who does not have a disability.[191] In those states that do not allow a parent to opt out of corporal punishment, parents can build prohibitions of corporal punishment into their child's IEP to protect their child from being physically disciplined.[192]

As mentioned above, students with disabilities are disproportionately at risk for being corporally punished than children without disabilities. It seems that teachers are unable or unwilling to recognize manifestations of disabilities. On this problem, the Council of Parents Attorneys and Advocates (COPAA), a nonprofit group that works to protect the civil rights of children with disabilities, writes:

> Children with disabilities are a vulnerable population, at special risk of being subject to aversive interventions. Their disabilities may manifest in what appears to be misbehavior, or they may have great difficulty following instructions. Rather than provide positive behavioral interventions, schools may react with aversive interventions. In addition, children may have communication, emotional, cognitive, or developmental impairments that may impede understanding or the ability to effectively report what happened to them. Moreover, they may be unable to comply with instructions that are made a condition for ending the abusive intervention and unable to communicate pain or danger while in the intervention. Children with these kinds of impairments are frequently segregated in self-contained classrooms with other

191. Chapman, *supra* note 187, at 32 ("[I]f the student's conduct is determined not to be a manifestation of the student's disability, the student may be disciplined in the same manner as any other student would be disciplined. However, regardless of the outcome of the manifestation review, the student must continue to receive a free, appropriate public education."). *See* 34 C.F.R. § 300.524(a) (2003).

192. Terry Seligman, *Step-By-Step: A Guide to Disciplining Children with Disabilities*, 2002 ARK. L. NOTES 65, 71 (2002) ("The major focus of the disciplinary provisions of the IDEA is on actions that change a child's placement or remove the child from school. Measures such as withholding of privileges, detention, and in-school suspension can generally be used for children with disabilities to the same extent as for non-disabled children. One constraint on the choice of a disciplinary response is the provisions of a particular child's IEP. Some children will have specific consideration in their IEPs of appropriate sanctions for misbehavior. For example, a child's IEP might state that withdrawal of privileges or time-outs be used for misconduct in lieu of corporal punishment.").

children with disabilities, and few witnesses who can describe the occurrence.[193]

Even when teachers violate IDEA by punishing a child's behaviors that are manifestations of their disability, judges have consistently upheld a school official's right to physically punish students with disabilities.

VIII. DISORDERLY AND DISRUPTIVE

As disabilities studies scholars have long argued, disabled bodies are disorderly and dangerous bodies: they violate ableist social norms and thereby disrupt institutional expectations of obedience and compliance.[194] Autistic bodies are paradigmatically disorderly bodies given that "autistic behaviors" are by definition behaviors that are disordered and so disrupt.[195] Indeed, teachers resent autistic children so strongly that parents of autistic children find that teachers in public schools refuse to allow their autistic children in their classrooms.[196] It is hardly surprising that the children a teacher is most likely to use corporal punishment on are young, non-verbal autistic students. These students are least able to understand and comply with the demands their teachers place on them, least able to defend themselves from harmful teachers, and they are least capable of reporting what happened to them. They are, then, the perfect victims.

As long as teachers are permitted to use "reasonable physical force" to maintain order and prevent disruptions, then teachers will continue to use force on students with disabilities, in particular, children with neurological disorders such as autism. This is because the very concept of "order" as currently understood in public school culture—as silence,

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193. JESSIE BUTLER, THE COUNCIL OF PARENT ATT'YS AND ADVOC., INC., UNSAFE IN THE SCHOOLHOUSE: ABUSE OF CHILDREN WITH DISABILITIES 9–10 (2009), https://cdn.ymaws.com/www.copaa.org/resource/collection/662B1866-952D-41FA-B7F3-D3CF68639918/UnsafeCOPAAMay_27_2009.pdf [https://perma.cc/9UA4-CKWP].

194. Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. 1637, 1672 (2021) ("[D]isorderly conduct laws are deployed to enforce ableist norms that target behaviors linked to disability—or at public manifestations of disability—perceived as deviant or threatening."); *See generally* SUSAN WENDELL, THE REJECTED BODY: FEMINIST PHILOSOPHICAL REFLECTIONS ON DISABILITY (1996); ELIZABETH BARNES, THE MINORITY BODY: A THEORY OF DISABILITY (2016).

195. Jami Anderson, *Elephants and Armadillos: Anti-Autistic Ideology FORMS an Anti-Autistic World, Contemporary Philosophy of Autism*, *in* CONTEMPORARY PHILOSOPHY OF AUTISM (Jami Anderson & Simon Cushing eds., forthcoming Sept. 2025).

196. *See, e.g.*, @Sixdeep357, *Autistic Child Ruining Class for Others*, A TO Z TCHR. STUFF: GEN. EDUC. F. (Sept. 1, 2011), https://forums.atozteacherstuff.com/index.php?threads/autistic-child-ruining-class-for-others.150455/#google_vignette [https://perma.cc/KP5K-T3BF].

compliance and immediate obedience is inherently anti-disability. Until all corporal punishment laws—those that permit *and prohibit* corporal punishment—are amended to prohibit the use of any physical force and any threat of physical force to control or prevent disruptive and disorderly behavior, teachers will continue to use physical force on students with disabilities. Because teachers are granted civil and criminal immunity, the "common law restraints" that the Court insisted in *Ingraham* provide sufficient safeguards against disciplinary abuses do not exist. Tolerance for any physical force or the threat of physical force undermines educational outcomes for students with disabilities. It violates the purposes and spirit of IDEA and is patently unjust.