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The Teacher Privilege to Use Corporal Punishment

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I. INTRODUCTION

Traditionally, teachers have had a qualified privilege to inflict corporal punishment on pupils under their control.¹ This privilege

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The privilege has long been controversial, but the opponents have seldom been able to abolish the deeply rooted practice. Its antiquity is demonstrated in *Proverbs* 22:15 (King James): "Foolishness is bound in the heart of a child; but the rod of correction shall drive it far from him." In 1645, the Free Town School of Dorchester included in its governing rules the following:

And because the Rodd of Correction is an ordinance of God necessary sometymes to bee dispenced unto Children . . . It is therefore ordered and agreed that the schoolmaster for the tyme beeing shall have full power to minister Correction to all or any of his schollers . . . and no parent . . . shall hinder or goe about to hinder the master therein [sic].

Dorchester Town Records, Jan. 14, 1645, in *The Fourth Report of the Record Commissioners of the City of Boston* 56 (1883), cited in Note, *The Birch Rod, Due Process, and the Disciplinarian*, 26 *ARK. L. REV.* 365, 375 n.47 (1972).

The opponent's case has seldom been put better than in *Cooper v. McJunkin*, 4 *Ind.* 290 (1853):

The law still tolerates corporal punishment in the schoolroom. The authorities are all that way, and the legislature has not thought proper to interfere. The public seem to cling to a despotism in the government of schools which has been discarded everywhere else. . . .

In one respect the tendency of the rod is so evidently evil, that it might, perhaps, be arrested on the ground of public policy. The practice has an inherent proneness to abuse. The very act of whipping engenders passion, and very generally leads to excess. . . . Hence the spirit of the law is, and the leaning of the courts should be, to discountenance a practice which tends to excite human passions to heated and excessive action, ending in abuse and breaches of the peace. Such a system of petty tyranny cannot be watched too cautiously nor guarded too strictly. . . .

Were it within the province of these discussions, how many other objections to the rod, based upon its injurious moral influence on both teacher and pupil, might be safely assumed.

One thing seems obvious. The very act of resorting to the rod demonstrates the incapacity of the teacher for one of the most important parts of

operates as a defense to both criminal and civil charges of battery brought against a teacher for such punishment. Although there has been only one opinion published in Indiana on the subject in the last eighty years,² two recent events have given a new urgency to the question of the exact scope of the defense. The first is the adoption of the new Indiana Criminal Code,³ which defines certain defenses but omits any explicit reference to a corporal punishment defense, leaving it unclear whether the defense still exists and if so, what its scope is.⁴ The second is the recent holding of the United States Supreme Court in *Ingraham v. Wright*.⁵ In *Wright*, the Court held the eighth amendment's cruel and unusual punishment clause inapplicable to pupil corporal punishment cases⁶ and further held that the fourteenth amendment's due process guarantee did not require notice or a hearing prior to the punishment.⁷ The significance of this case in this context is that the Court reached its holding in large part because of the existence of "adequate" state remedies for pupils who are the victims of unjustified corporal punishment. Because the adequacy of the remedy is dependent upon the scope of the defense available to the teacher, the scope of the defense takes on new significance.

II. THE TEACHER'S PRIVILEGE IN INDIANA

The intentional striking of another person without his consent for the purpose of punishing him clearly renders the actor liable to criminal and civil remedies for battery unless the action was privileged.⁸ The reason for any such privilege is that a greater

his vocation, namely, school government. For such a teacher the nurseries of the republic are not the proper element. They are above him. His true position will readily suggest itself.

It can hardly be doubted but that public opinion will, in time, strike the ferule from the hands of the teacher, leaving him as the true basis of government, only the resources of his intellect and heart.

Id. at 291-92.

Only two states prohibit corporal punishment by statute: MASS. GEN. LAWS ANN. ch. 71, § 37 G (West Supp. 1977-1978); N.J. STAT. ANN. § 18A:6-1 (West 1968).

²Indiana State Personnel Bd. v. Jackson, 244 Ind. 321, 192 N.E.2d 740 (1963).

³Pub. L. No. 340, 1977 Ind. Acts 1533 (codified in scattered sections of title 35 of IND. CODE (Supp. 1977)).

⁴See pp. 363-64 *infra*.

⁵430 U.S. 651 (1977).

⁶*Id.* at 671. See notes 78-90 *infra* and accompanying text.

⁷430 U.S. at 682. See notes 91-97 *infra* and accompanying text.

⁸IND. CODE § 35-42-2-1 (Supp. 1977) defines a battery as: "A person who knowingly or intentionally touches another in a rude, insolent, or angry manner commits battery . . ." Under prior law the provision read: "Whoever in a rude, insolent or angry manner, unlawfully touches another commits battery . . ." *Id.* § 35-1-54-4 (1976) (repealed 1977).

public good is achieved by permitting the commission of what otherwise would be a tortious or criminal act when the elements of the privilege are established. The battery remedy furthers the public good by protecting persons against unwanted intrusions on their personal security. The policy of the teacher's privilege is to permit such intrusions by a teacher that are reasonably necessary for the proper education and discipline of the student. In creating this privilege, the lawmaker balances competing policies: To further the policy of the privilege is to diminish the policy of the remedy, and vice-versa. These policies are given legal significance by the substantive scope of the privilege; and the remedy, and therefore the scope of the remedy, varies inversely with the scope of the privilege. This implies that the lawmaker creating a privilege must clearly specify its substantive scope because only then can he control the degree to which the policy behind it will prevail over the policy of the remedy.

The substantive scope of the privilege is defined by its specific elements and the effect given to a teacher's mistaken belief in the existence of those elements. It is difficult to determine the scope of the pre-Code privilege in Indiana because of the paucity of statutory and case law on the subject. There are only seven cases in Indiana involving corporal punishment by a teacher.⁹ Five of those were criminal battery prosecutions, the last one having occurred in 1894; one was a civil battery action in 1853; and one in 1963 involved corporal punishment as a ground for firing a state employee. Prior to 1973, there was no statute authorizing or regulating corporal punishment by teachers. In that year, a statute¹⁰ was enacted to regulate the suspension and expulsion of students. It has some bearing on corporal punishment but is far from a comprehensive treatment; there are no cases construing the statute as applicable to corporal punishment cases. In spite of this, this author believes the substantive scope of the privilege can be delineated sharply enough to answer the two questions concerning the impact of the new Code and the *Wright* decision.

A civil battery has a similar definition. See *Mercer v. Corbin*, 117 Ind. 450, 20 N.E. 132 (1889); *Cohen v. Peoples*, 140 Ind. App. 353, 220 N.E.2d 665 (1966); *Fort Wayne & N. Ind. Traction Co. v. Ridenour*, 71 Ind. App. 263, 123 N.E. 720 (1919). See note 9 *infra* for the teacher-privilege cases.

⁹*Indiana State Personnel Bd. v. Jackson*, 244 Ind. 321, 192 N.E.2d 740 (1963); *State v. Vanderbilt*, 116 Ind. 11, 18 N.E. 266 (1888); *Vanvactor v. State*, 113 Ind. 276, 15 N.E. 341 (1888); *Danenoffer v. State*, 69 Ind. 295 (1879); *Cooper v. McJunkin*, 4 Ind. 290 (1853); *Gardner v. State*, 4 Ind. 632 (1853); *Marlsbary v. State*, 10 Ind. App. 21, 37 N.E. 558 (1894).

¹⁰IND. CODE §§ 20-8.1-5-1 to -16 (1976).

A. *Elements of the Privilege*

This privilege can be analyzed in terms of the following elements: (1) The teacher must have the general authority to inflict corporal punishment on the pupil; (2) the rule violated must be within the scope of the educational function; (3) the violator of the rule must be the one punished; and (4) the punishment inflicted must be in proportion to the gravity of the offense.

1. *The teacher¹¹ must have the general authority to inflict corporal punishment on the pupil in appropriate cases.*—At a minimum, this excludes the possibility of relying on the privilege in a state that prohibits any type of corporal punishment. All of the Indiana cases involving corporal punishment have derived the teacher's authority from the doctrine of *in loco parentis*.¹² Simply stated, *in loco parentis* implies that the authority of a parent over a child is transferred to the teacher during the school day. Because a parent has the right to administer corporal punishment to his child, the teacher has the right by virtue of the doctrine of *in loco parentis*. The Indiana Supreme Court voiced this view in 1963:

The law of Indiana clearly accords to the public school teacher in proper cases the same right over a child in his or her school as is possessed by the parent, and this includes the right to administer corporal punishment when it is appropriate. The law is well settled in this state that the teacher stands in *in loco parentis* to the child, and his authority in this respect is no more subject to question than is the

¹¹The Indiana discipline statute makes it clear that the privilege is not confined to teachers but may be invoked by "any of the other school personnel" in charge of an educational function. IND. CODE § 20-8.1-5-2(a) (1976). *Id.* § 20-8.1-5-2(b) states:

Each principal within the school or school function under his jurisdiction, the superintendent and the administrative staff with his approval, with respect to all schools, may make written rules and establish written standards governing student conduct, and take any action which is reasonably necessary to carry out, or to prevent interference with carrying out, any educational function.

Often the principal, not the teacher, inflicts the corporal punishment. *See, e.g.,* *Ingraham v. Wright*, 430 U.S. 651 (1977); *Indiana State Personnel Bd. v. Jackson*, 244 Ind. 321, 192 N.E.2d 740 (1963); *Danenhoffer v. State*, 69 Ind. 295 (1879).

¹²*Ballentine's Law Dictionary* defines *in loco parentis* as follows: "One who has taken a position in reference to a child of that of a lawful father, assuming the office of a father and the obligation of supporting the child, assuming a parental character and discharging parental duties, although not the parent." *BALLENTINE'S LAW DICTIONARY* 943 (3d ed. 1969).

"An individual is said to stand in *in loco parentis* when he assumes the legal obligations of parenthood without going through the legal formalities of adoption." *Sturruv v. Mahan*, 261 Ind. 463, 470 n.3, 305 N.E.2d 877, 882 n.3 (1974).

authority of the parent. The teacher's authority and the kind and quantum of punishment employed to meet a given offense is measured by the same rules, standards and requirements as fixed and established for parents.¹³

This dictum is an overly broad statement of the teacher's authority under the doctrine of *in loco parentis*. It has been recognized since Blackstone¹⁴ that the teacher's authority to use corporal punishment is more limited than that of the parent, and the Indiana Supreme Court recognized this in *Vanvactor v. State*:¹⁵

The books commonly assume that a teacher has the same right to chastise his pupil that a parent has to thus punish his child. But that is only true in a limited sense. The teacher has no general right of chastisement for all offenses as has the parent. The teacher's right in that respect is restricted to the limits of his jurisdiction and responsibility as a teacher.¹⁶

This doctrine is appropriate for cases where an actual delegation of authority from the parent can be found—for example, in the case of students in private schools or those over the age of compulsory attendance. However, where parents cannot withdraw their children from school or prevent their being subject to corporal punishment, the doctrine of *in loco parentis* is a fiction, and it is sounder to recognize that such public school pupils are subject to corporal punishment under the police power of the states that is delegated to the school officials.¹⁷

¹³Indiana State Personnel Bd. v. Jackson, 244 Ind. 321, 328, 192 N.E.2d 740, 743-44 (1963).

¹⁴W. BLACKSTONE, COMMENTARIES 452-53 (1872).

[A parent] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.

Id. at 454.

¹⁵113 Ind. 276, 15 N.E. 341 (1887).

¹⁶*Id.* at 279-80, 15 N.E. at 342.

¹⁷1 F. HARPER & F. JAMES, LAW OF TORTS § 3.20, at 291 (1956); W. PROSSER, LAW OF TORTS § 27, at 136 (4th ed. 1971).

"Although the early cases viewed the authority of the teacher as deriving from the parents, the concept of parental delegation has been replaced by the view—more consonant with compulsory education laws—that the State itself may impose such corporal punishment as is reasonably necessary . . ." *Ingraham v. Wright*, 430 U.S. at 662.

For a more detailed discussion of this issue, see Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U. PA. L. REV. 373 (1969); Hudgins, *The Discipline of Secondary*

Since 1973, the teacher's authority to inflict corporal punishment could plausibly be based upon the following Indiana statute:

Delegation of Authority. In carrying out the school purposes of the school corporation the following grants of authority are hereby made:

(a) Each teacher and any of the other school personnel shall, when pupils are under his charge, have the right to take any action which is then reasonably necessary to carry out, or to prevent an interference with, the educational function of which he is then in charge.¹⁸

Although corporal punishment is not explicitly mentioned and there are no cases so construing the statute, the authorization of "any action" reasonably necessary to further the educational function would seem ample ground for implying the authority to use corporal punishment. Clearly the existence of the authority depends on the inflicter being one of the school personnel in charge of an educational function and the victim being a student involved in that function.

2. *The rule violated by the student must further the "educational function"—for example, it cannot be a rule designed by the educator to carry out some private personal end.*—What is an "educational function"? Although not defined in the statute, it is generally thought to include instruction per se and those housekeeping activities whereby the school acts as a host to the students—for example, in providing a safe environment for the students for eating, for recreation, and for transportation to and from school.¹⁹ The *Restatement (Second) of Torts* provides: "One other than a parent who has been given by law . . . the function of controlling, training, or educating a child, is privileged to apply such reasonable force . . . as he believes to be necessary for its proper control, training, or education"²⁰ There would be no sound reason for Indiana to allow the use of corporal punishment for a breach of discipline occurring during classroom instruction and not during lunch or on the school bus going to and from school.

The Indiana cases have established this second element by requiring that the rule or order enforced be "reasonable,"—that is,

School Students and Procedural Due Process: A Standard, 7 WAKE FOREST L. REV. 32 (1970); Sumption, *The Control of Pupil Conduct By the School*, 20 LAW AND CONTEMP. PROB. 80 (1955); Taylor, *With Temperate Rod: Maintaining Academic Order in Secondary Schools*, 58 KY. L.J. 617 (1970); Tripp, *Acting "In Loco Parentis" as a Defense to Assault and Battery*, 16 CLEV.-MAR. L. REV. 39 (1967); Note, *The Birch Rod, Due Process, and the Disciplinarian*, 26 ARK. L. REV. 365 (1972).

¹⁸IND. CODE § 20-8.1-5-2(a) (1976).

¹⁹1 F. HARPER & F. JAMES, *supra* note 17, § 3.20; Goldstein, *supra* note 17, at 387.

²⁰RESTATEMENT (SECOND) OF TORTS § 147(2) (1965).

reasonably related to the educational function.²¹ In *State v. Vanderbilt*,²² the Indiana Supreme Court held that a school rule requiring students to pay for school property carelessly destroyed was invalid, stating: "The rule or rules to which the teacher may thus enforce obedience must, however, be reasonable, and whether or not such rules are reasonable is ultimately a question for the courts."²³ The court said this rule was not reasonable because the students would have to look to the parents for money, and if it was not forthcoming, "the child would be left subject to punishment for not having done what it had no power to do."²⁴ In addition, the rule was not reasonable because it made punishable merely careless acts by the student.

In *Danenhoffer v. State*,²⁵ the Indiana Supreme Court reversed a battery conviction where the defendant, the superintendent of the school, whipped an eleven-year-old boy who disobeyed the order of the teacher to take a note to the defendant and went home instead. The court said a "teacher has the right to exact from his pupils obedience to his lawful and reasonable commands,"²⁶ and that this order was a reasonable command. In *Vanvactor v. State*,²⁷ the teacher switched the student for disrupting the class with humorous antics while the teacher's back was turned. The court reversed the battery conviction, stating that a teacher may exact compliance with all reasonable commands:

Patrick's offense as a breach of good deportment in a school was not one to be overlooked or treated lightly. It was calculated, and was most likely intended, to humiliate Vanvactor, in the presence of his pupils, and its tendency was to impair his influence in the government of his school.²⁸

In *Indiana State Personnel Board v. Jackson*,²⁹ the court held the whipping of a student for disrupting a class by using abusive language and throwing her books on the floor to be within the privilege.

²¹The concept of "reasonableness" also implies that there is room for difference of judgment on whether any given rule or order does further an educational function and whether the teacher's mistaken determination will be accepted, if reasonable. See pp. 360-63 *infra*.

²²116 Ind. 11, 18 N.E. 266 (1888).

²³*Id.* at 13-14, 18 N.E. at 267.

²⁴*Id.* at 14, 18 N.E. at 267-68.

²⁵69 Ind. 295 (1879).

²⁶*Id.* at 299.

²⁷113 Ind. 276, 15 N.E. 341 (1888).

²⁸*Id.* at 281, 15 N.E. at 343.

²⁹244 Ind. 321, 192 N.E.2d 740 (1963). See note 54 *infra* and accompanying text.

The rule or order must be reasonable as applied in addition to being reasonable in general. In *Fertich v. Michener*,³⁰ the Indiana Supreme Court held that a general rule requiring tardy students to wait in a vestibule until the opening exercises had been completed was reasonable. However, it could not reasonably be applied when the temperature outside was eighteen degrees below zero and the vestibule was too cold to wait in comfortably.³¹ The rule or order cannot make punishable any behavior that is constitutionally protected, nor can it discriminate against any student.³²

An Indiana statute also provides for the dissemination of rules and standards:

No rule or standard shall be effective with respect to any student until a written copy thereof is made available or delivered to the student or his parent, or is otherwise given general publicity within any school to which it applies. This limitation shall not be construed technically and shall be satisfied in any case where there has been a good faith effort to disseminate to students or parents generally the text or substance of any rule or standard.³³

Some rules are capable of being set out in writing, and it is no undue burden to require publication to the pupil before a violation can be punished. However, some orders are not capable of being specified in writing in advance because a wide variety of pupil conduct is punishable, and it would be impossible to anticipate it in detail. This

³⁰111 Ind. 472, 11 N.E. 605 (1887). This is not a corporal punishment case. The pupil sued the teacher for false imprisonment for keeping the student after class for violating a rule, and for injuries sustained when the pupil returned home in eighteen degree below zero weather rather than wait in an unheated vestibule as required by the teacher's rule.

³¹*Id.* at 480, 11 N.E. at 609.

³²IND. CODE § 20-8.1-5-3 (1976) provides:

The delegations of authority provided in . . . this chapter shall, however, be subject to the following limitations: (a) Delegation of authority shall be necessary in carrying out school purposes and shall comply with the applicable statutes of the state of Indiana and with the Constitutions of Indiana and of the United States. Rules, standards or actions shall not discriminate against any student or class of students, but the number of schools or students to which they apply shall not be determinative of whether they thus discriminate. Rules, standards or actions which interfere with a constitutionally protected fundamental student right shall be valid only in instances where they are necessary to prevent an interference with the educational function of the school. All rules, standards or actions shall be reasonably necessary in carrying out school purposes, and all rules, standards or actions shall be narrowly constructed in order to accomplish their purpose with the minimal infringement on constitutionally protected rights.

³³IND. CODE § 20-8.1-5-3(c) (1976).

is recognized in *Danenhoffer*³⁴ where the court cited with approval a Wisconsin case in which the pupil's obligation to obey lawful commands of the teacher was held to constitute the common law of the school and "every pupil is presumed to know this law and is subject to it, whether it has or has not been re-enacted by the district board in the form of written rules and regulations."³⁵ The Indiana statute on pupil discipline is in accord and provides that the requirement shall *not* apply to

rules or directions concerning the movement of students, movement or parking of vehicles, day to day instructions concerning the operation of a classroom or teaching station, the time or times for commencement of school, or other standards or regulations relating to the manner in which an educational function is to be carried out.³⁶

3. *The actual violator of the rule must be the one punished.* — This seems obvious, and none of the Indiana cases discuss this issue.³⁷

4. *The corporal punishment inflicted must be proportioned to the gravity of the offense.* — Corporal punishment is *punishment*³⁸ for the purpose of furthering the educational function of the school by rehabilitating the violator, deterring the pupil and other pupils from further violations, and vindicating the rule infringed. Therefore, the type and extent of the corporal punishment actually in-

³⁴Note, however, that *Danenhoffer* was decided long before the relevant statute and therefore is not an explicit interpretation of the statute.

³⁵69 Ind. at 299 (quoting *State ex rel. Burpee v. Burton*, 45 Wis. 150, 155 (1878)). See also *Salem Community School Corp. v. Easterly*, 150 Ind. App. 11, 275 N.E.2d 317 (1971).

³⁶IND. CODE § 20-8.1-5-3(c) (1976).

³⁷The dissenters in *Ingraham v. Wright*, 430 U.S. 651, 681 (1977), argued this element could present a problem to the Court's due process holding. See discussion at pp. 368-71 *infra*.

³⁸In *Wright*, the Court stated:

No one can deny that spanking of school children is "punishment" under any reasonable reading of the word, for the similarities between spanking in public schools and other forms of punishment are too obvious to ignore. Like other forms of punishment, spanking of school children involves an institutionalized response to the violation of some official rule or regulation proscribing certain conduct and is imposed for the purpose of rehabilitating the offender, deterring the offender and others like him from committing the violation in the future, and inflicting some measure of social retribution for the harm that has been done.

Ingraham v. Wright, 430 U.S. 651, 685-86 (1977) (White, J., dissenting). The majority in *Wright* agreed that spanking school children is "punishment" but argued that not all punishments are subject to the cruel and unusual punishments clause of the United States Constitution. *Id.* at 670 n.39 (citing U.S. CONST. amend. VIII).

flicted must further those purposes. Any corporal punishment other than that needed to accomplish these goals is excessive or unreasonable.³⁹ Excessiveness is determined by the varying circumstances in each particular case; and the factors considered are the nature of the offense, the age, sex, physical and mental condition of the student, the instrument used, the part of the student's body involved, and the severity of the force.⁴⁰

The oldest Indiana case involving this issue is *Cooper v. McJunkin*,⁴¹ a civil battery action by a pupil against his teacher. The second count of the complaint alleged the teacher "unlawfully, and with inhuman violence, beat, bruised, cut and gashed the face and head" of the pupil.⁴² The teacher pleaded that the good government of the school required him to moderately chastise the pupil for misconduct, as the teacher had the legal right to do so. The Indiana Supreme Court reversed a judgment for the teacher, stating that even if the teacher's plea was adequate for the first count of simple battery it was not sufficient in regard to the second count. If the teacher committed the acts alleged in the second count, this could not be justified as the lawful infliction of "moderate chastisement."⁴³

In *Gardner v. State*,⁴⁴ a teacher was alleged to have worn out two whips on the student and to have administered a "blow or two with his fist on the head, and a couple of kicks in the face"⁴⁵ because of the pupil's refusal to continue trying to spell the word "commerce." Although the court reversed the conviction on other grounds, it held that such actions would not fall within the privilege.⁴⁶

Cases involving excessive force by parents on their children are relevant here because the Indiana Supreme Court has stated that although the teacher does not have precisely the same right of corporal punishment as the parent in all respects, he does have the same right as far as the quantum of force permitted.⁴⁷ In *Hinkle v. State*,⁴⁸ the court affirmed a battery conviction of a father who had chained his twelve-year-old daughter to a sewing machine while the father was away at work all day because she was incorrigible and

³⁹See note 18 *supra*.

⁴⁰*Vanvactor v. State*, 113 Ind. 276, 15 N.E. 341 (1888); *Cooper v. McJunkin*, 4 Ind. 290 (1853).

⁴¹4 Ind. 290 (1853).

⁴²*Id.* at 291.

⁴³*Id.* at 293.

⁴⁴4 Ind. 632 (1853).

⁴⁵*Id.* at 633.

⁴⁶*Id.*

⁴⁷See *Indiana State Personnel Bd. v. Jackson*, 244 Ind. 321, 192 N.E.2d 740 (1963); *Vanvactor v. State*, 113 Ind. 276, 15 N.E. 341 (1888).

⁴⁸127 Ind. 490, 26 N.E. 777 (1891).

would not obey him. The court held that this chastisement was unreasonable and not within the privilege of a parent to use corporal punishment on his child.⁴⁹ In *Hornbeck v. State*,⁵⁰ the court affirmed a conviction for battery by the father for striking his thirteen-year-old son several times with a buggy whip, saying:

The law is well settled that a parent has the right to administer proper and reasonable chastisement to his child without being guilty of an assault and battery; but he has no right to administer unreasonable or cruel and inhuman punishment. If the punishment is excessive, unreasonable, or cruel it is unlawful.⁵¹

The corporal punishment is not excessive merely because it causes pain to the student. In *Vanvactor v. State*,⁵² the teacher struck a sixteen-year-old student nine sharp blows on the back part of his legs between his body and the knee joints with a green switch three feet long and forked near the middle with two prongs composed of twigs. The student made no outcry, the switch was not broken, and he was back in school the next day without complaint. The evidence showed the switching had left imprinted marks and abrasions on his legs, which for a time gave him pain and annoyance. The court reversed the teacher's battery conviction because there was insufficient evidence that the force used was excessive:

The legitimate object of chastisement is to inflict punishment by the pain which it causes as well as the degradation which it implies. It does not, therefore, necessarily follow, because pain was produced, or some abrasion of the skin resulted from a switch, that a chastisement was either cruel or excessive.⁵³

The only other case where punishment not found to be excessive was described within the opinion was *Indiana State Personnel Board v. Jackson*.⁵⁴ The plaintiff was a supervisor at the Muscatatuck State School under the direction of the Department of Mental Health. He was dismissed from his job for striking a fourteen-year-old female student several times across the buttocks with a belt for disrupting a class with abusive language to the teacher and the plaintiff. In ordering the plaintiff reinstated, the court noted the evidence showed

⁴⁹*Id.* at 491, 26 N.E. at 778.

⁵⁰16 Ind. App. 484, 45 N.E. 620 (1896).

⁵¹*Id.* at 485, 45 N.E. at 620.

⁵²113 Ind. 276, 15 N.E. 341 (1888).

⁵³*Id.* at 281, 15 N.E. at 343.

⁵⁴244 Ind. 321, 192 N.E.2d 740 (1963)

that the plaintiff had resorted to the belt only after persuasion and other means had failed, that the plaintiff had struck the student lightly and without anger, and that the striking had not harmed the girl but rather had enabled her to gain control of herself. Therefore, this amount of force was within the privilege.

B. Teacher's Mistaken Belief in the Elements

The teacher must often make the determination that the above four elements are present by relying only on ambiguous facts that arise in an emotionally charged atmosphere; hence, the teacher could make a mistaken determination on any of the four elements. Under what circumstances can a mistaken teacher retain the benefit of the privilege? There are three basic approaches that could be taken in answering this question. Each reflects a different policy choice as to the substantive scope of the privilege.

Model #1: "The Teacher Must Be Correct."—In the context of the administration of the privilege, this means that his conclusion as to the existence of the elements must coincide with the determination of the jury. For example, if the jury finds the victim was not the actual violator or the force used was excessive, then the teacher was mistaken in concluding differently no matter how reasonable the conclusion may have been. This rule would constitute the strongest deterrent to corporal punishment. The teacher would be uncertain as to when an unknown trier of fact with calm, detached hindsight would second-guess the teacher and impose its determination upon him, without deference to the teacher's superior position to evaluate the facts and to the necessity to act under pressure. This model gives the narrowest substantive scope to the privilege and enlarges that of the battery remedy.

Model #2: "The Teacher Must Be Reasonable."—Here the teacher need not be correct in concluding the four elements were present, but his conclusion must have been one a reasonable man could have made under the circumstances. This would be less of a deterrent to corporal punishment because a wider range of teacher decisions would fall within the privilege. He retains the privilege for mistakes that ordinary people would make but not for negligent choices, even if such choices were honest and due to abnormal perceptions or temperament.

Model #3: "The Teacher Need Only Act in Good Faith."—"Good faith" in this context means an honest, subjectively held belief in the presence of the element and thus is the equivalent of "without malice." The teacher would act *with* malice if he knew of the non-existence of the element or had a reckless indifference to its existence. A negligent determination by the teacher would *not* cost

him the benefit of the privilege. This approach offers the least deterrent to the use of corporal punishment because a very wide range of teacher decisions—except malicious ones—fall within the privilege. This model gives the widest substantive scope to the privilege.

In the abstract, any of these models could be applied to all four elements, or one model could be used for some of the elements and a different model for the others. The choice is dictated by the accommodation sought between the competing policies behind the remedy and the privilege.⁵⁵ There are no Indiana cases discussing the problem of the teacher's mistaken belief in the first or third elements. Although Indiana could take an approach to those two elements different from that taken to the others, there is no apparent reason to believe it would. The Indiana cases adopt the "reasonableness" approach of *Model #2* with respect to the second and fourth elements. The court signals this by requiring that the rule or amount of force used be "reasonable."⁵⁶ This implies that there is room for differences of judgment over whether any given rule or order furthers an educational function or whether a given punishment is proportioned to the gravity of the offense. The teacher's decision, though mistaken, will be accepted as within the privilege. The same reasoning applies to the Indiana statute, which authorizes "any action *reasonably* necessary to carry out" the educational function.⁵⁷

An apparent exception is *Fertich v. Michener*,⁵⁸ which involved, in part, an action for false imprisonment against the teacher for keeping a student after class as a penalty for violating a rule. The Indiana Supreme Court stated: "The recognized doctrine now is that a school officer is not personally liable for a mere mistake of judgment in the government of his school. To make him so liable it must be shown that he acted in the matter complained of wantonly, willfully and maliciously."⁵⁹ If the court meant that acting maliciously

⁵⁵In general, the older cases tended to adopt a malice requirement for the teacher's liability, but the modern majority rule is that "unreasonableness" is required. See *Sumption*, *supra* note 17; *Tripp*, *supra* note 17; *Annot.*, 89 A.L.R.2d 396 (1963).

⁵⁶See note 23 *supra* and accompanying text.

⁵⁷IND. CODE § 20-8.5-5-2(a) (1976) (emphasis added). See note 18 *supra* and accompanying text.

⁵⁸111 Ind. 472, 11 N.E. 605 (1887).

⁵⁹*Id.* at 485, 11 N.E. at 611.

However mistaken a teacher may be as to the justice or propriety of imposing such a penalty at any particular time, it has none of the elements of false imprisonment about it, unless imposed from wanton, willful, or malicious motives. In the absence of such motives, such a mistake amounts only to an error of judgment in an attempt to enforce discipline in the school, for which, as has been stated, an action will not lie.

was a *necessary* condition for liability, then a negligent mistake would still be within the privilege; and this would be incompatible with the reasonableness requirement. However, if the court meant only that a malicious mistake was a *sufficient* condition for losing the privilege, that would not be incompatible with saying a negligent mistake would *also* lose it. The court's use of the word "must" appears to indicate the former view was intended, but the court may have inadvertently used "must" because in the same opinion the court said: "A school regulation must therefore be not only reasonable in itself, but its enforcement must also be reasonable in the light of existing circumstances."⁶⁰ Again, in discussing the enforcement of a school rule, the court said it "was undoubtedly both an unreasonable and a negligent, and hence an improper, enforcement of the rule."⁶¹ This would imply that a negligent enforcement of a rule would *not* be within the privilege, and malice is not necessary to lose the privilege. All of the corporal punishment cases after *Fertich* adopted the "reasonableness" rule and never required the showing of malice.⁶² None of the Indiana cases cited by the *Fertich* court supported the "must" language found in that opinion.⁶³

The issue of the teacher's malice can also arise in a completely separate way. What if the jury determines that the defendant knew the four objective elements *were present* but his subjective motive for punishing the student was anger or hatred? Is that state of mind relevant to establishing the defense? There are several Indiana cases which imply that the teacher's motive is relevant and that administering corporal punishment with ill will or malice will defeat the privilege.⁶⁴ In *Cooper v. McJunkin*,⁶⁵ the Indiana Supreme Court said:

Teachers should, therefore, understand that whenever correction is administered in anger or insolence, or in any other manner than in moderation and kindness, accompanied with that affectionate moral suasion so eminently due from one placed by the law "*in loco parentis*"—*in the sacred relation*

⁶⁰*Id.* at 484, 11 N.E.2d at 610.

⁶¹*Id.* at 484, 11 N.E.2d at 611.

⁶²See *Indiana State Personnel Bd. v. Jackson*, 244 Ind. 321, 192 N.E.2d 740 (1963); *State v. Vanderbilt*, 116 Ind. 11, 18 N.E. 266 (1888); *Vanvactor v. State*, 113 Ind. 276, 15 N.E. 341 (1888); *Marlsbary v. State*, 10 Ind. App. 21, 37 N.E. 558 (1894).

⁶³See *Danenhoffer v. State*, 69 Ind. 295 (1879); *Gardner v. State*, 4 Ind. 632 (1853); *Cooper v. McJunkin*, 4 Ind. 290 (1853).

⁶⁴*Indiana State Personnel Bd. v. Jackson*, 244 Ind. 321, 192 N.E.2d 740 (1963); *Vanvactor v. State*, 113 Ind. 276, 15 N.E. 341 (1888); *Danenhoffer v. State*, 69 Ind. 295 (1879); *Cooper v. McJunkin*, 4 Ind. 290 (1853).

⁶⁵4 Ind. 290 (1853).

of parent—the Courts must consider them guilty of assault and battery⁶⁶

In *Indiana State Personnel Board v. Jackson*,⁶⁷ the court emphasized that the teacher administered the punishment in a “kindly manner and without anger.”⁶⁸ This problem of malice is completely different from the problem of a malicious mistake by the educator, and it is not clear that the court has ever meant to imply that the teacher’s motive is relevant even when the four objective elements were present. At least there is no case so holding when the facts of the case presented such an issue.

III. THE EFFECT OF THE NEW CRIMINAL CODE

The new Indiana Criminal Code,⁶⁹ in addition to codifying the criminal offenses, defines certain of the traditional criminal defenses,⁷⁰ but it omits any explicit reference to the teacher’s qualified privilege to inflict corporal punishment on students. However, section 35-41-3-1 of the Criminal Code does state: “A person is justified in engaging in conduct otherwise prohibited if he has legal authority to do so.”⁷¹ This could easily be construed as preserving intact all defenses in existence under prior law that were not explicitly defined in the new Criminal Code.⁷² The “legal authority” for the conduct would be found in the cases that created the defenses. Under this construction of the above provision, the teacher’s defense is *formally* codified, but its scope must be derived from case law. There are good reasons to construe the provision this way. The new Criminal Code contains no provision purporting to make it the exclusive source of all criminal defenses. Prior to the new Code, although criminal offenses could only be created by statute,⁷³ criminal defenses could be created by the courts.⁷⁴ There is nothing

⁶⁶*Id.* at 292 (emphasis in original).

⁶⁷244 Ind. 321, 192 N.E.2d 740 (1963).

⁶⁸*Id.* at 329, 192 N.E.2d at 744.

⁶⁹Pub. L. No. 340, 1977 Ind. Acts 1533 (codified in scattered sections of title 35 of the IND. CODE (Supp. 1977)).

⁷⁰*E.g.*, intoxication, IND. CODE § 35-41-3-5 (Supp. 1977); insanity, *id.* § 35-41-3-6; duress, *id.* § 35-41-3-8; self-defense, *id.* § 35-41-3-2.

⁷¹*Id.* § 35-41-3-1.

⁷²This provision could be construed even more broadly as sanctioning any defense created by the courts before *or* after the adoption of the Criminal Code. This broader construction is not required to preserve the educator’s defense, because it was clearly in existence prior to the adoption of the new Criminal Code.

⁷³IND. CODE § 1-1-2-2 (1976) (repealed 1977). “Crimes and misdemeanors shall be defined and punishment therefor fixed by statutes of this state and not otherwise.” *Id.*

⁷⁴*Hill v. State*, 252 Ind. 601, 251 N.E.2d 429 (1969) (insanity); *Gardner v. State*, 4 Ind. 632 (1853) (teacher’s defense to battery prosecution).

in the new Code to change this distribution of law-making power, nor is there any policy reason to adopt a strained construction of what is at best a legislative ambiguity in order to abolish a traditional defense.

There are no Study Commission comments⁷⁵ or legislative histories to assist in settling this problem. The original proposed code⁷⁶ to which the comments were directed did not include the teacher's defense or the legal authority defense. This could be viewed as indicative of omission through inadvertence especially given the lack of any policy reason to abolish the defense. It is plausible to view the later insertion of the legal authority defense as attempting to remedy the omission of some defenses from the code.

If section 35-41-3-1 is construed to apply only to public employees whose authority is based on statute, regulation, or superior's orders,⁷⁷ then the teacher's privilege is still included because of the statute that authorizes teachers to take "any action which is then reasonably necessary to carry out . . . the educational function."⁷⁸ This statute uses virtually the same language used by the cases creating the defense, and it can easily be interpreted to have the same scope as the court-created defense.

Under either interpretation of the Criminal Code, the teacher's defense remains intact, and its exact scope is dictated by the pre-Code cases and statutes described above.

IV. THE FEDERAL CONSTRAINT—INGRAHAM V. WRIGHT

In *Ingraham v. Wright*,⁷⁹ the United States Supreme Court held the eighth amendment's cruel and unusual punishment clause inapplicable to pupil corporal punishment cases and held that the fourteenth amendment's due process guarantee did not require notice or a hearing prior to the punishment.

⁷⁵INDIANA CRIMINAL LAW STUDY COMMISSION, INDIANA PENAL CODE: PROPOSED FINAL DRAFT (1974). The proposed code was authored by the Indiana Criminal Law Study Commission, which was created by Executive Order of the Governor. The Commission's comments to each section of the proposed criminal code are the only printed source of information on the legislative history of the new Criminal Code.

⁷⁶*Id.* (originally enacted as Pub. L. No. 148, 1976 Ind. Acts 718).

⁷⁷This interpretation is suggested by a similar statute proposed for the Federal Criminal Code. THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT: A PROPOSED NEW FEDERAL CRIMINAL CODE § 602(1) (1971) provided: "Conduct engaged in by a public servant in the course of his official duties is justified when it is required or authorized by law."

⁷⁸IND. CODE § 20-8.1-5-2(a) (1976).

⁷⁹430 U.S. 651 (1977).

A. Cruel and Unusual Punishment

The plaintiffs, who were pupils in a Florida public school system, claimed that the educators⁸⁰ who inflicted corporal punishment on them had deprived them of their constitutional right to be free of "cruel and unusual punishments."⁸¹ In rejecting this claim, the Supreme Court held that the original meaning of the clause and the Court's past decisions applying it had restricted the applicability of the clause to punishments related to criminal convictions.⁸² The plaintiffs conceded that the original design of the clause was to limit criminal punishment but requested the court to extend its coverage to corporal punishment of students. The Court refused on the ground that "[t]he school child has little need for the protection of the Eighth Amendment."⁸³ This conclusion results from a combination of two factors: (1) The school is an open, community institution in which the child is neither isolated from friendly support nor physically restrained from leaving, and this affords "significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner";⁸⁴ and (2) the existence of state remedies adequate to deter such abuses.

Public school teachers and administrators are privileged at common law to inflict only such corporal punishment as is reasonably necessary for the proper education and discipline of the child; any punishment going beyond the privilege may result in both civil and criminal liability. . . . As long as the schools are open to public scrutiny, there is no reason to believe that the common law constraints will not effectively remedy and deter excesses such as those alleged in this case.⁸⁵

It is not clear whether a pupil, allegedly the victim of excessive corporal punishment, could state a claim under the eighth amendment in a case where the factual premises of the Court's rule are absent—for example, where the institution is not open⁸⁶ or where

⁸⁰Named as defendants were the principal, the assistant principal and the superintendent of the county school system. It is not clear from the Supreme Court's opinion who actually inflicted the punishment on the plaintiffs. The court of appeals opinion indicates it was the principal who actually spanked one of the plaintiffs.

⁸¹U.S. CONST. amend. VIII, provides: "Excessive bail shall not be required, nor excessive fines imposed, nor *cruel and unusual punishments inflicted.*" (Emphasis added.)

⁸²430 U.S. at 669-70.

⁸³*Id.* at 670.

⁸⁴*Id.*

⁸⁵*Id.*

⁸⁶In *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974), the court held the eighth amendment applicable to corporal punishment in the Indiana Boys School, a school for

the state has no remedy adequate to effectively deter such abuses. If the inadequate scope of the state remedy could give rise to a claim for damages under the eighth amendment, then the scope of the remedy has taken on constitutional significance. Because the scope of the remedy is defined by the scope of the educator's privilege, the latter takes on a new constitutional significance, which can be litigated in a federal court.

The argument that such a claim is permissible under *Wright* is simply that when the reason for a court's ruling is nonexistent the ruling ceases to apply. It is not clear that the Supreme Court intended to hold that the applicability of the eighth amendment to school corporal punishment is open to relitigation merely by a student alleging that the state remedy against the teacher is inadequate. The tone of the Court's opinion seems contrary: "We conclude that when public school teachers or administrators impose disciplinary corporal punishment, the Eighth Amendment is inapplicable."⁸⁷ There are no qualifications or exceptions. In the course of the opinion, the Court carefully refrains from asserting that every state does, in fact, have an adequate remedy but uses phrases like: "[i]n virtually every community."⁸⁸ If the Court intended to leave open the possibility of an eighth amendment claim in a state without an adequate remedy, its holding would surely have been less general and conclusive.

If the Court does permit such claims under the eighth amendment, it would not be opening the federal judiciary to the litigation of numerous claims on the reasonableness of the punishment—something the majority was very anxious to avoid.⁸⁹ The sole issue

juvenile delinquents. Another example of an unopen school would be one for the mentally retarded where the patient-students are committed to the institution.

⁸⁷430 U.S. at 671.

⁸⁸"In virtually every community where corporal punishment is permitted in the schools, these safeguards are reinforced by the legal constraints of the common law." *Id.* at 670. "To the extent that the force is excessive or unreasonable, the educator in *virtually all States* is subject to possible civil and criminal liability." *Id.* at 661 (emphasis added).

The Court lists 21 states having statutes authorizing corporal punishment, *id.* at 662 n.23; 2 with statutes prohibiting it, *id.* at 663 n.27; and 10 states where the courts had authorized it, *id.* at 662, n.28. This is a total of 33 states. It does not appear crucial to the Court that some states may not provide an adequate remedy to the student.

⁸⁹The dissenting opinion warns that as a consequence of our decision today, teachers may "cut off a child's ear for being late to class." This rhetoric bears no relation to reality or to the issues presented in this case. The laws of virtually every State forbid the excessive physical punishment of school children [sic]. Yet the logic of the dissent would make the judgment of which disciplinary punishments are reasonable and which are excessive a matter of constitutional principle in every case, to be decided ultimately by this Court.

The hazards of such a broad reading of the Eighth Amendment are clear. *Id.* at 671, n.39 (citing Justice White's dissent, *id.* at 684).

would be the proper scope of the educator's defense required to effectively deter abuse of the right to use corporal punishment. This is a matter of substantive law and could be settled in one case for all the states. This may violate the Court's sense of its proper role in shaping state remedies,⁹⁰ but it would foreclose an endless stream of fact-sensitive cases concerning the reasonableness of the actual corporal punishment inflicted in each instance.

What is the test for the "adequacy" of the state remedy and privilege? The state remedy must be capable of deterring the punishments that would be excessive under the eighth amendment were it applicable. If the state remedy does not deter that type of punishment, then there is still a need for the federal remedy rejected in *Wright*. The Court is assuming that the definition of excessive force used by a state privilege of "adequate scope" would identify the identical set of cases as would the definition of excessive force for eighth amendment purposes. What is the scope of the privilege that will accomplish this? All versions of the privilege will include the four objective elements, and any difference will lie in the effect given to the teacher's mistake. If the malice model is adopted, the scope of the privilege is greater than if the reasonableness model is used, and it offers less deterrent to the use of excessive force. Does this decrease in deterrence mean that it would not be "adequate" within the meaning of *Wright* and that the reasonableness model is required? This is not necessarily so, because the standard for excessiveness is established to serve the policy involved. The policy behind the eighth amendment is to prevent certain types and amounts of punishment because their infliction would violate current concepts of decency and humane treatment of those otherwise legitimately punished.⁹¹ The policy behind

⁹⁰"It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Patterson v. New York*, 97 S.Ct. 2319, 2322 (1977) (citations omitted).

⁹¹These decisions recognize that the Cruel and Unusual Punishments Clause circumscribes the criminal process in three ways: first, it limits the kinds of punishment that can be imposed on those convicted of crimes . . . ; second, it proscribes punishment grossly disproportionate to the severity of the crime . . . ; and third, it imposes substantive limits on what can be made criminal and punished as such" The primary purpose of [the Cruel and Unusual Punishments Clause] has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes

Ingraham v. Wright, 430 U.S. at 667 (citing *Powell v. Texas*, 392 U.S. 514, 531-32 (1968)).

"[The prohibition] is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Gregg v. Georgia*, 428 U.S.

the privilege is to allow only the punishment that is necessary for the proper education and discipline of the child.⁹² There is no a priori reason why the two standards should always select the same quantum of punishment as excessive. This is true regardless of the scope of the privilege the state has adopted. In other words, the Court did not provide a criterion by which to determine whether any scope for the privilege will deter excessive force as defined for eighth amendment purposes. The Court simply assumed that the scope of the common law privilege of "reasonable necessity" is adequate to supplant the eighth amendment remedy. The Indiana privilege is essentially similar to that common law privilege and therefore should be considered satisfactory under this aspect of *Wright*.

B. Procedural Due Process

The plaintiffs in *Wright* also alleged a deprivation of their rights under the due process clause to notice and hearing prior to the punishment. The Court applied a two-step analysis that it uses for resolving procedural due process cases:⁹³ (1) Is the individual interest asserted within the due process clause protection of "life, liberty, or property"; and (2) if so, what procedures are required to satisfy the clause? The Court held that the child's interest in freedom from bodily restraint and punishment is within the protection of the fourteenth amendment:

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. There is of course a deminimus level of imposition with which the constitution is not concerned. But at least 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.⁹⁴

153, 171 (1976) (citing *Weems v. United States*, 217 U.S. 349, 378 (1910)). "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

In *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968), the eighth circuit held that the use of corporal punishment—in this case, the strap—on prisoners violated the evolving standards of decency implicit in the eighth amendment.

⁹²*Ingraham v. Wright*, 430 U.S. at 662. For Indiana cases on this point, see note 5 *supra*.

⁹³*Ingraham v. Wright*, 430 U.S. at 672 (citing *Board of Regents v. Roth*, 408 U.S. 564, 569-72 (1972); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

⁹⁴430 U.S. at 674.

The issue for the Court was whether the traditional common law remedies for unjustified corporal punishment are adequate to afford due process. This turns on an analysis of the competing interests at stake, and the Court identified four factors to be considered: (1) The private interest affected, in this case the liberty interest of the student; (2) the risk of an erroneous deprivation of such interest; (3) the probable value of additional procedural safeguards; and (4) the state interest involved.

The Court noted that reasonable corporal punishment in school is justifiable under the laws of most states, thus striking a balance between the student's interest in personal security and the view that some limited corporal punishment may be necessary for the education of the child: "Under that longstanding accommodation of interests, there can be no deprivation of substantive rights as long as disciplinary corporal punishment is within the limits of the common law privilege."⁹⁶ The Court recognized that there is always some risk that the deprivation of the student's liberty interest will be unjustified: "In these circumstances the child has a strong interest in procedural safeguards that minimize the risk of wrongful punishment and provide for the resolution of disputed questions of justification."⁹⁶ The Court then held that the existence of the Florida civil and criminal remedies against the teacher for an unjustified use of corporal punishment were adequate to afford due process to the student.⁹⁷

Because the Court squarely bases its holding on the adequacy of Florida law to remedy any unjustified intrusions on the pupil's liberty interest, it would seem to follow that in any state without an adequate remedy the school officials are constitutionally required to provide the pupil with prior notice and hearing. The Court is in cautious agreement: "Were it not for the common law privilege permitting teachers to inflict reasonable corporal punishment on children in their care, and the availability of the traditional remedies for abuse, the case for requiring advance procedural safeguards would be strong indeed."⁹⁸ In these circumstances, the failure to provide notice and hearing would violate the pupil's fourteenth amendment rights and subject the educator to a federal suit for damages. Once again, the nonexistence of an "adequate" state

⁹⁶*Id.* at 676.

⁹⁶*Id.*

⁹⁷*Id.* at 682. In reaching its conclusion, the Court also held that the additional safeguard of a pre-punishment hearing would not add significantly to the protection of the student's interest. Even if that were not the case, the burden on the state would outweigh the benefit to the student. *Id.* at 678-82.

⁹⁸*Id.* at 674.

remedy for unjustified corporal punishment is a crucial prerequisite for the existence of a pupil's federal constitutional right.

Under this part of *Wright*, the "adequacy" of the state remedy is tested by whether it removes the needs for the due process notice and hearing prior to the punishment. The purpose of the due process notice and hearing would be to provide a forum for the resolution of the disputed question of justification for the punishment and thereby minimize the risk of unjustified deprivation of a pupil's liberty interest. The state remedy must provide such a forum in order to supplant the pre-punishment procedure.

In contrast to the eighth amendment aspect of *Wright*, here the standard for defining "unjustified punishment" would be the same in the due process hearing as in the state litigation involving the privilege, because the liberty interest of the pupil is defined by the state law, not the fourteenth amendment.⁹⁹ This means that the substantive content of the privilege is not critical as long as some form of the teacher's privilege exists in the state and the privilege provides a forum for the resolution of disputes over the justification for the punishment. The Court found the Florida privilege, using the "reasonably necessary" test for civil cases and requiring only good faith for criminal cases, to be adequate to remove any need for a pre-punishment hearing.

The dissenters point out one problem with this result. Where the question is whether the teacher has identified the *actual violator*, that would be the precise issue presented at a pre-punishment hearing. In the post-punishment hearing, if the state has adopted a "reasonable mistake" component in its privilege the issue will be whether the teacher had reasonable grounds to believe he had the actual violator. There will never be a determination of the precise issue that would have been determined in the pre-punishment hearing, and the teacher will never be liable for punishing the wrong pupil. The policy behind the mistake doctrine in the privilege is sound, but it makes it impossible for the pupil to ever have resolved the issue that would have been resolved in the due process hearing. Yet the Court held the due process hearing unnecessary, because the later state litigation provided an adequate forum to resolve that justification issue.

The Indiana privilege is similar to the Florida rule with the exception that in criminal battery cases the teacher's mistaken belief

⁹⁹Board of Regents v. Roth, 408 U.S. 564, 577 (1972): "[Fourteenth amendment] interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . ." See also *Perry v. Sindermann*, 408 U.S. 593, 603 (1972) (Burger, C.J., concurring).

in the existence of the objective elements must be reasonable in addition to being in good faith, whereas in Florida good faith alone is sufficient. Therefore, the Indiana rule would probably be adequate to remove the need for any pre-punishment procedures.

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