DETERMINING REASONABLENESS UNDER THE FOURTH AMENDMENT: PHYSICAL FORCE TO CONTROL AND PUNISH STUDENTS

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INTRODUCTION

Striving to create an atmosphere conducive to learning, public school teachers, administrators, and security guards sometimes use physical force to control disruptive students. How school officials use physical force matters because students have a right to be free from "unreasonable" seizures, as protected by the Fourth Amendment to the United States Constitution.[1] School officials generally use physical force in two ways: to gain immediate control over disruptive students or to corporally punish them. Determining the reasonableness of their actions is a complex, novel inquiry because courts have rarely applied the Fourth Amendment to school officials' use of physical force to control and punish students.[2] Instead, courts have rejected these claims under the Fourteenth Amendment's substantive due process component, requiring

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[1] U.S. CONST. amend. IV. For an analysis of how these claims may fall under the Fourth Amendment as incorporated by the Due Process Clause of the Fourteenth Amendment, see Kathryn R. Urbonya, *Public School Official's Use of Physical Force as a Fourth Amendment Seizure: Protecting Students from the Constitutional Chasm between the Fourth and Fourteenth Amendment*, 69 GEO. WASH. L. REV. 1 (2000).

[2] *See* Urbonya, *supra* note 1, at 4–8.

students to prove a "shocking" use of force.[3] Few students are able to meet that difficult standard. How courts apply the Fourth Amendment's reasonableness standard in the future may thus result in more students bringing suits against school officials.

The purpose of this article is to examine public school officials' use of physical force under the Fourth Amendment. Part I discusses how the United States Supreme Court has defined reasonableness when police officers use physical force to arrest suspects. These decisions underscore that assessing reasonableness requires consideration of all the circumstances confronting officials. Part II examines the unique context of the public schools by describing the Court's determination of Fourth Amendment reasonableness with respect to searches by school officials. In *New Jersey v. T.L.O.*,[4] the Court assessed the reasonableness of searching an individual student's purse and, in *Vernonia School District 47J v. Acton*,[5] the Court discussed the reasonableness of mandatory drug-testing for student athletes. In both cases, the Court's reasonableness determination focused on the special context of public schools.

Part III revisits the decision of *Ingraham v. Wright*,[6] which sharply divided the Court even at the time it was decided in the 1970s. The majority held that public school officials need not provide students with process before hitting them for violating school rules.[7] In reaching its holding, the majority erroneously fused two types of force, force to control and force to punish, and assumed that striking public school students constituted effective discipline, a conclusion eroded by the Court's more modern personal security jurisprudence under the Fourth Amendment. *Ingraham* failed to discern that hitting is a "punishment" that harms both the student and the learning environment.

Part IV explores three significant aspects of the Court's Fourth Amendment jurisprudence as applied to the public schools. First, it distinguishes between the authority that public school officials have in educating students and the authority that parents possess in caring for children. School officials have only "custodial" and "tutelary" powers,[8] and any force used must further the schools' educational goals. In contrast, some parents use physical force to further their religious beliefs as

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[3] *See id.* at 38–41 (examining the history and difficulty of students' substantive due process claims challenging school officials' use of physical force).

[4] 469 U.S. 325 (1985).

[5] 515 U.S. 646 (1995).

[6] 430 U.S. 651 (1977).

[7] *Id.* The Court also held that the Eighth Amendment, U.S. CONST. amend. VIII, which prohibits the infliction of "cruel and unusual punishments," did not apply to students subjected to physical punishment by public school officials. *Ingraham*, 430 U.S. at 659–71.

[8] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995).

protected by the First Amendment to the United States Constitution.[9] Second, the Supreme Court interprets reasonableness by considering the history of the right to personal security, both at common law and under modern practices. Third, this section describes the significant psychological differences between physical force to control and physical force to punish: physical force to punish may engender both psychological harm to students and a poor environment for learning.

Part V then applies a reasonableness standard for public school officials' use of physical force in light of the Supreme Court's Fourth Amendment personal security decisions. It distinguishes sharply between school officials using force to regain order in the school and force used to punish. It contends that, even though the Fourth Amendment affords public school officials broad deference in their decisions to use physical force to control students, they have no discretion to use physical force as "punishment," in light of the Court's modern personal security decisions. The Fourth Amendment thus allows public school officials to act quickly to break up fighting, out-of-control students, but it also bars corporal punishment in the public schools.

I. POLICE OFFICERS' USE OF PHYSICAL FORCE UNDER THE FOURTH AMENDMENT

Police officers, suspects, prosecutors, judges, and juries often disagree as to what constitutes "reasonable" physical force in apprehending citizens. Such disagreements are inevitable because defining "reasonableness" under the Fourth Amendment requires a case-by-case balancing of conflicting interests.[10] In addition, officers face so many different situations that reasonableness evades easy categorization. The Supreme Court attempted to create such a "category" in *Tennessee v. Garner*[11] as it examined an officer's use of deadly force. However, in *Graham v. Connor*,[12] the Court declined to employ a categorical approach as to the use of non-deadly force. Both these cases reveal that context determines

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[9] U.S. CONST. amend. I.

[10] *See, e.g.*, Kenneth Adams, *Measuring the Prevalence of Police Abuse of Force, in* POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE 52 (William A. Geller & Hans Toch eds., 1996) (rejecting the idea of concrete "facts" as to what constitutes "excessive" force, particularly as the definition of "excessive" changes over time). *See also* SAMUEL G. CHAPMAN, MURDERED ON DUTY: THE KILLING OF POLICE OFFICERS IN AMERICA 5–13 (1998) (describing police officers as "punching bags" because of the assaults inflicted by the public); JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE USE OF EXCESSIVE FORCE 23–42 (1993) (examining the conflict between the public and officers in assessing what constitutes reasonable force). *See generally* MICHAEL AVERY ET AL., POLICE MISCONDUCT: LAW AND LITIGATION § 2.15, at 2-28 to 2-34 (2000) (collection of cases examining Fourth Amendment reasonableness).

[11] 471 U.S. 1 (1985).

[12] 490 U.S. 386 (1989).

the level of deference given to police officers' judgments: the greater the harm inflicted on suspects, the less deference officers receive from courts, juries, and the public.

In *Garner*, the Supreme Court examined the use of deadly force not just in light of common-law practices,[13] but also in light of evolving notions of what constitutes effective, sound policing.[14] At issue in *Garner* was an officer's intentional shooting of a fleeing suspect.[15] The officer had reason to believe that the suspect had committed a burglary but did not have any reason to believe that the suspect had harmed anyone.[16] As the suspect fled over a fence, the officer shot him in the back.[17] Even though a state statute had authorized this kind of shooting,[18] the Court held that the shooting was "unreasonable" under the Fourth Amendment.[19] In so doing, the Court created a category for assessing reasonableness: deadly force is reasonable when an officer has "probable cause that the suspect poses a threat of serious physical harm, either to the officer or to others."[20]

However, even in using this categorical approach, officers, courts, and juries have struggled to balance the interests of suspects and the public. The *Garner* Court properly noted that suspects have a "fundamental interest"[21] in life and that the reasonableness of taking suspects' lives thus depends on the threat to the lives of others. The problem has not been in recognizing the importance of bodily integrity on both sides of the scale, but rather in determining what actually happened and the degree of danger, whether to officers or communities.

In examining the question of danger, the *Garner* Court looked to contemporary notions of sound policing.[22] It noted some movement away from the common-law rule that allowed shootings under broader circumstances.[23] And even though a majority of states had not rejected the common-law rule, the Court determined that it should consider contemporary practices in determining reasonableness.[24] Specifically, the

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13 *Garner*, 471 U.S. at 12–15.

14 *Id.* at 14–22.

15 *Id.* at 7.

16 *Id.* at 3–4.

17 *Id.* at 4.

18 *Id.* 4–5.

19 *Id.* at 22 (stating that statute was "invalid insofar as it purported to give [the officer] the authority" to shoot a fleeing burglar).

20 *Id.* at 11.

21 *Id.* at 9.

22 *Id.* at 15–19.

23 *Id.*

24 The Court conceded, "[i]t cannot be said that there is a constant or overwhelming trend away from the common-law rule . . . . Nonetheless, the long-term movement has been away from the rule that deadly force may be used against any fleeing felon, and that remains the rule in less than half the States." *Id.* at 18.

Court referenced actual police department policies, stating that it "would hesitate to declare a police practice of long standing 'unreasonable' if doing so would severely hamper effective law enforcement."[25] Relying upon documented research, the Court concluded that limiting the use of deadly force to its new category—"when suspects threaten the infliction of serious physical harm"—would not undermine effective law enforcement goals.[26]

By contrast, when police officers use *non*-deadly force, the Supreme Court applies a case-specific balancing test[27] rather than its categorical approach when considering the reasonableness of the use of deadly force. Though noting that Fourth Amendment reasonableness "is not capable of precise definition or mechanical application,"[28] the *Graham* Court did suggest three factors relevant in assessing the reasonableness of the use of non-deadly force to apprehend suspects: the severity of the offense committed, the danger presented to the officer and the community, and the nature of the suspect's attempt to resist arrest and flee.[29] Linking this case to *Garner,* the Court noted that, in considering whether the use of deadly *or* non-deadly force meets the Fourth Amendment's standard of reasonableness, courts must examine all circumstances.[30]

The *Graham* Court did limit this totality of circumstances test in three ways: (1) it rejected using the officers' motive to establish or negate reasonableness;[31] (2) it advocated deference to officers' "split-second judgments"[32] under case-specific and emergent circumstances; and (3) it explained that, to be constitutionally unreasonable, the force used must consist of more than a simple "unnecessary push or shove."[33]

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[25] *Id.* at 19.

[26] *Id.* (quoting amicus brief of Police Foundation et al. at 11):

> After extensive research and consideration, [they] have concluded that laws permitting police officers to use deadly force to apprehend unarmed, non-violent fleeing felony suspects actually do not protect citizens or law enforcement officers, do not deter crime or alleviate problems caused by crime, and do not improve the crime-fighting ability of law enforcement agencies.

Id.

[27] Graham v. Connor, 490 U.S. 386, 396–97 (1989).

[28] *Id.* at 396 (quoting Bell v. Wolfish, 441 U.S. 520, 559 (1979)).

[29] *Id.*

[30] *Id.* (citing *Garner*, 471 U.S. at 8–9, which stated that the question is "'whether the totality of circumstances justifie[s] a particular sort of . . . seizure'").

[31] *Id.* at 397. Although the Court explicitly rejected malice as an element of a Fourth Amendment claim, it did not bar using malice to undermine officers' credibility as to what they claim actually happened. *Id.* at 399 n.12 (stating that the factfinder may consider "evidence that officer may have harbored ill-will toward the citizen" in assessing an officer's credibility).

[32] *Id.* at 396–97.

[33] *Id.* at 396 (quoting Johnson v. Glick, 481 F.2d 1028, 1033, *cert. denied*, 414 U.S. 1033 (1973)).

The Court rejected motive analysis by declaring that, in the context of an officer's use of force in apprehending a suspect, reasonableness is an objective standard.[34] Neither an injured suspect nor an officer may use motive to establish or disprove a Fourth Amendment violation: "An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional."[35] Instead, reasonableness considers *other* circumstances.[36]

The Court also stressed that the use of physical force must be assessed in light of what the "reasonable officer" would have done in the case-specific situation.[37] Warning against "20/20 hindsight,"[38] the Court recognized that policing requires officers to make quick decisions and opined that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments" in circumstances that are tense, uncertain, and rapidly evolving" about the amount of force that is necessary in a particular situation."[39] It follows that, in assessing reasonableness, one must consider how much time an officer had before deciding to act.

The third limitation on the totality of the circumstances test impliedly distinguishes between constitutional violations and batteries covered under state tort law. As the Court has stated in other personal security litigation cases, the challenged actions must be sufficiently offensive to rise to the level of a constitutional violation before an analysis of Fourth Amendment reasonableness will even be appropriate. Once officers' actions cross this threshold, then the Fourth Amendment applies, even if their actions also violated state law. For example, in *Monroe v. Pape*, the Court declared that the availability of a state-law remedy does not negate the presence of a constitutional violation.[40] It further noted that the aim of constitutional tort litigation under 42 U.S.C. § 1983 is to hold state officials accountable for their constitutional violations because the state law may be "invidious," the state's remedy may be inadequate, or the remedy may be available only in theory.[41] The *Monroe* Court also pointed out that, even when state officials act con-

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[34] *Id.* at 397.

[35] *Id.*

[36] *Id.* (indicating that objective reasonableness is to be determined "in light of the facts and circumstances confronting [the officers] without regard to their underlying motivation").

[37] *Id.* at 396.

[38] *Id.* ("The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.").

[39] *Id.* at 396–97.

[40] 365 U.S. 167, 183 (1961).

[41] *Id.*

trary to state law, their actions still fall within the purview of the statute designed to check abuses by state officials.[42]

The Court's guidelines for determining reasonableness thus leave much room for debate as to what is unreasonable physical force under the Fourth Amendment. Nonetheless, three themes link *Garner* and *Graham*: (1) a focus on the nature of the suspect's actions; (2) an understanding that reasonableness is ultimately determined by examining the totality of circumstances; and (3) a recognition of reasonableness as an objective inquiry.

II. REASONABLE SEARCHES BY PUBLIC SCHOOL OFFICIALS

The Supreme Court has yet to subject the use of physical force by public school officials to Fourth Amendment scrutiny. However, because the Court has twice applied the Fourth Amendment's reasonableness standard to *searches* in the public schools, its discussion of reasonableness in that context informs an approach to assessing the reasonableness of the use of physical force by public school officials. In *New Jersey v. T.L.O.*,[43] searching a student's purse was held to be reasonable under the Fourth Amendment and, in *Vernonia School District 47J v. Acton,*[44] drug-testing of student athletes similarly survived constitutional scrutiny. Although the Court decided these cases ten years apart, *T.L.O.* in 1985 and *Vernonia* in 1995, both decisions emphasize the unique environment of public schools, i.e., that a Fourth Amendment reasonableness inquiry must consider public schools' mission—education.[45]

A. REASONABLE SCHOOL SEARCHES: *NEW JERSEY V. T.L.O.*

In 1985, for the first time, the Supreme Court faced the difficult task of delimiting public school officials' power to search a student's purse. In *New Jersey v. T.L.O.*[46] the Fourth Amendment reasonableness inquiry focused on one student—T.L.O., a fourteen-year old girl who allegedly violated a school rule against smoking in the bathroom.[47] The facts of *T.L.O.* recount what could be a typical school day and help to explain why the Court sharply distinguishes between searches by school officials and searches by police officers looking for criminal violations.

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[42] *Id.* at 172–87.

[43] 469 U.S. 325 (1985).

[44] 515 U.S. 646 (1995).

[45] *Vernonia,* 515 U.S. at 653–56; *T.L.O.*, 469 U.S. at 339–43.

[46] 469 U.S. 325 (1985).

[47] *Id.* at 328.

1. *Examining the Purse: The Facts of* T.L.O.

Under school rules, smoking at school was illegal, but possession of cigarettes was not.[48] When a teacher "discovered" two girls smoking in the bathroom, she took the students to the vice-principal's office.[49] T.L.O.'s friend admitted to smoking in the bathroom, and T.L.O. denied it.[50] According to the Court, the vice-principal then had reasonable suspicion that T.L.O. had violated the school's rule against smoking.[51] He lawfully opened her purse (which the Court determined was the obvious place to find T.L.O.'s cigarettes)[52] and saw a package of cigarettes.[53] When he grabbed the cigarettes, he saw a package of cigarette rolling papers, which he thought was related to marijuana use.[54] Again according to the Court, the official's "second" search was based on reasonable suspicion that T.L.O. had marijuana as well.[55] This search revealed "a small amount of marijuana, a pipe, a number of empty plastic bags,"[56] lots of one-dollar bills, and an index card listing names and entitled "people who owe me money."[57] The vice-principal then notified T.L.O.'s parents and the police.[58] The school suspended T.L.O. for ten days — three days for smoking and seven days for possessing marijuana.[59]

The state also held T.L.O. to be a delinquent under state law.[60] The New Jersey Supreme Court later vacated on grounds that the search was unreasonable under the Fourth Amendment.[61] On appeal to the Supreme Court, the issue presented was whether the exclusionary rule applied to juvenile delinquency proceedings,[62] but the Court decided the case on a broader ground, holding that the vice-principal's searches did not violate the Fourth Amendment.[63] In short, the Court deemed the searches "reasonable."[64]

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48 *Id.* at 344.

49 *Id.* at 328.

50 *Id.*

51 *Id.* at 345–46.

52 *Id.* at 346.

53 *Id.* at 328.

54 *Id.*

55 *Id.* at 347.

56 *Id.* at 328.

57 *Id.* at 347.

58 *Id.* at 328.

59 *Id.* at 329 n.1.

60 *Id.* at 330.

61 *Id.* at 330–31.

62 *Id.*

63 *Id.* at 347–48.

64 *Id.*

2. *Defining Reasonableness in School Searches: The Model of* Terry v. Ohio

In interpreting what constitutes Fourth Amendment reasonableness for searches in public schools, the Court drew upon its analysis in *Terry v. Ohio*,[65] a case that established new boundaries for determining the reasonableness of police officers' stops and frisks. Under *Terry*, officers may forcibly detain a suspect if they have reasonable suspicion that the suspect is about to commit a crime, and they may frisk with reasonable suspicion that the suspect is "armed and dangerous."[66] The *T.L.O.* Court quoted the open-ended language of *Terry* to describe the reasonableness standard for school searches:

> Determining the reasonableness of any search involves a twofold inquiry: first, one must consider "whether the . . . action was justified at its inception"; second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place."[67]

Thus, the *T.L.O.* Court held that, in determining the reasonableness of Fourth Amendment searches by public school officials, courts must consider the suspicion underlying the search and the scope of the search in light of the basis for suspicion.

Even though the Court applied the *Terry* doctrine, it hinted that it might later deviate from it. With the *Terry* decision requiring reasonable suspicion to justify a police officer's stop and frisk, the *T.L.O.* Court left open the question of whether reasonable suspicion is *always* required before school officials may conduct "reasonable" school searches,[68] an ambiguity that the Court later used in *Vernonia School District 47J. v. Acton*,[69] to justify the reasonableness of drug-testing student athletes.

Perhaps even more significant is that, unlike *Terry* stops, school officials need not have reasonable suspicion as to a violation of criminal

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[65] 392 U.S. 1 (1968).

[66] *Id.* at 30. Since *Terry*, the Court has extended this view of reasonableness to other contexts. *See, e.g.*, Maryland v. Buie, 494 U.S. 325, 335–36 (1990) (officers may conduct a "protective sweep" to inspect "those spaces where a person may be found" if they have "reasonable suspicion" of danger during the execution of an arrest warrant); Michigan v. Long, 463 U.S. 1032, 1050 (1983) (officers may "frisk" the passenger compartment of a vehicle with reasonable suspicion that weapons are present during a valid traffic stop). The Court has at times also refused to expand *Terry*'s definition of reasonableness. *See, e.g.*, Florida v. J.L., 120 S.Ct. 1375, 1379–80 (2000) (refusing to create a "firearm" exception to *Terry* which would have allowed officers to frisk a person for weapons based on only an anonymous tip about illegal firearm possession); Minnesota v. Dickerson, 508 U.S. 366, 373–74 (1993) (refusing to allow officers to frisk a person based on reasonable suspicion of drug possession).

[67] *T.L.O.*, 469 U.S. at 341.

[68] *Id.* at 342 n.8.

[69] 515 U.S. 646 (1995).

law; mere reasonable suspicion that the student violated a school rule is sufficient to justify a reasonable search.[70] In allowing searches for school violations, therefore, the Court gave school officials broader powers than those afforded police officers under the *Terry* doctrine, even admonishing courts that they should, "as a general matter," refrain from "distinguish[ing] between rules that are important to the preservation of order in the schools and rules that are not."[71] The Court did not decide whether its new standard would apply to searches conducted in concert with police officers.[72]

The standard announced in *T.L.O.* also differs from *Terry* with regard to its analysis of the reasonable scope of the search. The search must be "reasonably related to the objectives of the search."[73] In a *Terry* context, this means that the scope of the search must relate to the need to disarm the suspect.[74] Yet, in the school context, the *T.L.O.* Court specifically mentioned that school officials should consider the degree of intrusion "in light of the age and sex of the student and the nature of the infraction,"[75] thus creating a potentially more open-ended standard for assessing the scope of a reasonable school search than for a traditional *Terry* stop and frisk.

3. *Looking to the Purpose of the Search: Genesis of the "Special Needs" Doctrine*

In defining reasonableness, the Court in *T.L.O.* focused on the schools' need to control students and the special relationship between school officials and students. The Court's willingness to make the non-law enforcement purpose of an intrusive activity a part of the reasonableness calculus laid the foundation for the now well established "special needs" doctrine under the Fourth Amendment.[76] In a concurring opinion, Justice Blackmun effectively described the "special needs" doctrine: "Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-

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[70] *Id.* (characterizing the requisite reasonable suspicion as a reason to believe that students violated either "the law or the rules of the school").

[71] *Id.* at 342–43 n.9.

[72] *Id.* at 341 n.7.

[73] *Id.* at 342.

[74] Terry v. Ohio, 392 U.S. 1, 27 (1968).

[75] *T.L.O.*, 469 U.S. at 342.

[76] *See e.g.*, Chandler v. Miller, 520 U.S. 305, 322–23 (1997) (rejecting drug-testing requirement for candidates running for state political offices); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) (explicitly applying the "special needs" doctrine to drug-testing of athletes. For a discussion of this case, *see infra* notes 86–141 and accompanying text); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 664–65 (1989) (upholding drug-testing of customs employees carrying weapons or involved with drug interdiction); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 619 (1989) (upholding drug-testing of railroad employees after major train accidents).

cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers."[77]

Thus, in *T.L.O.*, the reasonableness inquiry focused on the administrative, "special needs" purpose of the search and, impliedly, whether school officials were acting more like police officers, parents, or something else. The vice-principal's purpose in searching the purse was the enforcement of school rules, presumably to ensure an effective, disciplined, learning environment and not to bring about the criminal prosecution of T.L.O.

How the Court characterized the school official's capacity also related to the state-action question, i.e., whether school officials were even subject to the Fourth Amendment. In answering the state-action question, the Court looked to Fourth Amendment decisions that involved searches done for regulatory, not criminal, purposes, such as searches by building inspectors, firefighters, and safety inspectors.[78] Because the Fourth Amendment applied to these "regulatory" actors, school officials also were subject to the Fourth Amendment restraints — the need to act reasonably. The Court focused on the pedagogical mission of public schools and the need to define the constitutional relationship between school officials and students in light of that mission. In doing so, it repeatedly referred to the actual practices in public schools[79] and stated

[77] *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring). The *T.L.O.* majority did not clearly lay out this modern framework of the "special needs" doctrine, but it did effectively describe the groundwork for Justice Blackmun's explicit doctrinal category. The majority cited *Camara v. Municipal Court,* 387 U.S. 523 (1976), a case that analyzed the "unique" context of "administrative searches" to uncover housing code violations. *T.L.O.*, 469 U.S. at 337; *Camara*, 387 U.S. at 534. *Camara* explained that "administrative searches" at times may lead to the discovery of criminal violations, but their underlying purpose is not to serve criminal prosecutorial goals. *Id.* at 537 (stating that the inspections were not "aimed at the discovery of evidence of a crime"). *Camara* redefined both "probable cause" for these "administrative" searches and the warrant requirement. *Id.* at 535–39. The kind of "probable cause" necessary for these searches did not "depend upon specific knowledge of the condition of a particular dwelling." *Id.* at 538. Instead officials could get warrants based on a "reasonable legislative or administrative" scheme to select areas for inspections. *Id.* The Court has extended this type of "administrative search" to other "unique" contexts. *See, e.g.,* New York v. Burger, 482 U.S. 695, 699 (1987). In *Burger*, police officers conducted "administrative searches" of "automobile junkyards" pursuant to a state statute that also gave them arrest powers. *Id.* at 694–95. The Court noted that "an administrative scheme may have the same ultimate purpose as the penal laws, even if its regulatory goals are narrower." *Id.* at 713. The Court discerned "plain administrative purposes" for the statute, rejecting that the inspections were pretextual acts to uncover criminal violations. *Id.* at 716 n.27.

[78] *T.L.O.*, 469 U.S. at 325 (citing Michigan v. Tyler, 436 U.S. 499, 506 (1978) (fire inspections); Marshal v. Barlow's Inc., 436 U.S. 307, 312–13 (1978) (occupational, health, and safety inspections); *Camara*, 387 U.S. at 528 (housing code inspections)).

[79] *Id.* at 339 (stating that the "State's suggestion that children have no legitimate need to bring personal property into the schools [does not] seem well anchored in reality").

that applying the doctrine of *in loco parentis* to school officials did not make sense in light of "contemporary reality."[80]

With school officials acting neither as police officers nor surrogate parents, the Court had to decide how to measure reasonableness with regard to this new category of searchers. The majority rejected requiring probable cause and a warrant to conduct student searches because it viewed schools as needing "swift and informal disciplinary procedures."[81] Imposing a warrant requirement, the Court reasoned, would "frustrate"[82] the legitimate, non-law enforcement purpose of the searches — creating a sound educational environment. In recognition of the "special needs" of the schools, the *T.L.O.* Court opted instead for a pure balancing of interests, pitting "the schoolchild's legitimate expectations of privacy"[83] against the "school's equally legitimate need to maintain an environment in which learning can take place."[84] The Court then found

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[80] *Id.* at 336–37 ("In carrying out searches and other disciplinary functions, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment.").

[81] *Id.* at 340.

[82] *Id.* (quoting *Camara*, 387 U.S. at 532–33).

[83] *Id.*

[84] *Id.* One scholar has interpreted *T.L.O.* as "sending conflicting messages" in "its struggle to come to grips with school power." Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools,* 65 GEO. WASH. L. REV. 49, 80 (1996). For Professor Dupre, the middle ground taken by the Court — school officials were not police officers nor parents–created mixed signals regarding the school's mission — "social reconstruction" or "social reproduction." *Id.* at 64–69. In creating this dichotomy, Professor Dupre views a "social reconstruction" purpose for schools as requiring courts to give less discretion to school officials for their judgment, but to give them more if schools have a "social reproduction" purpose:

> In the social reconstruction model, the school is an institution where power is necessary only to facilitate the child in his attempts to reconstruct a new social order . . . . The school as a force in reconstructing a new social order was a reverse of the traditional function of public education in American society, in which the power of the school was necessary to inculcate — to reproduce — society's traditions and habits . . . . In contrast to the social reproduction model, which would allow the school the power it needed to mold children in society's image, the social reconstruction model would allow the student the power the student needs to avoid perpetuating society's flaws.

Id. at 65. Professor Dupre viewed the *T.L.O.* Court as a moving away from the "social reconstruction" model and toward the "social reproduction" model: "It was hard to keep an image of the pure school child leading society's reformation when the child keeps others from obtaining a serious education and begins to look like an oppressor himself." *Id.* at 81.

Even though educators for decades have debated these contrasting models, *id.* at 65, in the context of examining the constitutional rights of students, the dichotomy is difficult to apply. Having students seek enforcement of their Fourth Amendment rights is consistent with both models — social reconstruction and social reproduction — because of our long history of respecting individual liberty, an interest that both furthers the individual and society.

discipline a weighty interest that tipped the Fourth Amendment balance in favor of the school officials in the *T.L.O.* case.[85]

B. REASONABLENESS OF STUDENT DRUG-TESTING: *VERNONIA*

By 1995, when the Court faced the question of suspicion-less drug-testing of student athletes in *Vernonia School District 47J. v. Acton*,[86] it had firmly established the "special needs" doctrine; the Court had upheld suspicion-less drug-testing of railroad workers[87] and customs officials.[88] Yet, when it decided *Vernonia*, the Supreme Court articulated a more prominent role for the common law in determining Fourth Amendment reasonableness, indicating that, in some situations, the common law should possibly be the sole source in determining "reasonableness."[89] However, as in *T.L.O.*, the majority opinion also engaged in a general balancing of interests.[90] Focusing on the nature of public schools,[91] the majority ultimately upheld Vernonia's drug-testing policy as facially reasonable under the Fourth Amendment.[92] But the case also produced a dissent that posited a dramatically different view of reasonableness[93] as well as a concurring opinion advocating a strictly fact-specific holding.[94]

1. *The School District's Drug-Testing Policy: Facts of* Vernonia

The Vernonia School District in Oregon adopted a policy of drug-testing student athletes after noticing that students were rude and had used profane language in class.[95] Believing that athletes were "role models" for other students and leaders of the district's drug culture,[96] the district prohibited students from participating in sports unless they first, with their parents' permission, signed a form consenting to urine testing.[97]

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[85] *T.L.O.* 469 U.S. at 342 n.9 ("We have 'repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control the conduct in the schools.'").

[86] 515 U.S. 646 (1995).

[87] Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989).

[88] Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (as applied to officials carrying weapons and in drug interdiction).

[89] *Vernonia*, 515 U.S. at 652–53.

[90] *Id.* at 654–65.

[91] *Id.* at 655–57.

[92] *Id.* at 664–65.

[93] *Id.* at 666–86 (O'Connor, J., dissenting) (joining were Justices Stevens and Souter).

[94] *Id.* at 666 (Ginsburg, J., concurring) (stating holding applies only to student athletes who voluntarily participate in team sports).

[95] *Id.* at 648–49 (1995).

[96] *Id.* at 649, 663.

[97] *Id.* at 650.

Under the plan, a laboratory examined the urine to detect the presence of "amphetamines, cocaine, and marijuana."[98] The athletes were tested at the beginning of their chosen sport's season and then each week thereafter, with school officials randomly selecting ten percent of the athletes for further testing.[99] School officials of the same sex monitored the giving of a sample: male officials viewed the backs of boys urinating, and females stood outside the stalls of the girls, listening for the sounds of urination.[100] Students were to inform school officials about the prescription drugs they were taking.[101] Only school officials received the results of the tests; they did not give any information to the police.[102] If a test came back positive for drug use, the school administered a second test.[103] Upon a second positive test, school officials notified the athlete's parents.[104] School officials then gave athletes the option of weekly testing for drug use or suspension from athletics.[105]

Acton, a seventh grade student, refused to sign the consent form.[106] When school officials barred him from playing on the football team, his parents filed suit, seeking both declaratory and injunctive relief that the urine-testing policy was unreasonable under the Fourth and Fourteenth Amendments.[107] The Supreme Court, relying on the factual findings of the district court, held that the testing was reasonable as a "special needs" search.[108]

2. *Looking to the Common Law and Revisiting the "Special Needs" Doctrine*

The *Vernonia* decision created a special role for the common law in Fourth Amendment analysis. Although the Court had previously considered the common law in assessing the reasonableness of a police officer shooting a fleeing felon,[109] the *Vernonia* Court declared that the common law should be not just a mere consideration but potentially outcome de-

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98 *Id.*

99 *Id.*

100 *Id.*

101 *Id.* at 650, 660 (noting that this facial challenge to the district's drug-testing policy did not assume that students had to give medical information directly to school officials but rather that they may have done so confidentially by sealed envelope).

102 *Id.* at 658.

103 *Id.* at 651.

104 *Id.*

105 *Id.* If the school suspended an athlete who then tested positive again, another athletic suspension ensued. A "third offense [resulted] in suspension for the remainder of the current season and the next two athletic seasons." *Id.*

106 *Id.*

107 *Id.*

108 *Id.* at 664–66.

109 Tennessee v. Garner, 471 U.S. 1, 12–15 (1985). For a discussion of this case, see *supra* notes 13–26 and accompanying text.

terminative where a clear common-law rule exists.[110] It thus offered a new paradigm that some recent Supreme Court decisions also embrace.[111] In contrast to the Court's prior focus on the warrant requirement, a majority of the Court now embraced "reasonableness" as the analytical starting point for Fourth Amendment claims, with the common law being the first area to explore in adjudicating reasonableness.[112]

Drawing upon the common law as a primary basis for Fourth Amendment reasonableness analysis is no easy task because, as the *Vernonia* dissent noted,[113] one can characterize common-law practices in a variety of ways. The Court noted that education began in the private sector, with school officials having the authority to act in the manner that

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[110] 515 U.S. at 652–53 (suggesting that the balancing test must apply "at least, in cases such as this, where there was no clear practice, either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted").

[111] *See, e.g.*, Wyoming v. Houghton, 526 U.S. 295, 299–300 (1999). The Houghton Court articulated a two-part inquiry for determining Fourth Amendment reasonableness, citing *Vernonia* as a case where this new test was applied:

> [W]e inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed. Where that inquiry yields no answer, we must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.

Id. (citations omitted).

[112] *See* Urbonya, *supra* note 1, at 11 n.41 (describing the Court's shift from the warrant requirement to a general reasonableness inquiry). Prior to this decision, the Court had sometimes embraced the common-law view and sometimes rejected it. *See, e.g., Houghton*, 526 U.S. at 311 n.3 (Stevens, J., dissenting) (denying the primacy of the common law as a test for Fourth Amendment reasonableness); Wilson v. Arkansas, 514 U.S. 927, 931 (1995) (suggesting a common-law rule on the search of dwellings to be authoritative); County of Riverside v. McLaughlin, 500 U.S. 44, 55, 71 (1991) (argument between majority and dissent as to whether common-law rule on probable cause determinations should have been outcome determinative); California v. Hodari D., 499 U.S. 621, 626 n.2 (1991) (looking to common law to explain the meaning of seizure); Tennessee v. Garner, 471 U.S. 1, 12–13 (1985) (rejecting the common-law rule allowing the shooting of fleeing felons); Payton v. New York, 445 U.S. 573, 598, 591 n.33. (1980) (rejecting the common law as to warrantless arrests in the home); United States v. Watson, 423 U.S. 411, 421–22 (1976) (applying the common-law rule as to warrantless arrests in a public place).

[113] 515 U.S. at 681 n.1 (O'Connor, J., dissenting). Justice O'Connor wisely commented that one may choose different levels of generality in describing the "common law":

> [T]he historical materials on what the Framers thought of official searches of children, let alone of public school children (the concept of which did not exist at the time) are extremely scarce. Perhaps because of this, the Court does not itself offer an account of the original meaning, but rather resorts to the general proposition that children had fewer recognized rights at the time of the framing than they do today. But that proposition seems uniquely unhelpful in the present case, for although children may have had fewer rights against the private schoolmaster at the time of the framing than they have against public school officials today, *parents* plainly had greater rights then than now.

Id. (citation omitted).

parents would authorize.[114] However, because the *T.L.O.* decision had already distinguished modern-day public school officials from private school teachers at common law, the common-law practice did not neatly answer the reasonableness question in the *Vernonia* case.

The Court examined another aspect of the common law to determine reasonableness — how the common law characterized the relationship between parents and children.[115] Under the common law, parents enjoyed virtually unfettered power to control their children[116] and, contrary to its analytical emphasis in the *T.L.O.* case,[117] the *Vernonia* Court pointed to prior decisions recognizing that schoolteachers "for many purposes" act *in loco parentis*[118] in concluding that school officials do not "exercise only parental power over their students."[119] By analogizing common-law parental power to modern-day school officials' authority to educate, the majority opinion stressed how few rights children had at common law and, by extension, argued that children in the public schools should perhaps have similarly limited rights not only with regard to searches under the Fourth Amendment but also as to free speech rights under the First Amendment and due process safeguards under the Fourteenth Amendment.[120]

However, despite its analysis of the common law, the *Vernonia* majority decided that, because no clear practice existed when the Fourth Amendment was framed, the Court should balance the interests implicated, taking into account the "special needs" doctrine.[121] In balancing, the Court restated some of *T.L.O.*'s assumptions, but also added new glosses to the "special needs" doctrine. To determine whether Vernonia's drug-testing program was a reasonable "special needs" search, the *Vernonia* Court considered four factors: (1) "the nature of the [student's] privacy interest";[122] (2) "the character of the intrusion";[123] (3) "the nature and immediacy of the governmental concern . . . and; [4] the efficacy of [the selected] means for meeting it."[124]

"Central"[125] to the Court's analysis of the student's privacy interest was the legal relationship between the student and the state. The Court emphasized that Acton was a child "committed to the temporary custody

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[114] *Id.* at 654–55.
[115] *Id.* at 654–56.
[116] *Id.* at 654.
[117] *See supra* note 80 and accompanying text.
[118] 515 U.S. at 655.
[119] *Id.*
[120] *Id.* at 656.
[121] *Id.* at 653.
[122] *Id.* at 654.
[123] *Id.* at 658.
[124] *Id.* at 660.
[125] *Id.* at 654.

of the State as schoolmaster,"[126] and it used this relationship to assign to the school more expansive disciplinary powers than it had been willing to recognize in *T.L.O.* while, at the same time, limiting the schools' responsibilities to protect and preserve students' constitutional rights. The majority opinion acknowledged school officials have "custodial and tutelary" powers,[127] and yet also that they have no duty to protect students from other students.[128] A student's privacy interest, the Court reasoned, must therefore be viewed in light of "what is appropriate for children in school"[129] and the significant power that school officials must wield[130] in order to carry out what is "appropriate" for students. Furthermore, the Court indicated that the specific circumstances of this case, drug-testing in the context of school athletics, gave rise to an even further diminished expectation of privacy under the Fourth Amendment because, according to the Court, "sports are not for the bashful."[131] Thus, in the Court's estimation, the first factor — Acton's privacy interest —was not particularly weighty.

The majority opinion also assigned little weight to Acton's side of the balance in considering the second factor, the character of the intrusion, for two reasons. First, the drug-testing policy did little more than mandate something Acton would have to do anyway, urinate in a public restroom.[132] Second, the school used the results only to decide whether students could participate in sports, not for aiding criminal prosecution or

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[126] *Id.*

[127] *Id.* at 656.

[128] *Id.* at 655. This rejection of a duty to protect one student from harming another appeared as only dicta in the decision, but the majority, with its emphasis on "custodial" power, probably sought to signal that a corresponding duty to protect did not arise. School officials throughout the United States had already encountered numerous lawsuits alleging such a duty after the Court decided *DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 189 (1989). Though the *DeShaney* Court held that government officials did not have a Fourteenth Amendment duty to protect a child from an abusive parent, *id.* at 197, lawsuits followed when litigants claimed that schools — public actors — "created" the harm that students faced while in the school's custody. *See, e.g.,* Linda E. Fisher, *Anatomy of an Affirmative Duty to Protect: 42 U.S.C. Section 1986,* 56 WASH. & LEE L. REV. 461, 468 (1999) (collection of critical commentary on *DeShaney* decision); Landra Ewing, Note, *When Going to School Becomes an Act of Courage: Students Need Protection from Violence,* 36 BRANDEIS J. FAM. L. 627, 630–33, 642–44 (1997) (citing these lawsuits and criticizing the Court's failure to comprehend the schools' custodial duties); *see also* Katherine Lush, Note, *Expanding the Rights of Children in Public Schools,* 26 NEW ENG. J. CRIM. & CIV. CONFINEMENT 95, 117–22, 126 (2000) (rejecting *DeShaney*'s narrow view and advocating a broader reading of students' rights in the public schools, including a "right to attend a safe school" in order to promote effective education).

[129] *Vernonia,* 515 U.S. at 656.

[130] *Id.* at 655–56.

[131] *Id.* at 657.

[132] *Id.* at 658.

administering "internal disciplinary" policies, thereby minimizing the intrusion on Acton's already limited privacy rights.[133]

On the other side of the balance was the Court's third factor — the school's interest in dealing with drugs in sports. Although in its first drug-testing case, the Court labeled the government's interest in conducting the tests "compelling,"[134] the *Vernonia* Court declared that "compelling" really meant "important enough to justify [a] particular search."[135] By interpreting "compelling" in this less restrictive manner, the Court easily determined that the three stated purposes of Vernonia's drug-testing program ("to prevent student athletes from using drugs, to protect their health and safety, and to provide drug users with assistance programs")[136] outweighed the students' Fourth Amendment privacy interest.

In interpreting the fourth factor, the Court determined that the school district's drug-testing policy was an effective means of deterring drug use by athletes, one that not only helped them but other students as well; the athletes avoided the physical and psychological harm of drug use and other students were spared the classroom "disruption" caused by drug-using students.[137] The Court also explained that the means used by school officials need not be the least intrusive to further the school's interest in deterring drug use.[138] The Court stated that requiring school officials to have reasonable suspicion of drug use would undermine the relationship between school officials and students,[139] making officials adversaries and subjecting them to lawsuits challenging decisions to impose drug-testing on particular students.[140]

On balance the Court thus held that drug-testing athletes under the particular "special needs" presented by the facts of the *Vernonia* case was reasonable under the Fourth Amendment. Even though *Vernonia* involved group suspicionless searches and *T.L.O.* involved searches directed at a particular student, both decisions relied heavily upon the presumption of diminished constitutional protection for students and the characterization of schools as a place with "special needs" in deciding Fourth Amendment reasonableness.

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[133] *Id.*

[134] Skinner v. Ry. Labor Executives' Assn., 489 U.S. 602, 628 (1989).

[135] *Vernonia,* 515 U.S. at 661.

[136] *Id.* at 650.

[137] *Id.* at 661–62.

[138] *Id.* at 663.

[139] *Id.* at 663–64.

[140] *Id.* The dissent noted that teachers necessarily play an adversarial role when determining whether students have violated other aspects of a school's conduct code and selecting appropriate disciplinary responses for these infractions. *Id.* at 677 (O'Connor, J., dissenting).

C. THE "SPECIAL NEEDS" DOCTRINE UNDER *T.L.O.* AND *VERNONIA*

In balancing interests, the majority opinions in *Vernonia* and *T.L.O.* examined both the common law and modern practices. In doing so, the Court created a new framework for Fourth Amendment analysis, the "special needs" doctrine, in an effort to further and support sound educational practices in the public schools.[141]

In each case, the Court discerned "special needs" justifying searches to further an important purpose other than criminal investigation that, according to the Court, school officials could not fulfill using the more stringent requirements of a warrant, probable cause, or as in *Vernonia*, even reasonable suspicion. *T.L.O.* applied an "implicit" "special needs" doctrine but, by the time *Vernonia* came to the Court, the Court had already applied the doctrine in other similar contexts. Therefore, the explicit invocation of "special needs" analysis in *Vernonia* was hardly surprising.

What was startling was the Supreme Court's re-characterization of the role of the common law in deciding reasonableness.[142] Had the common law revealed a "clear" practice as to the reasonableness of searching public school students, the *Vernonia* Court would have considered this a dispositive answer to the Fourth Amendment inquiry.[143] This analytical sea-change — the movement from considering the common law as only one factor in its Fourth Amendment jurisprudence to a potentially controlling one — is a perplexing twist that has been criticized in subsequent opinions[144] and not always followed.

In applying the Fourth Amendment to the public schools, the Supreme Court did not determine that common law was controlling; as applied, the common law offered only limited guidance in discerning the reasonableness of student drug-testing.[145] Nevertheless, the common

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[141] Although historically fostering education has been left to local school boards, the Court may still influence school policies as necessary to interpret and enforce the Bill of Rights, of which the Fourth Amendment is a part. *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) (1803); *but see* Andre R. Imbrogno, *Corporal Punishment in America's Public Schools and the U.N. Convention on the Rights of the Child: A Case for Nonratification*, 29 J.L. & EDUC. 125, 143 (2000) (noting that even though the United States "remains one of the few industrialized nations which continues to permit corporal punishment in their public schools," local schools should decide whether to use this type of punishment). Imbrogno, however, did not mention the Fourth Amendment as a possible basis for students' personal security claims; he referred only to substantive due process and equal protection claims under the Fourteenth Amendment, and cited the First Amendment as a novel basis.

[142] *See supra* notes 110–120 and accompanying text.

[143] *See supra* note 111 and accompanying text.

[144] *See* Wyoming v. Houghton, 526 U.S. 295, 311 n.3 (1999) (Stevens, J., dissenting) (stating "we have never restricted ourselves to a two-step Fourth Amendment approach wherein the privacy and governmental interests at stake must be considered only if 18th-century common law 'yields no answer'").

[145] *Vernonia*, 515 U.S. at 652.

law affected its "special needs" balancing analysis: the opinion relied on common-law practices to justify restricting students' Fourth Amendment rights and privacy rights.[146] Yet, in keeping with the Court's acknowledgment that school officials have "tutelary" as well as "custodial" powers, any assessment of what is reasonable under the Fourth Amendment must consider what school officials "teach" students by their actions. Under the "special needs" doctrine, school officials must use their custodial power only as a means to educate students. This focus on educational purpose is at the core of the "special needs" doctrine.

III. PHYSICAL DISCIPLINE AND PROCESS FOR STUDENTS: *INGRAHAM V. WRIGHT*

The unique educational requirements of public schools also figured strongly in the Court's infamous decision of *Ingraham v. Wright*.[147] Even though *Ingraham* did not raise a Fourth Amendment claim challenging the school officials' use of corporal punishment,[148] the case nevertheless reveals the Court's perspective on public schools and its reliance on 1970s educational philosophy. Because public educational practices have changed dramatically since the 1970s, school officials and courts should now reexamine *Ingraham* and consider students' interests in personal security as safeguarded by the Fourth Amendment.

Ingraham involved a constitutional challenge to a Florida junior high school's policy of striking students for violating school rules.[149] Even though teachers were to consult the principal before hitting unruly students, they often did not[150] and, after two students received large bruises from repeated strikes with a wooden paddle, their parents filed suit.[151] The issues were narrow: whether a school's failure to provide students with process before corporally punishing them violated the Fourteenth Amendment and whether the Eighth Amendment's "cruel and unusual punishments" clause[152] applied to the act of physical punishment in the public schools.[153] The majority's opinion resolved both issues by examining the historical and contemporary use of corporal punishment[154] and the Framer's intentions regarding the issue.[155] *Ingraham* held that

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[146] *See supra* notes 115–120 and accompanying text.

[147] 430 U.S. 651 (1977).

[148] The students did not invoke the Fourth Amendment as a basis for the suit. *Id.* at 673 n.42. Nor did the Court grant review of their claim under the substantive due process component of the Fourteenth Amendment. *Id.* at 659 n.12.

[149] 430 U.S. 651, 655–57 (1977).

[150] *Id.* at 657.

[151] *Id.* at 653 n.1.

[152] U.S. CONST. amend. VIII.

[153] *Ingraham*, 430 U.S. at 653.

[154] *Id.* at 559–63, 674–78.

[155] *Id.* at 664–70, 672–74 (1977).

the Eighth Amendment did not apply to the school's substantive decision to hit students for punishment[156] and that the Fourteenth Amendment did not require "pre-hitting" process.[157] In rejecting both claims, the Court nevertheless had much to say about school officials' authority over students.

A. THE EIGHTH AMENDMENT CLAIM: THE COMMON LAW MEETS MODERN TIMES

In analyzing corporal punishment in the public schools, the *Ingraham* Court interpreted the Eighth and Fourteenth Amendments in light of its version of common-law history as well as contemporary standards. Drawing liberally on legal historian William Blackstone's *Commentaries* which "catalogued among the 'absolute rights of individuals' the right to security from the corporal insults of menaces, assaults, beating, and wounding,"[158] the Court nonetheless distinguished the public school context and recognized a teacher's authority to "corporal[ly] insult" a student as "moderate correction."[159] Thus, the use of physical force did not offend Blackstone's maxim when it furthered a student's education. The Court also looked at the 1970s practice of corporal punishment in the classroom.[160] When the Court decided *Ingraham,* twenty-one states "authorized the moderate use of corporal punishment in public schools"[161] and, even though "[p]rofessional and pubic opinion [was] sharply divided on the practice, and [had] been for more than a century,"[162] the Court discerned "no trend toward its elimination."[163] Further, in contrast to the common law, the *Ingraham* majority implicitly rejected the *in loco parentis* doctrine by holding that a teacher's authority in the classroom did not derive from parental authority,[164] and it noted that, even though one state required parental consent before striking students, such consent was not constitutionally required.[165]

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[156] *Id.* at 671.

[157] *Id.* at 683.

[158] *Id.* at 661 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *134).

[159] *Id.* (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *120).

[160] The opinion did, however, note the "general abandonment" of the common-law practice of corporal punishment among prison populations and mentioned applying "'evolving standards of decency'" to prisoners' personal security claims under the Eighth Amendment. *Id.* at 660, 668 n.36 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

[161] *Ingraham*, 430 U.S. at 663.

[162] *Id.* at 660–61.

[163] *Id.* at 661.

[164] *Id.* at 662 (stating that "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 'for the proper education of the child and for the maintenance of group discipline'") (citing 1 F. HARPER & F. JAMES, LAW OF TORTS, § 3.20, at 292 (1956)).

[165] *Id.* at 662 n.22.

B. THE FOURTEENTH AMENDMENT CLAIM: APPLYING THE *ELDRIDGE* TEST

After thus discarding the Eighth Amendment claim, the Court applied the classic three-part balancing test of *Mathews v. Eldridge* to determine what process the Fourteenth Amendment requires before school officials may strike students: (1) the student's interest in personal security; (2) the "risk of an erroneous deprivation" of personal security and "probable value" of the requested safeguard; and (3) the state's interests in not having the safeguard.[166] In assessing the first factor, the Court acknowledged students' "strong interest in procedural safeguards that minimize the risk of wrongful punishment"[167] but also observed that the common law only permitted students to sue where infliction of corporal punishment in the classroom was unjustified — "in light of its purpose."[168] The Court carefully sketched the contours of the common-law privilege that permitted the use of force for "moderate correction" in furtherance of education,[169] but rendered conduct outside of that privilege actionable under state tort law.[170] With regard to the second factor, the Court determined the risk of error in disciplining students to be "insignificant" because school officials directly observe the unruly students.[171] Likening the physical disciplining of unruly students to the warrantless arrest of suspects by police officers,[172] the majority held that more process was unnecessary because the open nature of the school system acts as a check on potential abuse and because, in any event, "there was a low incidence of abuse."[173] As a result, the second factor weighed in favor of the school's policy.

The majority's evaluation of the final factor, the state's interest in denying process to students subject to corporal punishment, relied upon two key assumptions. First, the Court assumed that physical punishment was an effective disciplinary tool, one that school officials might forego if they had to provide process before hitting students.[174] Although the Court noted that many people would welcome the "elimination or curtailment of corporal punishment . . . as a societal advance,"[175] it viewed the states' physical punishment policies as "reaffirm[ing]" the common-law

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[166] *Id.* at 675 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).
[167] *Id.* at 676.
[168] *Id.* at 675–76.
[169] *Id.* at 675.
[170] *Id.* at 676 n.45.
[171] *Id.* at 677–78.
[172] *Id.* at 679–80.
[173] *Id.* at 682.
[174] *Id.* at 680.
[175] *Id.* at 681.

practice of allowing corporal punishment.[176] Second, the Court assumed that teachers needed to corporally punish students quickly to be effective[177] and that students' "anxiety" would increase if school officials delayed the imposition of punishment by "interposing procedural safeguards."[178] In light of these assumptions, the Court determined that pre-hitting process would be a "significant intrusion into an area of primary educational responsibility."[179]

C. *INGRAHAM'S* RATIONALE

In deciding that the Fourteenth Amendment only required post-hitting process for physically disciplined students, the *Ingraham* Court distinguished between two disciplinary remedies — hitting and suspensions.[180] Pre-deprivation process is generally preferred before officials may suspend students.[181] The differing constitutional treatment may be related to the Court's view of physical discipline: a quick slap may keep the student in school, under control and learning, while a suspension results in ejection and loss of educational instruction. The *Ingraham* Court's bright-line rule of allowing physical punishment with only post-hitting process avoided burdening schools with the tedious and uncertain task of determining the appropriate amount of process justified by the degree of physical harm inflicted in a given instance, an approach whose "impracticability" the Court found "self-evident" and illustrative of "the hazards of ignoring the traditional solution of the common law."[182] In short, the Court examined historical and contemporaneous practices among the states in rejecting any protection for physically punished students under the Eighth Amendment and in deciding the scope of students' procedural due process rights under the Fourteenth Amendment. However, the *Ingraham* decision did explicitly leave open the question of whether physical punishment may violate the *substantive* due process component of the Fourteenth Amendment.[183] In light of the Court's more recent personal security jurisprudence, such claims would fall under the Fourth Amendment rather than the Fourteenth Amendment.[184]

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[176] *Id.*

[177] *Id.* at 681 (indicating that teachers disciplining students "sometimes require immediate effective action").

[178] *Id.* at 681 n.51.

[179] *Id.* at 682.

[180] *Id.* at 678 n.46.

[181] *Id.*

[182] *Id.* at 682 n.55.

[183] *Id.* at 659 n.12.

[184] *See* Urbonya, *supra* note 1 at 51–55.

IV. CONTEXTUAL BALANCING IN THE PUBLIC SCHOOLS: FORCE TO FURTHER SAFETY AND FORCE TO PUNISH

Modern courts adjudicating students' Fourth Amendment personal security claims must draw upon the Supreme Court's Fourth Amendment precedents examining police officers' use of physical force, (*Tennessee v. Garner* and *Graham v. Connor*), school officials' searches of students, (*New Jersey v. T.L.O.* and *Vernonia School District 47J v. Acton*), and the constitutionally mandated process owed to physically punished students (*Ingraham v. Wright*). This article synthesizes these cases and contends that the Supreme Court's Fourth Amendment jurisprudence is rooted in contextual balancing, with what constitutes Fourth Amendment reasonableness depending upon the particular educational practice at issue.

Grappling with numerous scenarios in which police officers use physical force to control and subdue suspects, the nation's courts, not surprisingly, have reached conflicting results when examining similar facts.[185] Many of the of the same problems surface when analyzing school officials' use of physical force in the public schools. As discussed above, in defining Fourth Amendment reasonableness for the classroom, the Supreme Court's jurisprudence suggests many factors: the nature of school officials' authority over students; the role of history, including common-law practices and modern practices; educational theory, which includes assessing harm to students and the learning environment as a result of using physical force; and the need to defer to school officials' decisions. Analysis of the Supreme Court's Fourth Amendment decisions suggests that the Constitution affords school officials broad deference in using physical force to maintain school safety, but that physical force to punish is per se unreasonable under the Fourth Amendment.

A. SCHOOL OFFICIALS' "CUSTODIAL" AND "TUTELARY" AUTHORITY: DIFFERENT FROM PARENTAL AUTHORITY

The Supreme Court's precedents distinguish between parental authority to use physical force and school officials' authority in educating students. According to the Supreme Court, school officials have both "custodial" and "tutelary" powers. When school officials searched students in both *T.L.O.* and *Vernonia*, the searches were to further the schools' mission — education. In these Fourth Amendment decisions,

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[185] *See, e.g.*, Kathryn R. Urbonya, *Dangerous Misperceptions: Protecting Police Officers, Society, and the Fourth Amendment Right to Personal Security*, 22 HASTINGS CONST. L.Q. 623, 648–73 (1995) (highlighting numerous differences in how courts determine whether police officers' use of force is reasonable).

the Court noted that schools officials have power exceeding the powers given to them under the doctrine of *in loco parentis.* The Court highlighted that compulsory education laws made the school officials function as state actors, not parents. As a result of exerting state, not parental, authority, school officials could not claim the "immunity"[186] that parents had or act free from "constitutional restraints."[187] In addition, the Court in dicta stated, "parental approval of corporal punishment is not constitutionally required."[188]

Whether school officials have acted constitutionally reasonable under the Fourth Amendment depends upon how the measures further the schools' educational goal. School officials have "custodial" power in order to educate students. Even though many states ask parents to sign consent forms regarding school activities, school officials still have authority that differs from parents because of their status as state actors.[189]

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[186] *T.L.O.*, 469 U.S. at 337.

[187] *Vernonia,* 515 U.S. at 655.

[188] Ingraham v. Wright, 430 U.S. 651, 662 n.22 (1977); *see also* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 681 n.1 (1995) (O'Connor, J., dissenting) (citing footnote in *Ingraham*).

[189] Parents have frequently invoked religious beliefs to justify the use of corporal punishment. *See, e.g.,* PHILIP GREVEN, SPARE THE ROD: THE RELIGIOUS ROOTS PUNISHMENT AND THE PSYCHOLOGICAL IMPACT OF PHYSICAL ABUSE 46–81 (1991). Greven explored the religious justifications that "fundamentalist protestants" have used when explaining the striking of their children. Parents often asserted a need to break the will of a child in order to save the child from "eternal punishment." *Id. See also* Christopher G. Ellison & Darren E. Sherkat, *Conservative Protestantism and Support for Corporal Punishment,* 58 AM. SOC. REV. 131, 131 (1993). Ellison and Sherkat, who are professors of sociology, examined the normative support for corporal punishment and noted its relationship to parents' religious beliefs:

> [T]he disproportionate support for corporal punishment among Conservative Protestants derives largely from the distinctive epistemological commitments implied by the doctrine of biblical "literalism," along with two related ideological orientations: (1) a view of human nature as sinful and prone to egoism, and (2) a heightened sensitivity to issues of sin and punishment.

Id. Although they stated that what constitutes a "'literal' interpretation of the Bible remains hotly disputed," *id.* at 132, they use the term "Conservative Protestant" to refer to an individual who focuses on "the certainty and legitimacy of biblical truth," linked with "issues of authority and obedience." *Id.* They also noted that psychologist James Dobson, the founder of Focus on the Family, justifies the use of corporal punishment by relying on his "Conservative Protestant" religious beliefs rather than his training as a psychologist in determining what constitutes "good discipline." *Id.*

Other sociologists have described this religious view in support of corporal punishment as "sacralized" violence, aimed at "fostering the child's well being in this world, and, ultimately, the next." Christopher G. Ellison & John P. Bartkowski, *Religion and the Legitimation of Violence: Conservative Protestantism and Corporal Punishment, in* THE WEB OF VIOLENCE: FROM INTERPERSONAL TO GLOBAL 48 (Jennifer Turpin & Lester R. Kurtz eds., 1997). These sociologists effectively described how such religious beliefs are not in any sense linked to a "true" interpretation of biblical truth, but rather tied to a particular religious institution's beliefs, which its members then adopt:

> Although many conservative Protestants would disagree, many observers argue that the Bible, like any text, contains passages that permit multiple readings. Thus, it is important to note that understandings of scripture —"inerrant" or otherwise — do

Yet, school officials who have signed parental consent forms in hand would naturally contend that a parent's consent to physically discipline the child would make the use of force per se reasonable.[190] Such an argument is not frivolous, but it nevertheless would miss the essence of the Court's decisions — school officials are state actors.[191] The Court assigned this constitutional status to school officials performing the public function of teaching for an important reason: school officials must be free to fulfill the state law's command to educate youth.[192] When stu-

> not emerge in a mechanical fashion from the solitary study and reflection of individuals . . . . Rather, scriptural readings are *social* products, generated and disseminated within interpretive communities. Members of interpretive communities make certain a priori assumptions about a given text, and they adopt certain ground rules to define the boundaries of acceptable practice. These assumptions and conventions shape their subsequent readings of concrete passages, ruling out alternative understandings.

Id. at 49.

[190] Many scholars, however, have reexamined how we discuss the relationship between children and parents. *See, e.g.*, James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371, 1379 (1994) (advocating that courts "dispense with the notion of parental rights altogether"). Professor Dwyer argued that child-rearing matters should focus on the interests of children:

> Abrogating parents' rights would, however, substantially alter the way that courts analyze conflicts between parents and the larger community over child-rearing. Rather than balancing parents' rights against state interests in the care and education of children, as presently occurs, judges would decide these conflicts solely on the basis of children's welfare interests. Doing so would be likely, in turn, to alter the precise limits of parental freedom and authority and to shift the boundary between permissible and impermissible state interventions.

Id. at 1376. Professor Orentlicher has also advocated for a "child's" perspective, stating that we have mistakenly afforded parents the opportunity to strike children because "we view corporal punishment from the perspective of parents" by "undervalu[ing] children and overvalu[ing] pain." David Orentlicher, *Spanking and Other Corporal Punishment of Children by Parents: Overvaluing Pain, Undervaluing Children*, 35 HOUSTON L. REV. 147, 185 (1998). In addition, Professor Bitensky has advocated that state laws should no longer recognize a privilege for parents to strike their children as a form of "discipline." Bitensky, *infra* note 197, at 360. She noted that the United States is one of the few nations to still allow this inhumane practice. *Id.* at 361.

[191] *See, e.g.*, Joan L. Neisser, *School Officials: Parents or Protectors? The Contribution of a Feminist Perspective*, 39 WAYNE L. REV. 1507, 1510 (1993) (rejecting the doctrine of *in loco parentis* as applied to teachers). Professor Neisser revealed an important problem if one were to view public school teachers as acting as parents: they would be able to physically punish students, asserting the parents' privilege at common law, but have no current duty to protect students in their custody. *Id.* For her, viewing teachers as parents would be adopting an "outmoded" "partriarchal model of the family." *Id.*

[192] *See, e.g.*, Anne Proffitt Dupre, *A Study in Double Standards, Discipline, and the Disabled Student*, 75 WASH. L. REV. 1, 77 (2000) (rejecting the notion of public school teachers acting as parents because of their duty to consider the good of all students, not what is good for a particular child as would a parent). In examining the difficult question of how public school teachers may legally discipline disabled students in light of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400(c)(2)(A)-(C) (Supp. 1997), Professor Dupre described the possible and common conflict between parents and public school teachers:

> [T]he parent of a disabled child is interested in the welfare of his or her child, not that of the many other students in the community of learning. Professor Stephen Gillers, in describing wnat he calls "liberal parentalism," states that parental control

dents enroll in public, as opposed to private, schools, the state guides the actions of these school officials.[193] Parents are free to enroll their children in private schools or even to "home school" them.[194] In the public school, due process requirements apply; they do not in private schools.

The unique context of the public schools, in which officials exercise neither criminal law enforcement powers nor parental powers but rather "custodial" and "tutelary" powers,[195] thus complicates the Fourth Amendment analysis of reasonableness. The reasonableness of physical force becomes intertwined with the school's power to exercise limited custody and requires an "objective"[196] examination of whether the force used was reasonable under the particularized circumstances confronting a

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> over a child's education is "presumed superior" because "the fallible human agents through whom government must act are less likely to do what is good for other people's children than fallible individual parents are to do what is good for their own." But even if a particular request is in the best interest of one particular child, it may *not* be in the best interest of other students and *their* parents, who do not have a voice in the matter . . . . To quote Justice Douglas, "It is the future of the student, not the future of the parents, that is of primary importance."

Id. at 77–78 (citations omitted). She thus viewed teachers as the state's, not parents', agents in making educational decisions for the class.

[193] *See, e.g.*, WILLIAM W. CUTLER III, PARENTS AND SCHOOLS 206–07 (2000) (detailing the historical conflicts between public school teachers and parents and advocating that teachers and parents work together). Cutler described this authority battle:

> Parents may not be the teacher's natural enemy, but they are usually unwelcome in the classroom. Armed with profession certificates and advanced degrees, educators believe that they have the authority to manage parental inquiries and even dismiss complaints about the judgments they make or the methods they use. Such autonomy carries a high price, justifying parental ignorance, apathy, and detachment.

Id. at 2. Cutler asserted that public schools would function better if parents and teachers recognized a "symbiotic relationship" with the interest of children placed first. *Id.* at 2, 199–207.

[194] *See, e.g.*, CHRISTOPHER J. KLICKA, THE RIGHT TO HOME SCHOOL: A GUIDE TO THE LAW ON PARENTS' RIGHTS IN EDUCATION 2 (2d ed. 1998). Klicka noted that when states first established compulsory public education, "home-schooling virtually died out." *Id.* He discerned the re-birth of home-schooling in the 1980s, noting two primary reasons: the parents' Christian religious beliefs and their dissatisfaction with the "academic and moral decline in the public schools." *Id.* at 2–3. The author, clearly in favor of home schooling, discussed the turf battle between public educators and parents. At one point, he quoted a public school teacher who referred to home-schooling as "a form of child-abuse" because of the social isolation home-schooled children experience. *Id.* at 24. He maintained that this "opposition" "seeks to regulate home schooling out of existence or at least into conformity" through excessive state regulation. *Id.* at 26–27. *See also* LOUIS FISCHER, DAVID SCHIMMEL, & CYNTHIA KELLY, TEACHERS AND THE LAW 434 (1999) (noting that all states allow parents to school their children at home if they meet the "requirements of their particular state"); *see generally* Dupre, *supra* note 192, at 85 (noting that many parents chose private schools because of discipline problems in the public schools).

[195] *Vernonia*, 515 U.S. at 655–56.

[196] *See, e.g.*, Graham v. Connor, 490 U.S. 386, 397 (1989) (stating that "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them").

given school official and whether it furthered the purpose for which it was used.

B. LEGAL AND EDUCATIONAL PRACTICES AT COMMON LAW AND TODAY

In making this objective assessment, the Supreme Court's opinions, both in the policing and school contexts, suggest that courts must consider past and present legal and educational practices. The Court finds the common law's conception of reasonableness informative, though Fourth Amendment reasonableness cannot be entirely equated with historical common-law practices because common-law principles necessarily fail to reflect the present-day realities of policing and education. In crafting its reasonableness jurisprudence, the Court therefore also considers modern practices, deferring in part to the judgments of the experts in particular areas.

The common law provided little protection for the personal security of children, whether at home or in school. As numerous scholars have noted, historically both children and women were chattel[197] — the property of the father and husband, who could beat them almost to death.[198] Private tutors at common law had the authority to use physical force for "moderate correction,"[199] but "unjustifiable" force was actionable because it exceeded the teacher's privilege.[200] Contemporary educational and legal practices also shape the Fourth Amendment standard of reasonableness. When the Court decided *Ingraham v. Wright* in 1977, women

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[197] *See, e.g.*, ROBERT WHEELER LANE, BEYOND THE SCHOOLHOUSE GATE: FREE SPEECH AND THE INCULCATION OF VALUES 18 (1995) (stating that "[f]rom 1870 to 1920, a parens patriae doctrine, giving legal authority to the state to control and supervise children, displaced their chattel legal status"). Lane discerned that there was "a transfer of broad discretionary power to the state," in light of new state restrictions —"compulsory-education laws," limits on "child labor," and the "creation of a juvenile justice system." *Id.* In short, "children became, in effect, a newly regulated industry." *Id.*; Susan H. Bitensky, *Spare the Rod, Embrace Our Humanity: Toward a New Legal Regime Prohibiting Corporal Punishment of Children,* 31 U. MICH. J.L. REFORM 353, 439 (1998) (stating that "[c]orporal punishment of children, which dates back to antiquity, reflects children's continued classification as parental property"); Susan D. Hawkins, Note, *Protecting the Rights and Interests of Competent Minors in Litigated Medical Treatment Disputes,* 64 FORDHAM L. REV. 2075, 2076 (1996) (stating that "[a]t one time, children in the United States were regarded simply as chattel of their parents, or, more accurately, of their fathers"; adding that the "law relating to children focused not on their rights, but on the rights of adults with respect to their children").

[198] *See, e.g.*, Reva B. Siegel, *Civil Rights Reform in Historical Perspective: Regulating Marital Privacy, in* REDEFINING EQUALITY 29, 31 (Neal Devins & Davison M. Douglas eds., 1998) (describing the husband's authority to "restrain" his wife through "domestic chastisement" in much the "same moderation that a man is allowed to correct his apprentices or children"). *See also* ROBIN WEST, CARING FOR JUSTICE 132–38 (1997) (describing the use of patriarchal violence as a means of controlling women).

[199] Ingraham v. Wright, 430 U.S. 651, 661 (1977) (quoting WILLIAM BLACKSTONE, 1 COMMENTARIES *134).

[200] *Id.*

were gradually becoming legally autonomous individuals — retaining both their property[201] and names after marriage,[202] working in a variety of professions,[203] and paying alimony when necessary.[204] But society did not afford a similar autonomy to children; parents continued to control many important decisions.[205]

Thus, when the *Ingraham* Court looked at "modern" practices of corporal punishment in schools, the 1970s legal landscape still reflected the historical pattern of diminished personal security interests for children.[206] The Court canvassed the states' corporal punishment policies in analyzing whether the Fourteenth Amendment required pre-hitting procedures:

> Of the 23 States that have addressed the problem through legislation, 21 have authorized the moderate use of corporal punishment in public schools. Of these

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[201] *See, e.g.*, Kirchberg v. Feenstra, 450 U.S. 455 (1981) (holding unconstitutional a statute that allowed husbands to dispose of mutually owned property without their wives' consent).

[202] *See, e.g.*, Priscilla Ruth MacDougall, *The Right of Women to Name Their Children*, 3 L. & INEQUALITY: J. THEORY & PRACTICE 91, 96 n.9 (1985) (stating that in the 1970s courts finally recognized "the right of women to chose their own names").

[203] *See generally* Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality opinion) (holding that federal law drawing different presumptions of dependencies for male and female spouses violated equal protection). In *Frontiero,* Justice Brennan discussed our nation's history of sex discrimination, stating society had justified this discrimination by its notion of "'romantic paternalism,' which . . . put women, not on a pedestal, but in a cage." *Id.* at 684. As an example of this cage, he looked to the 1873 case of *Bradwell v. State*, 83 U.S. (16 Wall.) 130 (1873), which denied women the right to practice law by relying on stereotypes and religious perspectives to justify discrimination:

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood . . . .
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> . . . [The] paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.

Id. (quoting *Bradwell*, 83 U.S. (16 Wall.) at 141).

[204] *See, e.g.*, Orr v. Orr, 440 U.S. 268 (1979) (holding unconstitutional a state law that required only men, not women, to provide alimony).

[205] *See, e.g.*, Parham v. J.R. et al., 442 U.S. 584, 616 (1979) (rejecting a facial procedural due process challenge to a state statute permitting parents to admit children to mental health hospitals, subject to evaluation by professionals). *But cf. id.* at 625 (Brennan, J., dissenting) (stating that "it ignores reality to assume blindly that parents act in their children's best interests when making commitment decisions and when waiving their children's due process rights").

[206] *See, e.g.*, Barbara Bennett Woodhouse, *"Who Owns the Child": Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1002 (1992) (arguing that "our attachment to [a] property-based notion of the private child cuts off a more fruitful consideration of the rights of all children to safety, nurture, and stability, to a voice, and to membership in the national family").

> States only a few have elaborated on the common-law test of reasonableness, typically providing for approval or notification of the child's parents, or for infliction of punishment by the principal or in the presence of an adult witness. Only two States, Massachusetts and New Jersey, have prohibited all corporal punishment in their public schools. 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.[207]

In short, the Court found "contemporary approval of reasonable corporal punishment,"[208] and "discern[ed] no trend toward its elimination."[209]

However, a survey of the same state laws today would reveal quite different results. In contrast to the 1970s, when twenty-one states authorized teachers to physically punish students, today only two states directly grant school officials the authority to use bodily punishment.[210] Another state requires parents or guardians to consent before the striking of their children is permitted.[211] And, in a dramatic reversal, nineteen states and the charter schools in the District of Columbia now expressly forbid corporal punishment.[212]

Such statutes are analogous to the regulations of at least thirty-four states that ban foster parents from administering corporal punishment under any circumstances[213] and provide further support for the notion

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[207] Ingraham v. Wright, 430 U.S. 651, 662–63 (1977).

[208] *Id.* at 663.

[209] *Id.* at 661.

[210] OKLA. STAT. ANN. tit. 21 § 844 (West 1998) (law does not prohibit a "parent, teacher or other person from using ordinary force as a means of discipline, including but not limited to spanking, switching or paddling"); TENN. CODE ANN. § 49-6-64103 (1996) (permitting any teacher or principal to use corporal punishment in a reasonable manner to maintain discipline and order).

[211] UTAH CODE ANN. § 53A-11-802 (1997).

[212] ALASKA ADMIN. CODE tit. 4, § 07.010(c) (1998); CAL. EDUC. CODE § 49001 (West 1993); HAW. REV. STAT. § 302A-1141 (1999); ILL. COMP. STAT. ANN. §§ 5/24-24, 5/34-84a (West 1998); IOWA CODE ANN. § 280.21 (West 1999); MD. CODE ANN., EDUC. § 7-306(a) (1999); MASS. GEN. LAWS ch. 71, § 37G (1996); MICH. COMP. LAWS ANN. § 380.1312 (West 1997); MINN. STAT. § 121A.58 (1999 Supp.); MONT. CODE ANN. § 20-4-302(3) (1999); NEB. REV. STAT. 79-295 (1996); NEV. REV. STAT. ANN.. § 392.465 (Michie 1996); N.J. STAT. ANN. § 18A:6-1 (West 1999); OR. REV. STAT. § 339.250 (1995); VT. STAT. ANN. tit. 16 § 1161a(c) (West 2000); VA. CODE ANN. § 22.1-279.1 (Michie 1997); WASH. REV. CODE ANN. § 28A.150.300 (West 1997); W. VA. CODE § 18A-5-1(d) (1997); WIS. STAT. ANN. § 188.31 (West Supp. 1998); D.C. CODE ANN. § 31-2817(f) (1998).

[213] ARIZ. ADMIN. CODE R6-5-5909E.4(e), (h) (2001) (stating "[n]o child . . . shall be subjected to . . . corporal punishment inflicted in any manner upon the body"; also banning "[p]unishment connected with functions of living, such as sleeping or eating"); Ark. Dep't Human Services Reg., Standards for Approval of Family Foster Homes § 139(c)((5) (a), (b), (c), (e), (f) (1999) (stating that "[p]hysical punishment inflicted in any manner" is unacceptable; banning "washing mouth out with soap, taping or obstructing a child's mouth, placing

painful or unpleasant tasting substances in mouth, on lips," "hitting, pinching, pulling hair, slapping, kicking twisting arm, forced fixed body positions . . ."; also prohibiting "[d]enial of meals, clothing, shelter" and "[a]ssignment of extremely strenuous exercise or work" and "[l]ocked in isolation of any kind"); CAL. CODE REGS. tit. 22, § 87072 (a)(3), (6) (2001) (stating that "[e]ach child [has a] personal right[ ] . . . to be free from corporal or unusual punishment," and "[n]ot to be locked in any room, building, or facility premises by day or night"); 12 COLO. CODE REGS. § 2509-6 (1998) (stating that "[t]he caregiver must not use . . . corporal or other harsh punishment, including but not limited to pinching, shaking, spanking, punching, biting, kicking, rough handling, hair pulling, or any humiliating or frightening method of discipline"); CONN. AGENCIES REGS. § 17a-150-109 (c) (2001) (stating that "[f]oster . . . parents shall not use . . . corporal punishment, including but not limited to spanking, cursing, or threats"); FLA. ADMIN. CODE ANN. r. 65C-13.010.5.(e), (f), (h), (l) (2001) (stating that "substitute care parents must not use corporal punishment of any kind"; also banning the punishments of "us[ing] soap to wash out the mouth, eating hot sauces or peppers, placing in hot water, kneeling on stones . . ."; also prohibited are withholding "meals, clothing, or shelter as a form of punishment" as well as assigning chores that "involve physical exercise so excessive as to endanger the child's health, or so extensive as to impinge on time set aside for school work, sleeping, or eating"); GA. COMP. R. & REGS. r. 290-2-5-.14(b)(2), (3), (4), (9) (2000) (stating that "corporal punishment" "shall not be used"; also banning as punishment the "[d]enial of meals or hydration," "sleep," and "shelter, clothing, or essential personal needs"); HAW. ADMIN. RULES § 17-890-25(a) (1999) (stating that "[n]o child shall be subjected to physical punishment or any action which would endanger the child's physical or emotional well-being"); ILL. ADMIN. CODE tit. 89, § 402.21(c), (d), (f), (g), (h) (2001) (stating that "[n]o child shall be subjected to corporal punishment"; adding that "[r]easonable physical force may be used to restrain a child in order to prevent injury to the child, injury to others, the destruction of property, or extremely disruptive behavior"; also banning as punishment depriving a child of a meal, clothing, shelter, or sleep; allowing restriction to an unlocked bedroom as punishment if for a "reasonable period of time"); IOWA ADMIN. CODE r. 441-113.18(2) (2001) (stating that the "[u]se of corporal punishment is prohibited"; allowing "reasonable physical force . . . to prevent injury to the child, injury to others, the destruction of property, or extremely disruptive behavior"); KAN. ADMIN. REGS. 28-4-314 (f) (1-3) (2000) (stating that "foster parent . . . shall not use . . . physical punishment, including hitting with the hand or any object, yanking arms or pulling hair"; also "restricting movement by tying or binding" and banning "[c]onfining a child in a closet, box, or locked area"); LA. ADMIN. CODE tit. 48, § I.6109(D)(9)(c)(ii), (v-vii) (1999) (stating that "[f]oster parent[ ] shall not use . . . corporal punishment"; also banning as punishments "[p]hysically strenuous exercise or harsh work," "[i]solation in a locked room or any closet or other enclosed space," and "[i]solation in an unlocked room for more than one hour"); CODE ME. R. § 10 148 016(9)(D)(2)(b)(d), (3)(b) (1998) (stating that "[i]n no instance shall a child be subjected to . . . [p]hysical punishment, kneeling, shaking, spanking, or striking with an object or a blow with the hand"; also prohibiting as punishment the "[d]eprivation of meals" but allowing for "[p]hysical restraint . . . when necessary to protect the child from inflicting injury to themselves or others"); MD. REGS. CODE tit. 07 § 02.25.19(D)(1-3), (6), (8-10) (2001) (stating that foster parents shall not use "[c]orporal punishment, which includes physical hitting or any type of physical punishment inflicted in any manner upon the body"; also banning as punishments the following: "[p]hysical exercises, such as running laps or performing pushups"; "[r]equiring or using force to require a child to take an uncomfortable position such as squatting, bending, or repeated physical movements"; "[d]enial of meals, clothing, bedding, sleep"; "[b]odily shaking"; "[p]lacement in a locked room"; and "[u]se of mechanical or chemical restraints"); MASS. REGS. CODE tit. 110, § 7.111(2) (2001) (stating that foster parents must sign a written agreement prohibiting "any form of corporal punishment"); MINN. R. 9545.0160 (2000)(D), (F),(I) (prohibiting corporal punishment, which "includes but is not limited to hitting, slapping, spanking, pinching, shaking, kicking, or biting"; prohibiting the deprivation of "meals" as discipline and "[i]solation" "in a closet or locked room"); MISS. REG. 11-111-003, vol. IV (C)(1-2), Placement Services (1994) (stating that "[f]oster parents shall not use corporal punishment" and also barring the "withholding of food"

as punishment); MO. CODE REGS. ANN. tit. 13, § 40-60.050(5)(A) (2001) (stating that "[f]oster parents shall not use corporal punishment"); NEB. ADMIN. R. & REGS. 474-6-003.33G(2)(a-d) (1999) (stating that foster parents shall never use as discipline the following: "[p]hysical punishment," "[d]enial of necessities," [c]hemical or mechanical restraints" or "threats of physical punishment"); N.J. ADMIN. CODE tit. 10, § 122C-1.13(b) (2001) (stating that "[t]he foster parent shall not use corporal punishment"); N.M. ADMIN. CODE tit. 8, § 27.3.25.1.5 (2001) (providing that "[p]rohibited forms of discipline include, but are not limited to the following: corporal punishment such as shaking, spanking, hitting, whipping, or hair or ear pulling; prolonged isolation; forced exercise; denial of food, [and] sleep"; also prohibiting locking a child "in a room or closet"); N.D. ADMIN. CODE § 75-03-14-05(7)(a) (1999) (stating that "[n]o child may be punched, spanked, shaken, pinched, roughly handled, or struck with an inanimate object;" allowing as discipline "gentle physical restraint such as holding"); OHIO ADMIN. CODE § 5101:2-7-09(E)(1-3), (6), (8-9), (F), (H) (2001) (stating that a "foster caregiver shall not use . . . [p]hysical hitting or any type of physical punishment inflicted in any manner upon the body such as spanking, paddling, punching, shaking, biting, hair pulling, pinching, or rough handling"; also banning a punishment "[p]hysically strenuous work or exercises"; requiring "child to take an uncomfortable position, such as squatting or bending, or requiring a foster child to repeat physical movements when used as a means of punishment"; depriving child of meals, sleep, "shelter, clothing, bedding, or restroom facilities"; but allowing physical restraint only by caregivers who have received "specific training" and who use the "least restrictive physical restraint necessary to control a situation"); OKLA. ADMIN. CODE § 340:75-17-2(b)(4); § 377:10-7-3(13)(A), (D) (1999) (stating that "[p]arental substitute authority does not include the use of corporal punishment"; also banning the withholding of meals as punishment); OR. ADMIN. R. 413-200-0170(1)(D-E), (G)(a), (c), (e-f), (j) (2001) (stating that "[f]oster parent(s) will provide positive discipline and guidance but shall not punish foster children"; prohibited punishments include "[p]hysical force or threat of physical force inflicted in any manner upon the child"; denying "food, clothing, shelter"; assigning "extremely strenuous exercise or work"; using or threatening to use "restraining devices"; and using a "shower as punishment"; allowing physical restraint only by trained foster care parents); 55 PA. CODE § 3700.63(b)(2), (5), (8) (2001) (prohibiting "[p]hysical punishment inflicted upon the body"; denying "meals, clothing, or shelter"; and assigning "physically strenuous exercise or work solely as punishment"); R.I. CODE R. 03-000-021(G)(f) (1998) (stating that foster parents should use "discipline appropriate to the child's age and stage of development and without harsh, humiliating, or corporal punishment"); 114 S.C. CODE ANN. REGS. 114-550 (J)(13)(b) (2001) (prohibiting "[c]ruel, inhumane and inappropriate discipline," including "but not necessarily limited to the following: head shaving or any other dehumanizing or degrading act; prolonged/frequent deprival of food . . . ; slapping or shaking"); TENN. COMP. R. & REGS. R. 0250-4-2-.07(3)(e)(2-3), (8) and (4)(b) (2001) (prohibiting "[c]orporal punishment"; the "[d]enial of meals, [and] daily needs"; and assigning "excessive or inappropriate work"; requiring strict monitoring of isolation techniques); UTAH ADMIN. CODE R501-12-13(B) (2001) (stating that "[f]oster parents shall not use, nor permit the use of corporal punishment, physical or chemical restraint, infliction of bodily harm or discomfort, deprivation of meals . . ."); VT. CODE R. 13-162-007.324(A)(.1)(.3-.4), .326.1 (1999) (stating that "[a] foster parent shall not subject a foster child to . . . spanking, slapping, hitting, shaking or otherwise engaging in aggressive physical contact"; also banning required physical discomforts as from prolonged squatting, isolating "in a closet or locked room," depriving child of "food, water, rest or opportunity for toileting or bathing" and allowing physical restraint only if force used was "the least amount consistent with reducing the risk to a level manageable by less restrictive means"); 22 VA. ADMIN. CODE § 40-141-150 (2001) (stating that "[t]here shall be no physical punishment, rough play or severe disciplinary action administered to the body such as, but not limited to, spanking, roughly handling a child, shaking a child, forcing a child to assume an uncomfortable position (e.g., standing on one foot, keeping arms raised above or horizontal to the body), restraining to restrict movement through binding or tying, enclosing in a confined space, or using exercise as physical punishment"); WIS. ADMIN. CODE HSS § 56.07(5)(c), (f), (h-i) (2001) (prohibiting "[c]orporal punishment" and banning the deprivation of "meals," the confining "in a closet or

that school officials serve as state-employed caregivers (like foster-parents) rather than as substitutes for biological parents. Though parents continue to assert a legal privilege to physically punish their children,[214]

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locked room" and regulating the use of time-outs in unlocked rooms); CODE OF WYO. R. 049-080-005 § 10(t)(iv)(C)(F)(u) (2001) (stating that foster parents may not punish "by shaking, striking or spanking" children or deprive them of meals; also strictly limiting the use of physical restraint).

At least five states prohibit certain forms of corporal punishment or limit the use of corporal punishment in certain circumstances. ALA. ADMIN. CODE r. 660-5-28-.02(6)(d)(2) (2001) (prohibiting "[s]lapping, striking, or hitting the child's face"; "[h]itting with a fist"; "[s]haking the child"; using "mechanical restraints," "belts, switches, extension cords, etc."); DEL. CODE Ann. tit. 11, § 468 (1-2) (2000) (stating that use of force by foster parent is justifiable if purpose was for "the prevention or punishment of misconduct," but determining that the following uses of force are unjustified: "[t]hrowing the child, kicking, burning, cutting, striking with a closed fist, interfering with breathing . . ."); IDAHO ADMIN. CODE § 16.06.02.405.03(e)(iii) (2000) (stating that "[n]o child may be subjected to cruel, severe, unusual or unnecessary punishment inflicted upon the body"); MICH. ADMIN. CODE r. 400.194(7) (2000) (stating that "[s]evere corporal punishment shall be a basis for revocation of license"); S.D. ADMIN. R. 67:42:05:15 (2001) (stating that "[a]ny discipline or control must be appropriate to the child's age and developmental level"); 40 TEX. ADMIN CODE § 720.243(h)(9) (2001) (stating that "[i]f the policy of the foster family home permits spanking children less than five years old, spanking can only be administered with an open hand on a child's buttocks or hands").

At least three states require foster caregivers to maintain and submit written records of incidents involving corporal punishment. MONT. ADMIN. R. 37.97.1011(10) (2001) (stating that "[a] report shall be completed and sent to the placing agency and licensing social worker by any foster parent involved in physical punishment"); NEV. ADMIN. CODE ch. 424, § 520(6) (2001) (stating that "[w]hen serious physical intervention is required by the caregiver in order to protect the child, others or property, an incident report must be filed within 48 hours to the division licensing representative and the agency responsible for the child"); 40 TEX. ADMIN CODE § 720.243(h)(3) (2001) (stating that a "record shall be kept of all physical punishment").

At least two states appear to discourage, but not ban corporal punishment. N.C. ADMIN CODE tit. 10, r. 41F.0701(e)(2) (2001) (stating that "[c]orporal punishment should be avoided"); W. VA. CODE ST. R. § 78-2-8.2(c)(6) (1999) (stating that family home study shall include a record of disciplinary techniques).

In seven states, the statutes and administrative regulations appear to be silent on the issue of foster parents utilizing corporal punishment: Alaska, Indiana, Kentucky, New Hampshire, New York, Washington, and West Virginia.

[214] *See, e.g.*, Victor I. Vieth, *When Parental Discipline is a Crime: Overcoming the Defense of Reasonable Force*, THE PROSECUTOR, July/Aug. 1998, at 29:

> States utilizing the majority rule hold that a parent is not criminally liable for an assault on a child if the blows to the child's body constitute "reasonable" force and are administered as a means of discipline . . . . Under the minority rule a parent is not criminally liable for an assault on a child even if the force is unreasonable so long as the parent does not act with malice. Under this rule, an "error in judgment" does not bring criminal liability.

a tradition with deep religious roots,[215] many have begun to advocate the abolition of corporal punishment even in the home.[216]

Fifteen states now give local school boards discretion to decide whether to authorize corporal punishment as a means of discipline[217] and one state recently repealed its prior statute prohibiting corporal punishment.[218] In addition, many states have enacted statutes that only gener-

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215 *See generally* Kandice K. Johnson, *Crime or Punishment: The Parental Corporal Punishment Defense — "Reasonable and Necessary, or Excused Abuse?,"* 1998 U. ILL. L. REV. 413, 415 (detailing a father's testimony that because the Bible allowed both corporal punishment and child sacrifice, beating a child is a more "merciful action"). *See also* Barbara Finkelstein, *A Crucible of Contradictions: Historical Roots of Violence against Children in the United States,* 40 HIST. EDUC. Q. 1, 9 (2000) ("the power of 'old-fashioned' religious traditions is alive and well in the private unregulated spaces of homes, religious schools, public schools where corporal punishment is still legally sanctioned, and in a variety of neighborhood associations where corporal punishment is a daily occurrence and invocations of biblical authority a commonplace justification for it.").

216 *See, e.g.,* Richard Garner, *Fundamentally Speaking: Application of Ohio's Domestic Abuse Violence Law in Parental Discipline Cases: A Parental Perspective,* 30 U. TOL. L. REV. 1, 2 (1998) (contending that domestic violence laws and "revisionist judicial interpretation of the traditional parental privilege of corporal discipline, have begun to erode traditional and constitutionally-protected concepts of parental primacy and family privacy"); Mary Kay Kearney, *Substantive Due Process and Parental Corporal Punishment: Democracy and the Excluded Child,* 32 SAN DIEGO L. REV. 1, 3, 46 (1995) (concluding that parents should not physically punish children "if they have other less restrictive ways of exercising control over them"); Barbara Bennett Woodhouse, *The Dark Side of Family Privacy,* 67 GEO. WASH. L. REV. 1247, 1257 (1999) (stating that "the ideology of [family] privacy may obscure and condone injustice to children, as it obscured and condoned injustice to women"). *See generally* Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System,* 11 YALE J.L. & FEMINISM 3, 9, 11 (1999) (stating that until recently "the European and American legal systems [had] a long history of complicity in — and even approval of — intimate abuse, particularly when perpetrated by men against their wives and children" and stating that "by the late 1960s and early 1970s, the domestic violence movement came into full swing and prompted substantial improvement in statutory law"). In addition, the American Academy of Pediatrics recommended that parents abandon the use of physical punishment:

> Because of the negative consequences of spanking and because it has been demonstrated to be no more effective than other approaches for managing undesired behavior in children, the American Academy of Pediatrics recommends the parents be encouraged and assisted in developing methods other than spanking in response to undesired behavior.

Guidance for Effective Discipline, 101 PEDIATRICS 723, 726 (1998) (Am. Acad. Pediatrics, RE9740).

217 ALA. CODE § 16-28A-1 (1995); ARIZ. REV. STAT. ANN. § 15-843(B)(2) (West 1999); ARK. CODE ANN. § 6-18-505 (Michie 1999); DEL. CODE ANN. tit. 14, § 701 (1999); FLA. STAT. ANN. § 232.27(1)(j) (West 1998); GA. CODE. ANN. § 20-2-730 (1996); KY. REV. STAT. ANN. §§ 158.444(1), 158.444(2)(b)(3) (Banks-Baldwin 1999); LA. REV. STAT. ANN. § 416.1B (West Supp. 2000); MISS. CODE ANN. § 37-11-57 (1999); MO. ANN. STAT. § 160.261(1) (2000); N.M. STAT. ANN. §§ 22-5-4.3A, 22-5-4.3B (Michie 1999); N.C. GEN. STAT. §§ 115C-390, 115C-391 (1999); OHIO REV. CODE ANN. § 3319.41 (1995); S.C. CODE ANN. § 59-63-260 (Law. Co-op. 1990); WYO. STAT. ANN § 21-4-308 (Michie 1999).

218 N.D. CENT. CODE 15-47-47 (1999).

ally refer to a school board's authority to discipline.[219] Of these, eight authorize school officials to use reasonable force to foster a safe and educational environment.[220] Only two states have failed to enact a statute addressing the use of force by school officials, whether to physically punish or to control students.[221]

In addition, even in those states that either directly authorize physical punishment or that grant educational entities the discretion to do so, school officials may still lose immunity[222] from state-law claims challenging the use of force where: the force constitutes unreasonable discipline;[223] the force used is not "administered in good faith . . . [and is] excessive or unduly severe;"[224] the official "exhibit[s] a wanton and willful disregard of human rights or safety";[225] the force is "excessive . . . or

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219 *See, e.g.*, IDAHO CODE § 33-1224 (1995) (stating that "[i]t is the duty of a teacher to carry out the rules and regulations of the board of trustees in controlling and maintaining discipline"); IND. CODE ANN. § 20-8.1-5.1-3 (1995) (stating that "[i]n all matters relating to the discipline and conduct of students, school corporation personnel stand the relation of parents and guardians to the students of the school corporation"; adding that "school corporation personnel have the right . . . to take any disciplinary action necessary to promote student conduct that conforms with an orderly and effective educational system").

220 COLO. REV. STAT. ANN. § 18-1-703(1)(a) (West 1998); CONN. GEN. STAT. ANN. § 53a-18(6) (West 2001); ME. REV. STAT. ANN. tit. 17-A, § 106(2) (West 1996); N.H. REV. STAT. ANN. § 627:6(II) (1996); N.Y. PENAL LAW § 35.10 (McKinney 1999); PA. STAT. ANN. tit. 18, §§ 509(2)(i), 509(2)(ii) (1998); S.D. CODIFIED LAWS § 13-32-2 (Michie 1991); TEX. PENAL CODE ANN. § 9.62 (West 1994).

221 *See generally* KAN. STAT. ANN. § 72-8901(b) and (c) (West 1999); R.I. GEN. LAWS § 16-12-3 (1956). In contrast to school officials who inflict physical punishment, school officials who use reasonable force to maintain a safe, non-violent school environment often have broader immunity under state law. For example, the District of Columbia forbids its charter schools from using physical punishment but allows officials to use "reasonable force to defend themselves against physical assaults by the students." D. C. CODE ANN. § 31-2817(f) (1998).

222 Some scholars have criticized states for granting school officials immunity for hitting students. *See* Carolyn Peri Weiss, *Curbing Violence or Teaching It: Criminal Immunity for Teachers Who Inflict Corporal Punishment*, 74 WASH. U. L.Q. 1251, 1278–79 (1996) (extensively criticizing Alabama's statute affording civil and criminal immunity for school officials who use physical force and stating that "teachers are already afforded the same legal protection as other citizens with regard to self-defense and the defense of others").

223 Utah allows corporal punishment if school officials have consent from the parents or guardian. UTAH CODE ANN. § 53-11-802 (1997). It also grants school officials immunity for using physical punishment but only if the force would "constitute reasonable discipline." UTAH CODE ANN. § 53A-11-804(1)(a) (1999) (stating that "[c]orporal punishment which would . . . be considered reasonable discipline of a minor . . . may not be used as a basis for any civil or criminal action").

224 Georgia leaves the issue of corporal punishment to the "area, county, or independent board of education," GA. CODE. ANN. § 20-2-730 (1996), but grants both civil and criminal immunity to school officials as long as the physical punishment was in "good faith and . . . not excessive or unduly severe." GA. CODE. ANN. § 22-2-732 (1996).

225 In Mississippi, physical punishment by school officials does not constitute "negligence or child abuse" if performed reasonably and in compliance with federal law and "rules or regulations of the State Board of Education or local school board," MISS. CODE ANN. § 37-11-57 (2) (1999), but immunity is granted unless the hitting was "in bad faith or with malicious purpose or in a manner exhibiting a wanton and willful disregard of human rights or

[constitutes] cruel and unusual punishment";[226] the force used violates the local school board's disciplinary policy;[227] or where school officials act with a "malicious purpose."[228] In addition, one state limits school officials' immunity to punitive damages, as at common-law.[229] Two others grant discretion to the board of education merely to "[i]nsure any employee of the school district . . . from an act . . . within the scope of employment;[230] and others allow indemnification only if the actions do not constitute "willful, wanton or malicious wrongdoing,"[231] "gross neg-

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safety," *id.*, or constituted "excessive force or cruel and unusual punishment," MISS. CODE ANN. § 37-11-57 (1).

226 Florida grants local schools boards the discretion to use physical punishment, FLA. STAT. ANN. § 232.27(1)(J) (West 1998), but it bars immunity if the officials use "excessive force or cruel and unusual punishment." FLA. STAT. ANN. § 232.275 (West 1998).

227 Alabama specifically leaves the question of physical punishment to the school board, ALA. CODE § 16-28A-1 (1995), but grants immunity both from civil and criminal actions if school officials followed the policy, ALA. CODE § 16-28A-1 (1995) (stating that "[s]o long as teachers follow approved policy in the exercise of their responsibility to maintain discipline in their classroom, such teacher shall be immune from civil and criminal liability"); Arkansas specifically leaves the question of physical punishment to the school board, ARK. CODE ANN. § 6-18-505 (Michie 1999), but grants immunity from civil liability if there was "substantial compliance with the district's written student discipline policy," ARK. CODE ANN. § 6-17-112 (Michie 1999); Indiana that school officials "stand the relation of parents and guardians to the students" and that they have the "right . . . to take any disciplinary action necessary to promote . . . an orderly and effective educational system," IND. CODE ANN. § 20-8.1-5.1-3 (1995), but it limits immunity to school officials who acted "reasonably under a disciplinary policy adopted under" a school's corporation disciplinary policy, IND. CODE ANN.§ 34-13-3-3 (19) (Michie 2000); Missouri specifically leaves the question of physical punishment to the school board, MO. ANN. STAT. § 160.261(1) (2000), but states that "[t]eachers . . . shall not be civilly liable when acting in conformity with the established policy of discipline developed by each board," MO. ANN. STAT. § 160.261(6) (2000).

228 Ohio prohibits corporal punishment unless the school board adopts a resolution permitting it and forms a task force that will regularly study disciplinary procedures, OHIO REV. CODE ANN. § 3319.41 (1995), but grants immunity to officials as long as there was no malicious purpose in the act, OHIO REV. CODE ANN. § 2744.03(6) (1995).

229 Arizona allows the school board to decide whether to authorize physical punishment, ARIZ. REV. STAT. ANN. § 15-843(B) (2) (West 1999). Arizona preserves common-law immunity, ARIZ. REV. STAT. ANN. § 12-820.05 (West 1999), but makes it the exception to the rule. *See* Doe *ex rel.* Doe v. State, 2000 WL 730356 (Ariz. App. Div. 1, June 8, 2000) ("liability of public servants is the rule in Arizona and immunity is the exception."). Punitive damages are barred by statute. ARIZ. REV. STAT. ANN. § 12-820.04 (West 2000).

230 North Carolina allows school officials to use reasonable force to correct pupils, N.C. GEN. STAT. §§ 115C-390, 115C-391 (1999), but only authorizes insurance to cover the costs of judgments against the officials if their actions were without malice, N.C. GEN. STAT. § 115C-43(b) (1999). Oklahoma does not prohibit a teacher from using "ordinary force as a means of discipline, including but not limited to spanking, switching or paddling," OKLA. STAT. ANN. tit. 21 § 844 (West 1998), but it only allows school districts to insure school officials, OKLA. STAT. ANN. tit. 51 § 168(2) (West 2000) (stating that the "board of education of any school district may . . . [i]nsure any employee of the school district against all or any part of his liability for injury . . . resulting from an act . . . in the scope of employment").

231 Tennessee permits teachers to use "corporal punishment in a reasonable manner, TENN. CODE ANN. § 49-6-64103 (1996), but bars indemnification by the "local education agency" if the act was "willful, wanton, or malicious," TENN. CODE ANN. § 49-6-4211(a)(2)

ligence," or "intentional acts."[232] Another state provides for state-funded legal representation of the challenged official only where the corporal punishment is administered in good faith.[233]

Therefore, since *Ingraham,* states have increasingly recognized the importance of children's interest in personal security both in the classroom and at home by both limiting the authority of public school teachers to physically punish students and by increasing their scrutiny of the force parents use to discipline their children. These changes reflect an evolving society, one that understands protecting children from harm furthers the community interest as well as the child's individual interest.

C. PSYCHOLOGICAL VIEWS OF CORPORAL PUNISHMENT IN THE SCHOOLS AND AT HOME

Numerous educational psychologists support these changes in state practices.[234] Many of them have vehemently condemned using physical force to punish students and several have linked some types of discipline to later violent behavior in students.[235] In effect, they argue that the use of physical punishment teaches students to be violent themselves.[236] With the nation's growing concern about violence in public schools, one might naturally question any movement to limit school officials' options in controlling the student environment. Yet, physical punishment of students is justifiable only if it furthers the goals of public education. According to these modern theorists, public schools actually undermine their educational goals by using physical punishment to discipline children. Still, just as the common law recognized the privilege to use force to defend oneself from impending physical harm, no psychologist has advocated that public school officials never touch students in their own

(1999). Louisiana similarly grants discretion and bars indemnification for "intentional wrongful act or gross negligence." LA. REV. STAT. ANN. § 13:5108.1 (West 2000).

232 Delaware allows the local school board to authorize physical punishment, DEL. CODE ANN. tit. 14 § 701 (1999), but it affords officials only indemnification except for "intentional acts or . . . gross negligence." DEL. CODE ANN. tit. 14 § 1095 (1999).

233 Kentucky allows state officials to request legal aid from the Attorney General, but the Attorney General can refuse to represent the official, KY. REV. STAT. ANN. § 12.211 & § 12.212, and the Kentucky Supreme Court has ruled that the school district and school officials are state entities and employees, *see* Reis v. Campbell County Bd. of Educ., 938 S.W.2d 880, 885 (Ky. 1996). In South Carolina, when a teacher requests aid, it becomes the "duty of the school district . . . to appear and defend the action or proceeding in his behalf," S.C. CODE ANN. § 59-17-110 (Law. Co-op. 1999).

234 *See infra* notes 263–75 and accompanying text.

235 *See, e.g.,* A. Troy Adams, *The Status of School Discipline and Violence,* 567 ANNALS AM. ACAD. POL. & SOC. SCI. 140, 143 (2000) (explaining that "[s]chool violence and discipline are not the same concept, but they are related concepts" and equating physical punishment with violent behavior that has a "lifetime impact").

236 *See, e.g.,* Bitensky, *supra* note 197, at 425 (citing numerous psychological studies relating corporal punishment to increased potential for aggressive behavior); Orentlicher, *supra* note 190, at 157.

defense or when necessary to control the classroom environment.[237] The difficulty is in determining when the use of force *is* necessary and when it does more harm than good.

Many modern psychologists suggest that, in most situations, striking a school child causes more psychological damage than would another form of discipline.[238] This modern view sharply contrasts with the majority opinion in *Ingraham*[239] which described physical punishment as an effective disciplinary tool, and reasoned that, if anything, granting students a hearing before punishment would cause more psychological harm because such process would increase the student's anxiety and undermine the ability of teachers to effectively control the classroom.[240] Today, educational psychologists such as Irwin A. Hyman[241] and Murray A. Straus,[242] as well as social historians and physicians,[243] advocate the elimination of physical punishment both at school and in the home. As

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237 *See, e.g.*, IRWIN A. HYMAN ET AL., SCHOOL DISCIPLINE AND SCHOOL VIOLENCE: THE TEACHER VARIANCE APPROACH 334–35 (1997) (discussing the difference between force used for self-protection and force used to punish: "all laws and regulations regarding corporal punishment in schools protect educators' rights to use force to quell disturbances, and to protect themselves, others' property, or students from self-injury").

238 The American Academy of Pediatrics, for example, denounces spanking, listing the following problems, among others with the practice:

> [1] Spanking children [less than eighteen] months of age increases the chance of physical injury, and the child is unlikely to understand the connection between the behavior and the punishment.
>
> [2] Although spanking may result in a reaction of shock by the child and cessation of the undesired behavior, repeated spanking may cause agitated, aggressive behavior in the child.
>
> [3] Spanking models aggressive behavior as a solution to conflict and has been associated with increased aggression in preschool and school children.
>
> [4] Spanking and threats of spanking lead to altered parent-child relationships, making discipline more difficult when physical punishment is no longer an option, such as with adolescents.
>
> [5] Spanking is no more effective as a long-term strategy than other approaches, and reliance on spanking as a discipline approach makes other discipline strategies less effective to use. Time-out and positive reinforcement of other behaviors are more difficult to implement and take longer to become effective when spanking has previously been a primary method of discipline.
>
> [6] A pattern of spanking may be sustained or increased. Because spanking may provide the parent some relief from anger, the likelihood that the parent will spank the child in the future is increased.

Guidance for Effective Discipline, *supra* note 216, at 726.

239 *See* Gerald P. Koocher, *Different Lenses: Psycho-Legal Perspectives on Children's Rights*, 16 NOVA L. REV. 711, 730 (1992) (criticizing *Ingraham v. Wright* as ignoring "the significant body of psychological literature in both interpersonal relationships and learning theory which shows that aggression tends to breed aggressive behavior").

240 430 U.S. 651, 680, 681 n.51 (1977).

241 *See supra* note 237.

242 *See* MURRAY A. STRAUS, BEATING THE DEVIL OUT OF THEM: CORPORAL PUNISHMENT IN AMERICAN FAMILIES (1994).

243 *See, e.g.*, GREVEN, *supra* note 189, at 9 (stating that "[c]hild abuse takes many forms[;]one of them is physical punishment").

discussed further below, these psychologists contend that when an authority figure, be it a parent or school official, strikes a child, the likelihood of significant psychological injury increases.

Society's continued acceptance of corporal punishment despite evidence of the harm it causes[244] may be grounded in our sociological past. Historically, American culture encouraged wives to believe that "they 'deserved it'" and viewed beating slaves as a mere form of "discipline."[245] Today "[w]e no longer permit the hitting of servants, apprentices, wives, prisoners, and members of the armed forces"[246] but many still support the physical disciplining of children perhaps because they themselves were struck as children.[247] Psychologists note that few people are aware of the effects of corporal punishment on either themselves or their children and theorize that this lack of awareness may make them more likely to hit their own children as well.[248] In short, hitting children is violence that begets violence.[249]

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244 PAULA M. SHORT ET AL., RETHINKING STUDENT DISCIPLINE: ALTERNATIVES THAT WORK 85 (stating that "[c]hild abuse and violent crime may . . . trace their origin to corporal punishment"); STRAUS, *supra* note 242, at 12 (noting that scholars have ignored the studies that suggest that 99 percent of the parents [that] "hit their children," produce "aggressive children").

245 STRAUS, *supra* note 242, at x.

246 *Id.* at 10.

247 *See, e.g.*, GREVEN, *supra* note 189, at 9 (contending that parents today continue hitting their own children because they were struck by their own parents). Parents may also fear that because they have hit their kids, they could be labeled child-abusers under psychological theories banning physical punishment. *Id. See also* STRAUS, *supra* note 242, at 61 ("[R]egardless of the age and sex of the child, the more corporal punishment parents experienced as children the more likely they are to do the same to their own children.").

248 *See, e.g.*, Patrick V. Gaffney, *A Study of Preservice Teachers' Beliefs about Various Issues and Myths Regarding the Use of Scholastic Corporal Punishment*, at 5 (May 20, 1997), *available at* http://www.edrs.com/DocLibrary4/1197/ED409315.PDF (noting that "the harmful effects of [physical punishment] do not become obvious right away, often not for years"); GREVEN, *supra* note 189, at 126 (explaining that "few adults recall the anger they experienced as children when being punished and hurt by their parents" because they often repress their rage and pain). *See also* Koocher, *supra* note 239, at 730 ("A common rationale cited by supporters of official corporal punishment tends to be, 'It taught me a lesson when I was their age.' Of course, all that is truly taught with such techniques is how to pass on the tradition of abuse.").

249 HYMAN ET AL., *supra* note 237, at 336 ("Because hitting at home does not help [children,] it is just as useless and counterproductive in school. The old saw that 'violence breeds violence' is supported by this finding. Teachers who do not paddle are most often those who were rarely if ever spanked or paddled as children."). *See also* Murray A. Straus & Carrie L. Yodanis, *Corporal Punishment in Adolescence and Physical Assaults on Spouses in Later Life: What Accounts for the Link?* 58 J. MARRIAGE & FAM. 825, 837–38 (1996) (summarizing the author's study on the effects of corporal punishment and its link to increased family violence and depression).

1. *Inflicting Psychological Harm*

Psychologists have identified various types of harm that can arise when one is physically punished by an authority figure. At least one study links the use of corporal punishment to depression, which may in turn cause numerous other problems[250] such as a greater propensity to commit suicide,[251] aggression, inability to succeed in the workplace[252], and physical expressions of anger toward others.[253] In addition, children disciplined through physical punishment "are less likely to be able to learn to solve problems logically"[254] and may experience greater difficulties developing "an internalized conscience."[255] Striking children causes them to be fearful and, often, to repress their anger.[256] This may in turn lead to "the stifling of empathy and compassion for oneself and others"[257] because, when parents strike children, they are in effect both manifesting and teaching "indifference to suffering."[258] Controlling this internal anger can also result in children later manifesting "obsessive" and "compulsive" characters; they may live rigidly as a way of containing their deep-seated anger.[259] In addition, they may experience a profound sense of ambivalence — love and hate for parents and themselves.[260] Many times, children cannot process this hate and they experience what psychologists call "dissociation" — the most "basic means of survival for many children" who need to "render unconscious" unbearable "feelings and experiences."[261] As a result, they feel disconnected from their inner feelings and the "external world."[262]

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[250] GREVEN, *supra* note 189, at 132; STRAUS, *supra* note 242, at 77.

[251] STRAUS, *supra* note 242, at 78.

[252] *Id.* at 144–45 (noting that this inability to function well in the workplace seemed to apply only to college graduates whose success tended to be undermined by "depression, an inclination to physical violence, a sense of powerlessness, and a lack of internalized moral standards").

[253] *Id.* at 107.

[254] Patrick V. Gaffney, *Arguments in Opposition to the Use of Corporal Punishment: A Comprehensive Review of the Literature*, at 10 (Mar. 17, 1997), *available at* http://www.edrs.com/DocLibrary4/0897/ED406054.PDF; *see also* PAULA M. SHORT ET AL., *supra* note 244, at 85 (stating that "[p]roblem solving via violence and aggression, learned in childhood, likely carries over into adulthood").

[255] STRAUS, *supra* note 242, at 96.

[256] GREVEN, *supra* note 189, at 132.

[257] *Id.* at 127.

[258] *Id.*

[259] *See id.* at 135.

[260] *Id.* at 142–47.

[261] *Id.* at 148.

[262] *Id.*

2. *Ineffective Discipline in the Classroom*

Using physical punishment to discipline children thus significantly increases the risk of profound and prolonged psychological injury. But educational psychologists also reject physical punishment as an effective form of discipline.[263] Fundamentally, this type of punishment distracts school officials from the task of understanding what motivated the disruptive behavior in the first place.[264] It also "may produce an anxious, fearful, angry, and aggressive climate" in the classroom.[265] As result, even students who merely witness the hitting may experience both "alienation and anxiety."[266] The presence of corporal punishment in the public schools is also linked to increased absenteeism and dropout rates.[267]

The act of striking students for punishment also has other unintended results. Even though a quick slap may stop disruptive behavior, it ultimately escalates the need for more hitting, with officials needing to employ "sterner and sterner measures" to control the classroom.[268] Once officials administer this type of discipline, they face the difficult task of establishing "open, trusted-based communication" with those students who have received the corporal punishment.[269] Furthermore, rather than curbing inappropriate behavior, corporal punishment tends to teach students to solve their problems through deviousness and aggression.[270] Some psychologists have noted that teachers who administer physical punishment may also inadvertently undermine their own authority. For example, some "males tend to equate receiving corporal punishment with claims to manhood, group solidarity, personal belonging, and a rise in social status and standing among one's peers," thus leading these students to actually enjoy corporal punishment rather than regarding it as a form of discipline.[271]

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[263] *See* Gaffney, *supra* note 254, at 5 (examining numerous psychological studies and concluding that "with few exceptions — this particular procedure is neither suggested nor defended by any recognized authority on classroom management and discipline"); *but cf.* Katherine Hunt Federle, *Violence is the Word*, 37 HOUS. L. REV. 97, 106–07 (2000) (supporting Gaffney's basic conclusions but noting the limitations of psychological studies that analyze the effects of corporal punishment).

[264] *See, e.g.*, Gaffney, *supra* note 254, at 9–10 (stating that "corporal punishment does not achieve its stated goal of the establishment and the preservation of discipline because it is treating the symptoms, as opposed to the cause, of children's misbehavior").

[265] *See, e.g.*, SHORT, ET AL., *supra* note 244, at 85.

[266] *Id.* at 84.

[267] *Id.* at 85.

[268] *Id.* at 85.

[269] *Id.* at 84.

[270] HYMAN ET AL., *supra* note 237, at 336 (stating that "[w]itnessing and experiencing corporal punishment, a form of aggression, results in modeling of aggression"); SHORT ET AL., *supra* note 244, at 84.

[271] Gaffney, *supra* note 254, at 6.

Educational psychologists advocate numerous alternatives to corporal punishment that are more effective disciplinary tools including behavioral modification, assertive discipline, and logical consequences.[272] Such methods take the student's age into account, thereby echoing the *T.L.O.* Court's acknowledgement that the reasonableness of a punishment varies according to whether it is appropriate for a student's age group. For example, with respect to younger students, "rewards approaches often are the most effective."[273] For older students, rewards systems are less effective, but entering into "behavior contracts" with students, sending "behavioral report cards to parents,"[274] or administering in-school suspensions[275] may be more effective alternatives. These modern disciplinary approaches lend support to the states' strong trend toward banning or limiting the use of physical punishment in the classroom. Courts should consider these important perspectives when assessing the Fourth Amendment reasonableness of corporal punishment.

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[272] *See, e.g.*, SANDY GARRETT, A HANDBOOK OF ALTERNATIVES TO CORPORAL PUNISHMENT 23–32 (4th ed. 1993); FREDERIC H. JONES, POSITIVE CLASSROOM DISCIPLINE 79–140 (1987) (describing how school officials establish important classroom limits); CHARLES H. WOLFGANG, SOLVING DISCIPLINE PROBLEMS 13–264 (1995) (describing nine models for disciplining students). Jones examined the Rogerian (emotionally supportive) model, *id.* at 13–39; the transactional model, *id.* at 45–61; the "social discipline model of Rudolf Dreikurs," *id.* at 65–90; Glasser's reality therapy, *id.* at 97–115; the "judicious discipline model," *id.* at 119–48; the "behavior analysis model," *id.* at 149–92; the "positive discipline model," *id.* at 195–245; the "assertive discipline model," *id.* at 249–65; and the "Dobson Love and Punishment Model," *id.* at 271–81.

Of these nine different models discussed by Wolfgang, only the last one — the "Dobson Love and Punishment Model" — advocated the use of physical punishments. In describing this latter model, Jones made two important points. First, Dobson advocates hitting children in order to further his religious belief that children will go "to Hell" if they do not adhere to boundaries. *Id.* at 273. Wolfgang stated that "Dobson, a former educator who is now a psychologist, does not separate his psychological views from his religious ones." *Id.* at 274. Second, other psychologists fundamentally disagree with Dobson. *Id.* at 280. Dobson's religious view of hitting children is one that historian Philip Greven examined extensively in his book advocating the elimination of physical punishments for children. GREVEN, *supra* note 189, at 46–72. Greven discerned a direct link between fundamentalist Christians' religious perspectives and their views of hitting children: "The long-sustained persistence of melancholy and depression among twice-born Protestants is clearly no accident, since it has consistently been paralleled by the tradition of assault, coercion, and violence against children committed with the rod, the belt, the hand, and other such instruments of parental discipline." *Id.* at 134.

[273] SHORT ET AL., *supra* note 244, at 86 (discussing "behavior management techniques" involving the giving or withholding of "rewards" that compel the teacher to first examine the reason for the misbehavior and then to reinforce the positive behaviors that are "incompatible with" the identified misconduct).

[274] *Id.* at 86–87.

[275] *Id.* at 87.

V. REASONABLE AND UNREASONABLE PHYSICAL FORCE IN THE PUBLIC SCHOOLS

In assessing whether school officials have violated the Fourth Amendment's standard of reasonableness, courts must apply the Supreme Court's contextual balancing test,[276] which considers the unique relationship of students to school officials, modern trends toward alternative methods of punishment, whether the use of the punishment furthered educational goals, and the fact-specific circumstances of a given case. Although one cannot exhaustively describe the protean circumstances that school officials encounter, schools generally administer corporal punishment to students either as a means of controlling them or punishing them. 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. As discussed below, these conclusions complement the Supreme Court's Fourth Amendment jurisprudence in both the law enforcement and "special needs" contexts.

A. ANALOGIZING PUBLIC SCHOOL TEACHERS TO POLICE OFFICERS: USING FORCE TO CONTROL DISRUPTION

In the context of public schools, determining what constitutes force to "control" versus force to "punish" may seem a difficult distinction to make. One way to assess the difference is to consider how the Supreme Court describes the Fourth Amendment reasonableness of police officers' use of deadly and non-deadly force when subduing suspects. This line of cases indicates that the use of force is never reasonable when used to "punish" suspects; the Fourth Amendment privileges law enforcement's use of physical force only when necessary in furtherance of an investigation or in apprehending suspects. Similarly, one might argue that school officials may use force to control and apprehend disruptive students but may not use force for the explicit purpose of punishing students for their misbehavior.

The Supreme Court's decisions in *Tennessee v. Garner* and *Graham v. Connor* explored reasonableness as applied to criminal policing functions.[277] These decisions set forth a three-factor test for assessing the reasonableness of police officers using deadly and non-deadly force that may also offer some guidance in shaping the reasonableness standard as applied to public school officials. In both *Garner* and *Graham*, the Court

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[276] *See, e.g.*, Graham v. Connor, 490 U.S. 386, 396 (1989).

[277] *See supra* notes 13–42 and accompanying text.

considered: (1) the nature of the suspect's alleged offense; (2) the risk to others if not apprehended; and (3) whether the suspect resisted the officers' use of physical force. The Court did not limit its analysis to these factors, but simply used them as aids in determining how to weigh the opposing sides of the balancing scales: the suspect's interest in personal security and the government's interest in effective law enforcement, with society having an interest on both sides of the scale.[278]

In applying these three factors, the Court created a categorical approach for the use of deadly force and an objective balancing test for the use of non-deadly force. The *Garner* decision established that the Fourth Amendment permits police officers to use deadly force against suspects only when the alleged crime involves the threatened or actual infliction of serious bodily injury to another, reasoning that the suspect's fundamental interest in his or her life outweighs the state's interest in apprehending non-violent offenders. However, when the issue is the reasonableness of using non-deadly force, courts and juries must consider "the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving" about the amount of force that is necessary in a particular situation."[279] In short, when law enforcement officers use non-deadly force, Fourth Amendment reasonableness does not necessarily demand that they use the least intrusive measures possible to apprehend suspects so long as their actions are objectively reasonable under the circumstances of the moment. Officers may act reasonably with bad intentions, and may act unreasonably with good intentions; the reasonableness inquiry focuses only on the means used to further the law enforcement goal of investigating and apprehending suspects, not the officers' individual states of mind.[280]

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[278] *See, e.g.*, SATNAM CHOONGH, POLICING AS SOCIAL DISCIPLINE 25–42 (1997). Choongh described the two classic views of policing, the "crime control model" and the "due process model," which characterize differently society's interest in this balancing process:

> The crime control model operates on the assumption that the primary purpose of a criminal process is to repress crime. The State cannot guarantee the social freedom of its citizens unless it has at its disposal procedures which efficiently screen suspects, determine guilt and secure appropriate punishment for those convicted of crime. . . . Whereas the crime control model places immense faith in the ability of the police to use their administrative expertise to discover the truth, the organizing matrix of the due process model is the proposition that informal police procedures are susceptible to misuse and prone to produce error.

Id. at 26, 27. Applying these models to the Fourth Amendment's balancing process, an advocate of the crime control model would view society's interests as protected by giving more weight to police officers' ability to apprehend suspects, but an advocate of the due process model would view society's interest as represented in the individual apprehended, more questioning of the procedures police officers used.

[279] Graham v. Connor, 490 U.S. 386, 397 (1989).

[280] *Id.* In discussing the analogous question of what constitutes a "seizure" under the Fourth Amendment, the Court similarly rejected using the minds of individual officials to

Courts may analogize the principles of *Garner* and *Graham* to the use of physical force by school officials. Both officers and school officials seek to control an environment as a means of furthering their ultimate objective, whether it be efficient law enforcement or effective student education. Recently, a police chief and an educator drew this analogy in proposing a continuum of physical force for educators,[281] one similar to the continuum that police officers apply when using non-deadly force.[282] Police Chief David Frisby and Professor Joseph Beckham created three categories for school disciplinary infractions: "verbal disruption," "property damage," and "menacing disruption."[283] Frisby and Beckham described these categories as running along a vertical line, beginning with verbal disruption and ascending to menacing disrup-

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determine whether a seizure had or had not occurred. Brower v. Inyo County, 489 U.S. 593, 598 (1989). The *Brower* Court stated that it would not "distinguish between a roadblock that is designed to give the oncoming driver the option of a voluntary stop . . . and a roadblock that is designed precisely to produce a collision." *Id.* What mattered was that police officers intentionally stopped the suspect, even if they subjectively intended a stop that did not cause the suspect's death. The *Brower* Court added another example of how an officer's intent does not resolve the Fourth Amendment seizure question:

> In determining whether the means used that terminates the freedom of movement is the very means that the government intended we cannot draw too fine a line, or we will be driven to saying that one is not seized who has been stopped by the accidental discharge of a gun with which he was meant only to be bludgeoned, or by a bullet in the heart that was meant only for the leg.

Id. at 598–99.

281 David Frisby & Joseph C. Beckham, *Developing School Policies on the Application of Reasonable Force*, 122 EDUC. L. REP. 27, 30–32 (1998).

282 *See, e.g.*, Paul W. Brown, *The Continuum of Force in Community Policing*, 58 FED. PROBATION 31, 31 (1994). Probation Officer Brown described a continuum of force:

> A use of force continuum is a model by which an officer can choose verbal and physical reactions to a subject's behavior from a range of options and adequately stop the subject's hostile behavior and establish command and control over the subject, but not more . . . . Most continuum of force models are similar and use the concept of a pyramid or a ladder. At the bottom are the least forceful and most reversible techniques and at the top, the most forceful and the least reversible. If there is a starting point or beginning in the continuum of force, it is usually the officer's mere presence. At the top is lethal force, usually illustrated by the use of a firearm.

Id. Brown described the following as incremental steps for gaining control of suspects: (1) "officer presence"; (2) "body language and verbal commands"; (3) "control techniques and physical defense tactics"; (4) "personal defense sprays," such as pepper spray, Mace, or tear gas; (5) "striking and jabbing instruments," such as "batons, expandable batons, and blackjacks"; and (6) "deadly force," which includes firearms and other possible weapons "such as a baseball bat, a knife, or a vase." *Id.* at 32. *See also* Robert G. Hanna, *Excessive Use of Force*, *in* HOW TO HANDLE UNREASONABLE FORCE LITIGATION: PROSECUTION AND DEFENSE STRATEGIES IN POLICE MISCONDUCT CASES 355, 357 (1998) (stating that "[m]ost police training includes some version of use of force continuum"); Kevin Parsons, *Decision to Use Force: The Confrontation Continuum*, *in* 8 CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK 115, 117–20 (1992) (listing six levels of "force" used by police officers: "dialogue," "escort," "pain compliance," "mechanical control," "baton," and "firearms").

283 David Frisby & Joseph C. Beckham, *supra* note 281, at 32.

tion.[284] A horizontal line intersects at a right angle, indicating what constitutes appropriate disciplinary responses by educators.[285] Nearest the intersecting lines is "verbal control," an appropriate response to offenses such as "talking" and "cursing in class"; in the middle of the bottom line is "touch control," which addresses "property damage" offenses such as "breaking windows" or "smashing computers."[286] Finally, at the "defense level" of control, educators might physically grab or strike students who are either "displaying" or "attacking with a deadly weapon."[287] Such striking of students would only be permitted as a defensive act used to control a violent student and would not be acceptable as a method of punishment.[288]

An alternative to the "continuum of force" model is the "wheel" model. The Federal Bureau of Investigation[289] and "wheel" model proponents believe that one problem with a force continuum approach is that officers may mistakenly believe that they have "to escalate through the continuum to reach the proper level of force."[290] Under a "wheel" model theory, officers still have the same options available under a continuum approach — "command presence, voice commands, controlling force, injuring force, and deadly force"[291] — but the focus is on what may be variable degrees of "reasonable force" during a police officer's encounter with a suspect.[292] In other words, the "wheel swings both ways," allowing an officer to escalate or deescalate the level of force used in response to "the officer[s'] reasonable perception of the suspect's apparent threat at any given moment."[293]

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284 *Id.*

285 *Id.*

286 *Id.* at 31.

287 *Id.*

288 *Id.* at 28. Such an approach is thus consistent with a Fourth Amendment theory of reasonableness that permits the use of physical force in the public schools only as a tool to control an unruly student.

289 Interview with John Hall, Legal Instructor for FBI, in Quantico, Va. (Aug. 11, 2000). Agent Hall stated that the FBI is not opposed to institutions training police officers using a continuum of force model, but that officers may inadvertently misinterpret what the continuum means by thinking that they must exhaust all other means before using deadly force. Deadly force is permissible when the circumstances fall within the parameter set by the Supreme Court in *Tennessee v. Garner*. Hall added that, to be effective, such a continuum would need to have a very identifiable point beyond which the use of deadly force would be permissible. Hall's viewpoint is consistent not only with the Supreme Court's jurisprudence, but also with how other federal courts and juries have applied *Garner* to a variety of facts.

290 Brown, *supra* note 282, at 32.

291 *Id.*

292 *Id.* (citing John Williams, *Use-of-Force Wheel*, POLICE MARKSMAN 48–49 (July/Aug. 1994)).

293 *Id.* Brown offered the following illustration of the "wheel" model:

> For example, the officer receives information on a suspect who has been involved in a disturbance. The officer confronts the suspect. At this point, no weapons have been observed by the officer. The wheel of force will spin to a stop at Command

The continuum of force model and the alternative "wheel" approach are each consistent with the Supreme Court's Fourth Amendment objective reasonableness standard and with modern educational psychologists' views of disciplining students and maintaining control in the classroom. Under either approach, the appropriate level of force varies with the context. School officials respond based on the particular school infraction committed. In both models, the mere presence of an official and/or the issuance of verbal commands are in themselves types of "force" that might control a situation. Educational psychologists suggest that this type of non-physical force is the best way to control the learning environment in the public schools while minimizing psychological damage to the disciplined student.[294] Furthermore, both models permit the use of force only to control students, never to punish them. This is consistent with the *Graham* Court's concern that the use of force be objectively reasonable. The limitations on the use of force proposed by the continuum and wheel concepts also accord with the modern trend among the states toward banning corporal punishment in the classroom,[295] and with the Supreme Court's express emphasis in *Ingraham v. Wright* on canvassing state practices.[296]

The Fourth Amendment applies when school officials and police officers use physical force to "seize" students or suspects. In the classroom, school officials may block or grab students who attempt to damage property or hurt another person. Under either model, this type of force is proportionate to the offender's actions. Courts should view these types of controlling actions the way they do police officers' actions in controlling suspects: "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer [or public school official] on the scene, rather than with the 20/20 vision of hindsight."[297]

Presence and Voice Commands and the officer identifies himself and tells the suspect to stop.

As the suspect realizes the officer is speaking to him, simultaneously recognizing the officer as a threat to his freedom, he reaches in his waistband and attempts to draw a partially concealed handgun. The butt of the weapon is now visible to the officer. The wheel of force now spins to Deadly Force. The officer's weapon is drawn and leveled at the suspect. Meanwhile, the suspect reaches toward the handgun, but instead of drawing it, succeeds in pushing it through his waistband where it promptly falls through to his ankle, and onto the ground. The officer observes the suspect give up his attempt to draw a weapon, just before the officer's trigger is pulled. The wheel spins to Controlling Force, and the suspect is given Voice Commands at gunpoint, and is safely taken into custody.

Id. This example captured the protean circumstances officers frequently face and the need to act reasonably in light of the known, shifting circumstances.

294 *See supra* notes 250–275 and accompanying text.

295 *See supra* notes 210–233 and accompanying text.

296 *See supra* notes 160–163 and accompanying text.

297 Graham v. Connor, 490 U.S. 386, 396 (1989).

B. Applying the "Special Needs" Doctrine: Affording Broad Deference to Control Disruptive Students and Eliminating Physical Punishment

In addition to the Court's balancing jurisprudence, one must consider the "special needs" doctrine in determining what constitutes reasonable force in the public schools. In synthesizing the schools' police-like responsibilities (i.e., to protect student safety) with their duty to educate, one may interpret the "special needs" doctrine under the Fourth Amendment as permitting school officials to use physical force only when necessary to control the educational environment. This limitation both furthers the schools' duty to educate and the students' Fourth Amendment personal security interests.

In *New Jersey v. T.L.O.* and *Vernonia School District 47J v. Acton*, the Supreme Court applied the Fourth Amendment's reasonableness standard to public schools, as it examined, respectively, searches of an individual student and a group of athletes. In both situations, it distinguished between public school officials and police officers who search or seize individuals: public school officials are foremost educators, while police officers are criminal investigators. The Court measured reasonableness in light of these contrasting goals, noting that educators are free to dispense with warrants, need not have probable cause to believe that a criminal violation occurred and, sometimes, do not even need reasonable suspicion to believe that a student violated school rules. *Vernonia's* four-part inquiry for assessing the reasonableness of suspicionless drug-testing suggests a framework applicable, with minor revision, to the issue of physical force in the public schools. In determining whether the use of physical force violated a student's Fourth Amendment rights, courts should examine: (1) "the [personal security] interest upon which the [seizure] intrudes";[298] (2) "the character of the intrusion that is complained of";[299] (3) "the nature and immediacy of the governmental concern at issue"; and (4) "the efficacy of this means for meeting it."[300]

Although the Court articulated these (now modified) distinct factors in *Vernonia*, a case involving searches without reasonable suspicion, these factors were nonetheless implicit in *New Jersey v. T.L.O.*, a suspicion-based search, and in the Court's policing jurisprudence in *Tennessee v. Garner* and *Graham v. Connor. T.L.O.* raised specific questions regarding school-related seizures that easily fit under these modified factors: the seizure must be "reasonably related to the objective of the [seizure] and not excessively intrusive in light of the age . . . of the

[298] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654 (1995).

[299] *Id.* at 658.

[300] *Id.* at 660.

student and the nature of the infraction."[301] Similarly both *Garner* and *Graham* stated that reasonableness includes consideration of the offense committed, whether the individual poses an "immediate threat to the safety of the officers or others,"[302] and whether the person resisted apprehension. *Vernonia* referenced the "character of the intrusion," while in *T.L.O.*, the Court asked whether the challenged search was "excessively intrusive in light of the age and sex of the student and the nature of the infraction." Although *T.L.O.* added the adverb "excessively" to question the degree of intrusion, the sub-issues raised — age, sex, and offense committed — are a part of the *Vernonia* Court's third and fourth factors, the "nature and immediacy of the governmental concern and the efficacy of this means for meeting it." Therefore, both reasonableness tests compare the degree of the intrusion with the need for it, as did the policing cases of *Garner* and *Graham.*

Thus, though *Vernonia, T.L.O.,* and *Garner/Graham* do differ doctrinally in minor ways, the reasoning of this line of cases also reflects overriding similarities, the dominant one being that each case defines reasonableness based upon balancing the individual's interest against the need to conduct the search or seizure. A synthesis of the Supreme Court's jurisprudence in this area therefore supports applying a modified four-factor, *Vernonia*-type test when defining the contours of Fourth Amendment reasonableness of physical force in the classroom. Applying this test indicates that school officials have broad discretion in using physical force to control students, but that they violate the Fourth Amendment when they use physical force to "punish" them.

1. *Students' Interest in Personal Security*

When students enter the public schools to fulfill their state's mandate that they receive an education, they retain their interest in personal security safeguarded by the Fourth Amendment. The scope of this interest, as the Court explained in examining students' privacy interests, relates to the particular place they are — the public schools.[303] In assessing privacy interests, the *Vernonia* Court emphasized two contextual factors: the students had "diminished" rights in comparison to

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301 New Jersey v. T.L.O., 469 U.S. 325, 342 (1985). The Court also mentioned that the "sex of the student" was a factor in determining the reasonableness of a search. A search implicates strong privacy interests, as can a seizure, but in the context of school discipline, the sex of a student is not a factor in analyzing the reasonableness of public school officials using physical force to effectuate a "seizure."

302 *Graham*, 490 U.S. 386, 396 (1989).

303 *See, e.g.*, Florida v. J.L., 120 S. Ct. 1375, 1380 (2000) (stating in dicta that safety concerns in the public schools diminish students' reasonable expectations of privacy under the Fourth Amendment).

adults, and students are in the "temporary custody of the State as school master."[304]

The first factor described the classic view of children having diminished rights in light of their age, and the second factor detailed the schools' custodial power and the duty to educate. Although the Court described these factors as "central"[305] to its Fourth Amendment analysis of suspicionless drug-testing, when the issue involves the application of physical force to students, students may assert a significant interest in personal security, one even greater than their interest in the privacy of their belongings, which too merit Fourth Amendment protection. In describing this right to bodily integrity, the Court in *Terry v.* Ohio[306] described well that even the act of frisking a person — a search under the Fourth Amendment — seriously infringes an individual's interest in bodily integrity:

> [I]t is simply fantastic to urge that [a frisk] performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity." It is a serious intrusion upon the sanctity of a person, which may inflict great indignity and arouse strong resentment, and it is not to be taken undertaken lightly.[307]

Although the Court drew this conclusion as it examined police officers' dealing with adults on the streets, public school officials' acts of grabbing or hitting students are likely to evoke similar responses. The two contexts are even doctrinally linked because the Court in *T.L.O.* applied *Terry*'s two-part inquiry to determine the reasonableness of searching a particular student's purse.

In the context of public schools, viewing students' interest in personal security is a complex issue because of compulsory education laws. When school teachers became "public" educators, a shift occurred. No longer were schools a place where teachers acted solely *in loco parentis*. School officials assumed a special duty to educate, one that at times was in conflict with parents' interests. School officials had "custody" of children only to further their public duty to educate.

When students thus entered public schools, the automatic linking of parents and teachers no longer applied. Even though parents historically have been able to use physical force to discipline children under both family privacy protected by the Fourteenth Amendment and under relig-

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304 *Vernonia*, 515 U.S. at 654.

305 *Id.*

306 392 U.S. 1 (1968).

307 *Id.* at 16–17.

ious views protected by the First Amendment, public schools have neither of these interests to assert to justify physically punishing children. They became a place for public education.

In addition, modern society has increasingly viewed children with more and more distance from their parents. The establishment of social service agencies has checked parents' interest in family privacy and in the exercise of religious beliefs. Simply, children are no longer the property of parents; they are under the care of states, who educate them in the public schools and who monitor their safety at home as well.

In short, public school students have a significant interest in personal security under the Fourth Amendment.[308] They are not like prisoners, with significantly diminished rights arising from convictions.[309] They are temporarily in the custody of school officials to learn. Even though students have this significant interest in personal security, a determination of reasonableness also includes consideration of the three other *Vernonia* factors — the degree of intrusion, and the school's need to use physical force and the means used.

2. *Characterizing the Intrusion*

In characterizing the nature of the intrusion caused by the use of physical force, one must examine school officials' objective purpose in using force. Physical force used to control disruptive students (rather than to punish them) presents a lesser degree of intrusion upon a student's personal security because the goal of the latter is to cause the student physical and psychological pain,[310] while the former is used merely to diffuse a disruptive and potentially violent situation. Our society has long recognized and accepted the use of physical force as a means of quelling and controlling the violence of others. Whether we think of police officers or citizens breaking up fights or schoolteachers controlling battling students, the use of physical force is often necessary to restore order and protect others from harm the disruptive individual might otherwise cause. In the context of the public schools, the use of force to control is a key function of public school officials' custodial powers as schools cannot accomplish their educational mission without

308 Even the antiquated decision of *Ingraham v. Wright*, 430 U.S. 651, 676 (1977), stated that a "child has a strong interest in procedural safeguards that minimize the risk of wrongful punishment." *Id.* For a discussion of this case, see *supra* notes 147–184 and accompanying text.

309 *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 338 (1985) (stating that "[w]e are not yet ready to hold that schools and the prisons need be equated for purposes of the Fourth Amendment").

310 *See* Gaffney, *supra* note 254, at 2–3 (acknowledging the lack of consensus in defining "corporal punishment" but concluding that the different conceptualizations usually convey the idea of the purposeful and intentional administration of some degree of pain or discomfort).

effective physical control of their student population. In contrast to the use of physical force to punish, reformers have not sought to limit the use of physical force to regain control of disruption. Order, whether on the streets or in the public schools, has a place in our society, rooted both in common and modern law. Physical force used to regain and maintain order must therefore be characterized much differently than force used to punish and humiliate a student.

The majority opinion of *Ingraham v. Wright*[311] failed to comprehend the difference between physical force used as a method of control and force used to punish. In holding that no process was constitutionally required prior to striking students, the *Ingraham* Court assumed that hitting a disruptive student was a form of *both* establishing control in the classroom and punishing the wrong-doer. However, the facts of the case clearly reveal that the beatings administered to the plaintiffs were intended solely as punishment. The teachers involved had numerous options available to control the disruptive students other than striking them.[312] And even if the teachers subjectively intended merely to control the students by striking them, the clear effect was one of punishment because the hitting occurred *after* the students ceased their disruption.

The harm caused by the intrusion is another factor that must be considered when assessing the nature of the intrusion. Educational psychologists argue that children who are physically punished by authority figures may experience significant psychological harm as a result including depression, dissociation, obsessive-compulsive tendencies, and repressed anger and anxiety.[313] In contrast, physical force to control disruptive students does not engender the magnitude of these psychological harms.

3. *The State's Interest: Physical Force to Control as a Means of Advancing Education*

To determine the Fourth Amendment reasonableness of striking a school student, one must also consider the government's interest in employing force. Included in this third inquiry, in light of the *Vernonia,*

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311 *See supra* notes 147–184 and accompanying text.

312 Even when physical force does have the effect of immediately stopping disruptive behavior, it may still be constitutionally unreasonable. For example, in *Young v. St. Landry Parish School Board*, 759 So.2d 800, 802 (La. 1999), a schoolteacher allegedly "pulled" a student away from another student that he was bothering. The majority opinion stated that the teacher "did not intend to harm" the student, who ended up falling, later incurring almost $15,000 in medical expenses. *Id.* at 803. The majority held that the force was reasonable under state law, which allows teachers to use "reasonable force to maintain order in the classroom or on school grounds." *Id.* at 804. The dissent, however, stated that the teacher used unreasonable force because better "alternative methods of discipline" existed. *Id.* at 805 (Thibodeaux, J., dissenting).

313 *See supra* notes 250-262 and accompanying text.

T.L.O., and *Garner/Graham* decisions, are the sub-issues of whether there was an "immediate" need for the force and the nature of the infraction committed. Under the "special needs" doctrine delineated in *Vernonia*, schools must have a "compelling interest" in order to use force, defined as one that "appears *important enough* to justify the particular search."[314] The school's interest, therefore, needs simply to "outweigh" the student's interest. Without question, the state has an important interest in allowing its public school officials to use physical force in order to subdue disruptive students who interfere with the successful functioning of the school. The state does not, however, have an important interest in physically punishing students because such acts "teach" students to be violent in solving problems. The authority that the state has relates to its state-law duty to educate. Therefore, the state's interest in striking students as punishment can never be a "compelling" one under the *Vernonia* test.

The *Vernonia* decision similarly characterized the state's interest in light of the school's goal to educate students. The Court determined that the Vernonia school district had an "important enough" interest in requiring drug-testing for school athletes because of the negative physical and psychological effects of drugs. The majority's reasoning thus linked the school's interest to its primary goal — education — and credited drug use with disrupting the "educational process."[315] It also found an "immediate" need for the testing because "[d]isciplinary actions had reached 'epidemic proportions.'"[316] Thus, the *Vernonia* Court determined that the searches were constitutional, at least in part, because they were necessary to control the school environment. In addition, *Vernonia* stressed that the results of the drug tests would not be turned over to the police, i.e., that the students would not be "punished" for their use of drugs.[317] In short, the *Vernonia* Court approved of drug-testing designed to control the school environment but not to punish the students.

4. *The Efficacy of Physical Force in the Schools*

Determining the reasonableness of physical force also requires scrutiny of the means that officials used, specifically, the relationship between the force used and the infraction that precipitated it, and the efficacy of the force in a particular situation. Though school officials need not employ the "least intrusive" means of accomplishing their

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[314] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995).

[315] *Id.* at 662.

[316] *Id.* at 663 (quoting the district court's conclusions). *But cf. id.* at 684 (O'Connor, J., dissenting) (arguing that that the record failed to establish a drug problem at the school).

[317] *Id.* at 658.

goals,[318] an assessment of Fourth Amendment reasonableness does require examination of the effects of the intrusion upon the student in light of the nature of the infraction committed and the urgency of the situation.

Using physical force on a student, whether for the purpose of control or punishment, affects that student's physical and psychological well-being. When school officials administer force solely for the purpose of controlling the student, the force is often proportionate to the level of resisting force being applied by the student and/or necessary to diffuse an emergent, violent situation. Just as police officers sometimes use unreasonable force in controlling suspects, public school officials may at times act unreasonably by using too much force in controlling students. Determining when school officials cross this line requires a case-by-case, objective analysis of the seriousness of the student's infraction, the intensity of the force used, the emergent circumstances of the situation, etc.

By comparing the infraction with the need for force, one can discern the difference between physical force to control and physical force to punish. Distinguishing between these types of force do not, however, require determination of a school official's subjective intent. Just as the Court stated in *Garner* and *Graham,* reasonableness is an objective inquiry, measuring the reasonableness in light of the facts under consideration. When public school officials use physical force to punish, they seek to change behavior by inflicting physical and psychological pain; when they use physical force to control it is because other alternatives will not stop the disruptive behavior. In short, physical force to punish is not a last resort technique to controlling a situation. School officials have a wide variety of other techniques to employ to stop this particular type of disruptive behavior.

Thus, even though public school officials need not use the "least" intrusive means to accomplish their goal of educating students, eliminating physical punishment does not impose on them undue restrictions. They still have a significant number of alternative means to discipline disruptive students. For example, courts will not decide that school officials constitutionally erred in using a social discipline model as opposed to a positive discipline model.[319] When public school officials use physical force to punish, they seek to change behavior by inflicting physical and psychological pain. When they use physical force to control it is because there are no other alternatives that will bring the disruptive behavior to an end.

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[318] *Id.*

[319] For a discussion of the numerous disciplinary tools that public school officials may use, *see supra* notes 272–275 and accompanying text.

Therefore, while force used to control may sometimes be the only effective means to restore order, force used to punish is never effective because of the significant infringement of personal security and because it undermines the school's goal to educate. Although children may experience such discipline in their homes, there is a constitutional difference between parents inflicting this type of harm and public officials committing this act. The means must further the goal — even under *T.L.O.*'s "reasonably related" test. Because students have such a significant interest in personal security and because public school officials are foremost educators, they must not harm students when other means are easily available to further their important interest in education. Thus, physical punishment of school students does not survive scrutiny in light of the Supreme Court's Fourth Amendment personal security jurisprudence.

CONCLUSION

When children enter the public schools, they leave their parents behind and experience a unique context, one controlled by state officials. At school, these officials have temporary custody of students to further their primary goal — education. To fulfill this goal, officials have used two different types of physical force: force to control disruptive, fighting students, and force used as punishment for violating school rules. Both types of physical force may implicate the Fourth Amendment because students have a right to be free from "unreasonable" seizures. Determining whether these seizures are constitutionally "reasonable" depends on how one balances the interests of the students and school officials. In light of the United States Supreme Court's modern Fourth Amendment personal security jurisprudence, school officials may act reasonably when using force to control disruptive students, but act unreasonably when they strike students to punish them.

The difference between these two types of force appears when examining "reasonableness" in two related contexts: police officers' use of physical force during investigations and arrests, and public school officials' searches of students. In analyzing the physical force police officers used, the Court stated that reasonableness is an "objective standard," one that includes consideration of all the circumstances. One of those circumstances was technological advancement in weapons, which compelled the Court to reject the common-law practice of shooting all fleeing felons. In addition, the Court looked to modern policing practices to assess what was "reasonable." When the Court thus balanced interests to determine reasonableness, it used modern policing views as an important factor.

This balancing process also occurred in the Court's cases examining whether public school officials had conducted "reasonable" searches of

students. It articulated a four-part balancing standard: the student's interest, the degree of intrusion on that interest, and the school's goals and means used to further those goals.

When one similarly balances interests in the context of public school officials' use of physical force, how the balancing scales tip depends on the objectives of the school officials. For example, when school officials use force to break-up students who are fighting, school officials resemble police officers (but with the goal of restoring an educational environment, not criminal prosecution). They need to act quickly, not only for the benefit of those harming each other, but also for students near them. Like police officers, school officials "must be judged from the perspective of a reasonable [school official] on the scene, rather than with the 20/20 vision of hindsight."[320] The balance tips strongly in favor of school officials' use of force.

In contrast, when public school officials use physical force to punish students, they act unreasonably. *Ingraham v. Wright,* decided in 1977, failed to distinguish between these two types of physical force when it held that teachers do not need to give "pre-hitting" process to students before they strike them. The Court assumed that a quick hit was good psychologically for the student and constituted effective discipline. It also noted that modern (1970s) practice allowed this hitting in the public schools. Since *Ingraham*, what the Court put in the balancing scales tips the other way. Numerous states have abandoned hitting in the public schools, and educational psychologists have declared that hitting does not teach self-discipline, nor does it create a sound educational atmosphere. In addition, the striking may cause students serious psychological damage.

By interpreting the Fourth Amendment to ban public school officials from hitting students as a form of punishment, courts would further public schools' primary goal — creating a positive learning environment for our nation's youth. Under this view of reasonableness, public schools teach self-discipline and how to resolve conflict peacefully.

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[320] Graham v. Connor, 490 U.S. 386, 396 (1989).