April 1, 1977

Re: No. 75-6527 - Ingraham v. Wright

Dear Lewis:

I think my vote at Conference was to the effect that there was no protected liberty interest involved in this case. Were I to adhere to that vote, of course, I could not join Part IV-A of your presently circulating draft opinion. I do very much agree with all of the rest of the opinion, however, and I think you have made out a stronger argument for the existence of a protected liberty interest than I thought could be done. If you are willing to make what seem to me some minor changes in Part IV-A, I think I could join the opinion.

I have thoroughly approved of the Court's recent practice in insisting on careful inquiry as to whether, in procedural due process cases, there is any protected liberty or property interest before deciding what process was due. The Chief's opinion in Morrissey v. Brewer and Potter's opinions in Roth v. Board of Regents and Perry v. Sindermann used this approach. Your IV-A has that element too, and I thoroughly approve its reference to Byron's opinion in Meachum v. Fano and to that case's observation that not every "grievous loss" is a deprivation of liberty.
I think an important part of the analysis in Meachum was the inquiry into whether state law had created a liberty interest. As I see it, the reason we need not undertake that analysis in this case is that, as your opinion points out, freedom from physical restraint and corporal punishment may be fairly viewed as being historically included in the liberty protected by the Due Process Clause. The first part of our opinion in Meachum proceeded on this basis. To indicate clearly that the opinion in this case does not cut back on Meachum, I would propose the addition of a footnote along the following lines:

"Since freedom from bodily restraint and corporal punishment is certainly 'liberty' within the meaning of the Due Process Clause, we need not inquire, as we had to do in Meachum v. Fano, whether state law has provided a liberty interest."

I also have the feeling that the reasons for concluding that there is a liberty interest could be more tightly articulated. I am prepared to agree that the combination of factors you set out on page 21 are sufficient to constitute a protected liberty interest under the Fourteenth Amendment:

School authorities, acting under color of state law, punish a child in their custody by deliberately restraining the child and inflicting appreciable pain. I would want to be as certain as we can that this holding did not open up the door to constitutional claims such as those based upon a teacher's decision to require a pupil to remain after school as a form of punishment, or upon a teacher's negligently slamming the door on the toe of a student. These students, of course, would be just as much in the state's "custody" as was Ingraham in this case.
I think the key to this distinction is already present in Part IV-A where you use the word "punish", because to me, at least, that word connotes a deliberate decision to inflict a penalty on a particular individual who is believed to have broken a rule or to have otherwise misbehaved. This is the sort of official action in which it is sensible to think that the Fourteenth Amendment requires at least consideration of what process is due, whereas in the case of any negligent action on the part of the officials which simply results in bodily injury the notion of procedural protection simply doesn't make sense.

I would favor a revision in the last sentence of Part IV-A substantially as follows, thereby making explicit which seems to me already implicit in that part of your opinion:

"But at least where school authorities, acting under color of state law, deliberately decide to punish a particular child believed to warrant such action, by restraining the child and inflicting appreciable physical pain, we hold that Fourteenth Amendment liberty interests are implicated."

I should add that in footnote 37 on page 20 you cite Professor Monaghan's draft article, "Of 'Liberty' and 'Property'" to be published in the Cornell Law Journal. I do not believe I could join the opinion if that citation is intended as a favorable reference to that article, as a whole. The article is quite critical of Paul v. Davis, which I wrote, and Meachum v. Fano, which I joined (and both of which you joined). I have no objection to the quotation from the article in footnote 43 on page 25.

Sincerely,

Mr. Justice Powell

Copies to the Conference
P.S. (To LFP only)

Having written this, I have a feeling that it is a case of a mountain laboring and giving forth a mouse, since when I come right down to it I have very few changes to suggest. Nonetheless, the changes which I do suggest are important to me.

Sincerely,

WHR
April 6, 1977

No. 75-6527 Ingraham v. Wright

Dear Bill:

Thank you for your thoughtful letter of April 1.

I am happy to try to accommodate your suggestions, and enclose pages 21 and 22 of my 5th draft. I have indicated on these changes prompted by your letter.

I have taken some liberty with the language but believe the substance accords with your wishes. I will not circulate again until I hear from you.

Sincerely,

Mr. Justice Rehnquist

lfp/ss
Enc.
Master
4/6/77
Pages from 5th Draft
Sent to J. Requiest
in response to his
letter of April 1st
A

"[T]he range of interests protected by procedural due process is not infinite." Board of Regents v. Roth, supra, at 570. We have repeatedly rejected "the notion that any grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause." Meachum v. Fano, 427 U. S., at 224. Due process is required only when a decision of the State implicates an interest within the protection of the Fourteenth Amendment. And "to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake." Roth, supra, at 570-571.

The Due Process Clause of the Fifth Amendment, later incorporated in the Fourteenth, was intended to give Americans at least the protection against governmental power that they had enjoyed as Englishmen against the power of the Crown. The liberty preserved from deprivation without due process included the "right generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." Meyer v. Nebraska, 262 U. S. 390, 399 (1923); see Dent v. West Virginia, 129 U. S. 114, 123-124 (1889). Among the historic liberties so protected was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security."

While the contours of this historic liberty interest in the context of our federal system of government have not been

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[41 See 1 Blackstone, Commentaries *134. See also Monitor, 1st 2d, at 100, 131-134 (1817). The 39th article of Magna Charta protected the right of personal security against deprivation "except by the legal judgment of his peers or by the law of the land." see Perry, supra, at 17. By subsequent enactments of Parliament during the time of Edward III, the right was protected from deprivation except "by due process of law." See Shattuck, The True Meaning of the Term "Liberty," 4 Harv. L. Rev. 365, 372-374 (1891).]
defined precisely," they always have been thought to encompass freedom from bodily restraint and punishment. See *Rochin v. California*, 342 U.S. 165 (1952). It is fundamental that the state cannot hold and physically punish an individual except in accordance with due process of law. This constitutionally protected liberty interest is at stake in this case.

But at least where school authorities, acting under color of state law, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain, we hold that Fourteenth Amendment liberty interests are implicated. *Wolff v. Colorado*, 435 U.S. 29, 27-28 (1949). It has been said of the Fourth Amendment that its "overriding function ... is to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber v. California*, 384 U.S. 757, 767 (1966). But the principal concern of that Amendment's prohibition against unreasonable searches and seizures is with intrusions on privacy in the course of criminal investigations. See *Whalen v. Roe*, 429 U.S. 57 (1976).

April 8, 1977

Re: No. 75-6527 - Ingraham v. Wright

Dear Lewis:

Please join me.

Sincerely,

Mr. Justice Powell

Copies to the Conference
April 11, 1977

Re: No. 75-6527 - Ingraham v. Wright

Dear Lewis:

Please join me in your recirculation of April 8.

Sincerely,

[Signature]

Mr. Justice Powell

cc: The Conference
April 13, 1977

Dear Lewis:

Re: 75-6527 Ingraham v. Wright

Even though I have not fully digested all of the material you and Byron have produced in this difficult case, I will be joining you. You can treat this as a "probable kill."

Regards,

Mr. Justice Powell

cc: The Conference
April 14, 1977

Re: 75-6527 - Ingraham v. Wright

Dear Lewis:

Although I still have high regard for your analysis in Part IVB, after rereading both opinions, I have decided to join Byron's entire dissent. I have also written a very brief additional comment which I hope to circulate promptly.

Respectfully,

[Signature]

Mr. Justice Powell
April 14, 1977

Re: 75-6527 - Ingraham v. Wright

Dear Byron:

Please join me in your dissent. I have also written a few additional paragraphs which are completely consistent with what you have said, and which I will circulate promptly.

Respectfully,

Mr. Justice White
Copies to the Conference
This case presents questions concerning the use of corporal punishment in public schools. Petitioners were junior high-school students in Dade County, Florida. They brought this suit in the United States District Court against school officials, alleging deprivation of constitutional rights and seeking damages and injunctive relief.

At trial, petitioners' evidence indicated they were severely paddled for relatively minor infractions of rules. One of the petitioners was subjected to more than 20 licks, resulting in serious bruising and absence from school for 11 days.

Florida law, in keeping with the common law, authorizes reasonable corporal punishment as a means of maintaining discipline. But such punishment may not be "degrading or unduly severe", and may be inflicted only after prior consultation with the school officials.

Although the evidence offered by petitioners indicated a violation of Florida law, the District Court found no violation of a federal constitutional right, and dismissed the suit without hearing evidence from the school authorities.
The Court of Appeals for the Fifth Circuit affirmed, and we granted certiorari.

Petitioners allege two violations of constitutional rights. They first assert that the Eighth Amendment's prohibition of cruel and unusual punishment applies to school punishment as well as to that imposed under the criminal law. We find no basis in the language or history of the Eighth Amendment that would justify extending it to school discipline.

The use of corporal punishment to discipline school children dates back to colonial times. The law was then well settled, as stated in Blackstone's Commentaries, that teachers had this right so long as excessive force was not used. The Founding Fathers certainly were familiar with the practice and the common law.

Nor has the law changed in the 187 years since the adoption of the Eighth Amendment. Twenty three states have addressed this issue through legislation. Twenty one, in effect, have reaffirmed the substance of the common law rule. Only two states have prohibited all physical punishment in public schools.

In sum, we find no basis whatever for wrenching the 8th Amendment.
In sum, we find no basis whatever for wrenching the Eighth Amendment from its historical context and extending it to school discipline.

* * * *

Petitioners further contend that they were entitled, by virtue of the Due Process Clause of the 14th Amendment, to a hearing before being paddled. We agree with petitioners that a protected liberty interest is implicated when school authorities restrain a pupil and inflict appreciable physical pain.

But the possible violation of a constitutional right does not always require a prior hearing. The basic question is whether other remedies are adequate to provide reasonable protection of the right.

The remedies here are substantial. The common law allows the pupil to recover damages from a teacher who imposes excessive punishment. Florida statutes also impose both criminal and civil liabilities.

Moreover, in view of the openness of a public school - with the restraining presence of pupils and other teachers - the risk of excessive punishment is slight. Indeed, the evidence in this case indicated that the punishment inflicted on petitioners was quite unusual.
Common sense, as well as long experience, tells us that the risk of abuse of this traditional disciplinary measure is minimal. And when abused, the consequences for the offending teacher can be serious indeed.

We find therefore no basis in the Constitution for commanding a prior hearing. The remedies already available have been accepted as adequate to protect children since the founding of this country.

We decline at this late date and at a time when serious problems beset our schools to impose an unnecessary restriction on all school teachers simply because of the misconduct of a few in one school in Florida.

We therefore affirm the judgment of the Court of Appeals.

* * * *

Mr. Justice White has filed a dissenting opinion, joined by Justices Brennan, Marshall and Stevens. Mr. Justice Stevens also has filed a dissent.
Sims v. Waln, No. 76-374, heretofore held for Ingraham v. Wright, No. 75-6527

MEMORANDUM TO THE CONFERENCE:

No. 76-374, Sims v. Waln, is a § 1983 action brought by a 16-year old junior high school student against her principal and his assistant. The school, located in Springfield, Ohio, had a policy permitting paddling of students for disciplinary infractions up to a maximum of three "cracks." Ohio law in effect at the time permitted the infliction of reasonable corporal punishment in the public schools, "whenever such punishment is reasonably necessary in order to preserve discipline. . . ." Ohio Rev. Code § 3319.61. The petitioner was subjected to two "cracks" on one occasion, and on another was suspended for resisting similar punishment. After a full trial, the District Court denied relief on the ground that petitioner's federal claims were insubstantial. The Sixth Circuit affirmed.

Petitioner makes three claims: (i) that paddling, even if "reasonable," in a per se cruel and unusual punishment under the Eighth Amendment; (ii) that the imposition of paddling without prior notice and an opportunity to be heard violates the Due Process Clause of the Fourteenth Amendment; and (iii) that the imposition of paddling regardless of parental instructions violates parental rights protected by the Fourteenth Amendment. Our decision in Ingraham v. Wright, No. 75-6527, forecloses the first two claims. The third was resolved against petitioner in our summary affirmance in Baker v. Owen, 423 U.S. 907, aff'g 395 F. Supp. 294 (MDNC 1975); see Ingraham, slip op., at 10 & n. 22. I therefore will vote to deny.

L.F.P., Jr.
By a vote of 5 to 4, the Supreme Court held last week that a schoolhouse spanking is "crue and unusual punishment" as the Eighth Amendment term is traditionally understood.

Mind you, the Court did not say that spanking is never cruel, nor did it decide a decision turn on any justice's personal opinion of "corporal punishment." The principal dissenter, Justice White, announced that a schoolhouse spanking would have quoted the American Dictionary of the English language: "The word "corporal punishment" does not mean the infliction of pain by the use of physical force, regardless of the degree of force used. It means the infliction of pain by the use of physical force, whether light or severe, which may result in injury to the body or in mental suffering.

The decision, echoes Ms. Goodman, who toils for the Psychological Association. It is not clear enough, I gather, a rightest, she says, "that there are many contending schools of righteousness waiting on the sidelines to write their own visions into law.

... starts jerking and stretching. There are many containing schools of righteousness waiting on the sidelines to write their own visions into law.

As an example of "result-oriented" comment on the Court, we would be amazed, if not contemptuous, if Mr. David Israel of The Star sports pages (or some other well known arbiter of excellence in sport) denounced the Redskins for playing football rather than baseball; but we get the equivalent of this practically every time the Supreme Court subordinates zeal to history and renders a decision whose result is objectionable.

As it happens, the spanking decision displeases result-oriented liberals who consider the rod and paddle instruments of unnatural tyranny. If the Court had ruled by one vote that schoolhouse disciplinarians were subject to the Eighth Amendment, no more and no less. The rights and wrongs of the rod were not at issue.

Elementary. Yes, elementary. But there are punx who go into angry gyrations every time the Court declines to strike a posture of righteousness. The righteous posture on spanking is clear enough, I gather, a rightest, she says, "that there are many contending schools of righteousness waiting on the sidelines to write their own visions into law.

... starts jerking and stretching. There are many containing schools of righteousness waiting on the sidelines to write their own visions into law.

From a judicial point of view, I am bold to say, both the Rowan and Goodman pieces are studies in caricature. Mr. Rowan, for instance, is persuaded that the spanking decision "legally and morally obscene... revolting" is the "legacy" of Richard M. Nixon, whose strict-constructionist justices honor the letter at the expense of the spirit of the Constitution, i.e., do not agree with him. Some - I include myself - find such an accusation obscene, not to say scandalous. It flies in the face of Court history to think that Presidents, even Mr. Nixon, can control the development of constitutional law by appointment. "The Burger group," as Mr. Rowan calls it, "powerfully assisted in the unmaking of Mr. Nixon by finding against him in the presidential tape-recording case.

Whether we think that spankings are good or bad, we may rejoice that the justices are not clothed with arbitrary regulatory power over the disciplinary practices of local schools. There is a practical reason for rejoicing. If the Supreme Court commonly functioned as result-oriented pundits wish, not even the marvelous elasticity of the Constitution could withstand the constraining.