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Corporal Punishment: The Nebraska Law: *Ingraham v. Wright*, 430 U.S. 651 (1977)

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Corporal Punishment: The Nebraska Law

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

I. INTRODUCTION

In a five to four decision,¹ the United States Supreme Court held that the eighth amendment sanction against cruel and unusual punishment does not apply to corporal punishment² in the public schools. The Supreme Court also held that, although deliberate restraint and subsequent infliction of physical pain on school children by school authorities, acting under color of state law, does implicate fourteenth amendment liberty interests,³ notice and a hearing is not required by the due process clause "prior to the imposition of corporal punishment in the public schools, as that practice is authorized and limited by the common law."⁴

Mr. Justice White authored a spirited dissent which attacked the majority's view as extreme in holding that "corporal punishment in public schools, no matter how barbaric, inhumane, or severe, is never limited by the Eighth Amendment."⁵ As to the fourteenth amendment issue, the dissent, in light of the Supreme Court's reasoning in *Goss v. Lopez*,⁶ found no justification for the abdication

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1. *Ingraham v. Wright*, 430 U.S. 651 (1977).
 2. Corporal punishment has since been defined by an amendment to the Florida statute under which *Ingraham* and *Andrews* were punished as "the moderate use of physical force or physical contact by a teacher or principal as may be necessary to maintain discipline or to enforce school rules." FLA. STAT. ANN. § 228.041(28) (West 1977). For a detailed account of the statutory and school board policy history of the *Ingraham* decision, see 430 U.S. 651, 655-56, nn.6 & 7.
 3. 430 U.S. at 675.
 4. *Id.* at 682.
 5. *Id.* at 691 (White, J., dissenting).
 6. 419 U.S. 565 (1975).

Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and

of due process guarantees in favor of the state statutory or common law limitations on corporal punishment. The dissent pointed out that not only do such common law remedies arise after the fact, but they protect the student only against unreasonable or bad faith error.⁷ Any reasonable, good faith mistake in the school disciplinary process, the Court's concern in *Goss*,⁸ would not be protected against by the remedial, traditional common law remedies relied upon by the majority.

Because of the clear and uncomplex nature of the reasoning in both the majority⁹ and dissenting¹⁰ opinions and the explicitness of the Court's refusal to extend either eighth or fourteenth amendment sanctions to the imposition of corporal punishment in public schools, this note will not engage in a detailed analysis of the Supreme Court's reasoning. Instead, this note will examine the legal issues that remain for the Nebraska attorney and educator in the wake of the Court's decision to defer to state law on the subject of corporal punishment.

II. THE FACTS

On January 7, 1971, James Ingraham and Roosevelt Andrews filed a complaint¹¹ in the United States District Court for the District of Florida naming as defendants the school officials of the Charles R. Drew Junior High School of Dade County, Florida.¹²

it should be guarded against if that may be done without prohibitive cost or interference with the educational process.

Id. at 580 (emphasis added). To guard against the punishment of an innocent student, the Court in *Goss* required under the Due Process Clause "an informal give-and-take between student and disciplinarian" affording the student "an opportunity to explain his version of the facts." *Id.* at 580, 582, 584.

7. 430 U.S. at 694 n.11 (White, J., dissenting).
8. *Id.* at 693 n.10.
9. *Id.* at 670. The Court reasoned that due process was adequately afforded by the common law remedies. The Court saw no need to extend the protection of the eighth amendment to school children in light of the same common law principles: "Public school teachers and administrators are privileged at common law to inflict only such corporal punishment as is reasonably necessary for the proper education and discipline of the child; any punishment going beyond the privilege may result in both civil and criminal liability." *Id.* See also notes 19-23 and accompanying text *infra*.
10. See notes 5-7 and accompanying text *supra*.
11. The complaint contained three counts alleging deprivation of constitutional rights under 42 U.S.C. §§ 1981-1988 (1970). The first two counts were individual damage actions based on paddlings which occurred in October, 1970, while Ingraham was in the eighth grade and Andrews in the ninth.
12. Defendants named in all three counts were "Willie J. Wright (princi-

Petitioners' evidence was presented in a week-long trial after which the district court dismissed the complaint.¹³ The court held that, although the eighth amendment could be violated by some types of corporal punishment, "in this case a jury could not lawfully find 'the elements of severity, arbitrary infliction, unacceptability in terms of contemporary standards, or gross disproportion which are necessary to bring punishment to the constitutional level of cruel and unusual.'"¹⁴

A panel of the Court of Appeals for the Fifth Circuit voted to reverse¹⁵ concluding that, upon the facts of this case, the eighth and fourteenth amendments were violated.¹⁶ The court of appeals en banc rejected these conclusions and affirmed the district court.¹⁷ The Supreme Court granted certiorari, limited to the questions of cruel and unusual punishment and procedural due process.¹⁸

III. THE DECISION

The Supreme Court, in rejecting the eighth amendment challenge to corporal punishment in public schools,¹⁹ first examined ancient common law privileges governing the infliction of corporal punishment. The majority found present-day viability in the common law as it has existed "since before the American Revolution."²⁰ The Court acknowledged as unchanged the common law privilege

pal at Drew Junior High School), Lemmie Deliford (an assistant principal), Solomon Barnes (an assistant to the principal), and Edward L. Whigham (superintendent of the Dade County School System)." *Ingraham v. Wright*, 430 U.S. at 654.

13. The dismissal was granted with leave to appeal. The district court was reversed in *Ingraham v. Wright*, 498 F.2d 248 (5th Cir. 1974), *vacated*, 525 F.2d 909 (5th Cir. 1976), *aff'd*, 430 U.S. 651 (1977).

14. 430 U.S. at 658.

15. *Ingraham v. Wright*, 498 F.2d 248 (5th Cir. 1974), *vacated*, 525 F.2d 909 (5th Cir. 1976), *aff'd*, 430 U.S. 651 (1977).

16. 430 U.S. at 658. The facts from the testimony of sixteen students suggest the administration at the junior high to be extremely severe. Ingraham testified that because he responded slowly to his teacher's instructions he was held over a table in the principal's office and struck more than 20 times with a paddle, suffering hematoma requiring medical attention. Ingraham missed 11 days of school as a result of his injuries. Andrews lost the full use of his arm for a week as a result of one paddling in which he was struck on the arms.

For an additional summary of the evidence presented, see *Ingraham v. Wright*, 498 F.2d at 256-59.

17. *Ingraham v. Wright*, 525 F.2d 909 (5th Cir. 1976), *aff'd*, 430 U.S. 651 (1977).

18. *Ingraham v. Wright*, 425 U.S. 990 (1976).

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

20. *Id.* at 661.

of school teachers to inflict reasonable corporal punishment on children. Particular departures from reasonable punishment were presumed by the Court to be remedied in virtually all states by the possibility of teachers being subjected to criminal or civil liabilities.²¹

Analyzing the eighth amendment as applicable only to the protection of those persons convicted of crimes, the Court held that the eighth amendment's sanction against cruel and unusual punishment did not apply to the paddling of children in the public schools for disciplinary purposes. Therefore, the Court reasoned, the only remaining "pertinent constitutional question [was] whether the imposition [of corporal punishment] is consistent with the requirements of due process."²² Although the Court found in its due process analysis that a constitutionally protected liberty interest was implicated by the imposition of corporal punishment, it held "that the traditional common law remedies are fully adequate to afford due process."²³

However, to present the Court's decision as judicial approval of corporal punishment, even to the excesses of the *Ingraham* case,²⁴ could be misleading in light of the majority's deference to the common law on both the cruel and unusual punishment and due process issues. Because of this deference, an investigation of the Nebraska law in the area is essential to anyone faced with a challenge to, or anyone challenging, the infliction of corporal punishment upon any student in the public schools of this state.

IV. THE NEBRASKA PRIVILEGE

A. Civil Liability

1. *Assault and Battery*

The earliest common law comments on corporal punishment made it clear the courts were to tolerate such punishment.²⁵ Under the doctrine of *in loco parentis* the courts analyzed the rights of teachers to punish students as derivative of the parental right of punishment.²⁶ The British Court of the Queen's Bench of 1893 summed up the common law doctrine:

21. For examples of cases discussing such liability, see *id.* at 1408 n.28. See generally I F. HARPER & F. JAMES, *THE LAW OF TORTS* 288-92 (1956); W. PROSSER, *LAW OF TORTS* 136-37 (4th ed. 1971); Proehl, *Tort Liability of Teachers*, 12 *VAND. L. REV.* 723, 734-38 (1959).

22. 430 U.S. at 671.

23. *Id.* at 672.

24. See note 16 *supra*.

25. *Cleary v. Booth*, [1893] 1 Q.B. 465.

26. See generally sources cited in note 20 *supra*.

It is clear that a father has the right to inflict reasonable personal chastisement on his son. It is equally the law, and it is in accordance with very ancient practice, that he may delegate the right to the schoolmaster. Such a right has always commended itself to the common sense of mankind. It is clear that the relation of master and pupil carries with it the right of *reasonable* corporal chastisement.²⁷

The Nebraska Supreme Court acknowledged this doctrine in *Clasen v. Pruhs*²⁸ stating that “[a] parent, teacher or master is not liable either civilly or criminally for moderately correcting a child, pupil, or apprentice, but it is otherwise if the correction is immoderate or unreasonable.”²⁹

The court in *Clasen* reasoned that it was an elemental principle of modern civilization that “there is and should be a reasonable limitation on the right of parents [or their representatives] to punish their offspring.”³⁰

The decision as to whether an educator had administered “unreasonable, unnecessary and cruel punishment to a child . . . [was to be] a question of fact to be determined by the jury.”³¹ This standard and mode of determination outlined in *Clasen* was the common law standard of reasonableness to which the *Ingraham* Court referred in its reliance on the adequacy of civil and criminal remedies available in virtually all states.³²

It can readily be seen that a broad range of teacher discretion in the imposition of corporal punishment is permissible under the *Clasen* standard of reasonableness. Neither the school child nor the school employee can act with certainty while functioning under such a vague standard. Since the Nebraska Supreme Court has never dealt directly with corporal punishment of public school children, it is necessary, in order to clarify the dimensions of the common law standard of reasonableness, to investigate the factors considered by other courts in their dealings with the issue.

The *Clasen* standard is consistent with the great weight of authority in that as long as public school officials acted *reasonably* in

27. [1893] 1 Q.B. at 468 (emphasis added).

28. 69 Neb. 278, 95 N.W. 640 (1903). The Nebraska Supreme Court has never specifically dealt with the issue of corporal punishment in the public schools, but acknowledges in *Clasen* the common law doctrine relative to that issue.

29. *Id.* at 283, 95 N.W. at 642.

30. *Id.*

31. *Id.* at 284, 95 N.W. at 642.

32. *Ingraham v. Wright*, 430 U.S. at 662. “All of the circumstances are to be taken into account [by the trier of fact] in determining whether the punishment is reasonable in a particular case.” *Id.*

administering corporal punishment, they were shielded from liability by the common law privilege.³³ The courts, in their individual determinations of reasonableness, commonly looked to all the circumstances of each particular case.³⁴ These circumstances usually included such factors as the nature of the pupil's offense,³⁵ the nature and severity of the punishment,³⁶ the age and physical condition of the pupil,³⁷ the motive of the school official who inflicted the punishment,³⁸ the attitude and past behavior of the pupil, and the availability of less severe but equally effective means of discipline.³⁹

Burden of proof was almost always on the student to convince the court that the punishment inflicted by the teacher was unreasonable.⁴⁰ Some jurisdictions even went so far as to require the student to prove beyond a reasonable doubt that the punishment was clearly excessive⁴¹ or that the injury inflicted was permanent.⁴² Additionally, there almost invariably was a strong presumption that the teacher acted properly.⁴³

Such jurisprudence and the standards resulting therefrom were patently arbitrary from jurisdiction to jurisdiction—often even from case to case within a single jurisdiction—⁴⁴ with the student

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33. See RESTATEMENT (SECOND) OF TORTS §§ 147-55 (1965) (detailing factors to be considered in judging reasonableness); Annot., 43 A.L.R.2d 469, 476-85 (1955): Comment, *Right of a Teacher to Administer Corporal Punishment to a Student*, 5 WASHBURN L.J. 75 (1965).
34. *Ingraham v. Wright*, 430 U.S. at 662. See generally I F. HARPER & F. JAMES, *supra* note 21, at 290-91; RESTATEMENT (SECOND) OF TORTS § 150 Comments c-e (1965).
35. See, e.g., *Vanvactor v. State*, 113 Ind. 276, 15 N.E. 341 (1888).
36. *Id.*
37. See, e.g., *Tinkham v. Kole*, 252 Iowa 1303, 110 N.W.2d 258 (1961).
38. See, e.g., *Suits v. Glover*, 260 Ala. 449, 71 So. 2d 49 (1954).
39. See RESTATEMENT (SECOND) OF TORTS §§ 147-55 (1965).
40. *Tinkham v. Kole*, 252 Iowa 1303, 110 N.W.2d 258 (1961).
41. *Patterson v. Nutter*, 78 Me. 509, 7 A. 273 (1886).
42. *Suits v. Glover*, 260 Ala. 449, 71 So. 2d 49 (1954). See also *Drum v. Miller*, 135 N.C. 204, 47 S.E. 421 (1904) (excessive punishment held not actionable even if injury was permanent unless such permanency was reasonably foreseeable as natural and probable from the act of punishment).
43. *Drake v. Thomas*, 310 Ill. App. 57, 33 N.E.2d 889 (1941); *Markbary v. State*, 10 Ind. App. 21, 37 N.E. 558 (1894); *Haycraft v. Griggsby*, 88 Mo. App. 354, *aff'd mem.*, 94 Mo. App. 74, 67 S.W. 965 (1902) (presumption disappears with the introduction of evidence, thus requiring the weight of the evidence to decide the case).
44. See, e.g., *People v. Ball*, 58 Ill. 2d 36, 317 N.E.2d 54 (1974) (teacher abused authority by paddling student); *People v. DeCaro*, 17 Ill. App. 3d 553, 308 N.E.2d 196 (1974) (teacher within authority to strike student with a ruler).

assured of successfully challenging the privileged battery in only the most severe cases.⁴⁵

2. Negligence

Corporal punishment is by definition an intentional tort. The common law privilege of *Clasen* attaches to the actions of a teacher or administrator in litigation for damages resulting from the intentional tort of assault or battery.

A different analysis results in an action for teacher negligence in the infliction of corporal punishment. The initial premise of the analysis is that "although teachers may stand *in loco parentis* as regards the enforcement of authority, teachers do not stand *in loco parentis* with regard to their negligent acts. A teacher is civilly liable for negligently causing the injury of a child, while a parent of the child is not."⁴⁶ As a result, the analysis of negligence in a fact situation involving corporal punishment is not substantially different than any negligence analysis.⁴⁷

The fact finding in negligence would differ from that of assault and battery:

We are not here concerned with the law applicable to punishment of a pupil by a teacher; but rather with the law applicable to the duties of a teacher in the care and custody of a pupil. In the faithful discharge of such duties the teacher is bound to use reasonable care, tested *in the light of the existing relationship*.⁴⁸

In assault and battery, the jury must determine if a reasonable man would believe the punishment was "unreasonable, unnecessary and cruel"⁴⁹ under the circumstances.⁵⁰ Negligence fact finding re-

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45. See, e.g., *Serres v. South Santa Anna School Bd.*, 10 Cal. App. 2d 152, 51 P.2d 893 (1935) (fractured pupil's coccyx); *Sheehan v. Sturges*, 53 Conn. 481, 2 A. 841 (1885) (teacher wore out two whips on the pupil, administered blows to the pupil's head and then kicked him in the face); *Frank v. Orleans Parish School Bd.*, 195 So. 2d 451 (La. App. 1967) (breaking pupil's arm).
 46. *Baird v. Hosmer*, 46 Ohio St. 2d 273, 279, 347 N.E.2d 533, 537 (1976). See also *Eastman v. Williams*, 124 Vt. 445, 207 A.2d 146 (1965).
 47. For a thorough discussion of the analysis of school and teacher negligence, see Proehl, *supra* note 21; Ripps, *Tort Liability of the Classroom Teacher*, 9 AKRON L. REV. 19 (1975); Seitz, *Legal Responsibility Under Tort Law of School Personnel and School Districts as Regards Negligent Conduct Toward Pupils*, 15 HASTINGS L.J. 495 (1964); Vacca, *Teacher Malpractice*, 8 U. RICH. L. REV. 447 (1974).
 48. *Gaincott v. Davis*, 281 Mich. 515, 519, 275 N.W. 229, 231 (1937) (emphasis added). See also *Segerman v. Jones*, 256 Md. 109, 124-25, 259 A.2d 794, 801 (1969).
 49. See note 31 and accompanying text *supra*.
 50. See notes 34-45 and accompanying text *supra*.

quires the jury to determine that standard of care which a person of ordinary prudence, *charged with the particular duties*, would exercise under similar circumstances.⁵¹

Theoretically, in the maintenance of classroom discipline the professional educator draws upon expertise to effect choices among various courses of action. Although in the ordinary negligence action, any mistake in judgement "becomes negligent, in a legal sense, by reason of the ability of a prudent man, in the exercise of ordinary care, to foresee that harmful results will follow its commission,"⁵² an educator may be held to a higher standard than an ordinary prudent man.⁵³ Any mistake in judgement could be analogized to malpractice cases and governed by those rules. If such an analogy is accepted by a Nebraska court,⁵⁴ the jury should be instructed in the following manner:

Whether errors of judgement will or will not make the defendant expert liable in a given case depends not merely upon the fact that he may be ordinarily skillful as such, but whether he has handled the matter skillfully or has exercised such reasonable skill and diligence as is *ordinarily exercised in his business or profession*.⁵⁵

A problem may exist with this analogy and the standard against which the analogy suggests the judgement of professional educators should be gauged. Although feasibly applicable to other choices in classroom discipline,⁵⁶ the higher standard is arguably inapplicable to the infliction of corporal punishment simply because there is no recognized special expertise in the use of force against children.

51. *Luna v. Needles Elementary School Dist.*, 154 Cal. App. 2d 803, 316 P.2d 773 (1957).

52. *Drum v. Miller*, 135 N.C. 139, 147, 47 S.E. 421, 425 (1904).

53. The professional educator not only has a special relationship with the child, but possesses unique training, special duty assignments, and even a state license. These factors among others could establish a higher standard of care than that of the ordinary prudent man.

54. The Nebraska Supreme Court has recognized the standard of care required of an automobile wrecker operator in the righting of an overturned truck to be analogous to the malpractice standard. *Brown v. Kaar*, 178 Neb. 524, 134 N.W.2d 60 (1965). It would seem logical that in light of such reasoning, the standard of care required of a professional educator prior to and at the infliction of corporal punishment would likewise require an analogy to the malpractice standard.

55. *Id.* at 530, 134 N.W.2d at 65 (citing *Johnson v. Winston*, 68 Neb. 425, 94 N.W. 607 (1903); *In re Estate of Johnson*, 145 Neb. 333, 16 N.W.2d 504 (1944)) (emphasis added).

56. There may be decisions for which most educators are specially trained, such as the evaluation of students' records or the analysis of test scores for the purpose of diagnostic treatment of an identifiable physical or intellectual deficiency. The educator could be held to a higher standard commensurate with the functional standards of the area of specialization in which he or she may be performing.

Educators generally receive no special college training in the paddling of students. If they should possess some innate talent or skill in such activities, certainly the skill would be no higher than the average prudent man's talent under the same circumstances.

In the final analysis there exists no significant difference between the requirement in negligence that a teacher's actions be compared to some theoretically higher standard of skill, and the requirement of assault and battery that the teacher's action be presumed reasonable or be proven by the student to be clearly excessive.⁵⁷

B. Criminal Liability

In the case of a criminal prosecution against an educator for use of force in student discipline, the Nebraska Legislature has considerably altered the standard of *Clasen* and the common law developed more fully by other jurisdictions in their attempts to establish civil standards of reasonableness. The use of force is now justified in Nebraska criminal law if the *educator believed* that force was necessary and consistent with the welfare of the minor, and if the force exerted did not create substantial risk of serious injuries.⁵⁸ Although gross "unreasonableness of an alleged belief may be evidence that it was not in fact held,"⁵⁹ the requirements that the edu-

57. See notes 40-45 and accompanying text *supra*.

58. NEB. REV. STAT. § 28-1413 (Supp. 1977):

The use of force upon or toward the person of another is justifiable if: . . . (2) The actor is a teacher . . . and: (a) The actor believes that the force used is necessary to further such special purpose, including the maintenance of reasonable discipline in a school, class or other group, and that the use of such force is consistent with the welfare of the minor; and (b) The degree of force, if it had been used by the parent or guardian of the minor, would not be unjustifiable under subdivision (1) (b) of this section.

NEB. REV. STAT. § 28-1413(1) (b) (Supp. 1977), defines the degree of force permitted to be used by a parent and an educator to be "[s]uch force [as] is not designed to cause or known to create a substantial risk of causing death, serious bodily harm, disfigurement, extreme pain or mental distress or gross degradation."

The legislative history indicates that there were no amendments or significant floor debate relating to the teacher's statutory privilege. As a result, the intent of the legislature is unclear. Because both statutory sections are taken directly from the MODEL PENAL CODE § 3.08 (Proposed Official Draft 1962), this note will partially draw its interpretation of the Nebraska statutes from the comments to the appropriate sections of the model code in the assumption that the Nebraska Legislature adopted at least tacitly the statutory intent of the original official committee.

59. MODEL PENAL CODE § 3.09, Comment (Proposed Official Draft 1962).

cator be *reasonable* in his belief and exert *reasonable* force are no longer necessary to justify the use of force.

Obviously broader than the privilege against civil liability,⁶⁰ the defense against a criminal prosecution for the use of force by an educator is not, however, unbounded. If the educator culpably creates substantial risk of excessive injuries as specified in section 28-1413 (1) (b) of the Nebraska Revised Statutes,⁶¹ the privilege will be unavailable and criminal liability may lie.⁶²

Furthermore, if the educator is prosecuted for an offense for which recklessness or negligence suffice for conviction, the educator's reckless or negligent acquisition of his or her belief in the justifiability of the use of force will make the privilege unavailable to the defendant.⁶³ However, "caution should be exercised in finding recklessness or negligence in forming the beliefs that are material to justification."⁶⁴

Although the infliction of serious injury or death upon a student by an educator in Nebraska is unjustifiable in a criminal prosecution for such injury, the threat of successful criminal prosecution for the exertion of any lesser degree of force is virtually nonexistent, so long as the educator's belief in the justification of such force is not recklessly or negligently acquired.

V. CONCLUSION

The refusal of the Supreme Court in *Ingraham v. Wright*⁶⁵ to extend eighth amendment sanctions against cruel and unusual punishment should not be viewed as judicial approval of corporal punishment per se. Neither should the acknowledgment by the Court that procedural due process is sufficiently guaranteed by the common law be viewed as carte blanche approval of any procedure for

60. This note maintains, for clarity of analysis, a distinction between civil and criminal standards available to Nebraska courts. It should be noted, however, that due to the lack of Nebraska precedent on the corporal punishment issue, a Nebraska court might be persuaded to adopt the statutory criminal standard as an indicator as to what the civil common law standard should be. However, in light of the policy statement of *Clasen* and the obvious derivation of the Nebraska statute from the Model Penal Code, the separation of the two standards is preferable and justifiable.

61. NEB. REV. STAT. § 28-1413(1) (b) (Supp. 1977).

62. MODEL PENAL CODE § 3.08(1), Comment (Proposed Official Draft 1962).

63. NEB. REV. STAT. § 28-1414(2) (Supp. 1977). See also MODEL PENAL CODE § 3.09(2), Comment (Proposed Official Draft 1962).

64. MODEL PENAL CODE § 3.09(2), Comment (Proposed Official Draft 1962).

65. 430 U.S. 651 (1977).

punishment that a school system may devise. The Court's holdings as to both issues were specifically limited to modes of corporal punishment as they are limited by the common law.

The Nebraska statutes relating to criminal prosecution recognize a justification for the use of force by educators so long as that force does not result in serious physical harm or death to the student. This standard is quite low and would seem to insulate from criminal liability the vast majority of educators who inflict corporal punishment.

The Nebraska Supreme Court has never dealt directly with a fact situation involving corporal punishment in the public schools. Unless the court adopts the statutory criminal standards for the determination of civil liability, the court's last statement on the issue would indicate that a teacher could be held civilly liable if a jury determined, after weighing all the circumstances of the case, that the educator administered unreasonable, unnecessary, or cruel punishment to a child.

In light of the already broad range of judicial decisions in this area⁶⁶ and the rapidly changing role of the public school in society,⁶⁷ educators, although seemingly secure in their statutory and common law privileges to administer corporal punishment, should be aware that someday they could face a jury which will be sympathetic to the pleas of a student in a particular set of circumstances, resulting in the educator being found civilly, if not criminally, liable.

But the educator and his or her privilege, regardless of its source, is only half of the corporal punishment issue. Sadly, the legal reasoning and case by case adjudication come too late to protect a battered child from the physical and emotional scars which could result from the imposition of corporal punishment, no matter how well-intentioned. Nothing short of a total ban on corporal punishment will insure the security which every student has a right to expect in his or her physical well-being.⁶⁸

It is indeed staggering that the educational system, although society's largest institution and staffed entirely by the college edu-

66. See Annot., 43 A.L.R.2d 469 (1955).

67. See 1976 WIS. L. REV. 689, 698 nn. 55-58.

68. See *Cooper v. McJunkin*, 4 Ind. (Porter) 290, 293 (1853) (Stuart, J.): The husband can no longer moderately chastise his wife; nor, according to the most recent authorities, the master his servant or apprentice. Even the degrading cruelties of the naval service have been arrested. Why the person of the schoolboy, "with his shining morning face," should be less sacred in the eye of the law than that of the apprentice or the sailor, is not easily explained.

cated, is unable to arrive at a more ingenuous solution to the disciplinary problems of the classroom than the officially sanctioned paddling of children.

Hopefully, challenges to corporal punishment will continue, in spite of the travesty of the Supreme Court's pre-revolutionary war analysis of our Constitution. Meanwhile, educators who rely on corporal punishment will continue, through their personal example, to teach the next generation that society's approach to that which disturbs its order does not include the human intellectual powers of reason, but the animal instincts of force.

Thomas D. Creighton '78