

Perfecting the Paddle: Michel Foucault's Genealogy of Disciplinary Power, the Decline of Corporal Punishment in Schools, and the Move toward More Pervasive Forms of Discipline

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*On 2 March 1757 Damiens the regicide was condemned . . . to be 'taken . . . to the Place de Greve, where, on a scaffold that will be erected there, the flesh will be torn from his breasts, arms, thighs and calves with red-hot pincers, his right hand, holding the knife with which he committed the said parricide, burnt away with sulphur, and, on those places where the flesh will be torn away, poured molten lead, boiling oil, burning resin, wax and sulphur. . .'*¹

*[The] regime at Drew was exceptionally harsh. . . . Because he was slow to respond to his teacher's instructions, Ingraham was subjected to more than 20 licks with a paddle while being held over a table in the principle's office. The paddling was so severe that he suffered a hematoma requiring medical attention and keeping him out of school for several days. Andrews was paddled several times on his arms, once depriving him of the full use of his arms for a week.*²

I. INTRODUCTION

In a recent law review article advocating the use of international human rights law to prohibit corporal punishment of children, one scholar triumphantly concludes:

Obviously, when spanking is prohibited by law and becomes socially unacceptable, our children are spared fear-ridden, harmful childhoods. . . . With the eradication of physical coercion as a childrearing technique, future adults will not be as aggressive, authoritarian, or lacking in empathy. Our descendents will then be poised for an epochal psychological breakthrough: at last the human psyche will be free to shun the tyranny, cruelty, and crimes against humanity that have plagued past millennia.³

This rhetorical flourish probably represents a special degree of hyperbole; nevertheless, the belief that ending corporal punishment would signal a new respect for freedom and

¹ See Michel Foucault, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 3 (trans. Alan Sheridan, 2d ed. 1995) (quoting description of public execution in William Blackstone, 4 *COMMENTARIES ON THE LAWS OF ENGLAND* 9, 89 (1766)).

² *Ingraham v. Wright*, 430 U.S. 651, 657 (1977).

³ Obviously, indeed. The quote is from Susan H. Bitensky, "Spare the Rod, Embrace Human Rights: International Law's Mandate Against All Corporal Punishment of Children," 21 *WHITTIER L. REV.* 147, 161 (1999).

individual rights is typical of the literature in the area.⁴ Such a belief does, admittedly, possess a certain intuitive value. Physical punishment is certainly among the most conspicuous displays of power and authority. Anecdotal recollections of ancient torture can leave us with a feeling of unfathomable horror. To a lesser degree perhaps, reports of severe corporal punishment of schoolchildren can also leave us quite uncomfortable.

Yet, the intuitive connection between the abolition of physical punishment and the reemergence of individual freedom may be less accurate than it seems. Debunking this connection is, in fact, a principle objective of Michel Foucault's 1975 treatise on the history of discipline, *Discipline and Punish*. Foucault traces the history of discipline from the horrific public tortures and executions of medieval monarchs to the prisons of modern day. To Foucault, contemporary institutions such as the prison represent the evolution of disciplinary power from the raw, primal force of public torture, to a sophisticated, well-planned, efficient, and complete system of control. His premise, that penal reform has served "not to punish less, but to punish better,"⁵ forms the basis of his argument that while the exercise of disciplinary power has become less shocking, the power of authorities over individuals has actually grown as discipline has become more hidden and sophisticated. In other words, while the practice of torture may shock us more, imprisonment exerts a power over an individual that is longer lasting and which seeks to control one's everyday behavior, rather than cause merely momentary pain upon the body.

⁴ See, e.g. Irwin A. Hyman, et. al., "Paddling and Pro-Paddling Polemics: Refuting Nineteenth Century Pedagogy," 31 J.L. & EDUC. 74, 77 (2002) (providing another example of anti-paddling, pro-rights literature and noting near unanimity in professional literature that corporal punishment should not be used in schools). The research done for this paper revealed that nearly all law review articles written on the subject of corporal punishment in schools advocate ending or limiting the practice.

⁵ See Michel Foucault. DISCIPLINE *supra* note 1, at 82 (describing evolution of disciplinary power in Western society).

Like the history of criminal discipline, the history of corporal punishment in American schools reveals a gradual evolution from a dependence upon physical punishments to the employment of more thoroughly thought-out and effective means of controlling students. Many educators and scholars have come to realize that the old practices of physically beating children often breeds resentment, rebellion, and criminality. Modern forms of discipline are thus beginning to emerge. Strict surveillance of students, an intricate system of recording student behavior, the organization of “problem” students into separate institutions, and the use of behavior modifying drugs represent modern, more effective forms of discipline and control. An analysis of these new methods and the rhetoric surrounding them draws our attention to the potential these methods have for becoming power instruments of social control. While this analysis probably will not inspire us to revert entirely to our former corporal habits, it should at least give us pause to consider the future of individual freedom and autonomy and how it is expressed in our disciplinary practices in school. A better understanding of the history of our disciplinary system and the nature of power may make room for the emergence of effective alternatives which continue to respect individual liberty.

II. BACKGROUND

In its 1977 decision in *Ingraham v. Wright*, the United States Supreme Court noted the long tradition of corporal punishment in American schools.⁶ Against this backdrop of historical acceptance, the Court decided that the practice did not implicate key constitutional safeguards against excessive or unfairly-imposed punishments.⁷ Yet, despite the Court’s implicit endorsement of the practice, corporal punishment is fading as a disciplinary tool in American

⁶ *Ingraham*, 430 U.S. at 660.

⁷ *See id.* at 664, 678 (holding that paddling does not violate Eighth Amendment; holding that paddling policies in question did not violate procedural due process).

academia.⁸ Michel Foucault’s theory of the evolution of disciplinary practices may help to explain this trend in a rather non-obvious way. To Foucault, the decline in harsh, physical criminal punishments has been largely a result of those punishments’ tendencies to incite violent popular rebellion and thus to undermine the power of those in authority.⁹ Those styles of punishment have been largely replaced by highly organized forms of institutional surveillance and control, such as the modern prison.¹⁰ Closely analyzed, the replacement of corporal punishment in schools by modern disciplinary practices may be understood not as a simple reemergence of humanity and liberty, but as discipline’s evolution into new, more effective and pervasive forms of control.

A. *Ingraham v. Wright* and the still-evolving history of corporal punishment

In its seminal decision on corporal punishment in schools, the U.S. Supreme Court in *Ingraham v. Wright* was confronted with two primary issues: first, whether paddling in schools was actionable as a violation of the Eighth Amendment’s prohibition against cruel and unusual punishment; and second, whether the Due Process Clause requires that students subject to paddling be given prior notice and an opportunity to be heard.¹¹ The Court ultimately concluded that corporal punishment implicated neither the Eighth Amendment nor procedural due process.¹²

⁸ See *infra* notes 30-37 and accompanying text (noting trend away from corporal punishment).

⁹ See *infra* notes 41-54 and accompanying text (describing Foucault’s theory of reform as reaction to popular rebellion).

¹⁰ See *infra* notes 55-67 and accompanying text (describing Foucault’s theory of “better” punishment).

¹¹ *Ingraham*, 430 U.S. at 653.

¹² See *id.* at 664, 678 (holding that paddling does not violate Eighth Amendment; holding that paddling policies in question did not violate procedural due process). As we shall see, however, the issue of substantive due process was left open, which has caused conflict among the circuits as to corporal punishment’s propriety.

The Petitioners in the case were a group of minors who had been paddled in junior high schools in Dade County, FL.¹³ The students claimed that their constitutional rights had been violated by the Dade County School Board's policies, which authorized teachers to paddle students.¹⁴ Particular emphasis was placed upon one instance in which Petitioner Ingraham claimed to have been hit twenty times with a paddle, causing him to suffer a hematoma, "requiring medical attention and keeping him out of school for several days."¹⁵ Another Petitioner alleged being struck on the arms so severely that he was deprived of full use of one arm for a week.¹⁶

The Petitioners' constitutional complaint was dismissed as a matter of law at the District Court, which found that the punishment described, even if the allegations were true, lacked the elements of "severity, arbitrary infliction, unacceptability in terms of contemporary standards, or gross disproportion" which must exist before punishment reaches the level of "cruel and unusual" proscribed by the Constitution.¹⁷ A panel of the 5th Circuit Court of Appeals reversed, finding that the described punishment was "so severe and oppressive" that it was proscribed under the Eight Amendment and that the procedures outlined in the School Board's policy offended due process protections.¹⁸ Upon rehearing, an en banc panel reinstated the District Court's decision, aptly noting that the "paddling of recalcitrant children has long been an accepted method of promoting good behavior and instilling notions of responsibility and decorum into the mischievous heads of school children."¹⁹

¹³ *Id.* at 653-54.

¹⁴ *Id.* at 656.

¹⁵ *Id.* at 657.

¹⁶ *Id.*

¹⁷ *Id.* at 658.

¹⁸ *Id.*

¹⁹ *Id.* (quoting *Ingraham v. Wright*, 525 F.2d 909, 917 (5th Cir. 1976)).

A majority in the Supreme Court agreed with the Circuit Court’s en banc decision. The Court’s decision that school discipline fell outside the protections of the Eighth Amendment rested largely on the majority’s view of the history of punishment in America. In fact, the court noted that history is to some extent determinative of the definition of “cruel and unusual punishment,” citing the plurality opinion in *Powell v. Texas* for the proposition that decisions on the matter should be made in light of “traditional common-law concepts” and “the attitudes which our society has traditionally taken.”²⁰ According to the *Ingraham* Court, while our system of criminal discipline has largely abandoned corporal punishment, the time-honored tradition of corporal punishment in schools has remained largely intact, and continues to be widely accepted.²¹ The Court noted an intense debate among educators as to corporal punishment’s propriety, yet found, “we can discern no trend toward its elimination.”²² The “single principle” regulating the use of such punishment is that disciplinary force be “reasonable, but not excessive.”²³ The *Ingraham* decision, and the legality of corporal punishment in schools, is still good law today. Yet, despite this holding, and despite years of tradition, changes in our culture’s approach to corporal punishment in schools are beginning to emerge.

The *Ingraham* Court correctly noted that corporal punishment of children has been around for a long time. A tradition brought to the states by European immigrants of the eighteenth and nineteenth century, corporal punishment may have been inspired in part by the belief that parents should beat their inherently sinful children as a means of “driving the devil from them.”²⁴ As the locus of formal schooling and training moved from the home to schools,

²⁰ *Id.* at 659 (quoting 392 U.S. 514, 535, 531 (1968)).

²¹ *Id.* at 660.

²² *Id.* at 660-61.

²³ *Id.* at 661.

²⁴ 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, 128-29 (2000), (citing Leonard P. Edwards, “Corporal Punishment and the Legal System,” 36 SANTA CLARA L. REV. 983, 987-88 (1996)).

however, the administrator of corporal justice oftentimes became the teacher or schoolmaster, acting *in loco parenti*.²⁵ Needless to say, corporal punishment in schools was a well-accepted and well-practiced American institution throughout the eighteenth and nineteenth centuries, and well into the mid-twentieth century.²⁶ While paddling has probably been the most widely practiced form of corporal punishment,²⁷ anecdotal evidence points to a catalog of punishments limited only by the creativity of their administrators.²⁸ Moreover, such practices, “in the old days,” generally “received wholehearted parental, administrative, and public support.”²⁹

Times are changing. Within the past 40 years, corporal punishment has been officially abolished in the legislatures of 27 states and the District of Columbia.³⁰ In many states where the practice is still technically legal, such as Pennsylvania, Rhode Island, and Wyoming, “the institution has all but died out.”³¹ What’s more, even in states where the practice is still an important part of school discipline – mostly conservative one in the Southeast and Midwest – “policies long favoring corporal punishment have come up for debate,” with controversy arising as to both the appropriateness and effectiveness of corporal punishment.³² One prominent example of encroaching reform lies in Memphis, Tennessee, where the school board recently voted to prohibit corporal punishment despite approval of the practice by nearly 70% of local

²⁵ See *Ingraham*, 430 U.S. at 662 (describing *in loco parenti* roots of corporal punishment in schools). The doctrine of *in loco parenti* as justification for corporal punishment has, according to the *Ingraham* Court, largely given way to a power possessed by the state itself to punish for the maintenance of school discipline. *Id.*

²⁶ See John Manning, “Discipline in the Good Old Days,” in CORPORAL PUNISHMENT IN AMERICAN EDUCATION 50, 52 (1979).

²⁷ See *Ingraham*, 430 U.S. at 659 (noting paddling’s prominence among methods of punishment).

²⁸ See Manning, *supra* note 26, at 51 (describing, inter alia, methods of punishment including students’ being “forced to wear a necklace of sharp Jamestown weed-burrs, strung on tape); Donald R. Raichle, “The Abolition of Corporal Punishment in New Jersey Schools,” in CORPORAL PUNISHMENT IN AMERICAN EDUCATION 62, 76 (1979) (describing, inter alia, punishment by “popping a handful of pepper” into unruly students’ mouths).

²⁹ Manning, *supra* note 26, at 52.

³⁰ Stacy A. Teicher, “To paddle or not to paddle? It’s still not clear in U.S. schools.” CHRISTIAN SCIENCE MONITOR, March 17, 2005, p. 01.

³¹ Michael Dobbs, “U.S. Students Still Getting the Paddle; Corporal Punishment Laws Often Reflect Regional Chasms,” THE WASHINGTON POST, February 21, 2004, p. A01.

³² *Id.*

parents.³³ The Memphis school board hopes to replace the practice with “mental health support, problem-solving teams,” and something called a “blue ribbon behavior initiative” designed to reward well-behaving students.³⁴ While in-school corporal punishment is still observed in many states, according to the Center for Effective Discipline’s analysis of data from the US Department of Education, “between 1980 and 2000, the number of students struck in US public schools declined from 1.4 million to 342,000.”³⁵ Thus, regardless of the fact that many continue to profess a philosophical adherence to the practice, the trend is decidedly moving away from corporal punishment in schools. What’s more, nearly all European states have banned the practice in their schools.³⁶ Zimbabwe, Zambia, and Pakistan are among the most recent members of the international community to join the trend toward banning corporal punishment.³⁷

B. Foucault’s Theory of the History of Criminal Discipline

Michel Foucault became famous in philosophical circles in the mid- to late-twentieth century for his “genealogical” critiques of modern phenomena such as the development of psychology and the evolution of the criminal justice system.³⁸ Foucault’s genealogies contrast traditional historical accounts by attributing modern phenomena to the convergence of gradual and even accidental turns in human history, rather than to any rationally-sought “grand scheme of progressive history.”³⁹ His history of modern disciplinary practices, *Discipline and Punish*, posits that the modern trend away from brutal physical torture and toward more humanitarian

³³ Ellen Barry, “In Memphis, a Battle Won, the Paddle Lost,” LOS ANGELES TIMES, Home Edition, November 24, 2004 p. A14.

³⁴ *Id.*

³⁵ Teicher, *supra* note 30.

³⁶ Dobbs, *supra* note 31.

³⁷ *Id.*

³⁸ The Metaphysics Research Lab Center for the Study of Language and Information, “Michel Foucault” § 3.2, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, <http://plato.stanford.edu/entries/foucault/>.

³⁹ *Id.*

and “gentler” punishments, while partially the result of popular demands for reform, is also the result of a society that values greater, yet subtler and less shocking control over individuals – “not to punish less, but to punish better.”⁴⁰

1. The failures of corporal punishment

According to Foucault, antiquated forms of corporal punishment such as torture were relied upon by a political system whose legitimacy was based almost solely upon its ability to terrorize the population into submission. The public execution, as a horrifying spectacle, was but one of a series of “great rituals” deployed by the sovereigns of early Western civilization to remind the public of their power and to frighten the populace into obedience.⁴¹ These rituals, designed to “[deploy] before all eyes an invincible force,” also included the coronation ceremony for monarchs, a king’s entry into a conquered city, and the submission of rebellious subjects.⁴²

The public execution was especially important to the maintenance of such a sovereign. The execution represented the king’s crushing and overwhelming triumph over an individual who had broken the king’s law and whose crime had thus “attack[ed] the sovereign” himself.⁴³ The public execution was, then, a symbolic act of decisive restoration of the king’s power over the offender, “the physical strength of the sovereign beating down upon the body of his adversary and mastering it.”⁴⁴ The execution’s public nature made it “an exercise in ‘terror’” which reminded everyone watching of the consequences of resisting the power of the sovereign.⁴⁵ “Nothing was to be hidden in the triumph of the law.”⁴⁶

⁴⁰ Michel Foucault, *supra* note 1, at 82.

⁴¹ *Id.* at 48.

⁴² *Id.*

⁴³ *Id.* at 47.

⁴⁴ *Id.* at 49.

⁴⁵ *Id.*

⁴⁶ *Id.*

Oddly, it was the public, overt, and excessive nature of this punitive system that was precisely its downfall. “In the ceremonies of the public execution, the main character was the people, whose real and immediate presence was required for the performance.”⁴⁷ This system of punishment, because it was designed to terrorize the public into submission, depended upon the witness of the public for its effectiveness. Not only was the punishment effective in that it frightened all into obedience, it was legitimate in that it was witnessed and thus implicitly accepted by the people at large.⁴⁸ Unfortunately for the sovereign, “it was on this point that the people, drawn to the spectacle, could express its rejection of the punitive power and sometimes revolt.”⁴⁹

The public execution became a locus for popular revolt in at least two ways. First, the execution created the luxury of a “momentary saturnalia,” in which the accused had nothing to lose and thus could say or do whatever he wanted.⁵⁰ Consequently, the public would gather not only to witness the state’s awesome power, but also for the excitement of hearing an individual “who had nothing more to lose curse the judges, the laws, the government, and religion.”⁵¹ Second, these executions, especially when they appeared to be unjust, often inspired public uprising and violent revolts. Foucault recounts two famous and well-recorded instances in French punitive history as evidence of this trend. The first, which took place at the end of the seventeenth century, involved a murderer who the public believed to have been unjustly condemned. When the scaffold malfunctioned, and the hanging failed to kill the prisoner, the executioner had to intervene to attempt to finalize the execution. Seeing that the prisoner was greatly suffering, a large group of people wrestled the prisoner away from the executioner. The

⁴⁷ *Id.* at 58.

⁴⁸ *Id.*

⁴⁹ *Id.* at 59.

⁵⁰ *Id.* at 60.

⁵¹ *Id.*

through beat the executioner, destroyed the scaffold, and took the man away to clothe and bathe him.⁵² The second event, which happened a century later, manifested the authorities' increasing concern with public uprising. As two condemned murderers were taken for public execution, two ranks of soldiers were ordered to surround the gallows, one rank facing the gallows, the other facing the crowd. The purpose was to keep the crowd a good distance from the execution and thus prevent the types of disruptions that were apparently becoming more and more commonplace.⁵³ While the execution did take place, the safeguards represented the sovereign's recognition that punishment, to be effective, may have to be hidden from sight. According to Foucault, the public execution's growing inability to terrorize the public into submission was a primary concern in the minds of many who sought to reform criminal justice in the eighteenth and nineteenth centuries.⁵⁴

2. Punitive reform and the increasingly pervasive nature of discipline

Foucault posits that the centralized, overwhelming punitive power manifested in public executions has, over time, been replaced by less shocking, yet more pervasive and complete manifestations of power. This modern system is most aptly manifest in the prison, but is also apparent in the modern factory, the military, and in schools. Foucault describes this new disciplinary form as such:

It is not a triumphant power, which because of its own excess can pride itself on its omnipotence; it is a modest, suspicious power, which functions as a calculated, but permanent economy. These are humble modalities, minor procedures, as compared with the majestic rituals of sovereignty or the great apparatuses of the state.⁵⁵

⁵² *Id.* at 63-4.

⁵³ *Id.* at 65.

⁵⁴ *Id.* at 63.

⁵⁵ *Id.* at 171.

Rather than the gallows and torture-devices of days past, this modern form of disciplinary power is exercised through the use of three primary “instruments:” “hierarchical observation,” “normalizing judgment,” and “the examination.”⁵⁶ By hierarchical observation is meant something akin to surveillance: for those in authority to keep constant watch over individuals under their control; to ensure that no action goes unnoticed, and thus to ensure that those in power may exercise control over even the smallest and most insignificant acts.⁵⁷ By normalizing judgment is meant a system that, while observing all actions, also makes precise judgments about each action and imposes some proportionate penalty. Rather than imposing a single massive penalty for egregious acts, a system of normalizing judgment imposes a series of “micro-penalties” for simple deviations from established standards of acceptability.⁵⁸ Foucault describes these “micro-penalties” as “subtle procedures . . . from light physical punishment to minor deprivations and petty humiliations” in response to even “the slightest departures from correct behavior.”⁵⁹

Finally, Foucault points to the examination as the combination of hierarchical observation and normalizing judgment.⁶⁰ By examination, Foucault seems to mean any ritualized activity, whether it be a test in school, an inspection of barracks in the military, or a psychological profile given to a mental patient, in which those in authority subject individuals to a ritualized process of observation and judgment.⁶¹ The examination, then, serves not only to observe and judge an individual, but also to provide a means to definitively “fix” an individual based on the results of that judgment.⁶² The purpose of this “defining” is to reduce an individual to a “case” which

⁵⁶ *Id.*

⁵⁷ *See id.* at 170-77 (describing “normalizing judgment”).

⁵⁸ *Id.* at 178

⁵⁹ *Id.*

⁶⁰ *Id.* at 184.

⁶¹ *See id.* at 184-92.

⁶² *Id.*

“may be described, judged, measured, compared with others;” the purpose of all this being to create a predictable, well-understood entity that can be “trained or corrected, classified, normalized, excluded, etc.”⁶³ In other words, the examination seeks to reduce a complex, unpredictable human individual into a simple, predictable entity that can be more easily controlled and utilized by those in power.

To Foucault, these changes in discipline are manifest in, among other places, the modern prison and the modern school. The modern prison, the ultimate manifestation of discipline’s evolution, involves the absolute organization of all aspects of an individual’s life into predictable, regimented spaces.⁶⁴ Prison is a place where the government may regulate an individual’s “waking and sleeping,” “number and duration of meals,” “quality and ration of food,” “the nature and product of labor,” and so on.⁶⁵ Foucault characterizes the contemporary schoolhouse as another manifestation of this same style of discipline.⁶⁶ The modern schoolhouse is a place of surveillance, where students are lined up into predictable rows of desks, watched over by the all-seeing eye of the teacher. These “pedagogical machines” are designed to “train” young people to accept particular versions of truth, and to penalize them for even slight deviations in behavior or level of knowledge.⁶⁷ These claims, certainly radical, warrant close analysis.

III. READING THE HISTORY OF CORPORAL PUNISHMENT THROUGH FOUCAULT’S LENS

An examination of the history and rhetoric surrounding reform of corporal punishment policies in American schools reveals a pattern that parallels the history of disciplinary power as

⁶³ *Id.* at 191.

⁶⁴ *See id.* at 239-248 (describing organization of various aspects of prisoners’ lives).

⁶⁵ *Id.* at 236

⁶⁶ *See id.* at 172-176 (describing school buildings as disciplinary machines).

⁶⁷ *Id.* at 178.

described by Michel Foucault. Debates over corporal punishment in school, while couched in humanitarian terms, also emphasize a desire to assert less overt, yet more effective methods of discipline and control over the lives of students. Foucault's genealogy of punitive reform, if one accepts it, helps to dispel the notion that a trend away from corporal punishment is also necessarily a trend of greater liberty and declining institutional authority and control.

A. A preliminary matter: *Ingraham v. Wright* and the bifurcation of the history of criminal punishment and school discipline

Any attempt to parallel the history of criminal punishment and school discipline may encounter the initial problem of explaining why the two seem to have evolved with such a marked incongruity. The *Ingraham* decision draws special attention to this problem. In rejecting the argument that the Constitution's proscription against cruel and unusual punishment could be used to regulate corporal punishment in schools, the *Ingraham* Court held: "An examination of the history of the [Eighth] Amendment and the decisions of this court . . . confirms that it was designed to protect those convicted of crimes. We adhere to this longstanding limitation and hold that the [the Amendment] does not apply to the paddling of children . . . in public schools."⁶⁸ According to the Court, the Eighth Amendment's ban on "cruel and unusual punishment" was promulgated based exclusively on concerns with the excessive punishment of criminals. The Amendment's text was taken "almost verbatim," from a colonial document that found its origins in the English Bill of Rights of 1689.⁶⁹ The English bill was drafted in reaction to excessive punishments prescribed by English judges, and was modeled by American revolutionaries who also feared "the imposition of torture and other cruel punishments" imposed both by judges and

⁶⁸ *Id.* at 664

⁶⁹ *Id.*

overzealous legislators.⁷⁰ Because the history of the Constitution’s prohibition against cruel and unusual punishment indicates an amendment designed to curb excessive criminal punishments, according to the Court, disciplinary procedures in school are beyond the Eighth Amendment’s purview.⁷¹

The *Ingraham* Court may have been correct to suggest that the histories of criminal punishment and school discipline have evolved separate from one another; however, the experience of the federal circuit courts of appeal post-*Ingraham* reveals that criminal law reformers’ concern that punishment be less “shocking” and more “reasonable” continues to run through the jurisprudence of corporal punishment in schools. For example, in the Fourth Circuit case of *Hall v. Tawney*, a case characterized by the Sixth Circuit as “seminal” in the jurisprudence of corporal punishment, the court held that fundamental rights to substantive due process are implicated by excessive or disproportionate corporal punishment in schools.⁷² The *Hall* court read *Ingraham*’s reservation of the substantive due process issue to mean that those rights “might be implicated in school disciplinary punishments even though procedural due process is afforded by adequate state civil and criminal remedies, and though cruel and unusual punishment is not implicated at all.”⁷³ Strikingly, the court based its finding in the logic of cases involving inhumane treatment of criminal suspects, including, inter alia, *Rochin v. California*, a U.S. Supreme Court case involving forcible use of a stomach pump by police, and *Johnson v. Glick*, a Second Circuit case dealing with the unprovoked beating of a pre-trial detainee by a guard.⁷⁴ The right of students implicated by corporal punishment was described as “the right to

⁷⁰ *Id.* at 665.

⁷¹ *Id.* at 664.

⁷² 621 F.2d 607, 611 (4th Cir. 1980). The Sixth Circuit’s characterization of the case appears in *Saylor v. Board of Ed. of Harlan County, Ky.*, 118 F.3d 507, 514 (6th Cir. 1997).

⁷³ 621 F.2d at 611.

⁷⁴ *Id.* at 613, *citing*, inter alia, 342 U.S. 165 (1952), and 481 F.2d 1028 (2d. Cir. 1973).

be free of state intrusions into realms of personal privacy and bodily security through means so brutal, demeaning, and harmful as literally to shock the conscience of a court.”⁷⁵ The court established a rule that corporal punishment violates a student’s substantive due process rights when “the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism . . . that it amounted to a brutal and inhumane abuse of power literally shocking to the conscience.”⁷⁶ The *Hall* rule has been adopted by both the Sixth and Tenth Circuits, and has been explicitly rejected only by the Fifth.⁷⁷

Clearly then, if the *Hall* decision is any indication, the same concerns embodied by the Eighth Amendment and by Foucault’s reformers of criminal punishment also embody the evolving jurisprudence of school discipline. By the same token, the humanitarian considerations that have had the perhaps unintended effect of making criminal punishment more subtle and pervasive may have had similar effects in the area of school discipline. Despite the separate histories of criminal and educational discipline, we may nonetheless draw important parallels between the two histories. The still-evolving history of school discipline, like the history of criminal punishment, can be understood as an evolution from a corporal, physical style of terror-inducing punishment to a subtler, yet more effective system of surveillance and control.

B. Avoiding rebellions

The history of the abolition of corporal punishment in New Jersey schools in 1893 illustrates how the desire to create a more predictable and effective system of punishment has helped to motivate reform. Historian Donald R. Raichle argues that legislation to ban the practice throughout the state may have been inspired by a well-publicized incident that occurred a day or

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See Irwin A. Hyman, et al. *supra* note 4, at 75-76 (chronicling circuit courts’ approaches).

so before the bill was introduced: a mother who believed her child had been punished too severely later showed up at the schoolhouse and gave the child's teacher "what the newspaper called a sound 'cowhiding.'"⁷⁸ Another well-known anecdote of corporal punishment's failure in New Jersey involved one Nathan Hedges, who served as the state's dean of teachers at the time the corporal punishment ban took effect.

. . . Hedges developed his own, ruthlessly playful style. . . . The victim was forced to crawl, on hands and knees, under the legs of the schoolmaster who stood like the Colossus of Rhodes, feet wide apart to permit the passage, meanwhile rewarding the victim with a shower of blows. . . . On one occasion, a particularly muscular lad, held fast by the schoolmaster's legs, simply stood up and toppled Colossus in what was surely the high point of delight in the school careers of those students present.⁷⁹

These anecdotes draw clear parallels to those Foucault recounts of the popular revolts that caused the failure of ancient forms of public criminal punishment. Just as the ancient sovereign's reliance upon brute force perhaps revealed its fragile dependence upon such force for legitimacy, the dependence on corporal punishment, in and of itself, perhaps undermined the educational system's sense of legitimate authority. Professor Raichle argues, "Does not corporal punishment forever establish the psychic insecurity of the schoolman and his own anxiety about the monotony, the irrelevance, and the haunting inhumanity of so many of the things he taught and the way he taught them?"⁸⁰ In other words, corporal punishment, rather than emphasizing the educational system's power, tended to reveal a glaring insecurity and weakness: absent the paddle, its power was empty. In fact, the New Jersey ban on corporal punishment was eventually accepted for these very reasons. The Superintendent for Newark Schools, himself reputed as a disciplinarian, expressed his hope that the new law would result in "more study [that] would enlighten 'the whole subject of punishments as related to the reformation, training, and education

⁷⁸ Donald R. Raichle, *supra* note 28 at 76.

⁷⁹ *Id.* at 65-66.

⁸⁰ *Id.* at 83.

of the young.’’⁸¹ Indeed, New Jersey’s substitute for corporal punishment, the segregation of “incurrigibles” into ungraded “reformatory” schools with “strict” faculties, resulted in greater student obedience.⁸²

The concern that corporal punishment might elicit violent backlash is also suggested by academic research and writing on the “cultural spillover” theory.⁸³ The basic hypothesis behind this research is that violent forms of punishment tend to create a society of violent criminals. This research, which examines punitive practices and crime statistics across various states and nations, suggests that children who are hit are more likely than others to commit crimes.⁸⁴ In other words, when authority figures hit children, children learn that violence is an acceptable means of accomplishing one’s goals, and are more likely to use violence in the future. This logic closely parallels the logic behind ending public executions: if the state treats the populace with great violence, great violence becomes the accepted currency of power, and dissent will be expressed in violent acts of rebellion against the state. Corporal punishment, then, is not only disfavored because of some lofty concern with liberty or human rights; it becomes disfavored also because it increases, rather than quells, undesirable social behavior. Certainly the objective is a good one; however, when it becomes clear that the objective of reform is not only to liberate, but also to control, we must be cautious that the latter objective does not overpower the former. Trends in modern school disciplinary practices suggest that our vigilance may be lapsing.

⁸¹ *Id.* at 79-80, *citing* Newark Board of Education, “Corporal Punishment,” ANNUAL REPORT 98, 100 (1894).

⁸² *See id.* at 79-81 (describing new reformatory schools’ emergence after ban).

⁸³ *See* Murray A. Straus, BEATING THE DEVIL OUT OF THEM 114 (Transaction edition, 2001) (collecting data from and describing cultural spillover research).

⁸⁴ *Id.* at 117.

C. “To punish better”

The experience of Soviet-era schools in the former USSR helps to demonstrate the ways in which non-corporal punishment in schools may be woven seamlessly into even a nation “scored for its brutal penal system and severe limitations on . . . essential civil rights.”⁸⁵ Kenneth Cassie’s observations of discipline in Soviet schools reveals a system in which corporal punishment was illegal, yet disciplinary control was profoundly well-tuned and effective.⁸⁶ The Soviet system employed both a system of hierarchical observation and an intense, formal system of normalizing judgment to effectuate almost perfect discipline. A prominent example of hierarchical observation in the Soviet school was the “dezhurny” system, which required students in upper grades to routinely monitor the behavior of younger students; the older students were then strictly monitored by teachers, who harshly enforced the older students’ duties.⁸⁷ Failure to keep the younger students in line could result in a “black mark,” which was viewed as a sign of great shame.⁸⁸ The hierarchical, observatory nature of education is also revealed in the one-directional nature of teacher-student interaction in the classroom. Teachers would ask questions, and students were expected merely to record information and provide correct answers when called upon; they were constantly monitored for correctness, with little in the way of “discussion” or even for students’ asking questions of the teacher.⁸⁹

The employment of a powerful normalizing judgment was central to Soviet-era discipline. Students received grades not merely based upon the quality of their work, but also

⁸⁵ See Kenneth Cassie, “Discipline in Soviet Schools: The Observations of an American Teaching in the USSR,” in *CORPORAL PUNISHMENT IN AMERICAN EDUCATION* 286, 286 (1979).

⁸⁶ See *id.* at 290-297 (describing Soviet-era school discipline).

⁸⁷ *Id.* at 293-94.

⁸⁸ *Id.*

⁸⁹ *Id.*

upon their behavior, with severe social consequences for even slight deviations from the ideal.⁹⁰ “Students were expected to behave perfectly in school, for which they receive a behavior grade of ‘5.’ Should the grade for behavior slip to a ‘4,’ the student may be placed on probation.”⁹¹ Imperfect behavior grades could result in loss of awards, or even the most dreaded consequence, loss of membership in Soviet political groups, a penalty treated by both school and family with great “guilt, unworthiness, and shame.”⁹² Thus, a system of complete surveillance over students, combined with intense, deeply-rooted social consequences for even minor behavioral deviations, created highly effective discipline without resort to corporal punishment.

The contemporary American system of school discipline may be growing to parallel the Soviet system in many respects. One scholar has looked to depictions of American schools in our popular culture to suggest that school discipline has indeed become a system of surveillance, judgment, and control over student’s thoughts.⁹³ For example, the well-known threat “this is going to go on your *permanent record!*” demonstrates one way the American system employs fear of a permanent, normalized judgment about one’s value in society in order to control students.⁹⁴ The traditional American classroom, a series of carefully lined up desks in which students are expected to sit quietly, demonstrates at least an attempt (granted, an often unsuccessful one), to organize students into a predictable and routine pattern.⁹⁵ Detailed files are kept on student’s behavior and progress in order to record their behaviors and make judgments as to whether they are “normal,” “gifted,” “troubled,” or otherwise.⁹⁶ Popular depictions of “school

⁹⁰ *Id.* at 291.

⁹¹ *Id.*

⁹² *Id.*

⁹³ See Margaret Betz Hull, “Postmodern Philosophy Meets Pop Cartoon: Michel Foucault and Matt Groening,” 34.2 JOURNAL OF POPULAR CULTURE 57, 62 (2002) (analysing Matt Groening’s depictions of school discipline through Foucault’s theories).

⁹⁴ See *id.* (citing depiction of threat in *Simpsons* cartoons).

⁹⁵ See *id.* at 61-62 (citing depictions of uncomfortable rows of desks in Groening’s comic strips).

⁹⁶ See *id.* at 62 (citing depictions of data-collecting in *Simpsons* cartoons).

as jail,” “a holding pen designed to help us through our formative ‘snotty’ years,” similarly reveal the feeling held by many Americans that our schools have become institutions designed to observe, judge, and train students into normalcy.⁹⁷

The increased use of “reward discipline” is another indication that discipline in schools is moving in the direction described by Foucault. Researchers into school discipline increasingly suggest the use of positive incentives as a means by which to control student behavior.⁹⁸ This description offers a glimpse of the practice’s aim to slowly mold a student’s behavior in a subtle, undetectable manner:

Through a process of rewarding ever increasing small amounts of appropriate behavior (shaping), a child may learn to sit still in his/her chair for longer periods of time, keep from talking out for longer periods of time, increase greater amounts [sic] of peer cooperation, increase on-task school work performance, or complete more classroom assignments.⁹⁹

Foucault recognized that this form of discipline, which he called “gratification-punishment” is an especially pervasive means of “training and correction.”¹⁰⁰ The goal, according to Foucault, is to “win the heart” of the disciplined person, making it easier to control them.¹⁰¹

A far more troubling trend in American schooling, however, is the increasing use of drugs like Ritalin to quell the behavior of students “distracted” from lessons in the classroom.¹⁰² Researchers concerned with the increasing use of these drugs note that a person on Ritalin can be “like a horse with blinders, plodding along. He’s moving forward, getting things done, but he’s

⁹⁷ See *id.* at 63 (citing quote for *Simpsons* episode).

⁹⁸ James H. Wise, “The Carrot Not the Stick: Comparing the Use of Reward to Corporal Punishment in Promoting Discipline, Learning, and Human Relationships in the Classroom,” in *CORPORAL PUNISHMENT IN AMERICAN EDUCATION* 373, 375-76 (1979).

⁹⁹ *Id.* at 376.

¹⁰⁰ Foucault, *supra* note 1, at 180.

¹⁰¹ *Id.*

¹⁰² See Jeffrey Zaslow, “What If Einstein Had Taken Ritalin? ADHD’s Impact on Creativity,” *WALL STREET JOURNAL – Eastern Edition*, January 25, 2005, p.D1 (describing trend).

less open to inspiration.”¹⁰³ Among our most well-renowned geniuses who may have technically had Attention Deficit “Disorder” are Thomas Edison, Salvador Dali, and Winston Churchill.¹⁰⁴ The list extends into contemporary times to include some of our greatest business leaders and artists.¹⁰⁵ Yet, the rate of prescriptions of ADHD drugs is rising rapidly; moreover, because the phenomenon is relatively new, there is little known about the long-term effects of these drugs on creativity.¹⁰⁶ In any case, it is clear that a society willing to drug its children in order to make them more predictable and controllable, yet less eccentric, is almost certainly a society moving toward the type of surveillance, judgment, and control described by Foucault. The resort to drugs as a means of control, perhaps more than any other trend, reveals the potential danger in disciplinary power’s evolution. Perhaps our punishments have indeed become less corporal, less physically painful; but if the price we pay is a loss of individualism, freedom, and creativity, it may not be worth it.

IV. CONCLUSION

One might suggest that a prominent weakness in Foucault’s philosophy is its lack of a positive, forward-looking direction. While his genius in deciphering historical trends is undeniable, his ability to provide the reader with possible avenues to avoid history’s less desirable results is perhaps lacking. This paper perhaps shares that weakness. As one scholar has noted recently, Foucault’s works are quite attractive to those who are critical of current trends in education, but who feel powerless to do anything about it:

Many academics . . . have maintained their egalitarian aspirations and hence the critical stance towards the role of schooling in modern societies that they adopted as young

¹⁰³ *Id.* (quoting Lara Honos-Webb, an ADHD researcher and psychologist at Santa Clara University).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

scholars. . . . At the same time, the public schools' apparent immunity to fundamental change over a generation demands a perspective whereby scholars can give expression to both the aspiration for transformation and to the despair regarding this possibility. Foucault's stance is ideally suited to meet this demand. . . . [By] embracing Foucault, scholars can announce their resignation to the status quo while appearing to protest it.¹⁰⁷

It is true that Foucault's description of history's course does suggest a certain air of inevitability. His genealogy of disciplinary power paints a picture of an overwhelming institutional authority; a sort of hydra whose power only reemerges twofold each time one of its most sinister heads is cut off.

On the other hand, Foucault's view of history may also give rise to creative and constructive ways of thinking about the future of education. If we were to combine the humanitarian, anti-corporal punishment view of reformers with Foucault's recognition that power and control manifest themselves in non-violent as well as violent forms, we could craft creative and effective alternatives to our current methods of discipline. Certainly, a wholesale reversion to the sort of abusive, sadist, corporal styles of the past is uncalled for. Yet, perhaps we should recognize that, from the standpoint of individual autonomy, reasonable corporal punishment may sometimes be preferable to a system that depends upon strict surveillance and manipulative forms of control for its effectiveness. Perhaps there is more dignity in withstanding a moment of physical pain than in being constantly monitored, analyzed, and drugged. Whatever the case may be, the possibility that current reforms may serve to reify a system that prioritizes stability and predictability over individual creativity and autonomy should give us pause. Recognition of this possibility can hopefully set the stage for the creation of a system of educational discipline which truly respects the dignity and autonomy of all its students.

¹⁰⁷ Francis Shrag, "Why Foucault Now?" 31.4 J. CURRICULUM STUDIES 375, 381 (1999).

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