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CALIFORNIA SCHOOLTEACHERS' PRIVILEGE TO INFLICT CORPORAL PUNISHMENT

The prediction of 100 years ago that corporal punishment in schools would soon be forgotten[1] has not come to pass.[2] In California this is evidenced by a recent legislative enactment which expressly authorizes the use of corporal punishment in schools.[3] Also bearing upon the problem is Penal Code section 273a, which prohibits the unjustified infliction by any person of physical pain on any child. This section was amended in 1963 by raising the penalty from fine to imprisonment.[4] It thus appears that the teacher who abuses his privilege by inflicting unjustified corporal punishment will be subjected to the base punishment of imprisonment. It is the purpose of this note to investigate the present uncertain status of the teacher's privilege in California.

The cases treating a school teacher's liability for corporal punishment have been concerned with two questions, namely, how much punishment may a teacher inflict, and secondly, when may a teacher punish. The early view is stated in *State v. Pendergrass*[5] where the court held that, short of inflicting permanent injury upon the pupil, the teacher was the sole judge of when to punish and of how much punishment the pupil deserved. With respect to the amount of punishment which the teacher may inflict, the rule of this case is obviously harsh, and the permanent injury rule has been almost completely superseded by the rule that the teacher is liable for excessive punishment, with excessiveness generally being a question of fact for the jury.[6] In passing on the question of excessiveness, the cases have considered primarily the manner in which the punishment is inflicted,[7] and

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[1] Annot., 76 Am. Dec. 164 (1886); Cooper v. McJunkin, 4 Ind. 290 (1853).

[2] As evidenced by recent cases, Suits v. Glover, 260 Ala. 449, 71 So. 2d 49, 43 A.L.R.2d 465 (1954); Andreozzi v. Rubano, 145 Conn. 280, 141 A.2d 639 (1958); Tinkam v. Kole, 252 Iowa 1303, 110 N.W.2d 258 (1961); People v. Baldini, 4 Misc. 2d 913, 159 N.Y.S.2d 802 (Mt. Vernon City Ct. 1957).

[3] CAL. EDUC. CODE § 10854, Cal. Stat. 1961, ch. 85 § 2, p. 1088, *renumbering* CAL. EDUC. CODE § 10853, Cal. Stat. 1959, ch. 2130, p. 5031.

[4] Cal. Stat. 1963, ch. 783 amended CAL. PEN. CODE § 273a by deleting "guilty of a misdemeanor" and adding "punishable by imprisonment in the county jail not exceeding one year, or in the state prison for not less than one year nor more than 10 years."

[5] 19 N.C. (2 Dev. & B.) 365, 31 Am. Dec. 416 (1837).

[6] Serres v. South Santa Anita School Bd., 10 Cal. App. 2d 152, 51 P.2d 893 (1935) (battery statute); Patterson v. Nutter, 78 Me. 509, 7 Atl. 273 (1886); Commonwealth v. Randall, 70 Mass. (4 Gray) 36 (1855); Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156 (1859); see Annots., 89 A.L.R.2d 396 (1963), 43 A.L.R.2d 469 (1955).

[7] Excessiveness concerns the extent of the injury to the pupil and is not determinative of the existence of the privilege, Christman v. Hickman, 225 Mo. App. 828, 37 S.W.2d 672 (1931) (teacher is privileged up to the point of excess; the excess constitutes the offence). Excessiveness is usually associated with lacerations, or with hitting in places conducive to serious injury, *e.g.*, Cooper v. McJunkin, 4 Ind. 290 (1853) (head); Rupp v. Zinter, 29 Pa. D. & C. 625 (C.P. Montgomery County 1937) (ear); Melen v. McLaughlin, 107 Vt. 111, 176 Atl. 297 (1935) (kidney). It does not appear that excessiveness would comprehend the ordinary spanking or the single blow on the behind. See Vanvactor v. State, 113 Ind. 276, 15 N.E. 341 (1888). These situations

the teacher's knowledge of the pupil's history and of the immediate circumstances giving rise to the punishment.[8]

Concerning the question of when may a teacher punish, the cases have reflected confusion principally because of the tendency to regard the teacher's privilege as merely an extension of the parental privilege to inflict corporal punishment.[9] Many cases have justified the teacher's privilege by saying that the teacher is in *loco parentis* with respect to the child, in the place of the parent, and hence has the same privilege which the law gives to the parent to deal with the child.[10] This view confined the teacher's privilege to situations where it could be found that the parent had expressly or impliedly delegated the privilege to the teacher. However, the parental delegation theory has been overruled in cases where it could not be invoked to justify the teacher's authority, *e.g.*, where the pupil is an adult,[11] or where parental consent is expressly withheld.[12] In these cases the courts realized that the duty to maintain classroom discipline is inherent to the educational process,[13] and that the proper discharge of the teacher's duty to maintain order among a large group of pupils may require punishment which will not necessarily coincide with the interest of a parent in correcting his child's faults. The more logical view, and the one more consistent with the exigencies of mass education, is that the teacher's authority to punish extends to all situations which directly affect the order and discipline of the school, and is entirely independent of the parental authority to deal with the child.[14] Thus the teacher's privilege has been held to extend to punishment for failing to do homework in the evening while under the jurisdiction of the

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are more properly considered as questions relating to the existence of the teacher's privilege, *i.e.*, whether or not the teacher may inflict any punishment at all.

[8] People v. Newton, 185 Misc. 405, 56 N.Y.S.2d 779 (White Plains City Ct. 1945) (evidence of pupil's prior misconduct of which the defendant teacher knew held admissible as bearing upon the reasonableness of the punishment inflicted for the immediate offence); *accord*, Andreozzi v. Rubano, 145 Conn. 280, 141 A.2d 639 (1958); People v. Mummert, 183 Misc. 243, 50 N.Y.S.2d 699 (Nassau County Ct. 1944).

[9] See, *e.g.*, Morrow v. Wood, 35 Wis. 59, 17 Am. Rep. 471 (1874).

[10] State v. Pendergrass, 19 N.C. (2 Dev. & B.) 365, 31 Am. Dec. 416 (1837); Cleary v. Booth, [1893] 1 Q.B. 465. In McCurdy, *Torts Between Persons in Domestic Relation*, 43 HARV. L. REV. 1030, 1069 (1930), referring to the assault and battery cases wherein a minor child sues one in loco parentis, the author states, "The basic assumption of these cases, however, is that one *in loco parentis* is in the same position as a parent."

[11] State v. Mizner, 45 Iowa 248 (1876), *aff'd*, 50 Iowa 145, 37 Am. Rep. 128 (1878); Stevens v. Fassett, 27 Me. 266 (1847).

[12] *Cf.* Burdick v. Babcock, 31 Iowa 562 (1871) (pupil expelled).

[13] See Griggs v. Board of Trustees, 37 Cal. Rptr. 194, 389 P.2d 722 (Sup. Ct. 1964) (upheld dismissal of teacher for failure to maintain discipline); People v. Petrie, 120 Misc. 221, 223, 198 N.Y. Supp. 81, 83 (Herkimer County Ct. 1923), where the court stated, "A teacher must be in authority . . . in a school. If not, there would be no school."; 5 CAL. ADM. CODE § 24.

[14] Note, 26 ILL. L. REV. 815 (1932); PERKINS, CRIMINAL LAW 879 (1957); PROSSER, TORTS 113 (2d ed. 1955); Proehl, *Tort Liability of Teachers*, 12 VAND. L. REV. 723 (1959); People v. Newton, 185 Misc. 405, 56 N.Y.S.2d 779 (White Plains City Ct. 1945).

parent,[15] and to offences directly affecting the school committed by a pupil after returning to his home.[16]

The cases from which the rule concerning when a teacher may punish has evolved have all rested upon the question whether, on the facts of the case, the teacher had authority to punish, *i.e.*, whether or not the teacher-pupil relationship existed.[17] The California case of *People v. Curtiss*[18] was the first case to expressly grant the trier of fact the power to determine whether the teacher had the privilege to punish where the teacher-pupil relationship concededly existed. In *Curtiss* the court held that a teacher is privileged to inflict corporal punishment but he must act reasonably in determining whether or not the privilege exists; *i.e.*, the trier of fact, not the teacher, is the judge of whether or not the privilege exists.[19] On the facts of the case the court held the teacher had no privilege because she spanked a seven year old pupil without confirming a hearsay report that the pupil had been in a fight. The appellate court affirmed the teacher's conviction under Penal Code section 273a, which at that time was a misdemeanor. Although concededly acting within her authority,[20] the teacher in *Curtiss* was held liable because, on the facts of the case, the pupil did not deserve punishment. This basis of liability suggests the disapproved parental delegation theory, *i.e.*, the teacher punished when a parent would not have punished. In view of the teacher's duty to maintain the discipline of an entire group of pupils, it is submitted that *Curtiss* sets forth an improper rule for schoolteachers.

Besides the fact that teachers do correct individual pupils, the teacher's duty to maintain discipline may require punishment as a preventive measure, with the misconduct of any specific pupil being only the occasion for punishment which is meant principally to affect the order and discipline of the

[15] Bolding v. State, 23 Tex. Ct. App. R. 172, 4 S.W. 579 (1887).

[16] O'Rourke v. Walker, 102 Conn. 130, 128 Atl. 25 (1925).

[17] For example, in the leading case of Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156 (1859), the defendant teacher was at home when he was insulted by one of several of his pupils who were passing by the defendant's house. The fact that the teacher was at home suggests prima facie that the teacher-pupil relation did not exist, and the court intimated that had the defendant and the pupil been alone, defendant would not have been privileged to punish the pupil later at school. It was the insult by the individual pupil *plus* the presence of the other pupils that created the teacher's jurisdiction to punish, since the act threatened to derogate defendant's authority as a teacher, thereby threatening the order and discipline of the school. The issue was whether the pupil's act under these circumstances deterimentally affected defendant's status as a teacher, thereby requiring punishment because of the interest in maintaining discipline in the school. Whether the pupil deserved corrective punishment—which would be the interest of the pupil's parent—was not at issue.

[18] 116 Cal. App. Supp. 771, 300 Pac. 801 (App. Dep't Super. Ct. Los Angeles 1931).

[19] See Note, 5 So. CAL. L. REV. 173 (1932).

[20] The court did not discuss this point, and evidently conceded that the teacher-pupil relation existed. The punishment by defendant teacher, a spanking, took place at school in the presence of two other teachers. The pupil's offence, fighting, has been held by several cases to be a prime example of an offence which justifies corporal punishment. Suits v. Glover, 260 Ala. 449, 71 So. 2d 49, 43 A.L.R.2d 465 (1954); Dowlen v. State, 14 Tex. Ct. App. R. 61, 4 Am. Crim. Rep. 49 (1883); Hutton v. State, 23 Tex. Ct. App. R. 386, 5 S.W. 122 (1887); Cleary v. Booth, [1893] 1 Q.B. 465.

entire group of pupils.[21] Under these circumstances punishment which may be unjustified as to the individual pupil—which is the basis of liability on the *Curtiss* theory—may be justified because of its beneficial effect upon the entire school. Examples of this would be where the teacher exaggerates the misconduct of a particular pupil with a view to setting an example for the other pupils, or when the teacher punishes an acknowledged leader among the pupils, whose misfortune will have a greater influence upon the order and discipline of the school than would a similar misfortune suffered by another pupil. As between the parties involved *Curtiss* appears to have been decided correctly, but the holding of the case as a first-impression construction of Penal Code section 273a is defective because it would not comprehend, for example, the disciplinary situations suggested above.

Curtiss was decided in 1931 and remains the only construction in the teacher-pupil context of Penal Code section 273a. The 1963 amendment to this statute raises the penalty to imprisonment, leaving the substance of the statute intact.[22] The crime for which the teacher in *Curtiss* was punished (by a fine of 100 dollars) was an unjustified spanking, and, in view of the substantial rise in penalty, it would seem that, despite being under a positive duty to maintain discipline, no reasonable teacher would wish to risk inflicting *any* punishment.[23] Considering the fact that Penal Code section 273a is a general statute for the protection of children, and considering the specific legislative authorization of corporal punishment in schools by Education Code section 10854, it is submitted that Penal Code section 273a should not apply to schoolteachers.

Section 10854 states, "The governing board of any school district shall adopt rules and regulations authorizing teachers, principals, and other certified personnel to administer reasonable corporal or other punishment to pupils when such action is deemed an appropriate corrective measure." It is submitted that the words "when such action is deemed an appropriate corrective measure" should be deleted from the statute. The presence of these words tends to suggest an approach to the teacher's privilege similar to that taken by *Curtiss*. It has been seen that the decision in *Curtiss* unduly restricts the situations in which a teacher may exercise the privilege in a manner inconsistent with the disciplinary requirements of a large group of pupils. The word *reasonable* sufficiently controls the privilege, and should

[21] Andreozzi v. Rubano, 145 Conn. 280, 141 A.2d 639 (1958) (despite rule of board of education that punishment could be inflicted only by the school principal, teacher held not liable for slapping pupil because the teacher acted not to punish the pupil but to restore order and discipline); *cf.* O'Brien v. Olson, 42 Cal. App. 2d 449, 109 P.2d 8 (1941); People v. McMillan, 45 Cal. App. 2d Supp. 821, 114 P.2d 440 (App. Dep't Super. Ct. Los Angeles 1941).

[22] See note 4 *supra*.

[23] See Dugan, *Teachers' Tort Liability*, 11 CLEV.-MAR. L. REV. 512, 520 (1962), where the author states, "But a teacher should not be so hamstrung by the law of intentional torts, especially with respect to alleged assaults and batteries, that it interferes with his function—to teach. One whose most recent experience with education has been at the university level tends to forget that serious discipline problems exist at the lower levels. A teacher who cannot control his class cannot teach—corporal punishment may be needed in certain instances to enforce such control." See Note, 6 CLEV.-MAR. L. REV. 313 (1957).