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A Study of Corporal Punishment and Court Decisions in Illinois

Mary Virginia Olsen
Loyola University Chicago

A STUDY OF CORPORAL PUNISHMENT AND COURT DECISIONS IN ILLINOIS

by

Sister Mary Virginia Olsen

O.S.M.

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CHAPTER I

INTRODUCTION

Today, with a growing knowledge of the law by parents, it is especially important that the classroom teacher be aware of and have a thorough understanding of the legal concepts surrounding American education. Educators may differ in regard to the many educational aspects of teaching, but they share one common goal: to obtain for teaching the recognition which it deserves as a significant profession. It is an objective which to a large extent depends upon the legal sanctions and controls surrounding the profession's members. State constitutions and statutes provide for the teachers as teachers, but their rights and responsibilities as individuals are being hammered out in courtrooms and legislative chambers.[1]

In loco parentis is a legal term and according to common law it has a legal meaning. It is the court's description of the relationship which exists between teacher and pupil. This relationship implies legal rights, duties, and responsibilities. Those engaged in education must be aware of all such

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[1]M. Chester Nolte and John Phillip Linn, School Law for Teachers (Danville, Illinois: Interstate Printers and Publishers, Inc., 1963), p. 7.

implications which are determined both legislatively and judicially.

The purpose of this paper will be to survey the principles enunciated by the courts in litigated decisions regarding the rights, responsibilities, and liabilities of teachers and other school authorities to discipline pupils through corporal punishment. Particular attention will be focused on the view accepted by Illinois courts on the subject of corporal punishment since by implication, the United States Constitution reserves the control of education to the states.

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.[2]

Education, then, is a state function. There are four ways by which the state governs its schools:

(1) Constitutional provisions,
(2) statutes,
(3) court decisions,
(4) rules and regulations of state boards of education.[3]

These concepts of the origin of authority and means of governing education as a function of the state are basic to an understanding of the study of corporal punishment and Illinois court decisions.

> As a part of governmental machinery, the courts play a large part in the administration of public education. They are charged with the responsibility for interpreting the laws, for determining their constitutionality, and for questions deciding the legality of the actions of those

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[2]U.S. Constitution, Art. 17.

[3]Leonard E. Meece, A Manual for School Board Members, (Lexington: U. of Kentucky, XXIX, June-1957, No. 4), p. 8.

> responsible for administering the public schools. In so doing, they are guided by legal principles which have grown up over the years.[4]

Such is the function of the Illinois judiciary.

Preliminary investigation reveals that there is little evidence of significant decisions involving Illinois. Therefore, decisions of some courts of last resort in states other than Illinois, will be used to clarify the legal position of the teacher in relation to pupils. While such decisions of courts outside Illinois are not binding on Illinois, they would be consulted and utilized as a persuasive force should a similar situation arise.

A special effort will be made to acquaint teachers and other school authorities with a definition and application of those common law principles in Illinois.

The study is not intended as a critical analysis of the courts' decisions, but, as a simple exposition of common law as interpreted by Illinois courts. It is hoped that teachers will benefit from this study.

No study bears similarity to this study of corporal punishment by those standing in loco parentis as viewed by Illinois courts.

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[4]L.O. Garber, The Yearbook of School Law, 1958 (Danville, Ill.: Interstate Printers and Publishers, Inc., 1958) p. 6.

However, two general studies on corporal punishment of children and court decisions in the United States were done by Hubert J. Freestrom at DePaul University in 1957,[5] and Dennis P. Burke at the University of Pittsburgh in 1958.[6] These studies of corporal punishment included summaries of a general nature to discussions and definitions of corporal punishment and the defenses which were available. Freestrom's study is limited to the years 1900-1955. Burke's study is limited to the years 1832-1957.

This study is similar to the above mentioned in this scope. However, the proposed study will deal with common law principles relating to corporal punishment, the status of teachers, the status of children, in Illinois; and will not emphasize the reason why the punishment was administered, unless such a reason has direct bearing on the significance of the decision.

Some pertinent questions to be considered in this study are as follows:

What is law? Common law? Civil law?

What is the civil law in the United States?
What is the common law in the United States?

What is the source of the state of Illinois' authority to govern education?

What powers are delegated to boards of education?
What binding force do they possess?

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[5]Hubert J. Freestrom, "Corporal Punishment and Court Decisions 1900-1955" (unpublished Master's thesis, DePaul University, Chicago, Illinois. 1957).

[6]Dennis P. Burke, "A Study of Court Cases Resulting from Corporal Punishment in Public Schools" (unpublished Ph.D dissertation, University of Pittsburgh, 1958).

What is corporal punishment as viewed by the Illinois courts?
What is criminal responsibility? Civil liability?
What is a tort? What is the criteria of a tort?

What is the meaning of in loco parentis from common law?
How is the teacher protected? What are the rights of the teacher?

How is the pupil protected in terms of the rights and duties of parents?
To what extent is the pupil bound by the rules and regulations of the school?

In order to locate the citations, reference was made to the various legal indices and handbooks which deal with the principles of common law in Illinois.

The Restatement to the Law of Torts, Vol. 1.

Callaghan's Illinois Digest (3rd Ed.) Vol. 4, § 2.5, "Assault and Battery."

Illinois Digest, Vol. 4, "Assault and Battery."

Illinois Law and Practice, Vol. 3, chapter 2, "Assault and Battery."

After the cases were located, reference was made to the Illinois Reports and to the Illinois Appellate Reports where the information pertinent to the study was taken from the cited cases.

Reference was made to the following indices in locating the citations to school cases related to corporal punishment from other states:

American Jurisprudence 2d, Vol. 6, § § 46, 47, 122, 149, 150, "Assault and Battery."

Corpus Juris Secundum, Vol 79, "Schools and School Districts," § 502, "Corporal Punishment."

After the citations were located, reference was made to the Reports of other states to locate information in the cases.

Shepard's Citations and Shephard's Illinois Citations proved to be most useful in locating related cases. Other useful sources for locating articles related to corporal punishment were Reader's Guide, Education Index, Legal Periodical Index.

Other sources of information will be cited in the bibliography of this paper.

CHAPTER II

LEGISLATIVE DIRECTIVES IN EDUCATION

Origin and Application

Basic to an understanding of the courts' views on corporal punishment is an understanding of the legal theory by which the various levels of legislative bodies derive their authority.

The word "law" itself is of Scandinavian origin and came into English about 1000 A. D. from prehistoric Old Norse which had derived it from the Old Icelandic word meaning "something laid or fixed."[1]

Blackstone defined law, "In its broadest sense, law signifies a rule of action."[2] Specifically, he defined law as common law and civil law.

Civil law as defined by Blackstone is, "... a rule of civil conduct, prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong."[3] Civil law is written law.

Gavit, in commenting on Blackstone's definition of Common Law, states, "It must be emphasized that we have inherited and adopted, ... a system of judge-made laws. It is unwritten in the sense that it is not stated in a

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[1] Oxford English Dictionary; Jespersen, Growth and Structure of the English Language, par. 74 (Anchor, 9th ed., 1955) as quoted in David Mellinkoff, The Language of the Law (Boston: Little, Brown and Co., 1963) p. 34.

[2] Bernard C. Gavit (Ed.), Blackstone's Commentaries on the Law (Washington, D.C.: Washington Law Book Co., 1941) p. 26.

[3] Ibid.

legislative enactment but found in the decisions of the courts....The Common Law system is, therefore, not only a system of administering law, but a system for making law by judicial decision rather than legislative enactment."[4]

Common law, therefore, is defined as, "distinguished from law created by the enactment of legislatures, ... comprises the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs;..."[5]

By these two sources, civil law and common law, the citizens of the United States of America are protected and governed.

In civil law, The Constitution of the United States is "...the supreme law of the Land."[6] All laws, including the constitutions of the individual states, "shall be made in Pursuance, thereof; ... and the Judges in every State shall be bound thereby,..."[7] Thus, common law in the United States, will be founded on the principles set forth in the federal constitution as interpreted by the courts.

The sections of the U.S. Constitution which are interpreted as having the most bearing on the schools are those which protect the "inherent" rights of the individual. These are Article I, section 10; and the First, Fifth, and

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[4]Ibid., p. 58.

[5]Henry Campbell Black, Black's Law Dictionary, (4th ed.; St. Paul, Minn., 1951).

[6]U. S. Constitution, Article VI, section 2.

[7]Ibid.

Fourteenth Amendments. The Tenth Amendment, however, has been interpreted as reserving to the states the powers to regulate and control education.

The Tenth Amendment reads as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people.[8]

This Tenth Amendment made the function of education a state responsibility, since nowhere in the Constitution is education mentioned. Therefore, each state in the Union has established and supported a system of public education.

In the preamble to the School Act of 1824, Illinois expressed the acceptance of the responsibility for establishing a system of free public schools by the Illinois legislature:

> To enjoy our rights and liberties, we must understand them; their security and protection ought to be the first object of a free people: and it is a well established fact, that no nation has ever continued long in the enjoyment of civil and political freedom, which was not both virtuous and enlightened; and believing that the advancement of literature always has been, and always will be, the means of developing more fully the rights of man; that the mind of every citizen in a republic is the common property of society, and constitutes the basis of its strength and happiness; it is therefore considered the peculiar duty of a free government like ours, to encourage and extend the improvement and cultivation of the intellectual energies of the whole.[9]

The statute enacted following this declaration of purpose stated three principles:

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[8] Ibid., Article 17.

[9] Illinois Laws, General Assembly, 1825, p. 121.

> First, public education is recognized as an essential duty of the state.
>
> Second, the control of the operation of the school should be delegated to the people of the local school district or their elected officials.
>
> Third, the supervision of the operation of the school is to be entrusted first to an official or officials on the county level and the more general supervision reserved for a state official and delegated to him.[10]

Illinois has had four Constitutions since its admission into the Union in 1818, including the present Constitution which was passed into law in 1870. The Illinois Constitution of 1818, made no provision to establish a public school system; the Constitution of 1825 proclaimed a formal acceptance by the State of the responsibility for the education of its citizens; the 1848 Constitution empowered the General Assembly to exempt school property from taxation and recognize school districts as a municipal corporation having authority to levy taxes;[11] the Illinois Constitution of 1870, imposed the duty and limitation in education,

> The General Assembly shall provide a thorough and efficient system of free schools, whereby all children of this State may receive a good common school education.[12]

The same Constitution of 1870 provided that:

> The executive department shall consist of a Superintendent of Public Instruction.[13]

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[10]Kenneth H. Lemmer, "The State and Public Education," Illinois Educational Press Bulletin: The School Law (May, 1961), p. 5.

[11]Ibid.

[12]Illinois, Constitution (1870), Article VIII, sec. 1.

[13]Ibid., Article V, sec. 1.

Illinois has no single state board exercising control over the public schools. The School Code provides for school boards:

> School districts having a population of fewer than 1000 inhabitants and not governed by any special act shall be governed by a board of school directors to consist of members who shall be elected....[14]

Section 34 provides for cities having a population of 500,000.[15]

Article I of the Illinois School Code defines the term school board:

> ...[school board] means the governing body of any district created or operating under the authority of this Act, including board of school directors and board of education.[16]

These boards are an "agency of the State having existence for the sole purpose of performing certain duties deemed necessary to the maintenance of an 'efficient system of free schools' within the particular locality of its jurisdiction."[17] The existence and authority of all boards are derived from the legislature; they have no inherent powers, but only those powers which are conferred expressly or by necessary implication.[18]

There is nothing in the School Code of Illinois pertaining to the corporal punishment of children in the public schools.

However, the law requires local school boards:

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[14]School Code of Illinois (1963), Sec. 10-1.

[15]Ibid., Sec. 34.

[16]Ibid., Article I-III.

[17]Scown v. Czarnecki, 264 Ill. App. 305 (1914).

[18]People ex rel. Dilks v. Board of Education, 283 Ill. App. 378, 388 (1936).

> To adopt and enforce all necessary rules for the management and government of the public schools in their district.[19]

Within its Constitutional powers, the General Assembly may confer authority on those having charge of the management and conduct of the public schools to provide reasonable rules and regulations for the discipline of the pupils. This authority is granted to the school boards by the Illinois legislature in Section 34-19 of the School Code. The by-laws, rules and regulations of the boards shall have the force of ordinances:

> The board shall, subject to the limitations in this Article, establish by-laws, rules and regulations, which shall have the force of ordinances, for the proper maintenance of a uniform system of discipline for both employees and pupils, and for the entire management of the schools,... It may expel, suspend or otherwise discipline any pupil found guilty of gross disobedience, misconduct or other violations of the by-laws, rules and regulations. **** Such records and all by-laws, rules and regulations, or parts thereof, ...shall be received as evidence, ... in all courts and places where judicial proceedings are had.[20]

An ordinance is an authoritative decree or direction promulgated by governmental authority; or a local law or regulation enacted by a municipal government. The by-laws of a municipal corporation, in the United States oftener called ordinances, are true laws.[21]

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[19]School Code, Sec. 10-20.5, 1963.

[20]Ibid., Sec. 34-19.

[21]Webster's New Collegiate Dictionary (Mass.: G. & C. Merriam and Co., 1953).

A school board, in determining what rules and by-laws are necessary to the proper conduct of the schools, exercises discretion and its determination will not be interfered with or set aside by the courts in the absence of a clear abuse of the power and discretion conferred.[22] The rules must be reasonable.

The court, then has agreed with the legislature that the school board is the governing body of the school districts, and grants the broad powers of promulgating policies, by-laws, rules and regulations governing pupil conduct.

The Reference Manual on Written School Board Policies defines policies as:

> ....Principles adopted by the school board to chart a course of action. They tell what is wanted and may include also why and how much. They should be broad enough to indicate a line of action to be taken by the Superintendent in meeting a number of problems; narrow enough to give him clear guidance.
>
> Rules and regulations are the detailed direction to put policy into practice. They give specific directions telling how, by whom, where, and when things are to be done.[23]

In keeping with the above definitions, the Board of Education of the Chicago Public Schools, for example, has stated as its "policy that firm

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[22]Sutton v. Board of Education, 138 N.E. 131, 306 Ill. App. 507 (1923); Favorite v. Board of Education of Chicago, 85 N.E. 402, 235 Ill. 314 (1908).

[23]N.E.A. publication quoted by Simon L. Friedman, "Powers of the Board to Control Pupil Conduct," I.E.P.B. op. cit., p. 26.

discipline shall be maintained in all Chicago Public Schools..." This policy is implemented and defined in its Rules and Regulations of the Board of Education, Sec. 6, (8-22):

> (Corporal Punishment Prohibited). No employee of the Board of Education may inflict corporal punishment of any kind upon persons attending the public schools of the City of Chicago.[24]

The Illinois Constitution, being silent of the manner of pupil discipline, leaves it to the discretion of the school board. The Chicago Board of Education, acting within the delegation of this authority, expressly forbids its employees to use corporal punishment in disciplining its students.

It was not possible to collect data regarding policies of school districts in Illinois on the matter of discipline. The Office of the Illinois Superintendent of Public Instruction has no information pertinent to the individual school boards' rules.

In speculating on the views of the Illinois Courts regarding the breach of such rules, Simon L. Friedman states, "This we know, it is mandatory for a school board to govern its attendance centers. They shall adopt necessary rules and regulations to carry out this activity. The crux of the problem is to determine what rules and regulations are necessary to carry out this mandate.

> The courts of this State have frequently stated that the rules necessary to the proper conduct and management of the schools are to be left to the

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[24]Rules of the Board of Education, City of Chicago (1961), Sec. 6-22.

> discretion of the board, and when that action is reasonable and within the powers so conferred, it is the province of the board of education to determine what things are necessary for a good management, a good order, and the discipline of the schools, and the necessary rules to obtain these results. The courts have repeatedly refused to substitute their judgment for that of the board and will only interfere when such rules are unreasonable, arbitrary, discriminatory, and an abuse of power.[25]

The Calumet Park School board has a written rule in which it prohibits its employees the use of corporal punishment on students. A teacher was dismissed on the charge that he violated this and other board rules. It is within the right of the board to dismiss a teacher for breach of its rules, but only according to the legal procedure outlined in the School Code of Illinois.

A study of the finding of Dennis P. Burke on the courts and corporal punishment "indicates that our school teachers can look to common law principles in determining their rights relating to corporal punishment. These principles become the law of the land and are important regardless of whether the law of the state is silent or decisive on the issue."[26]

The following chapters of this study will analyze these common law principles as they are related to the corporal punishment of students by pupils by teachers, and their application in the State of Illinois.

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[25]Friedman, op. cit., p. 27.

[26]Dennis P. Burke, "A Study of Court Cases Resulting from Corporal Punishment in Public Schools," (Unpublished Doctoral Dissertation, University of Pittsburgh, 1958) p. 71.

CHAPTER III

NATURE OF CORPORAL PUNISHMENT

The purpose of this chapter will be to try to acquaint the reader with: (1) an understanding of the nature of corporal punishment from the aspect of common law in Illinois; (2) the three types of legal actions which can grow out of the use of corporal punishment cases; and, (3) the law of torts in relation to corporal punishment.

Black's Law Dictionary defines corporal punishment as, "physical punishment, as distinguished from pecuniary punishment, of or inflicted on the body, such as whipping...."[1]

In the matter of discipline and the schools, Prosser gives the following principle:

> A parent or one standing in loco parentis may use reasonable force for the correction of the child.[2]

The court in Lander v. Seaver suggests the following principle:

> ...the master has always been deemed to have the right to punish such offenses. Such power is

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[1] Black's Law Dictionary, op. cit.

[2] Prosser, Handbook of the law of Torts, 2nd ed. (St. Paul, Minn., 1955).

> essential to the preservation of order, decency, decorum, and good government in the schools.[3]

Specifically, the court said:

> The law as we deem it to exist is this: A schoolmaster has the right to inflict reasonable corporal punishment.[4]

The County Court of Crawford County, Illinois, in 1889, considered corporal punishment as assault and battery:

> The court instructs the jury that if a teacher, in inflicting punishment upon his pupil,...he is clearly liable for such... in criminal prosecution for assault and battery.[5]

There are three types of legal actions which can grow out of corporal punishment cases:

1. Criminal action for assault and battery brought by the state against the teacher, with the end being a penalty against the teacher such as fine or imprisonment.

2. Civil action for assault and battery brought against the teacher by parents or guardian of the child.

3. Proceedings against the teacher by the school board charging cruelty or incompetency, and therefore, grounds for dismissal.

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[3]Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156 (1859).

[4]Lander v. Seaver, supra.

[5]Fox v. The People, 84 Ill. App. 270 (1898).

Assault and Battery

The Criminal Code of 1961 provides that a person commits assault and battery when, without lawful authority, he engages in conduct which places another in reasonable apprehension of receiving a battery,[6] and that a person commits a battery if he intentionally or knowingly, without legal justification, and by any means causes bodily harm to an individual, or makes physical contact of an insulting or provoking nature with an individual.[7]

In People v. Stagg, the court defined an assault as an unlawful attempt, coupled with the present ability to commit a violent injury upon another.[8]

An assault and an assault and battery are separate and distinct offenses, according to Illinois statute. Any unlawful touching is sufficient to cause an assault.[9] An assault may be complete without a battery.[10]

At common law, the least touching of the person of another in anger was a battery, for as it has been said, the law cannot draw the line between different degrees of the violence and, therefore, totally prohibits the lowest stages of it.[11]

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[6] Illinois Law and Practice (S.H.A.), Ch. 38 §12-1(a).

[7] Ibid.,Ch. 38 §12-3.

[8] People v. Stagg, 194 N.E.2d 342, 29 Ill. 2d 415 (1963).

[9] S.H.A. Illinois Statutes, Ch. 38 § § 55 & 56.

[10] Young v. People, 6 Ill. App. 434 (1880).

[11] Hunt v. People, 53 Ill. App. Ill (1893).

In a situation where more than one person is charged with commission of assault and battery, the court has ruled, "....While mere presence or negative acquiescence is not enough to constitute participation in an assault, circumstances may be shown that there is a common design, and in such cases, it is not necessary in order to establish an assault and battery, that the person so charged should have had actual contact with the victim, since whatever is done in furtherance of the design is the act of all, and each is guilty of the assault."[12]

Evidence of Provocation and Justification

In general, the courts hold that the accused has every right to prove that his actions were provoked and justified.

Evidence to prove the accused's defense and to justify his actions is admissible, as is evidence contrary to such matters.[13] The accused is entitled to introduce evidence to prove his defense and to show his reasons and justification for his acts,[14] however, any evidence offered in justification of the assault must be relevant to the justification relied on.[15] The prosecution

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[12] Jaffray v. Hill, 191 N.E.2d 399, 41 Ill. App2d 460.

[13] 6 Corpus Juris Secundum §122.

[14] Osborne v. State, 100 So. 365, 87 Fla. 418; Brannon v. State, 115 S.E. 281, 29 Ga. App. 311; State v. Wilson, 203 P. 351.

[15] People v. Emme, 7 P (2d) 183; Wheeler v. State, 132 N.E.259; Hensley v. State, 274 S.W. 135.

may introduce any relevant, competent evidence to disprove the defense for provocation or justification as established by the accused.[16]

If the evidence as to justification is too remote,[17] or if matter sought to be shown in justification or mitigation occurred a sufficient length of time before the assault to constitute "cooling time",[18] they cannot be submitted as evidence. Also, facts which are learned by the accused after the commission of the assault are not admissible in excusing his acts.[19]

The question of evidence as provocation and justification regarding the remoteness or proximity of the assault was discussed by the courts in the following cases.

In Haycraft v. Grigsby, the court held that evidence of past conduct was not acceptable. The court said:

> Without setting out in detail the excluded evidence, suffice it to say all of it, was clearly immaterial and had no tendency to prove or disprove any issue made by the pleadings. Misunderstandings between the teacher and other pupils on her good or ill success in other districts, could not possibly be relevant in this case, which must stand on its own facts.[20]

In Sheehan v. Sturges, the court laid down the principle that in inflicting punishment, the teacher may take into consideration the pupil's habitual disobedience.[21]

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[16] Adams v. State, 75 So. 641, 16 Ala. App. 93.

[17] State v. Welch, 278 S.W. 755, 311 Mo. 474.

[18] Sexton v. Commonwealth, 236 S.W. 956 (Ky.); State v. Jones, 217 S.W.22.

[19] People v. Curtiss, 300 P. 801, 116 Cal. App. (Supp) 771.

[20] Haycraft v. Grigsby, 88 Mo. App. 74.

The Supreme Court of Errors held that the evidence did not establish that the corrective action taken by the teacher against the pupil was unreasonable and that evidence as to the temper, character, and past conduct of the student was relevant. The court said:

> ....On the issue of temper, character, and past conduct of the plaintiff in school, if known to the defendant, were clearly relevant.[22]

The Appellate Court of Illinois stated that the past conduct of a pupil is clearly relevant, especially where such conduct is serious enough to demand special schooling.[23]

In the same case, Drake v. Thomas, the teacher was being sued for assault and battery in inflicting corporal punishment on a pupil in a correctional school for misbehavior in class. The lower court of Illinois refused as evidence the mother's letters to the school's principal requesting him to see if anything could be done to get her son to attend school regularly and expressed her desire that he take whatever steps were necessary to achieve this and improve his conduct. The Court of Appeals, however, viewed the matter in a far different light. Although the letters were respectively written by the mother on January 9th, and February 3rd, of 1938, and the punishment of the boy took place in March 24, 1938, the court stated:

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[22]Andreozzi v. Rubano, 141 A.2d 639 (1958).

[23]Drake v. Thomas, 33 N.E.2d 889, 310 Ill. App. 57 (1941).

> When we come to consider the facts as they appear in this case, and the question of admissibility of evidence - which we have indicated should have been admitted to aid the court in determining the question involved, rather than limiting the evidence to the happenings of March 24, 1938,...[24]

In this case the justification of the punishment, and the evidence admissible thereto, was based upon the pupil's past conduct and the two letters of the mother expressing her consent to whatever action the school authorities would take; although both points of justification were remote to actual event on which the suit was pending.

Justification from Relationship of Parties

The use of reasonable force to compel students to obey, without the incurrence of a suit for assault and battery, may be justified on the grounds of the relationship of parties. The general rule is: The relationship of parties may justify the use of reasonable force without the incurrence of liability for assault and battery.[25]

The courts have stated the opinion that if from the relationship existing between the parties, the defendant has the right to inflict violence on the plaintiff, his acts will not be looked upon as an assault, unless the privilege is abused and the violence goes beyond the necessities of the case.[26]

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[24] Drake v. Thomas, supra.

[25] 6 Corpus Juris Secundum §23.

[26] Treschman v. Treschman, 61 N.E. 961; Sampson v. Smith, 15 Mass. 365; Clausen v. Pruhs, 95 N.W. 640, 69 Neb. 278.

The principle of justification from relationship guiding the courts in Illinois is that the teacher stands in place of the parent to the pupil. The common law in Illinois is that at least a portion of parental authority is delegated to the teacher. This relationship places the teacher in a "quasi-judicial" position; and therefore, the teacher cannot be held liable for an error in judgment, under particular conditions, if the punishment exceeds what would have reasonable under the circumstances.[27]

The term, "quasi-judicial", is applied to an action which calls for discretion of public administrative officers, who are required to investigate facts, or ascertain the existence of facts and draw conclusions from them, as a basis for official action, and to exercise discretion of a judicial nature.[28]

Some courts have stated:

> ...and he is guilty of assault if he inflicts punishment which in the general judgment of reasonable men, after thought and reflection would call clearly excessive.[29]

However, the common law in Illinois will grant the teacher the benefit of the doubt for an error in judgment if there is a clear absence of malice in motive or intent, and no permanent injury results from the punishment.

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[27] Fox v. The People, supra.; Drake v. Thomas, supra.

[28] Black, Op. cit.

[29] Hinkle v. State, 26 N.E. 777, 127 Ind. 490; State v. Spiegel, 270 P. 1064, 39 Wyo. 309, 64 A.L.R. 289.

The Law of Torts

It is a well established principle of the law of torts that corporal punishment which is reasonable in degree and which is administered by a teacher to a pupil as a disciplinary measure, is privileged in the sense that the administration of such a form of punishment does not give rise for civil action against a teacher.[30]

"Tort," is derived from Latin meaning to twist, twisted, or wrested aside. According to Black, a tort is a private or civil wrong or injury, a wrong independent of a contract; or it is a violation of a duty imposed by general law or otherwise upon all persons occupying the relation to each other which is involved in a given transaction. There must always be a violation of some duty owing to plaintiff, and generally such a duty must arise by operation of law and not be mere agreement of the parties. Three elements in every tort action are:

1. Existence of legal duty of defendant to plaintiff;
2. Breach of duty;
3. Damage as proximate result.

A legal wrong committed upon the person or property independent of contract may be either (1) a direct violation / invasion of some legal right of the individual; (2) the infraction of some public duty by which special damage accrues to the individual; (3) the violation of some private obligation by which like

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[30] Suits v. Glover, 260 Ala. 449, 71 So.2d 49, 43 A.L.R. 464; Swigart v. Ballou, 106 Ill. App. 266 (1903) (rule supported by implication); Drake v. Thomas, 310 Ill. App. 57, 33 N.E.2d 889.

damage accrues to the individual. In the former case, no special damage is necessary to entitle the part to recover. In the two latter cases such damage is necessary.[31]

Prosser defines a tort as a term applied to a miscellaneous and more or less unconnected group of civil wrongs, other than breach of contract, for which a court of law will afford a remedy in the form of an action for damages. The law of torts is concerned with the compensation of losses suffered by private individuals in their legally protected interests, through conduct of others which is regarded as socially unreasonable.[32]

Prosser then goes on to distinguish between criminal proceedings and civil proceeding in a tort action.

Criminal Responsibility and Civil Liability

The injured party may bring a civil action of tort to recover compensation for the damage he has suffered. The state brings criminal proceedings to protect the interests of the public against the wrongdoer. The same act may be, although not necessarily, both a tort against an individual and a crime against the state. In such cases, the accused may be subject to both civil action in tort and criminal prosecution.[33]

In cases of torts which are considered aggravated, the purposes of the criminal laws are sometimes effected in the tort action by an award of punitive damages.[34]

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[31] Black, Op. Cit.

[32] Prosser, p.1.

[33] Ibid.

[34] Ibid.

A criminal prosecution is not seeking a compensation of the injured party against whom the wrong is committed, and his only part in it is that of an accuser and a witness for the state. So far as the criminal law is concerned, he will leave the courtroom empty-handed.[35]

The civil action for a tort is begun and maintained by the injured person himself, and its purpose is to obtain damages for compensation he has coming to him from what he has suffered at the expense of the accused. If he is successful, he receives a judgment of a sum of money, which he may enforce by collecting it from the defendant. The state may never sue in tort in its real or governmental authority, although as the owner of property, it may resort to the same tort action as any individual to recover for injuries to the property.[36]

The same act of tort may be both a crime against the state and a tort against the individual.[37]

In reaching a balance between the individual and the social interests involved in tort cases, the courts have been influenced not only by the weight attached to the particular interest, but also by other considerations. Among these are:

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[35] Ibid.

[36] Ibid.

[37] Ibid. p. 7 §2.

a. The Moral Aspect of the defendant's conduct;

b. The historical development of the law;

c. The possible prevention of further torts.[38]

The motive or purpose behind the defendant's conduct plays a predominant part in many questions of tort liability. The defendant's liability then will depend usually, upon the importance and social value attached to his objectives balanced against the nature of the plaintiff's interests and the extent of the harm to them.[39]

Criteria of Tort in Corporal Punishment

In the case of Tinkham v. Kole, the court followed a criteria of tort in corporal punishment:

a. Teacher's motive in administering discipline;

b. Nature of pupil's misconduct;

c. Means of administering punishment; and,

d. Extent of resulting injury to pupil.[40]

In Suits v. Glover, the court said:

> But a teacher's right to use physical punishment is a limited one. His immunity from liability in damages requires that the evidence show that the punishment was reasonable, and such a showing requires consideration of the nature of the punishment itself, the nature of the pupil's

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[38]Ibid. p.12 §3; p.14 §4.

[39]Ibid. p. 21, §5.

[40]Tinkham v. Kole, 110 N.W.2d 258 (1961).

> misconduct which gave rise to the punishment, the age and physical condition of the child, and the teacher's motive in inflicting the punishment. If consideration of all these factors indicates that the teacher violated none of the standards implicit in each of them, then he will be held free of liability; but it seems liability will result from proof that the teacher, in administering the punishment, violated any one of these standards.[41]

The first of the four factors in determining whether corporal punishment administered by teacher to pupil, namely, the teacher's motive, will be considered under "motive and intent." The latter three will be discussed as factors of "reasonableness."

The courts have held that in the matter of corporal punishment the teacher's motive in administering the discipline must be considered.[42]

> There is substantial evidence which stands undisputed that the defendant struck plaintiff several times on both sides of the head and <u>this was done in anger</u>. The finding is warranted. The boy's eardrum was ruptured and the injury was permanent.[43] (Emphasis added).

The principle stated in the <u>Restatement to the Law of Torts</u> reads as follows:

> Force applied or confinement imposed for any purpose other than the proper training or education of the child or for the preservation of discipline is not privileged although applied or imposed in an amount and upon an occassion which would be privileged had it been applied for such a purpose.[44]

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[41] <u>Suits v. Glover</u>, 260 Ala. 449, 71 So.2d 49 (1954).

[42] <u>Fox v. The People</u>, supra.; <u>Drake v. Thomas</u>, supra.

[43] <u>Tinkham v. Kole</u>, supra.

[44] <u>Restatement to the Law of Torts</u>, p.350 §151.

The use of force upon a child is privileged only if applied or imposed for the purpose of either correcting the child, thereby improving his character, or of compelling obedience to proper commands. If force is used for any other purpose, as to satisfy a violent antipathy taken by a school master to his pupil, it is not privileged even though the offense is of the nature which would justify the punishment. If it were inflicted upon the child for the proper purpose of correcting its faults, it would mold his character and be for his own good.[45]

Illinois courts have held that intent of malice is the essential element in tort cases of assault and battery. The intention to harm the person assaulted is the essence of an assault and battery,[46] but, this statement should be restricted to assaults committed in the course of performing lawful, rather than unlawful, acts, since it is a known rule that in an action for assault, if the occasion the injury is unlawful, the intent of the wrongdoer is immaterial.[47]

Civil liability is incurred if the act occasioning the injury is unlawful. The intent then is immaterial.[48]

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[45] Restatement to the Law of Torts, p. 350 §151.

[46] Gilmore v. Fuller, 65 N.E. 84, 198 Ill. 130, 60 L.R.A. 286; In re Murphy, 109 Ill. 31 (1884); In re Symser, 182 Ill. App. 208; Dryalski v. Thiele, 163 Ill. App. 290 (1911); Solomon v. Buchele, 127 Ill. App. 420 (1906).

[47] Paxton v. Boyer, 67 Ill. 132, 16 Am. R. 615; Johnson v. Englehardt, 256 Ill. App. 557 (1930); Nicholls v. Colwell, 113 Ill. App. 219 (1903).

[48] Smith v. Moran, 193 N.E.2d 466, 43 Ill. App.2d 373 (1963).

However, where a person inflicts an injury on another is not a wrongdoer, and his action which results in the injury is not of itself unlawful, the intent becomes material;[49] or of criminal negligence, the law implies the necessary intent.[50]

Malice is defined as the intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under the circumstances that the law will imply an evil intent.[51] This implied malice is inferred by legal reasoning and necessary deduction from the res gestol (conduct of the party). Malice may be inferred from any deliberate act which is cruel, committed by one person against another, however sudden.[52]

A teacher, who prompted by revenge, inflicts corporal punishment is as guilty criminally as if he acted with malice.[53]

Malice may be inferred from excessive punishment, according to the court in State v. Thornton, but where the punishment administered is not of itself immoderate, its illegality or its legality must depend entirely on the quo animo with which it was administered.[54] Illinois courts reject the theory of implying malice in a teacher's action unless there results a permanent injury.[55]

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[49]Paxton v. Boyer, 67 Ill. 132 (1873); Hitzelberger v. Kanter, 181 Ill. App. 459 (1913); Nicholls v. Colwell, 113 Ill. App. 219 (1903).

[50]Land v. Bachman, 223 Ill. App. 473 (1921).

[51]Black, Op. Cit.

[52]Nicholls v. Colwell, supra.

[53]State v. Thornton, 48 S.E. 602, 136 N.C. 610.

[54]State v. Thornton, 48 S.E. 602, 136 N.C. 610.

[55]Fox v. The People, supra.; Drake v. Thomas, supra.

The court in Commonwealth v. Ebert said, that a school teacher is in loco parentis to the scholars;[56] therefore, has the partial right of a parent to discipline the pupil and, if necessary, punish the child. In Melen v. McLaughlin the court said that if the punishment is excessive or cruel, and beyond that required by circumstances, the teacher is liable for an assault, from which liability he is not relieved by the fact that he acted in good faith. Excessive punishment refers to a situation where the punishment is questioned.[57] Improper punishment refers to a situation where the infliction of punishment at all or the type of punishment inflicted, as distinguished from the extent thereof, is questioned.[58]

It is not necessary that the injury in the precise form in which it in fact resulted should have been foreseen, but it is sufficient, if by the exercise of reasonable care, the teacher may have foreseen that some injury might result from his act.

The Court in Commonwealth v. Ebert said, that a teacher is in loco parentis to the scholars, and the same rules of law which are applicable to parental responsibility and parental control are applicable to the teacher, however,

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[56]Melen v. McLaughlin, (Vt.) 176 A. 297.

[57]Black, Op. Cit.

[58]Ibid.

> ....He may not, ...inflict punishment maliciously, that is, out of spite, hatred, or ill will, nor out of a mere desire to inflict pain in order to humiliate a pupil.
>
> In the infliction of such punishment, where he acts conscientiously and from motives of duty, he acts in a judicial capacity and is not liable for errors in judgment, even though the punishment seems unreasonably severe. But when the punishment seems unreasonable and he acts malo animo, from wicked motives, under the influence of an unsocial heart, he is liable civilly and criminally.[59]

The court's use of the term, "malo animo," is another way of saying with an evil mind; with a bad purpose or wrongful intention; with malice.

In this matter of determining intent of the teacher, the court in Lander v. Seaver said:

> Customary mildness and moderation of a teacher is not admissible upon the question as to whether the punishment inflicted by him in a particular case was excessive or not, but it is admissible in regard to whether the punishment was wanton and malicious.[60]

The courts are not in agreement on this point of implied malice. One group holds that excessiveness implies malice. The other group holds that the teacher is not liable for an error in judgment if there is no permanent injury; it will not otherwise imply malice.[61]

The courts in Illinois have considered the motive and intent of the teacher to be the essence of innocence or guilt in passing judgment on cases

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[59]Commonwealth v. Ebert, 11 Pa. Dist. 199 (1901).

[60]Lander v. Seaver, 32 Vt. 114; 76 Am. D. 156.

[61]People v. Curtiss, 300 P. 801, 116 Cal. App. (Supp.) 771 (1931).

involving corporal punishment of children where there was no permanent injury. There have been three such cases litigated in Illinois: Fox v. The People, 84 Ill. App. 270 (1899); Swigart v. Ballou, 106 Ill. App. 226 (1903); Drake v. Thomas, 310 Ill. App. 57, 33 N.E.2d 889 (1941).

On November 19, 1897, Medford Fox, a teacher, punished nine year old Palmer Seaney by whipping him with a switch about the size of an ordinary lead pencil about twenty inches long. The punishment was inflicted for alleged misconduct during the noon hour the previous day. The trial court found the teacher guilty of assault and battery. The court of appeals rejected the instructions which the trial court gave the jury. The rejected instructions were as follows:

> The court instructs the jury that if a teacher in inflicting punishment upon his pupil, goes beyond reasonable castigation, and either in mode or degree of correction, is guilty of any unreasonable and disproportionate violence or force, he is clearly liable for such excess in a criminal prosecution for assault and battery.
>
> The court instructs the jury that unreasonable and excessive use of force on the person of another being proved, the wrongful intent is a necessary and legitimate conclusion in all cases, when the act was designedly committed, and it then becomes an assault, because purposely inflicted without justification or excuse. And if you believe from evidence, beyond a reasonable doubt, that the defendant has made use of excessive and unreasonable force in inflicting the punishment,...the jury should find the defendant guilty.[62]

The Illinois Appellate Court held the above quotation contained a manifestation of "prejudicial error," and held that the principle applicable in this case was one cited from the American and English Encyclopedia of Law: (Vol. 21, p. 769).

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[62] Fox v. The People, supra.

> The authority of the teacher over his pupil being regarded as a delegation of at least a portion of the parental authority, the presumption is in favor of the correctness of the teacher's action in inflicting corporal punishment upon the pupil. The teacher must not have been actuated by malice, nor have inflicted the punishment wantonly. For an error in judgment, although the punishment is unnecessarily excessive, if it is not of a nature to cause lasting injury, and he acts in good faith, the teacher is not liable.[63]

The court in the Drake case in Illinois cited the same passage with this statement:

> The rule of the above citation, as called to our attention, is necessarily the rule, for a teacher stands in loco parentis. This rule is applicable to the facts in this case....[64]

The criteria by which the court in Illinois will judge the liability of the actions of a teacher will be:

1. The teacher stands in loco parentis, therefore a portion of parental authority is delegated to her.

2. The Court will presume the correctness of the teacher's action, provided:
   a) She was not actuated by malice.
   b) Punishment was not inflicted wantonly.
   c) Punishment is not of a nature to cause lasting injury.

3. The Court will not hold a teacher liable for an error in judgment if the punishment is excessive, provided she acted in good faith.

In Illinois, therefore, the Court will not accept the theory of implied malice because the punishment was excessive. The Court has granted the teacher

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[63]Supra.

[64]Drake v. Thomas, supra.

the benefit of the doubt for an error in judgment, where it was clearly evident that the intent was not malicious and wanton so as to cause permanent injury.

Section 148 in Restatement to the Law of Torts states the following in regard to excessive force:

> One other than a parent, who, in whole or in part, is in charge of the education or training of a child is not privileged to apply any force or impose any confinement which is unreasonable either,
>
> (a) as being disproportionate to the offense for which the child is being punished, or
>
> (b) as not being reasonably necessary and appropriate to compel obedience to a proper command.[65]

One of the most important factors in determining whether the punishment inflicted was reasonable is a consideration of a comparison between the harshness of the punishment and the weight of the offense for which it is inflicted.[66]

In determining whether a force or confinement is reasonable when used to compel obedience of a child by the person in charge of him, three factors are important:

> 1. The character of the command as being one obedience to which is necessary for the proper training or education of a child. To determine this, the following must be taken into account:
>
> a. where the entire training, as distinguished merely from the education of a child, is in the charge of the actor;
>
> b. of the desirability of inculcating in the child the habits of obedience to commands of those who are in authority over him which are not obviously improper.

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[65] Restatement to the Law of Torts, §148, p. 347.

[66] Ibid.

2. The necessity of the actor using the particular means which he adopts in order to compel the child to obey his commands. The question arises as to whether:
   a. there has been an excessive means of carrying out the purpose for which the privilege is given,
   b. the actor is not privileged to use a means to compel obedience if a less severe method is likely to secure obedience.

3. The character of the command and the importance of both the present welfare and future training or education of a child of his obedience to it.[67]

Section 149 of the same source states:

> One other than a parent who has been given by law or has voluntarily assumed, in whole or in part, the parental function of training or educating a child, or one to whom the parent has delegated such training or education, is not privileged to inflict upon a child a punishment which is degrading in character or which is liable to cause serious or permanent harm.[68]

In other words, a punishment which is obviously detrimental and not beneficial to the child as adult, or one which is degrading so as to injure the child's self-respect is not for the benefit of the child.

The factors involved in determining the reasonableness of punishment are stated in Section 150:

> In determining whether a punishment is excessive, the nature of the offense, the apparent motive of the offender, the influence of his example upon other children of the same family or group, the sex, the age, and physical and mental condition of a child...[69]

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[67] Ibid.

[68] Ibid. sec.149, p.348.

[69] Ibid. §150, p.349.

Liability cannot be incurred due to results from reasonable punishment upon a child whose physical weakness was not known.[70]

In Drake v. Thomas, the Illinois Court ruled that in determining the reasonableness of corporal punishment, not only the acts of the pupil which were the immediate cause of the punishment are to be considered, but in addition evidence should be admitted of the pupil's past conduct.[71]

The pupil under discussion "was a big boy, 15 years of age, and weighing about 200 pounds. He had been given up as incorrigible at the Betsy Ross School and his own mother requested that he be transferred to Mosely," a correctional school.

In admitting evidence of pupil's past conduct the court said:

> There are other citations of authorities that were passed upon by the courts in the various states regarding the rule that must be applied to a pupil who has been charged with acts of misconduct; among these are Sheehan v. Sturges, 53 Conn. 481, 2 A.841, cited upon this question, where the court approved that action of a teacher in whipping a student who had violated the rules of the school. The court there also approved of admitting in evidence past acts of misconduct in determining whether a teacher acted reasonably in administering punishment. Our attention is also called to Heritage v. Dodge, 64 N.H. 297, 9 A. 722.
>
> When we come to consider the facts as they appear in this case, and the question of admissibility of evidence, which...aid the court in determining the question involved, rather than limiting the evidence to the happenings of March 24, 1938..."[72]

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[70] Quinn v. Nolan, 4 W. L. Bull. 81, Ohio (1879).

[71] Drake v. Thomas, supra.

[72] Drake v. Thomas, supra.

Prosser, The Law of Torts, holds that in considering the reasonableness of corporal punishment sums it up as all of the circumstances surrounding it must be brought into the picture, including, the nature of the offense, the age, the sex and the strength of a child, his past behavior, the kind of punishment, and the extent of the harm inflicted.[73]

It is everywhere agreed upon that the teacher may administer corporal punishment which is reasonable and where school board regulations do not prohibit it. The courts of this country are divided upon the question who shall judge when the punishment inflicted has been reasonable: the teacher, because of her quasi-judicial capacity? or the jury?[74]

The law agrees that in the absence of statutory provisions, the common law rule upholds the person standing in loco parentis in administering corporal punishment.

In People v. Curtiss, the Appellate Department, Superior Court of California, cited two schools of legal thought on what constitutes reasonableness in corporal punishment and who was to judge if it was so:

> One group makes the teacher the arbiter, and declares all punishments to be reasonable which does not result in the disfigurement of or permanent injury to the child and which is not inflicted maliciously. The laws classicus on this subject seems to be State v. Pendergrass, 19 N.C. (2 Devereux and Battle's Law). 365, 31 A. Dec. 416.[75]

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[73]Prosser, op. cit. p.114.

[74]Illinois Law Review, 26: p.815.

[75]People v. Curtiss, supra.

> The second group...and the one which to our mind, expresses the more enlightened view--a view more consonant with modern ideas relating to the relationship between parents or those standing in their place and children--refuses to make the teacher the sole arbiter. The courts deciding these cases hold that both the reasonableness of, and the necessity for, the punishment is to be determined by a jury, under the circumstances of each case. This rule is expressed in Clasen v. Pruhs, 69 Neb. 278, 95 N.W. 640.[76]

Thus, according to the line of thought in the second group of cases, there is a clear-cut line of thought or distinction between decisions which give the power of judgment to the teacher and those which give the power to the jury. "The court follows the'more enlightened view' in interpreting the word 'justifiable in the minds of reasonable men.'"[77]

This difference of views is more apparent than real, as both doctrines express nearly the same point of view; that is, the teacher-arbiter doctrine is not as tyrannical as it sounds, nor is the jury-arbiter doctrine as restricting upon the teacher's discretion as it seems. The courts have never really recognized the teacher-arbiter doctrine in view of the quasi-judicial capacity which she occupies, to the extent of summarily dismissing a case of this nature. In reality, all such cases have been decided by judge or jury.[78]

Bishop's "just doctrine," which is applied to parents is equally applicable to the teacher:

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[76]People v. Curtiss, supra.

[77]Hunter, Illinois Law Review, p. 816.

[78]Ibid.

> The "just doctrine" would seem to consist of a compromise between the differing views thus stated; as that the parental judgment, if honest, without passion or malice, should be taken as prima facie establishing the right, and should be overcome only from evidence of passion, of malice, of the use of an improper weapon, or of such excessive severity as implies the absence of true parental love, or of a due appreciation of parental duty. 2 Bishop "Criminal Law sec. 886.[79]

In substance, then, both doctrines conform to Bishop's "just doctrine."

The Illinois court in Swigart v. Ballou, 1903, held by implication, the view that whether a particular punishment was, under the circumstances reasonable, is a question of fact to be determined by the jury.[80] However, the Illinois Court, as we have previously noted, will not imply malice because the punishment was excessive, but will grant the teacher the benefit of the doubt for an error in judgment. This benefit will only be accorded if there is a clear absence of malice, and an absence of permanent injury.

R. R. Hamilton in The National School Law Reporter, makes this comment:

> ...this presumption in the teacher's favor disappears if the pupil introduces evidence that the teacher has violated any one of the standards set out in the Glover case. It would be a rare case in which there would be no evidence a jury could reasonably believe to the effect that a standard had been violated. As a practical matter, if a teacher is taken to court he will marshall all the evidence he has to prove that he has violated no standard. He would not,...rely exclusively upon a favorable presumption, which is rebuttal.[81]

The teacher is supposed to act as a reasonable person. His actions will be judged by reasonable persons. In Illinois, the reasonable persons who will

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[79]Ibid., p.817.

[80]Swigart v. Ballou, 106 Ill. App. 226.

[81]R. R. Hamilton, "Corporal Punishment," The National School Law Reporter (XII No.3. March 27, 1962).

judge if the teacher acted as a reasonable man, will either be the judge, and in most cases, the jury. What is a "reasonable person"?

Prosser describes the reasonable person as:

> The standard required of an individual is that of the supposed conduct, under similar circumstances, of a hypothetical person, the reasonable man. He has ordinary prudence and represents a community ideal of reasonable behavior. The characteristics of this imaginary person include:
>
> a. Physical attributes of the actor himself.
> b. Normal intelligence and mental capacity.
> c. Normal perception and memory and a minimum of experience and information, common to all the community.
> d. Such superior skill and knowledge as the actor has or holds himself out as having when he undertakes to act.[82]

In accepting the doctrine of "presumption of reasonableness," the Illinois Courts will presume that the teacher acted as a reasonably prudent person,[83] but, the teacher has the burden of proving this fact.[84]

The court, in Patterson v. Nutter, held that if the punishment is not clearly excessive in the judgment of reasonable men, the teacher is not civilly liable for inflicting the same.[85]

The Supreme Court of Iowa in 1961, held a teacher liable for striking the face of a pupil several times with his hand. The pupil allegedly had been

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[82]Prosser, Op. Cit., §31, p. 124.

[83]Drake v. Thomas, supra.

[84]Swigart v. Ballou, supra.

[85]Patterson v. Nutter, 7 A.2d 73, 78 Me. 509. 57 Am. R. 818.

slow in removing another pupil's glove that fit rather tightly, from his own hands. A doctor later determined that the pupil had suffered a punctured eardrum as a result of the blows from the teacher. The result of the injury was permanent. The court said:

> ...it has frequently been said that the test for reasonableness being determined is whether the punishment was excessive in the judgment of reasonable men.[86]

The courts do not consider corporal punishment to be a form of negligence. Ordinary negligence does not figure in an action for assault and battery.[87]

> ...an assault and battery is not negligence. The former is intentional; the latter is unintentional.****
> ...THE DOCTRINE OF CONTRIBUTORY NEGLIGENCE HAS NO APPLICATION in an action for assault and battery.[88]

Although the form for assault and battery is trespass, the proof and its effects may depend on the principles of negligence and on what was proper care for the defendant under the circumstances.[89]

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[86] Tinkham v. Kole, supra.

[87] Donner v. Grasp, 115 N.W. 125, 134 Wis. 523.

[88] Ruter v. Foy, 46 Iowa 132.

[89] 6 Corpus Juris Secundum §11.

CHAPTER IV

LEGAL POSITION OF THE TEACHER

The purpose of this chapter will be to define the legal position of the teacher according to (1) the principle of immunity; (2) the doctrine of loco parentis; (3) the limitations placed on the teacher's authority; and, (4) the protection of her position as a teacher.

The law of torts has established the rule that a teacher is immune from liability for physical punishment when it is reasonable in degree; the right to immunity is a limited one.

A teacher's immunity from civil liability for reasonable chastisement administered to a pupil results from judicial recognition that as a teacher, she stands in loco parentis and shares, insofar as matters relating to school discipline are concerned, the parent's right to use moderate force to obtain the child's obedience.

For example, the court said in Stevens v. Fasset (27 Me., 266, 1847). that the right of a parent to keep his child in order and obedience is secured by the common law, and he may correct his child, being under age, in a reasonable manner, for the benefit of his education; a parent may also delegate a part of his parental authority to the teacher of his child who is then in

loco parentis. He has such portion of the power of the parent as may be necessary to answer the purpose for which he is employed.[1]

The courts admit to a general rule in the teacher's right of privilege in the administration of corporal punishment:

> It is a well-established principle of the law of torts that corporal punishment which is reasonable in degree and which is administered to a pupil as a disciplinary measure is "privileged" in the sense that the administration of such punishment does not give rise to a cause of action for damages against the teacher.[2]

Black defines "privilege" as a particular and peculiar benefit or advantage enjoyed by a person, company, or class, beyond the common advantage of other citizens; and exceptional or extraordinary power or exemption. It is a right, power, or franchise, immunity held by a person or a class, against or beyond the course of the law.[3]

The Restatement to the Law of Torts gives the following general principle:

> § 147. One other than a parent who has been given by law or who has voluntarily assumed in whole or in part the parental function of training or educating a child or one whom the parent has delegated such training, is privileged to apply such reasonable force.[4]

This privilege of immunity from civil liability is extended to the teacher by the common law. The court will uphold the privilege provided it would be

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[1]Stevens v. Fasset, 43 A.L.R. 469, 473 (1847).

[2]Suits v. Glover, supra.

[3]Black, Op. Cit.

[4]Restatement to the Law of Torts, Sec. 147.

considered as reasonable in the judgment of prudent men. This point is agreed upon by all the courts. The courts disagree on who composes the body of prudent men--the teacher or the jury. Illinois leaves the question of such determination to the jury.[5]

The Illinois Courts give the following statement on each of the above points:

Statement of Privilege of Immunity

> ...agree that neither parent nor a person in loco parentis is ordinarily liable to an unemancipated minor child in his charge for corporal punishment inflicted by way of discipline or correction. Foley v. Foley, 61 Ill. App. 577 (1895).

On Motive of Teacher

> ....The teacher must not be actuated by malice or inflict punishment wantonly. For an error in judgment, although the punishment is unnecessarily excessive, if it is not of a nature to cause lasting injury, and he acts in good faith, the teacher is not liable. Fox v. The People, supra.

On Extent of Harm

> ....The very nature of the rule which accords to a teacher the privilege to physically punish a pupil makes it clear that where it is sought to hold a teacher liable in damages for such punishment administered to a pupil, the crucial question is the reasonableness of the punishment. Swigart v. Ballou, supra.

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[5]Swigart v. Ballou, supra.

On Jury to Determine Reasonableness

> The courts are in harmony holding that a particular punishment administered, was under the facts and circumstances, reasonable, is a question of fact to be determined by the jury. Swigart v. Ballou, supra.

On Delegation of Parental Authority

> ....A teacher's authority over his pupils being regarded as a delegation of at least a portion of parental authority, presumption is in favor of the teacher's action.... Drake v. Thomas, supra.

The courts have always recognized the need to control the conduct of students and considers it a breach of duty if such control is lacking. In imposing this obligation upon the teacher, the court has granted her a unique position of authority:

> ....By law, as well as by immemorial usage, a schoolmaster is regarded as standing in loco parentis, and, like a parent has authority to moderately chastise the pupils under his care. One standing in loco parentis--exercising a parent's delegated authority--may administer reasonable chastisement to a child, or a pupil, to the same extent as a parent. The parent is not criminally liable in all cases, merely because in opinion of a jury or a court, the punishment inflicted is immoderate or excessive. More than this is necessary to fasten upon him guilt of criminality.[6]

The court holds that one in loco parentis is in place of a parent; charged facticiously, with a parent's rights, duties, and responsibilities.[7]

An even more expansive definition of in loco parentis was given by the court in Commonwealth v. Ebert:

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[6]Roberson v. State, 116 So. 317, 22 Ala. App. 413 (1928).

[7]Meisner v. U.S., D. C. Mo., 295 F. 866, 868.

> ....To render a parent liable to prosecution by his minor child, he must be governed by motives of malice or unkindness. For a mere error in judgment, influenced perhaps by fond parental love for the future prosperity of his child, he cannot be held legally liable. The law does not permit the court to enter the sanctity of the domestic circle and usurp the parental authority in every family because we think the punishment is severe. It is strong reason to believe that the parent is actuated by bad and malevolent motives, using his legal parental authority for the gratification of a mind bent on mischief that the law has given the right to interpose for the protection and safety of the child. Such is the rule relative to the school teacher, whom the parent for the time being, has placed in his stead...[8]

A teacher punished his pupil by "striking him a number of times on his rump and legs with a one-half inch rubber syphon hose." In upholding that the chastisement of the pupil by the teacher was lawful and reasonable under the circumstances, the court said:

> It will be noticed that the same rule applies to a teacher as to a parent, and I am sure that, if the father or mother of this boy had done just what this teacher did and had been arrested, there would not have been a conviction.[9]

The parent has the natural right over his child, but for purposes of education and training, he may delegate a portion of this right to another. It is within his right to restrict this privilege to a certain degree when he chooses a private school rather than a public school, but he cannot limit the policy of the State.[10] The common law in Illinois restricts the authority of the teacher to "at least a portion of parental authority."[11]

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[8]Commonwealth v. Ebert, 11 Pa. Dist. 199 (1901).

[9]Supra.

[10]Restatement to the Law of Torts, Vol 1, §153.

[11]Fox v. The People, supra.; Drake v. Thomas, supra.

"Teacher," in the State of Illinois, means any or all school district employees required to be certified under the laws relating to the certification of teachers,[12]

The court has held that under proper circumstances, a member of the school board may use sufficient force to remove a pupil from the school room.[13] But, the court in Prendergast v. Masterson, held that a superintendent is not a teacher and therefore, has not the right to discipline students. The court said:

> ....1) that there was nothing in the rules of the school board which authorized defendant as superintendent to take control of the high school to the exclusion of the teachers therein; 2) if, as superintendent, defendant was a public officer, he did not thereby have a right to chastise plaintiff, since such a right was not conferred by law on any public officer as such; and, 3) if the custom was for the superintendent of schools to chastise pupils, therein, the custom existed in violation not only of well-established principles of law, but in violation of a criminal statue denouncing as a crime the use of unlawful violence upon another.[14]

The reasoning behind the common law principle which permits the parent to limit the privilege of one in loco parentis seems to be explained by the court in Steber v. Norris:

> This parental power is little liable to abuse, for it is continually restrained by natural affection, the tenderness which the parent feels for his offspring, an affection ever on the alert, and acting rather by instinct than reasoning.

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[12]School Code, §24-1, p.232.

[13]Peck v. Smith, 41 Conn. 442.

[14]Corpus Juris Secundum, §23; Prendergast v. Masterson, 196 S.W. 2466 (Tex. Civ. App.).

> The schoolmaster has no such natural restraint. Hence, he may not safely be trusted with all a parent's authority, for he does not act from instinct of parental affection. He should be guided and restrained by judgment and wise discretion, and hence is responsible for their reasonable exercise.[15]

A third person may be legally authorized by the parent to administer such chastisement to their children as they might themselves lawfully inflict. This point was made by the court in Rowe v. Rugg:

> It is a general rule that those having the care, custody and control of minor children may, for the purpose of proper discipline and control, administer such moderate and reasonable chastisement as shall effect the desired object, and this rule has been applied generally to all those occupying a position in loco parentis.
>
> The duties which the parent owes to the child, as well as to the public, in the matter of its maintenance, protection, and education, have generally been held to give the parents or other person occupying such a place, the power to thus discipline and correct it.[16]

The Court of Appeals in Illinois considered a mother's two letters requesting action to be taken to correct her son as an express delegation of parental authority, and declared that the lower court erred in refusing these letters as evidence.[17] In this case, the parent chose, unwittingly, to grant to the school principal and teachers her expressed consent in any course of reasonable action. It has thus become a point of common law in the State of Illinois, that a teacher is not liable in civil action when the delegation of such parental authority has been so expressed.

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[15] Steber v. Norris, 188 Wis., 206 N.W. 173; 43 A.L.R. 501.

[16] Rowe v. Rugg, 91 N.W. 903; 117 Iowa 606, 94 A.S.R. 318 (1902).

[17] Drake v. Thomas, supra.

One point of common law which is peculiar to the State of Illinois is that the burden of proof of reasonableness rests with the teacher.

The case came before the Illinois Appellate Court in 1903. Mary Ballou, a teacher, had whipped a student with a stick for misbehaving a number of times. The county court acquitted her, but the pupil's counsel brought the case into the Appellate Court. The decision of the trial court was reversed. The Court said:

> In the State of Illinois, the burden of proof of the whipping being moderate and not excessive lies with the teacher, not with the boy. The jury was not so instructed, therefore, the judgment is reversed. The rule is that where the defendant, a teacher in this case, pleads moderate castigavit and the plaintiff replied de injuria, the burden of proof is upon the defendant.[18]

The School Code of Illinois is silent on the matter of corporal punishment. It has no direct or indirect statutes affecting corporal punishment, either prohibiting it or permitting it. The State of Illinois has no statute which places the teacher in loco parentis.

The Illinois Constitution of 1870, Article IV §22 states:

> The General Assembly shall not pass laws in any of the following enumerated cases, that is to say: for--*** Providing for the management of common schools;

The matter of discipline policy is delegated to the local school boards. Their rules and regulations must be obeyed as having the force of ordinances. Violation of these rules by the teacher may result in her dismissal.[19] Before dismissal takes effect, the board must decide if the teacher is capable of

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[18]Swigart v. Ballou, supra.

[19]Robinson v. School Directors of Dist. No.4, 96 Ill. App. 604 (1901).

remedying her violations. If they feel that the teacher's violations can be remedied, the board must first send her a warning notice. If she persists in breaking the rules of the board, the board has the legal right to dismiss her. The teacher has the right of appeal.

The School Code enumerates the reasons which might warrant a teacher's dismissal in Section 10-22.4:

> To dismiss a teacher for incompetency, cruelty, negligence, immorality or other sufficient cause and to dismiss any teacher, whenever in its opinion, the interests of the schools require it, subject, however, to the provisions of Section 24-10 to 24-15, inclusive. Marriage is not a cause of removal.

Illinois Courts have upheld this rule,[20] but, the Court holds that the burden of the proof rests with the school board in dismissal of a teacher.[21]

The common law privilege of the teacher to administer corporal punishment, does not dispense her from obeying school board rules. Common law protects the teacher from civil suit.

The law does protect the teacher, however, if the school board should abuse its discretionary powers.[22]

A case was adjudicated in the Illinois Appellate Court in August, 1964.[23] Henry W. Miller, a physical education teacher in Calumet School, Dist. 132 of

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[20] School Directors v. Reddick, 77 Ill. 628 (1875); School Directors v. Birch 93 Ill. App. 499 (1901).

[21] School Directors v. Reddick, supra.

[22] Supra.

[23] Miller v. Board of Education, 37 Ill. App. 2d 451, 186 N.E.2d 790 (1964).

Cook County, was dismissed by the Calumet Board of Education. The grounds for dismissal were established in four charges, the first being as follows:

> 1. Inflicting corporal punishment on students, thereby injuring them, and thereby violating the rules of the Board of Education prohibiting corporal punishment.

The Circuit Court of Cook County reversed the Board's order of dismissal, on the grounds that the Board had not complied with requirements in giving proper notice. No question was raised as to the Board's decision on the merits.

The Board appealed the judgment of the trial court. The Appellate Court reversed the summary judgment entered in the trial court, restricting its holding to the point urged by the Board that the notice of dismissal was properly given relative to the 60-day period prescribed by statute. The Appellate Court reviewed the case on the grounds that the charges made by the Board were never determined as "remedial" or "irremediable" before the notice of charges was served. The Illinois School Code outlines the legal procedure.[24] The Court said:

> ....It may be said that by not giving a warning notice, the Board inferentially determined that the charges were irremediable....assuming such determination was made, and its final decision on the hearing that the causes of dismissal are remediable, are subject to review.[25]

The Court quoted the School Code in agreeing that the Board had the legal right to dismiss a teacher on the charges presented. The Court also stated that the Teacher Tenure Act of the School Code, Section 24-1 to 24-8, expressly

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[24]School Code, Sec. 24-12.

[25]Miller v. Board of Education, supra.

provide that the power of the Board to dismiss a teacher is in no way modified or diminished by the Teacher Tenure Act except with respect to the procedure of discharge.

The purpose of the Teacher Tenure Act (enacted in 1941), was to protect Illinois teachers whose employment was otherwise at the mercy of school boards.

The court clarified the Teacher Tenure Law in Donahoo v. Board of Education:

> Its object was to improve the Illinois school system by assuring teachers of experience and ability a continuous service and a rehiring based upon merit rather than failure to rehire based upon reasons that are political, partisan, or capricious.[26]

The Illinois School Code, therefore, provides that a board of education may dismiss a teacher who has entered upon contractual continued service (more than two consecutive school terms), but only by following the procedure stated in the Teacher Tenure Act. The Court holds that where the language used in a statute is plain and certain, it must be given effect.[27] As a protection against the arbitrary use of the board's power of dismissal, the Tenure Act provides that if the charges for dismissal are "on account of causes that may be deemed to be remediable" by the board, before serving notice of such charges, specifically stating the causes which, if not removed, may result in bringing the charges of dismissal.[28] It is made clear that such a warning notice must be given to the teacher with enough time to correct that which is causing the pending charges of dismissal.

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[26]Donahoo v. Board of Education, 413 Ill. 422, 109 N.E.2d 787.

[27]Smith v. Board of Education, 405 Ill. 143, 89 N.E.2d 893.

[28]School Code, Sec. 24-3 (1959); Sec. 24-12 (1961 and 1963).

In Keyes v. Board of Education, the court stated:

> ....The underlying reasons for such provision, is the fact that the causes for dismissal referred to in sections 6-36 and 7-16 of the School Code are general in their nature. If the causes upon which the Board predicates its dismissal can, by their nature, be said to be remediable, then in order that the teacher may have an opportunity to remedy the same, he or she is entitled to a specific warning notice of the specific charges constituting such causes. Obviously, compliance with this warning notice provision cannot be had unless, prior to giving a dismissal notice, determination is made as to whether the cause or causes relied upon are remediable.
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> * * * * *
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> The determination of the Board in the first instance that the causes of dismissal are not remediable and its final decision on the hearing, are both subject to review. If the causes relied on in the instant were in fact remediable, then the requirement that a written notice be given the plaintiff was mandatory and failure to comply therewith deprived the Board of jurisdiction. (Emphasis added). [29]

The decision of the school board as to whether the charges for dismissal are remediable or irremediable is subject to review.[30]

> The Administrative Review Act (Ill. Rev. Stat., 1945, ch. 110, § § 264-279) provides that upon review, the findings and conclusions of the administrative agency shall be held prima facie true and correct and will not be set aside unless its decision is found to be without substantial foundation in the record or is against the manifest weight of the evidence.[31]

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[29] Keyes v. Board of Education, 20 Ill. App.2d 504, 156 N.E.2d 763.

[30] Keyes v. Board of Education, supra.; Meridith v. Board of Education, 7 Ill App.2d 477, 130 N.E.2d 5; Werner v. Community Unit School District No. 4, 40 Ill. App.2d 491, 190 N.E.2d 184; Hutchinson v. Board of Education, 32 Ill. App.2d 247, 177 N.E.2d 436.

[31] Miller v. Board of Education, supra.

The Appellate Court affirmed the judgment of the trial court in the Miller case on the grounds that findings of the Board that the charges were not remediable were against the manifest weight of the evidence. Since the court held that the dismissal charges were remediable, a warning notice was required and the teacher had not received one.

The plaintiff in the Miller case also stated that he had not been given a fair trial. The Board had acted as judge, prosecutor, complainant, and witness; it was in no position to render an impartial judgment. The agreement of the Court to this complaint was supported by Justice McCormick with a quote from Eidenmiller v. Board of Education, 28 Ill. App.2d 90, 170 N.E.2d 792. Justice McCormick quoted Justice Smith:

> The Teacher Tenure Law was designed to cure then existing evils in our school system providing a speedy, simple procedure for the dismissal of teachers based on charges, notice, fair hearing and a speedy judicial review under the provisions of the Administrative Review Act. These benign purposes become obscure in this record. In Lusk v. Consolidated School District, 20 Ill. App.2d 252, we had occasion to say that the teacher is not only entitled to a hearing, she is entitled to a fair hearing, that the administrative agency does not represent one party against the other, 1 Illinois Law and Practice, page 461, and 'our study of the record raises a grave doubt that the hearing afforded in this case was the type of hearing which the legislature had in mind when it enacted the Teacher Tenure Law.' What we then said of that record we now say of this. In so doing we fully recognize that the factual findings of an administrative tribunal are by statute prima facie correct, that we are not concerned with the wisdom of the decision, and that the decision of an administrative agency will be set aside only where there is support in the record or is manifestly against the weight of the evidence. Keyes v. Board of Education, 20 Ill. App.2d 504; Pearson v. Community Unit School District No. 5, 12 Ill. App.2d 44. We are thus circumscribed and inhibited by these rules when it may be said that a fair hearing was held. We do not understand that they inhibit us from determining whether the hearing

> as conducted, was fairly conducted within the purpose, intent, and principles of the Teacher Tenure Law.
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> ....In discussing dual functions similar to those here, Judge William J. Brennan, Jr. (now Justice of the United States Supreme Court) had this to say:
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> 'The substantiality of evidence must take into consideration whatever in the record fairly detracts from its weight...'
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> In re Larsen, N.J. Super. 564.
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> ....In discussing the case before us now, we deal not with a dual role, not with a triple role, but with the quadruple roles of complainant, prosecutor, judge, and witness in a single tribunal. Our Supreme Court once said of a similar statute that, 'a statute which compels a litigant to submit his controversy to a tribunal of which his antagonist is a member, makes his antagonist his judge, and does not afford due process of law.' Commissioners of Drainage Dist. No. 1 v. Smith, 223 Ill. 417. It is beyond the perimeter of our jurisdiction to question the validity of the statute here involved or the authority of the Board to proceed under it. It is within the perimeter of our jurisdiction, and it is our duty to determine whether this record had its birth in a fair hearing, before an impartial tribunal within the principles, purposes, and intent of the Teacher Tenure Law.

"Mr. Smith concludes his opinion by finding that the charges preferred against the teacher found no substantial support in evidence, and he further says:"

> ....For this reason, and for the further reason that the hearing disclosed by this record, as conducted, was not in keeping with the ordinary concepts of American justice nor within the spirit. intent, principles or the letter of the Tenure Act, the judgment of the trial court should be affirmed....

The weight of the evidence did not support the charges that Henry Miller had inflicted unreasonable corporal punishment on any student. It was, however, proven that he had violated the written rule of the Board prohibiting corporal punishment. Justice McCormick had this interesting comment to make:

> This court must take judicial notice of the present atmosphere existing in the schools of this County. The

> purpose of a school is to convey to the students knowledge which will enable them to go further in the educational field and to help them to attain success in life. In order for a teacher to function properly there must be some way of implementing the requirement that the students behave in an orderly and respectful manner. That in many cases students do not behave so is common knowledge. (Emphasis added).

The law in Illinois also protects the teacher from financial loss and expenses. The Illinois School Code (1963) states:

> § 34-85. ....Pending the hearing of the charges, the person charged may be suspended in accordance with rules prescribed by the board, but such person, if acquitted, shall not suffer any loss of salary by reason of the suspension.
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> § 34-85b. ....If the decision of the board is reversed on review, the board shall pay all the court costs.
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> § 34-85a. ....One-half of the cost of the reporter's attendance shall be paid by the board and one-half by the teacher. Either party desiring a transcript shall pay the cost thereof.

It is now mandatory that school boards insure all employees against civil suit actions. The law is stated in the School Code, Section 34-18.1.

The teacher's authority to administer corporal punishment may be limited by the prescribed rules of the school board. But, the Common law holds that the scope of the teacher's duty is not limited to punishing acts of misconduct which occur in the course of the school day, if such acts have a direct and immediate effect on the school. In O'Rourke v. Walker, the court said:

> ....A teacher has the right to punish a pupil for an offense committed after the pupil's return home, where such an offense has an effect upon the morale and efficiency of the school.[32]

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[32] O'Rourke v. Walker, 102 Conn. 130, 128 A. 25, 41 A.L.R. 1380 (1925).

CHAPTER V

LEGAL POSITION OF THE PUPIL

Blackstone states that the legal duties of parents toward their children are three: (1) maintenance, (2) protection, (3) education.[1] Gavit elaborates on each of Blackstone's duties of parents. Parents have the obligation of maintenance toward their children as a principle of the natural law. By begetting children, parents entered into a voluntary obligation to do all in their power to preserve the life of lives they had bestowed.[2]

Protection is also a natural duty, which is rather permitted than enjoined by any municipal laws; nature in this respect needing a cheek rather than a spur. A parent may maintain a child in a law suit, and may justify an assault and battery, in defense of his child.[3]

Education is the duty pointed out to the parent by reason and is of greatest importance.[4]

The state binds the parent in the obligation of educating the child. Every state has laws in its statutes compelling parents to educate their child-

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[1]Gavit, p.19.

[2]Ibid.

[3]Ibid.

[4]Ibid.

ren. These are known as compulsory education laws. These laws have been attacked as being unconstitutional, but the courts have always upheld them. The Constitutional objection raised is that by compelling school attendance, the individual liberty guaranteed by the Fourteenth Amendment of the United States Constitution is unreasonably infringed.[5] In answer to this objection the Court has stated:

> Since the welfare of the State is served by the creation of an enlightened citizenry, the enactment of the compulsory attendance laws is held to be a valid exercise of the police power of the state.[6]

A parent is free to choose a private or public school, in the fulfillment of this obligation, so long as the school follows the required program of education established by the state.[7]

The Illinois School Code, Section 26-2 contains the compulsory education law of the State of Illinois. It reads:

> Enrolled pupils below 7 or over 16. Any person having custody or control of a child who is below the age of 7 years or above the age of 16 years and who is enrolled in any of grades 1 through 12, in the public school shall cause him to attend the public school in the district wherein he resides when it is in session during the regular school term unless he is excused under paragraphs 2, 3, or 4 of Section 26-1.

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[5]Robert R. Hamilton and Paul R. Mort, The Law and Public Education, (Brooklyn: Foundation Press, Inc., 1959), p.506.

[6]Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, 39 A.L.R. 468 (1925).

[7]School Code (1963), §26-2, p.239.

Enforcement of compulsory attendance rules must be tempered with common sense. If a child is ill, or other good cause exists for failure to attend school, he is not truant and his parents are not guilty of keeping him out of school contrary to law.[8] Section 26-1 lists the reasons which legally exempt certain children from attending public schools.

Parents have a natural right of authority over their children. However, by common law in the State of Illinois, they must delegate at least a portion of their parental authority to the teacher.[9]

Section 153 of the Restatement to the Law of Torts[10] defines the powers of the parents to restrict the authority of one standing in loco parentis in the matter of discipline. Section 153 (1) states that a parent who sends his child to a private school may delegate only as much power to discipline the child as he, the parent, chooses to give.

> ....Thus, if a private school chooses to accept a child whose parents have stipulated that the punishments usual in the school shall not be inflicted upon him, the school master is not privileged to inflict the usual punishments even though they are otherwise permissible. If the punishment inflicted by such a school master is not excessive and is inflicted upon a proper occasion, the fact that the school or institution forbids it does not destroy the schoolmaster's privilege. This is so unless the parent's knowledge of the rules is shown to have operated as an inducement to send the child to a particular school, in which case the parent may be assumed to have delegated only so much of his privilege as is consistent with the school rules.

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[8]Hamilton and Mort, p.507.

[9]Fox v. The People, supra.; Drake v. Thomas, supra.

[10]Restatement to the Law of Torts, Sec. 153, p.352.

The parent is not free to restrict the person in loco parentis in a public school. Section 153 (2) states:

> One who is in charge of the training or education of a group of children is privileged to apply such force or impose such confinement upon one or more of them as is reasonably necessary to secure observance of the discipline necessary for the education and training of the children as a group.[11]

It is legally presumed that the school authorities have acted properly in administering any type of punishment, providing the teacher has not acted from malice and the injury was not of a permanent nature. It is further presumed that the authorities acted in good faith.[12] In Illinois, there is a presumption in favor of the teacher's action in an action against a teacher for assault and battery for inflicting corporal punishment on a pupil. However, in the State of Illinois, the burden of proof that the teacher acted correctly rests upon the teacher,[13] not upon the child.[14]

The parent is the legal protector of the child. If the teacher violates the right of the child, the parent may bring civil action for damages against the teacher. The State of Illinois holds that the elements and measure of damage in a civil action follow this principle:

> A successful plaintiff in an action for assault and battery is entitled to damages for his actual injuries and losses, and he may be awarded exemplary damages where the defendant's conduct was malicious, wanton, or in reckless disregard of plaintiff's rights.[15]

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[11] Ibid.

[12] Fox v. The People, supra.; Drake v. Thomas, supra.

[13] Swigart v. Ballou, supra.

[14] Supra.

[15] Illinois Law and Practice, Vol. 3, ch. 2, §27.

The person seeking action in a civil suit for assault and battery is entitled to such damages and will compensate him for injuries sustained.[16] He is also entitled to compensation for the consequences and sufferings arising from assault and battery,[17] proximate to the occasion, but is not limited to the day of the assault.[18]

In judging whether a punishment was excessive or not, the Illinois Court will take the pupil's past conduct into consideration and will not judge solely from the instant in question.[19]

The Illinois Courts hold also, that letters written by a parent to school authorities containing requests or instructions to discipline that parent's child, are held as express delegations of parental authority. All other things being equal, the parent cannot then hold a teacher liable in civil action.[20]

The purpose of the state in permitting the teacher to administer reasonable corporal punishment is the welfare of the child. As Justice McCormick has said, "...there must be some way of implementing the requirement that the students behave in an orderly and respectful manner."[21] When the punishment, however, is excessive, it loses the purpose for which it is permitted.[22]

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[16] Jones v. Jones, 71 Ill. 562 (1874).

[17] Slater v. Rink, 18 Ill. 527 (1857).

[18] Illinois Law and Practice, op. cit.

[19] Drake v. Thomas, supra.

[20] Supra.

[21] Miller v. Board of Education, supra.

[22] State v. Pendergrass, N.C. (2 Devereux and Battle's Law) 365, 31 Am. Dec. 416.

The common law also holds that if a teacher inflicts a punishment upon a child which is in excess of that which is privileged, the child has the privilege to defend himself against the attempted excessive force.[23]

The Texas Court of Criminal Appeals had before it in 1920, a case in which a pupil was convicted of manslaughter. The teacher had taken the child beyond the school grounds to a wooded area with the intention of chastising him. The court agreed that it was lawful for the teacher to chastise the child beyond the school grounds, but the court also stated:

> The state authorizes the schoolteacher to punish moderately his pupils. If it passes beyond that and the punishment is immoderate, or for the purpose of revenge or is maliciously done, then the right does not exist, and the right of self-defense obtains.

From all evidence, the pupil had not intended to kill his teacher. The weapon which he used to protect himself against attack was an ordinary pocket knife. The court considered the attack as not within the right of the teacher.[24]

Perhaps the teacher and the parent do stand on the same level insofar as the determination of the need for punishment is concerned but not as to the limits to which it shall be carried.[25]

When a teacher gave a child a choice of corporal punishment in order to save himself from expulsion from school, the court held such action as a defense to charge the teacher with assault and battery. In VanVactor v. State, the court said:

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[23] Restatement to the Law of Torts, §155, p.354.

[24] Dill v. State, 87 Tex. Cr. 49, 219 S.W. 481 (1920).

[25] Robert W. Miller, "Resort to Corporal Punishment in Enforcing School Discipline," 1 Syracuse Law Review (1950), p.254.

> The teacher has no right to chastise for all offenses as has the parent. The teacher's right in that respect is restricted to the limits of his jurisdiction and responsibility as a teacher.[26]

A teacher was held liable because she had whipped a child for not studying geography, a subject which she knew the child's parents had forbidden him to study. The court held that it is within the right of the parent to choose the child's course of study; the parent cannot be denied all right to control the education of his children.[27]

On the other hand, a teacher cannot be held liable for administering reasonable corporal punishment to a pupil whose parents had forbidden him to take a particular subject, but never informed the teacher. A teacher physically ejected from the classroom a pupil, who, after several days warning, refused to speak in the public speaking class. He informed the teacher that his parents had forbidden him to take the course after the teacher ejected him from the room. The court held that the parents could not expect the teacher to receive their child under his instruction without conforming to reasonable rules. Compelling a child to speak in a public speaking course seemed reasonable to the court.[28]

Parents likewise have the duty to inform the teacher of any physical or constitutional weakness of the child which might result in serious injury in what would otherwise be reasonable corporal punishment. If the teacher admin-

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[26]VanVactor v. State, 113 Ind. 276, 15 N.E. 341 (1887).

[27]Morrow v. Wood, 35 Wis. 59.

[28]Kidder v. Chellis, 59 N.H. 473.

isters corporal punishment within the scope of her legal authority, and through an unknown weakness of the child by the teacher, harmful effects result, the parents cannot recover for damages.[29]

Nevertheless, the teacher is responsible to consider the physical strength before imposing any punishment on a child. The Court in Virginia held a 24-year-old male teacher guilty of second degree murder when a 7-year-old female pupil died from a whipping with a switch 3 feet long.[30]

A parent cannot limit the scope of the teacher's authority to the hours within which school is in session. It is well-established that the power of the school authorities does not cease absolutely when the students leave the school premises. Conduct away from the school grounds may subject a pupil to school discipline if it directly affects the good order and welfare of the school. On the other hand, the school board cannot make rules and regulations governing student conduct where the morals, order, and discipline are not directly affected.[31]

The principle that a teacher's authority cannot be limited to school hours or school premises was enunciated in an old Vermont case, Lander v. Seaver. An 11-year-old boy, ninety minutes after the dismissal of school, spoke disrespectfully to the teacher in the presence of a fellow pupil. Upon his return to school the following morning, the teacher punished the boy with a small rawhide whip for his show of disrespect. The court said:

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[29]Quinn v. Nolan, supra.

[30]Johnson v. Commonwealth, 111 Va. 877, 69 S.E. 1104 (1911).

[31]Hobbs v. Germany, 94 Miss, 469, 29 L.R.A. 983 (1909).

> It is conceded his right to punish extends to school hours, and there seems to be no reasonable doubt that the supervision and control of the master over the scholar extends from the time he leaves home to go to school till he returns home from school....When the child has returned home to his parent's control, then the parental authority is resumed and the control of the teacher ceases, and then, for all ordinary acts of misbehavior the parent alone has the power to punish....
>
> ....But where the offense (committed after school hours) has a direct and immediate tendency to injure the school and bring the master's authority into contempt, as in this case, when done in the presence of other scholars and of the master, and with the design to insult him, we think he has the right to punish the scholars if he comes again to school....But the tendency of the acts so done out of the teacher's supervision for which he may punish, must be direct and immediate on their bearing upon the welfare of the school, or the authority of the master and the respect due him.... Hence each case must be determined by its peculiar circumstances....[32]

The courts have upheld teachers for administering corporal punishment for the following offenses committed outside of school hours and away from school grounds: abusing two small girls;[33] using profane language and fighting;[34] showing disrespect to school authorities.[35]

School boards are limited in their powers to make rules and regulations which affect pupil conduct once they reach home. The courts have upheld the right of the parent over their children's conduct, and will not permit the board to enforce rules which do not have a direct tendency on the school.

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[32] Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156 (1859).

[33] O'Rourke v. Walker, supra.

[34] Deskins v. Gose, 85 Mo. 485, 55 Am. Rep. 387 (1885).

[35] Lander v. Seaver, supra.

In Hobbs v. Germany, a boy attended service at church in the evening with his father. These hours had been designated by the school board as study hours. It was considered that the boy had violated the rule. The boy was compelled to submit to corporal punishment or confinement in a schoolroom for forty minutes during the noon hour for five days. The boy refused to do either and was expelled. The court said:

> ....It may be that the school authorities would have a right to make certain regulations and rules for the good government of the school which would extend and control the child even when it has reached home; but, if that power exists, it can only be done in matters which would per se have a direct and pernicious effect on the moral tone of the school, or have a tendency to subvert and destroy the proper administration of school affairs.[36]

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[36] Hobbs v. Germany, supra.

CHAPTER VI

SUMMARY

The proposal for this study was to survey the principles enunciated by Illinois courts in litigated decisions in regard to the rights, responsibilities, and liabilities of teachers and other school authorities to discipline pupils with corporal punishment. The findings of this study are related particularly to the State of Illinois, and are as follows:

1. Since the School Code of Illinois is silent on the matter of discipline, the formulation of a discipline policy is the delegated responsibility of the individual school board.

2. The rules and regulations, and by-laws of school boards have the force of municipal ordinances.

3. The teacher has the right to punish to enforce order, decency, decorum, and good government in the school.

4. Three types of legal actions can grow out of corporal punishment cases: criminal action for assault and battery; civil action for assault and battery; proceedings initiated by the school board to dismiss a teacher.

5. Assault and battery are two distinct offenses according to Illinois statute.

6. In punishing a pupil, a teacher may take into consideration the pupil's habitual conduct. In Illinois, serious habitual acts of misconduct are admissible as evidence in court to justify the teacher's actions.

7. The relationship of the teacher to pupil as one standing in the place of the parent (in loco parentis) justifies the use of reasonable force without the incurrence of liability.

8. The teacher, in loco parentis, occupies a quasi-judicial capacity. In Illinois, a teacher will be granted the benefit of the doubt for an error in judgment if the punishment inflicted is excessive, but there must be a clear absence of malice in motive and intent, and no permanent damage results from the punishment.

9. The criteria by which a teacher will be judged for her actions in the use of corporal punishment are: a. teacher's motive; b. nature of pupil's misconduct; c. means used to administer punishment; d. extent of resulting injury to pupil; e. pupil's sex, strength, age, mental maturity.

10. The teacher is "privileged" in the use of reasonable force.

11. Malice will not be implied as a result of excessive punishment by teacher unless permanent damage results.

12. Factors by which the court will judge the "reasonableness" of punishment are: a. nature of offense; b. apparent motive of offender; c. influence of his example to other children; d. sex; e. age; and, f. physical and mental condition of the child.

13. In Illinois, the jury will decide if the punishment is reasonable in the minds of reasonable men.

14. Negligence cannot figure in an action for assault and battery.

15. Illinois courts hold that a teacher, as one in loco parentis, is delegated at least a portion of parental authority.

16. "Teacher," in the State of Illinois, means any or all district employees required to be certified under the laws relating to certification of teachers.

17. The Superintendent is not a teacher, and therefore, has no right to discipline the students. Under certain circumstances, a member of the school board may discipline students.

18. Letters of requests for action to be taken to improve a child's conduct, will be considered express delegation of parental authority, when the same are addressed to the principal and teacher by the parent.

19. Peculiar to the State of Illinois, the teacher bears the responsibility for the burden of proof that her action was justified.

20. School boards have the legal right to dismiss a teacher for cruelty, negligence, incompetence, immorality, or whenever the interests of the school requires it. Such actions must be in accord with the legal procedure outlined in the School Code, or the board is liable.

21. The teacher is protected against the abuse of discretionary powers by the school board by:

a. The Teacher Tenure Law.

b. The Administrative Review Law.

22. Parents can limit the authority of teachers in private schools in the matter of punishment; they cannot limit the authority of public school teachers as this is the duty of the state.

23. The child has the right of self-defense in the face of an attempt of excessive punishment. He is privileged to defend himself.

24. The child cannot be punished for obeying his parents in not taking a particular course of study. The right of the parent to choose the course prevails.

25. The teacher must be informed that the child is forbidden to take the course. He is not liable if he is unaware of this fact and punishes the child.

26. The teacher is not liable for results of a harmful nature from reasonable punishment if the parent never informed her of a child's physical weakness.

27. If death results from excessive punishment of a child the teacher may be convicted of murder.

28. The authority of the teacher is not limited to punishing acts of misconduct to school hours. She may punish pupils for acts committed outside of school hours and away from school grounds if such acts have a direct harmful tendency on the school, or if such acts are subversive to the authority of the teacher.

29. The teacher should not administer corporal punishment, even if it is reasonable, if the school board forbids such action.

30. The school board may not make any rules governing the conduct of pupils outside school hours and away from school grounds, unless such rules have a direct tendency on the school.

31. It is the right of the parent to oversee the conduct of children once they return home from school, unless such conduct directly undermines the authority and good order of the school.

Conclusions:

There have been three cases involving corporal punishment by teachers litigated in the Illinois Appellate Court:

Fox v. The People, 84 Ill. App. 270 (1898);

Swigart v. Ballou, 106 Ill. App. 266 (1903);

Drake v. Thomas, 310 Ill. App. 57, 33 N.E.2d 889 (1941).

In all three cases the children were boys. In the two earlier cases, Fox and Swigart, the boys were about 9 years old. The Drake boy was 15 years old and considered incorrigible by school authorities.

Palmer Seaney, the pupil in the Fox Case, was punished for misbehavior during the noon hour of the previous day; he was whipped. The Drake pupil was punished for acts of misbehavior causing disturbance in the classroom of a school for incorrigibles. His punishment consisted of blows on the thighs with a paper tube. The teachers in both of these cases were males.

The pupil in the Swigart case was punished for a series of acts of misbehavior; he was whipped. The teacher was a female.

The trial courts found all the teachers guilty. The Appellate Court reversed the decisions involving the male teachers on the grounds that the punishment was reasonable and necessary evidence had erroneously been excluded by the court in one case.

In the case of the female teacher, the Appellate Court reversed the decision of the lower court on the technicality that the burden of the proof should have been borne by the teacher, not the boy. Therefore, the teacher was found guilty, but not for unlawful corporal punishment.

Therefore, in all three cases the Illinois Appellate Court upheld reasonable corporal punishment.

Recommendations:

It is not a purpose within the scope of this study to discuss the merits or demerits of the use of corporal punishment in the discipline of students. Certainly, the use of such discipline incurs the danger of legal liability and its psychological value is subject to question.

Where the school board has a written rule prohibiting the use of corporal punishment, a teacher must abide by it.

However, if the board has no policy regulating the use of corporal punishment and the teacher feels that there is some merit in its employment, she may use it. She should be cautious. Gail Inlow gives the following procedures which a teacher should employ when she deems it necessary to inflict corporal punishment.[1]

1. Consult the principal to assure his support.

2. Ask the principal to notify the parents regarding the contemplated action.

3. Whenever possible, have a central authority figure administer the punishment. (Note: Be sure he falls into the category described under "teacher" in the Illinois School Code.)

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[1]Gail M. Inlow, Maturity in High School Teaching, (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1963) p. 373.

4. Have a witness present.

5. Ascertain that the one who administers the punishment is of the same sex as the offender.

6. Keep the case in strict privacy from beginning to end.

Inlow then adds, "And after these criteria have been adhered to, it is quite possible that such premeditation will result ultimately in the selection of a substitute form of punishment."[2]

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[2] Ibid., p.374.

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July 22, 1964

Sr. M. Virginia, OSM
13811 S. Western Avenue
Blue Island, Illinois

Dear Sr. Virginia:

Your letter of July 21st has been received in this office and referred to my desk for attention.

I note you are preparing your thesis for a Master of Arts degree and have chosen the subject "Corporal Punishment and Court Decisions in Illinois." As you are probably aware, there is nothing in the School Code of this State concerning corporal punishment of pupils in the public schools. Further, few cases have been taken to the courts and hence material on the subject is quite limited.

Of course the law requires local school boards:

> "To adopt and enforce all necessary rules for the management and government of the public schools of their district." (Section 10-[illegible], School Code of Illinois, 1963.)

If a school board deems it advisable to authorize the use of corporal punishment in the public schools as a means of maintaining discipline, it has a right to so rule under authority of the above quoted section of the statute. Any rule adopted must, of course, be reasonable in order to be enforced.

We have no recent rulings of the courts on the matter but in general the courts have held that the teacher stands in loco parentis to the child, or in the position of the parent during the time the child is in school. In other words, the authority of the teacher over the pupil is regarded as a delegation of at least a portion of the parental authority. (See Fox v. The People, 84 Ill. App. 270.)

Mr. R[illegible]

[illegible] another case before the Appellate Court of this State, it was held that where a reasonable corporal punishment on a pupil and is not actuated by malice, and the punishment is not excessive or [illegible], the teacher is not liable. (Drake v. Thomas, [illegible]. I believe these early rulings indicate that the courts believe a school board may adopt a rule authorizing reasonable punishment of pupils when necessary, as long as it is not cruel, excessive, wanton or malicious.

As to whether punishment inflicted in a particular instance is a matter for the courts, to be decided after consideration of all circumstances connected with the case. The Attorney General held that "a small switch may be used more cruelly by one person than a leather strap or wooden paddle by another person." (1916 Report, Illinois Attorney General, page 970.)

I note that you are interested in decisions of courts other than in Illinois and I happen to have received a copy of the March 27, 1962 issue of The National School Law Reporter which deals with corporal punishment and quotes from cases arising in several states. I am enclosing it to you herewith and trust it will be helpful.

I am also sending you a copy of the May, 1961 issue of the Educational Press Bulletin published by this office and refer you to page 26 where you will find an article on "Powers of Board to Control Pupil Conduct". While it does not deal specifically with corporal punishment, it may be of interest to you.

We do not have a record of school districts in Illinois in which corporal punishment is prohibited by rule; therefore I am unable to comply with your request for this information. We have received many inquiries from school officials concerning the authority of the board in this matter but we have no way of knowing what action is taken by each individual board. Personally I would think that many boards rule to prohibit corporal punishment of pupils particularly in view of the fact that the courts have recognized the need for corporal punishment under certain circumstances.

Very truly yours,

Legal Advisor

H:L
Encl.

Sister Mary Virginia, O.S.M.
13811 S Western Avenue
Blue Island, Illinois 60406

Dear Sister Mary Virginia:

This letter is in response to your request of July 21, [illegible] information relating to your thesis topic, "Corporal [illegible] and Illinois Court Decisions."

The U. S. Office of Education has not compiled [illegible] laws and practices in the States in this area. However, enclose for your information "Research Memo 1964-[illegible]" [illegible] by the Research Division of the National Education Ass[illegible] which surveys the States' laws on corporal punishment [illegible]

You will note from the memo that it is generally the law that a teacher stands "in the place of the parent" for many purposes and due to that position, the teacher has authority to administer reasonable punishment for offenses related to his responsibilities as a teacher. Typically the local board of education establishes its own policy, provided it does not conflict with State law. The general rule has been modified or elaborated in a number of cases, many of which are listed in the memo. For instance, New Jersey has prohibited by statute the corporal punishment of pupils. In Wisconsin the common law recognizes the right of a teacher to inflict corporal punishment in appropriate cases; however, the Milwaukee school board has decided that in the city schools there can be no corporal punishment following a breach of discipline. But that board permits physical force by a teacher to prevent a threatened breach of discipline or to stop a continuing breach. (Policy of Milwaukee, Wisconsin, Board of School Directors, May 7, 1963.)

Some developments since the publication of the National Education Association memo are as follows:

In 1963 the Attorney General of Kentucky issued an opinion that corporal punishment is permitted in the schools [illegible]

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and Resolu[illegible] 1964, No. 940 Va. [illegible],

If you should need further refere[illegible] materials
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Angeles, University of South Carol[illegible] 19[illegible]
law in several of the States, and the lega[illegible]
Juris Secundum, Volume 79, which lis[illegible] ru[illegible]
court cases on the subject under the heading "Sch[illegible]
Districts," sections 502 and 11.

As for Illinois court decisions, there are several sec[illegible]
122 of Smith-Hurd Illinois Annotated Statutes, wh[illegible]
volumes containing the 1961 School Code of Illinois, [illegible]
annotations telling how the courts have interpre[illegible]
sections of the school code. Each volume is [illegible]
version of the code permits a researcher to find up-t[illegible]
which refer to any particular aspect of school [illegible]
Hurd Code is in widespread use, so a version may be av[illegible]
a local public library.

Another source of Illinois decisions is West's [illegible]
Reporter Digest. Under the heading "Schools and Schoo[illegible] Di
you will find collected there the old and new cas[illegible] on [illegible]
the geographic area in which Illinois is located. Unde[illegible] th
heading, and under the subheading "Pupils, tuitio[illegible] and
(Keynumber 8), you will find whatever corporal pun[illegible]ment [illegible]
there may be which apply to private schools. Under
"Teachers," (Keynumber 176), you will find a collec[illegible]
relating to public schools. To do a complete sea[illegible]
in any keynumbered subheading, you must check [illegible]
the "parent" volume, the bound "Cumulative Supplement"
pocket parts at the back of the parent volumes [illegible]
recent paperbound supplement. You will note that [illegible]
Illinois cases under Keynumber 176 [illegible] of [illegible]

Another source of decisions--from all the States--is the Decennium, under the general heading "Schools and School This and the Northeast Digest may be available at your law library.

A source of recent decisions from all the States is Gartner's Yearbook of School Law, published by the Interstate Danville, Illinois. This annual, published through 1964, digests cases of unusual interest to educators.

I hope these research hints will be of some help, and I wish you success in your studies.

Sincerely yours,

Carl J. Sokolowski
Research Assistant in
the School Law Unit

Enclosure

SPRINGFIELD

August 2, 1964

Mar

Sister Mary Virginia, O.S.F.
13811 South Western Aven
Blue Island, Illinois

Dear Sister Mary Virginia: ine

In connection with your communication of August , 1964, in regard to the
"Miller case", which is pending in the Appell
Court, I would suggest that you contact Mr.
Orville Leslie V. Beck, Clerk of the Appe
Court, 160 North Michigan Avenue, Chicag

There is very little law on the subject
of your inquiry in this State, however I
direct your attention to the case of
People, 44 Ill. App. 10.

Very truly yours,

ATTORNEY GENERAL
Criminal Division

Date

APPROVAL SHEET

The thesis submitted by Sister Mary Virginia Olsen, O.S.M. has been read and approved by three members of the Department of Education.

The final copies have been examined by the director of the thesis and the signature which appears below verifies the fact that any necessary changes have been incorporated, and that the thesis is now given final approval with reference to content, form, and mechanical accuracy.

The thesis is therefore accepted in partial fulfillment of the requirements for the Degree of Master of Arts.

Date

Signature of Adviser