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## CRIMINAL LIABILITY FOR THE PUNISHMENT OF CHILDREN: AN EVALUATION OF MEANS AND ENDS

Sheldon S. Levy

The author is a member of the New York Bar and is a Special Assistant Attorney General and Assistant Counsel to the New York State Crime Commission. He has contributed to legal literature on "The Interaction of Institutions and Policy Groups: The Origin of Sex Crime Legislation", "Probate in Common Form in the United States: The Problem of Notice in Probate Proceedings" and other topics.—EDITOR.

"Speak roughly to your little boy,  
And beat him when he sneezes;  
He only does it to annoy,  
Because he knows it teases."—CARROLL, *Alice in Wonderland*, c. 6.

Despite its recent overshadowing by television and radio exposés of adult criminality throughout the United States,<sup>1</sup> the problem of juvenile delinquency and its far-reaching effects remains as one of the most serious issues with which our law enforcement agencies and societal protective institutions have to contend. In the light of present-day developments, including an expansion in "gang warfare" and perhaps in the use of harmful narcotics by children of high school age, there can be little doubt that an evaluation of the modern standards for the upbringing of children is both appropriate and necessary.

It can no longer be seriously questioned that the initial conditioning of young children will ultimately determine their basic respect attitudes towards societal law and authority which will be carried with them through adolescence and manhood. When a large percentage of the nation's children become habitually addicted to patterns of behavior that are considered particularly anti-social and undesirable, we must seek the primary cause. It is most likely to be found within those institutions which are dedicated to the mental, moral and physical development of children, and from those persons who are delegated with the responsibility of maintaining and effectuating these aims.

Modern parents and teachers, primarily preoccupied with the pursuit of their own self-interests, have found it socially expedient to adopt a laissez-faire attitude toward the problem of parental and educational guidance and control of children. They have become the gullible adherents of the presumably modern school of child psychology—the do-nothings of our educational world. Without factual substantiation, they

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1. The reference is particularly to the activities of the Senate Crime Investigating Committee and state crime commissions throughout the country.

have vocalized on the inherent evils of the "spare-the-rod" philosophy and lauded the beneficent attributes of their modern method of offspring discipline—which often amounts to no discipline at all.

It is time that the iron facade of this modern psychology—if that it be—be penetrated and exposed to public view and understanding. The most prevalent basic misconception is that all psychologists are in wholehearted agreement that the rewards-as-a-substitute-for-punishment technique of discipline is the only one that can produce satisfactory results in our modern society. However, a brief perusal of recent popular writings, intended as guides to parents, will indicate the wide diversity of opinion that still exists among learned psychologists, psychiatrists, doctors, and child guidance counsellors on this subject.<sup>2</sup> Moreover, a careful inspection of these authorities reveals the significant fact that the majority of them do not advocate, by any means, the complete abolition of corporal punishment of children, but instead merely place varying restrictive limitations on its use.<sup>3</sup>

Not unlike its psychological counterpart, the Law—in the form of statutory enactments and judicial pronouncements—has long placed varying restrictive limitations on its abuse.

It will be the primary purpose of this article to investigate and evaluate the legally restrictive bounds within which a person may discipline a minor before society will step in to impose sanctions for any excess.

## I. METHODOLOGY

The most expeditious approach to this problem is through the use of the human motivation formula:

"Man pursuing values through institutions on resources."<sup>4</sup>

Translating the proposition to conform with our immediate needs, we may ask: Who is attempting to attain what ends in punishing children, and by what means are they going about it?

In our society it is the duty of parents, teachers, guardians, and those

2. See generally FOSTER, *You Don't Need to Punish*, PARENTS MAGAZINE, 22:17 (Oct., 1947); JENKINS, *Does Punishment Work?*, PARENTS MAGAZINE, 23:28 (Nov., 1948); BERENBERG, *I Don't Like to Punish Them But . . .*, AMERICAN HOME, 41:62-3 (March, 1949); MILLER, *New vs. Old Ways in Discipline*, PARENTS MAGAZINE, 24:32 (March, 1949); JOHNSON, *Discipline Without Dithers*, BETTER HOME & GARDEN, 27:121 (Apr., 1949); CUTTS & MOSLEY, *Should Dad Do the Disciplining?*, BETTER HOME & GARDEN, 27:142 (June, 1949); FERGUSON, *A Woman's Viewpoint*, N. Y. WORLD-TELEGRAM & SUN, June 6, 1951, p. 30, col. 6; BARCLAY, *Home Discipline*, N. Y. TIMES, MAGAZINE SECTION, May 25, 1952, p. 50, col. 2; TAYLOR, *Unhand That Child*, N. Y. WORLD-TELEGRAM & SUN, April 4, 1953, p. 3.

3. *Ibid.*

4. A complete discussion of this formula and its related value system by its originator can be found in the Appendix to LASSWELL, *POWER AND PERSONALITY* (1st ed. 1948).

*in loco parentis* to educate, by reasonable means, the younger generation as to the recognized standards and precepts inherent in our modern existence. Reasonable means must necessarily include sensible means; sensible means must include discipline. Discipline *per se* appears in the guise of a variety of techniques. Corporal punishment is one of them.

It would be foolhardy to advocate a return to the "cat-o'-nine-tails" for use on children and criminals alike, which, in fact, was praised by Theodore Roosevelt and urged by him upon the District of Columbia.<sup>5</sup> But this is little reason to gyrate to the opposite extreme and to declare that corporal punishment of any sort, administered at any time, can afford nothing but harmful consequences to a child.<sup>6</sup> The absurdity of both these extremes should be immediately apparent.

Parents and teachers and their legal equivalents, despite any doubts that might be expressed by their off-spring and pupils, are human beings, and as such are endowed with all the human attributes and fallibilities. Since human motivation is solely concerned with enhancing one's own self-interests,<sup>7</sup> parents and teachers do not fail to conform to this standard. Each one is continually striving to maximize his own values (self-interests), and, in dealing with children, the particular values to be augmented are: (1) individual well-being, (2) power, (3) respect, and (4) rectitude.

In these terms, the reasons for punishing children are easily comprehensible. First of all, the child is the living attestation of his parents'

5. See BELL, *The Cat as a Deterrent for Crime*, 3 J. CRIM. L. & CRIMINOLOGY, 945, 946 (1913). . . . See also N. Y. WORLD-TELEGRAM & SUN, December 26, 1951, p. 9, col. 4 (Senator Tobey (R., N. H.) proposes a revival of the whipping post for public officials who betray their trust); N. Y. DAILY NEWS, June 8, 1952, p. 70, col. 1 (members of the supreme court of Australia advocate the use of the "cat-o'-nine-tails" on sex offenders).

6. This latter proposition is tantamount to heresy! See BOOK OF PROVERBS of the OLD TESTAMENT,

13:24—"He that spareth his rod hateth his son; but he that loveth him chasteneth him betimes."

23:13—"Withhold not correction from the child: for if thou beatest him with the rod, he shall not die."

23:14—"Thou shalt beat him with the rod, and shalt deliver his soul from hell."

29:15—"The rod and reproof give wisdom: but a child left to himself bringeth his mother to shame."

7. This pronouncement may, at first, appear startling; however, a few minutes of considered thought will undoubtedly offer sufficient proof of its veracity. The author is prepared to conclusively show that self-interest is involved in every form of human action and endeavor. Perhaps an extreme example will be sufficient to demonstrate the *technique*. A complete stranger stops you in the hall and asks for change of a quarter. You immediately produce a dime and three nickels (if you have it) and make the exchange. What self-interest could have possibly propelled your action in this situation, you may ask? By the simple psychological principle of transference, you have placed yourself in the stranger's position—needing change of a quarter to make a purchase or a telephone call, and no one but strangers about you. This is not a pleasant situation, and if you were in it, you would want one of those strangers to make the necessary change for you. Therefore, unknowingly, you have beaten down any unpleasant feeling (anxiety) you might have gotten from being in that situation, and you have, in your mental reality, given yourself change of a quarter!

sexual potency; he is the symbol of the pride of parenthood; he supplies joys and amusements to his parents; he perpetuates the family name or, at least, its tradition; he is an object to demonstrate to a superiority that may otherwise be suppressed; and, if nothing else, he provides a topic of conversation over the bridge table. All in all, then, he is usually a desirable asset to the household. However, he is an asset that must be molded in a particular manner—in conformity with family tradition and with the standards of society.

When a child deviates from the accepted norms of conduct by either endangering himself or others, parents feel an immediate deprivation of their own values and must counter this feeling by punishment. What parent would not prefer to give his child a few licks on the buttocks if it might prevent a diminution of the parent's own values<sup>8</sup> and might ultimately prevent the complete loss of the child—the object that helps insure the parent's well-being in his home and community; the object to whom he can manifest his power; the object who grants him respect when few others may do so; the object to whom his word is law, and not just *stare decisis* at that.

All that has been said concerning parents can be equally well applied to teachers and to others who deal with children *in loco parentis*. It is not a difficult matter to employ the psychological technique of transference and to place one's self, mentally, at least, in the position of a parent to any child, or to any number of them, and thereby acquire the parental objectives in maximizing values. Moreover, it is well stated that, generally, a teacher's heart is as big as her bosom.

We must fully realize, therefore, that children are not punished for their own good, (a feeble excuse, at best), nor merely because of parental love and affection. Children are punished in order to achieve maximum security for the sacred values of the perpetrator of the punishment. Call it what you may, but, in the final reckoning, the maximization of self-interests is the essence of human existence, and as human beings we must accept it as such. Nevertheless, let us not leap blindly from this statement to the conclusion that no punishment is preferable to this sadistic torture. Perhaps in Aldous Huxley's totalitarian "Brave New World," when babies are conceived from bottles and reared cattle-like at government expense, we can attain a society devoid of discipline and punishment. However, until that time, no society or family or individual can long exist without discipline.

Amazingly enough, the Law, although probably unknowingly, has

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8. One example would be the loss of neighbors' respect by not showing evidence of sufficient control over the child.

reached correct conclusions—before society has—as to the reasons for the punishment of children, and has independently acted thereon. As recently as a century ago, learned law courts still espoused the ancient Roman doctrine of *patria potestas*, which gave the father the power of life and death over his children. In addition, the sanctity of the school and the authority of the school master were considered next to that of the king.<sup>9</sup> Today, however, the Law, though far from abolishing the discipline and punishment of children completely, has, at least, taken cognizance of the reasons for the actions of those who administer the punishment, and has imposed sanctions for excess in the pursuit of such values, thereby also preserving the child's own well-being from over-enthusiastic parents and teachers. No longer does the sanctity of group institutions, such as the family and the school, take absolute precedence over the dignity and well-being of the individual in our democratic state. It is when individual well-being is seriously threatened that the majesty of the Law intercedes to maintain moderation in all things.

Not often does the Law take the initial step in recognizing the cause and prescribing the limits of societal action. A thorough perusal of this phenomenal legal accomplishment should not be amiss.

## II. THE STATUTE LAW

It is interesting to note that persons, by means of the transference mechanism, can not only place themselves in the position of parents, defending their rights to inflict punishment on their children, but, in addition, can easily imagine themselves as the children of such parents. It is these persons, some of whom may be legislators themselves, who ultimately press for legislative enactments such as the so-called "Cruelty Statutes." These statutes, which make it "unlawful for any person having the care or custody of any child wilfully to abandon it, or to torture, torment, cruelly punish, or wilfully deprive it of necessary food, clothing or shelter," have been adopted in twenty-six jurisdictions<sup>10</sup> in the United States. Such wilful punishment or neglect is

9. Perhaps, even greater than the authority of the king:

"Many years ago a learned and judicious schoolmaster said to Charles II [of England] in the plenitude of his power:

'Sire, pull off thy hat in my school; for if my scholars discover that the king is above me in authority, they will soon cease to respect me.'

And the king pulled off his hat, to demonstrate, by example, that the schoolmaster's authority should be respected even by a king." BELL, J. in *People v. Petrie*, 198 N.Y.S. 81, 83 (1923).

10. Ark. Stats. Ann. sec. 41-1105 (1947); Cal. Penal Code sec. 273a (Deering 1949); Conn. Gen. Stats. sec. 8368 (1949); Dela. Rev. Code c. 70, sec. 2546 (1935); D.C. Code sec. 22-901 (1940); Fla. Stats. Ann. sec. 828.04 (1949); Ga. Code Ann. tit. 26, sec. 8001 (1935); Idaho Code sec. 18-1501 (1948); Ill. Rev. Stat. c. 38, sec. 147 (1941); Ind. Stats. Ann. sec.

usually held to be a misdemeanor, but in Illinois,<sup>11</sup> Michigan,<sup>12</sup> New Jersey,<sup>13</sup> and Vermont<sup>14</sup> it seems to be a felony offense.

The state of Missouri still grants parents some semblance of discretion in the matter by statutorily providing that a person inflicting punishment on an infant shall only be criminally liable where the chastisement is likely to injure the child, or the child's person, life, or health shall be endangered.<sup>15</sup> An Oregon statute holds that only those *in loco parentis*, as distinguished from parents, can be guilty of wilful mistreatment of children under 16 years of age.<sup>16</sup> Texas legislation on the subject, as usual, displays a uniqueness of thought and content, unsurpassed by any other state's statutes. The Lone Star State is once again alone in increasing the reprehensibility of the crime from simple assault to aggravated assault and from homicide to murder, depending on the instrument employed in the punishment, and whether it is likely to produce disgrace<sup>17</sup> or death<sup>18</sup>.

Some state legislatures, however, have not been lax in passing legislation designed to preserve the sanctity of a parent or teacher's right to punish his children or pupils, and to guard against over-severe sanctions for miscalculations. Therefore, in eighteen states,<sup>19</sup> homicide is an excusable offense "when committed by accident and misfortune, in lawfully correcting a child or servant."<sup>20</sup> In addition, six jurisdictions<sup>21</sup> afford parents, teachers, guardians, and masters the privilege of chastising minors under their control in a reasonable manner and moderate

10-807, 813 (Burns 1933); Ky. Rev. Stat. sec. 199.330 (1948); La. Rev. Stats. sec. 14-93 (1950); Me. Rev. Stats. c. 125, sec. 6 (1944); Mich. Stats. Ann. sec. 28.331 (1938); Minn. Stats. Ann. sec. 617.73 (1947); Mont. Rev. Codes Ann. sec. 94-306 (1947); Neb. Rev. Stats. sec. 38-115-7 (1943); N. J. Stats. Ann. sec. 9:6-1 (1939); Ohio Gen. Code sec. 12970 (Page 1939); Pa. Stats. Ann. tit. 18, sec. 4728 (Purdon 1945); S. C. Code sec. 1125 (1942); Va. Code sec. 40-112 (1950); Vt. Stats. sec. 8261 (1947); W. Va. Code Ann. sec. 6079 (1949); Wisc. Stats. sec. 351.32 (1949); Wyo. Comp. Stats. Ann. sec. 58-101 (1945).

11. Ill. Rev. Stat. c. 38, sec. 147 (1941).

12. Mich. Stats. Ann. sec. 28.331 (1938).

13. N. J. Stats. Ann. sec. 9:6-1 (1939).

14. Vt. Stats. sec. 8261 (1947).

15. Mo. Rev. Stats. Ann. sec. 4419 (1942).

16. Ore. Comp. Laws Ann. sec. 23-1039 (1940).

17. Tex. Penal Code art. 1147 (Vernon 1948).

18. Tex. Penal Code art. 1229 (Vernon 1948).

19. Cal. Penal Code sec. 195 (Deering 1949); Colo. Stats. Ann. c. 48, sec. 47 (1935); Fla. Stats. Ann. sec. 782.03 (1944); Ill. Rev. Stats. c. 38, sec. 370 (1941); La. Rev. Stats. sec. 14-18(4) (1950); Miss. Code Ann. sec. 2219 (1942); Mo. Rev. Stats. Ann. sec. 4380 (1942); Mont. Rev. Codes Ann. sec. 94-2511 (1947); Nev. Comp. Laws sec. 10082 (1929); N. M. Stats. Ann. sec. 41-2415 (1941); N. Y. Penal Law art. 94, sec. 1054 (1938); N. D. Rev. Code sec. 12-2703 (1943); Okla. Stats. Ann. tit. 21, sec. 731 (1937); Ore. Comp. Laws Ann. sec. 23-418 (1940); S. C. Code sec. 1103 (1942); S. D. Code sec. 13.2002 (1939); Tex. Penal Code art. 1228, 1229 (Vernon 1948); Wisc. Stats. sec. 340.30 (1949).

20. Cal. Penal Code sec. 195 (Deering 1949).

21. Hawaii Rev. Laws sec. 12264 (1945); Mont. Rev. Codes Ann. sec. 94-605 (1947); N. Y. Penal Law art. 20, sec. 246 (1938); N. D. Rev. Code sec. 12-2603 (1943); Okla. Stats. Ann. tit. 21, sec. 643(4) (1937); Wash. Rev. Stats. Ann. sec. 2416(4) (Remington 1932).

degree. Hawaii specifically exempts teachers from legal responsibility for administering necessary and reasonable punishment upon any pupil.<sup>22</sup>

Ironically enough, what might today be considered the most enlightened statutory enactment in this field, is but a hang-over from a pre-neo-discipline period. The Virginia Code<sup>23</sup> stipulates that, where a minor under 16 years of age has been convicted of a misdemeanor, the trial judge, at his discretion and in lieu of other punishment provided by law, may permit the parent, the guardian, or some other suitable person, to administer such corporal punishment to said minor as may seem adequate. Perhaps a nation-wide adoption of such a statute is the solution to the problem of juvenile delinquency. Rather than subject a young offender to the stigma of commitment to some short-term penal institution, and risk the possibility of his ultimate conversion to hardened criminality thereby, would it not be preferable to let him feel the wrath of the Law where he knows it best? Why not allow a beneficial impression on his body, rather than a harmful impression on his mind?

### III. THE CASE LAW

Before considering the judicial decisions which have formulated the rules applicable to a determination of the criminal liability of parents, teachers and those *in loco parentis* for the punishment of children, a brief digest of the factual situations inherent in these cases is in order.

Chastisement has been inflicted on children, ranging in ages of from two to twenty-one,<sup>24</sup> by persons of authority employing every type of manipulable instrument from a "black snake" whip to an iron ram-rod.<sup>25</sup> In addition, more sadistic purveyors of punishment have conceived of such ingenious methods<sup>26</sup> of demonstrating their power position to the younger generation as: knocking a youngster's head against a brick

22. Hawaii Rev. Laws sec. 1836 (1945).

23. Va. Code sec. 63-303 (1950).

24. Children between the ages of 12 and 13 were found to be the most popular objects of punishment. This is understandable since children of that age group are old enough to commit gross misconduct and young enough to be physically chastised therefor.

25. Other instruments used include: stick, tree limb, plain switch, persimmon switch, two-pronged switch, bois d'arc switch, green mesquite switch, hickory switch, rubber belt, waist belt, piece of board, wooden paddle, old saw, ox whip, buggy whip, riding whip, walking cane, ferrule, leather strap, razor strap, rubber pipe, "cat-o-nine-tails", rubber syphon hose, ruler, knotted bed cord, broom, rope, rattan, cowskin, hands, and the traditional hair brush.

26. Other interesting methods include: hitting over the head with butt end of a switch, hitting with closed fist, ducking in water with rope, kicking in stomach, keeping in cold, damp cellar in mid-winter for several days, chaining all day to a sewing machine, grabbing by ears, putting in grain sack for several hours, feeding on bread and water, flinging against brick chimney, stamping on, forcing to run five miles barefoot over stony ground, rabbit punching, lifting off feet while choking, tying to bedpost, dragging by hair, chaining in backyard, and tying naked on all fours.



wall,<sup>27</sup> roasting him over a fire,<sup>28</sup> and throwing him naked into a tub of boiling water.<sup>29</sup> Alleged reasons for meting out such corrective justice<sup>30</sup> include: "nastyng" the floor,<sup>31</sup> calling the defendant a thief for destroying a book on dancing,<sup>32</sup> refusing to carry a baby,<sup>33</sup> and writing an indecent note in school.<sup>34</sup> Persons charged with excessive punishment have been indicted for simple assault, first degree murder, and varying misdemeanors and felonies in between,<sup>35</sup> depending upon the measure of the excess and the results produced. They themselves have been punished by fines of from one to five hundred dollars, imprisonment, and even death.

It has been said that "variety is the spice of life." As to the punishment of children, however, variety seems to be the strife of life. When individual attempts to maximize values clash with group and institutional endeavors to attain the same ends, one must surely yield. It is usually those individuals who have exceeded the bounds of reasonableness in their efforts to enhance self-interests who incur the wrath of society and who are ultimately subjected to its criminal sanctions.

#### a. *Parents*

Few institutions have been held in higher esteem throughout the ages than that of the family. This is primarily because man has discovered that no other institution can offer him so great an opportunity for the pursuit of the maximization of his own individual values. With this attitude in mind, courts have steadfastly striven to maintain and enhance the sanctity of the family and to preserve the tranquility of domestic relations. At times they have gone to ridiculous extremes to accomplish this purpose.<sup>36</sup>

27. *Johnson v. State*, 2 Humph. (Tenn.) 283 (1841).

28. *State v. Mahly*, 68 Mo. 315 (1876).

29. *State v. Mc Donie*, 96 W. Va. 219, 123 S. E. 405 (1924).

30. Other motives for inflicting unusual punishment include: wetting cot and attempting to hide it with rubber sheet, using abusive language, taking part of a stove, stealing apples, stealing fifty cents, stealing candy, stealing teacher's overcoat, fighting, breaking a chest to get edibles, not learning to walk, being covered with vermin, making antic demonstrations in class, running away, talking back, forging a note for \$15, failing to have English lesson prepared, dropping book from balcony of auditorium, refusing to leave school grounds, begging a piece of meat from neighbor, having "filthy, insanitary habits", throwing snowballs in school yard, being a truant, refusing to do homework, and last, but not least, dividing brandy cherries among pupils in class.

31. *Williams v. State*, 57 Ga. 478 (1876).

32. *State v. Spiegel*, 39 Wyo. 309, 270 P. 1064 (1928).

33. *Goode v. State*, Tex. Cr. App., 77 S. W. 799 (1903).

34. *Stephens v. State*, 44 Tex. Cr. App. 67, 68 S. W. 281 (1902).

35. Other indictments include: aggravated assault, assault and battery, third degree assault, assault with intent to kill, under "cruelty statute", false imprisonment (of son), manslaughter, and second degree murder.

36. Consider the situation in many jurisdictions where a wife may be a surety for anyone but her husband, allegedly to preserve domestic tranquillity.

This human desire to uphold the inviolability of the family has continually afforded moral and legal support to the ancient judicial proposition that no child can maintain an action in tort against his parents.<sup>37</sup> Nevertheless, too great an infringement upon individual well-being has resulted in a few decisions, which propounded an exception to the rule where the cause of action was based upon some type of deliberate or malicious wrong or cruel and inhuman treatment.<sup>38</sup> At least one recent case<sup>39</sup> definitively rejected this general doctrine where a parent committed a wilful tort against an emancipated minor child.<sup>40</sup>

Despite the conflicting policy considerations that have fostered the few exceptions to the prohibition of tort actions between parent and child, the institution of the family has lost little of its dignity, prestige or major judicial support. As a result, the usual sanction imposed by the law upon parents who exceed all reasonable bounds in correcting or punishing children, is either removing the child from the parent's custody or subjecting the parent to a criminal prosecution. It is this latter category with which we are here concerned.

Since it is still the duty of parents to bring up and educate their children in accordance with the precepts and standards set by society in general and their community in particular, the act of a parent in inflicting corporal punishment on his child retains the sanctity of a legal right, and it is a universally recognized principle that such necessary chastisement does not constitute an assault and battery. Nevertheless, as intimated previously, there are limits beyond which society, acting through its legal institutions, will not sanction a parent's endeavors toward the education of his children.

A minority of courts have persistently adhered to the view, as originally expressed in *State v. Pendergrass*,<sup>41</sup> that, in punishing a child, a

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37. "To permit each of such acts of real or alleged negligence to be the basis of an action for damages against the father during the child's minority or upon his majority or against the father's estate upon the latter's death would destroy the harmony of the family and militate against the peace of society." *Matarese v. Matarese*, 47 R. I. 131, 133, 131 A. 198, 199 (1925).

38. *Brown v. Cole*, 198 Ark. 417, 129 S. W.2d 245 (1939) (strychnine poisoning); *Clasen v. Pruhs*, 69 Neb. 278, 95 N. W. 640 (1903) (permanent physical injuries from numerous whippings, improper food and clothing). *But cf. Mc Kelvey v. Mc Kelvey*, 111 Tenn. 388, 77 S. W. 664 (1903) (damages asked for cruel and inhuman treatment denied) and a most extreme case: *Roller v. Roller*, 37 Wash. 242, 79 P. 788 (1905) (tort action denied where father had committed rape on minor daughter).

39. *Cogwill, Ad'm. v. Boock, A'dm.*, 500 Or. Adv. Sh. 705, 218 P.2d 445 (1950), enthusiastically supported by Note, 30 Ore. L. Rev. 86 (1950) and 30 Boston U. L. Rev. 580-2 (1950).

40. However, another recent case has held that a parent can not sue an unemancipated minor child for a tort. *Detwiler v. Detwiler*, 162 Pa. Super. 333, 57 A.2d 426 (1948), severely criticized in 9 U. Pitts. L. Rev. 310 (1948).

41. 19 N. C. 365 (1837). The case itself involves the criminal liability of a school teacher.

parent can only contract criminal liability through the infliction of a permanent injury or as a result of proceeding from malice<sup>42</sup> and not in the exercise of corrective authority.<sup>43</sup> The vast preponderance of judicial authority, however, maintains the proposition that when a jury considers any particular form of parental correction as unreasonable, immoderate or excessive—even though administered in good faith and without malice—criminal sanctions will be imposed upon the perpetrator<sup>44</sup> of such correction.<sup>45</sup>

Oddly enough, however, this majority of courts, in attempting to enhance the individual well-being value in opposition to the maintenance of the power position of the parent, have adopted the tort test for reasonableness, and superimposed thereon the more severe penalties of criminal liability. A jury, in determining whether parental punishment has been excessive, may consider: (1) the nature of the child's offense, (2) the apparent motive of the offender, (3) the influence of his example upon other children of the same family or group, (4) the attitude and disposition of the parent<sup>46</sup> (5) the sex, age, and mental and physical condition of the child,<sup>47</sup> (6) the type of instrument, if any, employed in the chastisement,<sup>48</sup> and (7) the nature and extent of the harm inflicted. These, of course, are the usual indicia for a determination of the "reasonable man" standard of tort liability.<sup>49</sup>

The frivolities of a jury in deciding whether reasonable care has been exercised or in estimating a monetary recovery in a tort action is well known. To extend this type of whimsicality to situations, wherein

42. General malice can be defined as wickedness, a disposition to do wrong, a black and diabolical heart, regardless of social duty, and fatally bent on mischief. This is malice against mankind. Particularly, malice is ill will, a grudge, a desire to be revenged on a particular person.

Malice can be inferred from the circumstances of a particular case, from the fault for which punishment was inflicted, from the instrument used, and from similar findings of fact.

43. *Haydon v. State*, 15 Ala. App. 61, 72 So. 586 (1916); *Cameron v. State*, 24 Ala. App. 438, 136 So. 418 (1931); *State v. Washington*, 104 La. 443, 29 So. 55 (1900); *State v. Jones*, 95 N.C. 588 (1886); *Goode v. State*, Tex. Cr. App., 77 S.W. 799 (1903); *Walden v. State*, 89 Tex. Cr. Rep. 464, 232 S.W. 523 (1921).

44. A parent, apparently, may authorize another to inflict punishment, and, if done in a proper manner, such person will not be criminally liable, *Harris v. State*, 115 Ga. 578, 41 S.E. 983 (1902), but may be liable in tort. *Rowe v. Rugg*, 117 Iowa 606, 91 N.W. 903 (1902). However, any person, having parental authority over a child, who acquiesces in, aids, or abets excessive punishment of the child, is equally criminally liable. *State v. McDonie*, 96 W. Va. 219, 123 S.E. 405 (1924).

45. *Fletcher v. People*, 52 Ill. 395 (1869); *Hinkle v. State*, 127 Ind. 490, 26 N.E. 777 (1891); *Hornbeck v. State*, 16 Ind. App. 484, 45 N.E. 620 (1896); *Powell v. State*, 67 Miss. 119, 6 So. 646 (1889); *State v. Black*, Mo. Supp., 227 S.W.2d 1006 (1950); *Mohr v. State*, 19 Ohio C.C.(N.S.) 43 (1914); *Commonwealth v. Blaker*, 1 Brewst. (Pa.) 311 (1867); *Johnson v. State*, 2 Humph. (Tenn.) 283 (1841).

46. *Ackers v. State*, 73 Ark. 262, 83 S.W. 909 (1904).

47. *Stone v. State*, 1 Ga. App. 292, 57 S.E. 992 (1907).

48. *Williams v. State*, 57 Ga. 478 (1876); *Betts v. State*, 60 Tex. Cr. Rep. 631, 133 S.W. 251 (1911).

49. HARPER, LAW OF TORTS sec. 54 (1933); Restatement, Torts secs. 147-155 (1934).

emotionalism and personal preference are guiding principles, and, in addition, to place upon such capricious decisions the majestic cloak of criminal sanctions, is nothing more than an unnecessary reiteration of faith in our already out-moded jury system. Ironically, the Law, in providing specifically for the well-being of the child, has infringed upon the individual liberties of the parent. Although criminal sanctions are imposed for excessive punishment, the burden of proving such excess is no longer on the prosecution to the extent of the traditional "beyond a reasonable doubt." On the contrary, the burden, under this test, rests equally on the defendant to demonstrate to a jury's satisfaction that he has exercised the necessary moderation that each juror would himself consider sufficient.

This is not to say that nation-wide adoption of the Pendergrass principle for parental criminal liability would be the panacea. If most courts, however, continue to adhere to the policy of employing tort standards for a jury determination of criminal liability, the Pendergrass rule would seem to be a necessary counter-active measure. The burden of proving malice should once again be brought to bear upon the parties the Law intended.

The ultimate solution, of course, lies in a judicial adherence to one policy consideration in the final determination of which value is to be maximized at the expense of all others. If the head of the family is no longer to have the supreme authority which he once enjoyed,<sup>50</sup> a certain degree of family discord is naturally to be expected, and the ban on tort actions between parent and child would no longer have any legal or moral justification.<sup>51</sup> If, on the other hand, a preservation of the sanctity of the family, with its inherent power position in the parent, is deemed the wisest policy, then necessarily all of the safeguards to individual liberty inherent in a criminal prosecution must be maintained when a parent is accused of abusing his right to corporally punish his children and, thereby, of offending the moral senses of society. It should be clear that the diversity of legal pronouncements in this field is neither a sign of mature legal thought nor a symbol of judicial enlightenment. Consistency within basic policy considerations is the keynote of success in effective living.

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50. At common law a man was permitted to chastise his wife so long as the stick he used was no thicker than his thumb.

51. Query whether the ban on tort actions between parent and child ever had any justification in the first place. Why wouldn't a criminal action tend to upset the tranquillity of the home as much as a tort action? Or, in the alternative, hasn't domestic tranquillity usually been infringed upon as much by the impetus to a tort action as to a criminal proceeding?

### b. *Loco Parentis*

The law makes little differentiation between parents and those persons assuming the full-time parental function of educating and training the younger generation. This is especially true in the doctrines of criminal liability for the punishment of children.<sup>52</sup> The logic of this position cannot be disputed in view of the fact that those *in loco parentis* usually deem themselves substantial substitutes for the parents in the family relationship—and the law justifies their assumption.<sup>53</sup>

Those states which have adopted the Pendergrass rule of malice and permanent injury for the imposition of criminal liability upon a parent retain this rule for those *in loco parentis*.<sup>54</sup> And the jurisdictions which adhere to a jury determination of excessiveness in chastisement do not alter their position where a person legally delegated with parental authority is involved.<sup>55</sup> In addition, where a true *loco parentis* relationship exists, the importance of maintaining the domestic tranquility of the family makes for an extension of the traditional bar against tort actions between parent and child to this legal association.

Unlike the master-apprentice and guardian-ward relationships pictured by Charles Dickens in many of his novels, the typical *loco parentis* usually places himself whole-heartedly in the position of a natural parent and affords the child a decent and substantial upbringing. The *loco parentis* acquires the same proclivity toward the maximization of self-interests and personal values as does the natural parent. The law has recognized these human traits and has rightly provided safeguards and sanctions for the *loco parentis* association similar to the natural parent and child relationship.<sup>56</sup>

### c. *Teachers*

Practically speaking, our nation's parents have failed in their duty of effectively educating their children in the principles of self-discipline and respect for societal authority. The present rampage of (or exaggerated interest in) juvenile delinquency stands as grim attestation to

52. Where a person assumes toward a child not his own, a parental character, and holds the child out as his own, his liability for castigation is measured by that of the relationship he assumes. *Dix v. Martin*, 171 Mo. App. 266, 157 S.W. 133 (1913).

53. However, a parent has not the right to chastise an emancipated child that is no longer under his care. *Eitel v. State*, 78 Tex. Cr. Rep. 552, 182 S.W. 318 (1916).

54. *Dean v. State*, 89 Ala. 46, 8 So. 38 (1890); *Nichols v. State*, 32 Ala. App. 574, 28 So.2d 422 (1946); *State v. Harris*, 63 N.C. 1 (1868); *State v. Alford*, 68 N.C. 322 (1873).

55. *People v. Green*, 155 Mich. 524, 119 N.W. 1087 (1909); *State v. Koonse*, 123 Mo. App. 655, 101 S.W. 139 (1907); *Carpenter v. Commonwealth*, 186 Va. 851, 44 S.W.2d 419 (1947); *State v. Spiegel*, 39 Wyo. 309, 270 P. 1064 (1928).

56. *But see Steber v. Norris*, 138 Wis. 366, 206 N.W. 173 (1925).

this fact. It is obviously too late to instruct the parents themselves in these fundamental human doctrines that must be nurtured from birth; however, the hope for the future remains in the younger generation, and it is through our educational institutions that society's pursuit of basic values can most efficaciously be enhanced.

With these factors in mind, many legislatures and courts have desisted from the use of verbalistic nonsense and have put efficient theories into a workable practice. They have not been lax in a recognition of the fact that our schools are, at least, equally as important as the family in the up-bringing of children, and thus deserve an equal place before the law. In most states teachers have been accorded the same privileges as parents in the administering of corporal punishment to children.<sup>57</sup> Here again, it has been said that the majority test for criminal liability is the reasonableness of the chastisement as determined by a jury.<sup>58</sup> However, the more enlightened jurisdictions, by statute<sup>59</sup> and judicial decision,<sup>60</sup> have acknowledged the lack of effective success that the family institution has had in teaching societal discipline, and have adopted the Pendergrass rule for the personnel of educational institutions. Tort actions have always been maintainable against teachers for unreasonable punishment since presumably the facade of domestic tranquility did not extend to the school.<sup>61</sup> There is little necessity for an

57. However, these privileges have never been extended to spiritual advisers. *Donnelley v. Territory*, 5 Ariz. 291, 52 P. 368 (1898). Nor has the teacher's right of control over a pupil's discipline and conduct been extended to include authority over health and welfare. *Guerrieri v. Tyson*, 147 Pa. Super. 239, 24 A.2d 468 (1942).

58. *People v. Curtiss*, 116 Cal. App. (Supp.) 771, 300 P. 801 (1931); *State v. Mizner*, 50 Iowa 145 (1878); *Commonwealth v. Randall*, 4 Gray (Mass.) 36 (1855); *State v. Boyer*, 70 Mo. App. 156 (1897).

59. *People v. Petrie*, 198 N.Y.S. 81, 120 Misc. 221 (1923); *People v. Mummert*, 50 N.Y.S.2d 699 (1944); *People ex rel. Hogan v. Newton*, 56 N.Y.S.2d 779 (1945); *Martin v. State*, 11 Ohio N.P. (N.S.) 183 (1910); *Dowlen v. State*, 14 Tex. App. 61 (1883); *Bolding v. State*, 23 Tex. App. 175, 4 S.W. 579 (1887) (teacher struck one blow with a switch; pupil stabbed teacher twice with a butcher knife); *Hutton v. State*, 23 Tex. App. 386, 5 S.W. 122 (1887); *Whitley v. State*, 33 Tex. Cr. Rep. 172, 25 S.W. 1072 (1894); *Kinnard v. State*, 35 Tex. Cr. Rep. 276, 33 S.W. 234 (1895); *Stephens v. State*, 44 Tex. Cr. Rep. 67, 68 S.W. 281 (1902); *Greer v. State*, 106 S.W. 359 (1907); *Ely v. State*, 68 Tex. Cr. Rep. 562, 152 S.W. 631 (1912).

60. *Boyd v. State*, 88 Ala. 169, 7 So. 268 (1890); *Roberson v. State*, 22 Ala. App. 413, 116 So. 317 (1928); *Territory v. Cox*, 24 Haw. 461 (1918); *Fox v. People*, 84 Ill. App. 270 (1899); *Danenhoffer v. State*, 69 Ind. 295 (1879); *Vanvactor v. State*, 113 Ind. 276, 15 N.E. 341 (1888); *State v. Pendergrass*, 19 N.C. 365 (1837); *State v. Thornton*, 136 N.C. 610, 48 S.E. 602 (1904); *Commonwealth v. Seed*, 5 Clark (Pa.) 78 (1851); *Commonwealth v. Ebert*, 11 Pa. Dist. 199 (1901); *Anderson v. State*, 3 Head (Tenn.) 455 (1859).

61. *Sheehan v. Sturges*, 53 Conn. 481, 2 A. 341 (1885); *O'Rourke v. Walker*, 102 Conn. 130, 128 A. 25 (1925); *Calway v. Williamson*, 130 Conn. 575, 36 A.2d 377 (1944); *Drake v. Thomas*, 310 Ill. App. 57, 33 N.E.2d 889 (1941); *Patterson v. Nutter*, 78 Me. 509, 7 A. 273 (1886); *Haycraft v. Grigsby*, 88 Mo. App. 354 (1901); *Drum v. Miller*, 135 N.C. 204, 47 S.E. 421 (1904); *Quinn v. Nolan*, 7 Ohio Dec. (Reprint) 585 (1879); *Guyten v. Rhodes*, 65 Ohio App. 163, 29 N.E.2d 444 (1940); *Marlor v. Bill*, 181 Tenn. 100, 178 S.W.2d 634 (1944); *Prendergast v. Masterson*, Tex. Cr. Rep., 196 S.W. 246 (1917); *Lander v. Seaver*, 32 Vt. 114 (1859); *Melen v. McLaughlin*, 176 A. 297 (Vt. 1935).

alteration of this practice since some bounds must be set for excessive punishment. Nevertheless, it should be reiterated that the distinction between the proof necessary for criminal conviction and tort liability must be maintained.

Without adopting Dr. Samuel Johnson's extreme statement that:

. . . the government of the school-master is somewhat of the nature of a military government,—that is to say, it must be arbitrary; it must be exercised by the will of one man according to particular circumstances. A school-master has a prescriptive right to beat; and an action of assault and battery cannot be admitted against him unless there be some great excess, some barbarity,<sup>62</sup>

it should be recognized that the school teacher must act as a parent for as much of a child's life as the actual parent, and should therefore be afforded equal rights for equal duties. Moreover, it can be convincingly argued that presently the teacher serves an even more important function than the parent in the education of the younger generation—in the light of the apparent failure or inability of the parent in this regard—and thus is entitled to greater protections if he performs this function to the best of his ability. Although a particular punishment may be unnecessarily excessive, if it is not of such a nature as to cause or threaten lasting injury, and if the teacher is not actuated by malice, there should be no civil or criminal liability for possible errors of judgment in the administering of such punishment.

A teacher, of course, usually has no right to punish a pupil for misconduct committed after school hours, but such chastisement has been rightly sanctioned where the student's actions had a direct and immediate tendency to injure the school or to subvert the teacher's authority.<sup>63</sup>

It should be clearly comprehended that the proper education of children is an important and primary means of attaining values that must necessarily be maximized to their fullest extent in our society. Whether these aims can best be achieved through the family or the school, or preferably through both, is a policy consideration that must be definitively decided upon in the near future, and uniformly bolstered by legal rights and sanctions. If our educational system is to play the important part in this process that common sense suggests, it must surely have at hand the necessary means to carry out this plan most expeditiously. Effective discipline is that needed means; the ends will be forthcoming as the natural result.

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62. BOSWELL, LIFE OF JOHNSON 89-96 (1792).

63. O'Rourke v. Walker, 102 Conn. 130, 128 A. 25 (1925); People *ex rel.* Hogan v. Newton, 56 N.Y.S.2d 779 (1945).

## IV. THE CONCLUSIONS

It is inherent in our society that the enhancing of self-interests is the sole factor in human motivation. The Law has long been the societal institution through which this human desire to maximize values has been controlled and regulated. The upbringing of children in a fashion that will insure their ultimate usefulness to society is one of the methods for achieving value enhancement. The effective operation of this method, however, has come into direct conflict with the self-interests of various individuals, groups and institutions. The Law has been delegated with the function of resolving these conflicts and of setting the bounds beyond which too great a deprivation of individual values will be criminally sanctioned. In the disciplining of children, these bounds, in the past, have not been clearly defined. This fact is a direct result of the inability of our legislators and jurists to clearly formulate any idea of the basic purposes of discipline, and why such corporal regulation of children is needed at all. The so-called new school of child psychology has aided in disguising the definite need for such a determination.

The present abnormal increase (or interest) in juvenile delinquency, at least, has the questionable attribute of bringing the problem squarely before us in certain terms. That instruction in the art of constructive living and education in self-discipline can no longer be left primarily to the family, is uncomfortably obvious. The adults of today have failed in their parental primary duty, and, if society is to continue to exist at its present accelerated rate, the adults of tomorrow must not fail.

It has been the purpose of this paper to demonstrate the place of the Law in controlling the desires of society in general and of individuals in particular in employing various methods of discipline in the bringing up of children in conformity with moral and legal precepts. By tightening or relaxing its regulation in appropriate situations, the Law can go far in transforming fond hopes into reality.

A brief review of how the Law can help to achieve these aims is as follows: (1) nation-wide uniform legislation providing for the corporal punishment of minors, at the discretion of the court, should be adopted, (2) tort actions between parent and child should be allowed, (3) criminal liability for the punishment of children should be predicated on criminal safeguards designed to counter the whims of a jury, (4) the preservation of mythical domestic tranquility should no longer be the prime concern of the Law, (5) teachers should be given full legal recognition as a part-time parent, and (6) presuming our educational



system can today serve an even more important function than the family structure in the upbringing of children, the teacher should be afforded the additional protection of the Pendergrass rule in the administering of punishment.

Finally, just as the impeachment of a public official who holds a position of responsibility and trust is considered so serious that a special body is called upon to try the charges, so too, when a person is criminally indicted for the excessive punishment of a child, a special group should render the final decision in that case. Such a group should consist of at least one jurist, thoroughly versed in the problems of domestic relations, a psychiatrist, a psychologist, a child guidance counsellor, and perhaps even a physician. Any decision by such a group would only be arrived at after a careful investigation of the facts leading to the disciplinary measures, and of the mental, moral and physical disposition of both parties involved.

This then would seem to be the desired solution to the problem of criminal liability for the punishment of children—that ultimately both types of punishment can be eliminated.