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Constitutional Law -- School Law -- Restrictions on the Infliction of Corporal Punishment: Spoiling the Rod

John C. Lillie

protection of the law to those members of society who are stigmatized by a past criminal convictions. Although the case stopped short of declaring that all convicted criminals have a right to the franchise after release and offered no workable standard for legislatures to follow, standards might be fashioned from the law available in the area. However, a state can best serve its own interest and at the same time be free from any possible violation of equal protection by restoring suffrage to all prisoners upon completion of sentence. The state, of all institutions, should not let a citizen's conviction of a crime be prima facie evidence of his electoral dishonesty.

CHARLES H. CRANFORD

Constitutional Law—School Law—Restrictions on the Infliction of Corporal Punishment: Spoiling the Rod

In the past decade courts have begun to recognize the substantive and procedural constitutional rights of students who attend public schools[1] and to attempt to balance those rights against the effective maintenance of control and discipline in the educational context. Formerly courts had vested broad discretion in school authorities to control and discipline students,[2] but with the application of constitutional rights in the school context[3] it has become necessary to examine the disciplinary procedures of schools, including possible constitutional limitations upon the infliction of corporal punishment.[4]

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[1]*See generally* Note, *The Emerging Law of Students' Rights*, 23 ARK. L. REV. & B.A.J. 619 (1970); Comment, *Procedural Due Process in Secondary Schools*, 54 MARQ. L. REV. 358 (1971); Note, *Emerging Rights of High School Students: The Law Comes of Age*, 23 U. FLA. L. REV. 549 (1971).

[2]*See, e.g.*, John B. Stetson Univ. v. Hunt, 88 Fla. 510, 516, 102 So. 637, 640 (1924):

> [C]ollege authorities stand *in loco parentis* and in their discretion may make any regulation . . . which a parent could make . . . and . . . courts have no more authority to interfere than they have to control the domestic discipline of a father in his family.

[3]*See* Tinker v. Des Moines School Dist., 393 U.S. 503 (1969); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961). In *Tinker* the Supreme Court held that in the absence of substantial interference with school activities, the wearing of armbands by students was protected by the first amendment. In the landmark case of *Dixon*, the Fifth Circuit held that due process requires notice and some opportunity for a hearing before students can be expelled for misconduct.

[4]For the purposes of this note, corporal punishment is defined as the intentional infliction of physical pain subsequent to misbehavior for the purpose of deterring future misbehavior. It does not refer to the use of reasonable force as a means of self-defense or for the protection of other children.

In *Sims v. Board of Education*,[5] a basic challenge to the infliction of corporal punishment was made. There was no allegation that the infliction of the punishment was arbitrary or discriminatory,[6] that the purpose of the punishment was to inhibit the free exercise of a specific first amendment right, or that the *particular* punishment of the plaintiff was excessive so as to be cruel and unusual. Plaintiff alleged[7] essentially that "corporal punishment [denies procedural due process because it] constitutes summary punishment without affording an opportunity for notice, hearing, or right of representation"[8] and that " 'corporal punishment is, *ipso facto*, cruel and unusual' "[9] in violation of the eighth amendment. The court rejected both contentions.[10]

The concept of "cruel and unusual" punishment[11] is one of the most flexible in the Constitution since it must be interpreted in light of the contemporary values of society or, as the Supreme Court has said, "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[12] The standard that has been developed to determine the applicability of the eighth amendment is a moral one—whether the punishment is uncivilized[13] or "of such a character as to shock the conscience or violate fundamental fairness."[14] Because of the subjective character of the standard, establishing that corporal punishment or any punishment is "uncivilized" or "indecent" is difficult, but the history of a particular form of punishment as well as its application in other contexts is important.

While corporal punishment historically could be applied legally to a wife by her husband, to apprentices by their masters, and to sailors and convicts,[15] the school situation is the last area of society where it is

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[5]329 F. Supp. 678 (D.N.M. 1971).

[6]*Id.* at 685.

[7]While plaintiff alleged violations of substantive due process, equal protection, and the privileges and immunities clause of the fourteenth amendment, *id.* at 681, this note will discuss only the most viable allegations—the denial of procedural due process and the violation of the eighth amendment.

[8]329 F. Supp. at 681.

[9]*Id.* at 690.

[10]*Id.*

[11]"[C]ruel and unusual punishment [shall not be] inflicted." U.S. CONST. amend. VIII. This prohibition has been made applicable to the states by the fourteenth amendment. *See* Robinson v. California, 370 U.S. 660, 666 (1962).

[12]Trop v. Dulles, 356 U.S. 86, 101 (1958).

[13]*Id.*

[14]Williams v. Field, 416 F.2d 483, 486 (9th Cir. 1969).

[15]Note, *Corporal Punishment in the Public Schools*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 583, 588 (1971).

still extensively used by the state. The anomaly that corporal punishment can still be inflicted only upon students has been criticized by courts,[16] and the use of corporal punishment to control student behavior has been attacked by many educators.[17] The elimination of corporal punishment in areas other than education is indicative of the general attitude of society towards corporal punishment and relevant to the determination that corporal punishment violates the concept of dignity and the civilized standards of contemporary society.

There is also important judicial authority for the assertion that corporal punishment in secondary schools violates the eighth amendment. The case of *Jackson v. Bishop*[18] is, for example, highly relevant, although the court in *Sims* declared *Jackson* to be distinguishable[19] because it involved the infliction of corporal punishment upon Arkansas prisoners rather than upon students. In *Jackson* Judge (now Justice) Blackmun stated that corporal punishment "offends contemporary concepts of decency and human dignity and precepts of civilization which we profess to possess."[20] This broad characterization of corporal punishment as offensive to contemporary values cannot be ignored.

The recognition of constitutional restraints in the context of education requires that courts no longer rely upon the broad discretion of school authorities as justification for denying the rights of students. It is not sufficient to declare, as did the *Sims* court, that the court would not "substitute" its judgment for that of the school authorities as to what was appropriate to maintain discipline.[22] In addition, since it has been determined that children are possessed of the fundamental rights of the Constitution, childhood alone is no longer an adequate basis for denying rights to which an individual would otherwise be entitled;[23] a determination that corporal punishment is cruel and unusual in one context should result, in the absence of substantial countervailing reasons, in a similar determination when that punishment is applied to children. The historical diminution of corporal punishment as well as its treatment in the *Jackson* opinion militated towards a determination

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[16]*See* Cooper v. McJunkin, 4 Ind. 290 (1853).

[17]Note, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV., *supra* note 15, at 584.

[18]404 F.2d 571 (8th Cir. 1968).

[19]329 F. Supp. at 689.

[20]404 F.2d at 579.

[21]*See* cases cited note 3 *supra.*

[22]329 F. Supp. at 690.

[23]*See In re* Gault, 378 U.S. 1, 29-30 (1967). *Contra,* Ginsberg v. New York, 390 U.S. 629, 638 (1968).

that corporal punishment in secondary schools violated the eighth amendment.

It was also asserted in *Sims* that the imposition of the punishment without the procedural safeguards of notice, hearing, or right of counsel violated the due process clause of the fourteenth amendment.[24] The concept of due process, like the "cruel and unusual" provision of the eighth amendment, is a very flexible provision of the Constitution since the particular procedures necessary to comply with the due process clause will depend upon the total circumstances and interests of all the parties involved.[25] In school the student is entitled to "the observance of procedural safeguards commensurate with the severity of the discipline,"[26] and so the nature of the proceeding required will depend in part upon the extent of injury to the student. In addition to the character of the injury to the student, the importance of corporal punishment as well as the effect of a particular proceeding upon the effective use of the corporal punishment must be considered. Finally, the availability of alternatives to procedural safeguards that adequately protect the interest of the student and guard against the potential abuse of authority are relevant to the determination of what is required by the due process clause.

In cases involving expulsion or indefinite suspension a formal hearing has been required.[27] The severe social and economic consequences of an expulsion are the basis of the requirement of a hearing,[28] and since the consequences of corporal punishment are substantially less severe presumably a formal hearing would not be required by due process. Beyond that initial determination, the potential extent of the injury to the student as a result of corporal punishment cannot be determinative

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[24]"[No state shall] deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1. The actions of school officials are state action under the fourteenth amendment. Cooper v. Aaron, 358 U.S. 1, 16 (1958).

The procedural safeguards which may be required by due process can inclkude notice, a hearing, the right of representation by counsel, the right to call witnesses, and the right to cross-examination. The inclusion of one does not, of course, necessarily require the inclusion of others. *See* R. PHAY, SUSPENSION AND EXPULSION OF PUBLIC SCHOOL STUDENTS 22-30 (NOLPE Monograph No. 3, 1971).

[25]Hobson v. Bailey, 309 F. Supp. 1393, 1401 (W.D. Tenn. 1970).

[26]Vought v. Van Buren Pub. Schools, 306 F. Supp. 1388, 1393 (E.D. Mich. 1969).

[27]Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 157 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

[28]Sullivan v. Houston Independent School Dist., 307 F. Supp. 1328, 1343 (S.D. Tex. 1969).

of what procedures are required[29] since the exact effect of corporal punishment upon the student cannot be known.[30] However, although corporal punishment can be characterized as minor in comparison to other possible punishments, in the absence of countervailing circumstances some form of informal hearing should be required—even if it is nothing more than an opportunity for the student to explain his conduct to a neutral party.[31]

The burden on the effective use of corporal punishment that might exist as a result of procedural safeguards was a primary factor in the decision of the *Sims* court that no procedures were required by the due process clause. The court took judicial notice that "the purposes to be served by corporal punishment would be long since passed if formal notice, hearing and representation were required,"[32] and the assertion is undoubtedly true. The imposition of *formal* procedures would make the use of corporal punishment practically impossible. However, alternatives of less burdensome procedures that still protect the student are available so that the complete absence of procedural safeguards is not necessary to the effective use of corporal punishment. Procedural requirements such as administration of the punishment only by the principal or the presence of an adult other than the party inflicting the punishment do exist,[33] and the effective use of the punishment has not been reduced by these procedures. The purpose of such procedures has been primarily the protection of the school official from tort liability,[34] and the addition of similar procedures the purpose of which is the protection of the student from arbitrary or excessive punishment presumably would be of no greater burden. For example, the requirement that the

[29]It is necessary to distinguish between potential psychological or educational detriment to the student that may result from corporal punishment and potential injury to the student as a result of the abuse of the privilege to inflict the punishment. While the potential injury to the student cannot be known in either circumstance, only the unknown character of the former cannot affect the application of procedural safeguards. The unknown character of the latter strengthens the case for such safeguards. *See* text accompanying note 41 *infra*.

[30]It has been argued that corporal punishment produces adverse psychological reactions, increases delinquency, and disrupts the learning process. Note, 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV., *supra* note 15, at 584.

[31]Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U. PA. L. REV. 545, 583 (1971).

[32]329 F. Supp. at 683.

[33]*See, e.g.*, DEL. CODE ANN. tit. 14, § 701 (Supp. 1970): "In cases where corporal punishment is deemed necessary, it shall be administered by the Chief School Officer or by the principal in the presence of another adult."

[34]Buss, *supra* note 31, at 583.

punishment be inflicted by one other than the accuser or only after authorization from a superior would minimize the danger of excessiveness from anger that is inherent in immediate punishment, and the purposes of corporal punishment would still be achieved.

In addition to the burden that formal procedures might have on the effective use of corporal punishment, the availability of alternatives to procedural safeguards that protect the student against wrongful infliction of corporal punishment is important in determining what procedures are required by due process. In the teacher-pupil relationship, the deterrent effect of possible civil liability of a teacher for a wrongful infliction of corporal punishment exists as a protection against abuse of the common-law privilege to inflict the punishment.[35] However, the effect on the teacher's behavior of the actual legal consequences of wrongful infliction is minimal, primarily because of the restrictions that have been placed by courts or by statute upon recovery from a teacher. In North Carolina it is necessary to show not only unreasonableness in the infliction of the punishment[36] but also that the infliction was malicious or resulted in foreseeable permanent injury.[37] In other states there must be "gross abuse" before liability will be incurred,[38] or there may exist a presumption of the reasonableness of the teacher's conduct.[39]

The result of these limitations is that the student is legally protected only from an extremely abusive infliction of the punishment. In addition, the civil liability of teachers only relates to the nature of the infliction and is seldom dependent upon whether the student's conduct in fact warranted such punishment. Consequently, although it can be argued that the potential civil liability of a teacher does protect against excessive use of corporal punishment, it seldom guarantees that the student in fact engaged in the behavior that resulted in the punishment or that such behavior warranted that punishment. Therefore, potential civil liability is not an adequate substitute for the guarantees of due process under the fourteenth amendment.

Due process is an elusive concept that is dependent upon balancing

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[35]The deterrent effect of actual civil liability should be distinguished from the deterrent effect of the threat of being sued and the comcommitant cost of defense, loss of reputation, etc. The extent of the latter is not known, but it has been recognized to exist. Miller, *Resort to Corporal Punishment in Enforcing School Discipline*, 1 SYR. L. REV. 247, 265 (1949).

[36]N.C. GEN. STAT. § 115-146 (1966).

[37]Drum v. Miller, 135 N.C. 204, 208, 47 S.E. 421, 422 (1904).

[38]*E.g.*, MICH. STAT. ANN. § 15.3757 (1968).

[39]*E.g.*, Drake v. Thomas, 310 Ill. App. 57, 64, 33 N.E.2d 889, 891 (1941).

all the factors involved in a given situation, and in the case of corporal punishment it is necessary to consider the potential abuse of the privilege to inflict the punishment as well as the burden of procedures and the potential harm to the student. An Indiana court has observed that "[T]he practice of corporal punishment has an inherent proneness to abuse,"[40] and in view of the control that a teacher exercises over students, the frequency or severity of the punishment cannot be controlled by defining permissible punishment as that which is "reasonable." In *Jackson* Justice Blackmun noted that such regulations are easily circumvented and that where "power to punish is granted to persons in lower levels of administrative authority, there is an inherent and natural difficulty in enforcing the limitations of that power."[41]

Requiring authorization prior to the infliction of the punishment or requiring that the punishment be inflicted only in the presence of another adult would go far to eliminate the potential abuse of corporal punishment. The imposition of such minimal procedures in the context of secondary schools would not unduly burden school authorities in their attempt to maintain discipline and control among their students but would be an important step in guaranteeing the full constitutional rights of those who attend public schools.

JOHN C. LILLIE

Criminal Law—Reflections: Insanity, Bifurcation, Burden of Proof

Can an insane person "intend to commit a crime"? May the state exclude evidence of his mental disorder at the trial of his guilt? May it require him to disprove his sanity during the separate trial of that issue? The threshold question may be answered in the affirmative: In some superficial sense, at least, insane persons intend the crimes they commit. Yet the *mens rea* required for a crime such as homicide has commonly been supposed to connote something more profound.[1]

This note will examine these and other questions as singularly highlighted in the context of the bifurcated trial procedure. Recent Wiscon-

[40]Cooper v. McJunkin, 4 Ind. 290, 292 (1853).
[41]404 F.2d at 579.

[1]*See generally* MODEL PENAL CODE § 2.02, Comments 1-4 (Tent. Draft No. 4, 1955) and authorities cited therein.