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Who Are the Punishers

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I. INTRODUCTION

The Eighth Amendment is written in passive voice.[1] Despite the contentions of 5th grade teachers, passive voice is typically unproblematic.[2] Passive voice *is* problematic when it creates an unnecessarily long construction or when it obfuscates 'who did what to whom.' The Eighth Amendment is an example of the latter. It prohibits a certain class of actions but does not say to whom it is addressed. Specifically, it does not say *who* shall not require "[e]xcessive bail"[3] nor *who* shall not impose "excessive fines"[4] nor *who* shall not inflict "cruel and unusual punishments."[5]

This Article focuses on the missing addressee in the Punishments Clause. It may seem obvious to whom it applies, for courts and common sense agree that it applies to legislatures,[6] criminal courts,[7] and those who actually execute punishment like prison officials.[8] This Article questions whether the application should stop there. There are other state actors who use their power to rebuke alleged wrongdoing, and sometimes, these state actors inflict serious harm on individuals. Does the Punishments Clause apply to them? For instance, does the Clause apply to the county jail officer who slammed the head of a pretrial detainee into a concrete bunk and later tased the handcuffed detainee because he had refused to obey orders?[9] Does it apply to the immigrant detention center guards who slammed an elderly detainee's face against the concrete floor for not properly doing his chores?[10] Does it

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* Assistant Professor of Law and Philosophy, Louisiana State University. This Article was inspired by a very thoughtful question by Hila Kelly when presenting a related project at Northeastern Illinois University. I dedicate this Article to Hila and to Tyler Zimmer, who invited me to speak at NEIU. This Article benefited greatly from the opportunity to present my work before faculties at Northwestern University Pritzker School of Law, Seton Hall University School of Law, and the University of Kentucky College of Law as well as before my colleagues at LSU. I am also particularly indebted to Shari Diamond, Joshua Kleinfeld, and Andrew Koppelman for very rich conversations on this topic.

[1] *See* U.S. CONST. amend. VIII. ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

[2] As in my first sentence.

[3] *See* U.S. CONST. *supra* note 1.

[4] *See id.*

[5] *See id.*

[6] *See, e.g.*, Miller v. Alabama, 567 U.S. 460, 479 (2012) (holding that a state law mandating life without parole for juveniles violates the Eighth Amendment).

[7] *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding that a trial court's death sentence for a juvenile violates the Eighth Amendment).

[8] *See, e.g.*, Estelle v. Gamble, 429 U.S. 97, 104-05 (1976) (holding that a prison may violate the Eighth Amendment when its guards are deliberately indifferent to a prisoner's serious illness or injury); Goebert v. Lee Cty., 510 F.3d 1312, 1326 (11th Cir. 2007) ("Correctional officers are, of course, bound by the Eighth Amendment's prohibition against cruel and unusual punishment.").

[9] Kingsley v. Hendrickson, 135 S. Ct. 2466, 2470 (2015). The situation posed was the fact pattern found within this case. The detainee did not bring suit alleging cruel and unusual punishment.

apply to the public school teacher who bloodied the behind of a ten-year-old student for an insolent remark[11] or another public school teacher who whipped a Catholic boy's hands with "a three-foot-long rattan rod" for thirty minutes because the student refused to recite a Protestant version of the Ten Commandments?[12]

These assorted questions are components of a broader inquiry that I call *the punisher question.* The punisher question asks, "To whom does the Punishments Clause apply?" It is the primary task of this Article to show that the Clause applies to a great many more parties than courts and commentators have recognized. A secondary task is to make a methodological point, namely that it is acceptable to rely on moral-political argumentation to settle the punisher question – or indeed any constitutional question – when the ordinary sources of law, such as text, history, and precedent, do not provide unambiguous solutions.

The layout of the Article is as follows. Part II examines the Court's current precedent with respect to the punisher question and shows why this precedent should not command our respect. Part III considers whether an appeal to constitutional text yields an answer to the punisher question and concludes that the text does not provide enough information for this particular question. Part IV explores the history surrounding the Eighth Amendment. In exploring this history, I offer the best historical evidence for understanding the Eighth Amendment as applying to the conduct of government detention centers, public and private K-12 schools, and parents of juveniles. However, I also offer historical evidence that weighs against this expanded application. The upshot of Part IV, then, is that the history is too ambiguous to yield a conclusive answer to the punisher question. Part V makes a methodological argument, namely that it is acceptable to rely on moral-political argumentation to construe constitutional text when ordinary sources of law run out. Part VI, in turn, develops a moral-political argument in favor of expanding the application of the Punishments Clause to reach detention centers, K-12 schools, and parents of juveniles. Finally, Part VII concludes the Article and offers some remarks about the scope of the project and future work.

II. THE CURRENT STATE OF AFFAIRS

Our inquiry begins with surveying current precedent on the punisher question. It is because the precedent is so poorly justified, that it makes sense to revisit this question in the first place.

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[10] Nina Shapiro, *Tacoma immigrant detention center criticized over alleged violent incident*, SEATTLE TIMES (May 20, 2015), http://www.seattletimes.com/seattle-news/northwest/tacoma-ice-center-faces-new-criticism-over-alleged-beating. The immigrant-detainee did not bring suit at all; he was quickly deported after the incident.

[11] HUMAN RIGHTS WATCH, A VIOLENT EDUCATION: CORPORAL PUNISHMENT OF CHILDREN IN US PUBLIC SCHOOLS (2008), https://www.hrw.org/report/2008/08/19/violent-education/corporal-punishment-children-us-public-schools.

[12] DAVID SEHAT, THE MYTH OF AMERICAN RELIGIOUS FREEDOM 156 (2011).

A. To Whom Does the Court Apply the Clause Now?

Courts have understood the class of punishers to be fairly limited, following one key decision, *Ingraham v. Wright*.[13] In this case, schoolchildren brought suit under the Eighth Amendment against their public school.[14] Their theory was that severe corporal punishment, when used by public schoolteachers against students in their charge, amounts to cruel and unusual punishment. To be clear, this punishment was no mere slap on the wrist. One student "was paddled several times for minor infractions. On two occasions he was struck on his arms, once depriving him of the full use of his arm for a week."[15] For another student the "paddling was so severe that he suffered [internal bleeding] requiring medical attention and keeping him out of school for several days."[16] The Court, answering the punisher question, held that the Eighth Amendment's Punishments Clause does not apply to the actions of public school officials. The Court wrote that, "the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government."[17] Even "those entrusted with the criminal-law function of government" is a narrower class than one might expect. Police and jailers would seem to be central figures in this province of government, but they have been expressly excluded by later cases.[18] A few years before *Ingraham* made it official, Judge Friendly summarized the Eighth Amendment's reach. He said that it reached "legislatures in authorizing sentences," "judges imposing them," the "executioner," and those responsible for "conditions of confinement."[19] No less but certainly no more.

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[13] Ingraham v. Wright, 430 U.S. 651, 651 (1977).

[14] *Id.*

[15] *Id.* at 657.

[16] *Id.* (footnotes omitted).

[17] *Id.* at 664.

[18] Again and again, courts and commentators alike have said that the Eighth Amendment protection does not apply to pretrial detainees. *See, e.g., id.* at 671 n. 40 ("Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions."); Caiozzo v. Koreman, 581 F.3d 63, 69 (2d Cir. 2009) ("In the case of a person being held prior to trial, however, the 'cruel and unusual punishment' proscription of the Eighth Amendment to the Constitution does not apply") (internal quotations removed) (internal citations removed); Board v. Farnham, 394 F.3d 469, 477 (7th Cir. 2005) ("the Eighth Amendment does not apply to pretrial detainees"); Snow ex rel. Snow v. City of Citronelle, AL, 420 F.3d 1262, 1268 (11th Cir. 2005) ("the Eighth Amendment prohibitions against cruel and unusual punishment do not apply to pretrial detainees"); Bell v. Wolfish, 441 U.S. 520, 579 (1979) (Stevens, J., dissenting on other grounds) (The Eighth Amendment "protects individuals convicted of crimes from punishment that is cruel and unusual. The pretrial detainees whose rights are at stake in this case, however, are innocent men and women who have been convicted of no crimes."); DeAnna Pratt Swearingen, *Innocent Until Arrested?: Deliberate Indifference Toward Detainees' Due-Process Rights*, 62 ARK. L. REV. 101, 111 (2009) ("Pretrial detainees may not be punished prior to an adjudication of guilt in accordance with due process of law. Because of this, the Eighth Amendment's prohibition of cruel and unusual punishment is inapplicable.") (internal quotations and citations removed).

[19] Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir. 1973) (Opinion of Friendly, J.).

B. Three Reasons Why Ingraham is Wrongly Decided

The *Ingraham* Court offered three arguments in support of its conclusion. First, it argued that its ruling merely follows from existing case law on the question. Second, it argued that its ruling comports with the history of the Eighth Amendment. Third, it argued that, beyond the precedent and history, there is a good moral-political argument to be made for limiting the scope of the Clause. As I make clear, none of these arguments are very compelling.

1. Misread Precedent

The Court begins its contention that punishment can only apply to those convicted of crimes by first citing a number of famous Eighth Amendment cases which featured people convicted of crimes, claiming that their Eighth Amendment rights were violated.[20] This, of course, does not prove much, for everyone already agrees that an Eighth Amendment challenge can be brought if the person has already been sentenced. What one needs to maintain this claim is evidence that the courts have refused to extend Eighth Amendment protection outside of the criminal conviction context. The *Ingraham* Court accordingly cites *Fong Yue Ting v. United States*[21] and *Uphaus v. Wyman*,[22] two cases that allegedly show that, outside the conviction context, the Supreme Court "has had no difficulty finding the Eighth Amendment inapplicable."[23] As Professor Susan Bitensky aptly points out, "a ... fundamental shortcoming in *Ingraham's* use of *Fong Yue Ting* and *Uphaus* [is that] neither case suits the role."[24]

As Bitensky and others have noted, Chinese immigrants in *Fong Yue Ting* brought suit "under the Fifth Amendment Due Process Clause to contest their arrest and deportation for failure to have certificates of residence as prescribed by federal statute. The litigation was not brought under the Eighth Amendment, and the Court's holding was not under the Eighth Amendment."[25] To the extent that Eighth Amendment issues arose at all, the *Fong* Court made it clear that the deportation was expediency-based, not "punishment for crime."[26] If the deportation is not

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[20] Ingraham, 430 U.S. at 667.
[21] 149 U.S. 698 (1893).
[22] 360 U.S. 72 (1959).
[23] Ingraham, 430 U.S. at 667-68.
[24] Susan H. Bitensky, *The Poverty of Precedent for School Corporal Punishment's Constitutionality Under the Eighth Amendment*, 77 U. CIN. L. REV. 1327, 1337 (2009). *See also*, Celia Rumann, *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment*, 31 PEPP. L. REV. 661, 691 (2004) ("Neither of these cases provides the definitive answer of whether the Eighth Amendment applies outside of the instances wherein a criminal conviction has been secured.").
[25] Bitensky, *supra* note 24, at 1337. *See also* Rumann, *supra* note 24, at 690.
[26] Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893).

punishment, *a fortiori*, it is not cruel and unusual punishment. This explains why the *Fong* Court emphatically held that the Eighth Amendment has "no application."[27] In saying this, the *Fong* Court does not suggest that the Eighth Amendment has no application outside of criminal proceedings; rather, it merely suggests that the Eighth Amendment has no application where no punishment has occurred, and thus the Court leaves open whether there can be punishment outside of a criminal proceeding.

As Professor Celia Rumann notes, "*Uphaus* provides an even thinner reed for the Court to have relied upon in *Ingraham*."[28] Like *Fong Yue Ting*, *Uphaus* is not decided under the Eighth Amendment. This case concerned Willard Uphaus who was held in civil contempt for not producing documents requested through an investigation undertaken by the New Hampshire legislature.[29] Uphaus did claim that being held in civil contempt was cruel and unusual punishment,[30] but the Court, in summarily rejecting his claim, essentially said that contempt is "a civil remedy."[31] Because the Court is so conclusory in its treatment of Uphaus's claims, one must infer from its designation of contempt as a civil remedy, that contempt is not punishment and thus raises no Eighth Amendment problem. Again, however, saying that the Eighth Amendment has no application where no punishment has occurred leaves open whether there can be punishment outside of a criminal proceeding.

Examining these cases makes it clear that the *Ingraham* Court had little precedential support for its bold conclusion that the Eighth Amendment only applies once a criminal conviction has transpired. But the situation is much worse, for there *was* precedent for applying the Eighth Amendment without a criminal conviction. As Bitensky and others make clear, *Trop v. Dulles*[32] is "Supreme Court precedent extending the Cruel and Unusual Punishments Clause ... beyond formal judicial sentencing."[33] That case involved Albert Trop who, years after having been court-martialed and convicted of desertion and after having served his sentence, discovered that he had been de-nationalized by an Act of Congress that de-nationalized all those convicted of desertion. He discovered this when his application for a U.S. passport was rejected. The *Trop* Court held that de-nationalization, though it did not come from a judge, constituted punishment and indeed cruel and unusual punishment. The Court specifically said, "the Eighth Amendment forbids *Congress* to punish by taking away citizenship."[34] Trop was, in turn, declared a citizen again.

It might be contended that *Trop* is not a counterexample to the *Ingraham* Court's claim that punishment only comes from a criminal conviction, given that Albert Trop only faced de-nationalization after his conviction for desertion. The

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[27] *Id.*

[28] Rumann, *supra* note 24, at 691.

[29] New Hampshire's legislature is called The New Hampshire General Court.

[30] Uphaus, 360 U.S. at 76.

[31] *Id.* at 81 (quoting Green v. United States, 356 U.S. 165, 197 (1958) (Black, J., dissenting)).

[32] 356 U.S. 86 (1958). Note that this is nearly twenty years before *Ingraham* was decided.

[33] *See* Bitensky, *supra* note 24, at 1340. *See also* Ingraham, 430 U.S. at 687, n. 3 (White, J., dissenting).

[34] Trop, 356 U.S. at 103 (emphasis added).

problem with this contention is twofold. First, no judge issued a de-nationalization order; this was a Congressional decree.[35] Second, we should not see the de-nationalization as just part of the punishment rendered by the judge presiding at Trop's court-martial, for the government construed these as separate acts. Indeed, the government explicitly argued that the de-nationalization was not punishment at all, that it was just a civil remedy that *Congress* was free to perform.[36] The Court, of course, roundly rejected this ruse, noting that imposing a sanction "for the purpose of punishing transgression of a standard of conduct" is punishment, no matter how the government labels it.[37] Nevertheless, the Court recognized that Congress did the punishing here.

In reviewing the precedents upon which *Ingraham* relied and those that *Ingraham* omitted, I do not claim to settle the question of how widely the Punishments Clause applies. For all I have said thus far, there may be precedential support for a particular understanding of the Clause.[38] I only contend that *Ingraham*'s understanding of precedent is deeply flawed.

2. Misunderstood History

The *Ingraham* Court also relied on its understanding of the Eighth Amendment's history to reach its conclusion that the Clause only applies to sentences levied upon those convicted of a crime.[39] Because I review the history of the Eighth Amendment in greater detail below, this section briefly reviews what the *Ingraham* Court said and notes a few well-known problems with the Court's reasoning.

The Court began with noting that the text of the Eighth Amendment was derived from the English Bill of Rights of 1689. Whereas Article 10 of the English Bill of Rights of 1689 reads, "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted,"[40] the Eighth Amendment reads, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[41] The Court then sought to show that because the relevant provision of English Bill of Rights was limited to criminal cases so too is the Eighth Amendment.

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[35] *See* Bitensky, *supra* note 24, at 1340 ("Congressional legislation authorizing de-nationalization under these circumstances is not judicial sentencing of a convict.").

[36] Trop, 356 U.S. at 94 ("The Government contends that this statute does not impose a penalty and that constitutional limitations on the power of Congress to punish are therefore inapplicable.")

[37] *Id.* at 97-98.

[38] For instance, one might argue that the precedent until *Ingraham* supported applying the Clause to legislatures (whether in the context of a criminal conviction or not), courts, and those who actually perform the punishment like the executioner.

[39] Ingraham, 430 U.S. at 664 ("An examination of the history of the Amendment ... confirms that it was designed to protect those convicted of crimes.").

[40] THE BILL OF RIGHTS OF 1689, 1 W. & M., sess.2, c.2.

[41] U.S. CONST. amend. VIII.

The first problem with this inference is that the relevant provision of English Bill of Rights was *not* limited to criminal cases. The original draft of Article 10 of the English Bill of Rights had the limiting phrase "in criminal cases," but this was removed in the final version.[42] The Court was not unaware of the removal, but it downplayed its relevance by noting an additional fact: "a similar reference [to criminal cases] in the preamble [which] indicates that the deletion was without substantive significance."[43] *Pace* the *Ingraham* Court, the deletion is significant because this was moving text from the operative part of a law to the preamble of that law, which is not binding law.[44] Even if the preamble were binding law, its wording does not suggest that the drafters were only concerned about punishment in the context of criminal cases. To see this, it will help to quote a substantial portion of the text. In relevant part, the preamble reads:

> Whereas the late King James the Second, by the assistance of divers evil counsellors, judges and ministers employed by him, did endeavour to subvert and extirpate the Protestant religion and the laws and liberties of this kingdom:
> ...
> By prosecutions in the Court of King's Bench for matters and causes cognizable only in Parliament, and by divers other arbitrary and illegal courses
> ...
> And excessive bail hath been required of persons committed in criminal cases to elude the benefit of the laws made for the liberty of the subjects;
>
> And excessive fines have been imposed;
>
> And illegal and cruel punishments inflicted.[45]

With this passage before us, one can see that the drafters of the English Bill of Rights were airing grievances about prosecutions *and other illegal courses of action*. One can also see that the "criminal cases" limitation concerns bail, which, of course, only happens in the context of a criminal case. When punishment is mentioned, two clauses after the bail section, there is no limitation. Thus, if we were to consider the grievances mentioned in the preamble as the binding law, which we

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[42] Ingraham, 430 U.S. at 665.
[43] *Id.* (footnote omitted).
[44] D.C. v. Heller, 554 U.S. 570, 578 (2008) ("a prefatory clause does not limit or expand the scope of the operative clause.")
[45] THE BILL OF RIGHTS, *supra* note 40.

should not,[46] even *it* does not suggest a desire to stamp out cruel punishment only when it follows a criminal conviction.

A second problem with the Court's reasoning is that it moves too quickly from *the English thought* x to *the Americans thought* x. As Professor Rumann has pointed out, there was concern in the American colonies with stamping out cruel punishment *before* the English Bill of Rights, and some statesmen understood punishment to be broader than that meted out to convicts.[47] Also, Rumann notes that during the actual drafting of the Eighth Amendment, some of the key proponents and drafters understood *punishment* to include pretrial torture. For instance, Rumann offers a quotation from George Mason, author of the Eighth Amendment,[48] replying to George Nichols who worried that the Constitution contained no protection against torture,

> [T]he worthy gentleman was mistaken in his assertion that the bill of rights did not prohibit torture; for that one clause expressly provided that no man can give evidence against himself; and that the worthy gentleman must know that, in those countries where torture is used, evidence was extorted from the criminal himself. Another clause of the bill of rights provided that no cruel and unusual punishments shall be inflicted; therefore, torture was included in the prohibition.[49]

This evidence makes it clear that the history of the Eighth Amendment does not favor the *Ingraham* Court's narrow reading.

3. Poor Normative Arguments

Perhaps to 'cover its bases,' the *Ingraham* Court also offered a moral-political argument to substantiate its claim that the Eighth Amendment only applies to post-conviction retributive harm. This argument endeavored to show that "[t]he schoolchild has little need for the protection of the Eighth Amendment,"[50] and from this, the Court inferred that the schoolchild, *qua* schoolchild, may not avail herself of the Eighth Amendment. This endeavor failed, however. Essentially, the Court argued that schoolchildren have no need of the Eighth Amendment's protection

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[46] Professor Bitensky notes that the *Ingraham* Court forgot "the principle that a statutory preamble cannot create new substantive law." Bitensky, *supra* note 24, at 1343.
[47] Rumann, *supra* note 24, at 667-69.
[48] *Id.* at 674.
[49] *Id.* at 678 (quoting 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 452 (1836)).
[50] Ingraham, 430 U.S. at 670.

because "schools are open to public scrutiny" while prisons are not.[51] In claiming that the school is "an open institution,"[52] the Court meant that students may leave each day and that students have friends, family, and supportive teachers around them who can see and possibly inhibit mistreatment that might otherwise occur. This optimistic picture of the public school is belied by the violent fact-patterns mentioned above. The Catholic boy who was beaten for a half hour by his teacher would probably have disagreed with the notion that he had little need for the Eighth Amendment. The *Ingraham* Court's reasoning is problematic for two additional reasons.

First, the Court held that need for Eighth Amendment protection is positively correlated with how much the public knows of one's plight. If this were true and if not needing the Eighth Amendment means that one may not avail oneself of its protection, it suggests something absurd about prisoners. If prisons were glass houses in the middle of town squares, prisoners could be beaten by corrections officials with no recourse to the Eighth Amendment, under this reasoning. Or more realistically, if convicts were sentenced to the pillory, this could raise no Eighth Amendment problem, under the Court's reasoning. The Court's reasoning here also suggests something absurd about public executions, which as the name suggests, are not secret affairs.

Second, the Court held that the need for Eighth Amendment protection from an institution is negatively correlated with one's ability to temporarily leave that institution. If this were true and if (again) not needing the Eighth Amendment means that one may not avail oneself of its protection, it suggests that if prisoners were only incarcerated for a portion of the day (as some prisoners are),[53] any abuse could be visited upon them without raising an Eighth Amendment problem. Due to these ridiculous practical implications, the Court's moral-political argument fails. With this third failure, we see that the Court has *no* good reason to limit the class of punishers as it does.

III. AMBIGUOUS TEXT

The previous Part explains why the Court's precedent on the punisher question does not deserve anyone's respect: the Court misread its own past cases, misunderstood the history of the Eighth Amendment, and relied on poor normative arguments. In this Part, I consider the punisher question with fresh eyes, as it were, without the distorting lens of bad precedent. Here, I consider whether an appeal to the text of the Eighth Amendment or to the Constitution more broadly will help to

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[51] *Id.*

[52] *Id.*

[53] SUSAN TURNER & JOAN PETERSILIA, U.S. DEP'T OF JUSTICE, WORK RELEASE: RECIDIVISM AND CORRECTIONS COSTS IN WASHINGTON STATE 1 (1996) (discussing work release programs, programs that "permit selected prisoners nearing the end of their terms to work in the community, returning to prison facilities or community residential facilities in nonworking hours.")

resolve the punisher question. I conclude that the text is too ambiguous to decide this matter.

This investigation takes as its starting point that there are two main text-centered approaches, one I call, borrowing from John Hart Ely, "clause-bound"[54] and the other I call *synoptic*.[55] Since much turns on this distinction, it will be helpful to clarify these two approaches. A clause-bound approach focuses narrowly on what the text explicitly says (including the actual extension of key terms in the text).[56] A wonderful example of this strategy in action comes in Justice Black's famous concurrence in *State v. California*, where he writes of the First Amendment, "I read 'no law . . . abridging' to mean no law abridging."[57] A synoptic kind of text-centered approach is one that looks more sweepingly at the legal text, drawing upon its broad themes. *Griswold v. Connecticut* is one of the most famous instances of this strategy in action.[58] The *Griswold* Court found a Constitutional right to privacy, a phrase found nowhere in the text of the Constitution, by inferring it from various other provisions such as the Third and Fourth Amendments, which protect people from

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[54] JOHN HART ELY, DEMOCRACY AND DISTRUST 12 (1980). Like Ely, I think that an interpretive strategy that requires one to look only to specific bits of text within 'the four corners of the Constitution' is unworkable. Unlike Ely, I think such a view is so clearly untenable that it deserves no attention. A more workable clause-bound text-centered view would require an interpreter to discover the actual extension of terms in legal texts. For an explanation of actual extension, *see* note 56 below.

[55] What I call *synoptic* seems like the genus, which contains *structural* modes of argument. *See, e.g.*, PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 15 (1991). As I understand them, structural modes of argument usually start from a broad claim about what a legal text is doing; this broad claim typically summarizes various specific provisions. For instance, when judges use the "separation of powers" as a basis for deciding a case, they rely upon a synopsis of various other specific provisions, like Article I, § 1, Article II, § 1, cl. 1. and Article III, § 1. The phrase "separation of powers" nowhere appears in the Constitution, so to talk about the Constitution demanding the separation of powers requires some creativity.

[56] To explain what the actual extension of a term is, we must first see the difference between the meaning of a text and the text's extension. The meaning/extension distinction is best understood with a simple example. An argument over the meaning of cruel is an argument over whether the term means "designed to inflict a high degree of pain with indifference to, or even enjoyment of, the suffering of others" or something else. (That definition comes from Shell v. Mississippi, 498 U.S. 1, 2 (1990) (Marshall, J., concurring) (citing Cartwright v. Maynard, 822 F.2d 1477, 1488 (CA10 1987) (en banc)). However, an argument over the extension of cruel is an argument over which deeds to include in the class of cruelty. Such a debate might center on, for example, whether we should count exposing inmates to cancerous cigarette smoke as an instance of cruelty. This distinction is obvious. A second distinction exists between the actual extension and what I call the historical extension. To illustrate this distinction, I return to cruelty. In determining the actual extension of cruel, one asks a question like "Is flogging or hand-branding cruel?" and to answer that question, one should consult evidence about the pain these interventions occasion and whatever else renders an act cruel. In determining the historical extension, one asks how some historical person or set of persons would have answered the question about cruelty, and to answer that, one must consult those folks' writings, speeches, or practices.

[57] Smith v. People of the State of Cal., 361 U.S. 147, 157 (1959) (Black, J., concurring).

[58] 381 U.S. 479 (1965).

troops taking shelter in their homes and from unreasonable searches and seizures, respectively.

It is not precisely accurate to say that the two text-centered approaches are clause-bound and synoptic. No one who reads synoptically can get away with never looking directly at text that is "on point." There are, however, those who interpret in the clause-bound way and refuse a synoptic approach. To see this, one needs to look no further than to Justice Black, dissenting in *Griswold*:

> The Court talks about a constitutional 'right of privacy' as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the 'privacy' of individuals. But there is not. . . One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning.[59]

Justice Black's remarks sharply criticize any synoptic reading, since all synoptic readings look beyond specific constitutional text to summarize and to substitute new words. Thus, it is most accurate to say that the two text-centered approaches are (1) clause-bound and (2) a combination of clause-bound and synoptic reading.

A. Two Clause-Bound Answers to the Punisher Question

A clause-bound approach will not yield a workable answer to the punisher question. The relevant part of the Eighth Amendment reads, "[C]ruel and unusual punishments [shall not be] inflicted."[60] On its face, there is *no* text about the parties to whom the Clause is addressed. This is the problem with which we began. There are two clause-bound ways to respond, however; both of which rely on the notion that the meaning of *punishment* determines the class of punishers. On the first way, the word severely limits the application of the Clause. On this first way, one must maintain that *punishment* refers to a specific kind of harm, which redresses a particular kind of wrong, such that only certain persons or bodies can count as a punisher. On the second way, the word does no limiting, and the class of punishers is potentially unlimited. Anyone capable of inflicting harm to redress a wrong is a punisher for Eighth Amendment purposes.

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[59] *Id.* at 508 (Black, J., dissenting).
[60] U.S. CONST., *supra* note 1.

1. Justice Thomas for a Restrictive Reading

Justice Clarence Thomas has offered the first kind of clause-bound response. Thomas has claimed that the Clause only applies to judges and juries and does not apply to "jailers."[61] By *jailers*, Thomas means that it does not even apply to prison officials, which is an even more restrictive understanding than current precedent. Because his is a clause-bound argument, Thomas claims that the very word *punishment* indicates who can punish. Thomas cites a number of dictionaries to support his claim.[62] The smoking gun evidence for him is *Black's Law Dictionary,* which defines punishment as "fine, penalty, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offense committed by him."[63] This definition, at least on Thomas's construal, builds in who may punish: someone authorized by law in accord with the judgment of a court following a criminal procedure. Anything that a prison official does besides confine is not part of the sentence handed down by a court, and nothing that a jail official does to detainees is part of a sentence handed down by a court, so none of this counts as punishment, according to Thomas.

There are two problems with Thomas's argument. First, there are dictionaries that paint a different story, and second, Thomas's restrictive understanding of *punishment* makes certain political commitments, embodied in the Constitution, literally nonsensical.

While Justice Thomas was content to mention the definition from *Black's Law Dictionary*, there are other dictionaries, which suggest a broader notion of punisher. Even a dictionary that Thomas cites implies a more expansive class of punishers. For instance, according to Timothy Cunningham's Eighteenth Century dictionary, which Thomas approvingly cites, punishment is "the penalty of transgressing the laws."[64] If this is right, *punishment* names a broader phenomenon than *what a court hands down*. Cunningham's definition makes it entirely possible that a prison, jail, or other detention center official can punish before and beyond what a court sentences, for such an official can inflict a penalty upon another because the official believes the other has transgressed the law. Also, Cunningham explicitly contemplates punishments that do not get handed down by a court. Just after giving the short definition of punishment quoted by Thomas, he references Grotius's classic text *Of the Law of War and Peace*, and Cunningham explicitly mentions Grotius's thought that before there were courts and commonwealths, everyone had "the right of inflicting punishment to provide for the safety of society."[65] If only courts issue

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[61] Helling v. McKinney, 509 U.S. 25, 40 (1993) (Thomas, J., dissenting).
[62] *Id.* at 38 (string-citing six dictionaries).
[63] *Id.* (quoting BLACK'S LAW DICTIONARY 1234 (6th ed. 1990)).
[64] *Id.* at 40 (quoting TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW-DICTIONARY (1771)).
[65] TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW-DICTIONARY (1771). Grotius thought that there was a pre-civilization state of nature during which people retained the right to punish others was not at all idiosyncratic. John Locke, widely read in the American colonies, thought the same.

punishment, it would make no sense to talk about punishment before the advent of courts. As Cunningham does talk about this, *punishment* must mean something broader than what Thomas allows. In a certain sense, it is uncontroversial that punishment has a broader sense than what Thomas says, for people talk of punishing losses in sports,[66] punishing oneself for things beyond one's control,[67] and punishing their pets,[68] and none of this has to do with courts. But the broad definition upon which Cunningham relies in discussing Grotius is in the context of a *law* dictionary! Cunningham's book is called *A New And Complete Law-Dictionary*. Thus, even in the context of a law dictionary, it made sense to talk of extra-judicial punishment.

The case against Thomas's idiosyncratic understanding becomes stronger when considering other dictionaries. Samuel Johnson's 1755 *A Dictionary of the English Language* defines punishment as "Any infliction or pain imposed in vengeance for a crime."[69] Like Cunningham's, Johnson's definition implies no limit on who can perform punishment. Under Johnson's definition, jailers can punish, as they are capable of imposing pain in vengeance for a crime. A more modern dictionary defines punishment as "retributive suffering, pain, or loss."[70] This clearly imposes no limits on who can punish.

Even without dictionary evidence telling against a more restricted understanding of punishment, Thomas would face another problem. If courts were to accept his restrictive understanding of punishment, they could not make sense of a constitutive norm of a modern liberal polity, namely that the state may not punish its citizens without a trial.[71] If punishment can only come from a trial judge, it would be silly for liberal polities to worry about people being punished without a trial. But liberal polities – the American one not excepted – do worry about this. As I have noted elsewhere, if it were not possible for the state to punish without a trial and we *knew* that, it would be literally nonsensical to be morally exercised about this issue.[72] Thus, accepting this extremely restrictive notion of punishment makes a central concern of the liberal tradition a heap of nonsense. This is reason enough to reject Justice Thomas's answer to the punisher question.

See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, para. 8 (1690).

[66] The Associated Press, *Ernie Terrell dies at 75; boxer lost title to Muhammad Ali in 1967*, L.A. TIMES (Dec. 19, 2014, 1:05 PM), http://www.latimes.com/local/obituaries/la-me-ernie-terrell-20141220-story.html.

[67] Martha Beck, *How to Stop Being a Martyr*, O, THE OPRAH MAGAZINE, (Sep. 24, 2016, 1:48 PM), http://www.oprah.com/inspiration/How-to-Stop-Being-a-Martyr.

[68] Clarissa Fallis, *Using Negative Punishment to Correct Your Dog*, PETFUL, (May 13, 2013), http://www.petful.com/behaviors/negative-punishment-to-correct-dog/.

[69] SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE, vol. 2. (1756).

[70] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1843 (Philip Babcock Gove ed., 1976).

[71] *See* MAGNA CARTA § 39; Bell v. Wolfish, 441 U.S. 520, 535 (1979) ("under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.")

[72] *See* Raff Donelson, *Cruel and Unusual What? Toward a Unified Definition of Punishment*, 9 WASH. U. JURIS. REV. 1, 29 (2016).

2. Unrestricted Application

If one rejects Justice Thomas's restrictive understanding of punishment, one might wish to consider the other clause-bound strategy for answering the punisher question. On this suggestion, the word requires courts to apply the Clause to everyone. I should note this clause-bond approach is identical to another thought: the text mentions no specific addressee because it has unlimited application. A reason to support this suggestion is that it accords with how some laws are written. For example, an Iowa statute states, "The following acts and the causing of the acts within this state are unlawful: ... The introduction or delivery for introduction into commerce of any drug, device, or cosmetic that is adulterated or misbranded."[73] Introducing into commerce adulterated or misbranded drugs, devices, or cosmetics in Iowa is an act that could apply to anyone; thus, it applies to anyone who would do that. In the same way, perhaps the Punishments Clause applies to anyone who would punish. This suggestion, though clever, has counterintuitive consequences and seems at odds with other constitutional provisions.

Suppose we have two spouses, Rebecca and Shyla. Suppose that Rebecca decides to punish Shyla for leaving her books scattered about the house, so, to punish Shyla, Rebecca sets all Shyla's books on fire. Should Shyla be able to sue, claiming that her Eighth Amendment rights were violated? Seemingly not. Even though Shyla was punished and, arguably, in a cruel way, her situation does not seem to merit constitutional intervention because the Constitution, a charter of government, does not otherwise concern small-scale interpersonal interactions of this sort. In other words, looking at the Constitution's provisions more broadly counsels against this overly expansive reading of the Clause.

B. Synoptic Dead-Ends

These remarks should make it clear that a synoptic version of the text-centered approach is to be preferred, yet, as it turns out, even this fails to yield much of an answer. Consider the following synoptic-reading solution, one that solves the Shyla problem. We might say, again reading synoptically, that the Clause uniquely refers to *legal* punishment. One can infer that the Clause refers to legal punishment because the other prohibitions mentioned in the Eighth Amendment, concerning bail and fines, are levied or exacted by legal actors only. Before criticizing this suggestion, it should be noted that this fix has much to recommend it. This suggestion appears to answer the punisher question because it limits the application of the Clause to all those who inflict legal punishment. The suggestion also remains

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[73] Iowa Code § 126.3.1 (2017).

text-centered as one could reasonably infer this prohibition from the text.[74] The difficulty with this suggestion is that *legal punishment* is a woefully ambiguous term. The problem is not that it is hard to decipher the true nature of legal punishment.[75] Rather, there are multiple notions that one might denote by the words *legal punishment*. For instance, *legal punishment* might mean legally permissible punishment, just as legal handguns means legally permissible handguns. Or, *legal punishment* might mean punishment issued by legal officials, acting under color of state law. Or, *legal punishment* might mean punishment sanctioned by legal officials, acting under color of state law, no matter who actually performs the punishment. Or *legal punishment* might mean punishment that results from suspected law-breaking. These are all different *meanings* of legal punishment in the same way that "carry" and "give birth to" are different meanings of the word *bear*. None is the *right* meaning. If this is right, this construal does not offer enough resources to settle the punisher question.

Consider a different synoptic reading. It may be thought that looking at the rest of the Bill of Rights can help to decide the punisher question. For instance, one might claim that the Clause is addressed to the federal government because one might think that the whole Bill of Rights is addressed to the federal government.[76] This conjecture is mistaken for two reasons. First, it is not obvious from the text alone that the Bill of Rights is largely addressed to the federal government. The Second,[77] Third,[78] and Fourth Amendments[79] are also written in passive voice and also have missing addressees.[80] Granted, the First Amendment, written in active voice, is clearly addressed to Congress,[81] and one can deduce that the Tenth Amendment is also addressed to the federal government,[82] but this makes for an underwhelming case. Some of the Bill of Rights is clearly addressed to the federal government, and some is not. Therefore, we cannot infer that the federal government is the missing addressee of the Punishments Clause. A second reason to worry about this conjecture is that it offers an underdeveloped answer to the punisher question. Even if we accept that the Clause is addressed to the federal government, we still do not know which parts of the federal government. Though this may helpfully narrow the class, it does not provide a complete answer to our question. It does not tell us, for instance, whether teachers in D.C. public elementary schools are punishers. It also does not tell us whether one may bring an Eighth Amendment suit against

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[74] The limitation to legal punishment looks especially plausible given that the Amendment also mentions bail, which is something that attends suspected violation of law.

[75] Though this much is probably true. For my own skepticism about the matter see, Donelson, *supra* note 72, at 6-8.

[76] *See* Barron v. City of Baltimore, 32 U.S. 243, 250-51 (1833).

[77] U.S. CONST. amend. II.

[78] U.S. CONST. amend. III.

[79] U.S. CONST. amend. IV.

[80] Where were the 5th grade teachers when you needed them?

[81] U.S. CONST. amend. I.

[82] *See* U.S. CONST. amend. X.

officials at the University of the District of Columbia for sanctions rendered after a disciplinary proceeding. There should be answers to these questions, but the text alone does not provide them.

IV. AMBIGUOUS HISTORY

This Part of the Article considers whether the history of the Eighth Amendment points to an answer to the punisher question. After providing an overview of the Amendment's history, I highlight a key scholarly dispute over the parties to whom the Punishments Clause applies. Then, I present the best historical evidence in favor of applying the Clause to detention centers, schools, and to parents of juveniles. Next, I offer the countervailing historical evidence against this expansive reading. While a sympathetic reader may be convinced that history favors expansion, I conclude that the history is just too ambiguous to yield a conclusive answer to the punisher question.

A. Overview of the Eighth Amendment's History

We turn first to the history of the Eighth Amendment. It is well-established that the Amendment was taken almost verbatim from the tenth article of the English Bill of Rights of 1689. That clause decrees, "That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted."[83] This was later used word-for-word in the Virginia Declaration of Rights of 1776.[84] After a few small emendations, it became the Eighth Amendment, ratified in 1791.[85]

Why did the English have this clause in their bill of rights? Though there is some scholarly dispute,[86] it is fairly well-established that the clause came about in response to the trial and punishment of Titus Oates in 1685.[87] Oates spun an

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[83] Anthony F. Granucci, *"Nor Cruel and Unusual Punishment Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 853 (1969).

[84] *Id.* at 840.

[85] Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J. L. & PUB. POL'Y 119 (2004) ("The Virginia Ratification Convention of 1788 endorsed the Constitution, but appended to its approval a list of proposed amendments, which were collectively described as a declaration or bill of rights. Thirteenth among the recommendations was the language of the Virginia Declaration: That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.") (footnotes and internal quotations omitted).

[86] Rumann, *supra* note 24, at 670-71 ("The resolution of this historical debate is not as clear as Justice Scalia suggested in *Harmelin*. While it seems likely true that the first usage of similar phraseology appeared in debates relating to Titus Oates in the House of Lords, wherein the statement of dissenting judges uses the phrase 'cruel, barbarous, and illegal judgments,' the actual language in the Bill of Rights of 1689 suggests its roots are broader than this narrow focus on Titus Oates indicates."); Note, *What Is Cruel and Unusual Punishment*, 24 HARV. L. REV. 54, 55, n. 2 (1910).

[87] Granucci, *supra* note 83, at 857.

elaborate lie claiming that many Catholic Church officials and nobles were plotting to assassinate King Charles II. The lie was believed, and over a dozen innocent people were executed,[88] while many more were driven from London or incarcerated pending trial. Oates was later discovered for the perjurer he was and tried during the reign of King James II, brother of Charles II. The presiding judge at the trial was Chief Judge Jeffreys, and, after a jury found Oates guilty, the court sentenced him to life imprisonment, time in the pillory, whipping, and more.[89] Capital punishment was not available for perjury,[90] so this ghastly set of penalties was perhaps the best available substitute.[91]

Though we have little record of Parliament discussing the Oates case before penning the English Bill of Rights, the Oates trial and the punishment were extremely well-known throughout England and beyond,[92] and we have record of what members of Parliament said shortly after the enactment of the Bill of Rights because Titus Oates appealed his sentence to Parliament. The members of the House of Commons specifically said that they had been thinking of Oates when drafting the relevant provision of the English Bill of Rights, and furthermore, these members claimed that "[i]f [Oates's] punishment were affirmed, this would strip the prohibition of its meaning and eviscerate the 'ancient Right of the People of England that they should not be subjected to cruel and unusual Punishments.'"[93] Oates did not, however, win over the House of Lords. Nevertheless, the House of Commons petitioned King William III, and he pardoned Oates.[94]

The memory of Oates and the conviction that some punishment is legally beyond the pale were deeply ingrained in American life. While the particular phrasing of the Eighth Amendment came from the Virginia Declaration of Rights of 1776, it is also well-known that many states in the Founding Period had bills (or declarations) of rights or state constitutions with similar phrases.[95] Some of these

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[88] *Id.*

[89] *Id.* at 858.

[90] Harmelin v. Michigan, 501 U.S. 957, 970 (1991) ("At sentencing, Jeffreys complained that death was no longer available as a penalty and lamented that 'a proportionable punishment of that crime can scarce by our law, as it now stands, be inflicted upon him.'") (quoting *Second Trial of Titus Oates,* 10 HOW. ST. TR. 1227, 1314 (K.B. 1685)).

[91] EDGAR SANDERSON, JUDICIAL CRIMES: A RECORD OF SOME FAMOUS TRIALS IN ENGLISH HISTORY IN WHICH BIGOTRY, POPULAR PANIC, AND POLITICAL RANCOUR PLAYED A LEADING PART 127 (1902) ("The court, inspired by the Crown, was resolved to have the villain's life by indirect means and through a hideous form of torture.")

[92] *Id.* at 129 ("Oates had attained European fame. Millions of Roman Catholics abroad, having heard of the persecution of their brethren in England, and of Titus Oates as the chief agent in their martyrdom, rejoice to learn the tidings of the vengeance which had overtaken him. Engravings of him looking out from the pillory and writing at the cart's tail were circulated all over Europe.")

[93] John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation,* 102 NW. U. L. REV. 1739 (2008) (quoting 14 H.L. Jour. 228 (1689)).

[94] SANDERSON, *supra* note 91, at 133.

[95] Tom Stacy, *Cleaning Up the Eighth Amendment Mess,* 14 WM. & MARY BILL RTS. J. 475, 503-04 (2005); Rumann, *supra* note 24, at 674.

forbade "cruel and unusual punishment," some forbade "cruel or unusual punishment," and some just forbade "cruel punishment."[96] As nobody quibbled about the logical difference between conjunction and disjunction, it appears that people thought these variously worded provisions effected the same prohibition.

B. Disputed History

While there are many scholarly disputes about the history of the Eighth Amendment, the one that concerns us is the question of application. It is strongly disputed to whom the Punishments Clause applied. Professor Stacy writes, "The Cruel and Unusual Punishment Clause ... was meant primarily as a limit on legislative, not judicial, power."[97] However, there are detractors from that theory. Some scholars think the Clause had origins in checking the behavior of judges like Jeffreys who presided at Oates' trial,[98] and some think that the Clause was aimed at pretrial actors.[99] While there is little evidence that anyone specifically intended the Clause to apply to private persons acting in a private capacity, there is evidence that the phrase "cruel and unusual punishment" was used in private contexts in early American history. As Professor John F. Stinneford notes:

> The phrase "cruel and unusual" was ... employed to describe the use of excessive force by superiors against inferiors. At common law, masters were permitted to use moderate physical force to discipline their servants; parents were permitted to use moderate force to discipline their children; and teachers were permitted to use moderate force to discipline students. When a superior used excessive force, however, this discipline was described as a "cruel and unusual punishment." Masters could be indicted for imposing cruel and unusual punishments on slaves. Ship's officers could be indicted for inflicting cruel and unusual punishments on seamen. Teachers could be fired for

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[96] Stacy, *supra* note 95, at 504-05.

[97] *Id.* at 512.

[98] Granucci, *supra* note 83, at 853 ("Most historians point to the treason trials of 1685 – the 'Bloody Assize' – which followed the abortive rebellion of the Duke of Monmouth, and [are of] the opinion that the cruel and unusual punishments clause was directed to the conduct of Chief Justice Jeffreys during these trials.") Granucci is mentioning what was a scholarly consensus, not endorsing it.

[99] Rumann, *supra* note 24, at 666 (citing Furman v. Georgia, 408 U.S. 238, 260 n.2 (Brennan, J., concurring)) (1972)) ("The historical underpinnings of the Eighth Amendment make clear that when the framers of the Bill of Rights were considering the Eighth Amendment's proscription against cruel and unusual punishments, among their traditionally recognized concerns, they were equally concerned with and intended the clause to protect against 'the use of torture for the purpose of eliciting confessions.")

> imposing cruel and unusual punishments on students. And parents could lose custody of their children for inflicting cruel and unusual punishments on them.[100]

This evidence provides modest support for the thought that the original public meaning of "cruel and unusual punishments [shall not] be inflicted" encompassed many instances of violence perpetrated by someone whom the state has sanctioned to occupy a superior role vis-à-vis another and to exercise authority.

Below I rely on Stinneford's scholarship as well as that of others to make the best historical case for expanding the reach of the Punishments Clause, particularly to detention centers, schools, and the parents of juveniles. After making this case, I consider the opposing historical evidence.

1. The Best Historical Case for Expanding the Reach of the Punishment Clause

The best historical case for extending the reach of the Clause starts with the uncontroversial claim that the Eighth Amendment forbids tortures such as the rack. Commentator after commentator has noted this.[101] Few, however, have made much of the fact that these tortures were often used for extracting confessions in Europe.[102] If the Eighth Amendment was motivated by concern to stamp these things out, the Amendment must mean to stamp them out in the setting in which they customarily occurred: the pretrial context.

This evidence gives some reason to extend the Eighth Amendment to jails, but one might think that it offers no reason to extend it to other detention centers. Yet, it does. In early America, there were no detention centers besides jails. Thus, we might understand the venue of tortures like the rack in a wider-scope way: people were subject to the rack, the thumbscrew, and other torture devices while in detention prior to being convicted of a crime. Put that way, the county jailer and the immigration detention center guard are both potentially punishers.

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[100] John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 940–41 (2011) (internal citations omitted).

[101] See, *e.g.*, Harmelin v. Michigan, 501 U.S. 957, 981 (1991) (Opinion of Scalia, J.) (quoting J. BAYARD, A BRIEF EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 154 (2d ed. 1840)) ("The prohibition of cruel and unusual punishments, marks the improved spirit of the age, which would not tolerate the use of the rack or the stake, or any of those horrid modes of torture, devised by human ingenuity for the gratification of fiendish passion."); Furman v. Georgia, 408 U.S. 238, 345 (1972) (Marshall, J., concurring in judgment) ("But the Eighth Amendment is our insulation from our baser selves. The 'cruel and unusual' language limits the avenues through which vengeance can be channeled. Were this not so, the language would be empty and a return to the rack and other tortures would be possible."). If there is a legal proposition on which Antonin Scalia and Thurgood Marshall agree, it must be right!

[102] Professor Rumann has written persuasively to show that the Eighth Amendment was indeed about protecting pretrial detainees. *See* Rumann, *supra* note 24, *passim*.

Even if one accepts that detention center officials are punishers, what reason have we to extend the Clause to teachers and parents? Professor Stinneford's survey of early American statutes and court proceedings quoted above makes it evident that the phrase "cruel and unusual punishment" was used in reference to the student-teacher and child-parent relationships.[103] This shows that extreme retributive violence perpetrated on students by their teachers or on children by their parents was part of the ordinary public meaning of "cruel and unusual punishment." This might sound jarring until one considers what the various 'punishers' to whom Stinneford alludes have in common. In figuring this out, one arrives at the core notion of "cruel and unusual punishment." Masters and slaves,[104] ship officers and crew,[105] teachers and students,[106] and parents and children[107] all have (or had) relations of subordination that the law enforces. Also, in all of these pairings, the superiors in the pairs exercise a custodial right over the inferiors, which includes a right to issue retributive harm. Thus, there is a kind of chain of command running from the state to these superiors, which gives them the right to control these inferiors and to punish them, subject to certain legal limits. If this is the way to understand the range of cases to which the label "cruel and unusual punishment" was applied in early American history, it should not seem so unreasonable to include teachers and parents as potential punishers for Eighth Amendment purposes.

2. The Countervailing Case

Compelling and inspiring as the foregoing may have been, the countervailing case is fairly strong. The strongest piece of evidence for it is the fact that there were no Eighth Amendment cases brought by detainees or cases brought by beaten students or children in early America, roughly the period from the ratification of the Bill of Rights until 1900. This period is particularly significant, for, if people living in the century after the Eighth Amendment's ratification understood the Amendment to shield them from violent detention center officials, teachers, and parents, one would think that somebody would have brought forward a case. Since no cases were brought, it suggests that the Amendment was thought to have a narrower scope than I contended above.

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[103] Stinneford, *supra* note 100, at 940–41 (internal citations omitted).

[104] *See, e.g.*, Oliver v. State, 39 Miss. 526, 540 (Miss. Err. & App. 1860) ("Unconditional submission and obedience to the *lawful* commands and authority of the master is the imperative duty of the slave, as well as the undoubted right of the master.").

[105] *See, e.g.*, § 4596, REVISED STATUTES OF THE UNITED STATES, 1873-'74 (U.S. Gov't. P.O., Washington D.C., 1875) at 890 (explaining the duties that crew owe to the officers; among these include not deserting, that is, staying in the ship until the master gives them leave to go, and obeying all lawful orders of the officers.).

[106] *See*, the remarks about truancy, *infra*, note 140 and surrounding text.

[107] *See, e.g.*, In re Kottman, 20 S.C.L. 363, 364 (S.C. App. L. & Eq. 1834) ("There is no question of the perfect legal right of a father to the possession and controul of his child.").

The absence of such cases is not altogether dispositive when one notes a few things. First, there were very few Eighth Amendment cases in early America at all. Second, of the Eighth Amendment cases brought, most plaintiffs sought injunctive relief from executions[108] and long terms of incarceration,[109] not monetary damages for retributive beatings. Third, given the way damages had to be pursued for a great stretch of American history, it is little wonder that one sees but few cases explicitly grappling with Eighth Amendment violations by teachers or parents. Each of these points requires some elaboration.

First, to repeat, there were few Eighth Amendment cases in early America. This is important because it means there was a small sample size, and from small samples sizes, little can be inferred. Why were there few cases? Well, the Eighth Amendment, like all of the Bill of Rights, was initially understood only to redress the actions of the federal government, not the states nor relationships that only the states created or managed, like teacher-student or indeed parent-child.[110]

Second, to repeat, Eighth Amendment plaintiffs often sought injunctive and not compensatory relief. Because this is true, one should suspect that parents and teachers would not have found themselves as defendants in Eighth Amendment cases, for the kind of retributive harms parents and teachers were likely to inflict would not be remedied by injunctions. Recall the case of the Catholic boy who was beaten by his teacher with the rattan. While the boy or his guardians could have sued to enjoin such beatings, there was no guarantee that such beatings were likely to recur, and there are easier (and less expensive) ways to stop this sort of behavior: talking to the teacher's superiors, transferring schools, or homeschooling. The more reasonable way to pursue the vindication of one's rights in such cases is via damages.

This brings us to the third point, that given the way damages for constitutional violation had to be pursued, there should have been few cases explicitly grappling with the Eighth Amendment. Prior to statutes[111] and decisions[112] that have created causes of action to seek damages for constitutional violations, plaintiffs had to sue violators under state tort law, alleging, for instance, a battery, assault, trespass, or wrongful imprisonment.[113] As a defense, defendants, if they were state actors, could claim that they were acting within the scope of their authority granted by the government. To rebut this defense, the plaintiffs could, in turn, claim that the defendants' action violated the Constitution and thereby exceeded any

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[108] *E.g.* Wilkerson v. State of Utah, 99 U.S. 130 (1878); In re Kemmler, 136 U.S. 436 (1890).

[109] *E.g.* O'Neil v. State of Vermont, 144 U.S. 323 (1892).

[110] *See* Barron v. City of Baltimore, 32 U.S. 243 (1833) (holding that the Bill of Rights did not apply against the states); Pervear v. Commonwealth of Massachusetts, 72 U.S. 475 (1866) (holding that the Eighth Amendment in particular does not apply to state governments.).

[111] *E.g.* 42 U. S. C. § 1983 (1996)

[112] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

[113] For descriptions of this process, *see* Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the Bivens Question*, 161 U. PA. L. REV. 509, 531–32 (2013). *See also* James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 134 (2009).

authority granted by the government, since the government has no authority, nor may grant others authority, to do anything that violates the Constitution. But notice that though plaintiffs *could* explicitly reference the Eighth Amendment, there was no need to do so, for there were other ways of showing that an instance of violence exceeded whatever authority a defendant claimed as a basis for inflicting retributive harms. For instance, a child, or someone suing on her behalf, could cite to criminal child abuse statutes or case law; a student could easily look to other case law about abuse by superiors. There were no prizes for venturing a new constitutional claim for which there would have been little precedent.

In sum, until the Fourteenth Amendment[114] and courts' decision to incorporate the Eighth Amendment into its Due Process Clause,[115] there would have been very few parties eligible to be taken to court for an Eighth Amendment violation. Of those, few would have been teachers and parents because, given that plaintiffs would have been seeking damages and in state court, there would have been no particular incentive to rely on the Eighth Amendment.

One might worry that this elaborate response does too much and too little to redeem the expansive reading of the Eighth Amendment advanced above. The response does too much because if its contentions are true, it raises a very difficult question: how could the Framers have intended the Eighth Amendment to reach the conduct of parents and teachers if the Amendment reached so few of these people and afforded vulnerable parties no particular protection against their abuses? The response does too little because it does not answer the 'no cases' question about detention centers. There were federal detention centers, where the Eighth Amendment applied and where injunctive relief might have been useful, yet no cases were brought. The countervailing case strikes again.

The countervailing case is strong, but it does little to explain away the data above: courts did use the language of "cruel and unusual punishment" to refer to private parties, particularly those whom the state empowered to exercise custodial authority over others. Therefore, the public meaning of "cruel and unusual punishment" does include action performed by such parties. The countervailing case also does little to raise doubt about the fact that the Framers wanted to eliminate the rack and, thus, should have wanted to eliminate it in the context in which it actually had use. Thus, we arrive at an impasse: some history supports expansion, some history does not.

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[114] U.S. CONST. amend. XIV.

[115] State of La. ex rel. Francis v. Resweber, 329 U.S. 459, 464 (1947) (the Court suggests that the Eighth Amendment's protections apply against state government but that the particular harm complained of does not violate the Constitution); Robinson v. California, 370 U.S. 660, 667 (1962) (the Court explicitly held that the Eighth Amendment's protections are incorporated into the Fourteenth Amendment.).

V. METHODOLOGY

Thus far, I have argued that the current precedent on the punisher question no longer deserves our respect, that the text of the Constitution does not settle much about the punisher question, and that the history of the Eighth Amendment provides *some* basis for extending the reach of the Clause to detention centers, schools, and parents – but not enough to be conclusive. Thus, we have reached an impasse. In this Part, I argue that we can remedy our interpretive *aporia* by relying on moral-political arguments. A reconstruction of ordinary practices of constitutional interpretation shows that moral-political argumentation is always in the background. I argue that moral-political argument should come to the foreground in limited situations, like the one in which we find ourselves with respect to the punisher question. To stave off worries about relying on moral-political argument, I end this Part with suggestions about how such moral-political argumentation should ideally proceed.

A. Reconstructing Ordinary Interpretation

As I have explained elsewhere, when asking any question, we have to select a norm of inquiry, at least implicitly.[116] A norm of inquiry just explains what is to count as relevant evidence for settling that inquiry. For example, suppose that one is a business owner, and the inquiry at hand is whether to give the employees a raise. In trying to make that decision, one needs to determine what will bear on the matter. Perhaps, one is an Ebenezer Scrooge type of character, and all that matters is the company's profits. Thus, for a piece of information to count as relevant to the question of whether to give the raise, it must concern the company's profits. Most of the time, when inquiring about something, the norms of inquiry seem obvious to us, but even in those cases it is possible to step back and to ask whether that norm of inquiry is the appropriate one.

With this borne in mind, consider the task of interpretation. There are competing norms that might guide our interpretive inquiries. Two stand out, a text-centered norm and a history-based norm. What recommends selecting one of them? How does one go about deciding which to use?

Well, for text-centered norms, scholars mention an array of moral-political reasons to champion them. For instance, some scholars mention institutional competence. Since judges, after all, are the ones who will (or will not) adopt interpretive strategies, those in the academy should only recommend that judges perform tasks for which they are well-suited. Because judges are trained in reading legal texts, they should not be moonlighting as legal historians. Other scholars mention separation of powers and respect for democracy as reasons to prefer a text-

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[116] Raff Donelson, When We Ask What Law Is (Sept. 22, 2016) (unpublished Ph.D. dissertation, Northwestern University).

centered approach.[117] Such scholars also start from the political reality that judges will be the ones adopting the interpretive strategy, and they note that it is in better keeping with American democracy to have unelected judges stick to the text, that to which We the People have agreed.

For history-based norms, such as versions of originalism and views that prize precedent, scholars again tout moral-political reasons to prefer history-based norms of interpretation. Just as with text-centered approaches, there are the usual concerns about democracy and separation of powers to recommend that judges employ interpretive strategies, which constrain their answers to legal questions. Instructing judges to focus on what historical persons thought, and not on the actual extension of certain contentious terms like "equal protection,"[118] "necessary and proper,"[119] or indeed "cruel and unusual"[120] – one might think that this method will produce greater predictability in judicial outcomes.[121] Predictability is of a great value for the twin reasons that (1) people can engage in complex, desirable projects only when they have settled expectations[122] and (2) it is often unfair to unsettle people's reasonable expectations. For the originalist norms, one might think that following one of these is the only way to capture the true meaning of what legal texts say,[123] and if this were true, it would follow that this is a way of being faithful to the idea that we should be governed by law, not men.

All of these reasons for choosing particular interpretive norms are moral-political reasons. This should not be surprising for, in selecting the norm that will guide our inquiries – be they interpretive inquiries or something else – we are often implicitly relying on judgments about what would be just, efficient, democratic, sustainable, etc. Consider the reasons for adopting text-centered norms above; these included the value of democracy, political legitimacy, and the efficiency gained by specialization. Thus, even in being text-centered, one is still engaged in moral-political argument. Moral-political argumentation about how to decide a theoretical question, or what I will call *pragmatist* reasoning, is always in the background in law, directing what shall be in the foreground. Usually something other than pragmatist reasoning is in the foreground, for often the optimal way to attain good consequences requires aiming at something other than the good consequences

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[117] Stacy, *supra* note 95, at 502 ("Many scholars and jurists... maintain that a textualist approach maximizes the law's legitimacy and minimizes judicial subjectivity.").

[118] U.S. CONST. amend. XIV, § 1.

[119] U.S. CONST. art. I, § 8, cl. 18.

[120] U.S. CONST. amend. VIII.

[121] *See, e.g.*, Stinneford, *supra* note 100, at 923 ("It is... untenable for the Court to rely solely on its own independent judgment" of what counts as a disproportionate sentence.").

[122] THOMAS HOBBES, LEVIATHAN, in THE ENGLISH PHILOSOPHERS FROM BACON TO MILL: THE GOLDEN AGE OF ENGLISH PHILOSOPHY 161 (Edwin A. Burtt ed. 1939).

[123] Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 COL. L. REV. 1917, 1920 (2012) ("Many originalists claim that interpretation just *is* recovery of original meaning, that nothing else could count as interpretation.").

themselves.[124] Indeed, the starting assumption of employing text-centered or history-based norms is this: to get at the best consequences, we need to answer the punisher question by looking at text or history instead of looking directly to what would be good or bad. By looking directly at considerations of what would be good or bad, we get unpredictability, oligarchy, and so on. I have tried to mount a case that this indirect strategy may not yield much of an answer to the punisher question, whatever the merits of doing this when trying to answer other questions. What to do, then, in our case – that of resolving the punisher question? I suggest thinking directly about what would be good and bad; that is, I suggest using moral-political arguments.

B. The Case for Pragmatist Adjudication in Limited Circumstances

The case for adopting pragmatist reasoning for resolving the punisher question is a simple one. If pragmatist reasoning is always in the background, pragmatist reasoning has always been a legitimate basis on which to rule. Now, if in doing pragmatist reasoning, it becomes clear that an indirect strategy is to be preferred, one should use it, but if, as in the case at hand, indirect strategies are unavailing, we should revert to the original strategy upon which pragmatist reasoning is a legitimate basis on which to rule.

Even if this much were conceded, it would not follow that each case should be decided by reference to consequences nor would it follow that any and all moral values could serve as an appropriate basis for a decision. All of this is to say that there still can be some limits to this exercise of pragmatist reasoning. It is to those limits that I now turn.

C. The Style of Pragmatism

To comprehend the kind of pragmatist reasoning which is being advocated here, three things must be noted. First, this Article claims that a pragmatist reasoning is best for deciding the punisher question. An answer to the punisher question is a *rule* that names the kinds of parties to whom the Punishments Clause applies. As such, having a pragmatist norm to govern our inquiry does not mean considering the possible benefits and detriments of extending Eighth Amendment protection to each particular person aggrieved. Thus, the view under consideration is not outcome-oriented in the sense that particular outcomes in particular cases are considered. There are good practical reasons related to the value of the rule of law that counsel against that method of adjudicating cases.

Second, the pragmatism advanced here is no form of utilitarianism. Professor Douglas Lind has written eloquently distinguishing between pragmatism

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[124] Peter Railton, *Alienation, Consequentialism, and the Demands of Morality*, 13 PHIL. & PUB. AFF. 134, 140-141 (1984).

(in just the sense I mean) and utilitarianism.[125] Neither pragmatism nor utilitarianism, when initially conceived as philosophical theories, had much to do with deciding judicial decision-making; however, both are decision procedures and can direct us toward how to resolve cases. A key difference between pragmatism and utilitarianism, at least in its classical form, has already been noted: while a pragmatist approach to adjudication is concerned to find the optimal *rule* for adjudicating cases, utilitarian adjudication is concerned with finding the optimal action at each moment, such that one should consider benefits and burdens case-by-case. Another key difference concerns the types of benefits and detriments each approach is willing to countenance. Classical utilitarianism, when used as a theory of adjudication, considers the amount of pleasure or the level of preference satisfaction by all those affected by a decision as the inputs upon which the theory works to render a decision. On the other hand, pragmatism, used as a theory of adjudication, can be both more restrictive and more inclusive about the types of values relevant for deciding on the best rule. Classical utilitarians cannot directly accommodate fairness as value to be weighed among others to determine what to do; classical utilitarians also cannot exclude what third-parties to a case would want in determining how a case should be decided. Both of these can easily be accommodated within a pragmatist theory, and again, there seem to be good reasons related to the rule of law that favor both of these accommodations.

Third, the pragmatism advanced here should seek to rely upon just those values that are uncontroversial, that is, values acceptable to those with various conceptions of the good. For instance, one might rely on the simple idea to treat likes alike. In doing this, one avoids more contentious grounds for extending the Punishments Clause. For example, an argument could maintain, "Within the current immigration detention model, it is impossible to draw any meaningful distinction between civil custody and penal incarceration"[126] therefore we must apply the Eighth Amendment to immigration and other detention centers. This is a very controversial premise from which to arrive at a conclusion about the reach of the Clause. Instead, one might merely claim that there is no meaningful difference between two retributive beatings where one abusive state actor works in a prison and the other abusive state actor works at the immigrant detention center. This is uncontroversial because a state actor's retributive beating is a state actor's retributive beating.

The tradition of political liberalism, championed by John Rawls[127] and carried on by Professor Martha Nussbaum[128] and Professor Cass Sunstein,[129] defends

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[125] Douglas Lind, *The Mismeasurement of Legal Pragmatism*, 4 WASH. U. JUR. REV. 213, 217-226 (2012). Lind and I do have a small disagreement. Lind thinks the so-called pragmatist theory of truth (that truth is what works) is a necessary part of pragmatism, and I do not endorse that thesis, and I have shown that many leading pragmatists from both the classical and contemporary age explicitly reject the thesis. *See generally* Donelson, *supra* note 116.

[126] Whitney Chelgren, *Preventive Detention Distorted: Why It Is Unconstitutional to Detain Immigrants Without Procedural Protections*, 44 LOY. L.A. L. REV. 1477, 1493 (2011).

[127] JOHN RAWLS, POLITICAL LIBERALISM 139-40 (1996).

[128] Martha C. Nussbaum, *Perfectionist Liberalism and Political Liberalism*, 39 PHIL. & PUB. AFF. 3,

using "thin" values to argue in the public sphere, but my reason for doing so in this case differs from that tradition. Political liberals often couch their thin value advocacy in terms of respect for other persons, but, as I have argued elsewhere, it is not clear why it disrespects someone to base public policy decisions on values that this person disputes.[130] So long as this person has enjoyed a fair shot at convincing people of her side, no wrong is committed in the usual instance. Instead of basing thin value advocacy on a curious notion of respect, we might appeal to uncontroversial values just because these and the decisions based on them are more likely to garner widespread support. For any society to last, it is essential for its decisions to enjoy widespread support, and this is especially true of a democratic society like the American one.

VI. LOOKING TO VALUES

This final substantive Part of the Article now applies the lessons of Part V and offers a moral-political argument in favor of extending the reach of the Clause to jails and other detention centers, all K-12 schools, and to the parents of juveniles. To close this Part, I take on a lingering worry that there is no need for a specifically Eighth Amendment remedy to the problems I identify.

A. Reaching the Detention Centers

The argument to extend the application of the Punishments Clause to jails and other detention center is, primarily, a fairness argument. Concern about fairness will also figure in the arguments about why courts should recognize schools and parents as potential punishers. As I explained in Part V, thin values, such as the notion of fairness that I employ below, are the correct sorts of moral-political values to use in determining the scope of the Clause.

First, let us assume that it is morally problematic for the state to punish individuals without having proven that they are responsible for a wrong. As I noted above, this is a lodestar in any modern liberal polity, including the American one. If one affirms this principle, one is thereby committed to the proposition that it is *possible* for the state to punish individuals without having proven that they are responsible for a wrong.[131] Detainees – whether pretrial detainees ("those persons who have been charged with a crime but who have not yet been tried on the charge"[132]) or those otherwise detained in immigration facilities for example – are just the sort of individuals about whom we worry about punishment prior to any

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[129] CASS SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 41 (1999).

[130] Donelson, *supra* note 72, at 15.

[131] *But see*, Sandra Mayson, *Collateral Consequences and the Preventative State*, 91 NOTRE DAME L. REV. 301, 319 (2015) ("To intentionally 'punish' the blameless is not really to punish at all.")

[132] Bell v. Wolfish, 441 U.S. 520, 523 (1979).

formal adjudication of guilt.[133] Now, if it is possible for the state to punish such persons, surely, it is possible to do so cruelly or unusually. This Article takes no stand on what "cruel and unusual" amounts to, but whatever it is, it rightly describes at least some punishments that a state might impose on detainees. If we, therefore, know that there can be cruel and unusual punishment of detainees just as there can be cruel and unusual punishment of convicts, we must extend the same Eighth Amendment protections already afforded to convicts to the detainees. As Aristotle noted centuries ago, "equality means giving the same to those who are alike."[134] This should be no mere slogan; it should inform the legal system. As such, the Punishments Clause should reach jails and other detention centers.

B. Reaching the Schools

The moral-political case for extending the Clause to public and private K-12 schools is a complex one. First, I develop a two-part argument for extending the Clause to public K-12 schools. Next comes a simple fairness argument to extend the Clause to private K-12 schools. Finally, I explain why the arguments thus far advanced do not support further extending the application of the Clause to other educators such as public or private universities.

Having refuted the moral-political argument offered by the *Ingraham* Court above,[135] I can proceed directly to making a positive case for classifying public schools as punishers for Eighth Amendment purposes. The argument is two-part. The first part is a simple fairness argument, while the second part is an argument about how we should treat vulnerable persons.

Let us assume for just a moment that the reason to consider prison officials potential punishers is that we accept a broader proposition, namely that a state agency that crafts rules and then commits violence against people for noncompliance with those rules should get Eighth Amendment scrutiny. If we accept this broader proposition and if we recognize that prisons are just one such type of state agency, we are forced to expand the class of potential punishers. The class of agencies behaving this way includes public K-12 schools, so, by parity of reasoning, they too should receive Eighth Amendment scrutiny. As the Court once put it, the Constitution "protects the citizen against the State itself *and all of its creatures*—Boards of Education not excepted."[136]

The foregoing was a simple fairness argument for extending the reach of the Punishments Clause, an argument that assumed that the Punishments Clause should apply to any state agency crafting rules and beating people for noncompliance. What

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[133] *Id.* at 535 ("under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.")

[134] ARISTOTLE, *Politics* in A NEW ARISTOTLE READER 531 (J. L. Ackrill ed., T. A. Sinclair & T. J. Saunders trans.) (1989).

[135] *See infra* II.B.3.

[136] West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) (emphasis added).

is the reason for this assumption? This reason concerns how we should treat those in vulnerable situations. The Constitution has many punishment provisions.[137] No doubt including all these provisions in a relatively short text evinces great concern over how society should treat those against whom the state seeks retribution. This concern is rightly placed, for those subject to the state's retributive aims are in a vulnerable position. The state's power to take and to harm is greatest when pursuing its retributive aims. Because of our vulnerability to massive harm, we should have strong safeguards. Because this vulnerability always exists when we encounter the state, we should always have strong safeguards available. This, then, is reason to think that *anytime* the state stands ready to exercise its retributive powers, courts should be equally ready to apply those safeguards, including the Punishments Clause.

Even if the strong claim that all state actors are potential punishers is rejected as too far-fetched, there is good reason to accept the more modest claim that the particular vulnerability of school-aged children militates in favor of Eighth Amendment protection for them. As Professor Annette Appell puts it, "While it is true that the human condition is to be vulnerable, babies and young children exemplify a profound de facto and de jure vulnerability."[138] One thing that explains children's vulnerability is the fact that they are in a kind of custody while in school. Young pupils are mandated by the state to be in school and, potentially, to suffer abuse. In the typical case, the state does not directly mandate a child to be in any particular school, as it gives parents the choice of sending the child to public or private schools.[139] However, once a parent has selected the school, the state requires the child to be there.[140] Another thing that explains children's vulnerability is their political powerlessness. With few exceptions, school-aged children have no ability

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[137] Donelson, *supra* note 72, at 3 ("The word punishment and its cognates only occur seven times in the Constitution and mostly in minor clauses; however, the concept of punishment is implicated in numerous, weighty constitutional provisions. The Ex Post Facto Clauses deny Congress and the states power to punish for actions that were not criminal at the time of action. This obviously implicates the question of what counts as punishment. The Double Jeopardy Clause prevents, *inter alia*, multiple punishments for the same offense. The Fifth Amendment announces more procedural protections for defendants in criminal cases, such as the right against self-incrimination, indictment by grand jury, proof of guilt beyond a reasonable doubt. These protections also implicate the notion of punishment because arguably one distinguishes between civil and criminal cases, in part, by claiming that the latter always features punishment. The procedural protections of the Sixth Amendment, which include the Speedy Trial Clause, the Confrontation Clause, the guarantee of trial by impartial jury, and the right to counsel even when one cannot afford it, implicate the notion of punishment for the very same reason.").

[138] Annette R. Appell, *The Child Question*, 2013 MICH. ST. L. REV. 1137, 1138 (2013).

[139] Runyon v. McCrary, 427 U.S. 160, 178 (1976) ("parents have a constitutional right to send their children to private schools"); Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 535 (1925) ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only.").

[140] Jason Scronic, *Take Your Seats: A Student's Ability to Protest Immigration Reform at Odds with State Truancy and Compulsory Education Laws*, 2 FLA. A & M U. L. REV. 185, 188 (2007) ("Truancy laws or compulsory attendance laws have been enacted in all states.").

to shape the political process to improve their lot. These two facts – that members of a group are in custody and those members are politically powerless – are exactly the kinds of facts upon which the *Ingraham* Court relied to explain why prisoners get Eighth Amendment protection. If these same facts obtain with respect to children in public schools, surely they too deserve Eighth Amendment protection.

Having made the case that the Punishments Clause should reach public K-12 schools, it is simple to explain why the Clause should also apply to private K-12 schools: it is unfair to private school students not to do this. If one accepts the argument from the particular vulnerability of school-aged children, one should consider private K-12 schools punishers, too, because students in both sorts of institutions are similarly situated, and, *ceteris paribus*, similarly situated persons should be treated the same. Why think that these two groups of students are similarly situated? Well, students' presence at private K-12 schools is just as mandatory, and the level of control and abuse that these institutions can inflict is as high as that of their public counterparts. Admittedly, there are differences between public and private K-12 schools, and these differences may well justify treating free speech and free exercise of religion claims in private schools differently than we do in public schools, given the very reasons for which people send their children to private school. Nevertheless, whatever differences exist, they do not justify giving private school students fewer safeguards against violence than their public school peers would enjoy.

The final argumentative task of this section is to explain why the Clause should not apply to all educators. Two major types of educators have thus far been excluded from my analysis: public and private universities. I take each in turn.

There is reason to apply the Clause to public universities, just less than there is for applying it to public and private K-12 schools. The reason for applying the Clause is that public universities are state agencies that do punish[141] and could punish cruelly. With respect to punishment meted out by public universities, courts have held that students are only owed limited procedural due process, from a Constitutional standpoint.[142] This essentially makes certain state agencies safe

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[141] *See, e.g.*, Kathryn Andreoli, *Clemson student charged with attempted murder after stabbing at party*, WYFF NEWS 4 (Apr. 12, 2016), http://www.wyff4.com/news/clemson-student-charged-with-attempted-murder-after-stabbing-at-party/38973506 (Clemson University suspended student for attempted murder and drug possession); Susan Svrluga, *Two students expelled from OU for leading racist chant*, WASHINGTON POST (Mar. 10, 2015), https://www.washingtonpost.com/news/grade-point/wp/2015/03/10/two-students-expelled-from-ou-for-leading-racist-chant/?tid=a_inl (University of Oklahoma expelled two students for racist chants); Collin Binkley et al., *Few rights for either side in college judicial procedures*, COLUMBUS DISPATCH (Nov. 25, 2014), http://www.dispatch.com/content/stories/local/2014/11/25/few-rights-for-either-side.html (University of North Dakota expelled a student for sexual assault).

[142] *See, e.g.*, Doe v. Alger, 175 F. Supp. 3d 646, 661 (W.D. Va. 31, 2016) (recognizing that a student had a viable due process claim against the public university that suspended him for more than five years for sexual misconduct.).

havens wherein all kinds of retributive harm can be visited upon individuals without Eighth Amendment protection.

With that said, public universities, in fact, limit the kinds of retributive harm they issue.[143] This constitutes one reason to think that students and others subject to public university sanctions have little need for the Eighth Amendment. The absence of vulnerability also obviates the need for the Clause. Recall that student vulnerability justified extending the Clause to K-12 schools, but students are less vulnerable to grave harm issued by public university officials. This owes to the fact that, unlike the situation of K-12 students, university students are not mandated by the state to attend. They can leave when things get bad.[144] There are no truancy laws for college.[145]

This Article ultimately takes no stand on whether the Punishments Clause ought to apply to public universities; it only notes that the moral-political case for applying it is weaker than the case for applying it to K-12 schools. The case for extending the Clause to private universities is nonexistent. The key reason to extend the Clause to public universities was that it seems improper to give any state actors a free hand to level retributive harms without Eighth Amendment oversight. This reason is not available for catalyzing an argument for extending the Clause to private universities. Moreover, the reasons against extending the Clause to public universities – that these places do not issue severe sanctions and that students attending these schools are not especially vulnerable – these reasons are just as weighty, if not more so, in the case of private universities. Therefore, the Punishments Clause should not apply to them.

C. Reaching the Home

At last, we have arrived at the most controversial component of the case for extending the reach of the Punishments Clause, the case for extending it to the parents of juveniles. To make this argument, I rely on a formal deductive argument whose key premises I further substantiate below. The argument is this:

(1) If a class of parties A functions as a state actor with respect to a class of parties B, there is a *prima facie* reason to apply the Clause to A with respect to A's interaction with B.

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[143] David DeMatteo et al., *Sexual Assault on College Campuses: A 50-State Survey of Criminal Sexual Assault Statutes and Their Relevance to Campus Sexual Assault*, 21 PSYCHOL. PUB. POL'Y & L. 227, 230 (2015) ("the range of penalties associated with administrative adjudication of campus sexual assault cases is more restricted and less severe than the penalties that can result from adjudication of sexual assault cases in criminal justice contexts.").

[144] They can also choose not to matriculate in the first place if a school acquires a reputation for abuse. No school-aged child has the choice not to attend a violent school because parents, not children, ultimately decide where children enroll.

[145] As someone who taught undergraduates for several years, I have wondered whether such laws might prove helpful.

(2) A *prima facie* reason to apply the Clause to A with respect to A's interactions with B is undercut only if B is not especially vulnerable to abuse from A.

(3) If a *prima facie* reason to perform an action is not undercut, then there is conclusive reason to perform that action.

(4) Parents function as state actors with respect to juvenile children in their custody.

(5) Therefore, there is a *prima facie* reason to apply the Clause to parents with respect to their interactions with juvenile children in their custody.

(6) Juvenile children are especially vulnerable to abuse from parents.

(7) Therefore, there is conclusive reason to apply the Clause to parents with respect to their interactions with juvenile children in their custody.

Premise (1) should be relatively uncontroversial at this point in the argument. While there are detractors such as Justice Thomas and the *Ingraham* Court, in arguing that we should extend the Clause to reach jails and schools, I have implicitly relied on this notion throughout this moral-political argument, and moreover, there is not strong reason to doubt (1). Premise (2) is not uncontroversial, but I return to it at the very end of this section. Premise (3) is just supposed to be definitional. The heart of the controversy comes with premise (4).

To substantiate (4), all one needs to note is that children are in a kind of state-mandated custody of their parents, a custody that includes the right to issue retributive harm, much like the situation with K-12 school officials and students in their charge. Like teachers and even like detention center officials, parents enjoy a legal right to inflict punishment because the state has granted this right.

This understanding of the parent-child relationship will seem alien to those who hold natural rights understandings of the relationship. To begin my response, let us divide parents into three groups: 1) foster parents, 2) adoptive parents, and 3) biological parents. This grouping reflects the level of state involvement in the bestowal of parental rights. The state's level of involvement is greatest in the case of foster parents who only come to exercise parental authority over a child by asking the state for permission and for whom parental rights are extremely limited. Surely, in the case of foster parents, one should agree that vis-à-vis the child, the foster person looks like a state actor, one, who, by prerogative of the state, comes to exercise (limited) custodial rights which include the right to issue retributive harm. In this instance, it is clear that the state is an active participant in giving someone the right to

punish others. At one instant that person has no right to punish the child, and then at another instant, after state intervention, that person acquires the right. That this process occurs in so straightforward a manner makes it plausible that the foster parent is a state actor. They are merely exercising powers *conferred* by the state. Though custodial rights are expanded when it comes to adoptive parents, the story is much the same. At one instant that person has no right to punish the child, and then at another instant, after state intervention through an adoption, that person acquires the right. The natural rights paradigm seems most convincing in the case of biological parents who seem to enjoy parental rights naturally and automatically, but, arguably, the same mechanism is present. As Professor Akil Amar and his co-author contend, "a biological parent's custody over his offspring is not merely 'natural' and prepolitical. Rather, like property, custody is a *legal* concept, shaped and enforced by the state."[146] Biological parents, when they have it, exercise custodial control over their children that is state-backed, much like teachers hold over students and detention center officials hold over detainees, differing only in the extent and the reasons for which custody is granted.

If premise (4) is true, (5) logically follows. Premise (6) is absolutely uncontroversial because there are thousands upon thousands of instances of child abuse each year. If (5) and (6) both true, (7) logically follows.

There is the lingering worry about premise (2). One might think that other factors might undercut a *prima facie* reason to apply the Clause such as the administrative costs of dozens of new cases being brought. There are two reasons to fear the opening floodgates. First is the general worry that any time there is a new cause of action there will be many cases. Second is a more particular worry about this specific new cause of action, namely that courts will have to engage in lots of line-drawing about whether a punishment, meted out by parents, passes constitutional muster. I respond to these worries in reverse order. The line-drawing worry fades once we see that courts can rely on the lines that "have already been drawn and are enforced daily in our criminal codes that define child abuse."[147] On the general floodgates worry, we should begin by noting that, as of today, few child abuse cases end up in civil court with children suing their parents for battery. Because of this reality, it seems unlikely that extending the Punishments Clause will spur more cases. Granting that, one might then worry that this is a solution looking for a problem: if no one uses tort law for dealing with child abuse, why argue for a new constitutional tort? While I address the "why not other remedies?" question in more detail below, at this junction, I should note that a concern for simple fairness has been at the heart of this pragmatist argument. It is unfair for some state actors, or

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[146] Akil Reed Amar & Daniel Widawsky. *Child Abuse as Slavery: A Thirteenth Amendment Response to Deshaney*. 105 HARV. L. REV. 1359, 1362 (1992).

[147] *Id.* at 1378. Here Professor Amar and his co-author are talking about extending Thirteenth Amendment protections to abused children as opposed to my suggestion of extending Eighth Amendment protection. Though this suggestion differs from mine, we both face the general worry about line-drawing and can resolve that worry by relying on state child abuse laws.

those sanctioned by the state to exact retributive harm, to escape Eighth Amendment scrutiny. Even if this remedy is not much used, it should be available.

D. A Lingering Worry

The arguments advanced have not yet addressed an important question: Why do detainees, students, and juveniles need to be able to state an *Eighth Amendment* claim, as opposed to suing under ordinary tort law or bringing a Fifth or Fourteenth Amendment Due Process claim? Another way of putting this question is as the following challenge: If the primary concern is about deterring bad behavior and providing harmed parties with remedies, it should not much matter how we generate these good consequences. The key upshot of this challenge is a doubt that there really are good moral and political reasons to expand the reach of the Punishments Clause when other remedies exist. This challenge really amounts to two separate challenges. The first concerns the adequacy of ordinary tort law, while the second concerns about the adequacy of other constitutional torts. The plan is to take up each challenge in turn.

First, consider the challenge from ordinary tort law. We should prefer to press causes of action as constitutional torts and not as ordinary torts for reasons eloquently articulated by the Court – in the course of denying someone's request to sue under federal law. "[S]tate tort law may sometimes prove less generous than would a *Bivens* action, say, by capping damages... or by forbidding recovery for emotional suffering unconnected with physical harm ... or by imposing procedural obstacles."[148] The Court went on to claim that ordinary tort law is not "inadequate."[149] In that particular case, *Minneci v. Pollard*, the Court was deciding whether state tort law was an adequate remedy or whether the Court should create, as a matter of equity, a new cause of action for prisoners to bring constitutional torts against corrections officials in privately-operated federal prisons. Whatever one wants to say about *Minneci*, there is an obvious sense in which ordinary tort law *is* inadequate: it is not as good as what others get. This is why those who suffer state-sanctioned retributive harm should be permitted to state a constitutional claim.

The second matter is about why we should press for an Eighth Amendment remedy in particular. Deeply enough, it does not matter whether a claim gets adjudicated under the Eighth Amendment or the Fifth Amendment, so long as the remedy is the same. In a way, this is a concession, but not a big one. Conceding that it would be equally fine for a cause of action to proceed under one theory or another theory is not to concede that it would be fine for someone to declare one of those theories unavailable. For instance, if tomorrow, a troop of U.S. soldiers on official duty burst into the home of Patty Plaintiff and began cooking her food, sleeping in her beds, and generally making themselves at home, all without her permission, she

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[148] Minneci v. Pollard, 132 S. Ct. 617, 625 (2012).
[149] *Id.*

should be able to sue for relief under the Third Amendment or the Fifth Amendment (because this is a taking). Sure, it may not matter much to her whether she succeeds under one or the other, but that fact is no reason to argue that this is not a taking. Moreover, from the standpoint of Plaintiff, it is always better to have more routes to victory.

VII. FUTURE WORK

This Article has featured two ambitious claims. First, it contended that the Punishments Clause of the Eighth Amendment applies not just to legislatures, judges, and prison officials but also to detention officials, K-12 school officials, and the parents of juveniles. Second, it contended that it is appropriate to rely upon moral-political argumentation in constitutional interpretation when other sources of law cannot provide a workable, unambiguous answer to questions we face. Ambitious as this enterprise is, the Article still leaves much to be explored. The most glaring opening in the Article is that it does not provide a complete answer to the punisher question, that is, it does not give a test for determining the parties to whom the Clause applies. Instead, it argues analogically and thereby shows that three heretofore-unrecognized parties should receive Eighth Amendment scrutiny. There may be more. For instance, what should one say about the caretakers of mentally impaired adults? Perhaps most important, what should we say about financial institutions, schools, landlords, and others that are permitted to discriminate on the basis on one's criminal conviction? Are they punishers? These and other questions about the further application of the Clause lie beyond the scope of this Article.

Nevertheless, I can offer some exploratory remarks about the so-called collateral consequences of punishment about which so much has been written, both to explain why this Article does not treat the topic and to explain what considering this Article in conjunction with my other scholarship suggests about collateral consequences. Many scholars think that collateral consequences are punishment. The disenfranchisement of felons or the sorts of discrimination to which I alluded above – these are clear instances of punishment, say these scholars. The judiciary is unmoved, however. The judiciary has held that these are non-punitive measures intended to protect the franchise, to protect business owners from potentially miscreant employees, or what-have-you. Instead of wading into a dispute about what counts as punishment, this Article started with something less controversial, retributive physical violence. I recounted instances of people getting whipped and paddled, getting tased, getting their heads thrust into concrete or metal. Almost everyone can agree that this type of thing in the contexts I mentioned is punishment. Focusing on behavior that everyone would count as punishment allows us to concentrate on the precise question that this Article raises: "who can punish?" Of course, concentrating on one question for the purpose of gaining analytical clarity does not mean that I am unconcerned with which things one should deem as punishment in the first place. On the contrary, I have recently written an essay

addressing the fact that courts have no workable definition of punishment.[150] I propose a very broad understanding of punishment, which has as its core the following situation: the state-sanctioned retributive harm of a sufficiently serious degree. As I note in that article, some behavior that courts have understood to be merely civil actions could count as punishment under this expanded definition; in particular, I note some of the sex offender registration requirements. The broad understanding of punishment advocated in that earlier article combined with the thrust of this Article (that we should expand our understanding of punishers) very well could lead to answers about which collateral consequences might deserve Eighth Amendment scrutiny. This, however, is a project for future work.

Beyond simply not answering some questions, this Article also breathes life into questions that are currently underexplored. For instance, supposing that the arguments are persuasive and that, say, schools are punishing students in a sense that requires Eighth Amendment scrutiny, does the Constitution also mandate greater due process before such punishment is imposed – greater than what students currently receive? If parents are punishing, are there due process requirements there? These questions are also left for future work.

Finally, this Article treads nimbly around several large questions whose investigation has filled many law review pages. Chief among them is the question of when should public constitutional law provisions apply to ostensibly private parties. I have neither relied on any of the many theories on this topic nor canvassed them here. I have offered answers about particular cases and leave it for future study to examine whether these answers comport with the best solution to the state action problem or whether these answers could provide some corrective to our best solutions to the state action problem.

This Article perhaps suffers from many faults, but one for which I am unapologetic is that it leaves so much open. There is a place for grand theorizing of the sort that answers every question it raises. There is also a place for less systematic contributions that nevertheless move theoretical conversations forward. One hopes this Article achieves the latter.

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[150] Donelson, *supra* note 72.