The Poverty of Precedent for School Corporal Punishment's Constitutionality Under the Eighth Amendment

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THE POVERTY OF PRECEDENT FOR SCHOOL CORPORAL PUNISHMENT'S CONSTITUTIONALITY UNDER THE EIGHTH AMENDMENT

Susan H. Bitensky*

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* Professor of Law, Michigan State University College of Law. B.A. 1971, Case Western Reserve University; J.D. 1974, University of Chicago Law School. This Article is dedicated to the late Cynthia Price Cohen, a champion of children’s rights and dear friend. I am grateful for the excellent research assistance provided by student Evan Hansen Weiner. I would also like to thank Professors Deana Pollard Sacks and Kevin Saunders for their comments on the constitutional law aspects of earlier drafts of this Article, as well as Professors Brian C. Kalt and Amy C. McCormick for helping me make statistical sense of comparative data on state enactments and adjudications. Professor Elizabeth Gershoff provided invaluable information and guidance concerning the psychological effects of corporal punishment on children and respecting the data on the incidence of school corporal punishment among racial groups. Any errors contained in this Article are, of course, my own responsibility.

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"I know, up on top you are seeing great sights, but down on the bottom we, too, should have rights."

Dr. Seuss

This Article applies the analytical paradigm of the Supreme Court’s newest Eighth Amendment decision (summer 2008) to assess the constitutionality of public school corporal punishment. The application of this precedent, and other twenty-first century cases like it, demonstrate that school paddlings have become inconsistent with modern standards of decency and disproportionate to typical schoolchildren’s misbehavior—two central benchmarks of a violation under the Amendment’s Cruel and Unusual Punishments Clause. This Article, as a threshold matter, also exposes the serious errors and omissions underlying the Court’s 1977 decision holding that such punishment is totally immune from the Clause’s protections. Both strands of this Article, the one focused on the present and the one looking into the past, provide information and analyses which have not been previously published.

I. INTRODUCTION

We humans are a willful lot, determined to have enough control over our surroundings to survive and, better still, to flourish. But, these surroundings include other people whose inclinations and modus operandi may conflict with or thwart our own. Being an ingenious species, we have devised a range of strategies to force, manipulate, or cajole others to the realization that our way wisdom lies. The strategies run the spectrum from physical compulsion at one extreme to education and therapy on the other. History is a veritable lurching about, from waging just and unjust wars to spreading gospel and propagating isms


3. Without venturing into the myriad military clashes of earlier epochs, the persistence of war is all too well exemplified by the self-induced carnage of the twentieth century alone. See STEPHEN E. AMBROSE & DOUGLAS G. BRINKLEY, RISE TO GLOBALISM: AMERICAN FOREIGN POLICY SINCE 1938, at 1–51, 114–26, 190–253 (8th ed. 1997) (discussing World War II, the Korean War, and the war in.
Current events attest that there is no shortage of military and other strong-arm solutions to the problem of control in the modern era. Yet, as we stumble through the millennia, there has been an almost imperceptible attitudinal shift: we seem to like these sorts of solutions less and less. The most palpable evidence of this shift in thinking has thus far been expressed in the development of the law. Over the last sixty years, international law has heralded a slowly actualizing penchant for gentler, more compassionate methods, with proscriptions on, for example, cross-border wars of aggression, genocide, and torture. This is new—a genuinely nascent body of law within the time line of the human enterprise.

Consistent with the evolving shift on the international plane, domestic law has also gradually foresworn legalized “disciplinary” physical violence towards adults who once had been its victims, i.e., African Americans at the hands of slavemasters in the antebellum South, wives at the mercy of husbands, and sailors and prisoners at the whim of their
superiors. There is one group of people, however, many of the members of which have not yet been given such sanctuary by our laws—children. Legal corporal punishment is still routinely used on them in numerous twenty-first century American schoolhouses, among other venues.

That corporal punishment remains standard operating procedure in so many of this nation's public schools is due, in no small part, to the single and singular 1977 Supreme Court decision in *Ingraham v. Wright*. The singularity is a function of the factual and legal errors, some critical, which pervade the majority opinion. Indeed, this Article not only disentangles strands of enigmatic judicial reasoning as law review articles are wont to do, but also goes where none have gone before in presenting an investigation of the primary sources assembled by the Justices in support of the decision. The results are not pretty, and they throw into question what weight courts should give *Ingraham* in the future. However, even assuming arguendo that the case had a credible basis in the first place, this Article demonstrates that the Court's own recent Eighth Amendment holdings have made *Ingraham* an anachronism in urgent need of overturning.

II. PUBLIC SCHOOL CORPORAL PUNISHMENT: DEFINITION AND PREVALENCE

Before proceeding to a full description of *Ingraham*'s holding and extensive analysis of its infirmities, it will smooth the way to first clearly define the phrase "corporal punishment of children" as well as to limn a thumbnail sketch of its incidence in the United States.

Corporal punishment of children, no matter who dispenses it, where it

11. MYRA C. GLENN, CAMPAIGNS AGAINST CORPORAL PUNISHMENT: PRISONERS, SAILORS, WOMEN, AND CHILDREN IN ANTEBELLUM AMERICA *passim* (1984). Two qualifications need to be made to the statement above that the law protects prisoners from corporal punishment. First, with certain constitutionally mandated exemptions, the death penalty remains available to punish capital crimes in various American jurisdictions. See Dora W. Klein, *Categorical Exclusions from Capital Punishment: How Many Wrongs Make a Right?*, 72 BROOK. L. REV. 1211, 1212-15 (2007); Andrew Ditchfield, Note, *Challenging the Intrastate Disparities in the Application of Capital Punishment Statutes*, 95 GEO. L.J. 801, 802 (2007). Second, authorities' use of physical force on a prisoner which causes him or her to suffer only de minimis injuries should not constitute an Eighth Amendment violation, unless the force is of a type repellant to the norms of mankind. See Hudson v. McMillian, 503 U.S. 1, 9–10 (1992).

12. See *infra* notes 132–34 and accompanying text.


14. See *infra* Part III.C.

15. See *id*.

16. See *infra* Part III.C.2.

17. See *infra* Part IV.B.3.
is dispensed, or with what degree of severity it is dispensed, may be defined as follows: the use of physical force upon a child with the intention of causing the child to experience bodily pain so as to correct or punish the child's behavior. As such, this punishment is a form of physical violence.

Lest some question this conclusion, it answers much to compare corporal punishment of children with assault or battery, a crime of physical violence. Assault or battery (different states use one or the other term to designate the same crime) may be accurately described as an "unlawful application of force to the person of another" resulting in "either a bodily injury" or, in some states, a mere "offensive touching." Under the modern approach exemplified by the Model Penal Code, in order to constitute criminal assault, the attack must cause "bodily injury," defined as, among other things, "physical pain, illness or any impairment of physical condition...." Even a "temporarily painful blow" to another will be a battery "though afterward there is no wound or bruise or even pain to show for it." The perpetrator must also have the mental state of intending to cause bodily pain or injury to another person.

Even so-called reasonable corporal punishment of children is characterized by the above-described elements of assault and battery. Whether "reasonable" or more acute, corporal punishment of children is, at the very least, a temporarily painful blow intended to modify behavior by causing bodily pain. Indeed, if the punisher was to physically touch the child so as to induce a sensation milder than pain, the act would be a tap, a tickle, a caress or hug, and would lose its punitive value.

Affirmation, if affirmation is needed, that corporal punishment of children is violence may be found in the 2006 "Report of the Independent Expert for the United Nations Study on Violence against Children," which defines "violence against children" as "the

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20. MODEL PENAL CODE § 211.1 (1997); LAFAVE, supra note 19, § 16.2, at 816 n.6.

21. MODEL PENAL CODE § 210.0 (emphasis added).

22. LAFAVE, supra note 19, § 16.2, at 816.

23. See id.

24. See supra note 18 and accompanying text.

intentional use of physical force or power, threatened or actual, against a child, by an individual or group, that either results in or has a high likelihood of resulting in actual or potential harm to the child's health, survival, development or dignity. The study explicitly subsumes within this formulation all corporal punishment of children.

It should be noted that corporal punishment, as understood in this Article, excludes physically restraining children to prevent them from imminently injuring themselves or others or from imminently damaging property—an exclusion often recognized in state laws outlawing school corporal punishment. Nor should this Article be erroneously pigeonholed as a diatribe on the purported virtues of permissiveness in educating children. Like many experts on child development, I subscribe to the proposition that adults must set limits for children and that children should nonviolently be taught to adhere to those limits.

With respect to prevalence, federal statistics for 2006-2007 show that 223,190 children were corporally punished in public schools (hereinafter school corporal punishment), usually with wooden paddles. The punishment has led to injuries prompting approximately 10,000 to 20,000 students to seek medical treatment each year.

While 223,190 children admittedly represents a small fraction of this country's school-age population, there is, as will be explained later in...
this Article, tremendous cause for concern from the standpoint of human suffering and child endangerment. Indeed, to put the situation in perspective, consider for a moment the probable outrage and concern if it came to light that 200,000 adult law students underwent such disciplinary corporal assaults at the hands of their professors during even one academic year. In spite of the traditional "rough and tumble" typical of a law school classroom, news of Socratic grillings gone physical would assuredly be a first-class scandal.

III. INGRAHAM V. WRIGHT

A. Facts and Holding

As previously mentioned, the continued longevity of legalized school corporal punishment in parts of the United States is the constitutional legacy of Ingraham v. Wright. The case was precipitated by "exceptionally harsh" paddlings of two students at a Florida public junior high school. One boy, while being pinned atop a table in the principal's office, was given more than twenty whacks because he did not respond to his teacher's instructions with the desired alacrity. The paddling was "so severe" that the child suffered a hematoma requiring medical intervention and his absence from school for several days. The other boy was paddled multiple times for "minor infractions," with one of these sessions disabling him from the full use of his arm for a week.

The Court held, among other things, that the students had no viable claim under the Cruel and Unusual Punishments Clause of the Eighth

34. See infra notes 471–90 and accompanying text.
35. 430 U.S. 651 (1977) (5-4 decision).
36. Id. at 657. At the time that petitioners were paddled, Florida legislation and a local school board regulation authorized the use of disciplinary corporal punishment on students in petitioners' public school. Id. at 655. The state statute's authorization was by negative inference inasmuch as the statute prohibited corporal punishment which was "degrading or unduly severe" or which was carried out in the absence of prior discussion with the principal or teacher in charge of the school. Id. (quoting FLA. STAT. § 232.27 (1961)).
37. Id. at 657.
38. Id.
39. Id.
40. Besides its adjudication of the Eighth Amendment issue that is the focus of this Article, the Ingraham Court also held that the Fourteenth Amendment's Due Process Clause does not necessitate notice and a hearing prior to administering corporal punishment on a child in a public elementary or secondary school. Id. at 680–82. The Due Process Clause of that Amendment asserts: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1. The Court so held even though it also ruled "that corporal punishment in public schools implicates a constitutionally protected liberty interest" under the Clause. Ingraham, 430 U.S. at 672.
Amendment to the U.S. Constitution. This is an extreme ruling; it means that the Eighth Amendment does not exist for children when they enter the schoolhouse. It means that no child in this country can seek the Amendment’s protection against physical punishment meted out by schools, regardless of how grotesque or excruciating that punishment may be and though it could cause death. Less dramatically but just as importantly, the case means that, as a federal constitutional matter, it has been left within the political discretion of the states whether or not to prohibit the practice.

B. Time to Reconsider?

_Ingraham_ turned thirty years old in 2007, its age bespeaking many a child’s rendez-vous with the paddle. The incidence of students being hit was greater in the twentieth century than in its successor, but if one uses the government’s statistic of 223,190 schoolchildren physically punished per year for thirty years, then surely millions of children were disciplined in this way by school personnel between 1977 and 2007.

41. _Id._ at 653–71. The Eighth Amendment states in full: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII. The Eighth Amendment restrains the federal government, but was incorporated through the Fourteenth Amendment’s Due Process Clause so as to be applicable also to the states. Robinson v. California, 370 U.S. 660, 666–69 (1962).

42. In dissent, Justice White wrote:

Today the Court holds that corporal punishment in public schools, _no matter how severe_, can never be the subject of the protections afforded by the Eighth Amendment. . . . [T]he majority would afford the student no protection no matter how inhumane and barbaric the punishment inflicted on him might be. . . . I only take issue with the _extreme view_ of the majority that corporal punishment in public schools, _no matter how barbaric, inhumane, or severe_, is _never limited_ by the Eighth Amendment.

_Ingraham_, 430 U.S. at 691–92 (White, J., dissenting) (emphasis added).


44. The exact date that the Supreme Court decided _Ingraham_ was April 19, 1977. 430 U.S. at 651.

45. Both legal reform and changing mores are responsible for the steadily declining incidence of public school corporal punishment. For example, when _Ingraham_ was handed down in 1977, only three states prohibited the punishment as a matter of state law. See _infra_ notes 332–33 and accompanying text. Since that time, twenty-five more states have followed suit while many local school districts have exercised delegated authority to ban the practice on a district by district basis within the remaining twenty-two states continuing to permit the practice under state law. See _infra_ notes 313–15 and accompanying text. This trend has been complemented by a similar evolution in the thinking of educators. See _infra_ notes 345–49 and accompanying text.

46. The statistic of 223,190 schoolchildren corporally punished per year is the one provided by the federal government for 2006-2007. See _supra_ note 31 and accompanying text.
Though not a reason for overturning precedent, some commiseration and second thoughts in the face of these millions, and a belated pause marking Ingraham's thirtieth anniversary, would seem to warrant a critical re-examination of the decision. It is an ideal opportunity for examining whether the Ingraham Court's rationales and research were sound when the case was decided, and whether, in light of intervening significant legal, scientific, and attitudinal developments, the holding has become obsolete anyway.

C. Analysis of the Ingraham Court's Rationales

The children's Eighth Amendment argument in Ingraham was that the school corporal punishment administered to them violated the Amendment's Clause against governmental infliction of cruel and unusual punishments. The Supreme Court's chief rationale for repudiating the argument was that the Clause is a constraint exclusively on judicially rendered criminal law punishments of convicts; consequently, the Clause could not protect children from public school disciplinary penalties. The Court conceived the stinginess of the Clause's reach as the necessary outgrowth of stare decisis and original intent.

1. Debunking the Stare Decisis Rationale

   a. Inapposite Authorities

   In trying to verify the proposition that precedents circumscribe the Cruel and Unusual Punishments Clause to formal judicial sentencing in criminal cases, the Ingraham Court primarily relied upon Fong Yue Ting v. United States and Uphaus v. Wyman. The Ingraham majority maintained that these two cases are quintessential examples of the Court's unfailing sequestration of the Amendment from "claims that impositions outside the criminal process constitute[] cruel and unusual punishment." Yet, the Ingraham majority opinion offers little more than terse squibs about these decisions and does not even hint at the

47. See infra Parts III-IV.
49. Id. at 664-71.
50. Id. at 664-68.
51. 149 U.S. 698 (1893).
52. 360 U.S. 72 (1959); Ingraham, 430 U.S. at 667-68.
53. 430 U.S. at 667-68.
outsize impediments to assigning them this starring role in the stare decisis script.\textsuperscript{54}

Even assuming that \textit{Fong Yue Ting} and \textit{Uphaus} lent themselves to such casting, ultimately nothing could be gained by the effort. As this Article will illustrate, there are numerous other Supreme Court cases in which the Clause has been extended to situations beyond judicial sentencing of criminals.\textsuperscript{55} It was thus impossible for \textit{Fong Yue Ting} and \textit{Uphaus} to show that the Court had limited the Clause’s application exclusively to judicial sentencing of criminals. The very most the cases could show was that the Court had sometimes been of two minds on the subject.

There is, though, a more fundamental shortcoming in \textit{Ingraham}’s use of \textit{Fong Yue Ting} and \textit{Uphaus}; neither case suits the role. Chinese nationals brought \textit{Fong Yue Ting} 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.\textsuperscript{56} The litigation was not brought under the Eighth Amendment, and the Court’s holding was not under the Eighth Amendment.\textsuperscript{57} Rather, the Court held that the Due Process Clause could not preclude the federal government from exercising its constitutional plenary power to deport aliens.\textsuperscript{58} It is a mystery why the \textit{Ingraham} Court referred to \textit{Fong Yue Ting} as turning upon the Eighth Amendment. Although the \textit{Fong Yue Ting} majority opinion is ornamented with an aside that deportation of aliens is not punishment for a crime under the Cruel and Unusual Punishments Clause, the digression is dicta and without precedential value.\textsuperscript{59}

The mystery surrounding the \textit{Ingraham} Justices’ thinking only deepens upon thorough inspection of \textit{Uphaus}, the other decision supposedly supporting \textit{Ingraham}’s stare decisis theory. According to the Court in \textit{Uphaus}, the “sole question” presented for disposition was whether a state court’s order to produce certain documents on pain of contempt was valid.\textsuperscript{60} Appellant’s main legal arguments were that state authority to issue the order had been preempted by congressional legislation, and that the order violated his rights under the Fourteenth Amendment Due Process Clause and the First Amendment Free Speech

\textsuperscript{54} Id.
\textsuperscript{55} See infra Part III.C.1.b.
\textsuperscript{56} \textit{Fong Yue Ting}, 149 U.S. at 699 (comprising part of the statement of facts by Justice Gray).
\textsuperscript{58} \textit{Fong Yue Ting}, 149 U.S. at 699, 730.
\textsuperscript{59} Id. at 730; see Rumann, supra note 57, at 690–91.
\textsuperscript{60} \textit{Uphaus v. Wyman}, 360 U.S. 72, 75–76 (1959).
Clause.\textsuperscript{61} It was only at the eleventh hour, in front of the U.S. Supreme Court, that appellant first raised the additional argument that his incarceration for contempt of court was, in the \textit{Uphaus} Justices' jumbled phraseology, "such cruel and unusual punishment as to be a denial of due process."\textsuperscript{62} The Court, in the end, rejected all of appellant's contentions.\textsuperscript{63} Without specifically mentioning the Eighth Amendment or any part thereof, the \textit{Uphaus} majority upheld the contempt sanction because appellant had had the documents "at hand," his failure to produce had been intentional, the sanction was a "civil remedy," and he had the "keys to freedom" at the ready.\textsuperscript{64} \textit{Uphaus} is too unclear and confusing in relation to the Eighth Amendment to be of much use in effectuating the \textit{Ingraham} Court's stare decisis project. As one commentator aptly remarked in comparing \textit{Fong Yue Ting} to \textit{Uphaus}, "\textit{Uphaus} provides an even thinner reed for the Court to have relied upon in \textit{Ingraham}."\textsuperscript{65}

The \textit{Ingraham} majority also tacked on string citations to its superficial and incoherent treatment of \textit{Fong Yue Ting} and \textit{Uphaus}.\textsuperscript{66} These citations, to \textit{Mahler v. Eby}\textsuperscript{67} and \textit{Bugajewitz v. Adams},\textsuperscript{68} are not accompanied by even a shred of parenthetical information. Presumably, the \textit{Ingraham} Justices themselves were not overly impressed with the relevance of \textit{Mahler} and \textit{Bugajewitz} for stare decisis purposes, or they would have expended a few sentences in explanation.

In fact, \textit{Mahler} and \textit{Bugajewitz} do not—and cannot—bolster the proposition that the Eighth Amendment must be tethered to judicial sentencing of criminals. In both cases, the Court held that deportation of an alien is not a punishment.\textsuperscript{69} The Court explicated in \textit{Mahler} that it is not possible for deportation of an alien to be a punishment because it is always within the national government's sovereign power to expel aliens.\textsuperscript{70} If \textit{Mahler} and \textit{Bugajewitz} have anything to do with the Eighth Amendment, it can only be in connection with aliens. But, the \textit{Mahler} and \textit{Bugajewitz} opinions never once allude to the Eighth Amendment or

\textsuperscript{61} Id. at 74–75. Appellant's Due Process Clause claim was that the resolution authorizing the order was too vague and that the order itself sought irrelevant documents. \textit{Id.} at 75. His First Amendment claim was that the order violated his free speech and association rights. \textit{Id.}

\textsuperscript{62} \textit{Id.} at 76.

\textsuperscript{63} \textit{Id.} at 81–82.

\textsuperscript{64} \textit{Id.} (quoting Green v. United States, 356 U.S. 165, 197 (1958) (Black, J., dissenting)).

\textsuperscript{65} Rumann, \textit{supra} note 57, at 691.

\textsuperscript{66} \textit{Ingraham} v. Wright, 430 U.S. 651, 668 (1977).

\textsuperscript{67} 264 U.S. 32 (1924).

\textsuperscript{68} 228 U.S. 585 (1913).

\textsuperscript{69} \textit{Mahler}, 264 U.S. at 39–46; \textit{Bugajewitz}, 228 U.S. at 590–92.

\textsuperscript{70} \textit{Mahler}, 264 U.S. at 39; accord \textit{Bugajewitz}, 228 U.S. at 592.
any of its clauses. This is not surprising since the Court adjudicated those cases on the doctrinal basis of the deportations being within governmental power, not of the deportations impinging upon the Eighth Amendment.

b. Cases Which Apply the Eighth Amendment to Punishments Other than Judicial Sentencing of Criminals

In the preceding section, this Article asserts that the Supreme Court has often applied the Cruel and Unusual Punishments Clause to situations besides judicial sentencing of criminals. Ingraham would not have it so. Yet wishful thinking, even by the Court, cannot negate reality.

One of the cases cited by Justice White’s Ingraham dissent as inconsistent with the majority’s “stare decisis” is Estelle v. Gamble, decided one year before Ingraham. In Estelle, the Court held that prison authorities’ intentional disregard of an inmate’s medical needs may violate the constitutional interdiction on cruel and unusual punishments. Ignoring a prisoner’s medical needs is obviously not a judicially imposed sentence for perpetrating a crime. As will shortly be

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71. Mahler, 264 U.S. at 73–82; Bugajewitz, 228 U.S. at 590–92.
72. See supra note 55 and accompanying text.
74. 429 U.S. 97 (1976).
75. Id. at 103–05.
76. In Estelle, the formal sentence was imprisonment, not the prison authorities’ denial of medical care which respondent sued over. Id. at 98–101. The Supreme Court has observed that unpleasant conditions of confinement are part of the cost of crime. The observation could be taken to intimate that since the conditions are inherent in incarceration, they are a facet of the sentence. See, e.g., Rhodes v. Chapman, 452 U.S. 337, 347–49 (1981) (declaring that “the Constitution does not mandate comfortable prisons”). Such an intimation, however, would be misleading over the long run. The Court has adopted different standards for determining whether challenged governmental conduct violates the Eighth Amendment, depending on whether the conduct is part of the formal sentence or constitutes conditions of confinement. Compare Gregg v. Georgia, 428 U.S. 153, 173, 183 (1976) (plurality opinion) (explaining that infliction of pain in carrying out a sentence, in this instance the death penalty, contravenes the Eighth Amendment if the pain is “unnecessary and wanton” and if the punishment is grossly disproportional to the crime), with Wilson v. Seiter, 501 U.S. 294, 297–99, 301 n.2 (1991) (elucidating that when an inmate challenges prison conditions that are not “specifically part of the sentence,” then, in order to prevail, he or she must show that a “sufficiently serious deprivation” occurred and that the officials responsible for the deprivation possessed a “sufficiently culpable state of mind”). See also Melvin Gutterman, The Contours of Eighth Amendment Prison Jurisprudence: Conditions of Confinement, 48 SMU L. REV. 373, 376–78, 387–95 (1995) (tracing the development of Eighth Amendment standards used exclusively to evaluate prison conditions rather than formal criminal sentences); Jeff Zimmerman, Substantive Rights Retained by Prisoners, 87 GEO. L.J. 1904, 1914–19 (1999) (summarizing differences as between Eighth Amendment standards applicable to formal criminal sentences and standards applicable to attendant conditions of imprisonment). The existence of different standards betokens that the Court does not, under the Amendment, equate formal criminal sentences
discussed, *Estelle*’s conception that generic conditions of prison life are also actionable under the Eighth Amendment has become a staple of constitutional law over the years.\(^77\)

Although the *Ingraham* dissenters did not mention it, they could also have cited *Trop v. Dulles*,\(^78\) a Supreme Court precedent extending the Cruel and Unusual Punishments Clause not only beyond formal judicial sentencing but also beyond the confines of the penitentiary. In *Trop*, petitioner was an army private who had been convicted by court martial for desertion during wartime and sentenced to three years hard labor, forfeiture of all pay and allowances, and a dishonorable discharge.\(^79\) Many years later, after serving his time, petitioner sought a passport. The government rejected his application based upon a federal statute decreeing that a person may lose his or her U.S. citizenship if convicted of desertion and given a dishonorable discharge.\(^80\) No court was involved in deciding upon and issuing the rejection.\(^81\)

Congressional legislation authorizing de-nationalization under these circumstances is not judicial sentencing of a convict. Nor was Trop’s complaint even remotely related to prison conditions such as were challenged in *Estelle*. Nevertheless, the *Trop* Court characterized the congressionally decreed denationalization, applied after petitioner had served his sentence, as indeed a punishment within the purview of the Eighth Amendment,\(^82\) and held, among other things,\(^83\) that such denationalization contravened the Cruel and Unusual Punishments Clause.\(^84\)

Neither *Estelle* nor *Trop* were a mere slip of the pen, assuming Justices’ pens can slip for the length of two substantive opinions. These cases have not been overturned by *Ingraham* or any other decision. Quite the contrary, their teachings are still good law.\(^85\) For instance, a

\(^77\) See infra notes 85–87 and accompanying text.
\(^78\) 356 U.S. 86 (1958) (plurality opinion).
\(^79\) Id. at 88.
\(^80\) Id.
\(^81\) The federal statute in issue in *Trop* made de-naturalization contingent upon a preceding court martial and dishonorable discharge of a member of the armed forces for desertion during time of war. *Id.* at 88 & n.1.
\(^82\) Id. at 95–97.
\(^83\) The *Trop* Court also struck down petitioner’s denationalization on the ground that the Constitution imbues Americans with a fundamental right of citizenship that “is not subject to the general powers of the National Government and therefore cannot be divested in the exercise of those powers.” *Id.* at 92.
\(^84\) Id. at 103–04.
\(^85\) *Trop* has been cited by the Court in some of its most recent Eighth Amendment decisions. *E.g.*, *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002). *Estelle*’s continuing longevity is discussed in the
modern—and representative—incarnation of Estelle may be found in Helling v. McKinney. In Helling, the Supreme Court ruled that a prisoner stated a cause of action under the Cruel and Unusual Punishments Clause by alleging that the government had, with deliberate indifference, exposed him to levels of second-hand cigarette smoke posing an unreasonable risk of serious damage to his future health. The prisoner’s exposure to second-hand cigarette smoke was manifestly not part of his judicially mandated sentence.

Ingraham was, and is, glaringly out of sync with the line of precedent finding punitive government conduct actionable under the Cruel and Unusual Punishments Clause, regardless of the venue where or at whose behest that conduct occurs. Stare decisis does not support the outcome in Ingraham, either when it was decided or at present, of withholding all Eighth Amendment protection from children who are physically chastised in the public schools. If the law unquestionably required this result, then that would be that, barring an amendment to the Constitution or a revolutionary change of course by the Court. What is disturbing is that the Ingraham Court’s effective deviation from stare decisis, in the name of stare decisis, was a needless and unsupportable abrogation of a source of constitutional protection for schoolchildren.

2. Debunking the Original Intent Rationale

The second serious flaw in the Ingraham majority’s reasoning concerns its originalist interpretation of the Cruel and Unusual Punishments Clause so as to restrict the provision’s effect to criminal sentencing. The flaw inheres in two respects: the originalism argument is exquisitely flimsy to begin with, and does not square with the Clause’s self-evident textualism.

The flimsiness stems from the fact that the Ingraham Justices...
provided absolutely no direct evidence of original intent to shore up their interpretation. The majority substituted, in lieu thereof, their own attenuated inferences drawn from certain historic documents of limited interest to this particular originalist endeavor. Moreover, the Justices' selection of documents was incomplete and lopsided; there was contrary historic evidence then available to the Court concerning the probable import of the Clause.

To be precise, the documents cited by the majority in *Ingraham* are the English Bill of Rights of 1689 and the Virginia Declaration of Rights of 1776. Because the Court found the Eighth Amendment's Cruel and Unusual Punishments Clause was derived from the Virginia Declaration which allegedly had gotten the language from the prohibition on vicious punishments in the English Bill, the majority focused on the intent undergirding the latter. The Justices concluded, from the historical circumstances preceding the English Bill's adoption, that it was meant to curb ruthless judicial sentencing in enforcing the criminal laws during the reign of James II. The Justices inferred that the foregoing provision of the English Bill had only that one purpose and no other. Then, from this initial inference, they inferred again that such must be the exclusive meaning of the analogous provision in the Virginia Declaration and, consequently, the exclusive meaning of the Eighth Amendment's Cruel and Unusual Punishments Clause.

Temporarily putting aside the validity of relying entirely upon these historical circumstances, the *Ingraham* majority was faced with a glitch of major proportions in pursuing this line of reasoning. The original draft of the English Bill introduced in the House of Commons reads as follows: "The requiring excessive bail of persons committed in criminal cases and imposing excessive fines, and illegal punishments, to be prevented." The problem for the Justices was that the crucial phrase "criminal cases" was deleted from the bill upon enactment.

Under ordinary legal analysis—if not common sense—when language of draft legislation is deleted from the ultimate enactment, this is taken

89. See infra notes 91–96 and accompanying text.
90. See infra notes 116–19 and accompanying text.
92. *Id.* at 664.
93. *Id.* at 664–66.
94. *Id.* at 664–65.
95. *Id.*
96. *Id.* at 664–66.
98. *Id.*
to signify that the deleted language no longer affects the enactment’s meaning. The *Ingraham* Court attempted to sidestep this difficulty, observing that "the preservation of a similar reference in the preamble indicates that the deletion was without substantive significance"\(^9\) and that Blackstone treated the provision "as bearing only on criminal proceedings and judgments."\(^9\)

The words of the preamble itself, as opposed to the Justices’ representation of them, tell a different story. The preamble’s exact words, in pertinent part, are:

WHEREAS the late King James the Second, by the assistance of divers evil counsellors, judges, and ministers employed by him, did endeavor to subvert and extirpate . . . the laws and liberties of this kingdom.

. . . .

10. 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.

11. And excessive fines have been imposed; and illegal and cruel punishments inflicted. . . .\(^10\)

It should be noted that the much ballyhooed reference to “criminal cases” appears in the preamble’s clause 10 which solely addresses excessive bail; the reference does not appear in the preamble’s general introductory language or in the preamble’s clause 11 which solely addresses “illegal and cruel punishments inflicted.”\(^10\) To be blunt, the *Ingraham* Justices’ statutory construction of the English Bill of 1689’s preamble does not hold up.

*Ingraham*’s strained construction is even further enfeebled owing to the principle that a statutory preamble cannot create new substantive law.\(^10\) That was, nonetheless, what the Justices effectively did when they manipulated the English Bill’s preamble to create a limitation on the Bill’s body that is not actually there. While statutory preambles may be consulted to infuse “the meaning or application of words otherwise

\(^9\) Id.

\(^10\) Id. (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *297, *379).

\(^10\) Id. at 665 n.33 (citing RICHARD L. PERRY & JOHN C. COOPER, SOURCES OF OUR LIBERTIES 245-46 (1959)).

\(^10\) Id.

obscure or doubtful,” the Justices never pretended that the words of the English Bill’s text, taken by themselves, were obscure or doubtful. Furthermore, British jurists place even less emphasis on statutory preambles than their American counterparts. If the Ingraham majority was trying to unearth what the English Bill meant to the English, the Justices quite missed the proper interpretive route.

Ingraham likewise goes awry in summoning Blackstone to buttress the contention that the English Bill’s prohibition on cruel and unusual punishments appertained to criminal proceedings and judgments alone. To back up this version of Blackstone’s thinking, the Ingraham case cites two pages of the Commentaries. These pages are, however, jarringly silent on the issue. It is speculation, but perhaps the Ingraham majority opinion was the victim of a typographical or other clerical error rather than of a glaring substantive omission. Indeed, elsewhere in the Commentaries there is a cryptic allusion to the existence of the Bill’s directive against cruel and unusual punishments. But, this is a reference made in passing, during a discourse otherwise wholly dedicated to fines and forfeitures. The only thing that the reference says about the Bill’s cruel and unusual punishments clause is set forth in a parenthetical notation touching upon the clause as having “had a retrospect to some unprecedented proceedings in the court of king’s bench, in the reign of [K]ing James the second.” Blackstone did not, at this or, it seems, at any other juncture in the Commentaries, expand upon how the clause would apply to fines, forfeitures, or other types of punishment.

105. Ingraham, 430 U.S. at 665.
107. Ingraham, 430 U.S. at 665.
108. Id. at 665 & n.34 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *297, *379).
110. Id. at *372.
111. Id.
112. Id.
113. Id. 1 scanned those chapters of the Commentaries which, by virtue of their headings, appeared to be good candidates for locating a discourse on the English Bill’s cruel and unusual punishments clause, i.e., “Of the Nature of Crimes; And Their Punishment,” “Of Commitment And Bail,” “Of Trial, And Conviction,” “Of Judgment, And It’s Consequences,” “Of Execution,” and “Of the Rise, Progress And Gradual Improvements, of the Laws of England.” Id. at *1, *293, *336, *368, *396, *400. Except for the one page analyzed in the text above, these chapters did not deal with the clause. Id.

It is beyond the scope of this Article to fill in Ingraham’s gaps. One such gap is the lack of interpretation of Blackstone’s parenthetical notation to which the Justices did not even cite. See supra notes 107-12 and accompanying text. Out of curiosity, I have tried parsing the notation anyway, but still
The paucity of the Justices' sources, detailed thus far, should, by itself, be quite enough to shake Ingraham's historicist foundations beyond repair. The unsettling fact is, though, that this is not an isolated lapse. The Court, in gleaning original intent, was not sufficiently far-reaching since its focus was solely on events preceding the English Bill's enactment, to the exclusion of all other relevant historical evidence. Concededly, the English Bill was a logical place for the Justices to commence their originalist research inasmuch as the language of clause 11 of the Bill's preamble, inveighing against cruel and unusual punishments, was ultimately transposed, almost verbatim, into the Eighth Amendment. Yet, a good departure point is not necessarily the be-all and end-all, and here the Justices conflated the beginning with the end.

found no anchor for the Justices' account.

In construing the Blackstone notation, as set forth in the quoted text above, his use of the word "retrospect" invites some clarification for the contemporary reader. See BLACKSTONE, supra note 109, at *372. Webster's Dictionary gives an archaic definition of the noun "retrospect," hailing from 1602, as follows: "reference to or regard of a precedent or authority." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1008 (9th ed. 1989). So, it appears that Blackstone's notation merely tells us that the English Bill's cruel and unusual punishments clause regards "some unprecedented proceedings in the court of king's bench, in the reign of [K]ing James the second." BLACKSTONE, supra note 109, at *372.

Semantically, Blackstone's words do not assert that the clause must rein in only the King's Bench during James II's rule. If the Ingraham Court had drawn such an inference from Blackstone's parenthetical aside, the inference would have been a stretch. That the inference would have gone too far is manifested by historical as well as linguistic analysis. While James II occupied the throne, the English court system was decentralized. See Amalia D. Kessler, Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial, 90 CORNELL L. REV. 1181, 1202-03 (2005) (surveying some of the various courts that constituted the English legal system during the seventeenth century); Robert J. Pushaw, Jr., The Inherent Powers of Federal Courts and the Structural Constitution, 86 IOWA L. REV. 735, 800-06 (2001) (writing about the different types of courts in seventeenth century England). There were judges unattached to the King's Bench who tried criminal cases and sentenced those found guilty. See Pushaw, Jr., supra, at 800-06 (asserting that the king had judges throughout England, as well as commissioned sheriffs and justices of the peace, to dispose of criminal cases, and indicating that these "jurists" were separate from the King's Bench); see also J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 39 (4th ed. 2002) (pointing out that after 1421, the "first-instance criminal jurisdiction" of the King's Bench was confined to Middlesex cases and those cases removed by certiorari); CYNTHIA B. HERRUP, THE COMMON PEACE: PARTICIPATION AND THE CRIMINAL LAW IN SEVENTEENTH-CENTURY ENGLAND 43 (1987) (naming the various "formal outlets" for prosecuting crimes during the seventeenth century in Sussex). It defies reasonable belief that Blackstone, in twenty-one parenthesized words, would be making the strange proposition that the Bill's cruel and unusual punishments clause governed the King's Bench but not other courts with jurisdiction over criminal prosecutions. The improbability of Blackstone's having given the clause such a cramped reading is heightened by the fact that the text of the clause itself contains no caveats or qualifications whatsoever. See supra note 101 and accompanying text.

114. See supra note 101 and accompanying text.

115. See Rumann, supra note 57, at 669-72 (descending upon the existence of other available evidence besides the English Bill concerning the probable original intent underlying the Eighth Amendment, but accounting for the Justices' preoccupation with the English bill because its language is
It appears that they could have expanded their research to beneficial effect. The colonial intelligentsia had been well acquainted with the prohibition on cruel and unusual punishments long before the English Bill materialized.\(^{116}\) The Reverend Nathaniel Ward introduced, into the laws of Massachusetts colony, a provision quite similar to the Eighth Amendment.\(^{117}\) Ward’s language is traceable to Englishman Sir Robert Beale’s writings which denounced the rack and other forms of physical torture favored by his country’s ecclesiastical court to extract confessions from persons suspected but not yet convicted of offenses.\(^{118}\) It has been said “that the American Framers [clearly] read into [article 10 of the English Bill] the meaning of Beale and Ward.”\(^{119}\) The Beale-Ward evidence of original intent thus yields a very different and entirely plausible reading of the Eighth Amendment. This is evidence of an intent to protect persons who have not yet been convicted, arguably creating more latitude for extrapolation to endow public schoolchildren with an Eighth Amendment right against physical punishment.

Finally, Ingraham’s gossamer original intent argument becomes virtually spectral when juxtaposed with the text of the Eighth Amendment. That text is: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”\(^{120}\) There is no adjective “criminal” modifying “cruel and unusual punishments.” The Justices reasoned, though, that “[b]ail, fines, and punishment traditionally have been associated with the criminal process, and by subjecting the three to parallel limitations the text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government.”\(^{121}\)

Surely the framers of the Eighth Amendment were capable of the kind of drafting precision that would unmistakably ensure cabining application of the Cruel and Unusual Punishments Clause to criminal sentences or, more broadly, to criminal litigation, if that was their intent. One need only compare the Eighth Amendment with the Fifth and Sixth Amendments to see that this is so.\(^{122}\) While the Eighth Amendment

\(^{116}\) Id. at 666–67.

\(^{117}\) Id. at 667–69.

\(^{118}\) Id.

\(^{119}\) Id. at 680 (quoting Anthony F. Granucci, “Nor Cruel and Unusual Punishments Inflicted:” The Original Meaning, 57 CAL. L. REV. 839, 860 (1969)).

\(^{120}\) U.S. CONST. amend. VIII.

\(^{121}\) Ingraham v. Wright, 430 U.S. 651, 664 (1977).

\(^{122}\) The Fifth Amendment provides, in part, that “[n]o person... shall be compelled in any criminal case to be a witness against himself...” U.S. CONST. amend. V (emphasis added). The Sixth Amendment declares, in part, that “[i]n all criminal prosecutions, the accused shall enjoy the right to a
contains no reference to "crime" or "criminal," the latter two Amendments expressly use the words "crime" or "criminal prosecutions" to delimit their scope. None of this analysis is offered to suggest that original intent may never override textualism, but in this particular instance it is hard to fathom how an inconsistent original intent can compete with the immovable testament of the written word.

There is an apparent disingenuousness about the Ingraham majority opinion. How, after all, is one to rationalize the opinion's inclusion of Fong Yue Ting and Uphaus in and omission of Trop and Estelle from the stare decisis analysis, the inaccurate discussion of the English Bill's preamble, an obliviousness toward the Ward-Beal evolution of the language that is also in the Eighth Amendment, and the misattribution to Blackstone of words he did not write? Perhaps the nicest thing one can say is that when Ingraham was decided in 1977, its analysis was inexplicably deficient in resting on distorted and fragmentary evidence about precedent and the framers' intentions in drafting the Eighth Amendment—evidence at odds with the provision's literal text. Those problems with the decision have not, of course, been ameliorated over the last thirty-one years.

3. Debunking the Rationale Relying on Fictional or Insignificant Distinctions Between Schoolchildren and Prisoners

As the foregoing exegesis makes clear, the Ingraham Court found itself in the awkward position of depriving public schoolchildren of the Eighth Amendment while upholding its application to criminals. In addition to invoking stare decisis and original intent, the Justices sought to prop up this ethically dubious result with supposed distinctions between the circumstances of public schoolchildren and of prisoners:

The schoolchild has little need for the protection of the Eighth Amendment. Though attendance may not always be voluntary, the public school remains an open institution. Except perhaps when very young, the

speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. CONST. amend. VI (emphasis added); see also Kristi J. Spiering, Comment, Irrebuttable Exile Under the Immigration Marriage Fraud Amendments: A Perspective from the Eighth Amendment and International Human Rights Law, 58 U. CIN. L. REV. 1397, 1409–10 (1990) (averring that "[c]onsiderable dissension exists" about whether the framers of the Eighth Amendment intended its Cruel and Unusual Punishments Clause to protect no one else besides criminals inasmuch as the framers of other constitutional amendments explicitly confined them to criminal cases).


124. See supra note 122.
child is not physically restrained from leaving school during school hours; and at the end of the school day, the child is invariably free to return home. Even while at school, the child brings with him the support of family and friends and is rarely apart from teachers and other pupils who may witness and protest any instances of mistreatment.\footnote{Ingraham, 430 U.S. at 670.}

It is true that schoolchildren and prisoners are not identically situated; it would be a peculiar world if they were. However, the \textit{Ingraham} Court selected distinctions between the two populations that either are nonexistent or insignificant. For example, the Court would have us believe that children may sometimes \textit{voluntarily} attend school while prisoners involuntarily go to jail. The difficulty with this comparison is that each state has \textit{compulsory} education laws covering children within certain wide age ranges.\footnote{See Gershon M. Ratner, \textit{A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills}, 63 TEX. L. REV. 777, 823 (1985).} All states had compulsory education laws by 1918,\footnote{According to the U.S. Department of Education’s National Center for Education Statistics, the total enrollment of students in the nation’s public school system, from prekindergarten through the 12th grade, was 48,794,911 in the fall of 2004. NAT’L CTR FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., \textit{ENROLLMENT IN PUBLIC ELEMENTARY AND SECONDARY SCHOOLS, BY STATE OR JURISDICTION: FALL 1990 THROUGH FALL 2006 tbl.33} (2006), http://nces.ed.gov/progstats/digest/d06/tabs/d06_03 3.asp. That year is the most recent for which the Center has real enrollment statistics rather than projected enrollment data. \textit{Id.} The same source provides more dated statistics on enrollment of students in the nation’s private elementary and secondary schools; for fall 2003, the Center reports a total of 6,099,220 private school students in prekindergarten through the 12th grade. NAT’L CTR. FOR EDUC.} fifty-nine years before \textit{Ingraham}. The overwhelming majority of American children of eligible age are enrolled pursuant to these laws in public or private schools.\footnote{According to the U.S. Department of Education’s National Center for Education Statistics, the total enrollment of students in the nation’s public school system, from prekindergarten through the 12th grade, was 48,794,911 in the fall of 2004. NAT’L CTR FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., \textit{ENROLLMENT IN PUBLIC ELEMENTARY AND SECONDARY SCHOOLS, BY STATE OR JURISDICTION: FALL 1990 THROUGH FALL 2006 tbl.33} (2006), http://nces.ed.gov/progstats/digest/d06/tabs/d06_03 3.asp. That year is the most recent for which the Center has real enrollment statistics rather than projected enrollment data. \textit{Id.} The same source provides more dated statistics on enrollment of students in the nation’s private elementary and secondary schools; for fall 2003, the Center reports a total of 6,099,220 private school students in prekindergarten through the 12th grade. NAT’L CTR. FOR EDUC.}
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century, there has been nothing in the least voluntary about children’s presence in school.

Another purported contrast upon which the Ingraham Court relied is that, except for the “very young,” children are not “physically restrained” from leaving school premises during school hours while prisoners are restrained from leaving prisons. I do not know quite what the Justices had in mind when they employed the phrase physically restrained. Certainly schools do not contain cells or bars and prison guards do not patrol the halls. However, compulsory education laws do require that schoolchildren within specified age groups must be in attendance at school during specified hours; thus, students must obtain permission from school authorities in order to depart the premises.

In this connection, the Court added that when the school day ends, children return to the family circle. But, how does that fact detract from their situation as a captive audience while school is in session? Children’s inability during school hours to pick up and leave at their whim is not undone by the exodus homeward later in the day. Whatever distinctions exist, as between pupils and prisoners regarding mandatory attendance, are insignificant in relation to the purposes for which the Justices wished to use them.

The Ingraham Court also contrasted schools with prisons on the assumption that public schools are “open institution[s]” and that the child is hardly ever apart from teachers and other students who are in a position to see and protest corporal mistreatment. Prisoners, it is implied, do not enjoy these amenities. In all candor, it borders on the ludicrous to propose that children necessarily will be protected by being in the vicinity of teachers inasmuch as it is often teachers who dispense corporal punishment. And, it will be the rare child who, watching an


129. Ingraham, 430 U.S. at 670.

130. See supra note 126 and accompanying text.

131. Ingraham, 430 U.S. at 670.

132. Id.

133. See, e.g., ARK. CODE ANN. § 6-17-112(a) (West 2007) (providing immunity from civil liability for teachers and administrators who use corporal punishment); FLA. STAT. § 1003.32(1)(k) (2007) (allowing school staff, including teachers, to use corporal punishment in keeping with respective school board policies); GA. CODE ANN. § 20-2-730 (2007) (authorizing boards of education to adopt policies on the use of corporal punishment by teachers and school principals); KY. REV. STAT. ANN. § 503.110(1)(a) (West 2007) (letting a teacher, or other person entrusted with the care of a minor, to use physical force in order to promote the minor’s welfare); LA. REV. STAT. ANN. § 17:223(A) (2007) (endowing boards of education with discretion to adopt policies on use of corporal punishment by

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adult authority figure wielding a paddle, is likely to find the courage to protest on behalf of his or her fellow. 134

The Court's only other proffered distinction between schoolchildren and prisoners is that the child carries with him or her "the support of family and friends," while adults are jailed without any such support. 135 The Justices do not substantiate either assertion. 136 The assumption that all or most public schoolchildren are cushioned by such psychological support is a rather romantic, Norman Rockwellian generalization about the lives of American schoolchildren. 137 During the six-year period (1981–1987) that I was Associate Counsel to the New York City Board of Education, it was evident that large numbers of children saw their schools as respites, sometimes grossly imperfect ones, from dysfunctional, abusive, or neglectful families and the frequently anarchic neighborhoods in which they resided. It is unlikely that anyone has ever viewed imprisonment as a respite. But that is really neither here nor there. What matters is that in both schools and prisons the emotional support of family and friends is not always at hand; again, a distinction that cannot be said to exist as a general rule.

The Court would have it that the schoolchild does not need the Eighth Amendment as the prisoner does because "[t]he prisoner and the schoolchild stand in wholly different circumstances...." 138 Where the Justices went astray was in portraying the circumstances as "wholly" divergent; it would be more accurate to state that the conditions in which

teachers and school principals); N.C. GEN. STAT. § 115C-391(a)(3) (2007) (stipulating that only "a teacher, substitute teacher, principal, or assistant principal may [dispense] corporal punishment"); OKLA. STAT. tit. 21, § 844 (2007) (exempting teachers from a prohibition on employing ordinary physical force as a means of discipline); TENN. CODE ANN. § 49-6-4103 (West 2007) (permitting teachers and school principals to use corporal punishment).

134. Some experts opine that children who witness peers undergoing school corporal punishment may experience adverse emotional reactions. See, e.g., IRWIN A. HYMAN, READING, WRITING AND THE HICKORY STICK: THE APPALLING STORY OF PHYSICAL AND PSYCHOLOGICAL ABUSE IN AMERICAN SCHOOLS 78–80 (1990) [hereinafter HYMAN, HICKORY STICK] ( theorizing that children who witness school corporal punishment may internalize the experience which can later result in feelings of loneliness and sadness).

Some jurisdictions do not allow a student to be corporally punished in the presence of other schoolchildren. See, e.g., N.C. GEN. STAT. § 115C-391(a)(1) (2007); see also Jerry R. Parkinson, Federal Court Treatment of Corporal Punishment in Public Schools: Jurisprudence That Is Literally Shocking to the Conscience, 39 S.D. L. REV. 276, 283 (1994) (noting that schoolchildren are often removed from the classroom prior to receiving corporal punishment).

135. Ingraham, 430 U.S. at 670.
136. Id.
137. Other commentators have also taken a dim view of Ingraham's rosy assumptions about the lives of schoolchildren. See, e.g., Parkinson, supra note 134, at 281–83 (criticizing the Ingraham Justices for ignoring the realities of the school environment, including the reality that children will be leery of protesting the paddling of another student).
138. Ingraham, 430 U.S. at 669 (emphasis added).
the two groups function feature some differences and some commonalities. Then, the Court might have had a viable argument if the differences it selected were real and consequential.

4. Debunking Other Rationales

The Ingraham Justices pronounced the Eighth Amendment a dead letter vis-à-vis public schoolchildren predicated on considerations of stare decisis, original intent, and alleged selected dissimilarities between the situations of schoolchildren and prisoners. But, the Justices had still another arrow in their quiver to assure the dead letter was beyond resuscitation.

In deciding whether the Cruel and Unusual Punishments Clause extends to schoolchildren under threat of the rod, the Court opted to be guided by "[t]raditional common-law concepts" and "attitude[s] which our society has traditionally taken." If these standards for ascertaining the Clause's scope do not sound familiar, it is because they are not familiar in aid of such a cause. The Ingraham majority provided as its only authority for using them the plurality decision in Powell v. Texas. But, the Powell Court had employed these standards in an extremely limited way that has no bearing on whether the Eighth Amendment should or should not shield public schoolchildren from corporal punishment.

The petitioner in Powell, an alcoholic, argued that his conviction for public drunkenness ran afoul of the Amendment because Texas had imposed criminal liability on him for an involuntary condition entailing no mens rea. The lead opinion rejects this contention by, in part, referring to traditional common law concepts of personal accountability. Reference to these concepts led the Justices to conclude that assigning criminal responsibility for being drunk in public rightly falls within such a tradition and therefore outside the proscriptions of the Cruel and Unusual Punishments Clause. Boiled down, Powell deployed traditional common law concepts on the theory that, if Texas's assignment of criminal liability came within those concepts, the conviction could not violate the Clause. In comparison,

139. Id. at 659 (quoting Powell v. Texas, 392 U.S. 514, 531, 535 (1968) (plurality decision)) (alteration in original).
140. See 392 U.S. 514, 531, 533, 535 (1968) (plurality opinion).
141. Id. at 517, 530, 532, 535.
142. Id. at 535-36.
143. Id. at 535-37.
144. Id.
the Ingraham Court marshaled traditional common law concepts towards a completely different end, i.e., toward resolving the threshold issue of whether the Clause applies at all to corporal punishment in the public schools.\footnote{145} In Ingraham, the applicability of the Eighth Amendment was the issue, not how it applied.\footnote{146} The Ingraham majority never reached the question of whether public school paddlings actually violate the Amendment.\footnote{147}

Ingraham’s mention of “attitude[s] which our society has traditionally taken” is similarly incongruous here.\footnote{148} Powell averred that American society had a longstanding “harsh moral attitude” about intoxication and that criminal conviction for public intoxication was a reflection of that norm.\footnote{149} The Powell discussion does not address whether an Eighth Amendment cause of action could be stated against this type of conviction,\footnote{150} rendering the decision irrelevant to the issue presented in the schoolchildren’s case of whether an Eighth Amendment cause of action could be stated against disciplinary paddling.

5. Summation

The rationales underpinning the Ingraham decision do not withstand close scrutiny. Every one of them was and still is bankrupt. In fact, the majority opinion is remarkable for its rare display of judicial casualness. It is hard to understand why any Justice would ever treat a constitutional issue cavalierly, let alone one involving children’s physical integrity. There is an enigma here that is perhaps better left shrouded in the mists of 1977. That Ingraham was not the high Court’s finest hour, however, is crystal clear. For the sake of Eighth Amendment doctrine and the Court’s repute, if not to promote a less bruising pedagogy, the Justices should overturn the decision at the very first opportunity.

\footnote{146} Id. at 659–71.
\footnote{147} Id. at 659–83.
\footnote{148} Id. at 659 (quoting Powell, 392 U.S. at 531) (alteration in original).
\footnote{149} Powell, 392 U.S. 514, 531 (1968) (plurality opinion).
\footnote{150} Id. at 517–37.
IV. PUBLIC SCHOOL CORPORAL PUNISHMENT AS A VIOLATION OF THE EIGHTH AMENDMENT

A. An Introductory Overview of Relevant General Analytical Principles Under the Amendment

That *Ingraham* constitutes a poverty of precedent on its own terms suggests its days should be numbered. In the event that the Court invalidates *Ingraham* in the next appropriate case, the question will necessarily arise as to whether corporal punishment of children in public elementary and secondary schools does in fact violate the Eighth Amendment’s Cruel and Unusual Punishments Clause. This Article now broaches that unexplored question.

By way of preview, the argument will be advanced herein that the Court’s most recent Eighth Amendment decisions require an answer in the affirmative.\(^{151}\) As a tangential matter, however, observe that these decisions may also have set in motion a process of subtly eroding *Ingraham*’s social acceptability. That is, if public school corporal punishment cannot survive application of the Court’s recently articulated Eighth Amendment standards, then the outcome in *Ingraham* should seem increasingly heterodox and problematic from a policy perspective.

Until its most recent Eighth Amendment decision, *Kennedy v. Louisiana*,\(^{152}\) the Court sometimes has invoked as an initial consideration whether a challenged punishment would have violated the Amendment when the latter was adopted in 1791.\(^{153}\) A punishment that would have infringed the Amendment in 1791 was deemed automatically unconstitutional;\(^{154}\) a punishment that would have been

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151. See infra notes 462–64 and accompanying text.
152. 128 S. Ct. 2641 (2008), reh’g denied, 129 S. Ct. 1 (2008). In 2008, the Supreme Court also rendered another Eighth Amendment decision concerning the manner of implementing executions. See Baze v. Rees, 128 S. Ct. 1520 (2008). However, the latter is not germane to this Article.
153. Tracy E. Robinson, Comment, By Popular Demand? The Supreme Court’s Use of Public Opinion Polls in Atkins v. Virginia, 14 GEO. MASON U. CIV. RTS. L.J. 107, 109–10 (2004); see Jeffrey D. Bukowski, Comment, The Eighth Amendment and Original Intent: Applying the Prohibition Against Cruel and Unusual Punishments to Prison Deprivation Cases Is Not Beyond the Bounds of History and Precedent, 99 DICK. L. REV. 419, 423 (1995) (remarking that, after the initial phase of the Court’s Eighth Amendment jurisprudence, the Court has not restricted the Cruel and Unusual Punishments Clause to proscribing only those punishments that had been outlawed in the 18th century); cf. Brian W. Varland, Marking the Progress of a Maturing Society: Reconsidering the Constitutionality of Death Penalty Application in Light of Evolving Standards of Decency, 28 HAMLIN L. REV. 311, 314–16 (2005) (detailing the historicist criterion’s use as the sole test of constitutionality in the earliest cases under the Eighth Amendment).
154. See, e.g., Ford v. Wainwright, 477 U.S. 399, 405 (1986) (observing that a test of constitutionality under the Eighth Amendment remains the determination of whether a challenged punishment “had been considered cruel and unusual at the time that the Bill of Rights was adopted”); Robinson, supra note 153, at 110 (declaring that the Court has not abandoned the “historical
valid under the Amendment in 1791, required further analysis under other relevant criteria. In some cases, the Court skipped this preliminary consideration altogether, presumably when it was patent that the punishment would not have offended the sensibilities of the early republic. However, in its 2008 decision of *Kennedy v. Louisiana*, the Court expressed a pronounced disinterest, doctrinally speaking, in pursuing such a line of investigation. The Court did not state, though, that it was forever foreclosing an inquiry of this ilk either. It is quite possible, therefore, that the historical criterion (hereinafter the historical or first criterion) may be revived in future decisions.

The second criterion entails the application of two interrelated interpretive principles which have infused the Cruel and Unusual Punishments Clause with continuing life, enabling it to function as more than ink on vellum under glass. The second criterion requires that the Clause must be construed by reference to evolving standards of decency inhering in a mature society and to updated public opinion enlightened by a humane justice (hereinafter collectively referred to as “standards of decency”). To follow this principle of construction, the Court consults sources outside of the Constitution itself, searching for objective evidence of modern standards of decency, sometimes in other expressions of domestic public opinion.

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155. See infra notes 159–73 and accompanying text.
158. *Id.* at 2645–65.
163. E.g., *Atkins*, 536 U.S. at 316 n.21 (taking into account, under the Eighth Amendment, positions of professional organizations and religious communities as well as polling data concerning national lay opinion); *McCleskey*, 481 U.S. at 300 (remarking upon the existence of Eighth Amendment precedent for referring to the “sentencing decisions of juries”); Robinson, *supra* note 153, at 110–11 (averting that since 1910 the Court has been willing to consider “public attitudes” in adjudicating Eighth Amendment claims).
sometimes in international human rights law or international opinion;\textsuperscript{164} and sometimes in the laws of other countries.\textsuperscript{165} The Court commonly groups state law and other expressions of domestic opinion under the rubric of "national consensus," meaning an American consensus.\textsuperscript{166}

Regardless of the outcome under modern standards of decency, there is still a third criterion to be satisfied. The Court must also bring to bear its own subjective, independent judgment about whether a punishment flouts the Clause.\textsuperscript{167} Fulfilling this responsibility has essentially involved the Court in assessing the proportionality of a given punishment in relation to the crime being punished.\textsuperscript{168} For instance, in death penalty cases, the Justices have deciphered proportionality as an amalgam of such factors as whether the punishment serves penological or social purposes,\textsuperscript{169} whether the convict is of diminished culpability or capacity,\textsuperscript{170} and whether the circumstances are liable to result in wrongful execution.\textsuperscript{171} The contemporary Court has repeatedly made bona fide analytical efforts to form an opinion about the cruelty of each litigated punishment, quite separate from any extant national or international consensus on the matter.\textsuperscript{172} Whether or not such a feat of

\textsuperscript{164} E.g., Roper, 543 U.S. at 575–78; Atkins, 536 U.S. at 316 n.21; Enmund, 458 U.S. at 788, 796 n.22; Coker, 433 U.S. at 596 n.10; Trop, 356 U.S. at 102–03; Dwight Aarons, Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment?, 29 SETON HALL L. REV. 147, 204–05 (1998); A. Mark Weisburd, Roper and the Use of International Sources, 45 VA. J. INT’L L. 789, 795–98 (2005).

\textsuperscript{165} E.g., Roper, 543 U.S. at 577–78 (examining the laws and practices of all nations, with emphasis on laws of the United Kingdom); Atkins, 536 U.S. at 316 n.21 (attending to the policies of "leading members of the Western European community" (quoting Thompson v. Oklahoma, 487 U.S. 815, 830, 831 n.31 (1988))); Enmund, 458 U.S. at 796 n.22 (canvassing the laws of England, India, Canada and other Commonwealth countries as well as the laws of continental European nations); Coker, 433 U.S. at 596 n.10 (surveying the laws of sixty countries); Steven G. Calabresi & Stephanie Dotson Zindahl, The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision, 47 WM. & MARY L. REV. 743, 891–92 (2005).

\textsuperscript{166} See, e.g., Roper, 543 U.S. at 563–64.

\textsuperscript{167} E.g., id. at 564, 568–75; Atkins, 536 U.S. at 312–13, 318–21; Enmund, 458 U.S. at 801; Coker, 433 U.S. at 597; Kenneth W. Starr, The Court of Pragmatism and Internationalization: A Response to Professors Chemerinsky and Amann, 94 GEO. L.J. 1565, 1571 & n.33, 1572 (2006).


\textsuperscript{169} See, e.g., Kennedy, 128 S. Ct. at 2661–62; Roper, 543 U.S. at 571; Atkins, 536 U.S. at 318–19; Enmund, 458 U.S. at 798.

\textsuperscript{170} See, e.g., Roper, 543 U.S. at 568–71; Atkins, 536 U.S. at 318–20.

\textsuperscript{171} See, e.g., Kennedy, 128 S. Ct. at 2663; Roper, 543 U.S. at 573; Atkins, 536 U.S. at 320–21.

\textsuperscript{172} See, e.g., Roper, 543 U.S. at 568–75 (enumerating the characteristics of juveniles which make them, as a class, persons of diminished culpability and at increased risk of wrongful execution); Atkins, 536 U.S. at 312–13, 318–21 (identifying the traits of mentally retarded offenders which cause them to be of diminished capacity and in peril of wrongful execution); Enmund, 458 U.S. at 797–801 (stating that a defendant, who did not kill or intend to kill, does not deserve the death penalty).
mental compartmentalization is really possible, the Court seems to have been bound and determined to try.

B. Exposition and Application of Detailed Eighth Amendment Analysis to Public School Corporal Punishment

1. Exposition and Application of the First Analytical Criterion to Public School Corporal Punishment

There appears to be no evidence that the framers of the Eighth Amendment had punishments of schoolchildren in mind when drafting its prohibitions. Certainly the Ingraham Court did not allude to the existence of such evidence. This Article therefore will proceed upon a conservative supposition that governmental punishments of schoolchildren would not have contravened the Eighth Amendment in 1791. Hence, under the first criterion, school corporal punishment should be yet in good standing under the Amendment.

2. Exposition of the Second and Third Analytical Criteria as Interpreted in the Atkins-Roper-Kennedy Trilogy

Atkins v. Virginia, Roper v. Simmons, and Kennedy v. Louisiana, the most recent pertinent death penalty cases, represent the fullness of the Court's thinking to date on the contours of the second and third criteria. However, before analyzing this trilogy and how school corporal punishment might fare under its Eighth Amendment standards, a threshold issue fairly leaps off the page; this issue concerns whether, rather than how, these standards can apply to school paddling in the first place. In other words, are the death penalty and corporal punishment of children so profoundly different from each other that the trilogy should have no bearing on the constitutional status of the latter?

Punishment is punishment, whether it is a paddling in the public schools or a judicially ordered execution; both are meted out in response to wrongdoing; both are dispensed by governmental actors; and both are forms of legalized physical assault upon the wrongdoers.

But, these punishments are vastly different in other respects. School

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173. Cf Reynolds v. City of Chicago, 296 F.3d 524, 527 (7th Cir. 2002) (Posner, J.) (commenting, in a discussion about the standard of review of jury findings in a race discrimination suit, that "there are limits to the fineness of the distinctions that judges are able to make").


175. 536 U.S. 304 (2002).


corporal punishment is an attack on bodily integrity which may result in injury and only very, very rarely in death; to state the tautological, the death penalty is an attack on bodily integrity that always causes death. School corporal punishment is, by definition, always visited upon children; executions, as a constitutional matter, can only be carried out upon adults.\textsuperscript{178} School corporal punishment is usually administered in response to misbehavior which does not violate criminal laws; capital punishment is reserved solely for those convicted of heinous felonies involving the taking of or intention to take an individual human life.\textsuperscript{179}

The shared features of school corporal punishment and the death penalty logically point toward the conclusion that the former should be evaluated under the Eighth Amendment standards governing the latter. Two of the dissimilarities also logically point in that direction. The fact that children are generally more vulnerable, immature, and dependent than adults would seem to make them at least as needful of constitutional protection from bodily punishment as adults. And, the fact that the average child's misconduct is far more benign than the worst adult felonies would seem to make children in school more deserving of such protection.

Thus, the only aspect of these two punishments that arguably counsels divergent treatment under the Amendment is that school corporal punishment almost never results in death while capital punishment uniformly does. This distinction, extreme as it is, ultimately has no real significance for purposes of gauging the Amendment's applicability to corporal punishment of children. The Court has on occasion held that bodily punishments falling well short of death may contravene the Cruel and Unusual Punishments Clause.\textsuperscript{180} Indeed, the Court has also held that certain nonviolent punishments\textsuperscript{181} and various deleterious but nonfatal prison conditions\textsuperscript{182} violate the Clause. Making allowance for doctrinal

\begin{itemize}
\item \textsuperscript{178} Roper, 543 U.S. at 578.
\item \textsuperscript{179} Kennedy, 128 S. Ct. at 2650–51, 2659, 2664–65.
\item \textsuperscript{180} See, e.g., Hope v. Pelzer, 536 U.S. 730, 738–39 (2002) (ruling that security guards' handcuffing a prisoner to a hitching post and denying him adequate hydration and bathroom breaks while he was shackled for an extended period of time under a hot sun violated the Eighth Amendment). Although the Hope Court characterized the litigated conduct as part of prison conditions, the Court also described that conduct as punishment. \textit{id.} at 737–38; \textit{see also} Weems v. United States, 217 U.S. 349, 362–63, 380–81 (1910) (deciding that a sentence of a fine and fifteen years imprisonment, during which time the convict was forced to wear chains and engage in hard labor, violates the Eighth Amendment when meted out to punish an official's falsification of a public document).
\item \textsuperscript{181} See, e.g., Trop v. Dulles, 356 U.S. 86, 99–103 (1958) (plurality opinion) (holding that congressionally authorized termination of an individual's American citizenship, after he has been court martialed, constitutes an unconstitutionally cruel and unusual punishment even though the judiciary was not involved in deciding upon the termination).
\item \textsuperscript{182} See, e.g., Hudson v. McMillian, 503 U.S. 1, 4 (1992) (establishing that prison guards' use of
\end{itemize}
refinements over time and certain exceptions not germane here, the Court has applied the same basic constitutional standards in these cases as in death penalty challenges. There consequently is no discernable reason, based on logic or precedent, to exempt school corporal punishment from the trilogy's criteria.

a. Atkins

Atkins required the Court to pass upon whether the Eighth Amendment had become the undoing of the death penalty when used on mentally retarded persons convicted of capital crimes. Without stopping to explore the state of affairs in 1791, the Atkins Court plunged into identifying whether modern standards of decency tolerated the excessive physical force on an inmate may violate the Eighth Amendment even though he does not suffer serious injury therefrom); Estelle v. Gamble, 429 U.S. 97, 103–05 (1976) (ruling that prison employees' deliberate indifference to a prisoner's need for medical care may run afoot of the Cruel and Unusual Punishments Clause); Hutto v. Finney, 437 U.S. 678, 685–87 (1978) (holding that it contravened the Eighth Amendment for inmates to suffer the combination of poor diets, overcrowding, rampant violence, vandalized cells, extended time in the isolation cells, and lack of good judgment by security personnel).

183. For example, in Trop v. Dulles, 356 U.S. 86, the Court had not yet formally conceived that Eighth Amendment analysis should turn, not only upon objective indicia of standards of decency, but also upon the Court's separate independent judgment. The latter analytical phase has become an integral component of cases under the Amendment. See, e.g., Kennedy, 128 S. Ct. at 2650–51; Roper, 543 U.S. at 564; Atkins v. Virginia, 536 U.S. 304, 312 (2002).

184. In some Eighth Amendment actions, the outcome pivots solely on whether a person's acts and/or circumstances can be criminalized and punished. See, e.g., Robinson v. California, 370 U.S. 660, 667 (1962) (holding that the Cruel and Unusual Punishments Clause is not consistent with criminalizing and penalizing a person's narcotics addiction). Some cases under the Amendment have focused exclusively on whether a sentence is grossly disproportionate to the severity of the crime perpetrated. See, e.g., Solem v. Helm, 463 U.S. 277, 284, 290, 303 (1983), superseded by statute, Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 2011, as recognized in, In re Lauer, 788 F.2d 135, 137 n.2 (8th Cir. Jud. Council 1985) (deciding that a life sentence without possibility of parole is forbidden by the Eighth Amendment because it is not proportional to the perpetrator's commission of a seventh nonviolent felony).

185. Compare Estelle v. Gamble, 429 U.S. 97, 102–05 (1976) (using standards of decency, manifested in states' legislation, and the criterion of dignity in order to assess whether a prisoner stated a cause of action under the Eighth Amendment for prison authorities' deliberate indifference to his medical needs), and Rhodes v. Chapman, 452 U.S. 337, 346–47, 352 (1981) (applying standards of decency, including as evidenced in states' legislation, and bringing to bear the Court's own independent judgment for purposes of determining whether double ceiling violates the Eighth Amendment), with Kennedy, 128 S. Ct. at 2649–51 (utilizing standards of decency, evinced in states' laws, and bringing to bear the Court's own independent judgment in adjudging whether the death penalty is constitutional under the Eighth Amendment when meted out for raping a child), and Roper, 543 U.S. at 560, 564 (relying upon standards of decency, as manifested via states' legislation and other sources; upon the requirement of dignity; and upon the Court's independent judgment in order to adjudicate whether the juvenile death penalty offends the Eighth Amendment).

penalty for this cohort.\textsuperscript{187} In trying to determine whether an American national consensus existed on this issue and, if so, what it was, the Court did the sensible thing: it counted heads.\textsuperscript{188}

\textit{Atkins} regarded state enactments as the "most reliable objective evidence of contemporary values" manifesting standards of decency.\textsuperscript{189} According to the Justices' data, a total of thirty-two states had prohibited the death penalty for the mentally retarded when \textit{Atkins} was before the Court.\textsuperscript{190}

The \textit{Atkins} Court's next computation was directed at determining the "consistency of the direction of change" in state legislation on the topic,\textsuperscript{191} a computation that, in turn, was contingent upon the data giving rise to the rate of change. The Court stated that this factor was even more significant than the number of states rejecting the death penalty for mentally retarded felons.\textsuperscript{192} The Court found that there was a 100% "absence of States passing legislation reinstating... such executions."\textsuperscript{193}

The Justices arrived at this conclusion by what may be distilled to a five-step process,\textsuperscript{194} a process which would be used in subsequent cases, though with variations in either the sequence or the discreteness of the steps, or in both.\textsuperscript{195} First, they set a time period evidently deemed relevant to discovering the direction of legislative change on capital punishment of the mentally retarded.\textsuperscript{196} \textit{Atkins} demarcated that period as starting in 1989,\textsuperscript{197} the year in which the Court had last addressed the constitutionality of such punishment in \textit{Penry v. Lynaugh}.\textsuperscript{198} (\textit{Penry} had upheld execution of mentally retarded criminals under the Eighth Amendment.\textsuperscript{199}) The period ended in 2002, the year that the Court heard and decided \textit{Atkins}.\textsuperscript{200} Second, the \textit{Atkins} Justices ascertained that as of 1989, sixteen states had outlawed the death penalty for the mentally

\begin{footnotesize}
\begin{enumerate}
\item[187.] \textit{Id.} at 311–17.
\item[188.] \textit{Id.} at 313–15, 316 & n.21, 317 (reciting the state laws, state practices, professional organizations, religious representatives, and polling data against the death penalty for mentally retarded perpetrators).
\item[189.] \textit{Id.} at 312 (quoting \textit{Penry v. Lynaugh}, 492 U.S. 302, 331 (1989)).
\item[190.] \textit{Id.} at 313–14.
\item[191.] \textit{Id.} at 315–16.
\item[192.] \textit{Id.} at 315.
\item[193.] \textit{Id.} at 315–16.
\item[194.] \textit{Id.} at 310, 313–16.
\item[195.] \textit{See infra} notes 234–45 and accompanying text.
\item[196.] \textit{Atkins}, 536 U.S. at 310, 313–16.
\item[197.] \textit{Id.} at 310, 314.
\item[198.] 492 U.S. 302 (1989) (plurality opinion).
\item[199.] \textit{Id.} at 340.
\item[200.] \textit{Atkins}, 536 U.S. at 315 & n.17.
\end{enumerate}
\end{footnotesize}
retarded (consisting of two states that had barred execution of the mentally retarded in particular and fourteen states that had eliminated the death penalty entirely). Third, the Court took into account that a total of thirty-two states had prohibited the death penalty for the mentally retarded by 2002. Fourth, simple subtraction yielded the result that during a thirteen-year period, sixteen states had adopted de jure policies forbidding execution of this cohort. Fifth, the Court reported that during the same time span no states had legislated in the opposite direction. Hence, Atkins laid the basis for finding, and then found, an unbroken consistency among the state legislatures that had addressed the issue since the Court’s last decision on the punishment’s constitutionality.

In gauging the trend among state governments, the Court also investigated the de facto situation in those jurisdictions where executing mentally retarded convicts was still legislatively permissible. The Court determined that the practice had become “truly unusual,” which the Justices mused, could coincidentally explain these states’ inertia vis-à-vis initiating abolitionary legislative reform.

Beyond its census of state governments, the Court did a head-count of other expressions of societal and professional opposition to the death penalty as a criminal sentence for this cohort. For example, the Court consulted polling data which disclosed “widespread consensus among Americans” that putting mentally retarded convicts to death is wrong. The Court further remarked that representatives of some religious communities in the United States had filed an amicus curiae brief expressing the same bias. Additionally, the Court found a telling barometer of professional opinion in that “several organizations with germane expertise have adopted official positions” against the death penalty in this context.

On the basis of this wide-ranging survey, the Atkins Court ruled that

201. Id. at 313–14.
202. See id. at 313–15.
203. Id. at 313–15.
204. Id. at 315–16.
205. See supra note 198 and accompanying text.
206. Atkins, 536 U.S. at 316.
207. Id.
208. Id. at 316 & n.21.
209. Id.
210. Id. Representatives of the Christian, Jewish, Muslim, and Buddhist faiths filed the amicus curia brief. Id.
211. Id. The Court named the American Psychological Association as one of the organizations that had adopted an official position against sentencing mentally retarded criminals to death. Id.
the requisite American consensus against the punishment existed.\textsuperscript{212} However, before concluding whether modern standards of decency rejected such punishment, the Court inquired into the attitudes of those beyond U.S. borders,\textsuperscript{213} and summarized the international view as "overwhelming" disapproval of such sentencing.\textsuperscript{214} Thus, after all of the objective evidence, nationally and internationally, was said and counted, the \textit{Atkins} Court decided that modern standards of decency were incompatible with imposition of the death penalty on the mentally retarded.\textsuperscript{215}

This left the Court to tackle the third criterion of Eighth Amendment analysis. The Justices elaborated that, in cases where it has been concluded that the challenged punishment is contrary to modern standards of decency, the Court must additionally bring its own judgment to bear by asking "whether there is reason to disagree with the judgment reached by the citizenry and its legislators."\textsuperscript{216} Without explicitly mentioning that proportionality was informing its judgment, the Court recognizably used that concept in questioning whether the punishment's penological or social purposes would be served by executing a mentally retarded convict.\textsuperscript{217} The Court iterated that in prior decisions it had identified the purposes of the punishment as retribution for the crime committed and deterrence of other potential offenders.\textsuperscript{218} For a variety of reasons not relevant here, the Court determined that if the death penalty was imposed on mentally retarded perpetrators of capital crimes, it would serve neither purpose\textsuperscript{219} and therefore would be pointless and unnecessary infliction of pain and suffering,\textsuperscript{220} i.e., disproportional. The Court also threw into the mix that the mentally retarded are susceptible to wrongful execution because of their inherent deficiencies in proving mitigation, assisting defense counsel, impressing the trier of fact, or all three.\textsuperscript{221} On the basis of these considerations, the Justices gave their independent assessment that imposing the death penalty on the mentally retarded inevitably collides with Eighth

\begin{itemize}
\item \textsuperscript{212} \textit{Id.} at 316–17.
\item \textsuperscript{213} \textit{Id.} at 316 n.21.
\item \textsuperscript{214} \textit{Id.}
\item \textsuperscript{215} \textit{Id.} at 316 & n.21, 317.
\item \textsuperscript{216} \textit{Id.} at 313.
\item \textsuperscript{217} \textit{Id.} at 318–20.
\item \textsuperscript{218} \textit{Id.} at 318–19 (citing \textit{Gregg v. Georgia}, 428 U.S. 153, 183 (1976) (Stewart, Powell & Stevens, J.J.).)
\item \textsuperscript{219} \textit{Id.} at 319–20.
\item \textsuperscript{220} \textit{Id.}
\item \textsuperscript{221} \textit{Id.} at 320–21.
\end{itemize}
Amendment tenets. Because of this assessment and the American and foreign consensus, the Court held that sentencing mentally retarded felons to death violates the Cruel and Unusual Punishments Clause.

b. Roper

The second instructive case of the trilogy is Roper v. Simmons in which the Court held that sentencing felons to death for capital crimes committed when they were juveniles (hereinafter "juvenile death penalty") violates the Cruel and Unusual Punishments Clause as well. The Court’s analytical approach paralleled the criteria and progression it had employed in Atkins. As in Atkins, the Court skipped the first criterion without explanation, promptly launching instead into a quest for objective indicia of modern standards of decency by examining state legislation. The Roper majority reported that, as of 2004, the year in which the case was argued before the Justices, a total of thirty states prohibited the juvenile death penalty (comprised of twelve states that had abolished the death penalty for everyone and eighteen states that had only eradicated it for persons under eighteen years old). The Court compared this figure to the total of abolitionist states in Atkins, which the Roper opinion misstates to be thirty instead of thirty-two. The error is insignificant, though, because the Court in each case found thirty states, all subscribing to the same legislative choice, to constitute a sufficient indicator of national consensus. Indeed, Roper asserts: "[a] majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment." The assertion carries an irresistible implication that twenty-six states could have sufficed just as well.

The Roper Court conceded, however, that the rate of change in

222. Id. at 319–21.
223. Id. at 321.
225. Id. at 578.
226. Id. at 564–78.
227. Id. at 555–79.
228. Id. at 564–67.
229. Id. at 551.
230. Id. at 564.
231. Id. The Atkins Court’s actual enumeration of abolitionist states, as of the pertinent end date, is clearly set forth in the majority opinion, although the majority never itself bothered to do the addition. Atkins v. Virginia, 536 U.S. 304, 313–15 (2002). However, the addition of all states on Atkins’ abolitionist list comes to thirty-two. See supra notes 189–90 and accompanying text.
232. See Roper, 543 U.S. at 564–68; Atkins, 536 U.S. at 314–17, 321.
233. Roper, 543 U.S. at 568 (emphasis added).
reducing the incidence of the juvenile death penalty or in taking legal steps to eliminate it had been slower than the analogous rate of change involved in *Atkins*. To compute the rate of change and its consistency, the *Roper* Justices used the five-step process from *Atkins*. First, *Roper* establishes a relevant time period. The start date is 1989, the year in which the Court had last confronted the same issue, in *Stanford v. Kentucky*. (*Stanford* held that the Eighth Amendment does not preclude execution of juveniles over fifteen years of age.) The end date is 2004, when *Roper* was argued before the Court, thereby making the time period fifteen years long. Reversing the order of the second and fourth steps, the Court next reported that five states had prohibited the juvenile death penalty during the fifteen-year time span. Third, the Justices recalled their prior finding that, as of the 2004 end date, thirty states had interdicted the juvenile death penalty. The “new” fourth step, had the Court expressly laid it out, would have consisted of subtracting five from thirty, yielding the statistic that, at the start of the period, twenty-five states had adopted de jure bans on executing minors—a statistic that the Court must also have employed to obtain a grand total of thirty. Fifth, the Court remarked that there was no evidence that, during the fifteen years, any states had legislated to authorize or re-authorize the juvenile death penalty.

The *Roper* Justices expressed some misgivings over the fact that only five states had abolished the juvenile death penalty within fifteen years while under *Atkins* sixteen states had eradicated the death penalty for the mentally retarded over a thirteen year period. Nevertheless, the *Roper* majority judged that the slower rate of change was still “significant.” In any event, *Roper* followed *Atkins* in giving the most weight, in tallying state laws, to the “consistency of the direction of change”

234. *Id.* at 565.
235. *See supra* notes 194–205 and accompanying text.
237. *Id.*
241. *See infra* notes 242–44 and accompanying text.
243. *See supra* note 232 and accompanying text.
244. The computation in the text above is my own.
246. *Id.* at 565.
247. *Id.*
which, as in Atkins, was 100% against the challenged punishment.\(^{248}\) This unbroken trajectory was accentuated by enactment of the Federal Death Penalty Act of 1994 in which Congress also forbade administration of the death penalty to juveniles.\(^{249}\)

Further adhering to the Atkins analytical template, the Roper Justices took stock of state practice in those jurisdictions where the juvenile death penalty was still legal.\(^{250}\) They concluded that even in these states, the instances of juvenile execution were "infrequent."\(^{251}\) "[T]he rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice" led the Roper Court to find an American consensus against the penalty.\(^{252}\) Due to the evolution of state law and practice, the Court intimated that the constitutionality of the punishment under the Amendment was on shaky ground.\(^{253}\)

The Court then reconnoitered on the international front, discovering in the process an almost universal clamor against the penalty.\(^{254}\) The Justices found that the United States was the only nation in the world that continued to permit the juvenile death penalty;\(^{255}\) that the juvenile death penalty was interdicted by several international human rights treaties such as the Convention on the Rights of the Child, the International Covenant on Civil and Political Rights, the American Convention on Human Rights, and the African Charter on the Rights and Welfare of the Child;\(^{256}\) and, that only seven countries other than the United States had put juvenile perpetrators to death since 1990, and each of these seven subsequently either eliminated or publicly disavowed the

\[^{248}\text{Id. at 565–66 (citing Atkins v. Virginia, 536 U.S. 304, 315 (2002)).}\]
\[^{249}\text{Id. at 567.}\]
\[^{250}\text{Id. at 564–65.}\]
\[^{251}\text{Id. at 564.}\]
\[^{252}\text{Id. at 567. It should be noted that the petitioner in Roper argued that the national consensus against the juvenile death penalty had been broken by the United States reservation to article 6(5) of the International Covenant on Civil and Political Rights. Id. That treaty provision prohibits capital punishment of minors. Id. The Roper Court rebuffed petitioner's argument for two reasons. First, the reservation was adopted in 1992, and, since then, five states (American) had abolished the juvenile death penalty. Second, by enacting the Federal Death Penalty Act of 1994, Congress enunciated its disapproval of the juvenile death penalty. Id.}\]
\[^{253}\text{Id. at 568.}\]
\[^{254}\text{Id. at 575–78.}\]
\[^{255}\text{Id. at 575.}\]
juvenile death penalty. The Court considered the status of the penalty in the United Kingdom to be particularly material because of the historic link between that country and the United States and because of the purported origins of the Eighth Amendment in the English Bill of Rights of 1689. By the time Roper was decided in 2005, the United Kingdom had completely abolished the death penalty; this had been preceded five and a half decades earlier by abolition of the juvenile death penalty in particular. The Roper Court therefore deduced that an international consensus against executing juveniles was firmly in place.

Finally, addressing the third criterion, the Court brought to bear its own independent judgment on whether the juvenile death penalty was unconstitutionally cruel and unusual punishment. That is, the Court considered whether the penalty could not serve the purposes of retribution for the crime committed or deterrence of other potential criminals and therefore was not proportional to a capital crime committed by this order of offender. After painstakingly examining the qualitative psychological differences between juveniles under eighteen years of age and adults which, relatively speaking, shows the former to have "diminished culpability," the Roper Court concluded that the juvenile death penalty serves neither purpose. Having articulated its agreement with the broad consensus condemning this punishment, the majority held the penalty, as applied to this cohort, to be a violation of the Amendment.

c. Kennedy

In Kennedy v. Louisiana, the third case of the trilogy, the Court was faced with judging whether the Eighth Amendment should abrogate the death penalty for an individual convicted of raping, but not killing or intending to kill, a child (hereinafter "child rape" or "rape of a child"). After declaring its disinterest in the penalty's constitutional posture as of 1791, the Court straightaway took up application of the second

257. Roper, 543 U.S. at 577.
258. Id. at 577–78.
259. Id. at 577.
260. Id. at 578.
261. Id. at 564, 568–75.
262. Id. at 568–73.
263. Id. at 572.
264. Id. at 575, 578–79.
266. Kennedy, 128 S. Ct. 2641, 2650–51.
267. Id. at 2649.
criterion under the Amendment, i.e., whether contemporary standards of decency still embraced execution of such a perpetrator.\textsuperscript{268}

The Court searched for objective indicia of homegrown standards by examining state law on the topic.\textsuperscript{269} Still cleaving tightly to the methodology of Atkins and Roper, the Kennedy Justices counted heads as of 2008, the year they heard the case.\textsuperscript{270} They determined that out of the thirty-six states (plus the federal government) which retained the death penalty, a subset of only six states had the penalty for raping a child,\textsuperscript{271} or, conversely, forty-five jurisdictions simultaneously disallowed it. The Court noted that the latter figure—the total of abolitionist states—surpassed the end-date grand totals of abolitionist states in Atkins and Roper, respectively.\textsuperscript{272} In any event, the Kennedy Court opined that the forty-five abolitionist jurisdictions were significant evidence of societal standards of decency condemning capital punishment of child rapists.\textsuperscript{273}

Kennedy also took into account, as precedent dictated, the rate of change and its consistency against the penalty for such felons, and in a general way relied upon the five-step process to do so.\textsuperscript{274} However, Kennedy diverges from Atkins and Roper in implementation of the first step. The Court used two different time periods, instead of one, to make these calculations, with no explanation as to why two were called for or why any of their start and end dates were selected.\textsuperscript{275} The Court began by using “the last 13 years,”\textsuperscript{276} the same time period used in Atkins.\textsuperscript{277} The Kennedy Justices then made step two of their analysis the tabulation of states authorizing execution for child rape within that period. They found that during this interval, “there ha[d] been change towards making child rape a capital offense.”\textsuperscript{278} The Court detected no trend repudiating execution for this crime in the fact that the allotted period also saw six new death penalty statutes (applicable to child rapists) enacted,

\textsuperscript{268} Id. at 2658.
\textsuperscript{269} Id. at 2650–56. The Kennedy Court traced pertinent legislative history as far back as 1925. Id. at 2651. Although the majority opinion subsequently refers to this history as part of the search for a national consensus on the propriety of executing child rapists, it is not clear how the early history informed that search other than as a starting point. Id. at 2651–56.
\textsuperscript{270} Id. at 2650–53.
\textsuperscript{271} Id. at 2653.
\textsuperscript{272} Id.
\textsuperscript{273} Id.
\textsuperscript{274} Id. at 2654–57.
\textsuperscript{275} Id.
\textsuperscript{276} Id. at 2656.
\textsuperscript{277} See supra notes 196–200 and accompanying text.
\textsuperscript{278} Kennedy, 128 S. Ct. at 2656.
including three within the two years immediately preceding Kennedy, and the appearance of no statutes going the other way. This absence of a repudiating trend, said the Court, was confirmed by contrasting the situation with the relevant Atkins benchmark; Kennedy recalled Atkins as detecting a trend against execution of the mentally retarded on the basis that between 1986 and 2001 eighteen states had enacted laws forbidding the challenged punishment while no states did contrariwise.

The alternative time period utilized in Kennedy runs from 1972, when Furman v. Georgia was decided. (In Furman, the Court had issued a per curiam opinion striking down, under the Eighth Amendment, the death sentences lower courts had pronounced in two rape cases and one murder case.) Advancing to the second step under this timetable, the Kennedy Court reported that since Furman, six states had classified child rape as a capital offense, and opined that “[t]his is not an indication of a trend or change in direction comparable to the one supported by data in Roper.” So, Roper, in effect, functioned as Kennedy’s benchmark within the context of the second alternative time period. Kennedy editorializes that, although the pace of legislative abolition presented in Roper was not as great as in Atkins, Roper’s deficiency was “counterbalanced” by the sheer number of states rejecting the juvenile death penalty, including especially the twenty-seven states which had by 1989 banned executions of those juveniles between sixteen and eighteen years of age. Because the Kennedy Court already had ascertained that, as of 2008, a total of only six states had statutes authorizing capital punishment for child rape (the same calculation as in the third step), the Court intimated that the

279. Id.
280. Id. The above-referenced portion of the Kennedy majority opinion is somewhat confusing. The time period actually used in Atkins to compute the rate of change was thirteen years long. See Roper v. Simmons, 543 U.S. 551, 563 (2005) (describing Atkins as counting forward from Penry and thereby creating a thirteen-year time period); Atkins v. Virginia, 536 U.S. 304, 307–15 (2002) (counting forward from the 1989 decision of Penry v. Lynaugh, 492 U.S. 302 (1989)). Yet, Kennedy describes the data from Atkins as covering the fifteen-year time span between 1986 and 2001. Kennedy, 128 S. Ct. at 2656. While it is true that Atkins mentions some relevant events between 1986 and 1989, they do not consist of state enactments which are the key to the Atkins analysis. Atkins, 536 U.S. at 313–16.
281. Kennedy, 128 S. Ct. at 2656.
282. Id.
283. 408 U.S. 238 (1972) (per curiam opinion).
284. Id. at 239–40.
285. Kennedy, 128 S. Ct. at 2657.
286. Id.
287. See supra notes 274–81 and accompanying text.
consistency of the rate of change was not counterbalanced as it had been in *Roper*.288

The *Kennedy* Justices had no need to go further in their analysis of state legislation since the statistics produced by the second and third analytical steps could not hold a candle to the *Atkins* and *Roper* statistics indicative of a national consensus against the punishments litigated in those two cases. In the end, however, *Kennedy*’s shortfall became a moot point because the Justices instead recurred to *Enmund v. Florida*,289 which offered yet another and more generous benchmark by which to measure consistency of the rate of change. In *Enmund*, the Court had discerned a sufficient consistency of rate of change against capital punishment for vicarious felony murder even though eight jurisdictions had authorized the punishment.290 The *Kennedy* Court ruled that, because its data closely resembled the data adduced in *Enmund*, there was enough legislative reform to demonstrate a national consensus repugnant toward executing child rapists.291

The Court’s search for that consensus also prompted it to survey state practices with respect to executing child rapists.292 Statistics showed that no one had been put to death for raping an adult or child since 1964 and that no execution for any other non-homicide crime had occurred since 1963.293 Moreover, respondent Louisiana was the only state since 1964 to have even sentenced a person to death for raping a child, while petitioner Kennedy was only one of two convicts then on death row for committing non-homicide crimes.294 Predicated on the combination of the history of the death penalty for rape of a child and other non-homicide crimes, the numbers of state statutes embracing and barring the penalty for child rapists, the consistency of the rate of change manifested by those statutes, and state practice vis-à-vis such executions, the *Kennedy* Court concluded that a national consensus indeed existed against capital punishment for child rape.295

Without pausing to examine whether an international consensus complemented the American one or to explain why no such examination was undertaken, the Justices broached the third analytical criterion of bringing to bear the Court’s own independent judgment on whether

290. Id. at 789–93, 801.
292. Id. at 2657.
293. Id.
294. Id.
295. Id. at 2657–58.
executing child rapists offends the Eighth Amendment.\footnote{296} In this exercise, the \textit{Kennedy} Court reviewed whether, in light of relevant case law, imposition of the death penalty for the offense of child rape is proportional.\footnote{297} Without digressing into the particulars of that initial judgment call, which are of no moment in connection with this Article’s mission, \textit{Kennedy} found an unacceptable disproportionality in allowing the execution of someone for the act of child rape when the perpetrator did not cause a death as part of his crime.\footnote{298}

The \textit{Kennedy} Justices amplified upon the proportionality analysis by delving into the constituent questions of whether the death penalty for child rape would fulfill the penalty’s two time-honored penological or social justifications: retribution and deterrence.\footnote{299} Of course, if neither justification could be served by execution, then execution would necessarily be a disproportionate punishment.\footnote{300} The majority opinion posits that it cannot be maintained with any certitude that capital punishment would never avenge the crime committed or never deter other capital crimes.\footnote{301} Nonetheless, \textit{Kennedy} articulates reservations to finding proportionality on this basis.\footnote{302} For example, would inflicting the death penalty “balance[]” out the hurt to the victim?\footnote{303} In this regard, the Justices were troubled that classifying child rape as a capital case would usually require the young victim to tell his or her brutal, embarrassing story to law enforcement personnel. Additionally, at trial the child would be required to confront the harrowing choice of whether to testify so as to precipitate the assailant’s death.\footnote{304} These roles would assuredly add insult to injury rather than make the injured whole. The Justices were equally apprehensive about the danger of fabricated child-victim testimony, induced or otherwise, which could expose the defendant to wrongful execution.\footnote{305} Nor would the death penalty for child rape further the goal of deterrence if the punishment inspired non-reporting of other child rapes.\footnote{306} Yet, if victims fear that the perpetrators

\footnotesize{296. \textit{Id.} at 2657–64. In both \textit{Atkins} and \textit{Roper}, the Court looked for objective indicia of standards of decency in international law and/or the domestic laws of other countries. \textit{See supra} notes 213–15, 254–60 and accompanying text.}
\footnotesize{297. \textit{Kennedy}, 128 S. Ct. at 2659–64.}
\footnotesize{298. \textit{Id.} at 2659–61.}
\footnotesize{299. \textit{Id.} at 2661–64.}
\footnotesize{300. \textit{Id.} at 2662.}
\footnotesize{301. \textit{Id.}}
\footnotesize{302. \textit{Id.} at 2661–64.}
\footnotesize{303. \textit{Id.} at 2662.}
\footnotesize{304. \textit{Id.} at 2662–63.}
\footnotesize{305. \textit{Id.} at 2663.}
\footnotesize{306. \textit{Id.} at 2663–64.}
will be executed, a common anxiety when defendant is a family member, then children may be more reluctant to reveal the attack.\textsuperscript{307} In sum, the Justices' independent judgment under the Eighth Amendment caused them to agree with the national consensus and therefore invalidate capital punishment for child rapists.\textsuperscript{308}

When tracking the Court's reasoning in deciding \textit{Atkins}, \textit{Roper}, and \textit{Kennedy}, it is easy to lose one's bearings in the eddying vortex of numerical detail. The effort, however, is well worth the vertigo. Attentive analysis of these cases is of great value in yielding standards for ascertaining the presence of a consensus against a punishment\textsuperscript{309} and for projecting how the Court may independently judge the Eighth Amendment bona fides of punishments in future cases.\textsuperscript{310} These standards should, if stare decisis is given its due, reliably foreshadow what should happen in the next suit against public school corporal punishment under the Amendment.

3. Application of the Second and Third Analytical Criteria Under the \textit{Atkins-Roper-Kennedy} Trilogy to Public School Corporal Punishment

\textit{a. Application of the Second Criterion}

\textit{i. Determination of the Existence of a National Consensus}

Since the second criterion from the trilogy is to decide whether standards of decency are incompatible with a punishment and since an American consensus against a punishment is a guide to the existence of such standards, it becomes paramount whether there is a national consensus against public school corporal punishment. According to \textit{Atkins}, \textit{Roper}, and \textit{Kennedy}, a leading indicator on this score is state statutes.\textsuperscript{311}

The three cases each sought a sign of consensus in the total of states which, by the year the case was heard before the Court, had enacted and retained legislation banning the challenged punishment.\textsuperscript{312} A problem here is that there is no comparable Supreme Court hearing to mark the year. Thus, by default, the clock must stop in 2008, the year in which this Article was completed.

\begin{itemize}
\item \textsuperscript{307} \textit{Id.}
\item \textsuperscript{308} \textit{Id.} at 2664–65.
\item \textsuperscript{309} See supra notes 194–205, 234–57, 269–81 and accompanying text.
\item \textsuperscript{310} See supra notes 216–21, 261–64, 296–308 and accompanying text.
\item \textsuperscript{311} \textit{Kennedy}, 128 S. Ct. at 2651, 2656–57; \textit{Roper} v. Simmons, 543 U.S. 551, 564 (2005); \textit{Atkins} v. Virginia, 536 U.S. 304, 313–14 (2002).
\item \textsuperscript{312} \textit{Kennedy}, 128 S. Ct. at 2651–53; \textit{Roper}, 543 U.S. at 564; \textit{Atkins}, 536 U.S. at 312–16.
\end{itemize}
As of the foregoing date, a total of twenty-eight states have banned all school corporal punishment through laws having state-wide effect, 313 while some school districts within the remaining twenty-two states have


Maine's legislation is rather oblique on school corporal punishment inasmuch as the prohibition on the punishment is by negative inference. 2007 Me. Legis. Serv. 173 (West). Subsection 1 of the statute grants parents and other adults responsible for a child the power to use a reasonable amount of force on the child if the adult "reasonably believes it necessary to prevent or punish such... person's misconduct"; however, subsection 2 gives a teacher authority to use force on a student only if the teacher "reasonably believes it necessary to control the disturbing behavior or to remove" the student from the scene of such a disturbance. Id. (emphasis added). In other words, while caretakers of the child named in subsection 1 may use physical force on their charges to prevent or punish misbehavior, section 2 specifically singles out teachers as being entitled to use physical force not to punish, but only to handle a disturbance. That this is an accurate interpretation of the Maine statute is underscored by a Department of Education statement advising that school personnel do not have the right to corporally punish students. ME. DEP'T OF EDUC., SCH. HEALTH MANUAL: ABUSE AND NEGLECT OF CHILDREN 1-2 (2006), http://www.maine.gov/education/sh/abusenegect/ect/abuse06.pdf.

Rhode Island has no legislation forbidding corporal punishment of children in the schools. The state Board of Regents for Elementary and Secondary Education has, though, promulgated regulations prohibiting the punishment in the public schools. R.I. BD. OF REGENTS FOR ELEMENTARY AND SECONDARY EDUC., PHYSICAL RESTRAINT REGULATIONS §3.6 (2002), http://www.rules.state.ri.us/rules/released/pdf/DESE/DESE_3826.pdf.

South Dakota statutes on school corporal punishment are baffling. One declares, in part, that "[s]uperintendents, principals, supervisors, and teachers and their aids and assistants, have the authority, to use the physical force that is reasonable and necessary for supervisory control over students." S.D. CODIFIED LAWS § 13-32-2 (2007). Another provides that a teacher may employ moderate, reasonable and necessary force to restrain or correct a child. S.D. CODIFIED LAWS § 22-18-5 (2007). Taken at face value, these enactments would not appear to place South Dakota in the anti-paddling column. The old bromide that warns against judging a book by its cover applies here to the contents as well. The South Dakota Deputy Attorney General and Counsel to the state's Department of Education has previously acknowledged that the language of these statutes could be construed either to allow or outlaw school corporal punishment. Telephone Interview with Craig Eichstadt, S.D. Deputy Attorney General and Counsel to the S.D. Dep't of Educ. (June 17, 2004) [hereinafter Eichstadt Interview]. However, he related that whenever South Dakota school personnel inquire as to his opinion about the legal status of school corporal punishment in that state, he tells them that the punishment is prohibited. Id. What prompts him to do so is the legislative history of Section 13-32-2. The present statutory wording amends a former version which averred that school personnel had the "authority, to administer physical punishment on an insubordinate or disobedient student" in order to maintain "supervisory control over the student." Id. The amendment notably deleted the phrase "physical punishment on an insubordinate or disobedient student," thereby implying that the physical force now permitted by this section may not be for punitive purposes. Id.
banned the practice as well. Nor have rule makers at the national level evinced much eagerness for physical punishment of children as a disciplinary tool. For instance, a federal administrative regulation enjoins corporal punishment of preschoolers enrolled in Head Start, a federally funded child development program that, among other things, prepares very young children from low-income families for school.

A comparison of these statistics with their analogues from the trilogy cases is highly persuasive, though not conclusive, evidence of a national consensus antagonistic to school corporal punishment. The total of states with anti-paddling laws in 2008 is admittedly a colossal sixteen shy of the grand total of forty-five abolitionist states at the relevant date in *Kennedy*; but, this is hardly dispositive. The anti-paddling figure is only two less than the grand total of thirty states that, by the relevant date, had rejected the juvenile death penalty in *Roper* and four less than the grand total of thirty-two states that, by the relevant date, had opposed the death penalty for the mentally retarded in *Atkins*. In *Roper*, too, the Court suggested that a simple majority of states, i.e., twenty-six, would be indicative of a national consensus, a suggestion echoed in *Kennedy* as well. The grand total of twenty-eight anti-paddling states, of course, exceeds that threshold.

There are two hidden factors that enhance this already impressive showing. First, the twenty-eight to twenty-two ratio of state-wide laws on school corporal punishment does not reflect the fact that many school districts, in the bloc of twenty-two nonabolitionist states, have interdicted the punishment anyway. There was no equivalent interdiction on a local level in *Atkins, Roper,* or *Kennedy*. Second, there is the fact that the twenty-eight anti-paddling states target for abolition the one practice of corporally punishing public

314. School districts disallowing school corporal punishment in states that have not banned it as a matter of state law include Miami-Dade, Houston, Memphis, Austin, Fort Worth, Atlanta, San Antonio, Denver, Tucson, and Dallas. Center for Effective Discipline, Discipline at School (NCACPS), http://www.stophitting.com/index.php?page=1001argest (last visited Sept. 28, 2007).


316. *See supra* notes 269–73 and accompanying text.

317. *See supra* notes 229–31 and accompanying text.

318. *See supra* notes 189–90 and accompanying text.


320. *See Kennedy* v. Louisiana, 128 S. Ct. 2641, 2653 (2008), *reh’g denied,* 129 S. Ct. 1 (2008) (stating that “[t]he evidence of a national consensus with respect to the death penalty for child rapists, as with respect to juveniles, mentally retarded offenders, and vicarious felony murderers, shows divided opinion but, on balance, an opinion against it”).

321. *See supra* notes 313–14 and accompanying text.

schoolchildren.\textsuperscript{323} In contrast, in \textit{Atkins} and \textit{Roper}, respectively, only eighteen states targeted for abolition the discrete punishment contested in each of those cases.\textsuperscript{324} (The other abolitionist states in \textit{Atkins} and \textit{Roper} barred the death penalty for everyone and never addressed the contested punishments by themselves.)\textsuperscript{325}

It should be remembered that another, even more crucial indicator of national consensus against a punishment is the consistency of the rate of change against a punishment.\textsuperscript{326} The Court has typically tried to express this metric with unsynthesized data\textsuperscript{327} or impressionistic descriptions, instead of mathematically deducing a single percentage rate.\textsuperscript{328} It will additionally be remembered that the precedents from the trilogy more or less follow a five-step process in producing these data and descriptions.\textsuperscript{329} The same process will be used here in order to arrive at the rate of change and its consistency regarding the abolition of school corporal punishment, though the findings will then also be converted into percentages which should facilitate comparison among the rates.

In establishing the appropriate time period for making sense of the data, the start date probably should be 1977, the year when \textit{Ingraham v. Wright} held such punishment to be immune from the Eighth Amendment’s strictures.\textsuperscript{330} That is the last and only time that the Court addressed the status of the punishment under the Amendment. Using 1977 as the start date not only accords with precedent, but has the additional virtue of logicality. States’ de jure rebuffs of a punishment, after the Court has spared it from constitutional ignominy, necessarily reflects that those states must have harbored such earnest antipathy towards the punishment that its constitutionality had no decisive influence in shaping state policy.

As previously mentioned, the terminus of the time period must be 2008. The selection of that year is a function of the circumstance that, in light of precedent, no other seems reasonable or, for that matter, possible. In \textit{Atkins}, \textit{Roper}, and \textit{Kennedy}, the Court opted for end dates coinciding with the year it heard oral argument in each case.\textsuperscript{331} Since

\begin{thebibliography}{99}
\item \textsuperscript{323} See supra notes 313–14 and accompanying text.
\item \textsuperscript{324} \textit{Roper}, 543 U.S. at 564; \textit{Atkins}, 536 U.S. at 314.
\item \textsuperscript{325} \textit{Roper}, 543 U.S. at 564; \textit{Atkins}, 536 U.S. at 314.
\item \textsuperscript{326} See supra notes 192, 240, 278–81 and accompanying text.
\item \textsuperscript{327} See \textit{Atkins}, 536 U.S. at 313–15 (listing states which, within a specified time, legislated against the death penalty for the mentally retarded).
\item \textsuperscript{329} See supra notes 194–205, 234–45, 274–88 and accompanying text.
\item \textsuperscript{330} 430 U.S. 651, 671 (1977).
\item \textsuperscript{331} See supra notes 200, 240, 270 and accompanying text.
\end{thebibliography}
there is not yet a Supreme Court decision overturning, modifying, or reaffirming *Ingraham*, the end date here must be 2008, the year in which this Article was completed. The proper time period, then, running from 1977 to 2008, is thirty-one years.

Although the *Ingraham* majority stated that as of 1977 only two states, New Jersey and Massachusetts, had prohibited school corporal punishment, Maine also had previously done so. By 2008, twenty-eight states banned all public school corporal punishment via laws having state-wide application. Subtraction of three from twenty-eight means that, over a thirty-one year period, twenty-five states have forbidden school corporal punishment. During this interval, no states legislated to authorize or re-authorize the practice. The latter two statistics, therefore, show that the consistency of the rate of change is 100%, exactly the same as in *Atkins* and *Roper*.

Because juxtaposition of the rates of change among *Atkins*, *Roper*, *Kennedy*, and school corporal punishment involves so many numbers flying around the page, the following chart is provided to make the comparison more readily visible and intelligible.

<table>
<thead>
<tr>
<th>Punishment</th>
<th>Time Periods</th>
<th>Number of States Outlawing a Punishment at Start Date of Time Period</th>
<th>Number of States Outlawing a Punishment at End Date of Time Period</th>
<th>Number of States Outlawing a Punishment During Time Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public School Corporal Punishment</td>
<td>31 yrs. (1977–2008)</td>
<td>3</td>
<td>28</td>
<td>25 against 0 for</td>
</tr>
<tr>
<td>Death Penalty for Mentally Retarded Offenders</td>
<td>13 yrs. (1989–2002)</td>
<td>16</td>
<td>32</td>
<td>16 against 0 for</td>
</tr>
</tbody>
</table>

332. *Ingraham*, 430 U.S. at 663.
334. *See supra* notes 313–14 and accompanying text.
335. Research unearthed no state authorizations or re-authorizations of corporal punishment in the public schools between 1977 and 2008.
336. *See supra* notes 193, 248 and accompanying text.
337. The numbers set forth in the chart are identical to those given in *Atkins*, *Roper*, and *Kennedy* and described in the textual material above. *See supra* notes 269–88 and accompanying text.
### Table: Number of States Outlawing a Punishment During Time Period

<table>
<thead>
<tr>
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<th>Number of States Outlawing a Punishment During Time Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Juvenile Death Penalty</td>
<td>15 yrs. (1989–2002)</td>
<td>25</td>
<td>30</td>
<td>5 against 0 for</td>
</tr>
</tbody>
</table>

³³⁸ A question mark appears in the chart above because the majority opinion in *Kennedy* is ambiguous regarding the number of states which, at the onsets of the assigned time periods, had either outlawed or approved the death penalty for child rape. The ambiguity arises from the Court’s assertion that “[i]n 1972, *Furman* invalidated most of the state statutes authorizing the death penalty for the crime of rape.” *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2651 (2008), *reh’g denied*, 129 S. Ct. 1 (2008) (emphasis added). The uncertainty is compounded by the Court’s notation that earlier, in 1925, eighteen states, the District of Columbia, and the federal government had statutes allowing execution for raping a child or an adult; the opinion does not advise whether or how legal developments might have changed that number by 1972. *Id.* The same sort of difficulty obtains for the alternative time period used in *Kennedy* as beginning in 1995. The opinion appears to confine discussion of the legal situation from 1995 to 2008 only to re-introduction of statutory permission to use capital punishment for rape of a child, leaving vague the number of states, if any, that *continued* to grant such permission after 1995. *Id.*
compared in a truly accurate way.

The results are positively startling. The rise from three states prohibiting public school corporal punishment in 1977 to twenty-eight abolitionist states as of 2008 represents an 830% total increase in the number of abolitionist states.\(^3\) The climb from sixteen states forbidding the death penalty for mentally retarded convicts as of 1989 to thirty-two abolitionist states as of 2002 is a 100% total increase in the number of abolitionist states.\(^4\) The gain from twenty-five states proscribing the juvenile death penalty as of 1989 to thirty abolitionist states in 2005 constitutes a 20% total increase in the number of abolitionist states.\(^5\) (A total percentage increase in the number of states authorizing the death penalty for child rapists is not available because \textit{Kennedy} provides insufficient data to do the math.\(^6\) There is no contest. The total rate of increase of 830% in relation to school corporal punishment utterly dwarfs the total rates of increase of either 100% or 20%.

If the focus is shifted to yearly, rather than total, percentage rates of increase in state prohibitions, the pace of state prohibition of school corporal punishment again leaves the pertinent state death penalty prohibitions in the dust. (A yearly percentage increase in the number of states allowing the death penalty for child rapists is not available for the same reasons mentioned above vis-à-vis total percentage increases.\(^7\) The yearly rate of increase of states outlawing school corporal punishment is a robust 7.5%; the yearly rate of increase of states interdicting the mentally retarded death penalty amounts to only 5.5%, and of those eliminating the juvenile death penalty, a meager 1.2%.

These sets of total and yearly percentages make a compelling, if not unassailable, case that the most important of indicators of a national consensus establishes the presence of a national consensus against school corporal punishment. Indeed, it should be kept in mind that these percentages are still an understatement of the extent of that consensus because they do not reflect the many school districts which have forbidden the punishment in nonabolitionist states.\(^8\)

The trilogy shows that another index of national consensus concerning a punishment is state practice in those jurisdictions where the

\(^{339}\) The 830% figure was calculated by subtracting three from twenty-eight and then dividing by three.

\(^{340}\) The 100% figure was calculated by subtracting sixteen from thirty-two and then dividing by sixteen.

\(^{341}\) The 20% figure was calculated by subtracting twenty-five from thirty and then dividing by twenty-five.

\(^{342}\) See supra note 338.

\(^{343}\) See id.

\(^{344}\) See supra notes 313-14 and accompanying text.
punishment is still legal.\textsuperscript{345} The abolitionist stance adopted by many school districts within the twenty-two states that still condone school corporal punishment,\textsuperscript{346} is probative not only of the rate of legal change rejecting the punishment, but also manifests that day-to-day use of this type of discipline is on the decline. The fact that the federal government’s statistics show an annual figure of 223,190 schoolchildren nationally on the receiving end of the paddle in 2006-2007,\textsuperscript{347} down from 301,016 in 2003-2004,\textsuperscript{348} signals that school administrators and teachers are growing increasingly reluctant to use the punishment even when legally empowered to do so. According to federal government statistics of projected national totals of children subjected to school corporal punishment, the drop in use of the punishment has been a constant since before the 1977 \textit{Ingraham} decision.\textsuperscript{349}

These data on the frequency of use of school corporal punishment cannot compete with the statistics on use of the death penalty in \textit{Atkins}, \textit{Roper}, and \textit{Kennedy}. It should be recalled that in \textit{Atkins}, the Court characterized the infliction of the death penalty on mentally retarded convicts as having been “uncommon” and “truly unusual.”\textsuperscript{350} In \textit{Roper}, the Court remarked that implementation of the juvenile death penalty had been “infrequent.”\textsuperscript{351} And, in \textit{Kennedy}, the Court highlighted that between 1964 and 2008 no one had been put to death for the crime of rape.\textsuperscript{352}

Although use of school corporal punishment has been steadily diminishing over the last thirty-one years, it is hardly uncommon, truly unusual, or infrequent, and it has continued to occur since 1964 with some regularity in jurisdictions where it is legal.\textsuperscript{353} Still, the comparison cannot be made in a vacuum. It is reasonable to surmise that legislators’ sense of urgency about abolishing school corporal punishment would not be as keen as it has been in relation to abolishing a punishment that invariably extinguishes human life. It is also probable that many state

\begin{thebibliography}{99}
\bibitem{345} See supra notes 206, 250, 292 and accompanying text.
\bibitem{346} See supra notes 313–14 and accompanying text.
\bibitem{349} Center for Effective Discipline, Discipline at School (NCACPS), Number of Students Struck Each Year in U.S. Public Schools, http://www.stopfighting.com/index.php?page=statesbanning (last visited July 26, 2008).
\bibitem{351} Roper v. Simmons, 543 U.S. 551, 564 (2005).
\bibitem{353} See supra notes 345–49 and accompanying text.
\end{thebibliography}
lawmakers are as yet unaware of the deleterious effects of corporal punishment on children inasmuch as these effects have primarily been reported in scientific studies and other scholarly literature.\footnote{See infra notes 465–90 and accompanying text.}

The trilogy’s invocation of other assorted indicia of national consensus has been less uniform, but none of the indicia has ever been held invalid.\footnote{See Kennedy, 128 S. Ct. at 2645–65 (failing to invalidate any indicia of national consensus used in Atkins or Roper); Roper, 543 U.S. at 555–79 (failing to invalidate any indicia of national consensus used in Atkins); Atkins, 536 U.S. at 306–21 (failing to invalidate any previously judicially recognized indicia of national consensus).} Neither the \textit{Kennedy} nor the \textit{Roper} Courts mentioned polling data,\footnote{See Kennedy, 128 S. Ct. at 2645–65 (failing to mention polling data as bearing on the existence of a national consensus); Roper, 543 U.S. at 555–79 (same).} but the \textit{Atkins} Court was impressed with polling data reflecting “a widespread consensus among Americans” that executing the mentally retarded is unseemly.\footnote{Atkins, 536 U.S. at 316 n.21.} A 2005 poll of 30,000 Americans by SurveyUSA discloses that 75\% of respondents disapproved of allowing teachers to spank students.\footnote{See Atkins, 536 U.S. at 306–21 (refraining from consulting newspaper editorials as probative of national consensus).} A 75\% national disapproval rating is, by anyone’s measure, a widespread, or perhaps even prevalent, national consensus against school corporal punishment.

The Court in \textit{Atkins},\footnote{See Atkins, 536 U.S. at 306–21 (refraining from consulting newspaper editorials as probative of national consensus).} \textit{Roper},\footnote{See Roper, 543 U.S. at 555–79 (refraining from consulting newspaper editorials as bearing on the existence of a national consensus).} and \textit{Kennedy}\footnote{See Kennedy v. Louisiana, 128 S. Ct. 2641, 2645–65 (2008), \textit{reh’g} denied, 129 S. Ct. 1 (2008) (refraining from using newspaper editorials as indicative of a national consensus).} did not canvass newspaper editorials on the punishments litigated in those actions. But, if editorials may be considered an expression of popular opinion, it is edifying to consider the following. A 1994 editorial in USA Today, a national newspaper that is not known for being an organ of liberal elites or any other identifiable interest group, opined that school corporal punishment “will remain too high as long as it’s above zero.”\footnote{Darren Warrensford, \textit{End Legal Child Abuse; Stop School Paddlings}, USA TODAY, July 18, 1994, at A14, \textit{available at} http://www.stophitting.com/index.php?page=editorials.} In Alabama, where state law still authorizes public school physical discipline,\footnote{ALA. CODE § 16-28A-1 (2007).} a 2000 issue of the Huntsville Times exhorted area schools to cease paddling students.\footnote{Editorial, \textit{Stop School Beatings: Paddling is Archaic and Ineffective, and Local Schools that Use it Should Stop}, \textit{THE HUNTSVILLE TIMES}, Dec. 19, 2000, at B4.} A similar outcry has cropped up in...
newspapers publishing from the other bastions of legalized paddling as well.\textsuperscript{365} Given the news outlets or geographic locations where these articles were showcased, they are a window of sorts on the pervasiveness of the public's disillusionment with school corporal punishment.

The \textit{Atkins} Court credited a profusion of likeminded opinions coming from experts and community leaders also with being evocative of a national consensus.\textsuperscript{366} Numerous mainstream professional and civic organizations have, in fact, taken official positions against school corporal punishment. Many of these organizations are the most prestigious in their respective fields of medicine, law, psychology and education. Although the list is the classic stuff of footnotes, such a crowded and eminent roster is legally significant enough under the Eighth Amendment as to warrant inclusion in the text. The list includes the American Medical Association, American Bar Association, American Civil Liberties Union, American Academy of Child and Adolescent Psychiatry, American Academy of Pediatrics, American Academy of Family Physicians, American Psychiatric Association, American Psychological Association, National Association for State Departments of Education, National Association for the Advancement of Colored People, National Association of Elementary School Principals, National Association of Social Workers, and the National Parent Teacher Association.\textsuperscript{367} Furthermore, the United Methodist Church General Assembly and the Unitarian Universalist General Assembly have gone on record as condemning school corporal punishment;\textsuperscript{368} as of April 2005, 174 Catholic dioceses have either banned or refused to use corporal punishment in that denomination's schools.\textsuperscript{369} In short, professional opinion as well as that of influential public leaders is wholly in accord with the overwhelming lay aversion to this practice. The outpouring appears to easily surpass the \textit{Atkins} Court's reliance on "several organizations with germane expertise" and some religious

\textsuperscript{365} Anti-paddling editorials have appeared in the Inverness Chronicle (in Florida), the Atlanta Journal-Constitution, the Indianapolis Star, The Charlotte Observer (in North Carolina), the Cleveland Plain Dealer, and the Dallas Morning News, among others. See Center for Effective Discipline, Discipline at School (NCACPS), Editorials Calling for an End to Corporal Punishment, \url{http://www.stophitting.com/index.php?page=editorials} (last visited Nov. 10, 2007).


\textsuperscript{368} \textit{Id.}

\textsuperscript{369} Center for Effective Discipline, Discipline at School (NCACPS), Study of Corporal Punishment Policies in Catholic Schools (March 2006), \url{available at http://www.stophitting.com/index.php?page=epincatholic}. 
representatives' amicus curiae brief against the death penalty for mentally retarded criminals, in order to find evidence of national consensus.\textsuperscript{370} (Roper and Kennedy neglected expert opinion for this purpose.\textsuperscript{371})

The movement against school corporal punishment thus either meets or exceeds each metric used by the Atkins and Roper Courts to reckon national consensus. Were the Supreme Court faced today with a suit contending that public school corporal punishment violates the Eighth Amendment, the Court would be hard pressed not to find an American consensus unequivocally against school corporal punishment.\textsuperscript{372}

ii. Determination of the Existence of an International Consensus

As was described in Parts IV.A and IV.B.2 of this article, the existence of a national consensus against such punishment does not finish the analysis under the Eighth Amendment's Cruel and Unusual

\begin{itemize}
\item \textsuperscript{370} Atkins, 536 U.S. at 316 n.21 (emphasis added).
\item \textsuperscript{372} Since Roper was rendered in 2005, Chief Justice Rehnquist and Justice O'Connor have been replaced, respectively, by Chief Justice Roberts and Justice Alito. Erwin Chemerinsky, The Future of Constitutional Law, 34 CAP. U. L. REV. 647, 647 (2006). The ascension to the Court of Chief Justice Roberts is not likely to put the Court on a new course inasmuch as he and his predecessor appear to be cut from the same cloth. \textit{id.} at 647. The substitution of Justice Alito for Justice O'Connor has already had repercussions for the Court's direction on the abortion controversy. See Gonzales v. Carhart, 550 U.S. 124 (2007) (upholding a federal ban on partial birth abortion as against a substantive due process challenge).
\end{itemize}

However, even though Justice Alito and former Justice O'Connor may not see eye to eye on a variety of issues, this changing of the guard does not seem to presage any sharp deviations from the Eighth Amendment jurisprudence used in Atkins and Roper for detecting a national consensus by counting states hostile to a disputed punishment. It is Atkins and Roper themselves that provide clues as to why continuity should be anticipated.

In Roper, Justice O'Connor dissented from the majority's holding that the juvenile death penalty violates the Cruel and Unusual Punishments Clause. 543 U.S. at 587–607 (O'Connor, J., dissenting). Thus, in the event that Justice Alito is averse to siding with the plaintiffs in a suit challenging of school corporal punishment under the Eighth Amendment, it would not upset the balance of power struck in Roper, a balance still favorable to holding a challenged punishment unconstitutional under sufficiently analogous circumstances of national consensus, etc.

In Atkins, Justice O'Connor joined the majority in striking down the death penalty for the mentally retarded as violative of the Amendment. 536 U.S. at 306–21. That only three Justices dissented in Atkins—Chief Justice Rehnquist and Justices Scalia and Thomas—intimates that the loss of Justice O'Connor need not jeopardize the chances of plaintiffs prevailing in a suit on the Eighth Amendment status of school corporal punishment. \textit{id.} at 321–54. Plaintiffs arguably should still be able to command a majority of the Justices, provided that evidence is adduced showing the punishment is sufficiently objectionable to the American people.

The advent of the Eighth Amendment decision in Kennedy v. Louisiana is recent confirmation of the above predictions. 128 S. Ct. 2641.
Punishments Clause.\textsuperscript{373} Prior to \textit{Kennedy}, the precedents established that, in ferreting out modern standards of decency, the Court should resist any inclination toward parochialism and extend its horizons to international law and the laws of other countries.\textsuperscript{374} That \textit{Kennedy} ignored evidence of global consensus does not alter the continued validity or wisdom of this protocol.

School corporal punishment is a violation of international human rights law.\textsuperscript{375} Interpretation of major human rights treaties do not leave the least wiggle room for arguing otherwise. The Vienna Convention on the Law of Treaties (Treaty on Treaties) sets forth the rules governing treaty interpretation.\textsuperscript{376} The approach of the Treaty on Treaties is that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."\textsuperscript{377} The Treaty on Treaties defines "context" as a treaty's text, its preamble, and any annexes, as well as certain other agreements, instruments, practices, and rules that relate to the treaty.\textsuperscript{378}

Human rights treaties, like the U.S. Constitution, are positively groaning with what may be described as "omnibus terms" or "omnibus phrases."\textsuperscript{379} An omnibus term or phrase is language broad enough to encompass one or more implicit connotations as part of its ordinary meaning.\textsuperscript{380} An example of an omnibus phrase familiar to American jurists is the Equal Protection Clause of the Constitution's Fourteenth Amendment, which declares that "[n]o State shall... deny to any person within its jurisdiction the equal protection of the laws."\textsuperscript{381} "Equal protection," as construed by the Supreme Court, has come to stand for many included implied principles such as a prohibition on de jure racial segregation of students in public elementary and secondary schools\textsuperscript{382}

\textsuperscript{373} See supra notes 159–73, 309–10 and accompanying text.
\textsuperscript{374} E.g., \textit{Roper}, 543 U.S. at 575–78; \textit{Atkins}, 536 U.S. at 316 n.21; Enmund v. Florida, 458 U.S. 782, 788, 796 n.22 (1982) (plurality opinion); \textit{Coker} v. \textit{Georgia}, 433 U.S. 584, 596 n.10 (1977) (plurality opinion); \textit{Trop} v. Dulles, 356 U.S. 86, 102–03 (1958) (plurality opinion); \textit{Aarons}, supra note 164, at 199–205.
\textsuperscript{375} See infra notes 384–93 and accompanying text.
\textsuperscript{377} \textit{Id.} at art. 31, ¶ 1.
\textsuperscript{378} \textit{Id.} at art. 31, ¶ 2.
\textsuperscript{379} BITENSKY, supra note 18, at 48.
\textsuperscript{380} \textit{Id.}
\textsuperscript{381} U.S. CONST. amend. XIV, § 1.
and the unconstitutionality of irrational state discrimination against the disabled.\footnote{383}

Similarly, authorized treaty interpreters have understood omnibus terms or phrases in several human rights treaties to interdict tacitly, but nonetheless surely, all school corporal punishment.\footnote{384} The Convention on the Rights of the Child (hereinafter the Children’s Convention)\footnote{385} contains multiple omnibus terms from which the interdiction has been inferred as reasonably within these terms’ ordinary meanings.\footnote{386}

\footnote{383. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (plurality opinion).}
\footnote{384. For a detailed and comprehensive study of the treaties and their interpretations showing school (and other) corporal punishment of children to be a human rights violation, see BITENSKY, supra note 18, at 47–151.}
\footnote{386. See, e.g., Children’s Convention, supra note 385, at art. 19, \S\ 1 (prohibiting “all forms of physical . . . violence,” in addition to “injury or abuse,” against children); id. at art. 28, \S\ 2 (requiring
Article 28, paragraph 2 takes pride of place in this regard. The provision enunciates that "States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child’s human dignity and in conformity with the present Convention." On its face, the provision makes no reference to "corporal punishment," "spanking," or an idiomatically equivalent synonym. Article 28, paragraph 2 instead speaks to generic “school discipline,” an omnibus phrase broad enough in its ordinary meaning to cover the gamut of school disciplinary tactics. So, how do we know whether article 28 is proscribing corporal punishment when it demands that school discipline must not offend the child’s dignity or the Convention?

Article 28, without more, seems to put the uninitiated on an Escherian analytical staircase leading nowhere or who-knows-where. The treaty drafters, however, were not as enthralled with “wandering around in enigmas” as the artist. The Children’s Convention repeatedly guarantees the child’s human dignity and these guarantees have been repeatedly construed to foreclose corporally punishing children. The rest of the Convention abounds with omnibus provisions, in addition to article 28, which have also been interpreted to implicitly forbid corporal punishment of children. This profusion is homogeneous with

that school discipline must be compatible with the child’s human dignity and the rest of the Children’s Convention); id. at art. 37, ¶ (a) (outlawing the perpetration against children of torture or other cruel, inhuman or degrading treatment or punishment).

387. Id. at art. 28, ¶ 2.


389. E.g., Children’s Convention, supra note 385, at pmbl., art. 37, ¶ (c), art. 39.

390. E.g., Children’s Committee General Comment No. 8, supra note 384, ¶¶ 2, 5, 7, 16–17, 21–22, 26–27; Children’s Committee General Comment No. 1, supra note 384, at art. 29(1), ¶ 8.

391. E.g., Children’s Convention, supra note 385, at art. 19, ¶ 1 (interdicting all types of physical violence against children); id. at art. 37, ¶ (a) (prohibiting subjection of children to other cruel, inhuman or degrading treatment or punishment); id. at art. 39 (stipulating that states parties must take all appropriate measures to further the physical and psychological recovery of children who have been the victims of any form of cruel or degrading treatment and requiring that the recovery must occur in an environment fostering the child’s dignity); id. at art. 24, ¶ 3 (outlawing traditional practices prejudicial to children’s health).

the overarching and central object and purpose of the Children’s Convention which is to protect children from physical violence, of which corporal punishment is a subspecies.393

Naturally, the dilemma of how much credibility to give these interpretations depends upon who is doing the interpreting. As most Americans unfortunately are by now aware, a clever attorney or politician may even cast doubt on what “is” is.394 In any event, the interpretations described above suffer from no credibility problems, absurd or otherwise. For, they are the work of the Committee on the Rights of the Child (hereinafter the Children’s Committee), the official body created by the Children’s Convention to monitor treaty compliance and interpret treaty terms.395

It is true that many international law scholars tend to regard such monitoring committee emanations—usually embodied in General Comments or Concluding Observations396—as “soft” law, sans binding force.397 Without getting into an extended discourse on this aspect of


395. Children’s Convention, supra note 385, at art.43.


397. See JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 48 (2005) (describing the legal positivist view that the only sources of international law are listed in article 38 of the Statute of the International Court of Justice and that pronouncements by international organizations (like treaty monitoring committees) are not on that list); RICHARD B. LILLCHEL ET AL., INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 136 (4th ed. 2006) (referring to non-treaty international instruments as soft law that is “not legally binding”).
international law, suffice it to say that there are at least five reasons to treat these committee interpretations as dispositive. First, even as so-called soft-law, monitoring committee interpretations are considered by many scholars to be “authoritative” and “significant” and to carry “great weight.” This is as it should be inasmuch as the Children’s Committee, as per Children’s Convention mandate, must consist of “experts of high moral standing and recognized competence in the field” covered by the Convention. It is difficult to conceive of who else would be so knowledgeable and trustworthy in elucidating the Convention’s full meaning. Second, the legal traction of the General Comments and Concluding Observations against corporal punishment of children is magnified by their great volume and unwavering consistency. Third, the principle contained in General Comments and Concluding Observations against corporal punishment of children has been reiterated and developed by international human rights law scholars’ published works some of which, under the Statute of the International Court of Justice, may be deemed a source of “hard” law. Fourth, because human rights treaties typically lack “teeth,” in


400. Children’s Convention, supra note 385, at art. 43, ¶ 2.


404. See ALVAREZ, supra note 397, at 47 (describing the “doctrine of sources” of international
terms of enforceability, the difference between nonbinding General Comments and Concluding Observations and treaty law is close to, if not actually, illusory, i.e., enforceability problems with committee interpretations are no reason to demote them to a lesser legal stature than treaties. Fifth, some international law experts maintain that the “soft law” nomenclature for documents like General Comments is becoming outmoded inasmuch as such monitoring committee interpretations are increasingly serving the vital function of spelling out what cryptic treaty language means. Their idea is that, over the past fifty-five years, monitoring committee pronouncements have become an exponentially proliferating phenomenon on the verge of transitioning to a “hard” law equivalency.

Finally, perhaps the time has come to challenge the conventional wisdom that international law’s prohibition on corporal punishment is of the “soft” persuasion. Article 19, paragraph 1 of the Children’s Convention makes no bones about directing states parties to protect the child from “all forms of physical . . . violence.” Hitting is a form of physical violence. Corporal punishment is a form of hitting. Therefore, corporal punishment is a form of physical violence. The syllogism is self-evident, and not dependent on a Committee interpretation of article 19. Thus, article 19’s interdiction of such punishment may, after all, be unmediated treaty law and quite as “hard” as the many express treaty bans, for example, on the juvenile death penalty.

Leaving nothing to chance, the Children’s Committee has issued General Comments emphatically and explicitly declaring that Children’s Convention article 28, paragraph 2, as well as other provisions of the Convention, forbids all school corporal punishment. General Comment No. 8, which is titled, “The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (Articles 19; 28, para. 2; and 37, inter alia),” states in no uncertain terms:

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405. Dinah Shelton, Commentary and Conclusions, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 449–63 (Dinah Shelton ed., 2000), reprinted in LISICH ET AL., supra note 397, at 137, 142 (pointing out that while states comply with non-binding human rights norms only some of the time, they also comply with binding human rights norms only some of the time as well).

406. Id. at 139, 141–42.

407. See ALVAREZ, supra note 397, at 49, 596–601.

408. Children’s Convention, supra note 385, at art. 19, ¶ 1.


410. Children’s Committee General Comment No. 8, supra note 384, ¶¶ 18–21; Children’s Committee General Comment No. 1, supra note 384, at art. 29(1), ¶ 8.

411. Children’s Committee General Comment No. 8, supra note 384.
18. Article 37 of the Convention requires States to ensure that “no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.” This is complemented and extended by article 19, which requires States to “take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse,... while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.” There is no ambiguity: “all forms of physical or mental violence” does not leave room for any level of legalized violence against children. Corporal punishment and other cruel or degrading forms of punishment are forms of violence and States must take all appropriate legislative, administrative, social and educational measures to eliminate them.

20. Article 19 and article 28, paragraph 2, do not refer explicitly to corporal punishment.... But the Convention, like all human rights instruments, must be regarded as a living instrument, whose interpretation develops over time. ...

21. ... [I]t is clear that [corporal punishment] directly conflicts with the equal and inalienable rights of children to respect for their human dignity and physical integrity.

While there are hundreds of Concluding Observations promulgated by the Children’s Committee of the same import, General Comment No. 8 is quoted at length, not only to show the Committee’s utter lack of

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412. *Id.* ¶¶ 18, 20–21.


hesitation in classifying corporal punishment of children as a violation of the Children’s Convention, but also to convey the Committee’s analytical acumen and sense of responsibility in interpreting the treaty on this issue. Nor does the Children’s Convention, via its Committee, stand alone in designating the punishment to be a human rights violation. Paragraphs 22-25 of General Comment No. 8\(^{414}\) present a lawyerly recitation of those other human rights treaties that roundly condemn, via their respective monitoring committees, this disciplinary tactic regardless of where or how it is employed or who the punisher may be.\(^{415}\)

\(^{414}\) Children’s Committee General Comment No. 8, supra note 384, ¶¶ 22-25.

\(^{415}\) Paragraphs 22 through 25 of Children’s Committee General Comment No. 8 provide as follows:

22. The Committee emphasizes that eliminating violent and humiliating punishment of children, through law reform and other necessary measures, is an immediate and unqualified obligation of States parties. It notes that other treaty bodies, including the Human Rights Committee, the Committee on Economic, Social and Cultural Rights and the Committee Against Torture have reflected the same view in their concluding observations on States parties’ reports under the relevant instruments, recommending prohibition and other measures against corporal punishment in schools, penal systems and, in some cases, the family. For example, the Committee on Economic, Social and Cultural Rights, in its general comment No. 13 (1999) on “The right to education” stated: “In the Committee’s view, corporal punishment is inconsistent with the fundamental guiding principle of international human rights law enshrined in the Preambles to the Universal Declaration and both Covenants: the dignity of the individual . . .”

23. Corporal punishment has also been condemned by regional human rights mechanisms. The European Court of Human Rights, in a series of judgements, has progressively condemned corporal punishment of children, first in the penal system, then in schools, including private schools, and most recently in the home. The European Committee of Social Rights, monitoring compliance of member States of the Council of Europe with the European Social Charter and Revised Social Charter, has found that compliance with the Charters requires prohibition in legislation against any form of violence against children, whether at school, in other institutions, in their home or elsewhere.

24. An Advisory Opinion of the Inter-American Court of Human Rights, on the Legal Status and Human Rights of the Child (2002) holds that the States parties to the American Convention on Human Rights “are under the obligation . . . to adopt all positive measures required to ensure protection of children against mistreatment, whether in their relations with public authorities, or in relations among individuals or with non-governmental entities.” The Court quotes provisions of the Convention on the Rights of the Child, conclusions of the Committee on the Rights of the Child and also judgements of the European Court of Human Rights relating to States’ obligations to protect children from violence, including within the family. The Court concludes that “the State has the duty to adopt positive measures to fully ensure effective exercise of the rights of the child.”

25. The African Commission on Human and Peoples’ Rights monitors implementation of the African Charter on Human and Peoples’ Rights. In a 2003 decision on an individual communication concerning a sentence of “lashes” imposed on students, the Commission found that the punishment violated article 5 of the African Charter, which prohibits cruel, inhuman or degrading punishment. It requested the relevant Government to amend the law, abolishing the penalty of lashes, and to take appropriate measures to ensure
It is worth identifying some of the other treaties to which General Comment No. 8 refers;\textsuperscript{416} even a cursory review of them manifests that the international community’s recognition of corporal punishment of children as a human rights violation is ubiquitous. An implicit absolute ban on the punishment exists in the International Covenant on Civil and Political Rights,\textsuperscript{417} the International Covenant on Economic, Social and Cultural Rights,\textsuperscript{418} and the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.\textsuperscript{419} This is by no means an exhaustive list.\textsuperscript{420}

It should be clarified that, though the United States has ratified some of the above-named treaties and not others,\textsuperscript{421} its status as a state party is compensation of the victims. In its decision, the Commission states: "There is no right for individuals, and particularly the Government of a country to apply physical violence to individuals for offences. Such a right would be tantamount to sanctioning State-sponsored torture under the Charter and contrary to the very nature of this human rights treaty." The Committee on the Rights of the Child is pleased to note that constitutional and other high-level courts in many countries have issued decisions condemning corporal punishment of children in some or all settings, and in most cases quoting the Convention on the Rights of the Child.

\textit{Id. [22–25 (internal footnotes omitted).}

\textsuperscript{416} Children’s Committee General Comment No. 8, \textit{supra} note 384, ¶¶ 22–25.


For a detailed and fully supported analysis of this Covenant’s provisions which have been interpreted to ban corporal punishment of children, see BITENSKY, \textit{supra} note 18, at 76–78, 80–81, 95–97, 99, 102, 107–08.


For a thorough and fully supported analysis of this Covenant’s provisions which have been interpreted to proscribe corporal punishment of children, see BITENSKY, \textit{supra} note 18, at 76–78, 112–15.


For an extended and fully documented analysis of this Convention’s provisions which have been construed to forbid corporal punishment of children, see BITENSKY, \textit{supra} note 18, at 76–78, 80–87.


For analyses of how each of the above-mentioned treaties interdicts corporal punishment of children, see BITENSKY, \textit{supra} note 18, at 76–78, 80–95, 99–99, 101–12.

\textsuperscript{421} Of the human rights treaties referred to in the text above, the United States has ratified the International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. \textit{See} University of Minnesota Human Rights Library, Ratification of International Human Rights Treaties—USA, http://www1.umn.edu/humanrts/research/ratification-USA.html (last visited Apr. 3, 2009) (showing U.S. ratification of the Covenant and of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment).
irrelevant for purposes of this Article. These treaties are, rather, invoked as evidence of international legal norms and, therefore, of modern standards of decency on school corporal punishment, in keeping with the Eighth Amendment jurisprudence of Atkins, Roper, and earlier Supreme Court precedents.422

A survey of the domestic laws of other countries is of a piece with international human rights laws prohibiting this punishment. As of this writing, twenty-four nations have completely barred all corporal punishment of children, regardless of who dispenses it, how lightly or in what venue.423 The pace of this abolitionism has been rapidly accelerating since 1995, as the following graph424 illustrates:

One hundred and three nations presently completely bar corporal punishment of children in the schools, a solid majority of the world’s countries.425 Embarrassingly, that figure includes all of the major industrialized democracies except areas of Australia and twenty-two states in the United States.426 Because the U.S. Supreme Court, in previous Eighth Amendment cases, has been exceedingly sensitive to

422. See supra notes 165, 213, 254 and accompanying text.
424. Id.
426. Id.
laws and customs of the United Kingdom as evincing modern standards of decency, 427 it is no minor thing that school corporal punishment is illegal in that country as well. 428

The international concordance against school corporal punishment appears, on balance, to be on a par with the Atkins Court's summation that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." 429 In Roper, however, the Court had before it even more evidence of an international consensus abhorring the juvenile death penalty than currently prevails against corporal punishment of schoolchildren. 430 The Roper Court additionally could find reassurance in the fact that there are indisputably express treaty provisions banning the juvenile death penalty. 431 And, in Roper, the Court was placed in the unpalatable position of taking cognizance that, by 2005, the United States was the only country in the world that officially sanctioned the juvenile death penalty. 432

At first glance, the showing of an international consensus against the juvenile death penalty in Roper appears stronger than the international denunciation of school corporal punishment. But, a less superficial examination reveals the difference, in the final analysis, to be insubstantial. To recapitulate, there is a plethora of authoritative interpretations that the ordinary meanings of multiple omnibus terms, in multiple treaties, embrace a prohibition on corporal punishment of children, including that dispensed in the schools. 433 These interpretations have been accepted by a growing number of international law scholars who have reiterated the substance of them and thereby facilitated their ongoing elevation into hard law. 434 Finally, although the United States is certainly not the only country in the world where some school corporal punishment is still lawful, it is absonant in a minority that cannot boast a single other democratic world-class power. 435 This said, it should be noted that the Supreme Court has often posited that a punishment's legal rank in the international arena does not control the Eighth Amendment's

427. See supra notes 258–60 and accompanying text.
431. Id. at 576.
432. Id. at 575.
433. See supra notes 384–86 and accompanying text.
434. See supra notes 402–04 and accompanying text.
435. See supra notes 423–28 and accompanying text.
That school corporal punishment is anathema under international human rights law and the domestic laws of a majority of nations, including the United Kingdom, is an eloquent testament to modern standards of decency under the measures employed in Atkins and Roper. When combined with the overwhelming American consensus against school corporal punishment, the Court should find that modern standards of decency and corporal punishment of public schoolchildren are irreconcilable and mutually exclusive phenomena.

b. Application of the Third Criterion

That leaves the last analytical hurdle—the third criterion—under Eighth Amendment doctrine: the Court must bring to bear its own independent judgment on whether school corporal punishment passes muster under the Eighth Amendment Cruel and Unusual Punishments Clause. It is, frankly, not immediately obvious how the Court should proceed. When the Court brought its independent judgment to bear in Atkins, Roper, and Kennedy, it was not charting new territory inasmuch as the Justices had done the same in earlier death penalty cases. But, there is no similar line of school corporal punishment cases which previously tasked the Court in this manner. Ingraham foreclosed the development of such precedent.

Nevertheless, because public school corporal punishment and the death penalty are both variants of governmentally administered bodily punishment, the features of which call for similar Eighth Amendment treatment, the Court’s exercise of its separate judgment in Atkins, Roper, and Kennedy should logically afford an adaptable paradigm in the same

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437. See supra notes 425–28 and accompanying text.
438. See supra notes 313–14, 366–72 and accompanying text.
440. Kennedy, 128 S. Ct. at 2657–65; Roper, 543 U.S. at 564, 568–75; Atkins, 536 U.S. at 312–13, 318–21.
442. It will be recalled that the Ingraham Court precluded the development of any precedents on how the Cruel and Unusual Punishments Clause applies to public school corporal punishment, by holding that the Clause cannot ever apply to such punishment. Ingraham v. Wright, 430 U.S. 651, 671 (1977).
443. See supra notes 178–85 and accompanying text.
way that the trilogy’s analysis of standards of decency does. The alternative or as a supplement to the Atkins-Roper-Kennedy paradigm, Trop v. Dulles suggests another possible approach to exercising independent judicial discretion. This approach may be particularly attractive because Trop does not involve the death penalty, but, instead, turns on the constitutionality under the Eighth Amendment of a punishment, like school paddling, dispensed outside of the criminal justice system.

It should be recalled that the Atkins-Roper-Kennedy paradigm requires the Justices to answer certain inquiries constitutive to determining whether the challenged punishment is proportional to the crime. Does inflicting the death penalty on a designated cohort serve the penalty’s judicially recognized social purposes of deterrence, retribution, or both? Does the designated cohort have reduced capacity or culpability? And, do cohort members face a special risk of wrongful execution? If the Court answers at least the first question in the affirmative, then it probably should adjudge the punishment to infringe the Amendment, regardless of anyone else’s views on the subject.

The approach laid out in Trop v. Dulles to exercising independent judicial judgment is more nebulous than the Atkins-Roper-Kennedy model. Trop was an Eighth Amendment action against the congressionally decreed punishment of denaturalization imposed on one who had already served a judicial sentence. The Justices in Trop had, on the one hand, not yet self-consciously fashioned a distinctly unique role for themselves in deciding which punishments overstep the Amendment, apart from objective indicia of modern standards of

444. See supra notes 159–66 and accompanying text.
446. Id. at 88 (describing the punishment in issue as a congressionally authorized loss of U.S. citizenship, subsequent to conviction and sentencing by a court).
447. See supra notes 167–73 and accompanying text.
449. At 72–74; Atkins, 536 U.S. at 320–21.
450. Kennedy, 128 S. Ct. at 2662–64; Roper, 543 U.S. at 572–74; Atkins, 536 U.S. at 320–21.
451. In the trilogy cases, the Court has always asked and answered the first of the three questions set forth in the text above. See Kennedy, 128 S. Ct. at 2661–62; Roper, 543 U.S. at 571–72; Atkins, 536 U.S. at 318–20. Whether the Court inquires into either of the other two questions set forth in the text above has depended on whether the circumstances of a particular suit make the question probative on the proportionality issue. See, e.g., Kennedy, 128 S. Ct. at 2645–65 (failing to discuss whether child rapists have reduced capacity or culpability).
453. Id. at 88.
decency. On the other hand, the Trop plurality concomitantly conveyed the hazy notion that the courts could not decide cases under the Cruel and Unusual Punishments Clause by the simple expedient of unthinkingly bowing to modern standards of decency; indeed, the opinion for the Court provides an extended discussion as to why its authors found the challenged denaturalization to violate the Clause, a discussion preceding and discrete from the Court's excursus on modern standards of decency. The Justices explained that, to their way of thinking, denaturalization results in "the total destruction of the individual's status in organized society" and divests him or her of "the right to have rights." They elaborated that these repercussions rendered denaturalization an affront to the dignity of man, a core concept animating the Eighth Amendment. The Trop Court may be said to have, in effect, created a "dignity of man" standard to inform its own judgment on whether such denaturalization sank to the level of cruel and unusual punishments. The Court has subsequently, though unpredictably and with varying degrees of emphasis, recurred to this standard in bringing its unadorned judgment to bear under the Amendment, sometimes in tandem with proportionality analysis.

454. Id. at 99–104 (setting forth the relevant analysis under the Cruel and Unusual Punishments Clause without distinguishing a unique role for the Court apart from assessing objective evidence that the contested punishment is an affront to human dignity); see Matthew E. Albers, Note, Legislative Deference in Eighth Amendment Capital Sentencing Challenges: The Constitutional Inadequacy of the Current Judicial Approach, 50 CASE W. RES. L. REV. 467, 470–72, 487–89, 497–500 (1999) (describing Gregg v. Georgia, 428 U.S. 153 (1976), as the first case where the Court devised a test allocating to itself independent judgment, beyond consensus review, as to whether the penalty in a given context violates the Eighth Amendment).


456. Id. at 101.

457. Id. at 102.

458. Id.

459. Id. at 100; see Maxine D. Goodman, Human Dignity in Supreme Court Constitutional Jurisprudence, 84 NEB. L. REV. 740, 772–78 (2006) (pointing to the many Eighth Amendment cases in which the Court has paid homage to human dignity as integral to the Amendment's meaning, but criticizing the Court for only paying lip service to the concept); Judith Resnik & Julie Chi-hye Suk, Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty, 55 STAN. L. REV. 1921, 1935 (2003) (averring that human dignity has been at the heart of the Eighth Amendment's protections).


It is the thesis of this Article that in determining to its own satisfaction whether public school corporal punishment contravenes the Clause, the Court should use either the Atkins-Roper-Kennedy paradigm, the Trop standard, or a combination thereof. Selecting from among these three possibilities would be sufficiently consistent with stare decisis and, for the reasons stated below, eminently practicable and jurisprudentially fruitful.462 It is submitted that under any of the three the Court should, based on the most recent reliable scientific evidence463 as well as philosophical scruples about corporal punishment of children,464 invalidate the punishment in the public schools. This Article contends that, in fact, there is no conceivable standard which would enable the Court to independently find this punishment within the Eighth Amendment’s compass.

It should be acknowledged that there is a dearth of scientific studies directly examining the effects of school corporal punishment on children.465 This lacuna, however, is substantially bridged by psychologists’ clinical observations of466 and theoretical work on such effects,467 by scientific studies indirectly testing for such effects,468 and

462. See infra notes 463–562 and accompanying text.
463. See infra notes 465–98 and accompanying text.
464. See infra notes 534–62 and accompanying text.
467. E.g., HYMAN, HICKORY STICK, supra note 134, at 1–127; Owen, supra note 465 at 87–88 (suggesting that school corporal punishment is a factor inducing psychological injury in those who were so punished); cf. PHILIP GREVEN, SPARE THE CHILD: THE RELIGIOUS ROOTS OF PUNISHMENT AND THE PSYCHOLOGICAL IMPACT OF PHYSICAL ABUSE passim (1991) (theorizing as to corporal punishment’s negative effects on children in a variety of contexts).
468. E.g., J. Csorba et al., Family- and School-Related Stresses in Depressed Hungarian Children, 16 EUR. PSYCHIATRY 18, 25 (2001) (finding that an association exists between school corporal punishment and subsequent child depression); Maria R. Czumbil & Irwin A. Hyman, What Happens when Corporal Punishment Is Legal?, 12 J. INTERPERSONAL VIOLENCE 309, 312 (1997) (relying upon newspaper reports of school corporal punishment to deduce that abusiveness of such punishment increases with the frequency of its use); Daniel J. Flannery et al., Violence Exposure, Psychological Trauma, and Suicide Risk in a Community Sample of Dangerously Violent Adolescents, 40 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 435, 440 (2001) (publishing results of a correlational study of children subjected to violence “in the home, neighborhood, and school”); Society for Adolescent Medicine, supra note 32, at 388 (reporting on studies showing that school corporal punishment creates
by the recent proliferation of scientific studies concerning the effects of parental corporal punishment,\textsuperscript{469} some of which can legitimately be extrapolated to the school setting.\textsuperscript{470}

The anecdotal and theoretical literature in the psychology field is, without mincing words, almost totally damning of school corporal

an educational environment which is "unproductive" and "nullifying" and which has negative psychological impacts on pupils); cf. Harriet L. MacMillan et al., \textit{Slapping and Spanking in Childhood and Its Association with Lifetime Prevalence of Psychiatric Disorders in a General Population Sample}, 161 CAN. MED. ASS'N J. 805, 809 (1999) (presenting the results of a cross-sectional study of corporal punishment of children dispensed by "any adult").

\textsuperscript{469}  E.g., Julie L. Crouch & Leah E. Behl, \textit{Relationships Among Parental Beliefs in Corporal Punishment, Reported Stress, and Physical Child Abuse Potential}, 25 CHILD ABUSE & NEGLECT 413, 417 (2001) (demonstrating that parental corporal punishment of children is often the prelude to severe physical child abuse); Heather L. Bender et al., \textit{Use of Harsh Physical Discipline and Developmental Outcomes in Adolescence}, 19 DEV. & PSYCHOPATHOLOGY 227, 238-41 (2007) (finding parental corporal punishment to be correlated with children's ensuing deteriorating mental health); Elizabeth Thompson Gershoff, \textit{Corporal Punishment by Parents and Associated Child Behaviors and Experiences: A Meta-Analytic and Theoretical Review}, 128 PSYCHOL. BULL. 539, 543-44 (2002) [hereinafter Gershoff, \textit{Meta-Analytic Review}] (finding that parental corporal punishment is associated with at least ten negative outcomes for the recipients: decreased moral internalization, increased child aggression, increased child delinquent and antisocial conduct, decreased quality of the parent-child relationship, decreased child mental health, and increased risk of undergoing classic physical child abuse, and upon reaching adulthood, increased adult aggression, increased adult criminal and antisocial behavior, decreased adult mental health, and increased risk of abusing one's own child or spouse); Elizabeth Thompson Gershoff, \textit{Corporal Punishment, Physical Abuse, and the Burden of Proof: Reply to Baumrind, Larzelere and Cowan (2002), Holden (2002), and Parke (2002)}, 128 PSYCHOL. BULL. 602, 609 (2002) (observing that the "current state of the field" is that at worst parental corporal punishment may have destructive consequences for children and at best no effect whatsoever); Joseph T.F. Lau et al., \textit{The Relationship Between Physical Maltreatment and Substance Use Among Adolescents: A Survey of 95,788 Adolescents in Hong Kong}, 37 J. ADOLESCENT HEALTH 110, 111, 115-18 (2005) (finding an association between parental corporal punishment and later alcohol and drug use in the children hit); N. L. Lopez et al., \textit{Parental Disciplinary History, Current Levels of Empathy, and Moral Reasoning in Young Adults}, 3 N. AM. J. PSYCHOL. 193, 200-01 (2001) (concluding that young adults who had been subject to minor use of corporal punishment were apt to have low levels of empathy); Prahbhjot Malhi & Munni Ray, \textit{Prevalence and Correlates of Corporal Punishment Among Adolescents}, 46 STUDIA PSYCHOLOGIA 219, 224-25 (2004) (discovering that adolescents whose parents corporally punished them had lower overall adjustment, especially at home and school); Elizabeth A. Stormshak et al., \textit{Parenting Practices and Child Disruptive Behavior Problems in Early Elementary School}, 29 J. CLINICAL CHILD PSYCHOL. 17, 18, 26 (2000) (reporting that parental spanking is correlated with aggressive child behavior); Zvi Strassberg et al., \textit{Spanking in the Home and Children's Subsequent Aggression Toward Kindergarten Peers}, 6 DEV. & PSYCHOPATHOLOGY 445, 456-59 (1994) (showing that parental corporal punishment contributes to aggression in children regardless of the frequency of the punishment); Murray A. Straus, \textit{New Evidence for the Benefits of Never Spanking}, 38 SOC'Y 52, 54-55 (2001) (analyzing that parental corporal punishment is correlated with increased childhood antisocial behavior, increased probability of corporally punished children assaulting parents, and increased likelihood that corporally punished boys will later assault a girlfriend).

\textsuperscript{470}  E-mail from Dr. Elizabeth Gershoff, Assistant Professor, School of Social Work, University of Michigan, to Susan H. Bitensky, Professor of Law, Michigan State University College of Law (Sept. 1, 2004) (on file with author); see Society for Adolescent Medicine, \textit{supra} note 32, at 389-90 (noting that Gershoff's meta-analyses are a basis for admonishing teachers to refrain from corporally punishing students).
punishment. The explanation for this lies in the experts’ determination that school corporal punishment has only one fleeting positive effect while giving rise to a host of potential negative effects. The sole positive outcome of hitting a child for disciplinary purposes is that he or she will probably cease misbehaving. This, without more, would seem to counsel putting a paddle in every classroom, front and center and near at hand. But, as usual, the devil is in the details. It turns out that the cessation of misbehavior is ephemeral and teaches the child nothing of lasting import. Some experts have theorized that the only reason a child, upon being spanked, stops misbehaving at all is that he or she is momentarily outraged. It appears that corporal punishment accomplishes little except, perhaps, to give a weary and exasperated adult an opportunity to vent or to provide a short respite from a child’s trying conduct. While it is perfectly understandable that an adult attempting to manage an unruly child may need to let off steam or take a break, these are not disciplinary goals. This “positive” outcome is of extremely dubious, if not fanciful, value.

On the other side of the equation, corporal punishment risks harming children in so many serious ways as to sink the scales against the rod to bathyal depths. It is no surprise to learn that striking a child may easily result in physical injuries such as abrasions and hematomas. There have also been reports of whiplash, sciatic nerve damage, fracture

471. E.g., Hyman, Reflections, supra note 466, at 818; Owen, supra note 465, at 87–88; cf. Kline, supra note 466 (advising that childhood corporal punishment in unspecified venues caused fear of contact sports in some people).


473. Hyman et al., supra note 472, at 79; Hyman, Reflections, supra note 466, at 820.

474. Cf. Sears & Sears, supra note 30, at 150 (describing the child’s incensed feelings upon being hit by a parent as motivating temporary cessation of misbehavior); SAL SEVERE, HOW TO BEHAVE SO YOUR CHILDREN WILL, TOO! 139 (2000) (surmising that the child temporarily halts his or her misconduct, when hit by a parent, due to anger).

475. BITENSKY, supra note 18, at 2; MICHAEL J. MARSHALL, WHY SPANKING DOESN’T WORK: STOPPING THIS BAD HABIT AND GETTING THE UPPER HAND ON EFFECTIVE DISCIPLINE 107–09 (2002); Society for Adolescent Medicine, supra note 32, at 389.

476. See, e.g., Ingraham v. Wright, 430 U.S. 651, 657 (1977) (adverting to the fact that school paddling of one of the petitioners caused a hematoma); P.B. v. Koch, 96 F.3d 1298, 1299–1300, 1304 (9th Cir. 1996) (ruling that a high school principal violated students’ substantive due process rights in using corporal punishment on them which produced bruising, among other harms); Society for Adolescent Medicine, supra note 32, at 389 (noting that reported medical findings of the injuries caused by school corporal punishment include hematomas and abrasions).

477. Society for Adolescent Medicine, supra note 32, at 389.

478. Spencer, supra note 465, at 47.
of the sacrum, and hemorrhaging, to name just a few of the more alarming physical injuries suffered by corporally punished children.

Damage possibly to life and not infrequently to limb or skin, however, only begins to tell the tale. School corporal punishment is also correlated with increased childhood depression, increased childhood aggression, increased likelihood of childhood posttraumatic stress disorder, decreased childhood self-esteem, and reduced childhood self-control. Nor is this an exhaustive list.

Although parental corporal punishment is outside the scope of this Article, its effects on children are not. That is because the effects are thought to be largely reproduced by school corporal punishment and because parental corporal punishment, unlike school paddling, has been subject to considerable rigorous scientific study. A 2002 ground breaking meta-analytic review, covering eighty-eight studies conducted from 1938 to 2000, concerns links between parental corporal punishment and ensuing behaviors and syndromes in the punished children. The review establishes that parental physical punishment is associated with the following negative psychological and educational

479. Id.
480. Id.
481. IRWIN A. HYMAN & PAMELA A. SNOOK, DANGEROUS SCHOOLS: WHAT WE CAN DO ABOUT THE PHYSICAL AND EMOTIONAL ABUSE OF OUR CHILDREN 48 (1999); Hilarski, supra note 472, at 61; Society for Adolescent Medicine, supra note 32, at 388; but see Spencer, supra note 465, at 131 (claiming no connection exists between school corporal punishment and student depression).
482. HYMAN & SNOOK, supra note 481, at 48; Anthony F. Bongiovanni, An Analysis of Research on Punishment and Its Relation to the Use of Corporal Punishment in the Schools, in CORPoreal PUNISHMENT IN AMERICAN EDUCATION 351, 365-66 (Irwin A. Hyman & James H. Wise eds., 1979); Hilarski, supra note 472, at 61; Society for Adolescent Medicine, supra note 32, at 388.
483. Spencer, supra note 465, at 49, 52; Owen, supra note 465, at 88; Society for Adolescent Medicine, supra note 32, at 388.
484. HYMAN & SNOOK, supra note 481, at 48; Hyman et al., supra note 472, at 79; Hyman, Reflections, supra note 466, at 819; Society for Adolescent Medicine, supra note 32, at 388-89.
485. Society for Adolescent Medicine, supra note 32, at 388.
487. See supra notes 469-70 and accompanying text.
488. See id.
outcomes: decreased moral internalization, increased child delinquent and antisocial conduct, decreased quality of the parent-child relationship, decreased child mental health, and increased risk of undergoing classic physical child abuse, and, upon reaching adulthood, increased adult aggression, increased adult criminal and antisocial behavior, decreased adult mental health, and increased risk of abusing one's own child or spouse.  

Several aspects of these data merit neon highlighting. In an era when schools in the United States are sporadically scenes of devastating gun violence perpetrated by students, the heightened childhood aggression and antisocial behavior that may also be spurred by school corporal punishment should rivet our undivided attention. The dynamic by which hitting children may make them more aggressive or delinquent is subject to conjecture, but many experts offer the common sense explanation that adult physical chastisement of youngsters models violent problem-solving. When that chastisement is meted out in an educational institution by an educator, there is a “lesson” that is learned and it is quite contrary to any sane pedagogical aim. Furthermore, school corporal punishment may actually impair rather than foster the child’s development of a conscience, a central objective of all child discipline. It is the child’s inner controls that keep him or her out of mischief when adults are not present and that eventually grows the moral backbone to sustain an honorable adulthood.

It should, for accuracy’s sake, be underscored that the data prove that parental corporal punishment of children is correlated with the above-

490. Id. For more recent studies with one or more findings consistent with those listed by Professor Gershoff, see for example: Tracie O. Afifi et al., Physical Punishment, Childhood Abuse and Psychiatric Disorders, 30 CHILD ABUSE & NEGLECT 1093, 1094, 1099 (2006); Bender et al., supra note 469, at 238–41; Andrew Grogan-Kaylor, Corporal Punishment and the Growth Trajectory of Children’s Antisocial Behavior, 10 CHILD MALTREATMENT 283, 290–91 (2005); but see Elizabeth Oddone Paolucci & Claudio Violato, A Meta-Analysis of the Published Research on the Affective, Cognitive, and Behavioral Effects of Corporal Punishment, 138 J. PSYCHOL. 197, 214–15 (2004) (demonstrating that parental corporal punishment carries only “a small, and perhaps negligible, increased risk” of resulting in children’s emotional and behavioral problems).


493. Gershoff, Meta-Analytic Review, supra note 469, at 543–44; see Society for Adolescent Medicine, supra note 32, at 388 (positing that school corporal punishment of children sends “the wrong message, one of avoidance . . . from getting caught”); cf. Bear et al., supra note 486, at 63–64 (observing that punitive discipline of schoolchildren tends to foster a “hedonistic perspective” rather than moral reasoning).
described adverse impacts; the data do not show that such punishment *causes* these impacts. In other words, the experts know that some children who are corporally punished will be adversely affected by it, but that other similarly situated children who cannot be identified in advance, will emerge from the punishment unscathed.\textsuperscript{494} One could, therefore, imagine skeptics charging that this lack of predictability disables any claim that corporal punishment damages children with sufficient regularity or in large enough numbers to outweigh even its negligible efficacy.

The response to such criticism is that where adults or persons of all ages are in an analogous predicament, i.e., where their risk is unpredictable and imprecise, the government, private industry, and the medical profession are quick to formulate policy against or remove the source of the risk.\textsuperscript{495} There is no reason why children should not be entitled to the same solicitousness if they alone are put at risk. Two examples should suffice to dramatize the proposition. Several years ago, the U.S. Food and Drug Administration (FDA) advised against ingestion of Baycol, an anticholesterol medication, due to strong but inconclusive evidence of noxious side effects.\textsuperscript{496} The agency approved of the manufacturer's withdrawal of Baycol from the American market, in spite of the inconclusive evidence, because there were other anti-cholesterol drugs available that did not have these side effects.\textsuperscript{497} One would hope that the FDA's approach of barring Baycol would be equally applicable to spanking children, assuming that policymakers have as much regard for children as they do for adults with elevated cholesterol. Another apt parallel concerns smoking. Not everyone who smokes will get cancer or other life-threatening illnesses, but the fact that some smokers will be stricken is enough to make physicians

\textsuperscript{494} For an extended discussion about the fact that most relevant studies show only correlative rather than causative relationships between corporal punishment of children and the behavioral and psychological outcomes for those children, see BITENSKY, supra note 18, at 10, 11 & nn.55, 59. Indeed, experts purposefully shun experimental (causative) studies of spanking children because of ethical concerns about subjecting children to physical pain when there is no established benefit from doing so. E-mail from Dr. Joan Durrant, Associate Professor, Head of Family Studies, University of Manitoba, to Susan Bitensky, Professor of Law, Michigan State University College of Law (Oct. 9, 2002) (on file with author).


\textsuperscript{496} See U.S. FOOD AND DRUG ADMIN., supra note 495. The analogy of corporal punishment to Baycol was developed by Professor Murray A. Straus.

\textsuperscript{497} Id.
discourage all of their patients from lighting up.\textsuperscript{498} Again, one would hope that policymakers would care enough for children, who after all do not paddle themselves, as for adults and adolescents who, voluntarily and with fair warning, take up smoking.

If the Court were to apply the \textit{Atkins-Roper-Kennedy} paradigm in exercising its independent judgment on the constitutionality of school corporal punishment under the Eighth Amendment, it would be incumbent upon the Court to apply the foregoing data in answering the three inquiries comprising proportionality review.\textsuperscript{499} With respect to the first inquiry as to whether school corporal punishment serves the penological or social purposes of deterrence or retribution,\textsuperscript{500} the paddle is no better off, constitutionally speaking, than the death penalty for the mentally retarded, juveniles, or child rapists. There is no published scientific evidence that paddling deters the unpaddled from mimicking other students' disobedience. In fact, the evidence is all the other way; statistics show that schools which relinquish corporal punishment experience no rise in student misconduct.\textsuperscript{501} Conversely, states which continue to retain legalized school corporal punishment also happen to be the states that experience the highest incidence of school shooting fatalities.\textsuperscript{502} It is thought, too, that spanking students destroys rather than preserves a classroom atmosphere conducive to the learning process.\textsuperscript{503} From a more individualistic and less institutional perspective, it appears that corporal punishment may interfere with children's cognitive development,\textsuperscript{504} and that even watching corporal punishment of other

\textsuperscript{498} See Tobaccodocuments.org, \textit{supra} note 495. To my knowledge, the analogy of corporal punishment of children to cigarette smoking was first drawn by Professor Murray A. Straus.

\textsuperscript{499} See \textit{supra} notes 311, 444, 447, 451 and accompanying text.

\textsuperscript{500} See \textit{id.}


\textsuperscript{502} Doreen Arcus, \textit{School Shooting Fatalities and School Corporal Punishment: A Look at the States}, 28 AGGRESSIVE BEHAVIOR 173, 180-82 (2002); \textit{see also} Society for Adolescent Medicine, \textit{supra} note 32, at 389 (indicating that some research shows that the more corporal punishment is used in schools, the higher is the rate of student violence).

\textsuperscript{503} Society for Adolescent Medicine, \textit{supra} note 32, at 388 (stating that school corporal punishment introduces "trepidation . . . [and a lost] sense of confidence and security" in the classroom, such that even children who only witness others being paddled "are robbed of their full learning potential"); \textit{see also} Bear et al., \textit{supra} note 486, at 64 (reporting that supportive relations between teachers and students, as opposed to the antagonism to which punitiveness contributes, enhances the latter's academic prowess); \textit{cf.} Andero \& Stewart, \textit{supra} note 486, at 94 (pointing out that school corporal punishment may inspire tardiness, truancy, or dropping out of school, undermining "the very basic principle of education which is you cannot educate an absent child").

\textsuperscript{504} \textit{See HYMAN, HICKORY STICK, supra} note 134, at 96, 99 (stating that approximately seventy percent of those students with traumatic stress symptoms related to having been corporally punished at school, have problems with academic performance); Straus, \textit{supra} note 469, 55-56 (offering evidence
children may be deeply disturbing so as to induce child witnesses to experience their own adverse psychological reactions.\textsuperscript{505} Under these circumstances, there is plenty of detriment to students but no discernible deterrence of misbehavior.

The social purpose of retribution does not travel well from the gallows to the schoolhouse. Retribution against noncompliant students should have no place in a modern elementary or secondary school. Educators, even when in disciplinary mode, should be educating, not taking vengeance. Avenging a student’s misdeeds is not a pedagogical purpose.\textsuperscript{506}

The second inquiry, as to whether the recipients of a punishment are of diminished capacity or culpability when they are children, has already been answered by the Court in \textit{Roper v. Simmons}.\textsuperscript{507} In pursuing an Eighth Amendment proportionality review of the juvenile death penalty, \textit{Roper} ruled that children are, by their very nature, beings of diminished culpability in comparison to normal adults.\textsuperscript{508} The Court relied upon scientific and sociological studies to identify those facets of children’s nature which produce this phenomenon.\textsuperscript{509} The facets, wrote the Court, are that children, generally speaking, have an “underdeveloped sense of responsibility,” often leading them into reckless behaviors;\textsuperscript{510} they have a heightened susceptibility to negative outside influences such as unwholesome peer pressure;\textsuperscript{511} and their characters are not fixed, but rather, more of a work in progress.\textsuperscript{512}

Of course, these traits are present in children whether they are facing the death penalty or school corporal punishment. The traits’ significance in the former situation is that, when children commit crimes, reduced culpability makes the death penalty a disproportionate punishment for

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that corporal punishment of young children may weaken the foundations for cognitive development so that these children will continue to have difficulties with cognitive skills later in childhood).

\textsuperscript{505} See HYMAN, HICKORY STICK, supra note 134, at 78–79 (theorizing that a child’s witnessing of school corporal punishment may lead to his or her development of stress disorders); Society for Adolescent Medicine, \textit{supra} note 32, at 388 (claiming that child witnesses of school corporal punishment “are robbed of their full learning potential”).

\textsuperscript{506} RONALD G. MORRISH, WITH ALL DUE RESPECT: KEYS FOR BUILDING EFFECTIVE SCHOOL DISCIPLINE 63 (2000); see THOMAS LICKONA, EDUCATING FOR CHARACTER: HOW OUR SCHOOLS CAN TEACH RESPECT AND RESPONSIBILITY 110–11, 131 (1991) (arguing for schools to use “moral discipline” that does not rely extensively on external controls or punitiveness).

\textsuperscript{507} 543 U.S. 551, 569–72 (2005).

\textsuperscript{508} Id.

\textsuperscript{509} Id. at 569–70.

\textsuperscript{510} Id. at 569 (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

\textsuperscript{511} Id.

\textsuperscript{512} Id. at 570.
this type of perpetrator.\textsuperscript{513} The traits' significance in the latter situation is most apparent when corporal punishment's adverse effects on children are taken into account in light of the \textit{Roper} Court's concern for giving children the opportunity to mature and profit from rehabilitation efforts.\textsuperscript{514} It should be recollected that some of the adverse effects of paddling recited above are seriously damaging to personality development and may persist when the punished child reaches adulthood.\textsuperscript{515} Hence, these effects may not only mar the quality of life during childhood, but may also warp child development irretrievably so that the child is thwarted from fulfilling his or her potential, emotionally or intellectually.\textsuperscript{516} The constitutional dimensions of this dynamic are brought to the fore by the \textit{Roper} Justices' desideratum that the state must not destroy the child's "potential to attain a mature understanding of his [or her] own humanity."\textsuperscript{517} Although this principle was enunciated with respect to the juvenile death penalty, it should be just as applicable to the hobbling psychological outcomes of school corporal punishment.

Respecting the third inquiry, whether schoolchildren are in peril of being wrongfully corporally punished, the data about the punishment's negative effects can give rise to only one inference. If, and it was previously shown to be so, corporal punishment accomplishes no real, defensible purpose,\textsuperscript{518} but does have a range of heinous impacts on some children,\textsuperscript{519} then punishing students in this way is a wrong, and a cruel one at that. The wrong is aggravated by the fact that school personnel may resort to an array of nonviolent techniques for disciplining children which do not appear to threaten the latter's well-being but which are more effective than corporal punishment.\textsuperscript{520} These techniques include

\begin{itemize}
\item \textsuperscript{513} Id. at 571–75.
\item \textsuperscript{514} Id. at 573–74.
\item \textsuperscript{515} \textit{See supra} notes 489–90 and accompanying text.
\item \textsuperscript{516} \textit{See id.}
\item \textsuperscript{517} \textit{Roper}, 543 U.S. at 574.
\item \textsuperscript{518} \textit{See supra} notes 500–06 and accompanying text.
\item \textsuperscript{519} \textit{See supra} notes 476–90 and accompanying text.
\end{itemize}
deprivation of privileges, reasoning, negotiation and meditation, in-school suspension, parent pick-up, letting a student suffer the logical consequences, within reason, of his or her naughtiness, Saturday schooling, restitution, and detention. Less austere measures include providing a character education curriculum, enlisting the assistance of school psychologists and counselors, contracting with students for better conduct, and engaging in peer mediation.

Pursuant to the Atkins-Roper-Kennedy paradigm, then, school corporal punishment should meet with the Justices' ready censure under the Eighth Amendment. The punishment does not aid deterrence, should not aid retribution, and cannot but aid in wrongdoing the nation's youth. This analytical approach, though, does not exhaust the Court's options. In the alternative or as a supplementary technique in exercising independent judicial judgment regarding school corporal punishment under the Amendment, the Court could also invoke the Trop standard that governmentally imposed punishments may not run roughshod over human dignity. The concept of "human dignity" admits of several shades of meaning. Webster's Dictionary defines "dignity" as "the quality or state of being worthy, honored, or esteemed." This aggregation of synonyms, while not unhelpful, may be too


522. See Power & Hart, supra note 521, at 91, 94, 100 (advising "educative procedures" to foster children's development of a sense of right and wrong).

523. See id. at 112-13 (promoting negotiation and mediation processes for disciplinary purposes as used in Philippine schools).

524. JONES, supra note 520, at 298–300; Center for Effective Discipline, Alternatives, supra note 520; Owen, supra note 465, at 89.

525. Center for Effective Discipline, Alternatives, supra note 520.


527. Owen, supra note 465, at 89.

528. Center for Effective Discipline, Alternatives, supra note 520.

529. Id.

530. HYMAN ET AL., supra note 520, at 18–19; Center for Effective Discipline, Alternatives, supra note 520.

531. Center for Effective Discipline, Alternatives, supra note 520.

532. WOLFGANG, supra note 520, at 196; Owen, supra note 465, at 89.

533. Hilarski, supra note 472, at 70; Center for Effective Discipline, Alternatives, supra note 520.

534. See supra notes 452–60 and accompanying text.

impressionistic for purposes of legal analysis, without further explication. What, after all, does it really mean to be worthy, honored, or esteemed?

Immanuel Kant’s discourses on human dignity mine the phrase with more intellectual rigor. He conceived that humanity is only humanity and the bearer of dignity if human beings are ends in themselves; existing as a mere means to someone else’s ends is a degradation. In contrast to his meditations on human dignity in general, Kant was very much a man of his time (the eighteenth century) when it came to disciplining children, at least insofar as he assumed physical punishment was de rigeur. This fact does not, however, require the modern reader to regress two hundred or so years and refrain from applying Kant’s concept of dignity to disciplining children in the twenty-first century. Kant himself acknowledged that children too must be treated as the bearers of dignity, even though he apparently did not stop to consider whether corporal punishment of children could undermine that dignity. “The child’s duties... consist in his being conscious that man possesses a certain dignity, which ennobles him above all other creatures, and that it is his duty so to act as not to violate in his own person this dignity of mankind.” Furthermore, Kant stated, it is quite against the child’s dignity “to be cringing in one’s behaviour to others.” The Supreme Court has, on occasion, described human dignity as an intact feeling of personhood, an insight dovetailing with the Kantian construct of dignity as person cherished for being person. One commentator has added the interesting gloss that assertions of “raw power” trample human dignity, or personhood, underfoot.

This Article’s definition of corporal punishment of children and description of the ill effects thereof, make a potent case that such punishment invades children’s dignity. Inasmuch as this discipline is gratuitous use of physical force upon a child so as to cause somatic pain, the punishment necessarily discounts the child’s personhood. He or she becomes a convenient means to the adult punisher’s ends of unleashing pent-up anger or procuring a short respite from student

538. Id. at 101 (emphasis omitted).
539. Id.
541. Id. at 168.
542. See supra notes 489–90 and accompanying text.
intransigence. For the punisher, the child’s pain and trauma are inconsequential to this process; any cringing before the upraised paddle is considered, if noticed at all, to be merely incidental. Children’s degradation appears to have reached its limit when a society ignores corporal punishment’s toxic effects, including the punishment’s perverse interference with children’s development of conscience, and chooses instead to perpetuate irrational brute force—raw power—as pedagogy. As one perceptive student of the human heart has stated, “[t]here is a moment in the history of every beaten child when his mind parts with hopes of dignity—pushes off hope like a boat without a rower, and lets it go as it will on the stream, and resigns himself to the tally stick of pain.”

The argument that school corporal punishment constitutes an indignity takes on particular pathos when viewed historically across society. It is telling that the groups of people, besides children, who have endured legalized corporal punishment have been enslaved or extremely oppressed. The experience of slaves in the antebellum South is vividly emblematic. Slaveholders were endowed with the prerogative of physically coercing their African American “property”; the slaveholders were most partial to whipping to enforce submission. The abuse did not cease with the Emancipation Proclamation or the Thirteenth Amendment. During the Reconstruction era that followed

543. See supra notes 474–75 and accompanying text.
544. See id.
545. See supra notes 489–90 and accompanying text.
549. See FONER, supra note 548, at 78; Swinney, supra note 548, at 36–37.
550. Proclamation No. 17, 12 Stat. 1268, 1269 (1863) (declaring that slaves “henceforward shall be[] free”).
551. U.S. CONST. amend. XIII, § 1 (stating that “[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction”).
the Civil War, vigilante groups like the Ku Klux Klan took advantage of the complicity and fear of local authorities to intimidate freedmen, their families, and sympathizers with a reign of terror. The persecutors had a weakness for tradition, most often cracking the whip to get their message across. The bloodletting became so rampant that Congress ultimately enacted a series of statutes in an effort to protect Blacks and their supporters from the unrelenting corporal punishment.

This glimpse at the past is not intended to imply that children in the United States effectively are, regardless of legal niceties, slaves. Rather, the point is that, like the slaves, sailors, and prisoners of yore, American children can still be corporally punished with impunity, including many students at school. It is only our children who continue to have this dubious distinction. Such discrimination, especially when set in the foreground of the historical tableau, raises a perturbing question: Has legalized corporal punishment of children persisted through the ages by an antecedent inequity in the way societies have regarded children? When, for instance, educators paddle students, do they, unwittingly presume that the children are not full-fledged members of the human race, not fully human, because all other members enjoy legal protection from paddling? It would seem so, for otherwise these adults would assuredly not feel free to do to their young


553. "[W]hipping was the most common form of violence" used by the Ku Klux Klan in resisting Reconstruction. Robert J. Kaczmarski, The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866–1876, at 53–54 (1985). "[O]ver the course of two and one-half centuries corporal punishment became an accepted mode of dealing with incorrigible Negroes. Following the war it would be difficult to forswear the use of such a proven remedy for insolence and insubordination." Swinney, supra note 548, at 37. In the newly defeated South, corporal punishment of Blacks remained a "habit [] so inveterate with a great many persons as to render, on the least provocation, the impulse to whip a negro almost irresistible." Carl Schurz, Report on the Condition of the South, in Speeches, Correspondence and Political Papers of Carl Schurz 279, 316 (Frederic Bancroft ed., 1913).


555. Glenn, supra note 11, passim.

556. See supra notes 11–12 and accompanying text.

557. Bitensky, supra note 18, at 6–8.

558. For work propounding the notion that many societies have viewed children as the property of their parents, see, for example, John C. Holt, Escape from Childhood: The Needs and Rights of Children 18, 26, 39, 47–48 (1974); Mary Martin McLaughlin, Survivors and Surrogates: Children and Parents from the Ninth to the Thirteenth Centuries, in The History of Childhood, supra note 547, at 101, 140; Barbara Bennett Woodhouse, Hatching the Egg: A Child-Centered Perspective on Parents' Rights, 14 Cardozo L. Rev. 1747, 1810–12 (1993).
charges that which cannot be done legally to anyone else, i.e., physically attack the children. If school personnel corporally punish students, then there is a sense in which the students temporarily partake of the subhuman; they are stripped of their personhood and shorn of their human dignity.559

The sorrow of children's dehumanization by corporal punishment is scandalously exacerbated for African American students. Black children in this country are recipients of a disproportionate amount of school corporal punishment.560 The figures are staggering. Statistics for the 2003-2004 academic year show that Black students were hit in school at a rate that is more than twice their numbers in society at large.561 This is an allocation of school corporal punishment evocative of the violent racism that once ravaged the American body politic. It is essentially a holdover from slavery and from slavery's ugly legacy of racial discrimination,562 and thus a particularly grave insult to African American students' human dignity.

Ergo, when the Court brings its independent judgment to bear on whether public school corporal punishment violates the Eighth Amendment's Cruel and Unusual Punishments Clause, the way seems straight and clear. Under either the Atkins-Roper-Kennedy paradigm, the Trop standard of dignity, or both, it is to be expected that the Justices' respective lucubrations should lead them to a collective preference for invalidation of the schoolhouse scourge. This would be truly principled judging, above the tug of ideology or politics. It would be an act of judicial courage, born not of preconceived conviction, but, rather, of following where law and facts inevitably lead.

In sum, the component parts of Eighth Amendment analysis are in such alignment that no astrologer could dare to hope as much for his stars. More than a substantial majority of Americans want paddles out of classrooms and off of children's bodies.563 The people and governments


560. OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF EDUC., 2004 CIVIL RIGHTS DATA COLLECTION (2007), http://vistademo.beyond2020.com/ocr2004rv30/xls/2004Projected.html; E-mail from Elizabeth Gershoff, Assistant Professor, School of Social Work, The University of Michigan, to Susan H. Bitensky, Professor of Law, Michigan State University College of Law (Mar. 12, 2008) (on file with the author) (interpreting the data from the Office of Civil Rights as showing that Black students are two and a half times more likely to receive school corporal punishment than White students).

561. Id.

562. See Bitensky, Section 1983, supra note 559, at 371 (referring to antebellum abolitionists' view that corporal punishment of slaves and children was an expression of the chattel status of both).

563. See supra notes 358 and accompanying text.
of most other nations agree.\textsuperscript{564} International law teaches that school corporal punishment is a human rights violation.\textsuperscript{565} Given recent scientific findings and longstanding ethical concerns, the Justices of the Supreme Court have every reason to see the punishment as violating the Eighth Amendment as well. In any future relitigation of school corporal punishment under the Amendment, the rule of law should impel the Court to overturn \textit{Ingraham v. Wright}\textsuperscript{566} and outlaw the punitive use of bodily force on children in the public schools.

V. Conclusion

In making the legal case against public school corporal punishment under the Eighth Amendment’s Cruel and Unusual Punishments Clause, these pages represent a valiant, if not always successful, attempt to avoid preying upon readers’ natural empathy for children or making other appeals to emotion. The normative conclusions contained herein are meant to be limited to those required by the Eighth Amendment’s analytical framework.

But throughout there lurks a pressing and emotionally charged question that defies satisfaction with a legal job hopefully well done. It is a question that whispers provocatively to us from Nelson Mandela’s insight that “[t]here can be no keener revelation of a society’s soul, then [sic] the way it treats its children.”\textsuperscript{567} Who, in the end, are we? Are we a people who sincerely care for children? I do not mean only the children we have given birth to or adopted, but, rather, children \textit{en masse}. These are, compared to normal adults, the most vulnerable among us. What kind of people, speaking through their high Court, deprives children when they are in school of the Eighth Amendment’s protective mantle—a mantle under which even the most callous convict can shelter?\textsuperscript{568}

The Constitution can be likened to a mirror. “We the People”\textsuperscript{569} look into it and see ourselves as a national entity, reflected. The passage of over three decades since the \textit{Ingraham} decision is long enough to realize that, as the fairy tale puts it, we perhaps are not “the fairest . . . of [them] all.”\textsuperscript{570} Fortuitously, dispassionate legal analysis under the Eighth

\begin{itemize}
\item \textsuperscript{564} See supra notes 423, 428 and accompanying text.
\item \textsuperscript{565} See supra notes 375, 384–93, 410 and accompanying text.
\item \textsuperscript{566} 430 U.S. 651 (1977).
\item \textsuperscript{568} See supra notes 179, 308 and accompanying text.
\item \textsuperscript{569} U.S. CONST. pmbl.
\item \textsuperscript{570} The Internet Movie Database, Memorable Quotes for Snow White and the Seven Dwarfs
\end{itemize}
Amendment commands what common decency, self-respect, and a hunger for humaneness and justice seek—that when children go to school, their educators spare the paddle and teach that physical violence is, now more than ever, a poor solution to the difficulties of human relations.