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A Reassessment of Common Law Protections for "Idiots"

ABSTRACT. When the Eighth Amendment was ratified, common law protections categorically prohibited the execution of "idiots." On two occasions, the Supreme Court considered whether these protections proscribe executing people with intellectual disabilities; however, the Court concluded that idiocy protections shielded only the "profoundly or severely mentally retarded." This Note argues that the Court's historical analysis of idiocy protections was unduly narrow. It then proceeds to reassess common law insanity protections for idiots and finds strong evidence that these protections included people with a relatively wide range of intellectual disabilities. Based on this new historical account, this Note argues that there are people with intellectual disabilities on death row today who likely would have been protected from execution in 1791.

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INTRODUCTION

Today the United States is executing a group of people who were likely protected from such punishment in 1791. When the Eighth Amendment was ratified, categorical protections prohibited the execution of people described as "idiots" or "lunatics," collectively referred to as persons *non compos mentis*. As an initial definitional matter, it may be helpful to analogize "idiots" to people with intellectual disabilities (formerly called mental retardation) and "lunatics" to people with mental illness—although these analogies are certainly oversimplifications. In fact, the accuracy and scope of these transhistorical analogies are at the heart of this Note.

The Eighth Amendment expressly proscribes "cruel and unusual punishments,"[1] and this prohibition takes two forms. First, the Eighth Amendment prohibits those punishments that were considered "cruel and unusual" at the time of the Amendment's adoption.[2] Second, a punishment is "cruel and unusual" if it violates the "evolving standards of decency that mark the progress of a maturing society."[3]

Death penalty jurisprudence and scholarship focus almost exclusively on the latter formulation.[4] This is unsurprising—at least from an historical perspective. Eighteenth-century common law permitted the execution of felons,[5] and the Framers contemplated capital punishment in the Constitution.[6] The first Congress, for instance, adopted a statute authorizing the execution of

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1. U.S. CONST. amend. VIII.

2. *See* Ford v. Wainwright, 477 U.S. 399, 405 (1986).

3. *Id.* at 406 (citing Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).

4. I am aware of only two sources arguing for more expansive insanity protections based on eighteenth-century common law protections. However, these sources, unlike this Note, do not focus on idiocy; they do not discuss the inaccuracies of the Court's historical analysis in *Penry v. Lynaugh* and *Atkins v. Virginia*; and they do not provide similar prescriptive suggestions. *See* Brief Amici Curiae of Legal Historians in Support of Petitioner, Panetti v. Quarterman, 551 U.S. 930 (2007) (No. 06-647); Eric L. Shwartz, Penry v. Lynaugh*: "Idiocy" and the Framers' Intent Doctrine*, 16 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 315 (1990). The Brief of Legal Historians provides a strong, concise argument that Scott Panetti would have been considered a lunatic in 1791 and therefore protected from execution. This brief was influential in my research, and I am indebted to its authors: Paul Brand, Thomas A. Green, Stanley N. Katz, Eben Moglen, Jonathan Rose, and the late A.W. Brian Simpson.

5. *See* McGautha v. California, 402 U.S. 183, 197-202 (1971) (reviewing the common law history of executing individuals convicted of felonies).

6. Gregg v. Georgia, 428 U.S. 153, 177 (1976) ("It is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers."). Moreover, punishments such as branding, flogging, and mutilation were acceptable. *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 40 (1993).

seamen for theft of "any goods or merchandise to the value of fifty dollars."[7] In light of this well-known history, those who oppose the death penalty largely ignore the original public meaning of the Eighth Amendment and instead focus on "evolving standards of decency." As John Stinneford notes, "[t]he Court's nonoriginalists . . . have steadfastly refused even to consult the original intent of the Cruel and Unusual Punishments Clause."[8] As a result, Eighth Amendment jurisprudence has focused primarily on the "evolving standards of decency" and overlooked the common law's strong prohibition against the execution of people called "idiots."[9]

The Supreme Court has discussed common law insanity protections on three occasions: *Ford v. Wainwright*;[10] *Penry v. Lynaugh*;[11] and Justice Scalia's dissent in *Atkins v. Virginia*.[12] In *Penry* and Justice Scalia's dissent in *Atkins*, the Justices argued that common law protections for "idiots" protected only those who were "profoundly or severely retarded" and not those who were moderately or mildly mentally retarded.[13] This Note challenges that claim. It shows that both English and colonial common law rejected capital punishment for "idiots," and that the legal and public understanding of "idiocy" in 1791 was broader than the understanding proposed by the Court.

This Note proceeds in four parts. Part I frames the discussion by outlining common law notions of "cruel and unusual," the contours of the Eighth Amendment, and early insanity protections. Part II critiques the Supreme Court's historical analyses in *Penry* and *Atkins*, and shows that the Court relied

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7. An Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 8, 1 Stat. 114 (1790).

8. John Stinneford, *The Original Meaning of 'Unusual': The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1743 (2008).

9. Ideology may also play a role in this oversight. Originalism, as a modality of constitutional interpretation, is generally associated with ideological conservatism. *See* Keith E. Whittington, *Is Originalism Too Conservative?*, 34 HARV. J.L. & PUB. POL'Y 29, 29 (2011) ("Originalism as an approach to constitutional theory and constitutional interpretation is often associated with conservative politics."). And conservatives are less likely to oppose the death penalty than liberals. *See* Lydia Saad, *U.S. Death Penalty Support Stable at 63%: Decade-Long Decline in Support After 2001 Seen Mostly Among Democrats*, GALLUP (Jan. 9, 2013), http://www.gallup.com/poll/159770/death-penalty-support-stable.aspx [http://perma.cc/DGZ8-TYTT]. This misalignment of interpretive modality and death penalty support may have contributed to the legal community's longstanding neglect of idiocy protections. Other possible reasons – the thin historical record and the academy's general lack of interest in intellectual disability – are discussed in the introduction to Part III.

10. 477 U.S. 399 (1986).

11. 492 U.S. 302 (1989).

12. 536 U.S. 304 (2002) (Scalia, J., dissenting).

13. *Penry*, 492 U.S. at 305, 333.

on post-ratification disability models (such as eugenic and phrenological models) to construct a narrow definition of "idiocy." When the Court did use pre-ratification sources, it selectively quoted or relied on atypical cases. Part III reassesses common law insanity protections for "idiots," finding that notions of "idiocy" were not limited to those who were "profoundly or severely" mentally retarded; instead, "idiocy" encompassed a relatively wide range of intellectual disabilities. Most notably, this Part demonstrates that colonial and early American legal scholars relied on Matthew Hale's test to determine criminal liability for "idiots": people whose mental abilities were below those of an ordinary child of fourteen were not liable for felony or treason.[14] Part IV explores how this historical reassessment might affect contemporary death penalty litigation. Relying on the fourteen-year-old rule, it appears that a subset of the prisoners on death row with intellectual impairments would likely have qualified as "idiots" in 1791 and therefore should be exempted from execution today.

There are two important prefatory comments. First, the historical language in this Note—like the terms "idiot" and "lunatic"—likely sound jarring to the reader. And they should. The contemporary meanings of these words are heavily laden with a painful history of mistreatment and marginalization of people with intellectual disabilities and mental illness.[15] Unfortunately, due to the historical nature of this inquiry, it is necessary to use the terms from the relevant eras to avoid anachronism. Replacing the word "idiot" with the phrase "intellectual disability" would obscure the historical question that this Note seeks to answer: namely, *who* was considered an "idiot" and thereby afforded special protections at the end of the eighteenth century?

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14. *See* 1 SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 30 (William S. Hein & Co. 2007) (1736).

15. For more information on the impact of pejorative labels on people with intellectual disabilities, see, for example, Soeren Palumbo & Tim Shriver, *What's Wrong with 'Retard'?*, HUFFINGTON POST: BLOG (Mar. 6, 2013, 11:34 AM), http://www.huffingtonpost.com/soeren-palumbo/spread-the-word-to-end-the-word_b_2819328.html [http://perma.cc/3PPA-H6YS] (highlighting the comments of Jonathan Franklin Stephens, a self-advocate and author with Down syndrome: "So, what's wrong with 'retard'? I can only tell you what it means to me and people like me when we hear it. It means that the rest of you are excluding us from your group. We are something that is not like you and something that none of you would ever want to be. We are something outside the 'in' group. We are someone that is not your kind.").

    For an academic analysis of the transition from the phrase "mental retardation" to "intellectual disability," see Robert L. Shalock et al., *The Renaming of* Mental Retardation*: Understanding the Change to the Term* Intellectual Disability, 45 INTELL. & DEVELOPMENTAL DISABILITIES 116 (2007). Also note that the Supreme Court recently transitioned to the phrase "intellectual disability." *See* Hall v. Florida, 134 S. Ct. 1986, 1990 (2014) ("Previous opinions of this Court have employed the term 'mental retardation.' This opinion uses the term 'intellectual disability' to describe the identical phenomenon.").

Fidelity to the historical language is particularly necessary when studying idiocy because the subject contains an elusive and unstable vocabulary. As historian Patrick McDonagh notes, "[a]nyone wanting to understand the history of the idea of intellectual disability and its various genealogical precursors, such as idiocy, must contend with the slipperiness of the key terms . . . . With concepts as slippery as 'idiocy' and its kin, this task is imposing, but critical . . . ."[16] This slipperiness is inevitable as the vocabulary of idiocy expands and contracts in response to scientific, religious, and sociocultural factors. Instead of attempting to establish an exhaustive taxonomy of mental disability, this Note explains key terms as needed.

The second prefatory comment regards originalism. This Note argues that the original meaning of the "cruel and unusual" clause incorporates the common law prohibition against executing idiots. Furthermore, it argues that the public meaning of the term "idiot" captures a broader group of people than acknowledged by the Supreme Court in *Penry* and Justice Scalia's dissent in *Atkins*. To make this argument, this Note employs original meaning theories of constitutional interpretation, which ask what the constitutional text meant to a neutral reader at the time of adoption.[17] As Justice Scalia notes, this approach relies on the writings of "intelligent and informed people of the time" to understand "how the text of the Constitution was originally understood."[18] This task "requires immersing oneself in the political and intellectual atmosphere of the time—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day."[19] After determining how an "intelligent and informed" person understood the text in 1791, this Note proceeds to abstract "the constitutional principle away from the immediate expectations of the [F]ramers and [R]atifiers" in order to apply those principles today.[20] While this Note employs an originalist methodology, it does not enter the larger debate regarding the merits of originalism.[21]

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16. PATRICK MCDONAGH, IDIOCY: A CULTURAL HISTORY 5 (2008).

17. *See* William N. Eskridge Jr., *Original Meaning and Marriage Equality*, 52 HOUS. L. REV. 1067, 1074 (2015).

18. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 38 (Amy Gutmann ed., 1997).

19. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856-57 (1989).

20. Eskridge, *supra* note 17, at 1075 (citing JACK M. BALKIN, LIVING ORIGINALISM (2011)); Steven Calabresi & Livia Fine, *Two Cheers for Professor Balkin's Originalism*, 103 NW. U. L. REV. 663 (2009)).

21. Like work by John Stinneford, this Note proceeds from a modest set of assumptions:

I. FRAMING THE CONVERSATION

This Part frames the discussion by outlining three underlying premises. First, there are two ways in which a punishment may violate the Eighth Amendment: 1) it was considered "cruel and unusual" when the Eighth Amendment was adopted in 1791 (the original meaning approach);[22] or 2) it violates the "evolving standards of decency that mark the progress of a maturing society" (the evolving standards of decency approach). Second, because the Eighth Amendment incorporated the rights and protections afforded by English common law, the original meaning approach should investigate both English and colonial sources to determine the Amendment's meaning in 1791. Third, English and colonial common law considered it "cruel" to execute an insane person—a category that included idiots and lunatics.

A. The Two Ways in Which a Punishment May Violate the Eighth Amendment

The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[23] As discussed above, the Supreme Court has long held that there are two ways in which a punishment may violate the Cruel and Unusual Punishments Clause: first, if the punishment was considered "cruel and unusual" when the Amendment was adopted;[24] or second, if the punishment violates the "evolving stand-

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(1) that the original meaning of the text is relevant to constitutional interpretation, whatever one's position in the larger originalism/nonoriginalism debate; (2) that it is therefore worthwhile to seek to determine the original meaning of constitutional text where that meaning has previously been ignored or underdeveloped; and (3) that if one can determine the original meaning of the constitutional text, one should examine the effect one's conclusions may have on existing constitutional doctrine, particularly where the affected doctrinal area suffers from incoherence or instability—as does the Supreme Court's current Eighth Amendment jurisprudence.

Stinneford, *supra* note 8, at 1743-44.

22. Some scholars argue that this is not the "original meaning" approach but rather the "original expected application" approach. For a discussion of "original meaning" and "original expected application" see Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 293 (2007).

23. U.S. CONST. amend. VIII.

24. Ford v. Wainwright, 477 U.S. 399, 405 (1986) ("There is now little room for doubt that the Eighth Amendment's ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted."); Solem v. Helm, 463 U.S. 277, 286 (1983) ("Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English

ards of decency."[25] Initially, the Court primarily relied on the original meaning approach: the Court's earliest Eighth Amendment cases proceeded by "'looking backwards for examples by which to fix the meaning of the clause,' concluding simply that a punishment would be 'cruel and unusual' if it were similar to punishments considered 'cruel and unusual' at the time the Bill of Rights was adopted."[26] In 1878, the Court in *Wilkerson v. Utah* first indicated that the Amendment was not strictly tethered to eighteenth-century notions of cruelty.[27] The second approach was later recognized in 1958 in *Trop v. Dulles*, in which the Court held that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[28]

Since *Trop*, the Court has determined that either of these methods may show that a punishment violates the Eighth Amendment.[29] While subsequent death penalty litigation has focused almost exclusively on the evolving standards of decency, the Court never abandoned the original meaning approach. Indeed, on several occasions the Court reiterated the unconstitutionality of punishments that were considered cruel and unusual in 1791.[30] Moreover, the Court has consistently outlined a two-fold approach to its Eighth Amendment jurisprudence. Justice Scalia articulated this bifurcated approach as follows:

> Under our Eighth Amendment jurisprudence, a punishment is "cruel and unusual" if it falls within one of two categories: "those modes or acts of punishment that had been considered cruel and unusual at the

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counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection . . . .").

25. Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

26. Furman v. Georgia, 408 U.S. 238, 264 (1972) (Brennan, J., concurring) (citing Weems v. United States, 217 U.S. 349, 377 (1910)).

27. In *Wilkerson v. Utah*, the Court noted that "it is safe to affirm that punishments of torture, such as those mentioned by [Blackstone]" are cruel and unusual under the Eighth Amendment. 99 U.S. 130, 136 (1878). Because such punishment was permissible at the time of the Framing, this statement departed from a strict adherence to eighteenth-century notions of cruelty.

28. Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).

29. *See, e.g.*, Penry v. Lynaugh, 492 U.S. 302, 330-31 (1989); *Ford*, 477 U.S. at 405-08; *see also* Roper v. Simmons, 543 U.S. 551, 608 (2005) (Scalia, J., dissenting) (contrasting the "original meaning" approach and "evolving standards of decency" approach).

30. *See, e.g.*, *Penry*, 492 U.S. at 330 ("At a minimum, the Eighth Amendment prohibits punishment considered cruel and unusual at the time the Bill of Rights was adopted."); *Ford*, 477 U.S. at 405 ("There is now little room for doubt that the Eighth Amendment's ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted.").

> time that the Bill of Rights was adopted," and modes of punishment that are inconsistent with modern "standards of decency," as evinced by objective indicia, the most important of which is "legislation enacted by the country's legislatures."[31]

As these modes developed, the original meaning approach became recognized as a "constitutional floor." In *Ford v. Wainwright*, Justice Marshall stated that "[t]here is now little room for doubt that the Eighth Amendment's ban on cruel and unusual punishment embraces, *at a minimum*, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted."[32] While the evolving standards of decency are adaptable, the floor is not. The Eighth Amendment cannot provide less protection than it did in 1791.[33] In contrast to the floor set by the original meaning approach, the evolving standards of decency set the outer boundaries of Eighth Amendment protection. While there has been considerable debate regarding these outer boundaries, there is little discussion of the floor.[34] In Parts III and IV, this Note argues that the Court should restore the constitutional floor by enforcing the idiocy protections that existed when the Eighth Amendment was adopted. As discussed in more detail in Part IV, restoring the constitutional floor does not require abandoning the evolving standards of decency. The two methods can work in tandem.

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31. Atkins v. Virginia, 536 U.S. 304, 339-40 (2002) (Scalia, J., dissenting).

32. *Ford*, 477 U.S. at 405 (emphasis added).

33. This dual approach to Eighth Amendment jurisprudence seems to assume a Whiggish interpretation of history: the protections provided in 1791 serve as a constitutional "floor" because the progress of history inevitably moves toward greater liberty and enlightenment. The phrase "evolving standards of decency that mark the progress of a maturing society" seems to imply such a straightforward progression. However, this Note complicates that assumption. It shows that the "evolving standards of decency" do not protect certain offenders who likely were protected by the original meaning of the Eighth Amendment. For general information on the Whiggish view of history, see HERBERT BUTTERFIELD, THE WHIG INTERPRETATION OF HISTORY (1931).

34. *See, e.g.*, *Ford*, 477 U.S. at 405; *accord* Solem v. Helm, 463 U.S. 277, 286 (1983) ("Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection – including the right to be free from excessive punishments."); *see also* David L. Rumley, Comment, *A License To Kill: The Categorical Exemption of the Mentally Retarded From the Death Penalty*, 24 ST. MARY'S L.J. 1299, 1305 (1993) ("The exculpation of "idiots" from the death penalty has long been recognized and is now firmly ingrained in English and American common-law jurisprudence.").

B. The Common Law Roots of the Eighth Amendment

The Eighth Amendment's drafting history shows that the Framers intended to include the protections and rights established in English common law. The English Bill of Rights was enacted on December 16, 1689, and it stated that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[35] The Virginia Declaration of Rights incorporated the exact wording of the English Bill of Rights, and the Eighth Amendment, in turn, was directly based on the Virginia Declaration of Rights.[36]

The author of the Virginia Declaration of Rights, George Mason, explained his draftsmanship: "[w]e claim Nothing but the Liberties & Privileges of Englishmen, in the same Degree, as if we had still continued among our Brethren in Great Britain . . . . We have received [these rights] from our Ancestors, and, with God's Leave, we will transmit them, unimpaired to our Posterity."[37] Both the Supreme Court[38] and legal scholars[39] agree that by adopting this language, the Framers intended to guarantee at least those protections afforded under English law. In *Solem v. Helm*, the Court stated that "[a]lthough the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection . . . ."[40]

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35. An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown, 1 Wil. & Mar. 2d Sess., c. 2 (1689), *reprinted in* 8 ENGLISH HISTORICAL DOCUMENTS, 1660-1714, at 124 (Andrew Browning ed., 1953).

36. Furman v. Georgia, 408 U.S. 238, 242 (1972) (stating that the language of the Eighth Amendment was taken from the English Bill of Rights of 1689); ALLEN NEVINS, THE AMERICAN STATES DURING AND AFTER THE REVOLUTION: 1755-1789, at 146 (1924) (noting that the Declaration of Rights "was a restatement of English principles—the principles of Magna Charta, the Petition of Rights, the Commonwealth Parliament, and the Revolution of 1688").

37. Letter to the Committee of Merchants in London (June 6, 1766), *reprinted in* 1 THE PAPERS OF GEORGE MASON 71 (Robert Rutherland ed., 1970).

38. *Solem*, 277 U.S. at 285-86 ("When the Framers of the Eighth Amendment adopted the language of the English Bill of Rights, they also adopted the English principle of proportionality. Indeed, one of the consistent themes of the era was that Americans had all the rights of English subjects.").

39. *See, e.g.*, JOHN D. BESSLER, CRUEL & UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS' EIGHTH AMENDMENT 177 (2011) (arguing that adopting the verbatim language of the English Bill of Rights was intended to "ensure that Americans would enjoy the same rights as Englishmen").

40. *Solem*, 463 U.S. at 286.

The colonists were particularly faithful to English *criminal* law. While scholars note that colonists deviated from English law in some respects (forming "indigenous law"), this was generally not the case with criminal law.[41] When the colonists did deviate from English criminal law, they tended to move in the "direction of leniency" by "giving judges alternatives to the death penalty."[42] Because the Eighth Amendment incorporated the same protections as the English Bill of Rights, the following historical inquiry investigates the protections afforded to idiots in both English and colonial common law.[43]

C. It Was "Cruel" To Execute an Idiot

English common law considered it "cruel" to execute idiots, lunatics, and the insane. The term most commonly used to describe these protected groups was "*non compos mentis*" or simply "the insane."[44] In *Ford v. Wainwright*, Justice Marshall outlined the "impressive historical credentials" in English common law that prohibited the execution of the insane.[45] He surveyed the works of Edward Coke (1552-1634), Matthew Hale (1609-1676), John Hawles (1645-1716), William Hawkins (1673-1746), and William Blackstone (1723-1780) who described the execution of the insane as "savage and inhuman,"[46] a "miserable

41. *See, e.g.*, BRADLEY CHAPIN, CRIMINAL JUSTICE IN COLONIAL AMERICA, 1606-1660, at 7 (1983) ("In law concerning crimes against the person, the colonists heavily favored the English law . . . ."); *see also* JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 874-928 (2009) (providing an overview of the extent to which various colonial laws departed from English law in noncriminal matters, such as property, contract, tort, family law, and the law of slavery).

42. CHAPIN, *supra* note 41, at 8; *see also* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 33 (2005) ("Neither in theory nor in practice was colonial law very bloodthirsty. There were fewer capital crimes on the books than in England. In England, death was a possible punishment for many thieves; in Massachusetts, only for repeaters."); PETER CHARLES HOFFER, LAW AND PEOPLE IN COLONIAL AMERICA 113 (revised ed. 1998) ("Colonial criminal law followed the contours of English criminal law but was never as severe.").

43. The legal relationship between the North American colonies and England was quite complex. For an extended analysis, see HOFFER, *supra* note 42, at 1-26 (analyzing this relationship).

44. Beverly's Case, 4 Co. Rep. 123b, *in* 2 THE REPORTS OF SIR EDWARD COKE 568 (photo. reprint 2002) (1826) (defining *non compos mentis*). This schema was also cited by Matthew Hale and subsequent legal dictionaries. *See, e.g.*, 3 GILES JACOB, THE LAW-DICTIONARY: EXPLAINING THE RISE, PROGRESS, AND PRESENT STATE, OF THE ENGLISH LAW 370 (photo. reprint 2000) (T.E. Tomlins, ed. 1811).

45. *Ford*, 477 U.S. at 406.

46. *Id.* (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *24-25).

spectacle,"[47] and "of extreme inhumanity and cruelty."[48] This prohibition was effectively unwavering. As Justice Marshall noted: "We know of virtually no authority condoning the execution of the insane at English common law."[49]

The common law offered varying rationales for the prohibition on executing the insane: the practice "simply offends humanity"; it provides no general deterrence; it denies the condemned an opportunity to find peace with God; and "madness is its own punishment" (*"furiosus solo furore punitur"*).[50] Although Justice Marshall did not find a consistent justification, he nonetheless acknowledged the force of the prohibition because "whatever the reason of the law is, it is plain the law is so."[51] Since *Ford*, the Supreme Court has reaffirmed these protections. At the beginning of her historical analysis in *Penry*, Justice O'Connor confirmed that the common law protections for idiots and lunatics are "well settled."[52]

The protection for idiots in English common law carried over to the colonies. Scholars note that "[m]ost of the colonial law as well as the colonists' ways of thinking about idiocy originated in English common law and custom."[53] Moreover, as discussed in Part III, the prohibition on executing idiots

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47. *Id.* at 407 (citing 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 6 (London, W. Rawlins, 6th ed. 1680).

48. *Id.* (citing 3 COKE, *supra* note 47, at 6).

49. *Id.* Justice Marshall notes one aberration from this rule: Henry VIII enacted a law that required the execution of a man who committed treason, even if he fell mad. *Id.* at 408 n.1 (citing 33 Hen. VIII, c. 20). Justice Marshall notes that "[t]his law was uniformly condemned. The 'cruel and inhumane Law lived not long, but was repealed, for in that point also it was against the Common Law . . . .'" *Id.* (citations omitted) (quoting 3 COKE, *supra* note 47, at 6) (citing 4 BLACKSTONE, *supra* note 46, at *25; 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 35 (London, E. Rider 1736); 1 WILLIAM HAWKINS, A TREATISE OF PLEAS OF THE CROWN 2 (London, G.G. & J. Robinson, 7th ed. 1795)).

50. *Ford*, 477 U.S. at 407-08.

51. *Id.* at 408 (citing John Hawles, *Remarks on the Trial of Mr. Charles Bateman*, *in* 11 T.B. HOWELL, STATE TRIALS 474, 477 (London, T.C. Hansard 1811)).

52. Penry v. Lynaugh, 492 U.S. 302, 331 (1989) ("It was well settled at common law that 'idiots,' together with 'lunatics,' were not subject to punishment for criminal acts committed under those incapacities.").

53. Parnel Wickham, *Idiocy and the Law in Colonial New England*, 39 MENTAL RETARDATION 104, 104 (2001) [hereinafter Wickham, *Idiocy and the Law in Colonial New England*]; *see also* Parnel Wickham, *Idiocy in Virginia, 1616-1860*, 80 BULL. HIST. MED. 677, 677 (2001) [hereinafter Wickham, *Idiocy in Virginia*] ("The history of idiocy in America is firmly rooted in English interpretations of and responses to the problem."). Even scholars who oppose special capital protections for persons with intellectual disabilities concede the English and American common law protections for idiots. *See, e.g.*, Rumley, *supra* note 34, at 1305 ("The exculpation of 'idiots' from the death penalty has long been recognized and is now firmly ingrained in English and American common-law jurisprudence. The inherent point of disagreement,

was present in the primary legal resources upon which the Framers relied. Part III argues that it was "cruel" to execute an idiot; however, as an alternative originalist argument, one might also argue that it was "unusual" to do so.[54] Although the latter argument appears to hold promise, this Note does not pursue it.

II. A CRITIQUE OF THE HISTORICAL ANALYSES IN *PENRY* AND *ATKINS*

This Part critiques the Supreme Court's historical analyses in *Penry* and *Atkins*, which concluded that insanity protections for idiots protected only those who were "profoundly or severely mentally retarded." First, this Part shows that these opinions relied heavily on sources that postdate the adoption of the Eighth Amendment. Specifically, the Justices' definition of idiocy relied on sources influenced by eugenic and phrenological models of intellectual disability, both of which originated well after 1791. Second, when the Court did use sources from the relevant period, those sources were not representative of the treatment of idiocy at the time. The following critique aims to render explicit the post-ratification assumptions about disability that were projected onto the Eighth Amendment and to clear space for a new historical evaluation of idiocy protections.

A. *The Historical Findings of* Ford, Penry, *and* Atkins

The Supreme Court has discussed common law insanity protections three times: *Ford v. Wainwright*;[55] *Penry v. Lynaugh*;[56] and Justice Scalia's dissent in *Atkins v. Virginia*.[57] As discussed below, *Ford* addressed common law insanity protections generally and held that the Eighth Amendment prohibits the execution of the insane. *Penry* and Justice Scalia's dissent in *Atkins* addressed common law insanity protections for idiots in particular, and both opinions claimed that idiocy protections extended only to those who were profoundly or severely mentally retarded.

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however, arises in the determination of what level of mental disability constitutes 'idiocy' sufficient for exoneration from criminal responsibility.").

54. *See* Stinneford, *supra* note 8, at 1745 (showing that "unusual" meant "contrary to 'long usage' or 'immemorial usage'").

55. 477 U.S. 399 (1986).

56. 492 U.S. 302 (1989).

57. 536 U.S. 304 (2002) (Scalia, J., dissenting).

In *Ford v. Wainwright* a divided Supreme Court held that the Eighth Amendment prohibits the execution of people who are insane.[58] The defendant, Alvin Bernard Ford, was convicted of the 1974 murder of a police officer and was sentenced to death.[59] There was no indication that Ford was incompetent at the time of the offense, the trial, or the sentencing; however, he subsequently began to display signs of mental illness, such as delusions and paranoia.[60] In 1984, the Governor of Florida decided to proceed with Ford's execution after receiving conflicting reports on Ford's mental state.[61] Ford's counsel then unsuccessfully petitioned for habeas relief, seeking an evidentiary hearing to determine Ford's sanity.[62] After the Eleventh Circuit affirmed, the Supreme Court granted certiorari to "determine whether the Eighth Amendment prohibits the execution of the insane and, if so, whether the District Court should have held a hearing on petitioner's claim."[63]

As discussed in Part I.C, Justice Marshall surveyed the "impressive historical credentials" in the common law that prohibited the execution of the insane and found that these protections were unwavering. Notably, Justice Marshall did not attempt to discern *who* was included within the insanity protection: he made no effort to delineate and distinguish the type or degree of mental incompetence that would trigger the safeguards. Furthermore, Justice Marshall did not distinguish between the common law's different classifications for mental incompetence. Throughout his opinion, he interchangeably cites common law references to the insane, idiots, lunatics, the mad, and those of "nonsane memory."[64] In his concurrence, Justice Powell narrowed the holding by defining the "insane" as only those who are so disabled that they cannot perceive the connection between their crime and their punishment.[65] This narrow approach to insanity was subsequently adopted by most lower courts.[66]

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58. *Ford*, 477 U.S. at 401 ("For centuries no jurisdiction has countenanced the execution of the insane, yet this Court has never decided whether the Constitution forbids the practice. Today we keep faith with our common-law heritage in holding that it does.").

59. Ford v. Wainwright, 752 F.2d 526, 526 (11th Cir. 1985), *rev'd*, 477 U.S. 399 (1986).

60. *Ford*, 477 U.S. at 399.

61. *Id.* at 404.

62. *Id.*

63. *Id.* at 404-05.

64. *Id.* at 406-08.

65. *Id.* at 422.

66. SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 963 (9th ed. 2012) (noting that most jurisdictions today define insanity for purposes of execution along the lines endorsed by Justice Powell).

Three years later the Court addressed common law insanity protections again in *Penry v. Lynaugh*.[67] In *Penry*, the Court addressed a specific subset of defendants who invoke the insanity defense: people with mental retardation. In another divided decision, the Court held that the Eighth Amendment does not proscribe the execution of mentally retarded offenders but does require that juries be permitted to consider mental retardation as a mitigating factor.[68]

Johnny Paul Penry, was convicted of, and sentenced to death for, the rape and murder of Pamela Carpenter in 1979.[69] At a competency hearing, a clinical psychologist testified that Penry had organic brain damage and "had the mental age of a 6½ year-old, which means that 'he has the ability to learn and the learning or the knowledge of the average 6½ year old kid.'"[70] Penry's "social maturity" was reported as that of a nine- or ten-year-old.[71] Witnesses testified that Penry was incapable of learning in school (he never completed the first grade); he struggled for over a year to learn how to write his name; and he was often beaten over the head as a child.[72]

Writing for the Court, Justice O'Connor acknowledged that historical protections exempted idiots from execution; however, she claimed that these protections extended only to people who were "profoundly or severely retarded" and not to those who were moderately or mildly mentally retarded.[73] The historical evidence for this claim is closely examined and contested in Part II.B. While the central holding of *Penry* has since been overturned, this case remains the Court's most definitive analysis of common law insanity protections for idiots. Notably, for purposes of this discussion, none of the dissenting Justices provided a competing historical analysis.[74]

In 2002, the Supreme Court overruled *Penry* in *Atkins v. Virginia* and held that the Eighth Amendment categorically prohibits the execution of mentally retarded offenders.[75] Daryl Atkins was convicted and sentenced to death for the

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67. 492 U.S. 302 (1989), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002).

68. *Id.*

69. *Id.* at 307, 310 (quoting pretrial competency hearing).

70. *Id.*at 307-08.

71. *Id.* at 308.

72. *Id.* at 309.

73. *Id.* at 333.

74. In light of Justice Marshall's historical work only three years earlier in *Ford*, it is peculiar that he did not challenge Justice O'Connor's historical narrative.

75. 536 U.S. 304, 321 (2002) ("We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty. Construing and applying the Eighth Amendment in the light of our 'evolving standards of decency,' we therefore conclude that such punishment is excessive and that the Con-

abduction, robbery, and murder of Eric Nesbitt in 1996.[76] During the penalty phase, a forensic psychologist testified that Atkins had an IQ of fifty-nine and was "mildly mentally retarded," although the state's expert disputed this diagnosis.[77] In his majority opinion, Justice Stevens invoked the dissenting Justices of the Virginia Supreme Court, who concluded that it was impermissible to execute Atkins because he had a mental age between nine and twelve years.[78]

The Court's reasoning relied entirely on the "evolving standards of decency" and did not mention historical idiocy protections. Writing for the majority, Justice Stevens argued that the recent trend among state legislatures to ban the execution of mentally retarded offenders showed that the standards of decency were evolving.[79] Like Justice Marshall in *Ford*, Justice Stevens did not establish *who* was considered mentally retarded for the purposes of capital punishment. Instead, the Court left to the states "the task of developing appropriate ways to enforce the constitutional restriction."[80]

Justice Scalia's dissent in *Atkins* marks the last time the Supreme Court addressed common law insanity protections for idiots. Justice Scalia relied heavily on the historical analysis in *Penry*, adding only three new sources.[81] In step with *Penry*, he concluded that idiocy protections shielded only the "*severely* or *profoundly* mentally retarded."[82] Justice Scalia chided the majority for bypassing the original meaning approach and "making no pretense" that the execution of Atkins "would have been considered 'cruel and unusual' in 1791."[83]

These three cases comprise the entirety of the Court's analysis of common law insanity protections for idiots and lunatics. As discussed in the next section, these analyses—particularly from *Penry* and *Atkins*—are marked by serious historical flaws that render their findings unpersuasive.

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stitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." (citing Ford v. Wainwright, 477 U.S. 399, 405 (1986))).

76. *Id.* at 307.

77. *Id.* at 308-09.

78. *Id.* at 310 (citing Atkins v. Commonwealth, 534 S.E.2d 312, 321 (Va. 2000) ("[T]he imposition of the sentence of death upon a criminal defendant who has the mental age of a child between the ages of 9 and 12 is excessive . . . .")).

79. *Id.* at 314-17.

80. *Id.* at 317.

81. *Id.* at 340-41 (Scalia, J., dissenting). In addition to the sources in *Penry*, Justice Scalia added: SAMUEL J. BRAKEL ET AL., THE MENTALLY DISABLED AND THE LAW (3d ed. 1985); ANTHONY HIGHMORE, A TREATISE ON THE LAW OF IDIOCY AND LUNACY 2 (1822); and ISAAC RAY, A TREATISE ON MEDICAL JURISPRUDENCE OF INSANITY (Winfred Overholser ed., 1962).

82. *Atkins*, 536 U.S. at 340 (Scalia, J., dissenting).

83. *Id.*

B. Reliance on Disability Models That Postdate the Eighth Amendment

The primary problem with *Penry*'s historical analysis is that it never directly substantiates its central claim that idiocy protections were reserved for those who were "severely or profoundly retarded."[84] This omission is somewhat obscured by the semantics of idiocy. *Penry*'s claim is supported by sources that invoke the term "idiot"; however, these sources contain narrower definitions of idiocy that developed long after the adoption of the Eighth Amendment. Moreover, the sources on which the Court relies most heavily actually militate *against* the "profound and severe" theory.

Penry makes the "profound and severe" claim three times. The first two times have no citation to support the claim.[85] Only in the third instance does the Court provide a citation to support the "profound and severe" claim:

> In its emphasis on a permanent, congenital mental deficiency, the old common law notion of "idiocy" bears some similarity to the modern definition of mental retardation. Ellis & Luckasson, *supra,* at 417. The common law prohibition against punishing "idiots" generally applied, however, to persons of such severe disability that they lacked the reasoning capacity to form criminal intent or to understand the difference between good and evil. In the 19th and early 20th centuries, the term "idiot" was used to describe the most retarded of persons, corresponding to what is called "profound" and "severe" retardation today. See AAMR, Classification in Mental Retardation 179 (H. Grossman ed. 1983); *id.,* at 9 ("idiots" generally had IQ of 25 or below).[86]

This citation fails to support the Court's "profound and severe" claim for at least three reasons. First, the central claim that idiocy applied only to the most severely disabled is not supported by any pre-ratification source. Instead, the Court cites the *Classification in Mental Retardation* by the American Association on Mental Deficiency (AAMD) for the proposition that idiots correspond to "profound and severe" retardation and that they "generally had an IQ of 25 or below."[87] To provide some context: this characterization of idiocy protections, if true, suggests that most people with Down syndrome were likely not pro-

84. *Penry*, 492 U.S. at 305, 333.

85. *Id.* at 308, 333.

86. *Id.* at 332-33.

87. *Id.* at 333 (citing the AM. ASS'N ON MENTAL DEFICIENCY, CLASSIFICATION IN MENTAL RETARDATION 9 (Herbert H. Grossman ed., 1983)).

tected from execution.[88] While the Court stops just short of saying that idiots in 1791 had an IQ of 25, this seems to be the implication. The problem with this suggestion is that IQ tests were not developed until the beginning of the twentieth century.[89] The Court's careful wording ("In the 19th and early 20th centuries . . .") obscures the fact that the IQ classification system did not exist until over a hundred years after the adoption of the Eighth Amendment.[90] This twentieth-century classification does not accurately characterize idiocy protections in 1791.

Second, the AAMD manual actually militates against the "profound and severe" theory. In fact, the AAMD states that the definition of idiocy did *not* mean "profound and severe" until the nineteenth and twentieth centuries.[91] Prior to the nineteenth century—in the time period when the Eighth Amendment was adopted—idiocy referred to "*all* retarded people."[92] The AAMD manual is not an historical treatise, but to the extent it discusses the history of idiocy, it does not support the "profound and severe" theory.

Third, the cited IQ classification ("25 or below") actually pertains to the AAMD's description of the eugenics movement in the twentieth century, not the public understanding of idiocy in the eighteenth century. The AAMD sec-

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88. Many people with Down syndrome have IQ scores much higher than 25. *See Facts and FAQ About Down Syndrome*, GLOBAL DOWN SYNDROME FOUND., http://www.globaldownsyndrome.org/about-down-syndrome/facts-about-down-syndrome [http://perma.cc/EYE9-3RVT] (noting that 39.4 percent of people with Down syndrome have an IQ in the range of fifty to seventy). The average IQ of people with Down syndrome is 50. Mohammed Rachidi & Carmela Lopes, *Molecular and Cellular Mechanisms Elucidating Neurocognitive Basis of Functional Impairments Associated With Intellectual Disability in Down Syndrome*, 115 AM. J. ON INTELL. & DEVELOPMENTAL DISABILITIES 83, 84 (2010).

89. Corwin Boake, *From the Binet-Simon to the Wechsler-Bellevue: Tracing the History of Intelligence Testing*, 24 J. CLINICAL & EXPERIMENTAL NEUROPSYCHOLOGY 383, 383-84 (2002).

90. For a similar criticism of the Court's anachronistic originalism, but with regard to the Second Amendment, see Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 198 (2008) ("[I]s there reason to favor popular views of the [second] amendment one hundred years after its ratification? Either the evidence the majority marshals to demonstrate that it was 'widely understood' that the Second Amendment codified an individual right of self-defense accurately captures the understanding of those who ratified the amendment in 1791, or the majority is presenting *as* the original public meaning an understanding of the amendment that emerged in common law-like fashion in the decades after the amendment was ratified.").

91. The AAMD defines the term "idiot" as follows: "idiot - an obsolete term used centuries ago to describe all retarded persons and during the 19th and early 20th century to describe persons who would today be called profoundly or severely retarded." AM. ASS'N ON MENTAL DEFICIENCY, *supra* note 87, at 179.

92. *Id.* (emphasis added); *see also id.* at 8 (noting that "[i]n [the sixteenth century] the term *idiot* encompassed all levels of retardation").

tion that contains the "IQ of 25 or below" proposition describes a eugenic classification that consisted of "idiots," "imbeciles," and "morons." The section says:

> The end of the 19th century and beginning of the 20th century brought two related movements, the development of intelligence tests and concern for genetics as a factor in mental retardation . . . . The terms *idiot, imbecile,* and *moron* were used to identify three levels of retarded behavior, and approximate cut-off scores on intelligence tests were devised: 25, 50, and 75.[93]

This IQ classification of mental impairment (25, 50, and 75) was developed by Henry Herbert Goddard, one of America's most prominent eugenicists. He introduced the IQ classification—along with his neologism, "moron"[94]—in 1910 at an annual meeting of the American Association for the Study of the Feeble-Minded.[95] The IQ scale was calibrated to a mental age range. "Idiots" referred to those with a mental age up to two years; "imbeciles" had a mental age of three to seven years; and "morons" had a mental age of eight to twelve years.[96] Goddard's classification system was part of a larger movement holding that people with inferior genes needed to be found and controlled for society to progress.[97] Eugenic measures of control included the forced sterilization of people with intellectual disabilities, marriage restrictions, and confinement.[98]

It is curious that the Court chose to cite Goddard's mental disability classification, particularly because numerous other classifications of idiocy existed that were developed closer in time to the adoption of the Bill of Rights.[99]

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93. *Id.* at 9.

94. Morons greatly worried Goddard. He said, "The idiot is not our greatest problem. He is indeed loathsome . . . . Nevertheless, he lives his life and is done. He does not continue the race with a line of children like himself . . . . It is the moron type that makes for us our great problem." S. GOULD, THE MISMEASURE OF MAN 162 (1981).

95. *Report on Committee on Classification of Feeble-Minded*, 15 J. PSYCHO-ASTHENICS 61-67 (1910); *see also* R.C. SCHEERENBERGER, A HISTORY OF MENTAL RETARDATION 139 (1983); Sheldon H. White, *Conceptual Foundations of IQ Testing*, 6 PSYCHOL. PUB. POL'Y & L. 33, 37-38 (2000).

96. ALBERT DEUTSCH, THE MENTALLY ILL IN AMERICA: A HISTORY OF THEIR CARE AND TREATMENT FROM COLONIAL TIMES 355, 363 (2d ed. 1949).

97. *See id.* at 353.

98. *See* Ajitha Reddy, *The Eugenic Origins of IQ Testing: Implications for Post-Atkins Litigation*, 57 DEPAUL L. REV. 667, 667 (2008).

99. See, for instance, Hervey Wilbur's four types of idiocy, which he developed in 1852: simulative idiocy; higher-grade idiocy; lower-grade idiocy; and incurables. JAMES W. TRENT, JR., INVENTING THE FEEBLE MIND: A HISTORY OF MENTAL RETARDATION IN THE UNITED STATES 17 (1994). See also Kerlin's 1877 classification: "superior grades, who in five to ten years

While the horrors of the eugenics movement hardly need recitation here,[100] it is worth noting that Goddard's views fell out of favor not only for normative reasons; scholarly review of his work shows serious inadequacies in his scientific method and professional ethics.[101]

The eugenics movement is not as much a creature of the distant past as one might imagine. When *Penry* was authored in 1989, the last explicit remnants of the eugenic impulse were just subsiding. While most eugenic sterilization programs ended in the 1960s, several states actively continued these programs into the next decade.[102] The Iowa Board of Eugenics approved involuntary sterilizations of people with intellectual disabilities well into the 1970s.[103] In 1976, the North Carolina Supreme Court upheld the state's "compelling interest" to forcibly sterilize on the basis of "feeblemindedness, idiocy, or imbecility . . . to protect the public and preserve the race from the known effects of the procreation of the mentally deficient children by the mentally deficient."[104] Even after sterilization programs shed their explicitly eugenic skin, many of them continued into the 1980s recast as efforts to protect incompetent persons.[105]

In his dissent in *Atkins*, Justice Scalia incorporates *Penry*'s "IQ of 25 or below" standard to reaffirm a narrow definition of idiocy.[106] However, his dissent

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would be able to return to their communities; orphaned idiots and imbeciles; and lower grades, who needed 'habit training, amusements, [and] exercise, aided by appropriate medical treatment.'" *Id.* at 80.

100. For a history of the eugenics movement in the United States, see TRENT, *supra* note 99, at 131-83.

101. *See, e.g.*, GOULD, *supra* note 94, at 165-71 (discrediting Goddard's scientific methodology by showing his overuse of visual identification and his reliance on examiners' intuition; his failure to test an unbiased sample; and Goddard's modification of photographs to create physical features allegedly associated with mental disability).

102. Philip R. Reilly, *Involuntary Sterilization in the United States: A Surgical Solution*, 62 Q. REV. BIOLOGY 153, 167 (1987) (noting that Iowa, North Carolina, and Oregon continued operating sterilization programs into the 1970s).

103. *See, e.g.*, Howard v. Des Moines Register & Tribune Co., 283 N.W.2d 289, 291 (Iowa 1979) (discussing the involuntary sterilization of Robbin Howard in 1971 by the Iowa Board of Eugenics). This case notes that the Iowa Board of Eugenics "approved 176 sterilizations in the last five years." *Id.* at 293.

104. *In re* Moore's Sterilization, 221 S.E.2d 307, 312 (N.C. 1976).

105. Reilly, *supra* note 102, at 167. This process exemplifies Reva Siegel's theory of "preservation-through-transformation." *See* Reva Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119 (1996) (describing how the dominant group in a legal hierarchy may change its rhetoric over time to preserve the existing power structure); *see also* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).

106. Atkins v. Virginia, 536 U.S. 304, 340 (2002) (Scalia, J., dissenting).

cites this IQ cutoff without any reference to the time period: "citing sources indicating that idiots generally had an IQ of 25 or below, which would place them within the 'profound' or 'severe' range of mental retardation under modern standards."[107] This explanation makes it difficult for the reader to recognize that the IQ justification for the "profound and severe" theory did not emerge until well after the adoption of the Eighth Amendment.

In addition to the eugenic influence, the Court's understanding of idiocy relied on a phrenological model of disability—a model that also postdates the adoption of the Eighth Amendment. In his dissent in *Atkins*, Justice Scalia adds a citation to Isaac Ray's work, *Medical Jurisprudence of Insanity*, which provides Ray's account of the 1834 trial of an "imbecile."[108] Justice Scalia relies on this source, among others, to maintain that the common law has always distinguished between different grades of mental retardation. He says:

> Mentally retarded offenders with less severe impairments—those who were not "idiots"—suffered criminal prosecution and punishment, including capital punishment. *See, e.g.*, I. Ray, Medical Jurisprudence of Insanity 65, 87–92 (W. Overholser ed. 1962) (recounting the 1834 trial and execution in Concord, New Hampshire, of an apparent "imbecile"—imbecility being a less severe form of retardation which "differs from idiocy in the circumstance that while in [the idiot] there is an utter destitution of every thing like reason, [imbeciles] possess some intellectual capacity, though infinitely less than is possessed by the great mass of mankind.").[109]

This historical argument is unconvincing for several reasons. As a preliminary matter, the practice of grading idiocy was largely unknown in 1791. This fact was stated in the AAMD Classification Manual cited in *Penry*[110] (discussed above) and is further corroborated by other scholarly sources.[111] To the extent

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107. *Id.* (quoting Penry v. Lynaugh, 492 U.S. 302, 333 (1989)).

108. *Id.* at 341 (quoting RAY, *supra* note 82, at 65, 87-92).

109. *Id.* at 340-41.

110. *Penry*, 492 U.S. at 302 (citing AM. ASS'N ON MENTAL DEFICIENCY, *supra* note 87, at 179 (defining an idiot as "an obsolete term used centuries ago to describe all retarded persons and during the 19th and early 20th century to describe persons who would today be called profoundly or severely retarded")); *see also* AM. ASS'N ON MENTAL DEFICIENCY, *supra*, at 8 (noting that in the sixteenth and seventeenth century "the term *idiot* encompassed all levels of retardation").

111. *See, e.g.*, Jonathan Andrews, *Begging the Question of Idiocy: The Definition and Socio-Cultural Meaning of Idiocy in Early Modern Britain: Part 1*, 9 HIST. PSYCHIATRY 65, 93 (1998) ("[E]ighteenth-century medical commentators tended to conceive of idiocy in many ways quite broadly. Indeed, a broad definition was encouraged by the fact that they rarely distin-

that some legal commentators, such as Edward Coke, differentiated between grades of idiocy, this differentiation generally did not impact criminal liability.[112] While the law did distinguish between "weakness of understanding" (that is, people who were simply unintelligent) and idiots, it generally did not differentiate among different levels of idiocy.[113]

Second, Ray was an ardent phrenologist, and he viewed mental competence through this idiosyncratic theoretical lens.[114] The phrenological perspective of disability, however, was unknown to the Framers in 1791 because it had not yet been invented.[115] Phrenology, the creation of German physicist Franz Joseph Gall, was not well known in the United States until the 1820s.[116] As evidenced by law dictionaries from the 1850s, the phrenological perspective of disability significantly altered the legal understanding of idiocy.[117] The definitions that emerged during this time included measurements of idiots' heads and provided a peculiar list of character traits.[118]

Third, if Ray's views were actually representative of the public meaning of idiocy in 1791, then many imbeciles would likely be protected by insanity protections. Ray classified "imbeciles" and "idiots" as subtypes of the category of "insanity."[119] Because insanity was covered by common law protections, his

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guished idiocy and its corollaries very thoroughly in terms of degree, or type."); Wickham, *Idiocy in Virginia*, *supra* note 53, at 681 ("By the mid-1800s medical personnel introduced the classification of 'imbecile' to define a condition less impaired than idiocy.").

112. *See* NORMAN J. FINKEL, INSANITY ON TRIAL 9 (1988) (noting that although "Coke distinguished two types of 'idiocy' on the basis of severity . . . [a]s regarding crimes and culpability . . . this distinction would not lead to differing verdicts"). Matthew Hale distinguished between "insanity" and "partial insanity." *Id.* at 9-10. The former excused defendants in criminal matters; the latter did not. *Id.* However, as discussed *infra* Part III.C, Hale's understanding of insanity was sufficiently broad that it is inapplicable to Justice Scalia's grading claim.

113. *Id.*

114. Winfred Overholser, *Editor's Introduction to* RAY, *supra* note 81, at xi.

115. Ray's most influential work was not published until 1838. His work went on to deeply impact nineteenth-century views of mental health, specifically through Howe and Kerlin. TRENT, *supra* note 99, at 20.

116. Peter McCandless, *Mesmerism and Phrenology in Antebellum Charleston: "Enough of the Marvellous,"* 58 J. S. HIST. 199, 203-04 (1992).

117. *See, e.g.*, JOHN BOUVIER, *Idiocy*, *in* 1 A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND OF THE SEVERAL STATES OF THE AMERICAN UNION; WITH REFERENCES TO THE CIVIL AND OTHER SYSTEMS OF FOREIGN LAW 598 (7th ed. 1857) (citing FRANZ JOSEF GALL, SUR LES FONCTIONS DU CERVEAU [ON THE FUNCTIONS OF THE BRAIN] (Lewis Wilson trans., 1835), and describing measurements of idiots' heads).

118. *Id.*

119. RAY, *supra* note 82, at 60.

taxonomy did not categorically exclude imbeciles from protection. Furthermore, Ray himself explicitly argued for the mitigation of criminal liability based on imbecility: "To make such a person [an imbecile] responsible for his actions to the same degree as one enjoying the full vigor and soundness of the higher faculties is therefore manifestly unjust . . . ."[120] Other scholars, such as Norman Finkel, note that Ray "gave wide exemption for insane offenders" and viewed many criminal tests of sanity as "too narrow."[121] Therefore, the fact that an individual classified by Ray as an imbecile was tried and executed in 1834 does not clearly support a narrow interpretation of idiocy protections in 1791.

C. *Sources That Predate the Eighth Amendment*

When *Penry* and *Atkins* cite sources that predate the Eighth Amendment, those sources are either inadequately quoted or from unrepresentative cases. In supporting the "profound or severe" theory, Justice Scalia's dissent cites the description of idiots from Anthony Fitzherbert's sixteenth-century work, *Natura Brevium*. Justice Scalia has good reason to cite Fitzherbert, whose description of idiocy is one of the earliest and most frequently cited in the common law.[122] However, the dissent cites only the first sentence of Fitzherbert's two-sentence description: "An idiot is 'such a person who cannot account or number twenty pence, nor can tell who was his father or mother, nor how old he is, etc., so as it may appear that he hath no understanding of reason what shall be for his profit, or what for his loss.'"[123] According to this narrow definition, Justice Scalia argues, an idiot must be so profoundly or severely disabled that he cannot count to twenty or recognize his own parents. Consequently, only the most severe cases of mental retardation would qualify a defendant for idiocy protections. As Justice O'Connor noted in *Penry*, this person would likely be covered already by the insanity protections from *Ford*.[124]

While Fitzherbert's first sentence presents a narrow description of idiocy, the second sentence provides more perspective: "But if he [the idiot] hath [s]uch understanding, that he know and understand his letters, and do read by

120. *Id.* at 80.

121. FINKEL, *supra* note 112, at 19 ("Ray's position was that tests such as knowing right from wrong, knowing the nature of the act, or even delusion, were all too narrow.").

122. S. SHELDON GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW: A STUDY IN MEDICO-SOCIOLOGICAL JURISPRUDENCE 124(1927) (describing Fitzherbert's work as one of the "milestones on the road of the legal treatment of the subject of mental unsoundness").

123. *See* Atkins v. Virginia, 536 U.S. 304, 340 (2002) (Scalia, J., dissenting) (quoting 2 ANTHONY FITZHERBERT, NATURA BREVIUM 233B (9th ed. 1794)).

124. Penry v. Lynaugh, 492 U.S. 302, 329-33 (1989).

teaching or information of another man, then it [s]eemeth he is not a [s]ot nor a natural idiot."[125] While the first sentence lays out one extreme boundary line (those who cannot count to twenty or recognize their parents), the second sentence points to the opposite boundary: those who learn to read and write *seem* not to be idiots. Fitzherbert even softened the educability boundary with the word "seemeth."[126]

Legal scholars confirm the importance of Fitzherbert's second sentence. Sheldon Glueck—whom Justice O'Connor cites in *Penry*—notes that the first sentence of Fitzherbert's definition cannot be read in isolation because

> in the second portion of his definition, [Fitzherbert] modified the extreme example put by him in the first part. There is certainly a wide gap between the mental condition of the idiot who can not "number twenty pence," or "tell who was his father or mother"; and of one who cannot acquire the much more intricate accomplishment of understanding "his letters," and reading.[127]

Glueck further argues that Fitzherbert's definition was not meant to be a bright-line idiocy test, nor was it understood that way. "From the second portion of his definition, however, it seems clear that Fitzherbert, like his predecessors and successors, did not intend his definition to be categorically exclusive of any other means of determining a defendant's idiocy."[128]

Early legal commentators, such as Matthew Hale, did not abide by Justice Scalia's narrow interpretation of Fitzherbert. Hale was one of the most influential jurists in English legal history.[129] Nigel Walker, in his landmark study *Crime and Insanity in England*, appraises Hale's work as "[t]he clearest statement of the law and its procedures at any single time in this period."[130] His writings are particularly relevant for understanding the legal contours of idiocy in the late eighteenth century. As Walker notes:

> Unlike earlier writers, such as Coke . . . Hale devoted an entire chapter, the fourth, to "the defects of ideocy, madness and lunacy in reference to criminal offences and punishments." This chapter is not merely the

125. 2 ANTHONY FITZHERBERT, NATURA BREVIUM 533 (photo. reprint 2003) (9th ed. 1793).

126. *Id.*

127. GLUECK, *supra* note 122, at 128-29.

128. *Id.* at 128.

129. For an analysis of Hale's philosophy and his far-reaching impact, see Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651 (1994).

130. 1 NIGEL WALKER, CRIME AND INSANITY IN ENGLAND 35 (1968).

> most detailed description of seventeenth-century practice: after its belated publication in 1736 it had more influence on lawyers of the eighteenth and nineteenth century than any other single work on the subject.[131]

Despite Hale's significant influence on legal conceptions of idiocy, the Court in *Penry* and the dissent in *Atkins* give him only passing notice.[132]

Hale's commentary on Fitzherbert further discredits Justice Scalia's interpretation. After reciting Fitzherbert's test, Hale reflects on Fitzherbert's criteria, noting that "[t]hese, tho they may be evidences, yet they are too narrow and conclude not always; for ideocy or not is a question of fact triable by jury, and sometimes by inspection."[133] This quotation is significant for two reasons. First, Hale rejects the literal interpretation of Fitzherbert's description as too narrow, thereby opening up space for a more flexible understanding of mental incompetence. Second, Hale emphasizes that the determination of idiocy is a fact-intensive procedure that must be individualized to the defendant. Subsequent legal scholars also endorsed Hale's interpretation of Fitzherbert's definition.[134]

In *Penry*, the Court also relied on the 1724 *Trial of Edward Arnold* to support the "profound and severe" theory.[135] Edward Arnold pled insanity after he was charged with attempting to murder Lord Onslow in the 1720s.[136] At the end of the trial, Justice Tracy delivered jury instructions regarding the determination of sanity, and these instructions have since come to be known as the "wild beast test."[137] The wild beast test states that "a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more

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131. *Id.* (quoting HALE, *supra* note 14, at 29).

132. Justice O'Connor quotes Hale only for the proposition that "a person who is deaf and mute from birth 'is in presumption of law an ideot.'" Penry v. Lynaugh, 492 U.S. 302, 332 (1989) (quoting HALE, *supra* note 14, at 34). Justice Scalia cites Hale only to support the unremarkable claim that violent idiots could be "made wards of the state." Atkins v. Virginia, 536 U.S. 304, 340 (2002) (Scalia, J., dissenting).

133. HALE, *supra* note 14, at 29 (emphasis omitted).

134. *See, e.g.*, GLUECK, *supra* note 127, at 128 ("[Fitzherbert] suggested it merely as one of the convenient methods known to his day, of arriving at a judgment as to a person's feeblemindedness . . . ."); 1 WALKER, *supra* note 130, at 37 ("Hale implies that tests of this kind [Fitzherbert's idiocy test] were relevant in criminal trials, but not conclusive.").

135. *Penry*, 492 U.S. at 332.

136. Rex v. Arnold, (1724) 16 St. Tr. 695 (Eng.).

137. DEUTSCH, *supra* note 96, at 392 ("In 1724, Judge Tracey laid down what was subsequently known as the 'wild beast' test."); Nigel Walker, *The Insanity Defense Before 1800*, 477 ANNALS AM. ACAD. POL. & SOC. SCI. 25, 28 (1985).

than an infant, than a brute, or a wild beast, such a one is never the object of punishment."[138]

However, scholars maintain that the wild beast test was not representative of insanity protections in the eighteenth century.[139] As Nigel Walker noted, "The trials of Arnold and Ferrers have often been cited to demonstrate how strictly the criteria of insanity were applied by criminal courts; but it is a demonstration which assumes that these were typical cases. In fact they could hardly have been less typical."[140] The trial was atypical primarily because Lord Onslow portrayed Arnold's attack as an indirect attempt on the life of the king—in other words, as attempted regicide.[141] Walker argues that Justice Tracy "might well have been less hostile to Arnold if it had not been for the political suspicions which Onslow had aroused."[142] This case's idiosyncrasy is further corroborated by an acquittal that occurred a few years later with similar facts but without the heightened political pressures.[143] Moreover, even though Arnold was convicted and sentenced to death, his sentence was commuted to imprisonment for life.[144]

It is also worth noting that Edward Arnold's defense was lunacy, not idiocy. In general, the insanity defense included both lunatics and idiots at the time of Arnold's trial.[145] However, Justice Tracy's jury instructions emphasized that Arnold did not plead idiocy:

> [A]nd it is observed they admit he was a lunatic and not an idiot. A man that is an idiot, that is born so, never recovers, but a lunatic may,

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138. *Arnold*, 16 How St. Tr. at 765.

139. *See, e.g.*, FINKEL, *supra* note 112, at 16 (noting that Lord Erksine's successful insanity defense of James Hadfield in 1800 would have "fallen on deaf ears if the jurors' views of insanity had been consistent with the 'wild beast' test; fortunately for Hadfield, they were not. Erksine's description of insanity must have fit more closely with the jurors' intuitive ideas about what is and is not insane than the 'wild beast' test did").

140. 1 WALKER, *supra* note 130, at 53.

141. *Id.*

142. *Id.* at 57.

143. *Id.* ("A few years later, in 1731, an Old Bailey jury were persuaded to return a special verdict on evidence of insanity which was—to the modern eyes at least—no more impressive than in Arnold's case.").

144. *See* JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 174 (2003).

145. ROGER SMITH, TRIAL BY MEDICINE: INSANITY AND RESPONSIBILITY IN VICTORIAN TRIALS 92 (1981) (noting that the insanity plea was used to excuse idiots "until the end of the [eighteenth] century").

> and hath his intervals; and they admit he was a lunatic. You are to consider what he was at this day, when he committed this fact.[146]

By going out of his way to make this additional distinction, Justice Tracy's instructions were tailored to the intermittency and frenzied characteristics that distinguished lunacy from idiocy at the time.[147]

To recap, this Part challenged the Supreme Court's historical analysis of insanity protections for idiots. It showed that the Court's primary evidence for the "profound and severe" theory relied on post-ratification sources. Those sources are problematic because they employed theories of disability that did not exist in 1791. When the Court did use sources from the relevant time period, they were not representative of the normal treatment of idiocy. The following Part seeks to provide an alternative historical analysis of idiocy in English and colonial common law.

III. REASSESSING INSANITY PROTECTIONS FOR IDIOTS

Part III reassesses the protections afforded to idiots at the end of the eighteenth century. It finds that notions of idiocy included a relatively wide range of intellectual disabilities and were not limited to the "profoundly or severely retarded." This Part first discusses the common law's general understanding of idiocy. Throughout the common law, idiocy was usually defined by juxtaposition with lunacy; this Note follows that approach. The next two sections, Parts III.B and C, discuss two different methods of identifying *who* was an idiot for purposes of criminal liability: community reputation and the fourteen-year-old rule. The community reputation approach stemmed from families and community members serving as the locus of care for idiots.[148] Because community members provided support for idiots, they were thought best suited to identify who was an idiot. The fourteen-year-old rule—which prohibited the execution of a person whose mental abilities were below those of an ordinary child of fourteen years—was inherited from English common law.[149]

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146. WALKER, *supra* note 130, at 56 (citing Rex v. Arnold, (1724) 16 St. Tr. 695 (Eng.)).

147. *See id.* ("It is a mistake, however, to infer—as is often done—that the wild-beast test was always, or indeed usually, interpreted as insisting on conduct of a spectacularly frenzied kind. A whole century before Arnold's trial Dalton's *Countrey Justice* explains that if an 'idiot' kills a man it is no felony 'for they have not knowledge of good or evil, nor can have felonious intent, nor a will or mind to do harm.").

148. *See supra* Part III.B. For a wide-ranging discussion of families and communities as caregivers, see THE LOCUS OF CARE: FAMILIES, COMMUNITIES, INSTITUTIONS, AND THE PROVISIONS OF WELFARE SINCE ANTIQUITY (Peregrine Horden & Richard Smith eds., 1998).

149. *See, e.g.*, HALE, *supra* note 14, at 30.

This Part investigates both methods of identifying idiots. Both methods are relevant, in part, because they may have been in tension at the time of the adoption of the Eighth Amendment. As Langbein, Lerner, and Smith note, American law underwent a "titanic struggle" at the end of the eighteenth century between "folk law" and "learned law."[150] Proponents of the folk law side were "hostile to lawyers and legal doctrine" and believed that "[o]rdinary people, applying common sense notions of right and wrong, could resolve the disputes of life in localized and informal ways."[151] Those endorsing "learned law" believed that "the intrinsic complexity of human affairs begets unavoidable complexity in legal rules and procedures . . . . [and] insisted that law had to be, in this special sense, learned."[152] The folk law sentiment aligns naturally with the community reputation approach of determining idiocy; learned law aligns with the doctrinal approach, the fourteen-year-old rule. Of these two impulses—folk law and learned law—the latter ultimately prevailed. "In the end . . . American law came to be learned law, a body of law so strongly patterned on the learned English law that we still for many purposes think of the English and American legal systems as comprising an inseparable entity called Anglo-American law."[153] While this Part explores both ways of determining idiocy in the eighteenth century, Part IV narrows its focus to the fourteen-year-old rule for modern application.

A few qualifying comments are necessary at the outset. First, as a baseline matter, we know relatively little about criminal justice in the colonies. As Lawrence Friedman said, "The colonial world is not easy to capture in a few short pages, and its criminal justice system is no less elusive. The further we go back in time, the dimmer the world gets, and the stranger."[154] In their casebook, Langbein, Lerner, and Smith likewise acknowledge that "little is known about the conduct of criminal prosecutions in colonial America . . . ."[155] Second, the colonies were not homogenous; they varied across geographical regions. For instance, the northern Puritan colonies sanctioned morality offenses quite severely, but handled property offenses more leniently; the southern colonies operated inversely.[156] And of course, the colonies also varied over time. Friedman

150. LANGBEIN ET AL., *supra* note 41, at 496.

151. *Id.*

152. *Id.*

153. *Id.*

154. FRIEDMAN, *supra* note 6, at 21.

155. LANGBEIN ET AL., *supra* note 41, at 734; *see also id.* at 738 ("Although there is now an extensive understanding of the conduct of criminal jury trials in seventeenth- and eighteenth century England, little is known about criminal trials in colonial America.").

156. *Id.* at 740-41.

comments that "[i]t is convenient to talk about the colonial years as a single 'period.' Yet this period lasted about 150 years, a span of many generations; people were born, grew old, died, were forgotten, all within this single 'period.'"[157] This variation complicates any sweeping generalizations regarding idiocy in the colonies.

Third, few historians focus on mental impairments in colonial America, and even fewer focus specifically on idiocy.[158] Parnel Wickham suggests two reasons for this disregard: "[I]diocy has been neglected in studies of the American colonies partly because of the paucity of documentation and partly because of the disinterest of scholars."[159] Regarding the first reason, primary sources relating to idiocy are particularly scarce before the institutionalization movement in the nineteenth century.[160] In eighteenth-century England, and to an even greater extent in the colonies, there are few records of how idiots were treated in criminal matters. In the colonies, records are scarce partly because idiots were often dealt with outside of formal legal proceedings.[161] This extrajudicial treatment—combined with the general lack of case reporting in the eighteenth century[162]—resulted in few surviving records of idiots at trial.[163] Wickham's second reason—a lack of interest on the part of scholars—also rings true. Patrick McDonagh characterizes academia's approach toward idiocy as

157. FRIEDMAN, *supra* note 6, at 22.

158. *See* Wickham, *Idiocy in Virginia*, *supra* note 53, at 679 ("The problem of idiocy in America has received little attention from historians."). Parnel Wickham has written a series of articles on idiocy in colonial America that are cited throughout this Note. *See also* KIM E. NIELSEN, A DISABILITY HISTORY OF THE UNITED STATES 12-48 (2012); SCHEERENBERGER, *supra* note 95, at 91-107.

159. Parnel Wickham, *Conceptions of Idiocy in Colonial Massachusetts*, 35 J. SOC. HIST. 935, 935 (2002).

160. *Id.*; *cf.* Parnel Wickham, *Images of Idiocy in Puritan New England*, 39 MENTAL RETARDATION 147, 147 (2001) ("Historical research on mental retardation in the United States tends to focus on the institutional heritage that began in the early 1800s and continues into the present.").

161. *See, e.g.*, Wickham, *supra* note 159, at 939-40 (noting that idiots may have been "dismissed by the court before their trials began"); *see also* DANA Y. RABIN, IDENTITY, CRIME, AND LEGAL RESPONSIBILITY IN EIGHTEENTH-CENTURY ENGLAND 104 (2004) ("Legal authorities often settled cases involving idiocy without a trial.").

162. LANGBEIN ET AL., *supra* note 41, at 825 ("In colonial America 'the reporting of an decision was unusual,' and this state of affairs lasted well into the early national period. When Kent ascended the bench in 1798, there existed only a few volumes of American law reports."). *See generally*, *id.* at 824-38 (describing the rise of official reports in the nineteenth century).

163. EDGAR J. MCMANUS, LAW AND LIBERTY IN EARLY NEW ENGLAND: CRIMINAL JUSTICE AND DUE PROCESS, 1620-1692, at 104 (1993) (noting that insanity cases were rarely brought to trial).

one of "strenuous neglect."[164] C.F. Goodey observes that "[n]o honour accrues to the academy from natural and incurable idiocy."[165] Whatever the cause, the story of idiocy in colonial times is largely untold.

These prefatory points are meant to acknowledge this Note's limits. The evidentiary record is sparse; moreover, all historical generalizations, to some extent, sacrifice degrees of accuracy for increased intelligibility. As Friedman states with a mix of hope and frustration, "There *was* an overall pattern [in the colonies], which we can clearly see today; but the patterns dissolve the closer one gets—or the more carefully one looks at details."[166] Despite these limitations, the available resources—such as colonial statutes, legal treaties, legal dictionaries, newspapers, and trials in England—point to certain trends and generalizations that this Part seeks to synthesize.

A. Idiocy, Lunacy, and the Range of Intellectual Disabilities

The history of idiocy is inseparably paired with the history of lunacy. In fact, when idiocy is discussed at all, it is generally mentioned as a corollary to the primary subject of lunacy. The coupling of idiocy and lunacy is not a new phenomenon; its roots reach deep into the development of the two concepts.[167] Since the thirteenth century, idiocy and lunacy were consistently coupled and juxtaposed.[168] This interplay continued throughout the English common law and carried over to the North American colonies.[169] While theoretical expositions consistently distinguish between idiocy and lunacy,[170] the distinction often did not hold in practice. Because idiots and lunatics were often subsumed into the large category of "paupers," there are numerous instances of their con-

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164. MCDONAGH, *supra* note 16, at 8.

165. C. F. Goodey, *The Psychopolitics of Learning and Disability in Seventeenth-Century Thought*, *in* FROM IDIOCY TO MENTAL DEFICIENCY: HISTORICAL PERSPECTIVES ON PEOPLE WITH LEARNING DISABILITIES 95 (David Wright & Anne Digby eds., 1996).

166. FRIEDMAN, *supra* note 6, at 22.

167. *See, e.g.*, Jonathan Andrews, *Identifying and Providing for the Mentally Disabled in Early Modern London*, *in* FROM IDIOCY TO MENTAL DEFICIENCY, *supra* note 165, at 65, 72 ("Too often [idiocy] has been treated as a social and medical issue virtually synonymous with that of lunacy, or dealt with as a subordinate corollary to madness, rather than as a subject in itself."); Anne Digby, *Contexts and Perspectives*, *in* FROM IDIOCY TO MENTAL DEFICIENCY, *supra*, at 1, 7 ("Medical interest was much greater in lunacy than in idiocy and imbecility.").

168. Digby, *supra* note 167, at 2 ("From the thirteenth century onwards there had been a legal dichotomy between idiocy and lunacy.").

169. *See* Wickham, *Idiocy and the Law in Colonial New England*, *supra* note 53, at 106.

170. Comment, *Lunacy and Idiocy—The Old Law and Its Incubus*, 18 U. CHI. L. REV. 361, 362 (1951).

flation.[171] When this distinction was made in practice, there is little evidence regarding how it was made.[172]

The primarily theoretical difference between idiocy and lunacy was the permanence of idiocy as contrasted with the intermittency of lunacy.[173] Other important characteristics of idiocy included: heightened dependence on others,[174] ineducability,[175] a lack of normalcy[176] or maturity,[177] and sometimes idiocy's congenital origins[178] and accompanying physical abnormalities.[179] Lunacy, however, was marked by its intermittent periods of "madness." These periods

171. *See, e.g.*, DEUTSCH, *supra* note 96, at 116; STANLEY HERR, RIGHTS AND ADVOCACY FOR RETARDED PEOPLE 9 (1983) ("Despite long-standing distinctions between idiocy and lunacy, the conditions were often confused. Under categories such as lunacy, madness, or insanity people perceived as mentally retarded or mentally ill were often lumped together."); SCHEERENBERGER, *supra* note 95, at 94. The grouping of diverse marginalized people under the label of "paupers" continued well into the nineteenth century.

172. *See, e.g.*, Andrews, *supra* note 167, at 65, 72 ("Despite the evident existence and operation of significant criteria distinguishing certain 'idiotic' and 'foolish' types of mental abnormality from other 'lunatic' types, the fact remains that parish records tell us very little about how the distinctions rooted in such terminology were arrived at.").

173. Comment, *supra* note 170, at 361-62; Digby, *supra* note 167, at 7 ("Until the late nineteenth century there existed at best only a blunted perception of the difference between the imbecilic and the harmless or chronic lunatic, or between the congenitally handicapped and the senile demented.").

174. *See, e.g.*, Peter Rushton, *Idiocy, the Family and the Community in Early Modern North-East England*, *in* FROM IDIOCY TO MENTAL DEFICIENCY, *supra* note 165, at 51 (noting that idiocy tests focused on "socially necessary skills of numeracy and everyday language use").

175. *See, e.g.*, WALKER, *supra* note 130, at 36 (describing early tests, such as Fitzherbert's, that gauged numeracy and literacy).

176. The category of idiocy sometimes included those simply branded as socially deviant. For instance, up until the nineteenth century those convicted of bestiality were described as "idiots." SMITH, *supra* note 145, at 93.

177. *See, e.g.*, Walker, *supra* note 137, at 28 ("An almost adult knowledge of worldly matters seems to have been the criterion.").

178. There are notable exceptions to the congenital characteristic of idiocy. For instance, while Hale, like Coke, did not allow "induced witlessness," (that is, drunkenness) to excuse, he did carve out an exception for cases when heavy drinking caused "an habitual or fixed phrenzy." WALKER, *supra* note 130, at 39. As Nigel Walker points out, this principle "saved[d] several Victorian alcoholics from the gallows." *Id.*; *see also* Andrews, *supra* note 167, at 70 ("Early modern writers made little distinction between idiocy and chronically progressed conditions of mental enfeeblement. Identification of a number of elderly parishioners as 'foolish', or 'idiotic', in metropolitan parish records also suggests the importance of this conflation.").

179. *See, e.g.*, Andrews, *supra* note 167, at 70 (noting that idiots may be recognized by "odd physical appearance, especially the size of their heads, deformities, or enlargement in their features, and vacuousness in their expressions").

were compared to the permanent mental state of an idiot; however, there was often a heightened emphasis on the lunatic's "phrenzy."[180] If lunacy became permanent—as in cases of "chronic lunacy"—hardly any distinction remained between lunacy and idiocy.[181]

Many of the earliest examples of the idiocy/lunacy distinction originate in property law. In the thirteenth century, pursuant to the *Prerogativa Regis*, the King had the right and duty to take the land of subjects who could not manage their property.[182] The Crown exercised this right by seizing an idiot's inherited land, providing him with his "necessaries," and then transferring the land to his heirs upon his death.[183] The practice was largely similar for lunatics; however, since their insanity was intermittent, the King only assumed custody of their land and diverted the profits to the lunatic.[184] Because the financial ramifications for a finding of idiocy were so much harsher than for a finding of lunacy, Blackstone notes that jurors sometimes found a landowning idiot to be a lunatic just to ensure that he received the profits of his land.[185] This general structure carried over to the North American colonies, and most surviving idiocy cases from the colonies revolved around property disputes.[186]

Eighteenth-century colonial newspapers show that the general public was familiar with the property laws for idiots and lunatics. For instance, the *Pennsylvania Gazette* in 1773 reported a case where a fraudster married a wealthy "idiot" woman, apparently as part of a scheme to acquire her property.[187] In the article, the authors petitioned the colonial assembly to grant relief "in the same

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180. WALKER, *supra* note 130, at 28 (noting that early insanity cases for the mentally ill used terms such as "furiousus" and "frenetico passione detentus" whereas idiocy was described with a term like "fatuitas"); *see also* Walker, *supra* note 137, at 28 (noting that the conduct of idiots was not expected to be frenzied).

181. Andrews, *supra* note 167, at 70 ("Early modern writers made little distinction between idiocy and chronically progressed conditions of mental enfeeblement.").

182. The earliest copies of the *Prerogativa Regis* date back to the second half of the thirteenth century and announce the rights and duties of the king. Richard Neugebauer, *Mental Handicap in Medieval England*, *in* FROM IDIOCY TO MENTAL DEFICIENCY, *supra* note 165, at 22, 24-25.

183. *Id.* at 25.

184. *Id.* at 26-27.

185. 1 BLACKSTONE, *supra* note 46, at *303 (noting that juries often determined a landowner to be *non compos mentis* more generally, and not an idiot specifically, in order to protect the landowner's estate).

186. For instance, a Westlaw search for any of these terms—sanity, insan!, idiot!, ideot!, idiocy, lunatic!, lunacy, madman, compos, "non sane memorie"—before 1795 provided thirty-six results. Excluding false positives, all but four of these cases involved property disputes.

187. PA. GAZETTE, no. 2309, Mar. 24, 1773, at 4.

manner as a Committee of Lunaticks might or could do in England."[188] Other late-eighteenth-century newspaper accounts included jokes about idiots,[189] speculation about their chances in the afterlife,[190] and scandalous or lurid stories.[191]

The distinction between idiocy and lunacy also existed in criminal law. Since idiocy was generally considered congenital and permanent, an idiot was protected from punishment throughout life. However, since lunacy was intermittent, these cases required additional investigation to determine whether the defendant acted under such a disability.[192] The idiocy/lunacy distinction may have been relevant because of heightened concern that defendants would feign lunacy. Because idiocy was congenital, and community members could testify to this fact, it was much more difficult to fake.[193]

The general public was also aware of the criminal protections afforded idiots and lunatics. In 1788, Philadelphia's *Independent Gazetteer* reported a case of a man with "deranged understanding" who attacked people on several different occasions, broke windows, and spit in the face of a judge; however, he was consistently remanded to hospitals instead of criminally prosecuted.[194] Many colonial newspapers closely covered the 1786 acquittal of Margaret Nicholson,

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188. *Id.*

189. *See, e.g.*, MASS. CENTINEL, no. 43, Aug. 17, 1785, at 2 ("How shameful is it that you should fall asleep (said a dull preacher to his drowsy audience) when the poor creature (pointing to an idiot who was leaning on a staff and staring at him) is both awake and attentive. Perhaps, Sir, replied the fool, I should have been asleep to [sic], if I had not been an idiot.").

190. For instance, in 1771 a Boston newspaper jocularly discussed an "idiot, approaching so near the bestial kind, that 'twould be difficult, if not impossible, to distinguish him from the beast, were he not covered with a human body . . . ." BOS. EVENING POST, no. 1870, July 29, 1771, at 3. The author goes on to ask, "What will become of him at death? Will his spirit go down to the earth with the beast, or upwards with the man? Is he to be looked on as an infant, or adult? . . . Will he receive reward or punishment? Who can judge in this case, but the Great Judge of quick and dead?" *Id.*

191. CITY GAZETTE OR DAILY ADVERTISER, no. 983, June 27, 1788, at 2-3 (recounting a story from England wherein an idiot exhumed the corpse of his mother and covered her body in hemp "some of which was tied around her head").

192. *See, e.g.*, 1 WILLIAM HAWKINS, A TREATISE OF PLEAS OF THE CROWN 2 (Garland Publishing, Inc. 1978) (1716). ("[I]f it be doubtful whether a Criminal, who at his Trial is in appearance a Lunatick, be [s]uch in Truth or not, it [s]hall be tried by an Inque[s]t of Office, to be returned by the Sheriff of the County wherein the Court [s]its; and if it be found by them that the Party only feigns him[s]elf mad, and he [s]till refu[s]e to an[s]wer, he [s]hall be dealt with as one who [s]tands mute."),

193. RABIN, *supra* note 161, at 104 (noting that "[j]uries considered evidence of idiocy more credible than evidence of lunacy").

194. *See* INDEP. GAZETTEER; OR, CHRON. FREEDOM, no. 716, Mar. 29, 1788, at 3.

a *non compos mentis* woman who made an attempt on the life of King George III.[195] In 1789, Boston's *Herald of Freedom* relayed an account from London in which seventeen-year-old Eleanor Johnson committed suicide.[196] The paper reported that "an intimacy had fulfilled between the deceased and a black man, named Thomas Cato, a native of the East Indies, on whom she had fixed her affection . . . ."[197] After Cato "accused her of deceit," Johnson poisoned herself.[198] The report goes on: "When examined before the Jury, the Black appeared so ignorant and illiterate, that nothing could be collected from his evidence . . . . The Jury, after a very humane and attentive consideration, brought in their verdict, LUNACY."[199] These accounts show that the general colonial population was aware of idiocy protections and their English origins.

There appear to be fewer idiocy criminal cases than lunacy criminal cases. Some speculate that this difference is due to a lower incidence of crime in the demographic of idiots.[200] Others note that idiots were more likely to be acquitted extrajudicially.[201] Because idiots were known by their communities as such, when they committed crimes, they were often remanded to an almshouse, hospital, jail, or the custody of their families.[202] As a general matter, it seems there was less penological interest in idiots than in lunatics. Idiots were largely viewed as followers who were easily persuaded by others into criminality; however, they were also easily apprehended.[203]

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195. *See, e.g.*, AM. RECORDER AND CHARLESTOWN ADVERTISER, no. 76, Sept. 29, 1786, at 2-3; CARLISLE GAZETTE AND W. REPOSITORY KNOWLEDGE, No. 66, Nov. 8, 1786, at 2; PROVIDENCE GAZETTE & COUNTRY J., No. 1194, Nov. 18, 1786, at 2.

196. HERALD FREEDOM & FED. ADVERTISER, Nov. 27, 1789, at 86.

197. *Id.*

198. *Id.*

199. *Id.*

200. *See, e.g.*, Wickham, *Idiocy in Virginia*, *supra* note 53, at 681. ("While the surviving reports of lunacy [in criminal cases] are limited, there are even fewer of idiocy—probably because attention was directed more often toward lunatics.").

201. *See, e.g.*, Wickham, *supra* note 159, at 939-40 (noting that idiots may have been "dismissed by the court before their trials began").

202. *See, e.g.*, NIELSEN, *supra* note 158, at 37-38; *see also* Wickham, *Idiocy in Virginia*, *supra* note 53, at 691 (noting that a criminal offender was in "a State of entire ideotcy" and "uncapable of knowing right from wrong" so she was "taken from jail and 'forwarded to the hospital in Williamsburg, according to the law'"). Family confinement may have been a longstanding practice. *See* WALKER, *supra* note 130, at 26 ("I suggest that the pre-Norman practice in dealing with serious offenses by the insane, such as homicide, was to make the offender's family pay and look after him, and that this was done without presenting him formally for trial: local knowledge of insanity settled the matter without the necessity for that.").

203. TRENT, *supra* note 99, at 12. It seems that idiots garnered less attention than lunatics, not just in criminal law, but as a general matter as well. Andrews, *supra* note 167, at 67 ("There

In the colonies, idiots "blended into the general population unless they were apprehended for criminal behavior, and if the surviving records are any indication, few were brought before the courts."[204] Nonetheless, many colonies, similar to England, enacted statutes that explicitly exempted idiots from criminal punishment. For instance, the Colony of Rhode Island adopted a burglary provision holding that one who "in the night time do breake and enter into a Dwelling house with an intent to robb" is punished under a "Felonie of Death."[205] However, the provision "extends not to . . . fooles, nor to madd men."[206] The terms "fool" and "natural fool" were common synonyms of the word "idiot" in the eighteenth century.[207] Other colonies enacted similar statutes protecting idiots from criminal punishment.[208] In addition, idiots and lunatics who committed suicide were not counted as *felo de se* (which was a property sanction levied against the estates of those who committed suicide).[209]

B. Identifying Idiots: Community Reputation

There are several hurdles in identifying the characteristics of eighteenth-century idiots. The colonial criminal statutes make no effort to explain *who* qualified for these protections.[210] Other legal sources offer similarly scant de-

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is no escaping the fact that contemporaries spent more time, more money and more energy on providing for and writing about those deemed to be lunatics than on the merely idiotic.").

204. Wickham, *Idiocy in Virginia*, *supra* note 53, at 681.

205. Wickham, *Idiocy and the Law in Colonial New England*, *supra* note 53, at 107.

206. *Id.*

207. *See* SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1775) (defining an idiot as, "A fool; a natural; a changeling; one without the powers of reason); Wickham, *supra* note 160, at 148 (noting the appearance of "terms such as *incapashous*, *simplish*, and *natural fool*" in colonial records).

208. MCMANUS, *supra* note 163, at 104 (discussing statutory protections for idiots in the colonies of Connecticut, Massachusetts, and Rhode Island).

209. HUGH F. RANKIN, CRIMINAL TRIAL PROCEEDINGS IN THE GENERAL COURT OF COLONIAL VIRGINIA 70 (1965) ("A suicide adjudged *non compos mentis*, or insane, was not subject to the penalties of the law."). After suicides, coroners performed an inquest to investigate the death. There are numerous colonial newspapers that report their findings of "insanity." *See, e.g.*, ST. GAZETTE S.C., no. 2403, May 18, 1786, at 3 (reporting on the suicide of James Storie, and noting that the coroner found him "insane, and not of sound mind, memory, and perfect understanding").

210. MCMANUS, *supra* note 163, at 104 ("Massachusetts granted idiots and distracted persons statutory exemption from prosecution, but unfortunately provided no guidelines for identifying such persons. The Connecticut statute was equally vague . . . . Rhode Island's burglary

scription. For instance, a review of law student notebooks from the colonies show that these criminal protections existed, but it does not explain the legal standard by which idiocy was determined.[211] However, the historical record is clear about one identifying factor: the probative role of an idiot's reputation in her community.

Before the wave of institutionalization that swept England and the United States in the nineteenth century, idiocy was addressed on a local level by the idiot's family and community.[212] Since the community—not medical experts—was the locus of care for idiots, community members were the ones called on to testify at trials. Nigel Walker explains that the earliest insanity cases relied entirely on local knowledge: "Being local men, they knew—or thought they knew—who was born when and who was a lunatic or an idiot."[213] The "popular reputation" approach carried on throughout the eighteenth century and, to a lesser extent, into the nineteenth.[214] While many legal tests—such as Fitzher-

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statute exempted 'fools and madmen' from capital punishment, though the extent to which a burglar had to be foolish or mad was not clear.").

211. My review of the digitized Litchfield Law School student notebooks reveals that idiocy and lunacy shielded defendants from punishment; however, the notebooks provide little explanation of how idiocy or lunacy should be determined. *See, e.g.*, 3 Lonson Nash, Lectures on Various Legal Subjects Delivered in the Litchfield Law School 1392 (1803) (unpublished manuscript) (on file with Harvard Law School Library, Manuscript HLS MS 4004), http://pds.lib.harvard.edu/pds/view/40129255?n=443 [http://perma.cc/P393-MADA] ("Idiots and lunaticks are not punishable for a crime, because they have no will . . . . If the fact whether he is insane is doubtful, it must be determined by a Jury.").

212. TRENT, *supra* note 99, at 7 (noting that idiots in the colonies received care from their extended families); *see also* SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY 1674-1784, at 68 (Richard B. Morris ed., 1935) (providing an example of a case from May 10, 1720, where the Church Wardens were ordered to pay Mr. John Moore "four Shillings Weekly to be by him laid out and Applyed to the use of Mrs. Phillipina Schelleux Widdow (who is non Compos Mentis) towards her support and Maintainance She being an Object of Charity").

213. Walker, *supra* note 137, at 28.

214. Digby, *supra* note 167, at 2 (noting that "[l]egal decisions often effectively validated the viewpoint of families or endorsed the popular reputation of the individual as an idiot"); Rushton, *supra* note 174, at 52 ("The use of friends and neighbors as witnesses suggests that a general popular reputation [of idiocy] was taken as evidence in many instances."); Walker, *supra* note 137, at 30 ("Usually it was not medical evidence but the testimony of relatives, friends, or spectators that persuaded the court that the defendant had been mad at the time of his crime. If medical testimony was available, it was associated with a higher probability of a favorable verdict—but only a little higher."); *see also id.* ("On these occasions, as in allegations of lunacy, the everyday knowledge of normal mental states was thought sufficient to diagnose the abnormal, suggesting that, as Neugebauer notes, those manifesting these signs, to the popular mind, 'lived next door' and were part of ordinary acquaintance. The use of friends and neighbors as witnesses suggests that a general popular reputation was taken as evidence in many instances.").

bert's—contained seemingly rigid language, there is little evidence that they were implemented in such an unforgiving manner.[215] When they were, it was either because the crime created a fierce political response,[216] or, in civil cases, when a powerful person wanted to dispossess another of his property.[217]

Reports from the Old Bailey Courthouse in London provide illustrative examples of the community's probative role in eighteenth-century idiocy trials in England.[218] In 1767, Samuel Straham was indicted for bigamy because he married a second wife.[219] After Straham plead idiocy, the court heard testimony of witnesses who knew Straham. One said, "I have known [Straham] for sixteen

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215. Also note, as discussed *supra* in Part II.C, that Fitzherbert's language was not nearly as rigid as indicated by Justice Scalia in *Atkins*.

216. *See, e.g.*, WALKER, *supra* note 130, at 57.

217. These cases bent the idiocy classification in both directions. In some instances, a prominent person took advantage of an idiot and bought his land for a fraction of its worth. When the family of the idiot protested that the idiot was incompetent to make such a transaction, the prominent person sought to quash the finding of idiocy. *See, e.g.*, DEUTSCH, *supra* note 96, at 59 (noting that Benjamin Franklin expressed concern for insane people who were taken advantage of by "ill disposed Persons").

Alternatively, the definition of idiocy was stretched to include people who were capable of managing their affairs in order to allow the Crown to seize their land. Take, for instance, the case of Henry Roberts in 1747. Anonymous, *The Case of Henry Roberts, Esq*, *in* PATTERNS OF MADNESS IN THE EIGHTEENTH CENTURY: A READER 101-06 (Allan Ingram ed., 1998). Roberts was orphaned when he was young, and he inherited an estate from his parents. The estate was managed by trustees until Roberts came of age in 1739. At that time, in order to evade charges of mismanagement, his trustees initiated a "commission of idiocy" against him, which is described by the anonymous author in detail. The author describes the "very rough and hasty [m]anner" in which the vested inquisitors challenged Roberts, *id.* at 102, asking him questions "without giving [him t]ime to answer," *id.* at 104. During the hearing Roberts demonstrated that he knew the value of different coins, could perform basic arithmetic, and even write. *Id.* at 102. However, a witness testified that at a prior date Roberts could not answer "where the Soul went when it separated from the Body," and that he therefore must be an idiot. *Id.* at 103 (emphasis omitted). Moreover, the inquisitors quickly asked him questions such as "what a Lamb, and what a Calf was called at one, two and three Years old." *Id.* at 104 (emphasis omitted). After miscounting a sum of money, the inquisitors determined that he was incapable of managing his affairs. *Id.* The inquisition of idiocy ended with Roberts being declared incapable and stripped of his estate. *Id.* at 101.

218. First published in 1674, the Proceedings of The Old Bailey publicized accounts of the trials at the Old Bailey Courthouse in London. Today it is a free resource that provides an electronically searchable database for researchers. OLD BAILEY ONLINE (2015), http://www.oldbaileyonline.org [http://perma.cc/BV6C-X47R]. Unfortunately, no similar resource exists for trials in the colonies.

219. *Samuel Straham, Sexual Offences > Bigamy, 23rd February 1757*, PROC. OLD BAILEY: LONDON'S CENT. CRIM. CT., 1674 TO 1913 (1766), http://www.oldbaileyonline.org/browse.jsp?id=t17570223-9&div=t17570223-9&t [http://perma.cc/9664-UGFB].

years . . . [and] count him no better than an ideot."[220] Another said that he "always took [Straham] to be a fool" and that he "does not know right from wrong." Following this testimony, he was acquitted.[221] In 1762, Ann Wildman was indicted for stealing.[222] Several witnesses "who had known [Wildman] some years" testified to her idiocy.[223] They said "she was a very weak, easy, foolish girl, next a kin to an idiot."[224] Without mention of any formal tests, this evidence was sufficient to acquit Wildman as an idiot.[225] Many other acquittal cases exist; likewise, they often make little effort to explain why the defendant was considered an idiot.[226]

The Old Bailey accounts also contain instances where community witnesses were insufficient to secure an idiocy acquittal. For example, in 1748, Robert Miller was found guilty of stealing a linen handkerchief.[227] Community witnesses came forward to testify on Robert's behalf, including his employer and his brother Richard.[228] Robert's employer described him as one "troubled with fits" and "half an ideot."[229] Richard reported that he "maintained [Robert for] six or seven years" and that "[h]e has been under most of the doctors [sic] hands in London."[230] There is no explanation of the court's reasoning, but Robert Miller was found guilty and sentenced to transportation for seven years.[231]

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220. *Id.*

221. *Id.*

222. *Ann Wildman, Theft > Grand Larceny, 14th January 1762*, PROC. OLD BAILEY: LONDON'S CENT. CRIM. CT., 1674 TO 1913 (1762), http://www.oldbaileyonline.org/browse.jsp?id=t17620114-11&div=t17620114-11 [http://perma.cc/5DEC-CA8V].

223. *Id.*

224. *Id.*

225. *Id.*

226. See, for instance, the case of Mary Tame in 1719. Tame was indicted for drowning her sister in a pond. However, "it appeared by the Evidence that the Prisoner was an Ideot," and she was acquitted. No further information is provided regarding how the jury reached this conclusion. *Mary Tame, Killing > Murder, 3rd September 1719*, PROC. OLD BAILEY: LONDON'S CENT. CRIM. CT., 1674 TO 1913 (1719), http://www.oldbaileyonline.org/browse.jsp?id=t17190903-33&div=t17190903-33 [http://perma.cc/V3F6-HVU2].

227. *Robert Miller, Theft > Grand Larceny, 26th May 1748*, PROC. OLD BAILEY: LONDON'S CENT. CRIM. CT., 1674 TO 1913 (1748), http://www.oldbaileyonline.org/browse.jsp?id=t17480526-15-defend172&div=t17480526-15 [http://perma.cc/SF4Y-ZHMZ].

228. *Id.*

229. *Id.*

230. *Id.*

231. *Old Bailey Proceedings Punishment Summary, 26th May 1748*, PROC. OLD BAILEY: LONDON'S CENT. CRIM. CT., 1674 TO 1913 (1748), http://www.oldbaileyonline.org/browse.jsp

Although idiocy defenses sometimes failed, Nigel Walker's broader analysis of the Old Bailey Sessions Papers confirms a significant statistical increase in insanity acquittals in the second half of the eighteenth century.[232] He says that the insanity defense "often succeeded in the eighteenth century . . . [and] [l]aymen's evidence was often accepted without any testimony by mad-doctors."[233] After ruling out alternative explanations, Walker says that "[s]ince we cannot dismiss the [statistical increase] as a result of chance or improvements in procedure, we must look for signs of genuine changes either in the pattern of crime or in attitudes to mental disorder."[234] And while he acknowledges the possibility of "an increase in the relative frequency with which lunatics and idiots appeared in the docket at the Old Bailey" he insists that "an unmistakable phenomenon of this period was a growing public awareness of the special nature of the social problem posed by the mentally disordered."[235]

Insanity acquittals for idiots and lunatics also occurred in the colonies; however, as noted above, idiots and lunatics were particularly unlikely to receive formal trials.[236] Furthermore, the available trial records are often quite terse. Like the colonial statutes, colonial courts seem to rely on the assumption that idiots and lunatics would simply be known as such. This is consonant with general historical assessments of colonial trials, specifically, that colonial juries often decided both questions of law and fact.[237] For instance, a judge charging a

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?div=s17480526-1 [http://perma.cc/V62L-6YES]. Transportation was a punishment whereby the convicted was sent abroad to do hard labor. *Punishments at the Old Bailey*, OLD BAILEY ONLINE (2015), http://www.oldbaileyonline.org/static/Punishment.jsp#transportation [http://perma.cc/6RRQ-UZRS]("In 1718 the first Transportation Act allowed the courts to sentence felons guilty of offences subject to benefit of clergy to seven years transportation to America.").

232. WALKER, *supra* note 130, at 68 (describing "the increases in frequency and success rate [of insanity defenses] just after the middle of the [eighteenth] century").

233. Walker, *supra* note 137, at 25.

234. WALKER, *supra* note 130, at 70.

235. *Id.* Walker notes that even attacks on the king were liable to be dismissed based on the insanity defense. "By 1786, the climate of opinion was such that Margaret Nicholson . . . who attacked George III . . . was not even arraigned, but simply consigned to Bethlem." *Id.* at 223. Again in 1790 an insane person attacked the king. After John Frith was charged with high treason, he was adjudged insane and the matter was remanded. The record states that he was "remanded for the present." However, there is no historical evidence indicating that he went back to trial or was executed. *Id.* at 223-24.

236. *See supra* Part III.A.

237. LANGBEIN ET AL., *supra* note 41, at 474 ("Colonial judges were often untrained in law. In some colonial courts, more than one judge presided at trial, which made it difficult to give a consistent charge to the jury. In such circumstances, juries often decided matters of law, even in cases that had no political overtones."); *see also id.* at 479 ("Early American courts were not well-adapted to judicial control either of fact or of law. Many judges were un-

grand jury in Massachusetts in 1759 stated that in most matters the jurors "need no explanation [because] your good sense and understanding will direct ye . . . ."[238]

The surviving colonial insanity acquittals offer little evidence of the legal standard that was used. For example, in 1770 in Virginia, Moses Riggs was sentenced to death for murder.[239] However, due to his apparent insanity, "the Verdict against him was disapproved of by the Court" and he was declared "a fit Object of Mercy."[240] In 1776, it was ordered that "Moses Riggs be discharged from his Confinement in the publick Gaol."[241] In 1757 in New Jersey, a court discharged Elizabeth Post after she was indicted for arson.[242] The court was "doubtful . . . whether she was not an idiot or lunatic" and so ordered "the sheriff [to] inquire by the oaths of twelve good and lawful men of his bailiwick whether the s'd Elizabeth Post was [a] lunatic or idiot."[243] After the sheriff returned the finding of lunacy, the court ordered that Post be discharged.[244] No information is provided as to how the inquisition reached its determination nor what characteristics of Post led the court to suspect she was an idiot or lunatic. There are other similarly concise reports of colonial cases that acquit idiots and lunatics for serious crimes.[245]

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trained in the law – some were clergymen or physicians, others were farmers or blacksmiths. When judges lacked legal training, and law books were scarce, jurors must have seemed equally capable of determining the law.").

238. *Id.* at 479 (citing Grand Jury Charge, 1759, *reprinted in* WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830, at 26 (1975)).

239. 6 EXECUTIVE JOURNALS OF THE COUNCIL OF COLONIAL VIRGINIA 383 (Benjamin H. Hillman ed., 1966).

240. *Id.*; *see also* RANKIN, *supra* note 209, at 113 n.60 ("In 1770, the Council recommended a pardon for the murderer, Moses Riggs, on the grounds that he was insane.").

241. 7 REVOLUTIONARY VIRGINIA: THE ROAD TO INDEPENDENCE 656 (Brent Tarter ed., 1975) (1776).

242. George C. Thomas III, *Colonial Criminal Law and Procedure: The Royal Colony of New Jersey 1749-57*, 1 N.Y.U. J.L. & LIBERTY 671, 685 (2005).

243. *Id.*

244. *Id.*

245. For instance, in 1745 in Virginia, "Jack a Negro Man Slave" was spared because it seemed "Doubtfull Whether he was Sensible of the crime for which he is Sentenced." CRIMINAL PROCEEDINGS IN COLONIAL VIRGINIA: [RECORDS OF] FINES, EXAMINATIONS OF CRIMINALS, TRIALS OF SLAVES, ETC., FROM MARCH 1710 TO 1754 [RICHMOND COUNTY, VIRGINIA] 228 (Peter Charles Hoffer & William B. Scott eds., 1984). In 1754, William Sherrings was excused for stealing from a church because he had "impaired Understanding." *Id.* at 248-49. In 1773, Nathan Phillips was jailed instead of executed "because of his 'being a lunatick.'" RANKIN, *supra* note 209, at 206. In 1733, Elizabeth Horton appears to have been acquitted because the jury found that "before and at the time of committing the [murder] she was mad and is so

These cases confirm the practice of idiocy acquittals in the colonies, but they offer little evidence of *who* was considered an idiot for purposes of criminal liability. Based on our knowledge of common law idiocy acquittals more generally, there is strong evidence that community reputation played a prominent role in these acquittals. The next Part turns to the legal sources that were used by the Framers; the rule promulgated in these sources helps illuminate who was considered an idiot in the criminal context.

C. Identifying Idiots: Hale's Rule, the Framers' Rule

There is strong doctrinal evidence that the range of idiots' intellectual abilities was broader than the narrow definition adopted by the Supreme Court in *Penry* and *Atkins*. This is expressed most clearly in the work of Matthew Hale. As discussed above, Hale's work "had more influence on lawyers of the eighteenth and nineteenth century than any other single work on the subject [of idiocy]."[246] Hale provided an illustration to help determine the level of mental impairment that qualified an individual as an idiot for the purpose of criminal liability: only a person who "hath yet ordinarily as great an understanding, as ordinarily a child of fourteen hath, is such a person as may be guilty of treason or felony."[247] In addition to community reputation, there is evidence that this fourteen-year-old rule was used to determine idiocy in criminal cases in England.[248]

It is interesting that Hale set the age at fourteen for at least two reasons. First, and most obviously, this level of intellectual functioning is far broader than that contemplated under the Supreme Court's "profound and severe theory."[249] The definition of idiocy that the Court used—the definition that emerged from Goddard's IQ breakdown in the eugenics movement—held that

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at the present time." DOUGLAS GREENBERG, CRIME AND LAW ENFORCEMENT IN THE COLONY OF NEW YORK, 1691-1776, at 118 (1976).

246. WALKER, *supra* note 130, at 35.

247. *Id.* at 38.

248. *See, e.g.*, *John Leck, Theft > Grand Larceny, 9th July 1800*, PROC. OLD BAILEY: LONDON'S CENT. CRIM. CT., 1674 TO 1913, (1800), http://www.oldbaileyonline.org/browse.jsp?id=t18000709-21-defend204&div=t18000709-21 [http://perma.cc/T9EF-FSM3] ("Gentlemen of the Jury, you are here sworn on the part of the Crown, to inquire whether the prisoner at the bar is of sound mind or not; by which oath, I understand, that you are to pronounce whether you think the prisoner knows right from wrong; the rule laid down in our law books is this, that if a person has the same sort of understanding that a child of fourteen years of age has, he is then answerable to the laws of his country; now, by that rule, I understand, if he is a person that knows right from wrong as well as an ordinary child of fourteen years of age does.").

249. Penry v. Lynaugh, 492 U.S. 302, 305, 332-33 (1989).

idiots were people who "could not develop full speech and had mental ages below three."[250] This is plainly not the severity of disability contemplated by Hale's fourteen-year-old rule.

Second, the choice of fourteen had symbolic significance. During Hale's time it was fairly well established that the ability to know good from evil was a crucial test for a child on trial for a felony.[251] However, a child below the age of seven—the age of reason—was exempted from such a trial.[252] Nigel Walker notes

> the fact . . . that the madman tended to be compared to the child under the age of fourteen rather than the child under seven suggests that—at first at least—it was failure to appreciate the true nature and quality of his act that was supposed to be [the criminal madman's] defect.[253]

Walker uses this incongruity to contrast the theoretical formalism of knowing good from evil with the everyday reality of insanity acquittals:

> In all but the exceptional case the madman obviously does mean to kill or at least seriously injure his victim; in other words, what Bracton called the 'will to harm' was not lacking . . . . Yet throughout the period we are considering juries were, with the approval of judges, acquitting people who committed insane but intentional acts.[254]

According to Walker, setting the age at fourteen shielded defendants who purposefully harmed their victims—a much more generous standard than the one advanced by the Supreme Court.

Matthew Hale's fourteen-year-old rule is an important access point to colonial conceptions of idiocy protections. As discussed below, this rule was duplicated in many of the authoritative resources used by the Framers, and it was the sole method listed for determining idiocy in criminal matters.

One of the principal ways to establish the public meaning of idiocy in 1791 America is to examine legal dictionaries from the period. The Supreme Court increasingly turns to dictionaries to understand the meaning of specific

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250. GOULD, *supra* note 94, at 158; *see also Report of Committee on Classification of the Feeble-Minded*, *supra* note 95, at 61 ("(a) Idiots: Those so deeply defective that their mental development does not exceed that of a normal child of about two years.").

251. *See* WALKER, *supra* note 130, at 40.

252. *Id.*

253. *Id.*

254. *Id.*

terms.[255] For example, in *District of Columbia v. Heller*, Justice Scalia relied heavily on the 1773 edition of Samuel Johnson's Dictionary and Timothy Cunningham's "important 1771 legal dictionary" to determine the original meaning of the phrase "keep and bear arms."[256]

In a recent article, Justice Scalia and Bryan Garner identify specific legal dictionaries that they believe best define the meaning of legal terms during particular time periods.[257] For the time period 1750 to 1800, Justice Scalia recommends six legal dictionaries, one of which is Cunningham's 1771 edition.[258] All six of the recommended legal dictionaries provide entries for either "Ideots and Lunaticks" or "Idiot." Five of the six provide extended discussions on the subject[259] while the sixth only provides a cursory definition.[260] In each of the five, there is a subsection that specifically addresses criminal liability for idiots. In all of these five, the definitions have a similar structure, use similar wording, and cite many of the same authorities.

In Cunningham's 1771 edition, subsection three is labeled: "How far their want of understanding shall be said to prejudice them in civil and criminal cases," and nested under that heading is the subsection "Criminal cases."[261] This subsection opens: "It is laid down as a general rule, that ideots and lunaticks, being by reason of their natural disabilities incapable of judging between good and evil, are punishable by no criminal prosecution whatsoever."[262] The subsection proceeds to note that an idiot or lunatic who commits suicide does not

255. *See generally* Jeffrey L. Kirchmeier & Samuel A. Thumma, *Scaling the Lexicon Fortress: The United States Supreme Court's Use of Dictionaries in the Twenty-First Century*, 94 MARQ. L. REV. 76 (2010); John Calhoun, Note, *Measuring the Fortress: Explaining Trends in Supreme Court and Circuit Court Dictionary Use*, 124 YALE L.J. 484 (2014).

256. 554 U.S. 570, 581-89 (2008).

257. Antonin Scalia & Bryan A. Garner, *A Note on the Use of Dictionaries*, 16 GREEN BAG 2D 419, 424 (2012).

258. Note that there are four authors, but two of the authors have multiple recommended editions, yielding six total legal dictionaries. *Id.* (recommending six law dictionaries for 1750-1800: TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW-DICTIONARY, OR GENERAL ABRIDGMENT OF THE LAW, ON A MORE EXTENSIVE PLAN THAN ANY LAW-DICTIONARY HITHERTO PUBLISHED, 2 vols. (2d ed. 1771; 3d ed. 1783); GILES JACOB, A NEW LAW DICTIONARY (9th ed. 1772; 10th ed. 1782); RICHARD BURN, A NEW LAW DICTIONARY, 2 vols. (1792); WILLIAM MARRIOT, A NEW LAW DICTIONARY, 4 vols. (1797-1798) (an update of Cunningham)).

259. CUNNINGHAM, *supra* note 258 (2d ed. 1771; 3d ed. 1783); JACOB, *supra* note 258 (9th ed. 1772; 10th ed. 1782); MARRIOT, *supra* note 258.

260. BURN, *supra* note 258.

261. CUNNINGHAM (2d ed. 1771), *supra* note 258.

262. *Id.* (citing 1 HAWKINS, *supra* note 192, at 2).

qualify as *felo de se*.[263] Subsequently, Cunningham's dictionary proceeds to a thoughtful consideration regarding the difficulty of determining idiocy in criminal matters:

> The great difficulty in these cases is, to determine where a person shall be said to be so far deprived of his sense and memory, as not to have any of his actions imputed to him; or where, notwithstanding some defects of this kind, he still appears to have so much reason and understanding as will make him accountable for his actions, which my Lord *Hale* distinguishes between, and calls by the name of total and partial insanity; and tho' it be difficult to define the invisible line that divides perfect and partial insanity, yet, says he, it must rest upon circumstances, duly to be weighed and considered both by the judge and jury, lest on the one side there be a kind of inhumanity towards the defects of human nature, or on the other side too great an indulgence given to great crimes; and the best measure he can think of is this: Such a person, as laboring under melancholy distempers, hath yet ordinarily as great understanding as ordinarily a child of fourteen years hath, is such a person as may be guilty of treason or felony.[264]

This fourteen-year-old rule is the only method offered to determine idiocy for purposes of *criminal liability*.[265] The four other dictionaries likewise cite Hale's fourteen-year-old rule as the primary method for determining whether an offender is an idiot and therefore immune from prosecution for a felony or treason. Moreover, they track the language of Cunningham's 1771 edition almost verbatim, differing principally in matters of italicization, capitalization, and spelling.[266]

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263. *Id.*

264. *Id.*

265. Other parts of Cunningham's definition may seem to be in tension with this rule. For instance, several pages earlier he says, "If one have understanding to measure a yard of cloth, number twenty, rightly name the days of the week, or to beget a child, he shall not be counted an idiot or natural fool, by the laws of the realm." However, this portion of the definition cites *Beverly's Case*, a civil matter, and does not apply to criminal matters. *Id.* Hale's fourteen-year-old rule, however, is specifically labeled for criminal matters.

266. Cunningham's 1783 edition duplicates his 1771 edition verbatim. The only differences are in formatting: the capitalization of certain words (for example, judge to Judge); additional italicization (*total* and *partial* insanity); a missing comma; and changed spelling (tho to though). CUNNINGHAM, *supra* note 258. In Jacob's 1772 and 1782 editions, the criminal section is the fifth, and the header is similar: "How far the want of understanding will excuse in criminal cases." JACOB, *supra* note 258. The definition that follows is the same. The main deviance is in italicization and the addition of the word "commonly." It reads: "Such a per-

Although colonial trial records are unclear on the legal standard they used to determine idiocy, as discussed above, some nineteenth-century trials explicitly relied on the fourteen-year-old rule. For instance, in 1838 a Delaware court cited Hale's rule as the recommended standard to determine insanity in criminal matters.[267] There are additional nineteenth-century cases that cite Hale's rule,[268] as well as nineteenth-century legal scholars from the United States[269] and England.[270]

Despite the paucity of the colonial trial records, there is evidence that the notion of a mental age comparison – equating idiocy with childhood – was conceptually intuitive for the colonists. For instance, a Massachusetts deposition in 1670 described an idiot by an age comparison:

> [Deponent] and his sisters took a great deal of care and diligently instructed him in reading and he was also put to school, but he did not gain much of what might have been expected . . . . In his ordenary imployment he was incapashous that I neuar saw one of that age soe unfit for larning & any work in which was needfull to haue discresion used.[271]

Likewise, a Charlestown court in 1690, described an idiot as "void of common reason and understanding that is in other children of her age."[272] These records

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son, as labouring under melancholy distempers, hath yet *ordinarily* as great understanding as a *child of fourteen years* commonly hath, is such a person as may be guilty of treason or felony." *Id.* Marriot's dictionary also uses the same definition as Cunningham's with only minor differences. MARRIOT, *supra* note 258. The central difference is the header for the subsection, which changes "want of understanding" to "condition." It reads: "How far their condition shall affect them in civil and criminal cases." *Id.*

267. Duffield v. Morris's Ex'r, 2 Del. (2 Harr.) 375, 380 (1838).

268. *See, e.g.*, Parsons v. State, 2 So. 854, 857 (Ala. 1887) (discussing the former influence held by Hale's fourteen-year-old rule); State v. Richards, 39 Conn. 591, 594 (1873) (recommending the use of Hale's fourteen-year-old rule); Choice v. State, 31 Ga. 424, 475-76 (1860) (citing Hale's fourteen-year-old rule); *see also* Roberts v. State, 3 Ga. 310, 332 (1847) (citing Hale generally regarding mental capacity); *see also* DEUTSCH, *supra* note 96, at 392 (noting that "Hale's test was widely used in English criminal cases for many years after his time.").

269. *See, e.g.*, J.A.G. DAVIS, A TREATISE ON CRIMINAL LAW, WITH AN EXPOSITION OF THE OFFICE AND AUTHORITY OF JUSTICES OF THE PEACE IN VIRGINIA; INCLUDING FORMS OF PRACTICE 27-28 (1838) (providing Hale's fourteen-year-old rule as the "best rule upon the subject").

270. *See, e.g.*, HIGHMORE, *supra* note 81, at 141-42 (1822) ("[S]uch a person as . . . hath yet ordinarily as great understanding as a child of fourteen years hath, is such a person as may be guilty of felony or treason" (citing 1 HALE, *supra* note 14, at 30).

271. Wickham, *Idiocy and the Law in Colonial New England*, *supra* note 53, at 108 (citation omitted).

272. *Id.*

indicate that Hale's comparison between idiocy and a young age (fourteen) was not a foreign concept to the colonists.

There is much we still do not know about eighteenth-century idiocy protections. For instance, the historical record is unclear about the legal standard used by the colonists in criminal trials with idiot defendants. Nonetheless, as discussed above, we know that idiocy acquittals occurred and the community reputation of an idiot likely played a large role.[273] Moreover, the fourteen-year-old rule provides strong doctrinal evidence that idiocy protections were more expansive than argued by the Supreme Court in *Penry* and Justice Scalia's dissent in *Atkins*.[274] Circumstantial evidence supports this reading. As noted above, the colonists "undoubtedly relied on English definitions of idiocy and methods to determine incompetency with which they were familiar."[275] As Nigel Walker noted in his analysis of the Old Bailey Session Papers, late-eighteenth-century England was marked by a statistically significant increase in the success rate of the insanity defense.[276] The colonists generally followed English criminal law, and to the extent that they deviated from it, they moved in the direction of leniency and offered alternatives to the death penalty.[277] Given this collective evidence, the most persuasive reading of the historical record suggests that eighteenth-century protections for idiots were fairly strong. Moreover, as argued in Part IV, it appears likely that protections from the late eighteenth century would protect some of the offenders whom we execute today.

IV. RESTORING THE CONSTITUTIONAL FLOOR: APPLYING EIGHTEENTH-CENTURY PROTECTIONS TODAY

Part IV asks if there are people on death row today who would have been shielded by idiocy protections in 1791. The answer is likely yes. It then explores how the Court could enforce these protections. Although it is challenging to apply historical standards in a contemporary setting, the fourteen-year-old rule has some natural modern analogues, namely the concept of "mental age." As this Part explains, the concept of mental age, although it faces complications in both the fields of law and psychology, serves as a useful starting point for the application of idiocy protections today.

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273. *See supra* Part III.B.

274. *See supra* Part III.C.

275. Wickham, *Idiocy and the Law in Colonial New England*, *supra* note 53, at 106.

276. See WALKER, *supra* note 232.

277. *See* CHAPIN, *supra* note 41, at 8.

It should be clear that restoring the original meaning approach to the Eighth Amendment does not mean adopting ancient models of care or retrograde psychiatric diagnoses. Rather, it means gaining historical evidence about the characteristics of individuals the Framers and ratifying states meant to protect and then abstracting those principles to protect, *at minimum*, similar people today. In addition, restoring the original meaning approach does not require disrupting the evolving standards of decency approach. Restoring the floor simply establishes immutable, baseline protections below which the evolving standards of decency must not fall. Therefore, the floor can only create new protections to the extent that it exceeds the protections already provided by evolving standards of decency. Based on this Note's historical analysis, it is likely that restoring the constitutional floor would protect a segment of people with intellectual impairments who are currently sentenced to death.[278]

A. Why Idiocy Protections Matter Today

It may be helpful to start with a recent example. In light of the foregoing discussion, it is highly likely that in 1791 it would have been considered "cruel" to execute Freddie Hall. Hall is a prisoner on death row who was convicted of participating in the 1978 kidnap, rape, and murder of Karol Hurst.[279] Due to questions involving Hall's intellectual disability, the Supreme Court heard his case, *Hall v. Florida*, in 2014.[280] Hall is illiterate, unable to perform basic arithmetic, and has never been able to hold a steady job.[281] Growing up, he was considered intellectually disabled by his entire community, including his siblings, friends, and teachers.[282] Furthermore, although expert witnesses differed regarding Hall's precise "mental age," all of them diagnosed him with a mental

278. Alternatively, one might argue, as John Stinneford does, that the original meaning of the Eighth Amendment can replace the "evolving standards of decency" approach. Stinneford argues that, based on his historical research on the meaning of the Cruel and Unusual Punishments Clause, the Court could replace the "evolving standards of decency" with the "original meaning" approach and reach substantially the same results in cases like *Graham v. Florida*, 130 S. Ct. 2011 (2010). *See* John F. Stinneford, *Evolving Away from Evolving Standards of Decency*, 23 FED. SENT'G REP. 87, 87 (2010). While Stinneford's line of argument may hold promise, this Note does not pursue it.

279. *See* Hall v. Florida, 134 S. Ct. 1986, 1990 (2014) ("On February 21, 1978, Freddie Lee Hall, petitioner here, and his accomplice, Mark Ruffin, kidnaped, beat, raped, and murdered Karol Hurst, a pregnant, 21-year-old newlywed.").

280. *Id.*

281. Brief for Petitioner at 2, *Hall*, 134 S. Ct. 1986 (2014) (No. 12-10882).

282. *Hall*, 134 S. Ct. at 1991.

age below a fourteen-year-old.[283] Based on these characteristics, it is likely that Hall would have been considered an idiot in 1791 and therefore exempted from execution.

Hall is a strong case for idiocy protection; he qualifies as an idiot under almost any common law test. His inability to read and perform basic arithmetic would likely qualify him as an idiot under Fitzherbert's definition.[284] The collective understanding of his community that he was intellectual disabled would be probative under the community reputation analysis described in Part III.B. Finally, Hall's low mental age would likely qualify him as an idiot under the fourteen-year-old rule that was accepted common law doctrine in 1791.

Hall's case illustrates why common law idiocy protections are relevant today: states continue to execute people with significant mental impairments. Although *Atkins v. Virginia* proscribed capital punishment for people with intellectual disabilities, it left to the states "the task of developing appropriate ways to enforce the constitutional restriction."[285] As Carol and Jordan Steiker argued in 2008, many states adopted stringent procedures governing the determination of intellectual disability, thereby compromising the substantive guarantee of *Atkins*.[286] The Supreme Court's ruling in *Hall v. Florida* supports this argument.[287]

In *Hall*, the Court held that Florida's threshold requirement for proving intellectual disability—an IQ of seventy or below—was unconstitutionally rigid.[288] *Hall* is significant because it is the first time the Court stated that *Atkins* does not give states "unfettered discretion" to define the scope of the constitutional protection afforded to people with intellectual disabilities.[289] However,

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283. *Id.* (noting that "Hall's counsel recalled that Hall could not assist in his own defense because he had 'a mental . . . level much lower than his age,' at best comparable to the lawyer's 4-year-old daughter. A number of medical clinicians testified that, in their professional opinion, Hall was 'significantly retarded' . . . and had levels of understanding 'typically [seen] with toddlers'") (citations omitted).

284. *See* FITZHERBERT, *supra* note 125, at 533 ("And he who shall be said to be a sot and idiot from his birth, is such a person who cannot account or number twenty pence, nor can tell who was his father or mother, nor how old he is, &c., so as it may appear that he hath no understanding of reason what shall be for his profit, or what for his loss. But if he hath such understanding, that he know and understand his letters, and do read by teaching or information of another man, then it seemeth he is not a sot nor a natural idiot."); *supra* Part II.C.

285. *Atkins*, 536 U.S. at 317.

286. Carol S. Steiker & Jordan M. Steiker, Atkins v. Virginia*: Lessons from Substance and Procedure in the Constitutional Regulation of Capital Punishment*, 57 DEPAUL L. REV. 721, 724-31 (2008).

287. *Hall*, 134 S. Ct. at 1986.

288. *Id.* at 2001.

289. *Id.* at 1989.

Hall addressed only a narrow issue—the seventy-point IQ cutoff[290]—and leaves states with considerable flexibility to define intellectual disability. Indeed, the ruling does not necessarily shield Hall himself from execution; it merely holds that his IQ of seventy-one does not foreclose further exploration of intellectual disability.[291] And notably for this discussion, the Court's reasoning relied entirely on the "evolving standards of decency" method and did not mention historical idiocy protections.[292]

In light of this Note's historical analysis, death penalty jurisprudence should give renewed focus to the public meaning of idiocy in 1791. Today, all death penalty protections for people with intellectual disabilities are provided through the "evolving standards of decency" approach to the Eighth Amendment, as outlined in *Atkins* and *Hall*.[293] The original meaning approach to Eighth Amendment jurisprudence currently provides no special protections for people, like Hall, who have substantial intellectual impairments. The constitutional floor is missing. This Note's historical reassessment suggests that some prisoners on death row today who are not protected by *Atkins* or *Hall* may nonetheless be protected by eighteenth-century idiocy protections.

B. Enforcing Idiocy Protections Today

Although several different principles can be abstracted from this Note's historical analysis, this Part focuses on one of them: the fourteen-year-old rule. The requirement that the offender have "as great understanding, as ordinarily a child of fourteen years hath" is intuitively analogous to the concept of "mental age."[294] Broadly defined, mental age gauges defendants' "incapacity to function

290. *See* Lizette Alvarez & John Schwartz, *On Death Row With Low I.Q., and New Hope for a Reprieve*, N.Y. TIMES, May 30, 2014, http://www.nytimes.com/2014/05/31/us/on-death-row-with-low-iq-and-new-hope-for-a-reprieve.html [http://perma.cc/STM6-GGNE] (noting that the ruling in *Hall v. Florida* "affects roughly 30 death row inmates" and that "[t]he number is low").

291. *Hall*, 134 S. Ct. at 1990 ("Florida law defines intellectual disability to require an IQ test score of 70 or less. If, from test scores, a prisoner is deemed to have an IQ above 70, all further exploration of intellectual disability is foreclosed. This rigid rule, the Court now holds, creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional.").

292. *Id.* at 1992 ("To enforce the Constitution's protection of human dignity, this Court looks to the 'evolving standards of decency that mark the progress of a maturing society.'" (citation omitted)).

293. *See supra* Part I.A.

294. 1 HALE, *supra* note 14, at 30.

at an adult level cognitively and morally despite [their] chronological age."[295] It would seem that the Court could employ the mental age concept and adopt a *per se* rule that prohibits the execution of people with a mental age below fourteen. As discussed below, promulgation of this rule might protect a segment of capital offenders currently on death row. As of June 2014, approximately thirty of the last one hundred executed offenders were diagnosed with some degree of mental disability.[296] Some of them appear to qualify for idiocy protections based on their mental ages.

Consider Robert Woodall. He is currently sentenced to death for the kidnap, rape, and murder of Sarah Hansen.[297] Woodall is mentally impaired and "function[s] at the age equivalency of an 11 or 12 year-old."[298] Furthermore, he has displayed other symptoms throughout his life that are highly associated with idiocy. For instance, Woodall has been incontinent since childhood and "defecate[s] without warning."[299] In the common law, "befouling" oneself was associated with idiocy.[300]

Other capital cases similarly cite defendants' low mental ages, but courts often struggle to determine the legal relevance of such evidence. For instance, Thomas Bowling is currently sentenced to death in Kentucky for two murders from 1990.[301] Bowling was diagnosed with the mental age of an eleven-year-old.[302] However, the Kentucky Supreme Court rejected his mental retardation claim because, *inter alia*, he did "not cite[] any published authority prohibiting the death penalty based upon 'juvenile mental age.'"[303]

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295. James Fife, *Mental Capacity, Minority, and Mental Age in Capital Sentencing: A Unified Theory of Culpability*, 28 HAMLINE L. REV. 237, 251 (2005).

296. Robert J. Smith, Sophie Cull & Zoë Robinson, *The Failure of Mitigation?*, 65 HASTINGS L. J. 1221, 1229 (2014) ("One-third of the last hundred executed offenders were burdened by intellectual disability, borderline intellectual functioning, or traumatic brain injury – a similarly debilitating intellectual impairment.").

297. *Death Row Inmates*, KY. DEP'T CORR. (2015), http://corrections.ky.gov/communityinfo/Pages/DeathRowInmates.aspx [http://perma.cc/8FXE-NGZL].

298. Brief for Respondent at 2, White v. Woodall, 134 S. Ct. 1697 (2014) (No. 12-794).

299. *Id.* at 4.

300. *See, e.g.*, *John Stevens, Killing > Murder, 9th April 1766*, PROC. OLD BAILEY: LONDON'S CENT. CRIM. CT., 1674 TO 1913, http://www.oldbaileyonline.org/browse.jsp?id=t17660409-67&div=t17660409-67 [http://perma.cc/2WMA-33QZ] (determining the idiocy of the deceased because he was "really dumb" and used to "befoul himself").

301. *See Death Row Inmates*, *supra* note 297..

302. Brief for Appellant at 1-3, Bowling v. Commonwealth, 224 S.W.3d 577 (Ky. 2006) (No. 2005-SC-000712).

303. *Bowling*, 224 S.W.3d at 584.

Richard Henyard was executed in Florida in 2008 for capital crimes committed when he was eighteen years old.[304] During the capital phase of his trial, the court found that Henyard "functions at the emotional level of a thirteen year old and is of low intelligence."[305] However, the court determined that these findings reflected "nonstatutory mitigating circumstances" and therefore accorded them "little weight."[306] This decision was upheld by the Florida Supreme Court in 1996,[307] and Henyard was denied habeas relief by both the Florida Supreme Court in 2004[308] and the Eleventh Circuit in 2006.[309] However, Judge Barkett wrote separately "to address the separate and troubling issue of Henyard's mental age":[310]

> As with children and the mentally retarded, mental age is not the result of a failure to abide by an expected standard, but an incapacity to evaluate and comprehend it. The mere fact of a defendant's chronological age should not qualify a defendant for death where the measures of capacity render him lacking in culpability. Although it may not be directly before us, at some juncture this issue must be addressed.[311]

Today on death row there are other prisoners—similar to Henyard, Woodall, and Bowling—who have mental ages below fourteen.[312]

Although mental age seems a straightforward way to apply the fourteen-year-old rule today, the approach faces several challenges. The concept of "mental age" largely fell into legal disuse after the Supreme Court's ruling in *Penry*. In Part IV.C of *Penry*—a portion of the opinion adhered to only by Justice O'Connor—Justice O'Connor examined and rejected the concept of mental

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304. *Richard Henyard*, OFF. CLARK COUNTY PROSECUTING ATT'Y, http://www.clarkprosecutor.org/html/death/US/henyard1122.htm [http://perma.cc/5NSL-CNC6].

305. Henyard v. State, 689 So. 2d 239, 244 (Fla. 1996).

306. *Id.*

307. *Id.*

308. Henyard v. State, 883 So. 2d 753 (Fla. 2004).

309. Henyard v. McDonough, 459 F.3d 1217 (11th Cir. 2006).

310. *Id.* at 1247 (Barkett, J., concurring).

311. *Id.* at 1248-49.

312. *See, e.g.*, Rodriguez v. State, 919 So. 2d 1252, 1265 (Fla. 2005) (mental age of seven); Suttles v. State, 2014 WL 2902271, slip op. at *6 (Tenn. Ct. App. June 25, 2014) (mental age of between seven and nine); Brief for Appellant, People v. Woodruff, No. S115378, 2011 WL 4440789, at *28 (Cal. Aug. 29, 2011) (noting that a clinical psychologist examined Woodruff in 2003 and testified that he had "the mental age of someone 9 or 10 years old"); Reply Brief of Appellant, Hill v. Florida, No. SC68706, 2006 WL 868083, at *13-14 (Fla. Jan. 5, 2006) (mental age of approximately ten).

age as a consideration in capital sentencing.[313] Although Penry was diagnosed with a mental age of six and a half,[314] Justice O'Connor found the concept of mental age problematic for four reasons, and concluded that it "should not be adopted as a line-drawing principle in our Eighth Amendment jurisprudence."[315] Her objections were: first, that the trial court made no factual finding regarding Penry's age; second, that mental age diagnosis begins to plateau at the age of fifteen or sixteen; third, that some courts had already rejected mental age; and fourth, adopting the concept of mental age might deprive people with intellectual disabilities of other rights.[316] The Supreme Court has not discussed mental age at length since *Penry*.[317]

These four objections are ably rebutted in James Fife's article, *Mental Capacity, Minority, and Mental Age in Capital Sentencing: A Unified Theory of Culpability*.[318] Fife notes that the first objection was specific to *Penry*'s procedural history, and is no reason to reject the concept of mental age in general.[319] The second objection—that mental age begins to plateau at the age of 15 or 16—does not affect the fourteen-year-old rule discussed in this Note. Fife argues that the third objection is unpersuasive because *Penry* was a case of first impression, and the cases Justice O'Connor cited were scattered and outdated.[320] The final objection is similarly unconvincing. Fife points out the "pure unlikelihood that legislatures or courts would model everyday legal status decisions on the basis of capital sentencing factors."[321]

The mental age concept resurfaced in the legal landscape in the wake of *Roper v. Simmons* in 2005.[322] In *Roper*, the Supreme Court held that the Eighth Amendment prohibits the execution of individuals who were under eighteen

313. Penry v. Lynaugh, 492 U.S. 302, 339-40 (1989).

314. *Id.* at 339.

315. *Id.* at 340.

316. *Id.* at 339-40.

317. *See, e.g.*, McCollum v. North Carolina, 512 U.S. 1254, 1255 (1994) (Blackmun, J., dissenting from denial of certiorari) (citing Justice Stevens's opinion concurring in part and dissenting in part in *Penry*, and noting that McCollum's "mental age of a 9-year-old" was one among several factors contributing to his belief that McCollum's execution was unconstitutional); *see also* Atkins v. Virginia, 536 U.S. 304, 310 (2002) (citing the dissent in the Virginia Supreme Court, which appealed to Atkins's mental age).

318. Fife, *supra* note 295, at 263-65.

319. *Id.* at 263.

320. *Id.* at 263-64.

321. *Id.* at 264.

322. 543 U.S. 551 (2005).

years of age at the time of their capital crime.[323] The Court arrived at this decision based on the "evolving standards of decency" approach to the Eighth Amendment.[324] In dissent, Justice O'Connor noted that it was *not* considered "cruel and unusual" to execute an individual below eighteen years old in 1791.[325] After *Roper*, several death row prisoners brought actions attempting to combine *Roper* and *Atkins*. They argued that these holdings should merge to protect not only those with chronological ages below eighteen, but also those with mental ages below eighteen.[326] The lower courts refused to extend *Roper* to include mental age and categorically rejected these petitions.[327]

The legal status of mental age remains unsettled. Although many courts reject mental age, others continue to invoke it. For instance, in *Atkins v. Virginia* the Supreme Court cited the dissenting justices of the Virginia Supreme Court, who had written that "the imposition of the sentence of death upon a defendant who has a mental age of a child of 9-12 is excessive" and "incredulous as a matter of law."[328] More recently, in March 2015, Judge Beverly Martin of the Eleventh Circuit wrote in dissent that a defendant's claim – that his "mental and emotional age of less than eighteen prohibits his execution" – satisfied the certificate of appealability standard mandated under federal habeas law.[329] Numerous other cases and briefs, as mentioned above, reference the mental age of defendants.

Mental age is somewhat unsettled in the psychological literature as well. The concept originated at the beginning of the twentieth century as a way to

323. *Id.* at 578.

324. *See id.* at 561, 563.

325. *See id.* at 589 (O'Connor, J., dissenting).

326. *See* Thompson v. State, 153 So. 3d 84, 177-80 (Ala. Crim. App. 2012) (reviewing Bowling v. Commonwealth, 224 S.W.3d 577 (Ky. 2006) (holding that *Roper* did not prohibit the execution of offenders with the mental age of a juvenile and citing Mitchell v. State, 235 P.3d 640, 659 (Okla. Crim. App. 2010) ("We find the *Bowling* decision well reasoned and persuasive."))); Hill v. State, 921 So. 2d 579, 584 (Fla. 2006) ("*Roper* only prohibits the execution of those defendants whose *chronological* age is below eighteen."); State v. Campbell, 983 So. 2d 810, 830 (La. 2008) (rejecting the application of *Roper* to mental age); *see also* Suttles v. State, No. E2013-01016-CCA-R3-PD, 2014 WL 2902271, at *5 (Tenn. Crim. App. June 23, 2014) (noting that petitioner makes an "*Atkins-Roper* Claim" to argue his execution is unconstitutional because his mental age is below eighteen).

327. *See supra* note 326.

328. Atkins v. Virginia, 536 U.S. 304, 310 (2002) (quoting Atkins v. Commonwealth, 534 S.E.2d 312, 321 (2000) (Hassell, J., dissenting)).

329. Melton v. Sec'y, Fla. Dep't of Corr., 778 F.3d 1234, 1237 (2015) (Martin, J., dissenting).

calculate scores in early standardized intelligence tests.[330] The subsequent developments in the mental age concept are well documented—at least from its origins until the 1980s.[331] There is surprisingly little literature that discusses mental age as a concept over the past several decades. Nonetheless, various contemporary psychological studies continue to use iterations of the concept in practice.[332]

In addition, numerous modern psychological tests generate "age equivalency" scores. For example, the Second Edition of the Vineland Adaptive Behavioral Scales (Vineland II) tests the social adaptive functioning of people with intellectual disabilities and measures their performance along a spectrum of ages.[333] Vineland II assesses four adaptive skills: communication, daily living skills, socialization, and motor skills (the latter being optional for people over age six).[334] The test is "age-based and is defined by the standards of others . . . [representing] the typical performance rather than the potential or ability of the individual."[335] By providing the age equivalency of its test takers, Vineland II would likely be useful in implementing the fourteen-year-old rule.

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330. JOHN M. REISMAN, A HISTORY OF CLINICAL PSYCHOLOGY 60 (2d ed. 1991) (noting that the mental age concept was first introduced by Alfred Binet and Théodore Simon in 1908 as a score for their intelligence test); *see also* ROBERT M. THORNDIKE & DAVID F. LOHMAN, A CENTURY OF ABILITY TESTING 35 (1990) (describing how mental age was a conceptual building block of IQ: Mental Age/Chronological Age = Intelligence Quotient).

331. *See, e.g.*, THORNDIKE & LOHMAN, *supra* note 330 at 35, 50-54, 79. *See generally* Boake, *supra* note 89.

332. *See, e.g.*, Barbara Caplan et al., *Developmental Level and Psychopathology: Comparing Children with Developmental Delays to Chronological and Mental Age Matched Controls*, 37 RES. IN DEVELOPMENTAL DISABILITIES 143, 146 (2015) (calculating mental age using the formula MA = IQ/100 x CA, where CA is chronological age). See also Helma B.M. van Gameren-Oosterom et al., *Development, Problem Behavior, and Quality of Life in a Population Based Sample of Eight-Year-Old Children with Down Syndrome*, PLOS ONE, July 2011, at 1, which calculates developmental age for children using

> 18 subtests, grouped into the scales: verbal, perceptual, quantitative, memory and motor skills. The verbal, perceptual and quantitative scales are combined to form the general cognitive scale. A developmental age is calculated based on the various scale scores. To prevent an excessive influence of one of the subscales on the developmental age, the 18 subtests are each representing one competence in order to test a specific ability of the child and not a broad range of abilities, i.e. the test is developed so that level of verbal ability will minimally influence test-scores on other domains measured.

Id. at 2.

333. Sara S. Sparrow, *Vineland Adaptive Behavior Scales*, *in* ENCYCLOPEDIA OF CLINICAL NEUROPSYCHOLOGY 2618, 2618-19 (Jeffrey S. Kreutzer et al. eds., 2011).

334. *Id.*

335. *Id.* at 2620.

Similarly, the Fourth Edition of the Peabody Picture Vocabulary Test (PPVT-4) provides age- and grade-based standard scores.[336] The PPVT, the first edition of which debuted in the 1950s, provides "excellent reliability and validity" in testing receptive verbal skills.[337] Although the test should not substitute for IQ testing, its scores correlate with IQ scores and can provide some general guidance regarding a mental age conversion.[338] Using the PPVT-4's Table for age twenty-five to thirty-one, the following IQ to mental age conversions result: IQ of 50 corresponds to a mental age of 7 years and 3 months; IQ of 70 corresponds to a mental age of 10 years and 5 months; IQ of 75 corresponds to a mental age of 12 years and 2 months; and an IQ of 80 corresponds to a mental age of 14.[339] In addition to the PPVT-4, other methods exist for generating mental age calculations based on IQ scores[340] or grade equivalen-

336. Nathan Henninger, *Peabody Picture Vocabulary Test*, *in* ENCYCLOPEDIA OF CLINICAL NEUROPSYCHOLOGY, *supra* note 333, at 1889, 1889.

337. *Id.* at 1890.

338. ESTHER STRAUSS ET AL., A COMPENDIUM OF NEUROPSYCHOLOGICAL TESTS: ADMINISTRATION, NORMS, AND COMMENTARY 947-48 (3d ed. 2006) (outlining the correlation between PPVTs and IQ scores but noting that the PPVT cannot substitute for an IQ test).

339. E-mail from Stephen Greenspan, Professor Emeritus of Educ. Psychology, Univ. of Conn., to author (Apr. 5, 2015, 6:27 PM) (on file with author).

340. There is also a somewhat crude formula for converting IQ scores to a mental age that uses a denominator of 16. *See* Christopher Slobogin, *Scientizing Culpability: The Implications of* Hall v. Florida *and the Possibility of a "Scientific Stare Decisis,"* 23 WM. & MARY BILL RTS. J. 415, 424 n.62 (2014) ("Generally, to convert an IQ score into a rough mental age equivalent, the IQ is multiplied by 16, and then divided by 100. Thus, an IQ of 75 equates roughly with a mental age of twelve." (citation omitted)). As Stephen Greenspan explains it:

> Today, test scoring software and conversion tables do not routinely produce MA [mental age] scores; a widely used method for determining rough MA equivalents for different IQ scores is to use 16 as the denominator (because most IQ sub-tests tend to level off around age 16) in a modified ratio calculation. A couple of variants of this method can be used but one common one is to "multiply the [obtained] IQ by 16, and then divide by 100. So an adult with a 50 IQ is functioning at roughly an 8-year-old level."

E-mail from Stephen Greenspan, Professor Emeritus of Educ. Psychology, Univ. of Conn., to author (Apr. 4, 2015, 11:58 AM) (on file with author) (quoting Jonathan Rich, *Intelligence Testing*, PSYCHOL. TESTING, http://www.psychologicaltesting.com/iqtest.htm [http://perma.cc/X95A-ULCH]). Using this technique an IQ of 84 corresponds with a mental age of thirteen and a half, yielding a slightly more generous IQ range than the PPVT-4 equivalencies. E-mail from Stephen Greenspan, Professor Emeritus of Educ. Psychology, Univ. of Conn., to author (Mar. 31, 2015, 11:17 AM) (on file with author). Note, however, that this difference falls within the normal standard error of measurement for IQ tests, which is five points. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FIFTH EDITION: DSM-5 37 (2013).

cies.[341] Although these IQ-to-mental-age conversion techniques are by no means unequivocal, they help to illustrate that the fourteen-year-old rule likely captures a borderline group of intellectually disabled people who are not protected today.

Enforcing historical idiocy protections in the modern context will come with challenges. Complications inhere when transporting historical concepts. To address these challenges, more scholarship is necessary—scholarship that looks both backward and forward. Additional historical research will help fill gaps in our knowledge about idiocy protections; additional legal and psychological scholarship will help apply those protections to capital sentencing today.

More historical research will help supplement our understanding of idiocy protections at the time the Eighth Amendment was adopted. For instance, additional scholarship can refine our conception of the fourteen-year-old rule. Historical sensitivity asks that we consider not just the understanding of an ordinary fourteen-year-old, but the understanding of an ordinary fourteen-year-old *in 1791*. As noted above, many of the colonial trial records are too terse and descriptively vague to provide much help. Social science (and intuition) suggests that a fourteen-year-old in 1791 would be *more* mature than a fourteen-year-old today.[342] However, a sufficiently rigorous answer calls for more careful work in social history. On a more basic level, what was the public meaning of the word "understanding" in 1791?[343] As applied to a fourteen-year-old, did the concept of understanding encompass only intelligence? Or did it also consider social adaptive functioning? Dictionaries from the time period provide some

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341. For instance, until 2013, the Diagnostic and Statistical Manual of Mental Disorders (DSM) described a person with Mild Mental Retardation as one who could "acquire academic skills up to approximately the sixth-grade level." AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION: DSM-IV-TR 43 (1994). As explained in a report by the American Psychological Association, the DSM "indicates, even a person with only 'mild' mental retardation, as the term is defined in the Manual [sixth-grade level], has a mental age below that of a teenager." AM. PSYCHOLOGICAL ASS'N, REPORT OF THE TASK FORCE ON MENTAL DISABILITY AND THE DEATH PENALTY 2 (2005), http://www.apa.org/pubs/info/reports/mental-disability-and-death-penalty.pdf [http://perma.cc/2E87-SFEX]. The report explains that academic skills up to the sixth-grade level "amount[s] to the maturity of a twelve year-old." *Id.* at 2 n.8.

342. *See, e.g.*, Jeffrey Jenson Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens Through the Twenties*, 55 AM. PSYCHOLOGIST 469, 470 (2000) (noting that industrial societies allow "prolonged adolescence" (citing ERIK H. ERIKSON, IDENTITY: YOUTH AND CRISIS (1968))).

343. Recall that Hale's rule says only a person who "hath yet ordinarily as great an *understanding*, as ordinarily a child of fourteen hath, is such a person as may be guilty of treason or felony." 1 HALE, *supra* note 14, at 30 (emphasis added).

context;[344] however, the word "understanding" would benefit from a more sustained treatment, such as John Stinneford's extended analysis on the eighteenth-century meaning of the word "unusual."[345]

Similarly, joint work in the fields of law and psychology will help judges apply idiocy protections today (again, simply as a constitutional floor—not replacing the evolving standards of decency). The concept of mental age holds promise, but it may be insufficiently nuanced to fully capture the protections of the fourteen-year-old rule. As an alternative, psychologists may continue to explore innovative age comparison concepts, such as "adaptive age."[346] According to Stephen Greenspan and his coauthors, a new construct of adaptive age might "enable the courts to understand both the potential and limitations of adults at different developmental levels, while also emphasizing . . . that intelligence as applied to everyday (adaptive) living is a much broader and varied construct than intelligence as captured by IQ scores."[347]

These complications are not insurmountable barriers. The Court could take various approaches to understand and enforce eighteenth-century idiocy protections.[348] Although there will be procedural hurdles, such challenges should not vitiate our efforts to enforce the underlying substantive right.

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344. *See, e.g.*, SAMUEL JOHNSON, 2 A DICTIONARY OF THE ENGLISH LANGUAGE (1755) (providing three definitions for the noun "understanding": 1) "Intellectual powers; faculties of the mind, especially those of knowledge and judgment"; 2) "skill"; 3) "Intelligence; terms of communication"); SAMUEL JOHNSON, 2 A DICTIONARY OF THE ENGLISH LANGUAGE (1770) (providing a nearly identical definition).

345. *See* Stinneford, *supra* note 8.

346. Stephen Greenspan et al., *Intelligence Involves Risk-Awareness and Intellectual Disability Involves Risk-Unawareness: Implications of a Theory of Common Sense*, 36 J. INTELL. & DEVELOPMENTAL DISABILITY 242, 249 (2011).

347. *Id.* (internal citations omitted).

348. For instance, the Supreme Court might reuse its technique from *Atkins v. Virginia*. In *Atkins*, the Court announced a substantive right—it is unconstitutional to execute a person with mental retardation—but did little to explain the concept. *See* 536 U.S. 304, 321 (2002). Instead, the Court left to the states "the task of developing appropriate ways to enforce the constitutional restriction." *Id.* at 317 (quoting Ford v. Wainwright, 477 U.S. 399, 416-17 (1986)). The Court could do likewise today. That is, it could announce the substantive right—the fourteen-year-old rule—but leave to the states the task of enforcing the constitutional restriction. While this approach boasts certain merit, such as using the states as laboratories of democracy to unpack the meaning of idiocy protections, it also comes at a cost. As the Court held in *Hall v. Florida*, certain states provided overly stringent procedures for identifying intellectual disability, and thereby compromised the guarantee of *Atkins*. *See* 134 S. Ct. 1986, 2001 (2014). If the Court reuses that technique with the fourteen-year-old rule, it is likely that the floor will not be restored in some states—at least not until the Court intervenes for a second time, as it did in *Hall*.

CONCLUSION

This Note makes three contributions. First, it shows that the Supreme Court's historical analysis of eighteenth-century protections for idiots was deeply flawed. Second, it offers an historical account that strongly indicates that those protections cast a broader net than acknowledged by the Court. And third, based on this historical reassessment, it reveals that there are some prisoners with intellectual disabilities on death row today who likely would have been protected from execution in 1791. Ultimately, this Note's findings may seem modest. It appears that a small segment of capital prisoners qualify for additional protections based on this historical reassessment. However, from the perspective of those prisoners, this new historical analysis may be vitally important.