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Originalism and the Common Law Infancy Defense

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Originalism and the Common Law Infancy Defense

ARTICLE

ORIGINALISM AND
THE COMMON LAW INFANCY DEFENSE

CRAIG S. LERNER*

Justice Thomas and the late Justice Scalia consistently argued that the original meaning of the Eighth Amendment was to foreclose only those modes or acts of punishment that were considered cruel and unusual at the time the Bill of Rights was adopted. With respect to juvenile criminal responsibility, this would mean that the Constitution contemplated an infancy defense no broader than what existed in 1791. Yet the common law infancy defense, as sketched by originalist judges, seems barbaric. It treated all fourteen-year-olds as adults, and it permitted the imposition of punishment—even capital punishment—on offenders as young as seven.

This Article argues that the common law infancy defense was more nuanced than modern observers often recognize. With respect to misdemeanors, the defense was more broadly applicable than is typical today. Even with respect to felonies, offenders under the age of fourteen could be found liable only after an individualized inquiry as to their capacity to distinguish right from wrong. The eighteenth century culture and common law had higher expectations of juvenile abilities than prevail today; and not surprisingly, young people proved more mature than modern adolescents, who are told repeatedly that they are frail and vulnerable. This Article speculates on how the original meaning of the Eighth Amendment, assuming it incorporates the common law approach to juvenile responsibility, might be applied to modern conditions, given the diminished maturity of young people. However, the Article questions whether young people today are as immature as advertised; indeed, the study of the common law

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infancy defense could prompt a reconsideration of contemporary attitudes about the capacities of young people.

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INTRODUCTION

On July 21, 1786, the body of six-year-old Eunice Bolles, partially buried by stones, was discovered near a road in New London, Connecticut.¹ Her skull had been fractured, her arms and face had been bruised, and the prints of fingernails scarred her neck.² The community rallied to find the murderer, and suspicion fell upon twelve-year-old Hannah Ocuish.³ Hannah, whose mother was a Pequot Indian, denied wrongdoing; but her alibi, that a wall had fallen on Eunice, was unconvincing.⁴ A tearful confession soon followed, to the effect that Hannah was enraged when Eunice had earlier accused her of stealing some strawberries.⁵ Convicted of murder, Hannah seemed oddly, even disconcertingly, unconcerned.⁶ She may have been led to believe that she was not in mortal peril.⁷ If so, she was mistaken. In delivering an execution sermon, the Reverend Henry Channing elaborately acknowledged Hannah's youth, and regretted that a deficient religious

1. The facts of the case are drawn from the Appendix to the execution sermon of the Reverend Henry Channing. See Reverend Henry Channing, *A Sermon, Preached at New London, December 20, 1786. Occasioned by the Execution of Hannah Ocuish, A Mulatto Girl, Aged 12 Year and 9 Months, For the Murder of Eunice Bolles, Aged 6 Years and 6 Months*, 1, 29–30 (1786).

2. *Id.* at 30.

3. *Id.* at 29–30.

4. *Id.*

5. *Id.* at 30.

6. *Id.* at 30–31.

7. *Id.* at 30.

instruction had allowed Hannah's "vicious disposition" to go uncorrected.⁸ But, justice, he declaimed, required her execution, "for 'Whose sheddeth Man's blood, by Man shall his blood be shed.'"⁹

The past, it is said, is a foreign country, even, it would seem, when the country is one's own.¹⁰ It may be difficult for a modern observer to recreate the cast of mind that would incline a community to execute a twelve-year-old, regardless of the ghastliness of her crime. Over the past four decades, courts throughout the country have rescued juveniles older than Hannah Ocuish from judicial punishment. In 1988, the U.S. Supreme Court determined that the Eighth Amendment and "evolving standards of decency" foreclosed the execution of all persons who were under the age of sixteen at the time of the offense.¹¹ In 2005, the Court expanded the constitutional prohibition of capital punishment to all offenders under the age of eighteen.¹² More recently, in *Graham v. Florida*,¹³ the Court held unconstitutional the sentence of life without parole when imposed on a juvenile convicted of any offense other than homicide.¹⁴ And in *Miller v. Alabama*,¹⁵ the Court held life without parole unconstitutional when imposed on juveniles in a sentencing scheme that denied the judge the opportunity to consider youth as a mitigating factor.¹⁶

These cases are familiar to students of the juvenile criminal justice system, but less recognized is their influence on the development of constitutional law in the states. For example, the Iowa Supreme Court, construing the Eighth Amendment and the state constitutional analog, invalidated mandatory minimum sentences when imposed on juveniles convicted of robbery.¹⁷ The California Supreme Court

8. *Id.* at 5–6, 14 ("A bad natural disposition if not early subdued will . . . bring forth nothing but briars and thorns, to pierce a parent's heart with many sorrows.).

9. *Id.* at 5–6 (quoting *Genesis* 9:6).

10. L.P. HARTLEY, *THE GO-BETWEEN* 17 (1953).

11. *Thompson v. Oklahoma*, 487 U.S. 815, 821–23, 838 (1988).

12. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

13. 560 U.S. 48 (2010).

14. *Id.* at 82.

15. 567 U.S. 460 (2012).

16. *Id.* at 489 (synthesizing *Graham*, *Roper*, and other cases requiring individualized sentencing determinations in the capital context to conclude that a sentencing scheme that mandates life without parole for juvenile offenders is unconstitutional and that mitigating factors must be considered in juvenile sentencing); *see also* *Montgomery v. Louisiana*, 136 S. Ct. 718, 729, 732 (2016) (announcing that *Miller* introduced a "new substantive rule of constitutional law" and is thus retroactive on collateral review; however, states are not required to relitigate sentences, rather, *Miller* violations may be remedied by allowing juvenile offenders parole consideration).

17. *State v. Lyle*, 854 N.W.2d 378, 380 (Iowa 2014) (vacating and remanding the

overturned a life without parole sentence imposed on a seventeen-year-old offender convicted of “special circumstances” first degree murder, when the statute created a presumptive life sentence.¹⁸ And the Connecticut Supreme Court rejected a 100-year sentence imposed on a seventeen-year-old defendant who was convicted of homicide and nonhomicide offenses and sentenced by a judge exercising discretion.¹⁹ Given that the offenses included murder, the punishment was not life without parole, and the sentencing scheme was not a mandatory one, the Connecticut Supreme Court’s application of *Graham* and *Miller* is triply mysterious, although the decision was portrayed, however improbably, as an extrapolation of those cases.²⁰

The logical premise of all of these cases is a claim about juvenile responsibility—that is, that minors are categorically distinct from adults in their moral agency. In the words of the *Roper v. Simmons*²¹ Court, quoted repeatedly in subsequent cases, juveniles, when compared to adults, have a “lack of maturity and an underdeveloped sense of responsibility”; they “are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure”; and their characters are “not as well formed.”²² Flowing from these distinctions, courts have reasoned, the penological rationales of deterrence and retribution have less purchase with respect to juveniles than adults; for juveniles are less capable than adults of conforming their conduct to incentives, and their crimes are less reflective of an intractably bad character.²³ Punishments that are permissible when imposed on adults

seven-year mandatory minimum sentence of a seventeen-year-old who was prosecuted as an adult); *State v. Pearson*, 836 N.W.2d 88, 89 (Iowa 2013) (vacating a seventeen-year-old’s fifty-year sentence for robbery and burglary).

18. *People v. Gutierrez*, 324 P.3d 245, 249, 257, 270 (Cal. 2014) (invalidating life without parole sentence imposed on juvenile for “special circumstances” murder, which statutorily created a presumption of a life sentence).

19. *State v. Riley*, 110 A.3d 1205, 1206, 1219 (Conn. 2015) (stating that the defendant was entitled to a new sentencing hearing and instructing the lower court to “consider as mitigation the defendant’s age at the time he committed the offenses and the hallmarks of adolescence”).

20. *Id.* at 1206. The court in *Riley* determined that the term-of-years sentence was “the functional equivalent to a life sentence without parole.” *Id.* Even though this sentence was not mandatory, the court reasoned that under *Miller*, it had to consider the defendant’s youth before imposing a sentence of de facto life without parole. *Id.*

21. 543 U.S. 551 (2005).

22. *Id.* at 569–70 (internal quotation marks omitted).

23. See *Miller v. Alabama*, 567 U.S. 460, 471–72 (2012) (stating that it is “common sense” that juveniles’ developmental differences from adults lessen their culpability and that many juveniles will reform as they mature); *Graham v. Florida*, 560 U.S. 48,

are said to be “cruel and unusual” when imposed on minors, even for the most serious offenses and even if such punishments were routine centuries ago.²⁴ This reasoning prompted dissenting judges—specifically Justices Scalia and Thomas—to complain that the majorities had disregarded the original meaning of the Eighth Amendment.²⁵

Part I of this Article summarizes this originalist position, which contends that the Eighth Amendment should be understood to require an infancy defense no broader than what existed at the time the Bill of Rights was adopted. However, that defense, as sketched by originalist judges, seems indefensibly harsh to a modern observer, and Justice Scalia has hesitated from embracing the complete realization of his stated originalist principles. Part II reviews the relevant passages on the common law infancy defense in foundational works by Matthew Hale and William Blackstone. Through that consideration, the common law emerges as remarkably nuanced, and in important respects it is more congenial to the modern observer than one might gather from Justice Scalia’s summary. Indeed, this Part shows that the common law infancy defense enshrines principles that are embedded in the law today and which still accord with our moral intuitions.

Part III acknowledges that the modern depiction of the young as immature and reckless “adolescents” has been reflected in our legal

68 (2010) (citing *Roper*, 543 U.S. at 570) (claiming that scientific evidence demonstrates the developmental differences between juvenile and adult brains).

24. The cases do not explicitly address questions of race and poverty, although such issues are often lurking in the background. The NAACP Legal Defense Fund has regularly filed briefs on behalf of juvenile defendants, arguing that the imposition of punishment on juvenile defendants disproportionately affects minorities. *See, e.g.*, Brief for the NAACP Legal Defense & Educational Fund, Inc. et al. as Amici Curiae Supporting Petitioner at 1–3, 8, *Graham*, 560 U.S. 48 (Nos. 08-7412 & 08-7621) (arguing that “[t]rust barriers may also be exacerbated by the cross-racial nature of many attorney/client relationships”). Advocacy groups have regularly cited racial discrepancies in seeking to overturn harsh juvenile punishment. *See, e.g.*, *It’s Time to Talk About Race in the Juvenile Justice System*, CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, <https://www.fairsentencingofyouth.org/its-time-to-talk-about-the-role-of-race-in-juvenile-justice> (last visited June 1, 2018). In *Graham*, the Supreme Court cited a study finding that eighty-four percent of all juveniles sentenced to life without parole for nonhomicide offenses in Florida were black. *Graham*, 560 U.S. at 63–64 (citing PAOLO ANNINO ET AL., *JUVENILE LIFE WITHOUT PAROLE FOR NONHOMICIDE OFFENSES: FLORIDA COMPARED TO NATION 2* (2009)).

25. *See Roper*, 543 U.S. at 608 (Scalia, J., dissenting) (describing the majority’s evolving standard of decency approach to the Eighth Amendment as a “mockery” of the founders’ intent and accusing the majority of placing the “subjective views of five Members of this Court and like-minded foreigners” above “the people’s laws” approving the death penalty, which were enacted “barely 15 years ago”).

system and, to some extent, has created what it presupposes: immature and reckless youths. Consequently, it is possible that eighteen-year-olds today are roughly as mature as fourteen-year-olds in 1791. This Article speculates on how the original meaning of the Eighth Amendment, assuming it incorporates the common law approach to juvenile responsibility, might be “constructed” in modern conditions, given the diminished maturity of young people.²⁶ However, this Article concludes with some skepticism about the extent of contemporary youth’s immaturity; indeed, the study of the common law infancy defense could prompt a reconsideration of contemporary attitudes about the capacities of young people.

I. THE SCALIA/THOMAS ORIGINALIST POSITION

Justice Thomas and the late Justice Scalia consistently argued that the original meaning of the Eighth Amendment was to foreclose only those modes or acts of punishment that were considered cruel and unusual at the time the Bill of Rights was enacted.²⁷ The catalog of

26. Cf. JACK BALKIN, *LIVING ORIGINALISM* (2011).

27. Justice Scalia’s most complete statement of his interpretation of the Eighth Amendment appears in *Harmelin v. Michigan*, 501 U.S. 957, 966–84 (1991); see also *Graham*, 560 U.S. at 99 (Thomas, J., dissenting) (internal quotation marks omitted) (“The Cruel and Unusual Punishments Clause was originally understood as prohibiting tortuous methods of punishment, . . . akin to those that had been considered cruel and unusual at the time the Bill of Rights was adopted . . .”); *Atkins v. Virginia*, 536 U.S. 304, 349 (2002) (Scalia, J., dissenting) (“The Eighth Amendment is addressed to always-and-everywhere ‘cruel’ punishments such as the rod and thumbscrew.”). Several originalist scholars have proposed alternative interpretations of the phrase “cruel and unusual punishment.” Most notably, John Stinneford has argued that the original meaning of “unusual” was to foreclose any punishment that is contrary to “long usage or immemorial usage.” John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. L. REV. 1739, 1745 (2008) (internal quotation marks omitted). If Stinneford is correct, then it is possible that the Amendment might reflect a broader exclusion of juvenile punishments than existed at common law. If, for example, long usage was such that seventeen-year-olds were not subject to the death penalty, one might be able to argue that the traditional practice had fallen out of practice: *Roper* could then be defensible on such originalist grounds. There was, however, no such long practice; consequently, this argument is unavailing. *Roper*, 543 U.S. at 614 (Scalia, J., dissenting) (“Between 1990 and 2003, 123 of 3599 death sentences, or 3.4%, were given to individuals who committed crimes before reaching age [eighteen].”). Cf. Stinneford, *supra*, at 1822 (“[T]he Supreme Court’s current practice of selectively striking down traditional applications of the death penalty that have simply become less common—the death penalty for seventeen-year-olds, for example—is almost certainly not justifiable under the original meaning of the Cruel and Unusual Punishments Clause.”).

punishments permitted under the common law, as reflected in the legal commentaries and reported cases of the eighteenth and nineteenth centuries is, from a modern perspective, barbaric. This is particularly the case with respect to juvenile punishment. In his concurring opinion in *Roper*, Justice Stevens taunted Justice Scalia that “[i]f the meaning of [the Eighth] Amendment had been frozen when it was originally drafted, it would impose no impediment to the execution of [seven]-year-old children today.”²⁸ Justice Scalia did not flee from this result; he reveled in it. Citing Hale and Blackstone, Justice Scalia unhesitatingly acknowledged that the common law permitted the execution of a seven-year-old, although he added that “there was a rebuttable presumption of incapacity to commit a capital (or felony) murder until the age of [fourteen].”²⁹ Justice Scalia’s short statement of the common law infancy defense would seem, puzzlingly, designed to render the common law risible to a modern observer.

Justice Thomas’s dissenting opinion in *Miller* is also problematic.³⁰ The issue in that case was whether a mandatory life without parole sentence could be imposed on a juvenile as a consequence of a homicide conviction, or whether an individualized sentencing was required.³¹ Justice Thomas begins his dissenting opinion by reiterating his conclusion that the Eighth Amendment only prohibits methods of punishment deemed tortuous at the time the Bill of Rights was adopted.³² Given that introduction, one readies oneself for an originalist response to Justice Kagan’s majority opinion. Instead, Justice Thomas buries the originalist argument in a footnote:

When the Bill of Rights was ratified, [fourteen]-year-olds were subject to trial and punishment as adult offenders Further, mandatory death sentences were common at that time It is therefore implausible that a [fourteen]-year-old’s mandatory prison sentence—of any length, with or without parole—would have been viewed as cruel and unusual.³³

28. *Roper*, 543 U.S. at 587 (Stevens, J., concurring).

29. *Id.* at 609 n.1 (Scalia, J., dissenting) (citing *Stanford v. Kentucky*, 492 U.S. 361, 368 (1989); 4 WILLIAM BLACKSTONE, COMMENTARIES *23–24; 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 24–29 (Sollom Emlyn ed. 1736)).

30. *Miller v. Alabama*, 567 U.S. 460, 502–09 (2012) (Thomas, J., dissenting).

31. *Id.* at 465 (parsing the constitutionality of mandatory juvenile life without parole sentences without consideration of mitigating factors).

32. *Id.* at 503 (Thomas, J., dissenting) (quoting *Graham v. Florida*, 560 U.S. 48, 99 (2010) (Thomas, J., dissenting)).

33. 567 U.S. at 503–04 n.2 (internal citations omitted).

Thomas suggests that under an originalist view of the Eighth Amendment, there can be no objection to a “mandatory death sentence” imposed on a fourteen-year-old.³⁴ But would he really uphold such a practice today?

Justice Scalia had earlier conceded that he would, in fact, be prepared to strike down such a punishment as “cruel and unusual.”³⁵ In *Thompson v. Oklahoma*,³⁶ Scalia conceded that if the issue posed was whether a sixteen-year-old could be executed in a mandatory sentencing scheme, which denied the judge the opportunity to consider the defendant’s “maturity and moral responsibility,” he would accept the “conclusion that such a practice is opposed by a national consensus, sufficiently uniform and of sufficiently long standing, to render it cruel and unusual punishment within the meaning of the Eighth Amendment.”³⁷ Scalia went still further, stating that he would be willing to overturn a death sentence imposed on an offender younger than sixteen if the law did not provide that the offender enjoyed a “rebuttable presumption that he is not mature and responsible enough to be punished as an adult.”³⁸

Such conclusions are inconsistent with the common law infancy defense, according to which a fifteen-year-old is conclusively presumed to be a responsible adult.³⁹ Scalia rejects this position; he would hold not only that a fifteen-year-old is entitled to an individualized sentencing, but also that he is constitutionally entitled to a presumption of incapacity.⁴⁰ This may reflect the modern era’s changed view of juvenile responsibility, but it has no basis in the law as of 1791 and therefore, at least according to Justice Scalia, the original meaning of the Eighth Amendment.⁴¹ Thus, Justice Scalia repudiates his own originalist interpretation of the Eighth Amendment with regard to juvenile criminal responsibility. When America’s most famous originalist confronts the common law infancy defense in all its barbarity

34. *Id.*

35. *Thompson v. Oklahoma*, 487 U.S. 815, 859 (1988) (Scalia, J., dissenting).

36. 487 U.S. 815 (1988).

37. *Id.* at 859 (Scalia, J., dissenting).

38. *Id.*

39. See MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 17, 22 (1680); see also *Thompson*, 487 U.S. at 864 (Scalia, J., dissenting) (discussing Blackstone and Hale’s explanation of the age at which capital punishment should be prohibited at common law).

40. See *Thompson*, 487 U.S. at 859, 864, 870–71 (Scalia, J., dissenting).

41. *Id.* at 873. Justice Scalia ultimately faults the majority for failing to sufficiently account for “the evolving standards of decency of *our national society*.” *Id.*

he is apparently driven into the camp of “living constitutionalism.”⁴²

Nor is Justice Thomas a bulwark of originalism in this respect. The reasoning in his dissenting opinion in *Miller* is elusive on the crucial issue in the case: mandatory life without parole when imposed on juveniles.⁴³ Thomas devotes much of the dissent to proving that the common law countenanced mandatory death sentences.⁴⁴ This may be true, but is not directly on point because the law cited by Justice Thomas did not address the distinction between juveniles and adults.⁴⁵ Justice Thomas then recognizes that the sentence at issue in *Miller* is life without parole, not death.⁴⁶ At that point, Thomas abandons reliance on the common law and focuses his argument on recent Supreme Court precedents.⁴⁷ He writes, citing *Harmelin v. Michigan*,⁴⁸ that “this Court has already declined to extend its individualized-sentencing rule beyond the death penalty context.”⁴⁹ However, *Harmelin* involved a life without parole sentence imposed on an adult, so again the central issue of juvenile responsibility is skirted.⁵⁰ With respect to that question, which is the central question in the case, Justice Thomas buries the originalist position in a terse footnote, which observes that fourteen-year-olds in 1791 were treated as adults in the criminal law.⁵¹

It is not common practice for judges to conceal crucial links of an argument in a footnote.⁵² A truly originalist response to Justice Kagan’s majority opinion in *Miller* could have elaborated on that terse

42. See Craig S. Lerner, *Sentenced to Confusion: Miller v. Alabama and the Coming Wave of Eighth Amendment Cases*, 20 GEO. MASON L. REV. 25, 35–36 (2012).

43. See *Miller v. Alabama*, 567 U.S. 460, 502–09 (2012) (Thomas, J., dissenting).

44. *Id.* at 506–07 (explaining that mandatory death sentences were common in both federal and state penal codes from “the time of the [nation’s] founding throughout the 19th century”).

45. *Id.* Indeed, the capital punishment cases that Justice Thomas cited all dealt with the constitutionality of imposing the death penalty on adults. *Id.* at 505–07 (citing *Graham v. Collins*, 506 U.S. 461, 487 (1993) (Thomas, J., concurring); *Gardner v. Florida*, 430 U.S. 349, 371 (1977) (Rehnquist, J., dissenting); *Roberts v. Louisiana*, 428 U.S. 325 (1976) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion)).

46. *Id.*

47. *Id.* at 507.

48. 501 U.S. 957 (1991).

49. *Id.* (discussing *Harmelin*’s outcome).

50. *Id.* at 961–62 (outlining the adult petitioner’s appeal of his life without parole sentence).

51. See *Miller*, 567 U.S. at 503–04 n.2 (Thomas, J., dissenting).

52. See, e.g., Richard Posner, *Against Footnotes*, 38 COURT REVIEW: THE JOURNAL OF THE AMERICAN JUDGES 24, 24 (2001).

footnote, demonstrating that sentencing practices as of 1791 conclusively presumed responsibility on the part of fourteen-year-olds. An originalist opinion could have continued by arguing that fourteen-year-olds, considered to be adults, are not constitutionally entitled to an individualized sentencing hearing for *any* punishment. Yet, as we have seen, the difficulty is that Justice Scalia, in *Thompson*, specifically disavows this argument as inconsistent with a “modern consensus.”⁵³ If originalists are willing to reject some aspects of the common law infancy defense, when they are perceived as inconsistent with an emerging “national consensus,” what reason is there for preserving other aspects, when a new consensus has emerged? Resolving constitutional issues of juvenile responsibility seems to turn, at least in Justice Scalia’s account, not on the original meaning of the Eighth Amendment, but on the status of a modern consensus. This hardly sounds like a principled originalist argument.

II. THE COMMON LAW ON JUVENILE RESPONSIBILITY

Justice Scalia cites Hale’s *History of the Pleas of the Crown* (1680) and Blackstone’s *Commentaries on the Laws of England* (1769) for the proposition that the common law condoned the execution of a seven-year-old.⁵⁴ Both works include a substantial treatment of the infancy defense, which the authors group with other “capacity” defenses.⁵⁵ For each of these defenses, the offender concedes that he performed the relevant act, but denies that he did so with the requisite human agency to merit punishment.⁵⁶ In a technical sense, Justice Scalia’s claim that the common law permitted the execution of a seven-year-old is accurate; however, when the common law infancy defense, particularly as it emerged in the early American republic, is considered in its totality, the law is revealed as more subtle than Justice Scalia’s caricature suggests. The common law provided that any offender under the age of fourteen enjoyed a presumption of incapacity, which could only be overcome by compelling evidence of the defendant’s capacity to discern

53. *Thompson v. Oklahoma*, 487 U.S. 817, 870 (1988) (Scalia, J., dissenting).

54. *Roper v. Simmons*, 543 U.S. 551, 609 n.1 (Scalia, J., dissenting) (citing BLACKSTONE, *supra* note 29, at *23–24; MATTHEW HALE, *supra* note 29, at 24–29).

55. See BLACKSTONE, *supra* note 29, at *21–26, *27 (examining the “infancy” defense along with other capacity defenses like “madness,” “lunacy,” “intoxication,” and “ignorance”); HALE, *supra* note 29, at 16–48 (same).

56. The treatments of the infancy defense in Hale and Blackstone are harmonious; indeed, Blackstone borrowed freely from Hale in summarizing the infancy defense of his own time. BLACKSTONE, *supra* note 29, at *22–24; HALE, *supra* note 29, at 16–29.

the wrongness of his offense. Furthermore, as shown below, the harshness of the common law infancy defense was reserved for felonies; juvenile misdemeanants were provided a more generous defense than what prevails in the law today.

A. *The Law's Varied Treatment of Age*

Both Hale and Blackstone begin their treatments of the infancy defense on the same note: by observing that the law's treatment of age varies widely depending on context and jurisdiction.⁵⁷ As Hale writes, there is one threshold for the capacity to enter into a contract—twenty-five years in civil law counties, twenty-one in England—another for the capacity to be an executor—seventeen in both jurisdictions—and yet another for the capacity to enter into marriage—twelve for females and fourteen for males in both jurisdictions.⁵⁸ The criminal law poses yet another context, with different rules. According to Hale and Blackstone, the criminal law presumed that one was answerable for criminal offenses at age fourteen, and, in some instances, minors as young as seven years old could be found criminally liable.⁵⁹

To this day, the law establishes widely varying age requirements for such activities as participating in politics, consenting to medical treatment, and getting married.⁶⁰ A recent law review article faulted the law's "inconsistent" conceptions of maturity and its tendency to "consider[] maturity narrowly and only on an ad hoc basis around single issues."⁶¹ Yet the law's traditionally varied treatment of age is defensible because, in different contexts, the law seeks to measure different kinds of human "capacity."⁶² One might, for example, conclude that the human capacity that makes it fair to assign criminal responsibility arises in virtually all individuals by the age of fourteen.⁶³ By contrast, the law might conclude that the human capacity that

57. BLACKSTONE, *supra* note 29, at *22–23; HALE, *supra* note 29, at 16–17.

58. HALE, *supra* note 29, at 17.

59. BLACKSTONE, *supra* note 29, at *22–23; HALE, *supra* note 29, at 17–18.

60. *Infra* notes 167–69 and accompanying text.

61. Jonathan Todres, *Maturity*, 48 HOUS. L. REV. 1107, 1110, 1113 (2012).

62. See *supra* notes 58–60 and accompanying text (explaining the varying levels of "capacity" in different legal contexts).

63. See BLACKSTONE, *supra* note 29, at *23 (stating that under ancient Saxon law, an offender who was fourteen years old or younger "might, or might not, be guilty of a crime, according to his natural capacity or incapacity"); HALE, *supra* note 29, at 25–27 ("It is clear that an infant above fourteen and under twenty-one is equally subject to capital punishments . . . and can discern between good and evil . . .").

makes it fair to bind one to one's contractual obligations arises later in life.⁶⁴ If there is merit to this hypothesis, the question for our purpose is: what is the capacity that is most at issue in the context of the criminal law? As we shall see, Hale's and Blackstone's answer to this question—the capacity to discern good and evil—provides guidance in establishing the threshold age for criminal culpability. Furthermore, their answers, when properly considered, cannot be dismissed as absurd even by a modern observer.

B. Misdemeanors

One crucial aspect to the common law infancy defense that is seldom addressed in summaries of that defense today is the distinction between capital crimes—or felonies—and misdemeanors.⁶⁵ Hale and Blackstone both begin their treatment of the infancy defense by drawing this distinction and first addressing misdemeanors.⁶⁶

What emerges is a law that is remarkably lenient for minors. Both authors write that for misdemeanors, no criminal liability can arise until the offender is fourteen years old.⁶⁷ Even after that age, a defense is sometimes available all the way to the age of twenty-one years, or later than is the practice today.⁶⁸ Hale and Blackstone draw a further distinction between those misdemeanors that entail a breach of the peace, such as riot and battery, and other misdemeanors, which are characterized as ones of “mere non-feasance” or “omission.”⁶⁹ With respect to the first category—breaches of the peace—liability is permissible, but only upon a demonstration that the offender was *doli*

64. See Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status Under Law*, 10 U.C. DAVIS J. JUV. L. POL'Y, 275, 376 (2006) (“In the area of children and the law, inconsistency is not necessarily a bad thing It is not unreasonable to conclude that our expectations of what children are capable of will vary by age.”).

65. In Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLAL REV. 503, 510 n.20 (1984), the author alludes the distinction in a footnote. Other articles mention the defense in the context of capital punishment cases but do not distinguish between capital and misdemeanor offenses. See, e.g., Andrew M. Carter, *Age Matters: The Case for a Constitutionalized Infancy Defense*, 54 U. KAN. L. REV. 687 (2006).

66. BLACKSTONE, *supra* note 29, at *22; HALE, *supra* note 29, at 20.

67. BLACKSTONE, *supra* note 29, at *22 (limiting misdemeanor criminal liability of offenders at least fourteen years old to “notorious breach[es] of the peace, a riot, battery or the like”); HALE, *supra* note 29, at 20 (similarly indicating that offenders under twenty-one should be immune from liability for all misdemeanors other than riot or battery).

68. BLACKSTONE, *supra* note 29, at *22; HALE, *supra* note 29, at 20.

69. BLACKSTONE, *supra* note 29, at *22–23; HALE, *supra* note 29, at 20.

capax, or, capable of committing a crime.⁷⁰ With respect to other misdemeanors—those of “nonfeasance,” which today would be called acts of omission—a complete defense was available until the age of twenty-one.⁷¹ Hale notes, for example, that misprision of a felony⁷² could give rise to criminal penalties for adults, but not for those younger than twenty-one, who enjoy complete immunity.⁷³

In reading Hale and Blackstone’s accounts of the infancy defense, the modern reader is reminded of the scarcity of common law crimes. The criminal universe at the time comprehended capital offenses, misdemeanors involving a breach of the peace, and misdemeanors involving nonfeasance.⁷⁴ There were, of course, a limited category of other offenses, such as fraud or extortion, and it is unclear how an infancy defense would apply with respect to such crimes.⁷⁵ Furthermore, some of the most common juvenile offenses today did not exist in the late eighteenth century, including drug possession crimes and the entire range of “status offenses” such as truancy, drinking alcohol, purchasing cigarettes, or violating curfew.⁷⁶ We can only speculate how a common law defense would apply in the context of crimes that did not exist in the eighteenth century. But this uncertainty aside, the important point is that at common law the infancy defense was broadly available with respect to non-capital offenses.⁷⁷

Indeed, the comparatively relaxed common law treatment of minor juvenile indiscretions can be contrasted with the more stringent handling of juvenile “delinquency” in our era. In his revisionist work, *The Child Savers: The Invention of Delinquency*, Anthony Platt argued that the modern juvenile justice system “invented . . . new categories of

70. BLACKSTONE, *supra* note 29, at *22–23; HALE, *supra* note 29, at 20.

71. BLACKSTONE, *supra* note 29, at *22; HALE, *supra* note 29, at 20.

72. The deliberate concealment of one’s knowledge of a felony. 18 U.S.C. § 4 (2012).

73. Hale writes, “If A. kills B. and C. & D. are present, and do not attach the offender, they shall be fined and imprisoned; yet if C. were within the age of twenty-one years, he shall not be fined nor imprisoned.” HALE, *supra* note 29, at 21 (footnote omitted). The offense described is akin to misprision of a felony, that is, failing to report a known felon to the authorities.

74. See BLACKSTONE, *supra* note 29, at *22–23; HALE, *supra* note 29, at 20, 22.

75. Both Hale and Blackstone’s accounts omit information regarding the infancy defense as applied to these offenses.

76. See Claire Shubik & Jessica Kendall, *Rethinking Juvenile Status Offense Laws: Considerations for Congressional Review of the Juvenile Justice and Delinquency Prevention Act*, 45 FAM. CT. REV. 384, 385 (2007).

77. See *supra* notes 67–73 and accompanying text.

youthful misbehavior,” often targeted at disfavored classes.⁷⁸ By contrast, in the more liberal common law era, juveniles were not subject to the countless status offenses and misdemeanors prevalent today.⁷⁹

C. Felonies

When Hale and Blackstone turn to capital offenses, they observe that in “ancient law,” no criminal liability could attach until the offender was twelve years old.⁸⁰ Both authors indicate that they regard this ancient law as defective, and approvingly note the common law’s movement to a more rigorous definition of the infancy defense.⁸¹ Blackstone writes that conferring a defense on all those under twelve was “dubious,” and Hale is in accord: “men grew to greater learning, judgment and experience, and rectified the mistakes of former ages and judgments”⁸²

According to Hale and Blackstone, the common law eventually lowered the threshold age for criminal liability to seven years.⁸³ With respect to offenders aged seven to fourteen, the question of capacity was a factual issue for the jury to decide.⁸⁴ Hale and Blackstone slightly differ on the question of where to assign the burden of proof. Hale argues that for offenders aged twelve to fourteen, the law presumed

78. ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 3 (2d ed. 1977); see also Barry C. Feld, *The Transformation of the Juvenile Court—Part II: Race and the “Crack Down” on Youth Crime*, 84 MINN. L. REV. 327, 330 (1999) (“Current punitive juvenile justice policies reflect the . . . [f]ear of ‘other peoples’ children’ . . .”).

79. See *supra* note 76 and accompanying text (noting certain misdemeanors that exist today but did not exist in the common law era).

80. HALE, *supra* note 29, at 22. Blackstone calls it the “ancient Saxon law.” BLACKSTONE, *supra* note 29, at *23.

81. It is not clear what time period Hale and Blackstone are referring to when they refer to the “ancient law.” It is clear that as early as the fourteenth century, minors under the age of twelve could be found liable and even executed. In a 1338 case, for example, a ten-year-old was convicted of murdering a companion and then concealing the body. The judge found him guilty, and ordered his execution, reasoning as follows: “[B]y the concealment [the defendant] showed that he knew how to distinguish between evil and good. And so malice makes up for age” Anthony Platt & Bernard L. Diamond, *The Origins of the “Right and Wrong” Test of Criminal Responsibility and its Subsequent Development in the United States: An Historical Survey*, 54 CALIF. L. REV. 1227, 1233–34 (1966) (footnote omitted).

82. BLACKSTONE, *supra* note 29, at *23; HALE, *supra* note 29, at 24–25.

83. BLACKSTONE, *supra* note 29, at *23; HALE, *supra* note 29, at 27–28.

84. BLACKSTONE, *supra* note 29, at *23 (“[I]f it appeared to the court and jury, that [the offender] was *doli capax*, and could discern between good and evil, he may be convicted and suffer death.”); HALE, *supra* note 29, at 27.

that the offender was capable of committing a crime and could be found guilty, whereas for offenders aged seven to twelve, the presumption operated in the opposite direction.⁸⁵ Blackstone seems to indicate that the presumption is one of incapacity for the entire age range.⁸⁶ On the crucial question of how to determine capacity, the authors are in accord: any offender aged seven to fourteen, should be found capable and criminally responsible if the jury finds that the defendant could “discern between good and evil.”⁸⁷ Hale writes that the common law upholds liability, even of a seven-year-old, “if it appear by strong and pregnant evidence and circumstances, that he had discretion to judge between good and evil.”⁸⁸ Blackstone uses almost identical language, noting that the common law assigns liability if a defendant—again, even a seven-year-old—“manifested a consciousness of guilt, and a discretion to discern between good and evil.”⁸⁹

Neither author hints at any disapproval of the common law infancy defense. Hale reports a case in which a nine-year-old committed murder and then “hid the blood and the body.”⁹⁰ Capital punishment was appropriate, Hale concludes, although he adds that “[i]t is necessary that [there be] very strong and pregnant evidence . . . to convict one of that age, and to make it appear that he understood what he did.”⁹¹ In that instance, the hiding of the body reflected that understanding. Blackstone similarly reports instances in which murderers aged thirteen, ten, nine, and even eight, were executed; in each case, the murderers manifested a “consciousness of guilt” and a “discretion to discern between good and evil.”⁹² Blackstone gives an example of such a case:

[I]n very modern times, a boy of ten years old was convicted on his own confession of murdering his bedfellow; there appearing in his whole behaviour plain tokens of a mischievous discretion: and, as

85. HALE, *supra* note 29, at 26.

86. BLACKSTONE, *supra* note 29, at *23 (stating that “the capacity of doing ill . . . is not so much measured by years and days, as by the strength of the delinquent’s understanding and judgment” and offenders under the age of fourteen “shall be prima facie adjudged” incapable of committing a crime unless a jury found otherwise).

87. *Id.*; HALE, *supra* note 29, at 26.

88. HALE, *supra* note 29, at 26–27.

89. BLACKSTONE, *supra* note 29, at *23–24. In Blackstone’s example, the offenders, “one boy of ten, and another of nine years old, who had killed their companions” were sentenced to death because their actions—“that the one hid himself and the other hid the body he had killed”—evinced consciousness of guilt. *Id.* at 23.

90. HALE, *supra* note 29, at 27.

91. *Id.*

92. BLACKSTONE, *supra* note 29, at *23–24.

the sparing this boy merely on account of his tender years might be of dangerous consequence to the public by propagating a notion that children might commit such atrocious crimes with impunity, it was unanimously agreed by all the judges that he was a proper subject of capital punishment. But, in all such cases, the evidence of that malice, which is to supply age, ought to be strong and clear beyond all doubt and contradiction.⁹³

Somewhat unspecified is the “dangerous consequence” of showing leniency to the young; presumably, laxity in such cases would broadly diminish the general deterrence of the criminal law. And Hale alludes to a crime wave overtaking the country, and the consequent necessity of dealing harshly with those who, by criminal violence, threaten the social order.⁹⁴

Although the common law infancy defense, as summarized here, will strike the modern observer as barbaric, we should acknowledge certain qualifications. First of all, it does not appear that, in actual practice, the common law as of 1791 condoned the execution of a seven-year-old.⁹⁵ The youngest offender Blackstone finds in his era was ten.⁹⁶ The eight-year-old he alludes to, as did Hale, seems to be John Dean, who was convicted of arson in 1629.⁹⁷ A second point is that with all minors between seven and fourteen, there seems to have been, as a matter of practice, an additional layer of caution, even after the verdict.⁹⁸ Hale notes that “it [was] prudence in such a case after conviction to respite

93. *Id.* at *24 (footnote omitted).

94. *Id.* There is a modern analogy: In the 1980 and 1990s, in the midst of surging crime rates, observers on the political right and left argued that the rise of juvenile “superpredators” made it necessary to stiffen criminal penalties even on youth offenders. See Lara A. Bazelon, Note, *Exploding the Superpredator Myth: Why Infancy Is the Preadolescent’s Best Defense in Juvenile Court*, 75 N.Y.U. L. REV. 159, 166–67 (2000).

95. Some scholars have contended that seven- and eight-year-olds were executed in England in the eighteenth and nineteenth century, but documentation is scarce. For example, Richard Brown writes that a seven-year-old English boy was executed in 1808, but it is unclear what supports this claim. See, e.g., RICHARD D. BROWN, SELF-EVIDENT TRUTHS: CONTESTING EQUAL RIGHTS FROM THE REVOLUTION TO THE CIVIL WAR 141 (2017). But see Victor L. Streib, *Death Penalty for Children: The American Experience with Capital Punishment for Crimes Committed While Under Age Eighteen*, 36 OKLA. L. REV. 613, 615 (1983) (“[O]fficial records for the years 1801 to 1836 for the Old Bailey, a major criminal court in London [found that] . . . [i]n 103 cases, children under age fourteen were sentenced to death but none were executed.”).

96. BLACKSTONE, *supra* note 29, at *24.

97. *Id.* at *24, *25; see also Holly Brewer, *The Historical Links Between Children, Justice, and Democracy*, 28 HAMLINE J. PUB. L. POL’Y 339, 348 (2006) (noting eight-year-old John Dean was executed for burning two barns).

98. HALE, *supra* note 29, at 27.

judgment, or at least execution,” so as to give the king an opportunity to grant a pardon.⁹⁹ Third, in the eighteenth century, some legal elites recognized that minors, even as old as twenty-one, might be exempted from the harshest of punishment. For example, Hale’s editor, Sollom Emlyn, writing in 1736, disagreed with Hale on the appropriateness of executing all minors convicted of capital offenses.¹⁰⁰ Hale wrote that “no man’s life or estate shall be safe” if minors can commit the most serious crimes with “impunity,”¹⁰¹ but Emlyn raised an objection:

Our author’s argument concludes very strongly against their escaping with *impunity*, but loses much of its force when urged in behalf of *capital* punishments, for there is no necessity that if they not be capitally punished they must therefore go unpunished; so that whatever severity must be needful in cases of murders and acts of violence, yet in the common instances of larceny and stealing, some other punishment might be found, *which might leave room for the reformation of the young offenders*.¹⁰²

Justices Thomas and Scalia have written that the Eighth Amendment excluded only those modes of punishment deemed cruel and unusual at the time the Bill of Rights was adopted, but there were disagreements on this issue within the legal community. Emlyn, however obscure a figure today, wrote the introduction to the 1742 collection of State Trials.¹⁰³ He advocated widespread reforms in both civil and criminal law, including the more discriminating use of capital punishment.¹⁰⁴ On that last issue, the American Founders enacted laws that more closely resembled Emlyn’s views than Hale’s.¹⁰⁵ And to the

99. *Id.* In the modern era, the Supreme Court has suggested that executive clemency is a “remote possibility.” See *Graham v. Florida*, 560 U.S. 48, 70 (2010). But see Craig S. Lerner, *Juvenile Criminal Responsibility: Can Malice Supply the Want of Years?*, 86 TUL. L. REV. 309, 334 (2011) (arguing that the possibility of executive clemency is “not always that remote”).

100. HALE, *supra* note 29, at 25 n.t.

101. *Id.* at 25.

102. *Id.* at 25 n.t (emphasis added).

103. SOLLOM EMLYN, 1 A COMPLETE COLLECTION OF STATE-TRIALS, AND PROCEEDINGS FOR HIGH-TREASON AND OTHER CRIMES AND MISDEMEANOURS; FROM THE REIGN OF KING RICHARD II TO THE REIGN OF KING GEORGE II i (3d ed. 1742).

104. *Id.* at x (“Death is *ultimum supplicium*, and is therefore intended only for crimes of the highest Rank; but when it is indiscriminately inflicted, it leaves no room to difference of punishments of Crimes widely different in their own Nature.”).

105. Whether the American Founders were influenced by Emlyn is uncertain, but there is overwhelming evidence that they read and admired the Italian thinker Cesare Beccaria, who was renowned for his opposition to torture and capital punishment and his insistence that punishments be proportioned to the offense. See John D. Bessler, *The*

extent that the Eighth Amendment reflected the inclusion of a common law infancy defense, as Justices Scalia and Thomas argued, the American Founders may have been more willing than Hale to “leave room for the reformation of young offenders.”¹⁰⁶

D. *Discerning Good and Evil*

Justice Scalia’s shorthand account of the common law infancy defense—to the effect that it would have permitted the execution of a seven-year-old—seems, puzzlingly, designed to render that law contemptible to the modern observer. In light of the qualifications explored above, this Section articulates an alternative, more sympathetic characterization.

The common law reflected the view that it was fair to impose criminal liability on any fourteen-year-old, and even on those as young as seven, *provided that the crime in question is a capital offense*.¹⁰⁷ The wrongness of such offenses—murder, rape, robbery, etc.—is self-evident to the juvenile human mind. As one strays from these core crimes, moral judgments are apt to be more nuanced. Thus, the crucial, albeit often neglected, aspect of the common law infancy defense was its restriction to the most serious crimes.¹⁰⁸ This must be contrasted with the liberality of the common law defense with respect to misdemeanors, sometimes exempting from liability even those as old as twenty-one.¹⁰⁹ With respect to such offenses, which may involve subtle moral judgments, excusing minors is defensible. It is perhaps believable that many minors lack the capacity to discern the wrongness of the act; and, furthermore, the social harms attendant to the offense are sufficiently insubstantial that an allowance can be made without danger to the community.

But when the offense is capital, neither of these qualifications applies. The logical and moral reasoning needed to apprehend the

Italian Enlightenment and the American Revolution: Cesare Beccaria’s Forgotten Influence on American Law, 37 *HAMLIN J. PUB. L. & POL’Y* 1 (2016). The Founders’ attitudes towards punishment were, from a modern perspective, harsh, as evidenced by the Crimes Act of 1790. See *An Act for the Punishment of Certain Crimes Against the United States*, ch. 9, §§ 9, 14, 33, 1 Stat. 112, 114, 115, 119 (1790) (codifying crimes such as counterfeiting and piracy as punishable by “hanging the person convicted by the neck until dead”). Nonetheless, American criminal law in the early Republic was less punitive than England’s contemporaneous Bloody Code. See Bessler, *supra*, at 34–35.

106. HALE, *supra* note 29, at 25 n.t.

107. See *supra* notes 83–89 and accompanying text (detailing the common law’s criminal liability for children from the age of seven through fourteen for capital offenses).

108. See *supra* Section II.C.

109. See *supra* Section II.B.

wrongness of murder, for example, is elementary: any ordinary fourteen-year-old possesses such capacity, and many, if not most, younger minors do as well. On this point, modern science has done much to buttress the common law—and common sense—view. Every measure of cognitive power, such as pattern recognition and working memory, demonstrates that human beings peak on average around age fourteen.¹¹⁰ This accords roughly with the findings of the previous century’s most famous child psychologist, Jean Piaget, who concluded that children develop “adult-like reasoning abilities by age [fifteen].”¹¹¹

Recent studies shed more light on the moral development of young people, suggesting that even toddlers are capable of sophisticated moral judgments.¹¹² Steven Pinker, drawing upon the work of social scientists, has written that young children are capable of remarkably subtle moral reasoning:

Four-year-olds say that it is not O.K. to wear pajamas to school (a convention) and also not O.K. to hit a little girl for no reason (a moral principle). But when asked whether these actions would be O.K. if the teacher allowed them, most of the children said that wearing pajamas would now be fine but that hitting a little girl would still not be.¹¹³

The demonstrable ability of many young children to draw sophisticated moral distinctions supports the idea, on which the common law was premised, that children have no difficulty recognizing the transparent wrongness of *mala in se*¹¹⁴ offenses.

110. ROBERT EPSTEIN, *THE CASE AGAINST ADOLESCENCE: REDISCOVERING THE ADULT IN EVERY TEEN* 173, 178, 184, 200 (2007).

111. The many works of Jean Piaget are synthesized in Wallace J. Mlyniec, *A Judge’s Ethical Dilemma: Assessing a Child’s Capacity to Choose*, 64 *FORDHAM L. REV.* 1873, 1878–85 (1996).

112. See, e.g., Marc Jambon & Judith G. Smetana, *Moral Complexity in Middle Childhood: Children’s Evaluations of Necessary Harm*, 50 *DEVELOPMENTAL PSYCHOLOGY* 22, 22 (2014) (“During the early school years, children begin to make rudimentary distinctions between malevolent transgressions and those entailing mitigation circumstances.”); Judith Smetana et al., *Children’s Reasoning About Interpersonal and Moral Conflicts*, 62 *CHILD DEV.* 629 (1991) (concluding from a series of empirical studies that “concerns with justice and interpersonal relationships” are observed in young children); Judith G. Smetana & Courtney L. Ball, *Young Children’s Moral Judgments, Justifications, and Emotion Attributions in Peer Relationship Contexts*, *CHILD DEV.*, June 6, 2017, at 1, 1–2 (2017) (explaining that by three years of age, children can recognize certain “moral violations as wrong because they are harmful to others not simply because they are prohibited”).

113. Steven Pinker, *The Moral Instinct*, *N.Y. TIMES MAG.* (Jan. 13, 2008), <http://www.nytimes.com/2008/01/13/magazine/13Psychology-t.html>.

114. See *Morrisette v. United States*, 342 U.S. 246, 258–59 (1952) (distinguishing common law offenses from more modern regulatory offenses).

One can still wonder, as Emlyn did, whether punishment should be meted out on minors with the same rigor as on adults.¹¹⁵ Such concerns would be heightened in the eighteenth century, when so many felonies were potentially *capital* offenses. Justice Scalia's observation that the law in 1791 countenanced the execution of a seven-year-old excites horror today. But his observation does not correspond to actual practice. Although eighteenth century Americans were notably more tolerant of capital punishment than is commonplace today, it does not appear that even they regarded it as proper to execute seven-year-olds.¹¹⁶ In all of American history, there are only two reported executions of defendants who were ten years old at the time of the offense, but one case is "poorly documented," and in the other, thirteen years separated the offense and the execution.¹¹⁷ Thus, the common law, as it existed in practice, does not support the claim that it permitted the execution of seven-year-olds.

Moreover, a distinction should be drawn between the common law as it existed in England and the common law as it existed in the American colonies and early American republic. Obviously, if Justice Scalia is correct that the Eighth Amendment reflected the common law infancy defense, the relevant law is that of America, not England. It is apparently true, as Emlyn lamented, that the English criminal law was often indiscriminate in its use of capital punishment.¹¹⁸ Even English minors convicted of larceny were executed, at least as late as the seventeenth century.¹¹⁹ However, this would not seem to have been the American practice. Victor Streib's painstaking analysis of the juvenile death penalty in the United States failed to uncover a single defendant convicted of mere larceny.¹²⁰ From 1642 to 1899, ninety-five juveniles were executed, broken down by criminal offense as follows:

115. HALE, *supra* note 29, at 25 n.t.

116. See *supra* notes 95–97 and accompanying text (noting that very young juveniles were seldom executed, even in Blackstone's era).

117. VICTOR L. STREIB, *DEATH PENALTY FOR JUVENILES* 57 (1987).

118. HALE, *supra* note 29, at 25 n.t.

119. Brewer, *supra* note 97, at 348 ("Even in the late seventeenth century, young girls of eight and nine years of age were hanged for picking pockets in London."); see also CLAIRE MCDIARMID, *CHILDHOOD AND CRIME* 103–04 (2007) (recounting that in Scotland, "a boy of eight was hanged in 1629 for burning two barns and it appears that a brother and sister aged seven and [eleven] respectively were hanged for felony . . . in 1708").

120. See STREIB, *supra* note 117, at 57.

Murder	81
Rape	4
Arson	3
Assault	2
Sodomy/Animals	2
Spy	1
Robbery	1
Unknown	1 ¹²¹

Streib does not provide a list restricted to 1750 to 1800, which is the most relevant period for our purposes.¹²² Nonetheless, his study reveals that as a practical matter, the offenses that for juveniles gave rise to capital punishment in America were murder and, in rare instances, arson and rape. For other felonies, the punishments imposed on juveniles were markedly less severe.¹²³

The common law, as practiced in England and America, also provided for an additional layer of protection for all offenders between the ages of seven and fourteen: the jury had to find, beyond a reasonable doubt, that the offender could discern the wrongness of his acts.¹²⁴ Thus, the jury would be instructed to convict only if the evidence showed not only that the defendant performed a specified act and did so with a specified mens rea, such as premeditatedly or intentionally, but also that the defendant discerned the wrongness of the act.¹²⁵ The 1806 trial of thirteen-year-old Mary Doherty, charged with the murder of her father, is illustrative.¹²⁶

121. *Id.*

122. It is likely that punishment practice evolved considerably. In this context, it is worth noting that one of the sodomy convictions dates all the way back to 1642 and therefore sheds no light on punishment practices in the Founding Era. See John D. Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement*, 4 Nw. J.L. & SOC. POL'Y 195, 219 (2009) (describing the case of Thomas Graunger, a Plymouth Colony teenager who was convicted of "buggery" against numerous farm animals and consequently executed). Also, all of those executed for rape must have been over the age of fourteen, as the common law conclusively presumed that anyone under fourteen was incapable of this crime.

123. Illustrative is the case of eight-year-old George Stage, convicted in 1820 of grand larceny, and sentenced to three years in the state prison. See Platt & Diamond, *supra* note 81, at 1241 (discussing *Stage's Case*, 5 City-Hall Recorder (New York City) 177, 178 (1820)).

124. See, e.g., *State v. Doherty*, 2 Tenn. 80, 82–84, 88 (1806); *supra* notes 84–87 and accompanying text.

125. See *supra* notes 84–87 and accompanying text.

126. *Doherty*, 2 Tenn. at 80.

The facts of the case are worthy of a CSI episode. Mary and her two younger brothers were being raised by their reclusive father.¹²⁷ After he had gone missing for several days, two neighbors visited the house.¹²⁸ His body, with its head slashed, was discovered buried under the floor of the house.¹²⁹ Also discovered was an axe, recently scrubbed, with remnants of blood clinging to the blade.¹³⁰ The sheets had also been washed, though blood was nonetheless found on them, and investigators concluded that the victim had been in bed at the time of the crime.¹³¹ When questioned, Mary failed to provide a convincing explanation of what had happened, and her evasiveness intensified suspicions that she was the culprit.¹³²

In short, the evidence of guilt was circumstantial but, at the same time, overwhelming.¹³³ What is striking is that the trial moved beyond the traditional criminal law issues of *actus reus* and *mens rea* to a more probing individualized inquiry into Mary's capacity.¹³⁴ Many witnesses gave evidence on this issue. One neighbor testified that Mary "usually did not talk much."¹³⁵ The jailer testified that she spoke only three times and even then in "monosyllables."¹³⁶ He added that she occupied her days laying in jail on a bed of straw, "covered with a blanket, [even] in the hottest weather."¹³⁷ The prosecution introduced evidence about Mary's relatively normal interactions with a black girl, but the defense rebutted with several witnesses who testified about her stony silence while awaiting trial.¹³⁸ The prosecution countered with evidence that Mary had an "obstinate disposition" and hammered away at the facts of the case, which were said to show a design to evade the law, and therefore the necessary malice to support a conviction.¹³⁹ The trial judge instructed the jury:

If a person of fourteen years of age does an act, such as stated in the indictment, the presumption of law is that the person is *doli capax*.
If under fourteen and not less than seven, the presumption of law is

127. *Id.* at 85.

128. *Id.* at 84.

129. *Id.* at 85–86.

130. *Id.* at 84.

131. *Id.* at 84–86.

132. *Id.* at 84–85.

133. *Id.* at 84–86.

134. *Id.* at 87–89.

135. *Id.* at 81.

136. *Id.*

137. *Id.*

138. *Id.* at 81–82.

139. *Id.* at 87.

that the person can not [sic] discern between right and wrong. But the presumption is removed, if from the circumstances it appears that the person discovered a consciousness of wrong.¹⁴⁰

After a few hours of deliberation, the jury found Mary not guilty.¹⁴¹ The verdict is most intelligible as the conclusion that the prosecution failed to meet its burden of proving Mary's capacity to discern right and wrong. There was clearly something "off" in her behavior; she was no ordinary thirteen-year-old. The jury likely concluded that, even assuming she had committed what would otherwise be murder, her behavior suggested that she did not display a "consciousness of wrong."¹⁴²

Not all minors were as fortunate as Mary Doherty. Minors could be found criminally liable, provided the prosecution came forth with persuasive evidence of the offender's capacities.¹⁴³ In one case, involving the theft of a bear skin, the jury convicted an eight-year-old defendant, and the judge sentenced him to three years in prison.¹⁴⁴ The court explained that the jury could convict an offender between the ages of seven and fourteen only if it was satisfied, from "extrinsic testimony" or "the circumstances of the case," that he possessed the "capacity of knowing good from evil." In this case, the "fact of the concealment and . . . an attempt to escape" provided the necessary proof.¹⁴⁵

A modern observer might object that the common law infancy defense unrealistically focused on a youth's reasoning capacities. As a consequence, the defense failed to recognize that some juvenile offenders know right from wrong, but are unable to conform their conduct to what they abstractly know. This critique of the infancy defense resembles modern criticisms of the traditional insanity defense. According to this argument, the *M'Naghten* rule¹⁴⁶ was premised on an overly cognitive view of human nature that had been exposed as implausible by modern psychology.¹⁴⁷ Such a critique,

140. *Id.* at 88.

141. *Id.*

142. *Id.*

143. See, e.g., Platt & Diamond, *supra* note 82, at 1241 (citing Stage's Case, 5 City-Hall Recorder (New York City) 177, 178 (1820)).

144. *Id.*

145. *Id.*

146. See Daniel M'Naghten's Case, 8 Eng. Rep. 718 (1843). Under the test articulated in that case, "It must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know, he did not know he was doing what was wrong" *Id.* at 722.

147. See, e.g., Blake v. United States, 407 F.2d 908, 914 (5th Cir. 1969) ("We think

however, implies that before the twentieth century people were unaware that the human soul was a composite of many forces, of which reason was often the weakest.¹⁴⁸ There is no basis for thinking that two centuries ago people were unaware of this incontestable truth.

Such a complete understanding of human nature was on view in the 1828 trial of James Guild, a twelve-year-old charged with beating an old woman to death.¹⁴⁹ The prosecution belabored the violence of the crime.¹⁵⁰ Character evidence was also introduced to overcome the presumption of incapacity and prove that the defendant could discern right from wrong.¹⁵¹ Miscellaneous witnesses testified to the effect that “[h]e has a great deal of understanding,” and “[h]e is reputed a cunning smart boy.”¹⁵² But even assuming that Guild “knew” what he was doing was wrong, a modern observer might object that Guild’s juvenile impulsiveness overwhelmed his reasoning capacities. As it happened, a witness for the defendant, Stephen Albro, made precisely that argument.¹⁵³ Albro testified that he had visited the jail and talked to the defendant, who “had intelligence enough to know when he did wrong, *but was wanting in discretion, and could not fully appreciate the consequences of crime.*”¹⁵⁴ Under cross-examination, Albro persisted in

that the [the Model Penal Code approach to insanity] is called for in light of current knowledge regarding mental illness.”), *superseded by statute*, 18 U.S.C. § 17, *as recognized in* United States v. Long, 562 F.3d 325 (5th Cir. 2009); MODEL PENAL CODE § 4.01 cmt. 3 at 168 (AM. LAW. INST. 1985) (“The Model Code formulation is based on the view that a sense of understanding broader than mere cognition, and a reference to volitional incapacity should be achieved directly in the formulation of the defense, rather than left to mitigation in the application of [*M’Naghten*].”); Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199, 1210–11 (2000) (“*M’Naghten* was faulted because it focused solely on cognitive impairment, thus failing to recognize volitional impairment.”).

148. The standard citation for Plato’s tripartite image of the soul is Book IV of the Republic. PLATO, THE REPUBLIC, bk. IV, at 439d4–441c7 (G.R.F. Ferrari ed., Tom Griffith trans., Cambridge Univ. Press 2000). It should be noted that Socrates, at the outset of this discussion, implies that the tripartite image provides only an imprecise shortcut to the truth. *Id.* at 435b9–d5; *see also id.* at 443c9–444a2 (suggesting that the soul may have more than three parts).

149. State v. Guild, 10 N.J.L. 163, 168–71 (N.J. 1828).

150. *Id.* at 165–66. A doctor testified in detail about the victim’s wounds: “her hair clotted; her breast covered with blood, which was still flowing; her head dreadfully mangled; the scalp loose and cut through; a large bruise on the right side of the head; the under jaw broken. He should not have known her she was so disfigured.” *Id.* at 165.

151. *Id.* at 170.

152. *Id.* at 167.

153. *Id.* at 170.

154. *Id.* (emphasis added).

what one might call a modern argument: “[The defendant] has capacity to distinguish right and wrong; *but I do not think he considers or reflects as much as some.*”¹⁵⁵

Thus, the argument that juvenile impulsiveness overwhelmed Guild’s reasoning abilities was ventilated in his trial.¹⁵⁶ The jury, in convicting Guild, presumably rejected Albro’s testimony.¹⁵⁷ At the same time, the guilty verdict and the law’s imposition of punishment (death) were entirely consistent with a finding that Guild was young and impulsive. Even if Albro’s account of Guild’s character were true, the legal system never purports to give a comprehensive account of human nature. There is no doubt that many people deemed legally sane suffer from acute mental illness.¹⁵⁸ There is equally no doubt that many juveniles deemed adults for purposes of criminal culpability are impulsive, vulnerable, and immature.¹⁵⁹ The criminal justice system’s finding of liability in such cases is limited to the purposes of the criminal law. It is a claim that the criminal act is *sufficiently* a reflection of moral agency that, within the criminal justice system, it is fair to assign blame and socially useful to impose punishment.¹⁶⁰ Guild could thus be both young and impulsive on the one hand, and guilty of murder—a crime punishable by death—on the other.

Over the course of the early to mid-twentieth century, the law of insanity and juvenile responsibility evolved. As the requirement of moral agency heightened, both defenses expanded. With respect to the law of insanity, this movement culminated in the enactment of a new test, reflected in the American Law Institute’s Model Penal Code, which extended the defense to those who “appreciated” that their actions were wrong, but lacked the “substantial capacity . . . to conform [their] conduct to the requirements of law.”¹⁶¹ The evolution of the insanity defense is a complicated topic, but it is sufficient here to note

155. *Id.* (emphasis added).

156. *Id.* at 167–70.

157. *Id.* at 190.

158. See, e.g., Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777, 791 (1985) (arguing that the American Medical Association “impermissibly confuses psychiatric and legal concepts”).

159. See, e.g., *United States v. Doe*, 49 F.3d 859, 868–69 (2d Cir. 1995) (transferring the status of an “impulsive and immature” seventeen-year-old from juvenile to adult); *United States v. Juvenile Male*, 844 F. Supp. 2d 333, 335–36 (E.D.N.Y. 2012) (finding that a sixteen-year-old should be transferred from juvenile to adult status, even though he had been determined to be “emotionally immature” by a psychologist).

160. See Morse, *supra* note 158, at 780.

161. MODEL PENAL CODE § 4.01(1) (AM. LAW. INST. 1985).

that the movement away from the traditional *M’Naghten* test was eventually viewed, at least by many political actors, as a failure. By 2004, a majority of states had abandoned the Model Penal Code and returned to the *M’Naghten* test.¹⁶² Even many scholars questioned the premises of the Modern Penal Code insanity defense, arguing that it was fair to hold even some seriously mentally ill people accountable for criminal offenses, given that “they retain substantial ability to control their craziness and other behavior related to it.”¹⁶³ The insanity defense persists, but its scope is limited in jurisdictions that have returned to the *M’Naghten* rule. In criminal cases in which the issue of sanity is raised, the jury is required to make an individualized determination that the defendant knew the wrongness of the act. Such a finding is necessary first, from the perspective of retribution, to justify punishment, and it is necessary second, from the perspective of utilitarianism, to ensure that there is some margin, however thin, on which deterrence is operating. A finding of criminal guilt does not exclude the possibility that a defendant knew what he was doing was wrong, but had difficulty, even great difficulty, conforming his conduct accordingly.¹⁶⁴ The insanity defense, as it exists in most American jurisdictions today, in this respect resembles the common law infancy defense: the focus is on what the defendant *knew*.

In sum, Justice Scalia’s statement that the common law infancy defense would countenance the execution of a seven-year-old gives the inaccurate impression of a law utterly foreign to modern sensibilities. To be sure, the common law infancy defense is different from the contemporary defense. To a great extent, this reflects different attitudes towards youth, a topic pursued in the next Section. The point here has been to demonstrate that the common law infancy defense enshrines principles that are embedded in the law today and still accord with our moral intuitions. The claim of the common law is this: if any defendant charged with a serious criminal offense, regardless of age, could

162. Michael Louis Corrado, *Responsibility and Control*, 34 HOFSTRA L. REV. 59, 61–62 (2005).

163. Stephen J. Morse, *Justice, Mercy, and Craziness*, 36 STAN. L. REV. 1485, 1491 (1984) (reviewing NORVAL MORRIS, *MADNESS AND THE CRIMINAL LAW* (1984)). *But see* David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1655 (1992) (critiquing the “harshly punitive attitudes of legal actors” who would hold the mentally ill and the insane criminally liable).

164. *Cf. Roper v. Simmons*, 543 U.S. 551, 618 (2005) (Scalia, J., dissenting) (“It is entirely consistent to believe that young people often act impetuously and lack judgment, but, at the same time, to believe that those who commit premeditated murder are—at least sometimes—just as culpable as adults.”).

discern right from wrong, then the community is justified in blaming and punishing him.

III. RETHINKING THE INVENTION OF ADOLESCENCE

Near the end of his discussion of the infancy defense, Hale addresses the question of whether the criminal law should treat males and females differently.¹⁶⁵ He answers in the negative:

[A]ltho the laws of *England*, as well as the Civil and Canon law, assign a difference between males and females as to their age of consent to marriage, *viz.*, fourteen to the male, twelve to the female; yet it seems to me, that as to matters of crimes, especially in relation to capital punishments, the females have the same privilege of nonage as the males; and therefore the regular [age of criminal culpability] . . . is fourteen.¹⁶⁶

By making it possible for a twelve-year-old female and a fourteen-year-old male to consent to marriage, the common law presupposed a level of maturity among young people starkly different from contemporary assumptions. In most American states today, marriage without parental consent is not permissible until eighteen; in a few states the minimum age is nineteen and even twenty-one.¹⁶⁷ Other states do not specify a statutory minimum age if parental consent is given, but legislation of that sort has been under attack.¹⁶⁸ Just months ago, the state of New York amended its law to provide that, even with parental consent, the minimum age for marriage is seventeen.¹⁶⁹ In his signing statement, Governor Cuomo called the change “a major step forward in our efforts to protect our children.”¹⁷⁰ The governor’s depiction of sixteen-

165. HALE, *supra* note 29, at 28.

166. *Id.*

167. HANNAH CARTWRIGHT, GLOBAL JUSTICE INITIATIVE, LEGAL AGE OF CONSENT FOR MARRIAGE AND SEX FOR THE 50 STATES (2011), <https://globaljusticeinitiative.files.wordpress.com/2011/12/united-states-age-of-consent-table11.pdf>. With parental consent, some states permit marriage at younger ages. Emily Shugerman, *New York Passes Child Marriage Law Raising Age of Consent from 14 to 18*, INDEPENDENT (June 21, 2017, 2:04 PM), <http://www.independent.co.uk/news/world/americas/new-york-marriage-laws-marital-age-raised-14-178-governor-andrew-cuomo-a7800986.html>.

168. *US: New York Governor Signs Anti-Child Marriage Law*, HUMAN RIGHTS WATCH (June 20, 2017, 6:00 AM), <https://www.hrw.org/news/2017/06/20/us-new-york-governor-signs-anti-child-marriage-law> (noting that twenty-seven states did not have an age minimum “if a judge authorizes the marriage”).

169. N.Y. DOM. REL. LAW § 15-a (2017).

170. Shugerman, *supra* note 167. The New Jersey legislature enacted an even more stringent law than New York’s, prohibiting any marriages, even with parental consent, of those younger than eighteen. Governor Christie vetoed the bill, stating there should be an exception for sixteen- and seventeen-year-olds who have parental

and seventeen-year-olds as “children” in need of protection is reminiscent of Justice Kennedy’s characterization of minors in *Roper* and *Graham* as vulnerable and undeveloped.¹⁷¹

Such sweeping statements of juvenile immaturity are problematic, both descriptively and normatively, and in this respect, the common law attitudes are worth revisiting. As a descriptive matter, the categorization of teenagers as amorously defective, vis-à-vis adults, is doubtful. If the criterion is pure intellectual ability, young people are at least on par with middle-aged adults and are likely superior to septuagenarians and octogenarians.¹⁷² The case for juvenile immaturity is thus based on supposed defects in minors’ judgment and prudence. However, reading any biography of an eighteenth century figure raises doubts about categorical claims of juvenile frailty. To take one legendary example: Horatio Nelson, born in 1758—the sixth of eleven children of a relatively prosperous family—joined the English navy at age twelve as an ordinary seaman.¹⁷³ While still in his mid-teens, Nelson had already crossed the Atlantic, visited Jamaica and Tobago, and served as coxswain on a trip through the Northwest Passage towards the North Pole.¹⁷⁴ Nelson’s life is in one sense extraordinary, but in another sense typical of young Englishmen in the late eighteenth century, who were often expected to achieve independence at ages now sometimes called “preadolescence.”¹⁷⁵ Observers at the time commented that American youths were even more assertive and independent than their European counterparts.¹⁷⁶ As a contemporary

consent. Andrew Buncombe, *New Jersey Governor Refuses to Ban Child Marriage Because “It Would Conflict with Religious Customs,”* INDEPENDENT (May 14, 2017, 6:06 PM), <http://www.independent.co.uk/news/world/americas/new-jersey-chris-christie-child-marriage-ban-fails-religious-custom-a7735616.html>.

171. Shugerman, *supra* note 167; *see also* *Graham v. Florida*, 560 U.S. 48, 68 (2010); *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

172. *See* EPSTEIN, *supra* note 110, at 172–73 (arguing that intelligence may peak as early as thirteen or fourteen).

173. ROBERT SOUTHEY, *THE LIFE OF HORATIO LORD NELSON* 3–4 (1813), <https://www.gutenberg.org/files/947/947-h/947-h.htm>.

174. *Id.* at 3–5, 8.

175. MAX SUGAR, *FEMALE ADOLESCENT DEVELOPMENT* 120–21 (2d ed. 1993) (illustrating that young people in the seventeenth and eighteenth centuries were highly independent by today’s standards); *Preadolescence*, MERRIAM-WEBSTER DICTIONARY (online ed. 2018) (defining preadolescence as “the period between the approximate ages of 9 and 12”).

176. *See* ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 34 (Henry Reeve trans., 1838) (observing that American youths were expected to have finished their education and chosen a career by the age of fifteen).

historian has observed, American children were at young ages expected to enter the working world and “work was seen as leading to self-improvement or future options.”¹⁷⁷

The modern depiction of minors as somehow frail and vulnerable—defective adults—has generated the invention, unknown in prior eras, of the concept of “adolescence.”¹⁷⁸ James Q. Wilson has written:

Society’s fundamental task has always been to socialize its youth, especially during the tumultuous teenage years. Never an easy task, it was in the nineteenth century easier than it is today because adolescence—that recognized interregnum between childhood and adulthood—did not exist. As soon as children were physically able to work, they worked Today we live in a world in which an intellectual invention—adolescence—has become a practical reality. Large numbers of young people are expected to be free both of close parental control and of the discipline of the market.¹⁷⁹

It is not that prior eras were unaware that the young are in some ways different from the middle-aged and that the attainment of adulthood can be, as Wilson observed, “tumultuous,” but the modern era is unique in the ways in which those supposed differences are reflected in educational policy, labor laws, and the criminal justice system.¹⁸⁰ We are apt to see these differences as evidence of progress, emphasizing the greater protections afforded to the young. There are less generous explanations for the legal changes. Indeed, a skeptic might observe that “[c]ompulsory education, child labor laws, and the like were justified in great part by the desire to *prevent* children from asserting independence.”¹⁸¹ Whatever the impetus for such laws, there can be little doubt that the legal environment today is one in which minors are treated as vulnerable and in need of protection.¹⁸² And given the panoply of laws telling minors that they are irresponsible, it should not

177. Paula S. Fass, *How Americans Raise Their Children: Generational Relations over Two Hundred Years*, 54 BULL. GER. HIST. INST. 7, 9–10 (2014).

178. For a helpful survey of the literature, see generally Frank A. Fasick, *On the “Invention” of Adolescence*, 14 J. EARLY ADOLESCENCE 6 (1994).

179. JAMES Q. WILSON, ON CHARACTER 33 (1991).

180. See *id.* (arguing that socializing adolescents in the nineteenth century was easier than it is today because adolescents were treated like adults); Fasick, *supra* note 178, at 7 (suggesting that the “marginality” of the modern adolescent might result from his exclusion from work opportunities and compelled attendance at secondary schools).

181. Lee E. Teitelbaum, *The Legal History of the Family*, 85 MICH. L. REV. 1052, 1069–70 (1987) (reviewing MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA (1985)).

182. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

be a surprise that some minors act irresponsibly.

The seventeenth and eighteenth centuries had a more generous view of the capacities of the young, and this view was reflected throughout the legal system.¹⁸³ Significantly, in Hale's account, the minimum age for males to enter into marriage is the same as the presumptive age of capacity for purposes of criminal liability.¹⁸⁴ Different policy concerns are implicated, but one can hypothesize that the minimum age for criminal culpability generally tracks the age at which individuals are perceived to be sufficiently mature to enter into marriage. In the early years of the American republic, marriages entered into by males as young as fourteen and females as young as twelve were "consistently upheld," even when parental consent was absent.¹⁸⁵ This may seem reckless and irresponsible on the part of the legal system, but we have in mind the twelve- and fourteen-year-olds of the present day. What it meant to be a fourteen-year-old in 1791 is quite different from what it means to be a fourteen-year-old today.

Which brings me back to Justice Scalia. In his much-cited law review essay, *Originalism: The Lesser Evil*, Scalia wrote that "most" nonoriginalists would recoil from the extreme implications of their principles.¹⁸⁶ Even practitioners of living constitutionalism, he argued, would concede that certain constitutional provisions are sufficiently determinate that the original meaning still governs.¹⁸⁷ For example, most nonoriginalists, according to Scalia, "would not ascribe evolving content to such clear provisions as the requirement that the President be no less than thirty-five years of age."¹⁸⁸

In fact, there is a rich, if puckish, literature on precisely this point. Frank Easterbrook, for example, has written that "thirty-five years" could correspond to the "number of revolutions of the world," but could also imply "a percentage of average life expectancy," which in the modern world, implies a biological age of fifty. Alternatively, "thirty-five years" could mean a "minimum number of years after puberty," which would now mean an age younger than thirty-five.¹⁸⁹ Likewise, Gary Peller has written that "it is open to argument whether

183. See *supra* note 175 and accompanying text.

184. HALE, *supra* note 29, at 22.

185. Vivian E. Hamilton, *The Age of Marital Capacity: Reconsidering Civil Recognition of Adolescent Marriage*, 92 BOS. U. L. REV. 1817, 1829 (2012).

186. Antonin Scalia, Essay, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 851 (1989).

187. *Id.* at 863.

188. *Id.* at 862.

189. Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 536 (1983).

the translation in our social universe of the clause still means thirty-five years of age.”¹⁹⁰ He notes that “thirty-five years” could mean an older biological age today, given that “children are actually given less responsibility than in revolutionary times.”¹⁹¹ Finally, in 1996, Michael Paulsen argued that the then-President had not achieved the degree of maturity that was intended by the constitutional text as a prerequisite for becoming President.¹⁹²

In the spirit of Paulsen’s playful suggestion, consider this: even if we accept the originalist claim that the Eighth Amendment embodies the common law infancy defense, and that defense conclusively presumes criminal responsibility at age fourteen and contemplates the possibility of responsibility in children as young as seven, the question remains what is intended by these biological ages. The ages were surely understood to correspond to a certain level of maturity. However, a fourteen-year-old today does not possess the maturity of his similarly aged counterpart two centuries ago. The change in matrimonial capacity laws suggests that an eighteen-year-old today possesses roughly the maturity of a fourteen-year-old of 1791.¹⁹³ According to this line of argument, the modern infancy defense, and more broadly the criminal justice system, should likewise acknowledge that the typical eighteen-year-old today is roughly as mature as the typical fourteen-year-old of 1791. As the common law insisted for all offenders under age fourteen, so too should the law now insist for all offenders under eighteen: there is only a presumption, *necessarily rebuttable*, that they possess the requisite capacity to incur criminal liability. Liability under eighteen can then attach only upon an individualized inquiry into the defendant’s capacity. We have arrived, however improbably, at a living-originalist¹⁹⁴ defense of the result in *Miller*, which holds that no defendant, under the age of eighteen at the time of the offense, can be sentenced to life without parole in a mandatory sentencing scheme that denies the judge the opportunity to make an individualized assessment of that defendant’s capacity.¹⁹⁵

190. Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1174 (1985).

191. *Id.*

192. Michael Stokes Paulsen, *Is Bill Clinton Unconstitutional? The Case for President Strom Thurmond*, 13 CONST. COMM. 217, 219–21 (1996).

193. See *supra* notes 166–70 and accompanying text.

194. It may be originalist in the loose sense now popularized most notably in BALKIN, *supra* note 26. For a criticism of this approach, see generally Nelson Lund, *Living Originalism: The Magical Mystery Tour*, 3 TEX. A&M L. REV. 31 (2015).

195. *Miller v. Alabama*, 567 U.S. 460, 465, 483 (2012). Indeed, under the logic of

This conclusion is premised, however, on the claim that young people in the modern era really are as reckless and immature as advertised. In a brief filed in *Roper*, to take one example, the American Psychiatric Association argued that the juvenile death penalty is unconstitutional because minors are unable to “perceive and weigh risks and benefits accurately.”¹⁹⁶ Stated in such sweeping terms, the claim is puzzling. Given that animals astutely perceive risks and benefits, it is hard to believe that adolescent human beings are utterly defective in this regard. And what does it mean to “weigh risks and benefits accurately”? Do all adults, including the millions who smoke cigarettes and underinvest in their retirement savings? Curiously, prior to filing its brief in *Roper*, the American Psychological Association sounded a different note on juvenile capacities.¹⁹⁷ In a case involving a challenge to a law requiring minors to notify parents before having an abortion, that same organization cited a “rich body of research” that concluded that by age fourteen or fifteen, “young people develop abilities similar to adults in reasoning about moral dilemmas, understanding social rules and laws, [and] reasoning about interpersonal relationships and interpersonal problems.”¹⁹⁸

The evidence on juvenile risk-taking is indeed rich and multifaceted. It is important to recall that both adults and juveniles vary widely in their risk profiles. A claim that all juveniles are insensitive to risk, legal and otherwise, is contradicted by much empirical evidence. For example, one study found that changes in welfare benefits in the 1990s reduced teenage pregnancies.¹⁹⁹ And in another study, economist Steven Levitt found that for every juvenile delinquent

this argument, all *mandatory* minimum sentences imposed on juveniles are unconstitutional. See *State v. Lyle*, 854 N.W.2d 378, 380 (Iowa 2014) (extending *Miller* and reversing a mandatory minimum sentence of seven years imposed on a juvenile convicted of robbery).

196. Brief for the American Medical Association et al. as Amici Curiae Supporting Respondent at 6, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633).

197. Brief for American Psychological Association et al. as Amici Curiae Supporting Petitioners at 6, 18–19, *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (No. 88-805) (“[T]here is no empirical evidence to suggest that adolescents by about age 14 are less competent to consent to abortion than adults, or that at least some younger adolescents do not possess similar competence.”).

198. *Id.* at 18–19 (footnotes omitted). Justice Scalia noted this inconsistency in his dissenting opinion in *Roper*. *Roper v. Simmons*, 543 U.S. 551, 617 (2015) (Scalia, J., dissenting).

199. Moin A. Yahya, *Deterring Roper’s Juveniles: Using a Law and Economics Approach to Show that the Logic of Roper Implies that Juveniles Require the Death Penalty More than Adults*, 111 PA. ST. L. REV. 53, 94 (2006) (citing Phillip B. Levine, *The Sexual Activity and Birth-Control Use of American Teenager* 3 (Nat’l Bureau of Econ. Research, Working Paper No. 7601)).

incarcerated, there was a “reduction of between .49 and .66 violent crimes for each delinquent-year of custody.”²⁰⁰ This conclusion is striking in that the reduction is on par with or even greater than the comparable reduction of adult violent crime. The upshot of Levitt’s study is that juveniles—even those supposedly infantilized by modern culture—are as sensitive to punishment as adults.²⁰¹

In sum, the modern depiction of “adolescents” as immature has perhaps become, to some extent, a self-fulfilling prophecy. The holdings in *Roper*, *Graham*, and *Miller*, and more broadly the creation of a separate juvenile justice system, based on the immaturity of teenagers, presumes what it thereupon produces.²⁰² Told how vulnerable they are and then legally coddled, some young people emerge, unsurprisingly, as immature. However, vague assertions that juveniles are immature or cannot perceive risks mask a more complex situation. It is not surprising that some juveniles, told that they are incapable of exercising judgment, fail to exercise judgment. As James Q. Wilson observed, “we ought to be thankful that any adolescents are left intact.”²⁰³

CONCLUSION

Let us conclude where we began, with the 1786 murder trial of twelve-year-old Hannah Ocuish.²⁰⁴ The length and solemnity of Reverend Channing’s execution sermon are evidence that the community recognized that the imposition of so severe a punishment on a person as young as Hannah Ocuish required justification.²⁰⁵ To this end, Channing emphasized the aggravating circumstances of the crime. He announced that he was “[a]mazed at such an instance of *cruelty* and *revenge* in one so young,” and added that “deliberate revenge and cruelty in one so young, has scarcely a parallel in any civilized country.”²⁰⁶ Implicit in Channing’s elaborate sermon is the acknowledgment that only upon a persuasive showing of egregious conduct could hanging, the presumptive punishment for adults convicted of murder, be appropriate.

200. Steven D. Levitt, *Juvenile Crime and Punishment*, 106 J. POL. ECON. 1156, 1176 (1998).

201. Yahya, *supra* note 199, at 85–87 (analyzing Levitt’s article).

202. *Miller v. Alabama*, 567 U.S. 460, 477 (2012); *Graham v. Florida*, 560 U.S. 48, 73–74 (2010); *Roper*, 543 U.S. at 578.

203. WILSON, *supra* note 179, at 34.

204. See *supra* notes 1–8 and accompanying text.

205. Richard Brown observes that within a decade of Hannah’s execution, Connecticut officials spared the life of a twelve-year-old girl charged with a similar offense. BROWN, *supra* note 95, at 143.

206. Channing, *supra* note 1, at 8, 30.

Towards the end of the sermon, Reverend Channing addressed the young people in the audience.²⁰⁷ Because Hannah was “mulatto,” many of the white youths might discount the lessons from her crime and punishment as somehow inapplicable to them.²⁰⁸ Channing corrected this misimpression: “Think not that crimes are peculiar to the *complexion* of the prisoner, and that ours is pure from these stains.”²⁰⁹ This is a reminder to the white youths that the color of their skin did not entitle them to any preening confidence that they are exempt from the temptations of crime or that they would escape punishment because of the color of their skin. Channing pursued this point:

Know, my brothers, that *that* casket [referring to Hannah] notwithstanding its colour, contains an immortal soul, a Jewel of inestimable value; which, polished by divine grace, would shine in yonder world with a glorious lustre: while the Jewel in a brighter casket, being left in its natural state, would be *blackness and darkness forever*.²¹⁰

The plethora of religious metaphors may date the speech for many modern readers. But the important point here is that Channing addressed the young people in the audience not very differently from how he addressed adults: by sketching the risks associated with crime. Unlike the modern American Psychological Association, Channing assumed that youths, much like adults, can be reasoned with and, when addressed in this manner, are capable of conforming their conduct to the community’s demands. Indeed, in the seventeenth and eighteenth century, morally responsible people thought it appropriate to expect teenagers to act like adults and to punish them like adults if, through criminal offenses, teenagers failed to meet this expectation. The result was, overwhelmingly, mature teenagers. Jarring to modern sensibilities, the common law infancy defense was situated in a culture that was far more demanding of young people than our own. That legal system and that culture should prompt reflections on our own era’s legal treatment of the young, and more generally on our cultural assumptions of juvenile capacities that may be dubiously grounded in biological reality.

207. *Id.* at 23.

208. *Id.*

209. *Id.*

210. *Id.* Brown draws attention to this extraordinary passage. BROWN, *supra* note 95, at 143.