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Killing the Non-Willing: Atkins, the Volitionally Incapacitated and the Death Penalty

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**KILLING THE NON-WILLING:
ATKINS, THE VOLITIONALLY INCAPACITATED,
AND THE DEATH PENALTY**

JOHN H. BLUME AND SHERI LYNN JOHNSON*

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I. INTRODUCTION

Jamie Wilson, nineteen years old and severely mentally ill, walked into a school cafeteria and started shooting. Two children died, and Jamie was charged with two counts of capital murder. Because he admitted his guilt, the only issue at his trial was the appropriate punishment. The trial judge assigned to his case, after hearing expert testimony on his mental state, found that mental illness rendered Jamie unable to conform his conduct to the requirements of law at the time of the crime—not *impaired* by his mental

illness in his ability to control his behavior, but *unable* to control his behavior. The following day, the same judge sentenced Jamie to death.¹

The most common reaction to Jamie's story, regardless of the death penalty views of the audience, is "What?" At the very least, it is counterintuitive to kill someone for behavior he was powerless to avoid. Whether a practice is unconstitutional, of course, is hardly determined by whether it is sensible, and the South Carolina Supreme Court has held that, sensible or not, it is constitutional.² In so holding, the fact that no other defendant—in South Carolina or any other state—has ever been sentenced to death after the factfinder determined that he lacked volitional control did not sway the court.³

Atkins v. Virginia,⁴ decided in 2002 by the United States Supreme Court, casts further doubt on the South Carolina highest court's holding.⁵ Reversing its 1989 holding in *Penry v. Lynaugh*,⁶ the Supreme Court in *Atkins* held that the Eighth Amendment's ban on excessive and cruel and unusual punishments prohibited the execution of individuals with mental retardation.⁷ Already, two state court justices have opined that the rationale of *Atkins* likewise precludes the execution of severely mentally ill offenders.⁸ In this Article, we consider the implications of *Atkins* for mentally ill defendants, arguing that it does indeed compel the conclusion that executing a defendant for conduct he was unable to control is a violation of the Eighth Amendment. On the other hand, we think that the application of *Atkins* to other kinds of mentally ill defendants is less clear, and that much work remains to be done on that front; we begin that work in this Article.⁹

1. *State v. Wilson*, 306 S.C. 498, 501, 413 S.E.2d 19, 21 (1992).

2. *Id.* at 512, 413 S.E.2d at 27.

3. *Id.* at 516, 413 S.E.2d at 30 (Finney, J., dissenting).

4. 536 U.S. 304 (2002) (holding death penalty unconstitutional for mentally retarded defendants).

5. More recently, three Justices dissented from denial of certiorari in *Patterson v. Texas*, 536 U.S. 984 (2002), a case raising the constitutionality of imposing the death penalty on juveniles. Justice Ginsburg explained in her dissenting opinion that *Atkins* makes it "tenable . . . to urge reconsideration of *Stanford v. Kentucky*, 492 U.S. 361 (1989)," which upheld the imposition of the death penalty for crimes committed by sixteen- and seventeen-year-olds. *Patterson*, 536 U.S. at 985 (Ginsburg, J., dissenting).

6. 492 U.S. 302 (1989) (finding that the Eighth Amendment's ban on cruel and unusual punishment does not prohibit the execution of the mentally retarded).

7. *Atkins*, 536 U.S. at 321.

8. See Corcoran v. State, 774 N.E.2d 495, 502 (Ind. 2002) (Rucker, J., dissenting); *State v. Nelson*, 803 A.2d 1, 47 (N.J. 2002) (Zazzali, J., concurring) (applying the reasoning of *Atkins* to a severely mentally ill defendant as a matter of state constitutional law); *contra* *State v. Weik*, No. 25526, 2002 S.C. LEXIS 159, at *13 (S.C. Sept. 3, 2002) (finding that *Atkins* has no applicability to mentally ill offenders), *cert. denied*, 123 S. Ct. 2580 (2003).

9. As we discuss more fully in Part IV, one other article, Anne S. Emanuel, *Guilty but Mentally Ill Verdicts and the Death Penalty: An Eighth Amendment Analysis*, 68 N.C.L. REV. 37, 39 (1989), and a note, Van W. Ellis, Note, *Guilty but Mentally Ill and the Death Penalty: Punishment Full of Sound and Fury, Signifying Nothing*, 43 DUKE L. J. 87, 89 (1993), argue that the imposition of the death penalty on "guilty but mentally ill" (GBMI) defendants violates the

Part I briefly reports on the life of Jamie Wilson and the litigation of his case. Part II summarizes relevant Eighth Amendment law, focusing on the Supreme Court's decision in *Atkins*. Part III applies the *Atkins* rationale to the execution of persons whose mental illness rendered them unable to control the conduct for which they were prosecuted, and Part IV begins to explore the harder question of what the Eighth Amendment says about the execution of persons who are able to control their conduct, but who are nonetheless seriously mentally ill. In so doing, we consider the cases of several other very mentally ill offenders, as well as several different standards for a categorical exemption of the mentally ill. In the end, we conclude that the *Atkins* methodology carries us further into the ranks of the mentally ill than volitional incapacitation—but not much.

II. JAMIE WILSON: A “NON-WILLING”¹⁰ OFFENDER

A. *The Defendant*

Lest the reader wonder if the trial court's finding inartfully overstated Jamie's volitional incapacitation, or that Jamie hoodwinked the trial court by skillful malingering, we will briefly summarize his social history. The frequency of mental illness in Jamie's family is very high, even for a patient identified as schizophrenic.¹¹ For at least four generations back, relatives had been medicated and hospitalized for mental illness.¹² Given the prevalence of

Eighth Amendment. Both articles predate *Atkins*, and unlike this article, neither attempts to count the jurisdictions which preclude execution based upon volitional incapacity, as we think is required by *Atkins* (as well as the rest of the Supreme Court's Eighth Amendment jurisprudence). Not surprisingly, our different methodology leads us to different results.

10. By “non-willing” offender, we mean a defendant who, in the words of the South Carolina statute, “lack[s] sufficient capacity” to control his conduct or to “conform [it] to the requirements of the law.” S.C. CODE ANN. § 17-24-20(A) (Law. Co-op. 2003) (emphasis added). As the South Carolina Supreme Court observed, this formulation is the equivalent of the “irresistible impulse” test. See *State v. Wilson*, 306 S.C. 498, 504–05, 413 S.E.2d 19, 23 (1992). We also use the term “volitionally incapacitated” to refer to a such a person.

11. Transcript of Post-Conviction Relief Hearing and Exhibits at 332, *Wilson v. Evatt* (No. 93-CP-24-037) (S.C. Ct. Com. Pl. filed Sept. 24, 1998) [hereinafter PCR Tr.]; Record at 1446, *Wilson* (No. 93-CP-24-037).

12. Jamie Wilson's paternal great-grandfather, Edgar Wilson, had a nephew who was mentally ill and spent fourteen years in a psychiatric institution. PCR Tr., *supra* note 11, at 251–52. One of Edgar Wilson's daughters married a man who became mentally ill. *Id.* at 254–55. Another of his daughters had a mentally ill child, Eva Wright, who has been taking medication for anxiety symptoms for much of her adult life. *Id.* at 255. Twymond Wilson, Jamie's grandfather, also had psychiatric problems. *Id.* at 257–58. He would become overwhelmed with anxiety about minor problems and took prescription medication on and off throughout his life. *Id.* at 259.

Jamie's great-grandmother on his paternal grandmother's side, Lila Watts, had an aunt, Lula Mullinax, who spent much of her life in the state hospital diagnosed with the disease now referred to as schizophrenia. *Id.* at 262. Mullinax's daughter, Etta Davis, had her first psychotic episode around age twenty-six, when she gave her children away to her neighbors. She was hospitalized, never to come out. PCR Tr., *supra* note 11, at 263. Lila Watts, herself, also had emotional

mental illness, it is not surprising that numerous instances of attachment disruption and emotional abuse or neglect have occurred for several generations.¹³

Physical abuse and conflict were also rampant in Jamie's extended family on both the maternal¹⁴ and paternal sides.¹⁵ Violence was directed at Jamie himself while he was still a toddler, and in his middle years, his father "would pull out a gun and threaten to kill him."¹⁶ Moreover, Jamie was physically abused by his mother and both paternal grandparents.¹⁷

problems. *Id.* at 264. She was compulsive, depressed, paranoid, and suffered from kinesthetic hallucinations and a preoccupation with germs. She too was hospitalized, though not until later in her life. *Id.* at 264–66.

In the next generation, Lila's daughter, Annie, (Jamie's grandmother's sister) was described by Jamie's grandmother as being a lot like Jamie. *Id.* at 267. She had obsessive compulsive symptoms with psychotic episodes, for which she was hospitalized several times. *Id.* at 268–69.

On the maternal side, Jamie's great-grandmother, Lilly Minor, "suffered from fairly serious depression . . . [with] episodes of paranoia throughout her life and . . . hallucinatory experiences." *Id.* at 286. One of her daughters, Onie Buford, had a "history of psychiatric problems" that included many anxiety symptoms and required medication. PCR Tr., *supra* note 11, at 290. Another daughter, Alice Swink, (Jamie's grandmother) had a "severe incapacitating depression for many years," as well as "paranoid ideation" and "odd habits," such as distributing aluminum foil around the yard. These illnesses required both antipsychotic and antidepressant medications. *Id.* at 294.

13. *Id.* at 253, 255–57, 267–68, 279, 291. For example, Jamie's grandmother Swink had an extraordinarily anxious, dependent attachment to her mother. This relationship, in which each felt the other's thoughts and feelings, was so strong that Jamie's grandmother was essentially uneducated because she did not wish to leave her mother for school. *Id.* at 291.

14. On his mother's side of the family, Jamie's great-grandfather Swink "was physically abusive towards his wife and . . . children." *Id.* at 285. Great-grandfather Minor (Jamie's maternal grandmother's father) was also physically violent. *Id.* at 286. His son, Riley Swink, (Jamie's grandmother's brother) and daughter, Onie Buford, (Jamie's grandmother's sister) also had histories of violence. PCR Tr., *supra* note 11, at 290.

15. His paternal great-grandfather, Edgar Wilson, was a violent adult with a reputation for using guns and even lost a leg in a gun accident. He was physically abusive to his blind wife and to his children. *Id.* at 252, 256. Edgar Wilson's daughter, Myrtle, who was a particular focus of his abuse, also had a violent relationship with her husband. Two of her sons have a great deal of marital conflict and physically abuse their wives, as do two of her grandsons. *Id.* at 253–54. Edgar Wilson's son, Twymond Wilson, (Jamie's paternal grandfather) was also a violent man who "enjoyed using guns" and was known for threatening people with them. He was physically abusive to his wife and children. *Id.* at 257–58. The family story was that he was a racist who got in trouble for having killed a couple of African-Americans. He was a member of the Ku Klux Klan. *Id.* at 258–59.

On the paternal grandmother's side, Robert Lee Watts (Jamie's other great-grandfather) was physically violent toward his wife, Lila Watts, and toward their children. *Id.* at 262. Their daughters, Marian and Margaret, had violent relationships with their husbands. PCR Tr., *supra* note 11, at 270, 273. Jamie's grandmother, Gladys Wilson, was physically abused by her father and emotionally abused by both of her parents. She was also physically abused by her husband. *Id.* at 274–76, 278. Both she and her husband directed a "great deal of physical violence" toward Jamie's father, Jimmy Wilson. *Id.* at 278. In one instance, Gladys Wilson banged Jimmy Wilson's head against the porch wall in an effort to teach him math. *Id.* at 281–82.

16. *Id.* at 313, 321.

17. *Id.* at 322.

Drug and alcohol abuse, particularly prescription drug abuse, were also common on both sides of Jamie's extended family for several generations back. By the time he was thirteen, Jamie himself was given medication, which had been prescribed to his grandmother or grandfather, when he became violent or difficult.¹⁸ Later, when Jamie was prescribed medication for himself, he abused that as well, and when he ran out of drugs before his prescription could be refilled, his grandmother helped him get extra medication.¹⁹

The first indication of emotional problems, stuttering, began when Jamie was about five years old. He also yelled obscenities in church.²⁰ By the age of eight, he was very anxious about germs and had elaborate rituals for food preparations.²¹ He developed extreme bathing compulsions, and by the time he was thirteen, would not go to church because of a fear that people were staring at him. He was also physically aggressive toward other children, his mother, and his grandparents.²² Jamie was paranoid from early adolescence on, and as he got older, he reversed his days and nights, a common phenomenon with schizophrenics.²³ His obsession with germs continued until age seventeen or eighteen, when he developed a complete disregard for hygiene. His suicidal thinking and gestures began at about age thirteen and continued.²⁴ When he was fourteen, Jamie developed a compulsive spitting habit,²⁵ and by tenth grade, his school behavior had become extremely bizarre and included clucking like a chicken in class.²⁶ When Jamie's disturbance began to escalate, his family sent him to another house or a motel, and then when the problem became too serious, they attempted to get him hospitalized. They would not, however, make sure that he went to follow-up appointments or participated in a day treatment program, even at the age of fourteen.²⁷

Jamie was first hospitalized around age fourteen and was then hospitalized twice more before the age of sixteen.²⁸ He was hospitalized again at seventeen and was hospitalized three more times in the next two years, during the course of which he was diagnosed with borderline personality disorder and paranoia.²⁹ He attempted to admit himself on a later date, but "was denied admission because he was no longer covered by his father's insurance."³⁰

18. PCR Tr., *supra* note 11, at 328–29.

19. *Id.* at 330.

20. *Id.* at 339–40.

21. *Id.* at 341.

22. *Id.* at 342–43.

23. *Id.* at 345–46.

24. PCR Tr., *supra* note 11, at 346–47.

25. *Id.* at 376.

26. *Id.* at 371.

27. *Id.* at 396–97.

28. *Id.* at 377–79.

29. *Id.* at 381–84.

30. PCR Tr., *supra* note 11, at 386.

B. The Crime

The summer before his crime, Jamie slept during the day and refused to let anyone into the house. He spent his waking time watching television and staring off into space.³¹ He was obsessed with books about murder and horror movies, resumed stuttering, and renewed his obsession with the dark. He experienced more and more auditory hallucinations. When his grandfather died, Jamie did not respond with normal grief, and tried to avoid the funeral; pressed to attend, he wore jeans and alternated between being very out of contact and being somewhat euphoric.³² Immediately before the crime, a neighbor murdered his own sister, and Jamie became extremely focused on that event.³³

"On the morning of September 26, 1988, Jamie Wilson drove to his maternal grandmother's house and stole her .22 caliber, nine-shot revolver."³⁴ He then drove to a "discount store and purchased some .22 hollow-point long rifle ammunition," discarded the bullets in the gun, and reloaded the weapon with the new bullets.³⁵ He drove to the school, found the cafeteria, and "stood quietly for a moment."³⁶ He "pulled out the pistol and began shooting."³⁷ He reloaded the gun in a restroom and emptied his gun a second time in a classroom.³⁸ He then crawled out a window, where a teacher told him to stand with his hands up. He did so until police arrived. He handed the police his library card. Several people were injured, and two eight-year-old girls were killed.³⁹

C. The Legal Proceedings

Shortly after Jamie's arrest, he was committed on motion of the prosecutor to the forensic unit of the South Carolina Department of Mental Health.⁴⁰ There, the staff noted that Jamie had a lengthy history of prior psychiatric commitments and determined that he suffered from a severe and debilitating form of mental illness, borderline personality disorder. Schizophrenia, the most debilitating form of mental illness, is commonly misdiagnosed as borderline personality disorder in the onset period, and there would later be a consensus that Jamie actually suffers from schizophrenia. Regardless of the proper diagnostic category, the state mental health professionals were

31. *Id.* at 387–88.

32. *Id.* at 392.

33. *Id.* at 394.

34. *State v. Wilson*, 306 S.C. 498, 500, 413 S.E.2d 19, 20 (1992).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. PCR Tr., *supra* note 11, at 162.

unanimous that Jamie was hearing command hallucinations at the time he entered the school and that mental illness had deprived Jamie of the ability to conform his behavior to the requirements of the law. Several viewed the further question of whether he knew the difference between right and wrong—the insanity defense formula in South Carolina—as a close one.⁴¹ When Jamie pleaded guilty but mentally ill to all charges, the trial judge convened a hearing to determine whether the statutory standard for a “guilty but mentally ill” (GBMI) verdict was met.⁴²

A short digression on GBMI verdicts may be helpful here. The traditional legal definition of insanity was formulated in *M’Naghten’s Case*:⁴³ a defendant is insane (and therefore absolved of criminal responsibility) if, due to a defect of reason caused by mental illness at the time of the act, he did not “know [either] the nature and quality of the act” or that the act was wrong.⁴⁴ The Model Penal Code,⁴⁵ which has been widely adopted by the states (and until 1984,⁴⁶ by the federal courts of appeal), expands that test in three important ways. First, it relaxes the term “know” to “appreciate”; second, instead of requiring a total lack of capacity to appreciate wrongfulness, it requires only lack of “substantial capacity”; and third, it adds a second, “volitional” prong, exonerating defendants who lack substantial capacity to control their conduct.⁴⁷

Not surprisingly, the broadening of the insanity defense led to a backlash. GBMI verdicts attempt to create a middle ground between guilty verdicts and insanity acquittals by recognizing the role mental illness played in the offense, yet insisting that the defendant is nonetheless criminally responsible for the offense and therefore subject to punishment. In theory at least, the harshness of supplanting insanity acquittals with guilty verdicts is mitigated by the guarantee of mental health treatment during the period of incarceration, though commentators have criticized this promise as illusory.⁴⁸ GBMI verdicts have, in fact, been criticized on a number of grounds,⁴⁹ but it is not our purpose here

41. *Id.* at 174–76.

42. *Wilson*, 306 S.C. at 501, 413 S.E.2d at 21.

43. 8 Eng. Rep. 718 (H.L. 1843).

44. *Id.* at 722.

45. MODEL PENAL CODE § 4.01 (1985).

46. 18 U.S.C. § 17(a) (1988) (codifying *M’Naghten* rule).

47. MODEL PENAL CODE § 4.01 cmt. 3 (1985).

48. See, e.g., Gare A. Smith & James A. Hall, Project, *Evaluating Michigan’s Guilty But Mentally Ill Verdict: An Empirical Study*, 16 U. MICH. J.L. REFORM 77, 79 n.10 (1982) (arguing that it is unlikely that Michigan’s GBMI convicts actually received this “guaranteed treatment”); Bradley D. McGraw et al., *The “Guilty But Mentally Ill” Plea and Verdict: Current State of the Knowledge*, 30 VILL. L. REV. 117, 125–26 (1985) (questioning treatment of GBMI convicts). See also *People v. Carter*, 481 N.E.2d 1012, 1020 (Ill. App. Ct. 1985) (“Although there is no guarantee that defendant will be treated as the trial court suggested, the fact that defendant was found guilty but mentally ill does guarantee defendant the benefit of being characterized as in need of treatment . . .”).

49. See, e.g., STANDARDS FOR CRIMINAL JUSTICE § 7-6.10 at 357 (1986) (noting that GBMI verdict is “at best confusing and at worst extremely prejudicial”); Christopher Slobogin, *The Guilty But Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*, 53 GEO. WASH. L.

to explore the merits of GBMI pleas in the abstract, but to focus on those facts relevant to their interaction with the death penalty.

The GBMI verdict originated in Michigan in 1975 in response to the release of sixty-four defendants who had been found "not guilty by reason of insanity" (NGRI), but were subsequently found sane at civil commitment hearings.⁵⁰ Two of these defendants committed violent crimes almost as soon as they were released, and the resulting public outrage triggered the first GBMI statute.⁵¹ That statute provides that a court may impose any sentence upon a GBMI defendant it could impose on a defendant found guilty.⁵²

The Indiana Legislature enacted the second GBMI statute in 1981,⁵³ also in response to a particularly heinous crime in which the insanity defense was offered.⁵⁴ Then, in 1982, John Hinckley, who was accused of an assassination attempt on then-President Ronald Reagan, raised an insanity defense and was acquitted.⁵⁵ In two years, dissatisfaction with the Hinckley acquittal led to the creation of GBMI verdicts in ten additional states, including South Carolina; sometimes reformulation of the insanity defense to exclude any volitional prong accompanied the creation of these verdicts.⁵⁶ All of the GBMI statutes copied Michigan's model in providing that any sentence lawfully imposed upon a defendant found guilty may be lawfully imposed upon a defendant found GBMI.⁵⁷ Generally, these statutes gave no consideration to the question

REV. 494, 497 (1985) (suggesting GMBI verdict does not meet stated goals); Mark A. Woodmansee, Comment, *The Guilty But Mentally Ill Verdict: Political Expediency at the Expense of Moral Principle*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 341, 372-73 (1996) ("If it does not suggest a reduced level of culpability . . . , then the GBMI verdict is no different from a simple guilty verdict, and the designation of 'guilty but mentally ill' is superfluous."); see also Rene J. LeBlanc-Allman, Comment, *Guilty But Mentally Ill: A Poor Prognosis*, 49 S.C. L. REV. 1095, 1101 (1998) (arguing that under South Carolina's narrow definition of insanity, GBMI verdict could not serve function of providing gradations in culpability).

50. Ira Mickenberg, *A Pleasant Surprise: The Guilty but Mentally Ill Verdict Has Both Succeeded in Its Own Right and Successfully Preserved the Traditional Role of the Insanity Defense*, 55 U. CIN. L. REV. 943, 973 (1987) (detailing facts leading to Michigan's adoption of GBMI statute).

51. *Id.* at 973-74.

52. MICH. COMP. LAWS ANN. § 768.36(3) (West 1982).

53. IND. CODE ANN. § 35-36 (Michie 1984).

54. See Scott A. Kinsey, Note, *Indiana's Guilty But Mentally Ill Statute: Blueprint to Beguile the Jury*, 57 IND. L.J. 639, 639 n.4 (1982).

55. Stuart Taylor, Jr., *Hinkley Cleared but is Held Insane in Reagan Attack*, N.Y. TIMES, June 22, 1982, at A1.

56. Emanuel, *supra* note 9, at 42 n.33.

57. *Id.* at 47.

of whether this rule also applied to death sentences,⁵⁸ an issue that could not have arisen in Michigan, given its longstanding abolitionist stance.⁵⁹

Though the label is the same, and the sentencing provisions are the same, the GBMI formulations differed wildly, with some requiring only an impaired capacity to control conduct, and others phrasing their standard in terms that do not match any previous insanity standard and indeed, make no reference to volitional control.⁶⁰ Among the death penalty states, only the South Carolina and Delaware statutes clearly require a finding that the accused, because of mental disease or defect, “lacked *sufficient* capacity to conform his conduct to the requirements of the law.”⁶¹ Despite that apparent clarity, the Delaware Supreme Court has construed its GBMI statute to require only a finding that the defendant’s “volitional capacity was *impaired* by mental illness.”⁶² The Pennsylvania statute seems to walk the line between requiring impaired capacity and insufficient capacity, requiring that the defendant, by reason of mental illness, lacked “substantial capacity either to appreciate wrongfulness . . . or to conform his conduct to the requirements of the law.”⁶³ Thus, the particular question posed to the judge assigned to Jamie’s case—whether Jamie lacked *sufficient* capacity to control his conduct—would only be posed in a GBMI proceeding in South Carolina (and possibly Pennsylvania, depending on how the Pennsylvania Supreme Court interprets that phrase).

Jamie’s defense called four mental health professionals, including the chief state psychiatrist, Dr. Donald Morgan, and chief state psychologist, Dr. McKee, both of whom testified that Jamie Wilson’s crime occurred during a transient psychotic episode in which he lacked the capacity to conform his conduct to

58. The possible exception is Georgia, whose GBMI statute when enacted included mentally retarded individuals within the umbrella of “mentally ill.” Later, it passed legislation forbidding the execution of mentally retarded individuals, but did not forbid the execution of other GBMI defendants, thereby implying that those defendants could be executed. See Emanuel, *supra* note 9, at 48–49. Nonetheless, the Georgia Supreme Court has twice stated that the question of whether defendants found GBMI can be executed is an open one. See Ward v. State, 417 S.E.2d 130, 136 (Ga. 1992) (noting explicitly that the question is undecided); Spraggins v. State, 364 S.E.2d 861, 863–64 n.2 (Ga. 1988) (same).

59. Michigan abolished the death penalty for all crimes except treason in 1846, see FRANKLIN E. ZIMRING & GORDAN HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 28 (1986), and completely abolished it by constitutional amendment in 1963, MICH. CONST. of 1963, art. IV, § 46.

60. See, e.g., GA. CODE ANN. § 17-7-131(a)(2) (1997) (defining “mentally ill” as a disorder that “significantly impairs” judgment, behavior, perception, or control); 720 ILL. COMP. STAT. ANN. 516-2(d) (West 2002) (defining “mentally ill” as “a substantial disorder of thought, mood, or behavior”); 18 PA. CONS. STAT. ANN. § 314(a) (West 1998) (defining “mentally ill” as one who lacks “substantial capacity” to appreciate wrongfulness or to conform conduct to the requirements of law); 14 S.D. CODIFIED LAWS § 22-1-2(24) (Michie 1998) (defining “mental illness” as a “substantial psychiatric disorder” that “impairs a person’s judgment”).

61. S.C. CODE ANN. § 17-24-20(A) (Law. Co-op. 2003) (emphasis added); see also DEL. CODE ANN. tit. 11, § 401 (1974).

62. Sanders v. State, 585 A.2d 117, 135 (Del. 1991) (emphasis added). See also *id.* at 125 n.6 (“[A]ny significant volitional impairment is included with the scope of [the GBMI statute].”).

63. 18 PA. CONS. STAT. ANN. § 314(a).

the requirements of law.⁶⁴ The state disputed this conclusion through the testimony of lay witnesses and the expert testimony of Dr. Park Dietz. Dr. Dietz, a notoriously pro-prosecution psychiatrist⁶⁵ who formed his conclusion without even examining Jamie, agreed with the state hospital's experts that he suffered from borderline personality disorder and that it was possible that he had suffered a transient psychotic episode at the time of the offense, but concluded nonetheless that he "retained sufficient capacity to conform his conduct to the requirements of the law."⁶⁶

After considering all of the psychiatric and lay testimony, the trial judge announced that he would accept Jamie's plea of guilty but mentally ill.⁶⁷ Notwithstanding this determination, the next day, the trial judge sentenced him to death.⁶⁸ Confusion about the meaning or narrow scope of the GBMI verdict is not the explanation: immediately prior to imposing that sentence, the judge stated on the record that he had found the defendant mentally ill as defined by the GBMI statute, reiterating that

[t]he Court found that the defendant at the time of the commission of the acts constituting the offenses had the capacity to distinguish right from wrong, or to recognize his acts as being wrong, . . . but, *because of mental disease, or defect, he lacked sufficient capacity to conform his conduct to the requirements of the law.*⁶⁹

64. During the state post-conviction proceedings, Dr. Morgan testified that, after listening to the witnesses to the shooting testify at the GBMI hearing, he modified his opinion and concluded that Mr. Wilson was legally insane under South Carolina's *M'Naghten* standard. PCR Tr., *supra* note 11, at 174–76.

65. Dr. Dietz is on retainer for the FBI. The most recent flurry of notoriety came when he testified at the Andrea Yates trial that she was not insane when she drowned her five children, and proceeded to explain that a recent *Law and Order* television program had featured a mother who drowned her children and got away with it, a program that likely inspired Yates to believe she could escape her unglamorous life by the same route. The prosecutor used his testimony in summation, but as was revealed shortly after the guilty verdict, there had been no such program. Carol Christian, *Psychiatrist Worth \$50,000?*, HOUS. CHRON., Mar. 30, 2002, at 41; "*Law and Order*" *Saved Yates*, N.Y. POST, Mar. 22, 2002, at 6.

66. PCR Tr., *supra* note 11, at 767.

67. State v. Wilson, 306 S.C. 498, 501, 413 S.E.2d 19, 21 (1992).

68. *Id.*

69. Transcript of Guilty Plea and Sentencing Proceedings at 892, Wilson v. Evatt (No. 93-CP-24-037) (S.C. Ct. Com. Pl. filed Sept. 24, 1998); Record at 892, Wilson, (No. 93-CP-24-037) (emphasis added).

III. THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENTS

A. *General Principles Determining Whether a Punishment Is Cruel and Unusual*

"The Cruel and Unusual Punishments Clause of the Eighth Amendment is directed, in part, against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged."⁷⁰ To determine whether a given punishment is disproportional, "evolving standards of decency that mark the progress of a maturing society,"⁷¹ as well as the standards that prevailed at the time the Bill of Rights was adopted, must be considered.⁷² In establishing what these evolving standards are, the Supreme Court has turned first to the popular will as expressed in the legislative enactments of the people's elected representatives,⁷³ but has noted that another "significant and reliable objective index of contemporary values" regarding the propriety of a given punishment is the sentencing behavior of juries.⁷⁴ While less important in the Court's calculus, even prior to *Atkins* public opinion had a role to play in the additional light it sometimes shed on contemporary societal norms regarding criminal punishments.⁷⁵

The Eighth Amendment tests all punishments for their congruence with evolving standards of decency, but capital sentences, because of their extremity, require more.⁷⁶ A capital sentence is also violative of the Eighth Amendment when it is "grossly out of proportion to the severity of the crime"⁷⁷ or "so totally without penological justification that it results in the gratuitous infliction of suffering."⁷⁸ In *Gregg v. Georgia*,⁷⁹ the Supreme Court identified retribution and deterrence as the two principal social functions that the death penalty purports to serve,⁸⁰ and held in *Enmund v. Florida*⁸¹ that "[u]nless the death penalty when applied to those in [the defendant's] position measurably contributes to one or both of these goals, it 'is nothing more than the

70. *Enmund v. Florida*, 458 U.S. 782, 788 (1982) (internal quotations omitted).

71. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion), *quoted in* *Stanford v. Kentucky*, 492 U.S. 361, 369 (1989).

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

73. *Stanford*, 492 U.S. at 370; *Enmund*, 458 U.S. at 788–93; *Coker v. Georgia*, 433 U.S. 584, 593–96 (1977); *Gregg v. Georgia*, 428 U.S. 153, 179–81 (1976).

74. *Gregg*, 428 U.S. at 181, *quoted in* *Coker*, 433 U.S. at 596.

75. *See* *Penry v. Lynaugh*, 492 U.S. 302, 334–35 (1989) (noting poll data reflecting opposition to the execution of mentally retarded defendants, but finding it, standing alone, insufficient evidence of consensus).

76. *See, e.g., Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (explaining that "the penalty of death is qualitatively different").

77. *Gregg*, 428 U.S. at 173 (joint opinion of Stewart, Powell, and Stevens, JJ.).

78. *Id.* at 183.

79. 428 U.S. 153 (1976).

80. *Id.* at 183.

81. 458 U.S. 782 (1982).

purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment."⁸²

B. The Application of the Cruel and Unusual Punishment Clause in Atkins v. Virginia

The rationale of *Atkins v. Virginia*⁸³ makes easier work of any evaluation of the constitutional legitimacy of executing a person so mentally impaired that he lacks the capacity to conform his conduct to the requirements of the law. In 1989, in *Penry v. Lynaugh*, a majority of the Court found no sufficient national consensus barring the death penalty for retarded persons,⁸⁴ but as a result of the "dramatic shift in the state legislative landscape" that occurred after *Penry*, the Court decided to revisit the issue.⁸⁵ The Court first granted certiorari in *McCarver v. North Carolina*⁸⁶ and then replaced *McCarver* with *Atkins*.⁸⁷

The *Atkins* Court began by establishing that a fundamental "precept of justice [is] that 'punishment for crime should be graduated and proportioned to [the] offense.'"⁸⁸ This proportionality concept is—and was even before *Atkins*—an integral part of any Eighth Amendment analysis.⁸⁹ The Court also made clear that determining whether a punishment is constitutionally excessive or cruel and unusual⁹⁰ is judged by current standards, not by those which existed at the time the Eighth Amendment was ratified.⁹¹ The core Eighth Amendment concept is the "dignity of man" and thus its constitutional content must be informed by "the evolving standards of decency that mark the progress of a maturing society."⁹² The "evolving standard," the Court again reiterated, "should be informed by 'objective factors to the maximum possible extent'";⁹³ hence, the most reliable evidence of this standard is found in state legislative enactments and jury verdicts. However, despite the importance of the objective evidence, the Court was adamant that "in the end [its] own judgment will be

82. *Id.* at 798 (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

83. 536 U.S. 304 (2002) (holding death penalty unconstitutional for mentally retarded defendants).

84. 492 U.S. 302, 335 (1989).

85. *Atkins*, 536 U.S. at 310.

86. 533 U.S. 975 (2001).

87. *Id.* *McCarver* became moot due to the passage of legislation in North Carolina prohibiting the execution of persons with mental retardation.

88. *Atkins*, 536 U.S. at 311 (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)).

89. *Id.*

90. The Court was clear that the Eighth Amendment prohibits "all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive." *Id.* at 311 n.7.

91. *Id.* at 311.

92. *Id.* at 311–12 (quoting *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958)).

93. *Id.* at 312 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991)).

brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.”⁹⁴

Its course set, the Court first reviewed the lay of the legislative land. The Court seemed greatly impressed with the fact that at the time of *Penry* only two death penalty states and the federal government proscribed the death penalty for mentally retarded offenders, but that since *Penry*, an additional sixteen states had taken death off the punishment table for the mentally retarded.⁹⁵ Moreover, the Court noted, “[i]t is not so much the number of these States that is significant, but the consistency of the direction of change.”⁹⁶ These enactments, “[g]iven the well-known . . . [popularity of] anticrime legislation,” provided the Court with “powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.”⁹⁷ In its successful search for a national consensus, the Court relied heavily upon the fact that the legislatures passing the laws “voted overwhelmingly in favor of the prohibition.”⁹⁸ The Court also looked to the opinions of social and professional organizations with “germane expertise,”⁹⁹ the opposition to the practice by “widely diverse religious communities,”¹⁰⁰ international practice,¹⁰¹ and polling data.¹⁰² While not dispositive, these factors gave further support to the Court’s opinion that there was a consensus opposing the practice “among those who have addressed the issue.”¹⁰³ Finally, the Court also noted that even in those states that retained the death penalty for the retarded, only five had actually carried out the execution of a mentally retarded individual since *Penry*.¹⁰⁴ Since “[t]he practice . . . has become truly unusual, . . . it is fair to say,” according to the Court, “that a national consensus has developed against it.”¹⁰⁵

94. *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

95. *Id.* at 314–15.

96. *Id.* at 315.

97. *Id.* at 315–16.

98. *Id.*

99. For example, the American Psychological Association. *Id.* at 316 n.21.

100. The Court noted that representatives of Christian, Jewish, Muslim, and Buddhist organizations believed that “the execution of persons with mental retardation cannot be morally justified.” *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (quoting Brief of Amici Curiae United States Catholic Conference et al.).

101. “[W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.” *Id.* at 317 n.21 (quoting Brief of Amicus Curiae European Union). The significance of international practice in interpreting constitutional norms was reaffirmed in 2003 in *Lawrence v. Texas*, 123 S. Ct. 2472, 2483 (2003) (noting that the European Court of Human Rights, as well as other nations, protects the right of homosexual adults to engage in intimate sexual conduct).

102. “[P]olling data shows a widespread consensus among Americans, even those who support the death penalty, that executing the mentally retarded is wrong.” *Atkins*, 536 U.S. at 317 n.21.

103. *Id.*

104. *Id.* at 316.

105. *Id.*

The Court then examined the underlying merits of the consensus, beginning with the observation that it reflected a “judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty,”¹⁰⁶ a judgment the Court itself ultimately endorsed. The Court noted that due to their impairments those with mental retardation “have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.”¹⁰⁷ These deficiencies, while not justifying an exemption from criminal liability, do diminish the personal culpability of retarded individuals to the extent that neither of the justifications advanced by states in support of the death penalty—retribution and deterrence—would be served by permitting their execution.¹⁰⁸

Retribution in the capital context has been limited to “ensur[ing] that only the most deserving of execution are put to death.”¹⁰⁹ Since “just deserts . . . necessarily depends on the culpability of the offender,” the Court found that the most extreme punishment was excessive due to the “lesser culpability of the mentally retarded offender.”¹¹⁰ The Court also concluded that deterrence interests are not served by the execution of offenders with mental retardation, reasoning that “capital punishment can [only] serve as a deterrent when [a crime] is the result of premeditation and deliberation,”¹¹¹ i.e., when the threat of death “will inhibit criminal actors from carrying out murderous conduct,”¹¹² but that this type “of calculus is at the opposite end of the spectrum from [the] behavior of [the] mentally retarded” due to their cognitive and behavioral impairments.¹¹³

In addition to its conclusion that retaining the death penalty for the mentally retarded would not further legitimate interests in retribution or deterrence, the Court also found that “[t]he reduced capacity of mentally retarded offenders provides a second justification for a categorical rule making such offenders ineligible for the death penalty.”¹¹⁴ Due to their impairments, there were a host of reasons, including the increased risk of false confessions, the likelihood of difficulties in communicating with counsel, and a lesser ability (due to limited communication skill) to effectively testify on their own behalf, that “in the aggregate” rendered retarded offenders subject to an

106. *Id.* at 317.

107. *Id.* at 318.

108. *Atkins v. Virginia*, 536 U.S. 304, 318–20 (2002).

109. *Id.* at 319.

110. *Id.*

111. *Id.*

112. *Id.* at 320.

113. *Id.* at 319–20. The Court also concluded that exempting the retarded would not diminish any other deterrent interests associated with the death penalty because those without mental retardation are “unprotected by the exemption.” *Atkins v. Virginia*, 536 U.S. 304, 319–20 (2002).

114. *Id.* at 320.

unacceptable “risk of wrongful execution.”¹¹⁵ The Court also noted the particular danger that a mentally retarded person’s “demeanor may create an unwarranted impression of lack of remorse for their crimes” which could enhance the likelihood that the jury will impose the death penalty due to a belief that they pose a future danger.¹¹⁶

Thus, the Court concluded that its “independent evaluation of the issue reveals no reason to disagree with the judgment of the legislatures that have . . . concluded that death is not a suitable punishment for a mentally retarded criminal,”¹¹⁷ and therefore, the Constitution “‘places a substantive restriction on the State’s power to take the life’ of a mentally retarded offender.”¹¹⁸

IV. APPLYING *ATKINS* TO NON-WILLING OFFENDERS

*Atkins*¹¹⁹ provides specific directions for calibrating the Eighth Amendment standard against which we evaluate whether it is excessive or cruel and unusual to execute a person who, due to his mental illness, lacks the capacity to conform his conduct to the requirements of the law. First, we must look to the objective evidence of the acceptance of the practice expressed in state legislative enactments, jury verdicts,¹²⁰ and by others who have closely examined the issue. Second, we need to analyze the moral culpability of those who cannot conform their conduct due to mental illness, and third, the related question of whether the execution of such offenders will further any legitimate retributive or deterrent interest. Finally, *Atkins* requires that we also investigate whether, due to the severity of the mental illness, there is a heightened risk of wrongful execution. Application of this framework to Jamie Wilson’s death sentence, imposed for a crime he lacked the capacity to avoid, compels the modest conclusion that his sentence is an unconstitutional punishment; we leave what broader implications *Atkins* holds for other mentally ill offenders to Part IV.

115. *Id.* at 320–21.

116. *Id.* at 321.

117. *Id.*

118. *Id.* (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)).

119. Since *Atkins*, the Supreme Court has decided two Eighth Amendment cases, *Lockyer v. Andrade*, 123 S. Ct. 1166 (2003), and *Ewing v. California*, 123 S. Ct. 1179 (2003). Neither case is a capital case, however, and neither calls into question the cruel and unusual punishment clause analysis employed in *Atkins*.

120. Even the three dissenting Justices agreed that the relevant Eighth Amendment inquiry must take into account the “work product of legislatures and sentencing jury determinations” in ascertaining “contemporary American conceptions of decency for purposes of the Eighth Amendment.” *Atkins v. Virginia*, 536 U.S. 304, 324 (2002) (Rehnquist, C.J., dissenting).

A. *Evolving Standards of Decency Prohibit the Execution of a Person for Conduct He Was Unable to Control*

1. *Legislative Enactments and Judicial Interpretations of Those Enactments*

The South Carolina Supreme Court acknowledged that the trial judge's acceptance of Jamie Wilson's GBMI plea established an "unreviewable fact that he was unable to control his behavior on [the day of the crime]." ¹²¹ As that court noted, the pertinent question in answering whether a national consensus exists that would prohibit such a defendant's execution is *not* answered by comparing how many jurisdictions with GBMI statutes have authorized the imposition of the death penalty for persons who fall within their definition of "guilty but mentally ill" with the number of jurisdictions with GBMI statutes that do not authorize the imposition of the death penalty on GBMI defendants. Such a comparison confounds at least four issues: (1) which jurisdictions have a death penalty; (2) what the definition of GBMI in that jurisdiction covers; (3) how GBMI defendants are sentenced in comparison to other defendants; and (4) whether that jurisdiction has explicitly authorized, prohibited, or failed to mention death sentences for GBMI defendants. Focus on GBMI states also ignores the possibility that some jurisdictions without GBMI statutes regulate the disposition of defendants who are unable to control their conduct through other statutes or forms of appellate review.

Instead of focusing on the states which coincidentally treat some mentally ill offenders under the same nominal rubric as does South Carolina, the proper question is how many states preclude death sentences for defendants who "lacked sufficient capacity to conform [their] conduct to the requirements of the law." ¹²²

a. *States Whose Laws Preclude the Execution of Volitionally Incapacitated Offenders*

In seventeen states, the trial court's fact finding concerning Jamie's volitional capacity would have shielded him from *all* criminal responsibility and *all* punishment. ¹²³ Of the seventeen states that have a volitional prong as

121. *Wilson v. State*, 306 S.C. 498, 505, 413 S.E.2d 19, 23 (1992). The trial court found that "because of mental disease, or defect, [Jamie Wilson] lacked sufficient capacity to conform his conduct to the requirements of the law," Transcript of Guilty Plea and Sentencing Proceedings at 892, *Wilson v. Evatt* (No. 93-CP-24-037) (S.C. Ct. Com. Pl. filed Sept. 24, 1998); Record at 892, *Wilson* (No. 93-CP-24-037) (emphasis added), and that finding has not been disputed by the state in subsequent proceedings.

122. S.C. CODE ANN. § 17-24-20(A) (Law. Co-op. 2003).

123. See ARK. CODE ANN. § 5-2-312 (Michie 1997); CONN. GEN. STAT. ANN. § 53a-13 (West 2001); GA. CODE ANN. § 16-3-2 (1999); HAW. REV. STAT. ANN. § 704-400 (Michie 1999); KY. REV. STAT. ANN. § 504.020 (Michie 1999); MD. CODE ANN., HEALTH-GEN. I § 12-108

part of their insanity defense, seven do not presently have a death penalty.¹²⁴ Nevertheless, they contribute equally to the legislative consensus that the death penalty may not be imposed based upon conduct the defendant was powerless to avoid. It is not their prohibition of the death penalty but their recognition of the radically lesser culpability of nonvolitional actors that contributes to this consensus.¹²⁵ If any of these seven states were to enact a death penalty tomorrow, persons who were volitionally incapacitated would be ineligible for death sentencing for precisely the same reason they are presently ineligible in the ten volitional prong death penalty states: because such persons are deemed undeserving of any criminal sanction at all.

In another state, Montana, a barrier closely related to the volitional prong of the insanity defense would preclude execution of a person unable to avoid his criminal act. Although Montana allows mental illness to *excuse* criminal conduct only when it is proven that the defendant did not have the requisite mental state,¹²⁶ the existence of a "mental disease or defect [at the time of the offense] that rendered the defendant unable . . . to conform the defendant's behavior to the requirements of law"¹²⁷ affects the sentencing of that defendant. Upon a finding that the defendant lacked the ability to conform his conduct,

the court shall sentence the defendant to be committed to the custody of the director of the department of public health and human services to be placed . . . in an appropriate [institution] for custody, care, and treatment for a definite period of time not to exceed the maximum term of imprisonment that could

(2000); MICH. COMP. LAWS ANN. § 768.21a (West 2000); OR. REV. STAT. § 161.295 (2001); VT. STAT. ANN. tit. 13, § 4801 (1998); WIS. STAT. ANN. § 971.15 (West 1998); WYO. STAT. ANN. § 7-11-304 (Michie 2003); Commonwealth v. McHoul, 226 N.E.2d 556 (Mass. 1967); State v. Cegelis, 638 A.2d 783 (N.H. 1994); State v. White, 270 P.2d 727 (N.M. 1954); State v. Johnson, 399 A.2d 469 (R.I. 1979); Thompson v. Commonwealth, 70 S.E.2d 284 (Va. 1952); State v. Myers, 222 S.E.2d 300 (W.Va. 1976), *overruled on other grounds*, 461 S.E.2d 163 (W. Va. 1995).

124. These states include Hawaii, Massachusetts, Michigan, Rhode Island, Vermont, West Virginia, and Wisconsin. See *infra* Chart I, at p. 114.

125. *Stanford v. Kentucky*, 492 U.S. 361 (1989), is not to the contrary. *Stanford* found that abolitionist states reveal nothing about the proportionality of executing sixteen- and seventeen-year-olds. *Id.* at 370 n.2. But the reason that abolitionist states are not probative is that nothing in their treatment of sixteen- and seventeen-year-olds demonstrates a view that they are substantially less morally culpable, or that they would be shielded from imposition of the death penalty were it enacted in such a state. If, contrary to fact, one of those states had laws that rendered juveniles of those ages *ineligible* for treatment as adult offenders, such laws would indeed be probative regarding a consensus of the appropriateness of the death penalty for juveniles; because none of them had such laws, their abolitionist stand reflected only a view on the death penalty and not a view on whether juveniles were peculiarly inappropriate candidates for it.

126. MONT. CODE ANN. § 46-14-102 (2001).

127. *Id.* § 46-14-311.

be imposed [upon a finding that the defendant did not suffer from such a mental disease or defect].¹²⁸

Thus, in Montana as well as in the seventeen volitional prong states, no criminal punishment may be imposed on a person who lacked the capacity to conform his conduct to the requirements of law.

In addition to the eighteen states in which persons who are unable to control their conduct are totally excused from criminal punishment, in at least one more state such defendants are ineligible for a death sentence because their volitional incapacity would provide an affirmative defense that mitigates murder to manslaughter. In New York, it is an affirmative defense to murder if "[t]he defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be."¹²⁹ Defendants who are unable to control their conduct would, by virtue of that impairment, be under the influence of extreme emotional disturbance.¹³⁰ Therefore, the total number of states who have made a judgment that volitionally incapacitated offenders are categorically ineligible for the death penalty is nineteen—one more than the eighteen the Court found sufficient for the evolving standard of decency in *Atkins*.

In at least six additional states—Arizona, Florida, Indiana, Mississippi, Ohio and Nevada—proportionality review has served to remove many mentally ill offenders (where the existence of serious mental illness is not disputed) from the ranks of the condemned despite the apparent availability of capital punishment in such cases.¹³¹ While these proportionality decisions do not

128. *Id.* § 46-14-312.

129. N.Y. PENAL LAW § 125.27(2)(a) (McKinney 1998).

130. In states such as Delaware and Montana, a similar extreme emotional disturbance formula would often result in the mitigation of murder to manslaughter for volitionally impaired defendants, but might not always do so because those states require that the reasonableness of the explanation for the disturbance be judged by "*a reasonable person* in the accused's situation," thus precluding reliance upon the illness itself to form part of the explanation. DEL. CODE ANN. tit. 11, § 641 (2001) (emphasis added); *see also* MONT. CODE ANN. § 45-5-103 (2001). Because New York requires that the disturbance be judged from the viewpoint of *a person* in the defendant's situation under the circumstances the defendant perceives, the defendant's "situation" would include his mental illness, and his resultant incapacity to control his conduct would provide the only required explanation for his emotional disturbance.

131. *See, e.g.,* State v. Fierro, 804 P.2d 72, 90 (Ariz. 1990) (holding death penalty to be disproportionate due in part to defendant's "history of psychological illness"); State v. Jimenez, 799 P.2d 785, 797-801 (Ariz. 1990) (reducing death sentence to life imprisonment based on defendant's mental incapacity); State v. Doss, 568 P.2d 1054, 1061 (Ariz. 1977) (same); Besaraba v. State, 656 So. 2d 441, 447 (Fla. 1995) (overturning death sentence where defendant was under the influence of great emotional disturbance); Knowles v. State, 632 So. 2d 62, 67 (Fla. 1993) (finding mitigating factors of defendant's mental illness, including his impaired capacity to control his conduct, outweighed aggravating factors); Huckaby v. State, 343 So. 2d 29, 33-34 (Fla. 1977) (finding evidence of mental illness outweighed evidence in aggravation and required reduction of

correspond precisely to the so-called “irresistible impulse” category at issue here, they sweep in offenders *less* impaired than Jamie, and help explain why these state courts may not have had to face squarely the issue of the permissibility of death sentences for conduct the defendant was incapable of controlling. Moreover, the fact that these jurisdictions have used proportionality review to strike down sentences of mentally ill offenders whose illness has left them with *some* capacity to control their conduct suggests that they might well adopt a *per se* rule prohibiting the execution of offenders totally lacking in that capacity if such an offender were in fact sentenced to death in that jurisdiction.

The Supreme Court has rejected the notion that states without a death penalty contribute any information to the question of evolving consensus on the eligibility of particular classes of offenders.¹³² Nonetheless, it is worth noting that in addition to the twenty-five states in which the volitionally incapacitated in particular would likely be exempted from the death penalty, in five more states such a person could not face the death penalty because there is no death penalty to face.¹³³ Chart 1 summarizes the thirty states whose laws preclude the execution of volitionally incapacitated persons, giving the reasons for ineligibility so that the reader may grant whatever weight to the absence of a death penalty, or the probable ineligibility due to proportionality review, as he or she deems appropriate:

sentence from death to life imprisonment; “while [defendant] may have comprehended the difference between right and wrong his capacity to appreciate the criminality of his conduct and to conform it to the law was substantially impaired.”); *Burch v. State*, 343 So. 2d 831, 834 (Fla. 1977) (same); *Jones v. State*, 332 So. 2d 615, 619 (Fla. 1976) (reducing death sentence to life based on evidence of defendant’s mental illness); *Evans v. State*, 598 N.E.2d 516, 519 (Ind. 1992) (finding where defendant produced uncontradicted evidence of psychiatric disorder and parental neglect, death penalty inappropriate despite aggravated nature of crime and defendant’s prior violent history); *Edwards v. State*, 441 So. 2d 84, 92–94 (Miss. 1983) (plurality opinion) (vacating death sentence based on offender’s mental illness); *Haynes v. State*, 739 P.2d 497, 503 (Nev. 1987) (vacating as disproportionate death sentence imposed on mentally ill offender); *State v. Claytor*, 574 N.E.2d 472, 482 (Ohio 1991) (finding where defendant produced un rebutted evidence that he lacked substantial capacity to conform, impact of that mitigating factor should have been given more weight and a life sentence imposed).

132. *Stanford v. Kentucky*, 492 U.S. 361, 370 n.2 (1989) (holding that abolitionist states reveal nothing about the proportionality of executing sixteen- and seventeen-year-olds).

133. These states include Alaska, Iowa, Maine, Minnesota, and North Dakota. *See infra* Chart 1, at p. 113-14.

<p>Chart 1</p> <p>Reasons for Death Penalty Ineligibility of Defendants with "Insufficient Capacity" to Control their Conduct</p>					
State	Insanity defense with volitional prong	Extreme emotional disturbance mitigates murder to manslaughter	Statutory provision limits punishment to imprisonment	Proportionality review removes severely mentally ill offenders	No death penalty
Alaska					X
Arizona				X	
Arkansas	X				
Connecticut	X				
Florida				X	
Georgia	X				
Hawaii	X				X
Indiana				X	
Iowa					X
Kentucky	X				
Maine					X
Maryland	X				
Massachusetts	X				X
Michigan	X				X
Minnesota					X
Mississippi				X	
Montana			X		
Nevada				X	
New Hampshire	X				

State	Insanity defense with volitional prong	Extreme emotional disturbance mitigates murder to manslaughter	Statutory provision limits punishment to imprisonment	Proportionality review removes severely mentally ill offenders	No death penalty
New Mexico	X				
New York		X			
North Dakota					X
Ohio				X	
Oregon	X				
Rhode Island	X				X
Vermont	X				X
Virginia	X				
West Virginia	X				X
Wisconsin	X				X
Wyoming	X				
TOTAL: 30	17	1	1	6	12

b. States that Permit Execution of Volitionally Incapacitated Defendants

Thus, nineteen states have statutes that explicitly preclude execution of a defendant for conduct he was incapable of controlling, and an additional five have judicial decisions that raise a strong inference that volitionally incapacitated offenders are ineligible for execution. In contrast, only South Carolina law affirmatively sanctions execution of a defendant for conduct he was unable to control.¹³⁴

134. See *Wilson v. State*, 306 S.C. 498, 413 S.E.2d 19 (1992).

c. *The Silent States*

Although eight other death penalty states have GBMI statutes that on first glance would seem to *include* volitionally incapacitated defendants, three of them in fact would exonerate volitionally incapacitated defendants through their insanity defenses,¹³⁵ and the remaining five have not yet determined the question. Three states have upheld death sentences in GBMI cases, but none of these cases involved defendants that lacked sufficient capacity to control their conduct.¹³⁶ Although the Delaware statute on its face appears to allow an offender to be found GBMI only if he wholly lacked the capacity to control his conduct, and the Delaware Supreme Court *has* held that a GBMI verdict does not preclude a death sentence, it did so (1) in the course of reversing that defendant's sentence on another ground, and (2) only after construing the GBMI verdict to require only a finding that the defendant's "volitional capacity was *impaired* by mental illness."¹³⁷ In explaining why the legislature deemed punishment as well as treatment appropriate for GBMI defendants, the court explained that "an individual whose willpower was undermined by disease . . . might, in theory at least, have resisted the urge to commit the crime of which he has been convicted."¹³⁸ This reasoning, of course, could not be used to uphold Jamie Wilson's sentence because the GBMI finding made by the judge foreclosed the possibility that Jamie could have resisted his urge. Reiterating that a GBMI verdict is not inconsistent with the possibility that the defendant "might . . . have resisted his pathological impulses,"¹³⁹ the *Sanders* court explicitly reserved the question of whether a person who, as a result of mental illness, had "*insufficient willpower to choose* whether or not he would commit the crime with which he was charged" could be executed for that crime.¹⁴⁰

In Illinois, a GBMI defendant has been held to be eligible for the death penalty, but because the insanity defense in effect at that time had a volitional prong, by virtue of being found sane the defendant had been determined to be "able to conform his conduct to the requirements of law."¹⁴¹ Indeed, the court cited this finding on insanity as the reason for finding that "deterrence and retribution remain valid considerations in his punishment."¹⁴² Illinois no longer has a volitional prong to its insanity defense, but the Illinois courts have yet to

135. GA. CODE ANN. § 16-3-2 (1999); KY. REV. STAT. ANN. § 504.020 (Michie 1999); *State v. White*, 270 P.2d 727, 731 (N.M. 1954) (adopting *M'Naghten* Rule).

136. These include Delaware, Illinois, and Indiana.

137. *Sanders v. State*, 585 A.2d 117, 135 (Del. 1990) (emphasis added). *See also id.* at 125 n.6 ("[A]ny significant volitional impairment is included within the scope of [the GBMI statute].").

138. *Id.* at 126.

139. *Id.* at 134.

140. *Id.* at 135 (emphasis added).

141. *People v. Crews*, 522 N.E.2d 1167, 1174 (Ill. 1988).

142. *Id.*

rule upon the death eligibility of GBMI defendants under its new insanity defense.

Indiana has affirmed the death sentence of a GBMI defendant, but there was no indication that the defendant lacked the ability to control his conduct.¹⁴³ In Indiana, a GBMI finding implies nothing about volitional capacity, requiring proof only that the defendant suffered from “a psychiatric disorder which substantially disturbs a person’s thinking, feeling, or behavior and impairs the person’s ability to function.”¹⁴⁴ Moreover, as mentioned previously, the Indiana Supreme Court has used proportionality review at least once to reverse the death sentence of a mentally ill offender who was not even psychotic, suggesting that, *a fortiori*, a more severe mental illness would also render a death sentence inappropriate.¹⁴⁵

Of the remaining GBMI states,¹⁴⁶ South Dakota and Pennsylvania have yet to rule on whether a GBMI defendant is eligible for the death sentence. But, to the best of our knowledge, no person found GBMI has been sentenced to death in either of these states.

If we look to the death penalty states *without* GBMI statutes (and, of course, without volitional prongs to their insanity defenses), none has held, said in dicta, or even suggested, that the death penalty may be applied to offenders who lack sufficient capacity to conform their conduct to the requirements of law. In the five such states with very small death row populations—Colorado, Kansas, Nebraska, New Jersey, and Washington—the dearth of death penalty cases means that no valid inferences can be drawn about the views of sentencing juries or the interpretation of state law that would be made on this issue. There remain three such states—California, Idaho, and Louisiana—which have imposed and affirmed relatively large numbers of death sentences, and which have neither any formal method of determining whether mentally ill defendants meet the “irresistible impulse” test nor a record of reversing death sentences of mentally ill offenders on proportionality grounds. But even these jurisdictions do not reflect, for Eighth Amendment purposes, any “considered judgment approving the imposition of capital punishment”¹⁴⁷ on mentally ill offenders who were unable to conform their conduct. Rather, like the states’ laws governing waiver of juvenile offenders for trial as adults which were considered in *Thompson*, the states’ substantive

143. *Harris v. State*, 499 N.E.2d 723, 726 (Ind. 1987).

144. IND. CODE ANN. §§ 35-36-1-1, 35-36-2-3 (Michie 1998).

145. See *Evans v. State*, 598 N.E.2d 516, 519 (Ind. 1992). The Court’s decision in *Evans* was made in the context of an aggravated crime involving a defendant with a history of sexual assault, burglary, and child molestation. *Id.*

146. Nevada was one of the original GBMI death penalty states, but its supreme court has held that the GBMI statute is unconstitutional. *Finger v. State*, 27 P.3d 66, 84–85 (Nev. 2001). Georgia does have a GBMI statute, and has explicitly reserved the question of whether GBMI defendants are death-eligible, see *Ward v. State*, 417 S.E.2d 130, 136 (Ga. 1992); *Spraggins v. State*, 364 S.E.2d 861, 863 n.2 (Ga. 1988), but because it has a volitional prong to its insanity defense, a defendant without sufficient capacity to control his conduct would not be found GBMI.

147. *Thompson v. Oklahoma*, 487 U.S. 815, 852 (1988) (O’Connor, J., concurring).

insanity standards reflect a myriad of legislative considerations far more pressing than their theoretical effect on eligibility for capital punishment.¹⁴⁸ A state's decision to reject or abandon use of the capacity-to-conform prong of criminal responsibility simply does not constitute reliable evidence of a legislative or public attitude in favor of using the death penalty in such cases.¹⁴⁹ In the absence of actual death sentences and executions of volitionally incapacitated offenders, the lack of legislative or judicial preclusion of such sentences is similarly ambiguous; silence under these circumstances signifies neither approval nor disapproval.

Moreover, even these states have not been entirely silent on the issue; all three recognize *impaired* capacity to conform conduct to legal requirements as a statutory mitigating factor.¹⁵⁰ One plausible inference from these statutory mitigation schemes is that legislators anticipated that in those rare cases where the defendant possesses *insufficient* capacity to conform his conduct to the law, juries instructed on the mitigating significance of *impaired* capacity will not impose the death penalty. While this is not the only possible inference from the overall statutory schemes, it is at least as likely as the silence-equals-approval inference. Indeed, as discussed below in Part IV.A.1, if legislators have assumed that juries will give life sentences in extreme cases of impaired volitional capacity, such an assumption would seem to comport with the actual behavior of juries.

Thus, speculation about silent states can run in either direction. But the incontrovertible fact is that *no* state—including South Carolina—has by express legislative enactment rendered offenders who lacked sufficient capacity to conform their conduct to the requirements of law eligible for capital punishment, and except for the decision in Jamie Wilson's case, no court has ever construed the laws of any American state to permit such a result. At least nineteen states' laws clearly preclude the possibility of such a sentence, and this virtual unanimity among those states whose laws speak directly to this issue more than establishes the "evolving standard of decency" that precludes the execution of a class of offenders.¹⁵¹

2. Behavior of Sentencing Juries

The silence of many death penalty states on the question of the death eligibility of a person totally lacking in the ability to control his conduct appears to be attributable to the screening behavior of prosecutors and the sentencing behavior of juries. The latter is itself another "significant and

148. *Id.*

149. *Id.* at 852–53.

150. CAL. PENAL CODE § 190.3 (West 1999); IDAHO CODE § 19-2523 (Michie 1996); LA. CODE CRIM. PROC. ANN. art. 905.5 (West 1997).

151. *E.g.*, *Atkins v. Virginia*, 536 U.S. 304, 311 (2002); *Thompson v. Oklahoma*, 487 U.S. 815 (1988); *Enmund v. Florida*, 458 U.S. 782, 789–93 (1982); *Coker v. Georgia*, 433 U.S. 584, 596–97 (1977).

reliable objective index of contemporary values” regarding a given punishment.¹⁵² Assessing the willingness of juries to impose death sentences on defendants *who have been formally determined* to lack the capacity to conform their conduct to the law is undeniably problematic, for the revealing reason that in only two states—South Carolina and Pennsylvania—are such sentences *even theoretically* possible. In these two states, it does not appear that death has been made available as a sentencing option to juries in any significant number of cases. Indeed, the State informed the South Carolina Supreme Court in the direct appeal of Jamie Wilson’s death sentence that it was “not aware of any cases in Pennsylvania where the death penalty was *sought* in a GBMI situation.”¹⁵³ Ten years later, we are unable to find *even one other case* in which a death sentence has been pronounced upon a person found unable to control his conduct.

In South Carolina, Jamie’s case remains the only one in which a jury or judge has sentenced a mentally ill offender to death after first determining that his illness deprived him of sufficient capacity to conform his conduct to the requirements of the law. In other jurisdictions, it is possible that some offenders that juries *believed* were unable to control their conduct were sentenced to death, but no record has been left of that finding because the statutory structure did not ask the jury to make such a determination. But certainly, if such situations were *common*, one would expect capital defense attorneys, zealous in their representation, to have raised this as an issue at some point in the appellate proceedings. Since no court in the nation has ever determined whether volitionally incapacitated defendants are death eligible absent a GBMI statute, and only the South Carolina Supreme Court has determined this question under such a statute, the number of such cases must be very small indeed.

It is impossible to know the number of times in which such sentences have been *submitted* to juries. But whether juries have been given few or many opportunities to impose such sentences, the undeniable fact is that the imposition of death sentences on such volitionally impaired offenders by American juries is so infrequent as to be virtually unknown. And, if we turn to the indicator of previous *executions*, the picture is even more stark: there are none. In contrast, the *Atkins* court deemed the practice of executing the mentally retarded “truly unusual” because actual executions were limited to *five states*.¹⁵⁴ If ever there was a punishment whose “freakish” rarity establishes its unconstitutionality under the Eighth Amendment, it is this one.

152. *Gregg v. Georgia*, 428 U.S. 153, 181 (1976), *quoted in Coker*, 433 U.S. at 596; *see also Atkins*, 536 U.S. at 316 (noting infrequency of execution of mentally retarded offenders in states permitting the practice).

153. Brief of Respondent at 36, *State v. Wilson*, 306 S.C. 498, 413 S.E.2d 19 (1992) (No. 23545) (emphasis added).

154. *Atkins*, 536 U.S. at 316.

Chart 2 summarizes the extremity of Jamie Wilson's sentence, whether measured by the governing legal standard, the number of death sentences imposed, or the number of executions:

<p>Chart 2 Death Penalty Eligibility of Defendants with "Insufficient Capacity" to Control their Conduct</p>			
State	Eligible?	Number of Death Sentences	Number of Executions
Alabama	Has not decided	0	0
Alaska	Has not decided (but no death penalty)	0	0
Arizona	Probably not	0	0
Arkansas	NO	0	0
California	Has not decided	0	0
Colorado	Has not decided	0	0
Connecticut	NO	0	0
Delaware	Has not decided	0	0
Florida	Probably not	0	0
Georgia	NO	0	0
Hawaii	NO	0	0
Idaho	Has not decided	0	0
Illinois	Has not decided	0	0
Indiana	Probably not	0	0
Iowa	Has not decided (but no death penalty)	0	0
Kansas	Has not decided	0	0
Kentucky	NO	0	0
Louisiana	Has not decided	0	0

State	Eligible?	Number of Death Sentences	Number of Executions
Maine	Has not decided (but no death penalty)	0	0
Maryland	NO	0	0
Massachusetts	NO	0	0
Michigan	NO	0	0
Minnesota	Has not decided (but no death penalty)	0	0
Mississippi	Probably not	0	0
Missouri	Has not decided	0	0
Montana	NO	0	0
Nebraska	Has not decided	0	0
Nevada	Probably not	0	0
New Hampshire	NO	0	0
New Jersey	Has not decided	0	0
New Mexico	NO	0	0
New York	NO	0	0
North Carolina	Has not decided	0	0
North Dakota	Has not decided (but no death penalty)	0	0
Ohio	Probably not	0	0
Oklahoma	Has not decided	0	0
Oregon	NO	0	0
Pennsylvania	Has not decided	0	0
Rhode Island	NO	0	0

State	Eligible?	Number of Death Sentences	Number of Executions
South Carolina	YES	1	0
South Dakota	Has not decided	0	0
Tennessee	Has not decided	0	0
Texas	Has not decided	0	0
Utah	Has not decided	0	0
Vermont	NO	0	0
Virginia	NO	0	0
Washington	Has not decided	0	0
West Virginia	NO	0	0
Wisconsin	NO	0	0
Wyoming	NO	0	0

3. *Public Opinion*

Public opinion, as reflected by polling data and by informed public commentary, may in some cases shed additional light on contemporary societal norms regarding criminal punishments.¹⁵⁵ Little direct evidence is available concerning contemporary public attitudes toward the narrow question raised in this case, most probably because the question has so rarely arisen. Indeed, since Jamie Wilson appears to be the only person in the United States to have been sentenced to death after an express finding that he lacked sufficient capacity to conform his conduct to the law, it is not surprising that no public opinion research has been undertaken to probe Americans' views concerning such sentences.

Similarly, professional associations in the mental health field have not had any reason to focus on the execution of the volitionally incapacitated, an issue which, until this case, seemed so settled, and any search for other public

155. See *id.* at 316 n.21 (reviewing public opinion survey data and positions of pertinent professional associations on question of executing mentally retarded offenders).

responses to such sentences must, of necessity, be limited to this case.¹⁵⁶ Viewed more broadly, however, nearly every major mental health association in the United States has published a policy statement addressing the umbrella issue of the execution of mentally ill offenders, and all of those organizations advocate either an outright ban on executing *all* mentally ill offenders, or a moratorium until a more comprehensive evaluation system can be implemented. Although these organizations differ on whether to outlaw or suspend such executions, they unanimously agree that the current capital punishment system inadequately addresses the complexity of cases involving mentally ill defendants.¹⁵⁷

It is obvious from these general statements concerning a wide range of mentally ill offenders that these organizations adamantly oppose the execution of persons as severely mentally ill as Jamie Wilson. The reason for

156. An example of the editorial reaction to the sentence imposed upon Jamie Wilson is this editorial by the *Atlanta Constitution*:

While Wilson's crime was inarguably ghastly, his disordered mental state makes his rampage more a hideous tragedy than an unmitigated outrage. What purpose would his execution serve? Would it deter other psychotics from similar behavior? The very notion is ridiculous. . . . At best, Wilson's execution would be no more than a hopeless gesture of protest against a crime that defies understanding. At worst, it would be an act of unspeakable meanness. James Wilson could not control his own worst impulses. Sometimes our judicial system has the same problem.

It's Wrong to Kill the Mentally Ill, ATLANTA J. & CONST., May 14, 1989, at D6, *quoted in* Emanuel, *supra* note 9, at 38 n.5. *See also Wilson Case Raises Legal, Ethical Questions*, THE STATE (Columbia, S.C.), May 14, 1989, at D2 ("[I]s there any justice in electrocuting a young man . . . whose mind was so diseased that he could not resist his murderous impulses? We think not.").

157. AM. PSYCHIATRIC ASS., MORATORIUM ON CAPITAL PUNISHMENT IN THE UNITED STATES (approved October 2000), APA Document Ref. No. 200006, *available at* <http://www.psych.org/archives/200006.pdf> (last visited Sept. 3, 2003); AM. PSYCHOLOGICAL ASS'N., RESOLUTION ON THE DEATH PENALTY IN THE UNITED STATES (Aug. 2001), *available at* <http://www.apa.org/pi/deathpenalty.html> (last visited Sept. 3, 2003); NAT'L ALLIANCE FOR THE MENTALLY ILL, THE CRIMINALIZATION OF PEOPLE WITH MENTAL ILLNESS, *available at* <http://web.nami.org/update/unitedcriminal.html> (last visited Sept. 3, 2003); NAT'L MENTAL HEALTH ASS., DEATH PENALTY AND PEOPLE WITH MENTAL ILLNESS (approved March 10, 2001), *available at* <http://www.nmha.org/position/deathpenalty/deathpenalty.cfm> (last visited Aug. 27, 2003). Specifically, the National Mental Health Association (NMHA) found that the fact-finding portion of capital trials "fails to identify who among those convicted and sentenced to death actually has a mental illness." *Id.* Similarly, the American Psychological Association (APA) argued that too many "[p]rocedural problems, such as assessing competency," render capital punishment unfair to the mentally ill. AM. PSYCHOLOGICAL ASS'N, *supra*. Such procedural inadequacies fall far short of the "basic requirements of due process," according to the American Psychiatric Association (AMPA). AM. PSYCHIATRIC ASS'N, *supra*. Thus, the NMHA, APA, and AMPA believe that the criminal justice system routinely executes many mentally ill individuals without realizing that any illness existed and, therefore, without considering that illness as a mitigating factor. All of these organizations favor a moratorium. The National Alliance for the Mentally Ill (NAMI) has voiced a stronger opinion, advocating for an outright ban on death sentences for individuals with any type of brain disorder. NAT'L ALLIANCE FOR THE MENTALLY ILL, *supra*. NAMI asserts that the overwhelming number of violent acts committed by the mentally ill is the result of neglect or inadequate treatment of the illness—as was present in Jamie's case—and concludes that the answer therefore is "treatment, not punishment." *Id.*

the paucity of direct evidence of public and expert attitudes towards the execution of the subcategory of mentally ill defendants who lack the capacity to control their behavior is not hard to discern. The issue is no longer a subject of investigation or public debate because such executions are by and large nonexistent. The use of the death penalty as a punishment for essentially involuntary crimes has long ago disappeared both from our society's arsenal of criminal sanctions and from our public consciousness. And, but for this one anomalous case, this narrow question might never have been raised again.

Jamie Wilson's death sentence also runs afoul of international law and opinion. The International Covenant on Civil and Political Rights (ICCPR) specifically forbids the use of the death penalty in an arbitrary manner.¹⁵⁸ The Human Rights Committee of the United Nations interpreted the treaty to forbid the execution of persons with severe mental illness.¹⁵⁹ In addition, for three consecutive years—1999, 2000, 2001—the United Nations Commission on Human Rights has adopted resolutions calling on all states that maintain the death penalty “[n]ot to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person.”¹⁶⁰ The Commission interpreted the phrase “mental disorder” to encompass both mental illness and mental retardation.¹⁶¹ As recently as 2000, the U.N. Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions called on the United States “to take immediate steps to bring [its] domestic legislation and legal practice into line with the international standards prohibiting the imposition of death sentences in regard to minors and mentally ill or handicapped persons.”¹⁶²

The prohibition on the execution of the mentally ill also qualifies as customary international law because it satisfies the required elements: (1) general practice and (2) *opinio juris*. The general practice among states with death penalty statutes is to exclude those whose mental illness prevents them from conforming their actions to the requirements of the law.¹⁶³ Furthermore,

158. International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 6, 999 U.N.T.S. 171, 174.

159. See William A. Schabas, *International Norms on Execution of the Insane and the Mentally Retarded*, 4 CRIM. L.F. 95, 100–01 (1993).

160. *The Question of the Death Penalty*, Comm'n on Human Rights Res. 2001/68, U.N. ESCOR, 57th Sess., 67th mtg. ¶ 4(e), U.N. Doc. E/CN.4/RES/2001/68 (2001); *The Question of the Death Penalty*, Comm'n on Human Rights Res. 2000/65, U.N. ESCOR, 56th Sess., 66th mtg. ¶ 3(e), U.N. Doc. E/CN.4/RES/2000/65 (2000); *The Question of the Death Penalty*, Comm'n on Human Rights Res. 1991/61, U.N. ESCOR, 55th Sess., 65th mtg. ¶ 3(e), U.N. Doc. E/CN.4/RES/1999/61 (1999).

161. See *supra* note 160. Resolutions from all three years included mental illness and mental retardation within the phrase “mental disorder.”

162. *Civil and Political Rights, Including Questions of: Disappearances and Summary Executions: Report of the Special Rapporteur*, U.N. Commission on Human Rights, 56th Sess., Prov. Agenda Item 11(b), ¶ 97, U.N. Doc. E/CN.4/2000/3 (2000).

163. See Schabas, *supra* note 159, at 110–13.

as we have previously established, Jamie Wilson is the only known person in the United States who was sentenced to death after the factfinder determined the person suffered from a lack of capacity to conform to the requirements of the law. The prohibition satisfies the second element, *opinio juris*, because several international documents condemn executing the mentally ill. Resolution 2001/68 of the Commission of Human Rights condemns the imposition of the death penalty on people who suffer from mental disorders.¹⁶⁴ The Rome Statute of the International Criminal Court exempts persons from criminal responsibility if “[t]he person suffers from a mental disease or defect that destroys that person’s capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of the law.”¹⁶⁵ Also, the International Criminal Tribunal for the former Yugoslavia upheld the mental incapacity defense when “abnormality of mind . . . substantially impair[ed] . . . ability to control.”¹⁶⁶

The Supreme Court has often considered international standards when determining Eighth Amendment questions.¹⁶⁷ Most recently, in deciding that

164. *The Question of the Death Penalty*, Comm’n on Human Rights Res. 2001/68, U.N. ESCOR, 57th Sess., 67th mtg. ¶ 4(e), U.N. Doc. E/CN.4/RES/2001/68 (2001).

165. Rome Statute of the Int’l Crim. Ct., art. 31(1)(a), available at www.un.org/law/icc (last visited Sept. 3, 2003).

166. *Prosecutor v. Delali*, Judgment, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (ICTY), Case No. IT-96-21-T, Nov. 16, 1998, 399.

167. See *Thompson v. Oklahoma*, 487 U.S. 815, 830–31 (1988) (“The conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense is consistent with the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community.”); *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982) (“[F]elony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe.”); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (noting that the Court previously examined “the climate of international opinion concerning the acceptability of a particular punishment. It is thus not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue.” (citing United Nations, Department of Economic and Social Affairs, *Capital Punishment* 40, 86 (1968))); *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (holding that the policy of the Eighth Amendment

is firmly established in the Anglo-American tradition of criminal justice. The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.[.]).

Realizing the history of the Eighth Amendment, Justice Blackmun remarked, “[t]he drafters of the Amendment were concerned, at root, with ‘the dignity of man,’ and understood that ‘evolving standards of decency’ should be measured, in part, against international norms.” Harry Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 45–46 (1994) (internal citations omitted).

consensual private homosexual activity is constitutionally protected, the Court found international opinion and practice relevant to its interpretation of the due process clause.¹⁶⁸ Even more to the point, although the Court rejected and discounted international law and opinion in *Stanford v. Kentucky* when it held that the Eighth Amendment did not bar the death penalty for sixteen- and seventeen-year old offenders,¹⁶⁹ it did factor international law and opinion into the constitutional calculus in *Atkins*.¹⁷⁰ Just as in *Atkins*, the weight of international law and opinion also reveals that the severely mentally ill should not be subject to execution.

For all of these reasons, the sentence pronounced upon Jamie Wilson is, without doubt, "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."¹⁷¹ The Eighth Amendment analysis applied by the Court to assess the constitutionality of the death penalty for the mentally retarded in *Atkins v. Virginia*,¹⁷² for rapists in *Coker v. Georgia*,¹⁷³ for nontriggers in *Enmund v. Florida*,¹⁷⁴ and for fifteen-year-olds in *Thompson v. Oklahoma*,¹⁷⁵ clearly establishes the inadmissibility of the sentence imposed in this case. The categories of death sentences struck down in *Atkins*, *Coker*, *Enmund*, and *Thompson* appear to have been rarely authorized and rarely imposed, but they were not wholly unknown. By contrast, Jamie's sentence probably would not have been imposed—let alone carried out—in any other American jurisdiction, and there is no record of a similar sentence ever having been imposed on even a single other convicted murderer. Thus, if the sentences imposed on Atkins, Thompson, Coker, and Enmund constituted cruel and unusual punishment, the sentence imposed on Jamie Wilson surely does as well.

168. *Lawrence v. Texas*, 123 S. Ct. 2472, 2483 (2003).

169. 492 U.S. 361, 369 n.1 (1989).

170. *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

171. *Thompson*, 487 U.S. at 859 (Scalia, J., dissenting).

172. 536 U.S. 304 (2002).

173. 433 U.S. 584 (1977).

174. 458 U.S. 782 (1982).

175. 487 U.S. 815 (1988).

B. Imposition of a Death Sentence for Conduct the Defendant was Unable to Control is Grossly Disproportionate to His Personal Moral Culpability and Lacks Penological Justification

1. The Moral Culpability of Volitionally Incapacitated Offenders Does Not Warrant a Death Sentence

A sentence that is “grossly out of proportion to the severity of the crime” violates the Eighth Amendment.¹⁷⁶ Determination of the proportionality of a capital sentence, however, cannot be based solely upon the magnitude of harm resulting from the offense. “For purposes of imposing the death penalty . . . punishment must be tailored to [a defendant’s] personal responsibility and moral guilt.”¹⁷⁷ Thus, in considering claims that particular categories of convicted murderers are not constitutionally punishable by death, the Supreme Court has always focused on the offenders’ moral culpability and their degree of personal responsibility for the harm resulting from the offense.¹⁷⁸

The Supreme Court’s rationale for accepting the contention that mentally retarded murderers are *categorically* so lacking in moral blameworthiness as to be ineligible for the death penalty compels the conclusion that the volitionally incapacitated are likewise ineligible.¹⁷⁹ The Court noted the obvious cognitive limitations of the retarded, but also stressed their “diminished capacities . . . to control impulses” and the “abundant evidence that they often act on impulse rather than pursuant to a premeditated plan.”¹⁸⁰ These characterizations have even greater applicability to those who, because

176. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (joint opinion of Stewart, Powell and Stevens, JJ.).

177. *Enmund*, 458 U.S. at 801. *See also* *California v. Brown*, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring) (“[P]unishment should be directly related to the personal culpability of the criminal defendant.”).

178. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding death penalty unconstitutional for mentally retarded offenders); *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (finding death penalty not unconstitutional for sixteen- and seventeen- year-old offenders); *Thompson*, 487 U.S. at 838 (holding death penalty unconstitutional for offenders under sixteen); *Tison v. Arizona*, 481 U.S. 137, 157–58 (1986) (finding death penalty not unconstitutional for nontriggerman who was major participant in dangerous felony and acted with reckless indifference to human life); *Enmund*, 458 U.S. at 801 (finding death penalty unconstitutional for minor participant who did not intend to kill).

179. Indeed, even *prior* to *Atkins*, Jamie Wilson’s ineligibility for the death penalty ought to have been clear because *Penry*’s rationale strongly implied the ineligibility of persons who were volitionally incapacitated. The *Penry* Court was careful to note that by rejecting *Penry*’s insanity defense and convicting him of capital murder under Texas law, the jury had necessarily found “that *Penry* knew that his conduct was wrong and was capable of conforming his conduct to the requirements of the law.” *Penry v. Lynaugh*, 492 U.S. 302, 333 (1989) (emphasis added). This second finding was the diametric opposite of what the trial judge found to be true of Jamie Wilson. Thus, Jamie Wilson lacked one of the two characteristics that the *Penry* Court found to be crucial in ascribing to *Penry* sufficient moral responsibility to justify the death penalty.

180. *Atkins*, 536 U.S. at 318.

of mental illness, are completely unable to conform their conduct to the requirements of the law. Moreover, this inference as to the moral centrality of volitional control is corroborated by the Court's reasoning in determining that execution of persons under the age of sixteen violates the cruel and unusual punishments clause.¹⁸¹ In discussing the lesser "personal culpability" of adolescents, the Court cited with approval the following passage:

Adolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults.¹⁸²

Certainly if crimes committed by the retarded and by young adolescents deserve less punishment due to those groups' *lesser* capacity to control their own conduct, the crimes of persons who, by reason of mental illness, lack even *sufficient* capacity to control their conduct are also deserving of less than the most severe punishment.¹⁸³

2. *Neither Retribution nor Deterrence are Served by Death Sentences for Volitionally Incapacitated Offenders*¹⁸⁴

A capital sentence violates the Eighth Amendment when it is "so totally without penological justification that it results in the gratuitous infliction of suffering."¹⁸⁵ Unless the death penalty "measurably contributes" to either the goal of deterrence or the goal of retribution, "it is nothing more than the purposeless and needless imposition of pain and suffering," and hence an unconstitutional punishment.¹⁸⁶ Neither retribution nor deterrence is served

181. *Thompson*, 487 U.S. at 834.

182. *Id.* (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115 n.11 (1982) (quoting TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, *CONFRONTING YOUTH CRIME* 7 (1978))).

183. The philosophical literature on moral culpability, though not invoked by the Court, supports this conclusion. See *infra* note 192.

184. Ellis, *supra* note 9, at 90-92, argues that the proportionality requirement and the penological justification for retributivism should not be viewed as separate tests, given that both hinge on the culpability of the defendant. Without deciding the merits of that view, we follow the Supreme Court's pattern of analysis here, largely to demonstrate that under any standard the Court might apply, volitionally incapacitated offenders are on the unconstitutional side of the line.

185. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.).

186. *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

by the execution of defendants whose mental illness rendered them powerless to avoid criminal conduct.

The South Carolina Supreme Court stated without elaboration that “the penological goal of retribution is served by this sentence, as, under South Carolina law, Wilson is completely culpable and responsible for his crimes.”¹⁸⁷ However, whether a defendant possesses that “degree of culpability associated with the death penalty”¹⁸⁸ cannot be resolved by reliance on state law definitions of crimes and defenses. Although “[s]tates have authority to make aiders and abettors equally responsible . . . with principals, or to enact felony-murder statutes,”¹⁸⁹ minor participation in a felony that results in an unanticipated death does not evidence sufficient “moral culpability” to justify the imposition of a death sentence on retributive grounds.¹⁹⁰ Similarly, South Carolina may, unfettered by the Constitution, choose to make those who act without sufficient capacity to conform their requirements to the law as “equally responsible” as those who act with completely unimpaired capacity. But in order to justify a capital sentence for such offenders as retribution, a state must explain how executing such offenders “measurably contribute[s] to the retributive end of ensuring that the criminal gets his just deserts.”¹⁹¹ This simply cannot be done: once a fact-finder has determined that a defendant’s mental illness has deprived him of sufficient capacity to avoid criminal behavior, there can be no measurable contribution to retribution, but only the “exacting [of] mindless vengeance” forbidden by the Eighth Amendment.¹⁹²

187. *State v. Wilson*, 306 S.C. 498, 508–09, 413 S.E.2d 19, 25 (1992).

188. *Penry v. Lynaugh*, 492 U.S. 302, 338 (1989).

189. *Lockett v. Ohio*, 438 U.S. 586, 602 (1978) (plurality opinion).

190. *Enmund*, 458 U.S. at 798–801; *see also Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (“[The] deficiencies [of mentally retarded offenders] do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.”).

191. *Enmund*, 458 U.S. at 801.

192. *See Ford v. Wainwright*, 477 U.S. 399, 410 (1986) (finding execution of the insane amounts to the “exacting of mindless vengeance”). The philosophical literature on retribution lends further support for this argument. There is dispute among philosophical theorists as to whether retribution is a legitimate goal of punishment at all. *See, e.g., JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE* 156–201 (1990) (discussing retribution as a flawed penological goal in both theory and practice); Jeffrie G. Murphy, *Retributivism, Moral Education, and the Liberal State*, 4 CRIM. JUST. ETHICS 3 (1985) (arguing retribution is a penological goal that should be beyond state power in a liberal society); David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623 (1992) (arguing retribution does not actually support the values it sets for itself); Russ Shafer-Landau, *The Failure of Retributivism*, 82(3) PHIL. STUD. 289 (June 1996) (arguing retribution is not a comprehensive theory). Even among those theorists who support retribution as a valid and desirable penological goal, none would argue that any retributive purpose is served in the criminal punishment of someone like Jamie Wilson. This is because retributive theorists justify punishment based on the moral culpability and blameworthiness of the offender. *See, e.g., R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY* (2001) (arguing that retribution is a valid penological goal and should be based on the blameworthiness of the offender); ANDREW VON HIRSCH, *CENSURE AND SANCTIONS* (1993) (arguing that retribution requires proportional sentencing and culpability

Nor is a plausible deterrence argument possible to construct, for “the death penalty has little deterrent force against defendants who have *reduced* capacity for considered choice.”¹⁹³ Deterrence certainly cannot justify imposing the death penalty upon volitionally incapacitated defendants because by definition, those whose mental disorders robbed them of *sufficient* capacity to conform their conduct to the requirements of law are incapable of responding to legal rules.¹⁹⁴ In *Thompson v. Oklahoma*, the Supreme Court observed that for murderers under the age of sixteen, “[t]he likelihood that the . . . offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.”¹⁹⁵ Young offenders, however, are merely *extremely unlikely* to make choices about unlawful behavior based on possible penalties, whereas those who lack the sufficient capacity to conform their conduct to the law *cannot* make choices about unlawful behavior, regardless of the stakes. Indeed, just as it is for mentally retarded offenders, the “cold calculus” of cost and benefit is “at the opposite end of the spectrum from behavior”¹⁹⁶ of those who cannot control their own conduct. Finally, as the Supreme Court also noted concerning an exemption of the mentally retarded from the death penalty, exempting those who are unable to conform their conduct to the requirements of the law will not lessen the deterrent effect upon other offenders.¹⁹⁷

is determined by the blameworthiness of the offender). In order for an offender to be morally culpable or blameworthy, that person must have been capable of doing other than he or she did. See, e.g., H. L. A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 152 (1968) (“What is crucial is that those whom we punish should have had, when they acted, the normal capacities, physical and mental, . . . for abstaining from what it forbids, and a fair opportunity to exercise these capacities.”); WOJCIECH SADURSKI, GIVING DESERT ITS DUE: SOCIAL JUSTICE AND LEGAL THEORY 241 (1985) (“Retributivism is the only theory of punishment which takes the notion of human responsibility seriously because it justifies punishment solely on the basis of acts and situations which were under the control of the perpetrator concerned. Only those facts which are believed to be free human acts are relevant in assessing guilt and deciding about punishment.”); Michael Moore, *Choice, Character, and Excuse*, 7 SOC. PHIL. & POL’Y 29 (1990) (arguing for the choice theory of excuse which requires that to be deserving of punishment an offender must have been able to do other than that which he or she did). In Jamie Wilson’s case, the South Carolina court determined that Jamie Wilson was unable to conform his conduct to the requirements of law and therefore his act was not a result of any exercise of free will nor was it under his control. Thus, no philosophical theorist would support any level of criminal punishment in Jamie Wilson’s case based on retributive ideals and certainly none would support a punishment as severe as the death penalty. See Dolinko, *supra*, at 1650 (arguing that Jamie Wilson’s case would be understood by retributivists as a “gross misunderstanding of what retributivism is”).

193. *Skipper v. South Carolina*, 476 U.S. 1, 13 (1986) (Powell, J., concurring) (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115 n.11 (1982)) (emphasis added).

194. *Cf. Harris v. State*, 499 N.E.2d 723, 727 (Ind. 1986) (explaining deterrence rationale may support execution of Indiana GBMI offenders where state law defines GBMI offenders as “not defendants who . . . fully lacked the capacity to conform their behavior to the law”).

195. 487 U.S. 815, 837 (1988).

196. *Atkins v. Virginia*, 536 U.S. 304, 319 (2002).

197. *Id.* at 320.

Thus, both logic and precedent dictate the conclusion that the death penalty can serve no deterrent purpose when applied to defendants who lacked sufficient capacity to avoid their criminal acts. Because the capital sentencing of persons determined to be unable to control their conduct amounts to execution for essentially nonvolitional conduct, neither retribution nor deterrence are thereby measurably advanced.

C. Capital Prosecution of Volitionally Incapacitated Offenders Carries Heightened Risks of Unjustified Executions

In *Atkins*, the Supreme Court cited the enhanced risk faced by retarded defendants “that the death penalty will be imposed in spite of factors which may call for a less severe penalty”¹⁹⁸ as a second justification for the national consensus that they should be categorically excluded from eligibility for the death penalty. Volitionally incapacitated defendants, such as Jamie Wilson, face similar obstacles in “mak[ing] a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors.”¹⁹⁹

Any defendant whose mental illness at the time of the offense rendered him unable to conform his conduct to the requirements of law is a defendant suffering from severe mental illness. Severe mental illness, like significant cognitive limitations, sharply constricts a defendant’s ability “to give meaningful assistance to their counsel.”²⁰⁰ As Jamie Wilson’s case aptly illustrates, volitional incapacity (as distinguished from *impaired* capacity) is frequently the consequence of hallucinations and delusions. Hallucinations and delusions diminish the defendant’s ability to report in two distinct ways: they impair his ability to accurately observe, and, particularly where the delusions are paranoid (as Jamie’s are), they cause mistrust of persons attempting to help and consequently impair willingness to cooperate with defense attorneys. Thus, whether the question is the accuracy of aggravating details of the crime or the existence of mitigating circumstances, a severely mentally ill defendant is less able to assist his attorney in presenting “factors which may call for a less severe penalty.”²⁰¹ A second impediment to effective defense of the volitionally incapacitated lies in the fact that defendants who are unable to conform their conduct to the requirements of law usually are equally unable to conform their conduct to the requirements of courtroom decorum and procedure. They therefore “are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.”²⁰² Moreover, when such defendants are heavily medicated in an attempt to reduce psychotic symptoms and restore

198. *Id.* (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)).

199. *Id.*

200. *Id.*

201. *Id.* (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)).

202. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

competence (as Jamie was), the resulting synthetic competence is likely to create its own significant impediments to cooperation with attorneys, and a stoney-faced demeanor that is likely to be read as indifference.²⁰³

Finally, mental illness that disables a defendant from controlling his own conduct “can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness²⁰⁴ will be found by the jury.”²⁰⁵ Indeed, it is hard to imagine a fact about a defendant that would engender greater fear of future violence, and yet would not reflect moral culpability on his part.

In summary then, as we have demonstrated in this section of the Article, the weight of national consensus is substantially greater with respect to volitionally incapacitated defendants’ cases than it is with respect to mentally retarded defendants. A capital sentence is grossly disproportionate to such offenders’ moral culpability, serves no permissible penological goal, and carries an enhanced risk of error. In short, imposing the death penalty on such offenders is cruel and unusual punishment barred by the Eighth Amendment.

V. BEYOND THE NON-WILLING: THE APPLICATION OF *ATKINS* TO OTHER SERIOUSLY MENTALLY ILL OFFENDERS

Jamie Wilson is hardly the only seriously mentally ill death row inmate. Most mental health organizations and professionals would oppose executing many, if not all, of these offenders, and drawing on the *Atkins* analogy, one might predict a campaign to put all seriously mentally ill offenders beyond the reach of the death penalty. Such a campaign may be laudable, and even ultimately successful, but it faces obstacles that Jamie Wilson’s Eighth Amendment argument does not.

As mentioned in the introduction to this Article, two state court justices have expressed the view that the rationale of *Atkins* likewise precludes the execution of severely mentally ill offenders.²⁰⁶ Neither of them would claim that the rationale of *Atkins* reaches *all* mentally ill offenders, which would encompass a huge number of current death row inmates, not to mention a large proportion of the regular population. Indeed, the author of one of these opinions explicitly disavows such a generalization.²⁰⁷ Whether one takes the

203. See *Riggins v. Nevada*, 504 U.S. 127, 142 (1992) (Kennedy, J., concurring) (“[D]rugs [that restore competence] can prejudice the accused in two principal ways: (1) by altering his demeanor in a manner that will prejudice his reactions and presentation in the courtroom, and (2) by rendering him unable or unwilling to assist counsel.”).

204. Future dangerousness is a statutory aggravating factor in Virginia, but not in South Carolina. Nonetheless, the Supreme Court’s observation is equally apt in states where future dangerousness is not among the statutory aggravators because it is beyond dispute that juries in such jurisdictions also give it substantial weight.

205. *Atkins*, 536 U.S. at 321.

206. See *Corcoran v. State*, 774 N.E.2d 495, 502 (Ind. 2002) (Rucker, J., dissenting); *State v. Nelson*, 803 A.2d 1, 47 (N.J. 2002) (Zazzali, J., concurring).

207. *Nelson*, 803 A.2d at 44.

real-politik approach that the Supreme Court would never invalidate so many death sentences, or makes the more respectful observation that there is no "evolving standard of decency" for such a broad categorical exemption, the bottom line is the same: not any time soon.

The question then becomes whether there is a category broader than the volitionally incapacitated, yet narrower than the mentally ill, about which there is a consensus. We think there are several possibilities, most of which we must reject.

A. *Looking to the Experts: Psychotic Disorders*

One way of approaching this issue is to look to psychiatrists for an answer, or at least a set of priorities. *Atkins*, of course, did not outlaw the application of the death penalty to all persons with subnormal intelligence, as measured by psychologists. Instead, it seized on an IQ score of seventy, a level that represents two full standard deviations from the mean, which means that two and a half percent of the population would be expected to score below that cut-off. However, because a diagnosis of mental retardation also requires significant limitations in adaptive functioning in at least two areas and an onset before the age of eighteen,²⁰⁸ the prevalence in the population is estimated to be only about one percent.²⁰⁹ A parallel path, therefore, would be to ask which offenders are most severely mentally ill.

Our first²¹⁰ rough cut (educated both by the Diagnostic and Statistical Manual (DSM) and by professional encounters with mental health professionals) is that the experts' response would be: defendants suffering from psychotic disorders should be categorically exempt. The DSM-IV lists schizophrenia, schizophreniform disorder, schizoaffective disorder, delusional disorder, brief psychotic disorder, shared psychotic disorder, psychotic disorder due to a general medical condition, substance-induced psychotic disorder, and psychotic disorder not otherwise specified.²¹¹ These disorders vary in etiology and duration, but they share a constellation of symptoms that cluster around delusions and hallucinations on the one hand, and disorganized or catatonic behavior on the other.²¹²

Psychotic disorders, like mental retardation, are relatively rare. Estimates of the prevalence of schizophrenia run from .5% to 1.5%,²¹³ and while the

208. See AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed., text rev. 2000).

209. *Id.* at 46.

210. An even broader argument could be made: anyone suffering from an Axis I diagnosis should be exempt. Given the breadth of that category, which includes not only schizophrenia and bipolar disorder, but also anxiety disorders and sleep disorders, we think such an argument is not worth serious consideration, at least at this time.

211. See, AM. PSYCHIATRIC ASS'N, *supra* note 207, at 298.

212. *Id.* at 297-298.

213. *Id.* at 308.

estimates of the other disorders are less reliable, at least in the United States and other developed countries, most are quite rare.²¹⁴ We think that psychotic disorders fit not only with public conceptions of mental illness, but that their hallmarks—delusions and hallucinations—are likely to result in significantly diminished moral responsibility. The one obvious exception to these generalizations—substance-induced psychotic disorder—is both more common (albeit for short time periods) and less likely to be able to claim *any* consensus concerning the diminishment of moral culpability; this obstacle could be surmounted, however, by excluding self-induced psychoses.²¹⁵

We have deliberately painted the argument for a psychotic disorders categorical exemption with broad strokes because we must rather quickly, if somewhat reluctantly, reject it. First, if we remain true to the Supreme Court's methodology, we have to observe that there is simply no way to assemble an evolving standard of decency that prohibits the execution of persons with psychotic disorders; this is both because *no* statutes or judicial opinions are written in those terms, or anything approximating them, and because there is no obvious way to count the number of persons actually sentenced or actually executed who have suffered from these disorders.²¹⁶

There are at least two additional barriers to this standard. First is the fact that the most common (and severe) of these disorders—schizophrenia—is frequently undiagnosable at the time of a defendant's crime. In part this is true because during the onset period it is easily misdiagnosed as borderline personality disorder or other personality disorders, as many of the symptoms of these disorders overlap. Moreover, because the diagnostic criteria require at least one month of active phase symptoms and at least six months of the disease, missed schizophrenia diagnoses also occur after the onset period due to a lack of adequate information about defendants, many of whom were living in situations not likely to produce accurate reports of their mental state.²¹⁷

A second difficulty with the "psychotic disorder" candidate for categorical exemption from the death penalty lies in its lack of a necessary

214. Schizophreniform disorder has approximately one-fifth the incidence of schizophrenia, AM. PSYCHIATRIC ASS'N, *supra* note 208, at 318; schizoaffective disorder is "less common," *id.* at 321; delusional disorder is estimated at .03% of the population, *id.* at 326; brief psychotic disorder is rare in developed countries, *id.* at 330–31; "psychotic disorders due to a general medical condition are difficult to estimate given the wide variety of underlying medical etiologies." *Id.* at 336.

215. The exclusion of self-induced conditions has precedent in the doctrines that prohibit the use of voluntary intoxication to negate recklessness. MODEL PENAL CODE § 2.08(2) (1985) (codifying the common law).

216. This is not to say that we endorse the Court's bean-counting approach to the cruel and unusual punishment clause. Given that approach, however, to be successful, candidates for categorical exemption must be phrased in terms of beans that can be counted.

217. A diagnosis of mental retardation requires onset before the age of eighteen, which can also be problematic, but in many cases school records can provide the necessary documentation of juvenile onset.

nexus to the crime. Mentally retarded individuals are disabled all the time, but as the popular movie, "A Beautiful Mind," vividly demonstrated, a schizophrenic can be relatively normal at some times and in some situations. One might add a nexus requirement, but it would have to be formulated very carefully. Merely saying that the psychotic disorder was the *cause* of the crime would not suffice. For example, if the defendant's delusion is that God has called him to be the Dalai Lama, and he then shot the Dalai Lama, the psychotic disorder that produced the delusion would be the cause of the crime. Yet we might want to know more before we judge his moral culpability; the Constitution might not exempt him on the basis of the bare delusion, but might exempt him if the delusion were accompanied by command hallucinations from God.

This may vaguely remind the reader of the *Durham*²¹⁸ product rule debacle, and it should. The *Durham* rule, followed for nearly twenty years by the District of Columbia Circuit, provided that "an accused is not criminally responsible if his unlawful act was the product of mental disease or defect."²¹⁹ The attraction of that rule, much like the attraction of a psychotic disorder standard in this context, was that it permitted psychiatrists to testify in an unfettered way about the question on which they were indeed experts. The flip side of this advantage was that the expert's diagnosis was completely determinative, arguably usurping the jury's function. When the D.C. Circuit overruled *Durham*, it recounted a dramatic illustration of that problem, in which a doctor testified on Friday afternoon that the defendant, a "psychopath," was not mentally ill, but on Monday morning testified that he was, because in the interim the hospital at which he was a physician decided to classify psychopathic personality as a mental disease.²²⁰ Obviously, changes that may be entirely appropriate within the discipline of psychiatry, if incorporated wholesale into the law, may create bizarre results.

Justice Zazzali's variation of the "severe mental illness" approach avoids, or at least attempts to avoid, complete dependence on psychiatric diagnosis. In *State v. Nelson*,²²¹ he tells a compelling and bizarre story of the defendant, a story that incorporates but does not turn solely upon psychiatric diagnosis.²²² The defendant, Leslie Ann Nelson, a transsexual, was diagnosed

218. *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954), *overruled by* *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972) (en banc).

219. *Id.* at 874-75.

220. *Brawner*, 471 F.2d at 978 (reporting on the facts of *In Re Rosenfield*, 157 F. Supp. 18 (D.D.C. 1957)).

221. 803 A.2d 1 (N.J. 2002) (Zazzali, J., concurring).

222. [The defendant Nelson] was emotionally disturbed throughout her childhood and mentally ill in her adolescent and adult years. She was obsessed with and threatened to commit suicide. She was involuntarily committed to a psychiatric facility and eventually underwent a sex change operation. . . . [She] stated that she wanted to undergo sex reassignment surgery to become an exotic dancer, adult film actress, or prostitute. . . . Unlike most people who undergo the surgery as a remedial response to transexuality, defendant

with “a longstanding depression,” and with “problems of social withdrawal, delusions, paranoia, and schizoid and borderline personality disorders.”²²³ When police came to arrest her, she used an AK-47 to kill one of them and inflict multiple wounds on another—all because she wanted to avoid going to jail where she would lose her guns (which she viewed as surrogate children), and would be unable to keep up her appearance as a woman.²²⁴ In response to these facts, Justice Zazzali makes no generalizations at all and does not exempt a defined class of defendants, explaining, “[m]y approach is specific to [the defendant in this case] and based on her specific set of psychological problems and her condition during the circumstances of her crimes . . .”²²⁵

This “I know it when I see it” approach does solve the problem of overreliance on psychiatrists, but it does so at the cost of predictability. Perhaps state constitutional law can manage such an unwieldy test (though it sounds more like proportionality review to our ears), but it is hard to imagine how this could fit into Eighth Amendment jurisprudence as we know it. To be consistent with existing Eighth Amendment precedent, we need to define a category of mentally ill offenders that both permits us to demonstrate an evolving standard of decency and simultaneously avoids fears about reliance on medical diagnoses that do not accurately track culpability concerns. If this suggests looking to the substantive criminal law for a standard, rather than to medical experts, that is indeed the direction in which we are heading, but we digress first to consider using the GBMI standards, as one commentator has proposed.

B. Look to Existing Procedures: GBMI Statutes

So if lawyers and judges, rightly or wrongly, are unwilling to give control to doctors, would it make sense to rely on existing procedures? One commentator, Anne Emanuel, takes the position that defendants who are found GBMI should be excluded from eligibility for the death penalty because GBMI statutes reflect a determination that the individual’s “mental abnormality bears a causal relation to the . . . crime, but does not prevent the formation of the necessary level of mens rea.”²²⁶ She argues that because this is both a plausible and the “most favorable” interpretation of the GBMI verdicts, it should be adopted.²²⁷ This interpretation, according to Emanuel,

. . . did not want to become a woman in order to reconcile her physical gender with her psychological gender.

Id. At 44–45 (Zazzali, J., concurring).

223. *Id.* at 45–46.

224. *Id.* at 9, 50.

225. *Id.* at 49 (Zazzali, J., concurring).

226. Emanuel, *supra* note 9, at 54.

227. *Id.* at 52 nn.105–08.

then necessarily implies diminished responsibility,²²⁸ which in turn implies that the death penalty is inappropriate.²²⁹

This, it seems to us, is the least attractive option. First, we doubt this interpretation of the GBMI statutes, given their history. Second, we cannot imagine how an evolving consensus could be constructed from these statutes, given the great variety of definitions of mental illness encompassed by the various statutes, a variety that Emanuel herself notes.²³⁰ Finally, and most importantly, the constitutionality of imposing the death penalty on a particular defendant depends upon whether the state has enacted a GBMI statute and the terms of that statute; the protection such a rule of categorical ineligibility might afford defendants is surely evanescent, given that the legislature could terminate that protection simply by repealing the GBMI statute.

C. *Look to the Substantive Law: Insanity Defense Variations*

If we do not look to existing procedures, we must face the question of inventing procedures, whatever other standard for determining categorical ineligibility we elect. We pause only a moment here to note that this issue also arises with respect to the categorical exclusion of mentally retarded offenders and is left unresolved by *Atkins*. Even the preliminary question of who should initially devise the procedures, courts or legislatures, may be answered differently in different states, and the content of those procedures is likely to be hotly contested in every state. We are impressed by the proposal made by Professor James Ellis, architect of and Supreme Court advocate in *Atkins*, which is laid out in the accompanying footnote,²³¹ but think

228. *Id.* at 56–59.

229. *Id.* at 59–63.

230. *Id.* at 44.

231. Ellis recommends the following statutory language to govern trial procedures:

ALTERNATIVE A: If defense counsel has a good faith belief that the defendant in a capital case has mental retardation, counsel shall file a motion with the court, requesting a finding that the defendant is not death-eligible because of mental retardation. Such a motion shall be filed within [time period] after the prosecution files notice of intent to seek the death penalty, unless the information in support of the motion came to counsel's attention at a later date.

Upon receipt of such a motion, the trial court shall conduct a hearing for the presentation of evidence regarding the defendant's possible mental retardation. Both the defense and the prosecution shall have the opportunity to present evidence, including expert testimony. After considering the evidence, the court shall find the defendant to be not death-eligible if it finds, by a preponderance of the evidence, that the defendant has mental retardation. If the defendant is not death-eligible because of mental retardation, the trial may proceed as a non-capital trial, and, if convicted, the defendant may be sentenced to any penalty available under state law, other than death.

that it is foolish to propose procedures determining the categorical exclusion of some subgroup of mentally ill offenders before those procedures are established for determining mental retardation. In short, we would expect to borrow procedures from those that prevail in the mental retardation area, making modifications where appropriate.²³²

If the court finds that defendant is death-eligible, the case may proceed as a capital trial. The jury shall not be informed of the prior proceedings or the judge's findings concerning the defendant's claim of mental retardation.

If the capital trial results in a verdict of guilty to a capital charge, the parties shall be entitled to present evidence to the jury on the issue of whether the defendant has mental retardation. Having heard the evidence and arguments, the jury shall be asked to render a special verdict on the issue of mental retardation. The special verdict shall ask the jury to answer the question: "Do you unanimously find, beyond a reasonable doubt, that the defendant does not have mental retardation?" If the jury answers "yes," the case shall proceed to a penalty phase under [state statute regarding penalty phase of capital trials]. If the jury answers the question "no," defendant may be sentenced to any penalty available under state law, other than death.

ALTERNATIVE B: If defense counsel has a good faith belief that the defendant in a capital case has mental retardation, counsel shall file a motion with the court, requesting a finding that the defendant is not death-eligible because of mental retardation. Such a motion shall be filed at least [time period] prior to the date for trial, unless the information in support of the motion came to counsel's attention at a later date.

Upon receipt of such a motion, the trial court shall conduct a hearing for the presentation of evidence regarding the defendant's possible mental retardation. The hearing shall be conducted before a jury, which shall be specially empanelled for this issue only. Both the defense and the prosecution shall have the opportunity to present evidence, including expert testimony. After considering the evidence, the jury shall be asked, by special verdict, "Do you unanimously find, beyond a reasonable doubt, that the defendant does not have mental retardation?" If the jury finds, beyond a reasonable doubt, that the defendant does not have mental retardation, the case may be certified for a capital trial. Such a trial shall be conducted before a separate jury. The trial jury shall not be informed of the prior proceedings or the findings concerning the defendant's claim of mental retardation, and the defendant shall not be precluded from offering evidence of the defendant's mental disability in the guilt/innocence phase or the penalty phase of the trial.

If the defendant is not eligible for the death penalty because of mental retardation, the trial may proceed as a non-capital trial, and, if convicted, the defendant may be sentenced to any penalty available under state law, other than death.

James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues* (2002), at <http://deathpenaltyinfo.org/MREllisLeg.pdf> (Sept. 3, 2003). The paper explores both the reasons supporting these procedures and the supplementary procedures that should govern post-conviction and clemency proceedings involving mentally retarded death row inmates.

232. A simpler alternative, given the definition of the exempt category we ultimately propose, may be to borrow procedures from the states that currently exempt the same group of offenders from all criminal liability through their insanity defenses; the question with such procedures is only where in the process to place them.

This decision to put aside the question of procedure is not, we hasten to say, motivated by a belief that the question of procedures is unimportant. Indeed, we think most of the extremely mentally ill offenders on death row are there because they lost the *factual* dispute about the severity and effects of their illness;²³³ far fewer are there because they lost a *legal/moral* dispute about the propriety of a death sentence for a person whose crime actually was caused by severe mental illness. (In that respect too, Jamie Wilson is an outlier, for he clearly won the factual dispute and nonetheless was sentenced to death.) We agree that establishing appropriate procedures to accurately determine membership in the categorical exemption, however it is defined, is crucial, but we think there is no need to reinvent the wheel.

We return then to our main task, defining the group of offenders, beyond Jamie Wilson, whom *Atkins* places beyond the reach of the death penalty. Our success in finding a consensus with regard to the volitionally incapacitated suggests that the place to look for a definition of serious mental illness, meaning mental illness that categorically forbids the imposition of the death penalty, is in the substantive law of criminal responsibility. This is in part because a consensus is easier to “count” where the definitions are already in use in a large number of jurisdictions, and in part because at least some of the competing concerns in assessing moral culpability are already reflected in the tests that have evolved. We consider them in ascending order of breadth.

1. *The M’Naghten Rule*

A consensus certainly can be established against the execution of persons who by virtue of mental illness do not know right from wrong. Because this is the strictest insanity test, all states that have any insanity defense at all would count toward a consensus that persons cannot be executed for conduct they did not, at the time of the offense, know was wrong. Only four states have abolished the insanity defense altogether—Kansas, Idaho, Montana, and Utah²³⁴—and of these, Montana otherwise precludes the execution of defendants who were mentally ill at the time of the offense.²³⁵ Thus, the overwhelming majority of states have set their course against the execution of the insane, have done so for a long time, and are unlikely to alter that course. Moreover, the moral culpability of such persons is obviously less than that of the “worst” murderer. The only problem with this formulation is

233. See, e.g., *McGregor v. Gibson*, 248 F.3d 946 (10th Cir. 2001); *Ex Parte Perkins*, 808 So. 2d 1143 (Ala. 2001); *People v. Lawley*, 38 P.3d 461 (Cal. 2002); *Corcoran v. State*, 774 N.E.2d 495, 502 (Ind. 2002) (Rucker, J., dissenting); Final Order, *Provenzano v. State*, No. 99-286CFA (Fla. Cir. Ct. Dec. 8, 1999).

234. IDAHO CODE § 18-207 (Michie 1997); KAN. STAT. ANN. § 22-3220 (1995); MONT. CODE ANN. § 46-14-102 (2001); UTAH CODE ANN. § 76-2-305 (1999).

235. MONT. CODE ANN. § 46-14-312 (2001).

its narrowness; given the extremely small size of the Kansas, Utah, and Idaho death rows, such an extension of *Atkins* has no likely impact at all.

2. *The M'Naghten Rule Plus an Irresistible Impulse Test*

The Eighth Amendment forbids the execution of defendants who, by reason of mental illness, either do not know right from wrong or cannot control their conduct. This conclusion follows from the analysis of *State v. Wilson* detailed in Part IV, combined with the brief but parallel analysis on *M'Naghten* offenders sketched in the previous paragraph. Given that Jamie Wilson is the only offender in the first category, and the death rows in Kansas, Utah and Idaho are so small, adoption of this formulation, though thoroughly defensible, is significant for very few offenders. Does *Atkins* press us further?

3. *The Model Penal Code Rule*

The Model Penal Code exonerates the defendant whose mental illness causes him to lack "substantial capacity" either to appreciate the wrongfulness of his actions or to conform his conduct to the requirements of law.²³⁶ This formulation is the most appealing on the culpability front: by its terms, it covers all those defendants whose mental illness renders them *less* morally responsible for their actions, and categorically *less* moral culpability is sufficient reason to refrain from the imposition of the death penalty. Moreover, both deterrence and retribution rationales are implicated by this definition. In order to justify a capital sentence as just retribution, executing the offender must "measurably contribute to the retributive end of ensuring that the criminal gets his just deserts."²³⁷ It is hard to see why the harshest penalty should be inflicted on those whose ability to know right from wrong is "substantially impaired"; it is equally hard to see why those whose ability to control their conduct is "substantially impaired" deserve the harshest penalty.²³⁸ Moreover, the death penalty has "little deterrent force against defendants who have *reduced* capacity for considered choice,"²³⁹ and presumably has less force against those not able to fully appreciate the wrongfulness of their conduct.

236. MODEL PENAL CODE § 4.01 (1985).

237. *Enmund v. Florida*, 458 U.S. 782, 801 (1982).

238. Ellis, *supra* note 9, at 100–09, makes an extended argument demonstrating the reduced moral culpability of those whose ability to control their conduct is impaired, and hence the lack of a retributive justification for executing such persons. His argument relies in part on the similarity between involuntary acts and acts performed without volitional control.

239. *Skipper v. South Carolina*, 476 U.S. 1, 13 (1986) (Powell, J., concurring) (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115 n.11 (1982)) (emphasis added).

We are left, however, with the question of whether we can count a consensus for this more generous “lack of *substantial capacity*” (or, as it can also be phrased, a “substantial impairment”) standard. With respect to the right versus wrong prong, we can; with respect to the volitional prong, we have to say: not yet.

a. Impaired Ability to Distinguish Right from Wrong

In seventeen states, the right versus wrong prong of the insanity defenses requires only that the defendant lacks “substantial capacity” to appreciate the wrongfulness of his conduct.²⁴⁰ An additional six states move halfway from the *M’Naghten* right versus wrong test toward the Model Penal Code formulation, substituting “appreciate the wrongfulness of his conduct” for the traditional requirement that he does not “know” right from wrong,²⁴¹ and Montana exempts defendants who do not “appreciate” the wrongfulness of their conduct from the application of the death penalty.²⁴²

Seven of the seventeen states that clearly exempt those who lack “substantial capacity” to tell right from wrong through their insanity defenses (and four of the five that exempt those unable to “appreciate” the wrongfulness of their conduct) do not presently have a death penalty. Nevertheless, just as was the case with respect to the volitional prong of the insanity defense, the abolitionist states contribute equally to the legislative consensus that the death penalty may not be imposed upon those who lack “substantial capacity” to recognize the wrongfulness of their conduct.²⁴³ Again, it is not their prohibition of the death penalty, but their recognition of

240. CONN. GEN. STAT. ANN. § 53a-13 (West 2001); DEL. CODE ANN. tit. 11, § 401 (2001); HAW. REV. STAT. ANN. § 704-400 (Michie 1999); 720 ILL. COMP. STAT. ANN. 516-2 (West 2002); KY. REV. STAT. ANN. § 504.020 (Michie 1999); ME. REV. STAT. ANN. tit. 17-A, § 39(1) (West 1983); MD. CODE ANN., C.P. § 3-109(a) (2001); MICH. COMP. LAWS ANN. § 768.21a (West 2000); N.Y. PENAL LAW § 40.15 (McKinney 1998); N.D. CENT. CODE § 12.1-04-04(1)(a) (1997); OR. REV. STAT. § 161.295(1) (2001); VT. STAT. ANN. tit. 13, § 4801(a)(1) (1998) (“lacks adequate capacity . . . to appreciate the criminality of his conduct”); WIS. STAT. ANN. § 971.15 (1) (West 1998); WYO. STAT. ANN. § 7-11-304(a) (Michie 2003); *Commonwealth v. Johnson*, 663 N.E.2d 559, 562–63 (Mass. 1996); *State v. Cegelis*, 638 A.2d 783, 785–86 (N.H. 1994) (finding crime must be the “product” of mental illness); *State v. Johnson*, 399 A.2d 469, 476 (R.I. 1979).

241. ALA. CODE § 13A-3-1(a) (1994); ARK. CODE ANN. § 5-2-312 (Michie 1997); IND. CODE ANN. § 35-41-3-6 (Michie 1998); MO. ANN. STAT. § 562.086(1) (West 1999); TENN. CODE ANN. § 39-11-501(a) (1997); *State v. Myers*, 222 S.E.2d 300, 305 (W.Va. 1976).

242. Upon a finding that the defendant lacked the ability to “appreciate the criminality of [his] behavior,” MONT. CODE ANN. § 46-14-311 (2001), “the court shall sentence [him] to be committed to the custody of the director of the department of public health and human services to be placed . . . in an appropriate . . . [institution] for custody, care, and treatment for a definite period of time not to exceed the maximum term of imprisonment that could be imposed [upon a finding that the defendant did not suffer from such a mental disease or defect].” *Id.* at § 46-14-312.

243. Coincidentally, both the total number and the death penalty versus abolitionist state split is exactly the same as it is with respect to the recognition of a volitional prong to the insanity defense, but the identity of the states is different.

the radically lesser culpability of nonvolitional actors that contributes to this consensus. If any of these seven states were to enact a death penalty tomorrow, persons whose mental illness robs them of "substantial capacity" to tell right from wrong would be ineligible for death sentencing for precisely the same reason they are presently ineligible in the ten "substantial capacity" right versus wrong death penalty states: because such persons are deemed undeserving of *any* criminal sanction at all.

Moreover, as we noted with respect to volitional incapacity, at least six additional states—Arizona, Florida, Indiana, Mississippi, Ohio, and Nevada—use proportionality review to remove mentally ill offenders from the ranks of the condemned despite the apparent availability of capital punishment in such cases.²⁴⁴ While these proportionality decisions do not correspond precisely to the "lack substantial capacity to appreciate wrongfulness" standard (just as they do not match with the "irresistible impulse" category at issue in Jamie Wilson's case), they sweep in some offenders *less* impaired than those who lack "substantial capacity to appreciate wrongfulness," and therefore contribute additional support for a conclusion of an evolving standard of decency that prohibits execution of those whose mental illness substantially impairs their ability to distinguish right from wrong.

And again, as we noted with respect to volitional incapacity, despite the Supreme Court's rejection of the notion that states without a death penalty contribute any information to the question of evolving consensus on the eligibility of particular classes of offenders,²⁴⁵ we observe that in five more

244. See, e.g., *State v. Fierro*, 804 P.2d 72, 90 (Ariz. 1990) (holding death penalty to be disproportionate due in part to defendant's "history of psychological illness"); *State v. Jimenez*, 799 P.2d 785, 797–801 (Ariz. 1990) (reducing death sentence to life imprisonment based on defendant's mental incapacity); *State v. Doss*, 568 P.2d 1054, 1061 (Ariz. 1977) (same); *Besaraba v. State*, 656 So. 2d 441, 447 (Fla. 1995) (overturning death sentence where defendant was under the influence of great emotional disturbance); *Knowles v. State*, 632 So. 2d 62, 67 (Fla. 1993) (finding mitigating factors of defendant's mental illness, including his impaired capacity to control his conduct, outweighed aggravating factors); *Huckaby v. State*, 343 So. 2d 29, 33–34 (Fla. 1977) (finding evidence of mental illness outweighed evidence in aggravation and required reduction of sentence from death to life imprisonment; "while [defendant] may have comprehended the difference between right and wrong his capacity to appreciate the criminality of his conduct and to conform it to the law was substantially impaired."); *Burch v. State*, 343 So. 2d 831, 834 (Fla. 1977) (same); *Jones v. State*, 332 So. 2d 615, 619 (Fla. 1976) (reducing death sentence to life based on evidence of defendant's mental illness); *Evans v. State*, 598 N.E.2d 516, 519 (Ind. 1992) (finding where defendant produced uncontradicted evidence of psychiatric disorder and parental neglect, death penalty inappropriate despite aggravated nature of crime and defendant's prior violent history); *Edwards v. State*, 441 So. 2d 84, 92–94 (Miss. 1983) (plurality opinion) (vacating death sentence based on offender's mental illness); *Haynes v. State*, 739 P.2d 497, 503 (Nev. 1987) (vacating as disproportionate death sentence imposed on mentally ill offender); *State v. Claytor*, 574 N.E.2d 472, 482 (Ohio 1991) (finding where defendant produced un rebutted evidence that he lacked substantial capacity to conform, impact of that mitigating factor should have been given more weight and a life sentence imposed).

245. *Stanford v. Kentucky*, 492 U.S. 361, 370 n.2 (1989) (stating that abolitionist states reveal nothing about the proportionality of executing sixteen- and seventeen-year-olds).

states a person lacking "substantial capacity" to tell right from wrong could not face the death penalty because there is no death penalty to face. Thus, with respect to impaired capacity to appreciate wrongfulness, the Eighth Amendment calculus very much resembles that for volitional incapacity, and we conclude that it commands a categorical exemption for both.

b. Impaired Volitional Capacity

With respect to impaired volitional capacity, however, substantially fewer states can be counted in the categorical exemption column. The Note that addresses the imposition of the death penalty on GBMI offenders concludes that all volitionally impaired offenders should be exempt, but it relies solely on a culpability analysis, and specifically abjures any measuring of consensus or evolving standards.²⁴⁶ While we agree with the culpability argument, we read the whole of recent Eighth Amendment jurisprudence to compel some kind of measuring. So we count, and by our count only twelve states recognize substantially impaired volitional control as a bar to criminal responsibility,²⁴⁷ and hence, the imposition of the death penalty. Looking to the lesson of precedent, the magic number seems to be between the eighteen of *Atkins* that was enough and the fifteen of *Stanford* that was not; our count therefore leaves us unable to find, at least at this time, an Eighth Amendment violation in the imposition of the death penalty for volitionally impaired mentally ill offenders.

We are left with a curious hybrid: The Eighth Amendment precludes the imposition of a death sentence on a defendant whose mental illness either (1) substantially impaired his capacity to tell right from wrong, or (2) deprived him of sufficient capacity to conform his conduct to the requirements of law.

Curious, but not inexplicable; both psychiatry and the law have worked much longer with the effects mental illness has on the ability to tell right from wrong than they have with its impact on volition, so we might expect to be further toward consensus on the former. It is not only problems of proof that cause hesitation, but those of understanding what it *means* to be volitionally impaired. Therefore, with respect to impaired volitional capacity, we seem to be closer to where we were with respect to mental retardation when *Penry* was decided: not to the destination, but on the road.

246. See Ellis, *supra* note 9, at 109–12.

247. CONN. GEN. STAT. § 53a-13 (2001); HAW. REV. STAT. ANN. § 704-400 (Michie 1999); KY. REV. STAT. ANN. § 504.020 (Michie 1999); MD. CODE ANN., CRIM. PROC. § 3-109(a) (2001); MICH. COMP. LAWS ANN. § 768.21a (West 2000); OR. REV. STAT. § 161.295(1) (2001); VT. STAT. ANN. tit. 13, § 4801(a)(1) (1998) ("lacks adequate capacity . . . to appreciate the criminality of his conduct"); WIS. STAT. ANN. § 971.15(1) (West 1998); WYO. STAT. ANN. § 7-11-304(a) (Michie 2003); *Commonwealth v. Johnson*, 663 N.E.2d 559, 562–63 (Mass. 1996); *State v. Cegelis*, 638 A.2d 783, 785–86 (N.H. 1994) (finding crime must be the "product" of mental illness); *State v. Johnson*, 399 A.2d 469, 476 (R.I. 1979).

VI. CONCLUSION

Sometimes the worst are the friends of the bad: because we can see that mentally normal murderers are worse than mentally retarded or mentally ill murderers, we hesitate to execute those with mental impairments of either kind. The Eighth Amendment proportionality requirement broadly embodies this sentiment.

But at other times, the best is the enemy of the good. Reading the *Atkins* opinion, both the abolitionist and the advocate for the mentally ill are likely to be filled with hope that mental illness is the next categorical exemption. That hope is fine, but if it stands inviolate in its scope, it is also likely to be unrealized. It seems to us that all mental illness, or at least all major mental illnesses, such as schizophrenia, bipolar disorder, or even substance abuse disorders, diminish culpability in a significant way. Persons with such diminished capacity *ought* not be eligible for the death penalty, and with respect to *statutory* reform, major mental illness is the standard we think legislatures ought to adopt for categorical exemption.

On the constitutional front, however, we come to a different conclusion: Rather than follow our own personal predilections, we have followed the reasoning of the Court, choosing thereby to lend our efforts to support a good result, instead of squandering them in a purist pursuit of the best outcome. Looked at more broadly, this instrumentalist approach is the necessary if sad response of most capital defense lawyers in the post-*Furman* era. One lesson of *Atkins* is that the reward—sometimes—is incremental change.

