FILLING THE GAP: MENTAL ILLNESS AND THE DEATH PENALTY IN INDIANA

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INTRODUCTION

One night in 1985, Arthur Baird sat in his car in a bar parking lot reading a book.[1] Earlier that day, he had left several notes at his parents' home, including some directions on how to finish his mother's pickling and how to care for the chickens on their family farm.[2] One note also said he would surrender himself to the police.[3]

Baird had murdered his parents and had killed his wife the day before.[4] He had held his wife's lifeless body after she had passed.[5] She was six months pregnant, and he had planned to buy a new farm for his growing family to live on together.[6] He had even set a closing date to purchase the farm and had packed his belongings to move to the farm.[7] He believed the government was going to give him one million dollars for his help with solving the country's economic problems, and he needed the government to pay him before he could purchase the farm.[8] Baird, however, was delusional: he had never helped the government, and the government was not going to pay him.[9] According to Baird, the pressure of the upcoming farm purchase "had caused him to crack."[10]

Baird had otherwise been an upstanding citizen,[11] and he had no apparent conflict with his parents or his wife or motive to murder them.[12] As Baird himself later described it to police, "he had totally lost control and gone 'berserk.'"[13] The police arrested Baird the day after he murdered his parents.[14] At trial, Baird raised an insanity defense, but the jury faced conflicting evidence about whether Baird

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1. Baird v. Davis, 388 F.3d 1110, 1112-13 (7th Cir. 2004).
2. *Id.* at 1112.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 1113.
11. *Id.* at 1112.
12. *Id.* at 1113.
13. Baird v. State, 688 N.E.2d 911, 913 (Ind. 1997).
14. *Baird*, 388 F.3d at 1112.

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had been legally insane at the time of the crimes.[15] On the one hand, psychiatric evidence suggested that Baird's mental condition, characterized by "delusional [and] obsessive features," influenced him to commit the murders.[16] On the other hand, he had lied to his wife's parents and deceived police about the murders, suggesting he understood that what he had done was wrong.[17] One psychiatrist testified that Baird was legally insane, but two others testified that he was not insane.[18] A jury eventually found Baird guilty for the murders of his parents and his wife.[19] At sentencing, the jury recommended the death penalty for the murders of his parents, and the trial court sentenced accordingly.[20] The court reasoned that a death sentence was appropriate because Baird had murdered multiple people, and it gave no mitigating weight to Baird's mental condition at the time of the murders of his parents.[21] On appeal, the Indiana Supreme Court reviewed and assigned "some mitigating value" to his mental condition, but the mitigation was not enough to reduce his sentence.[22] Until 2005, Baird underwent numerous other appeals to the Indiana Supreme Court and to the federal court system, many of which included issues related to his mental illness.[23] Although multiple courts acknowledged that his mental illness influenced his commission of the murders, no court overturned his death sentence.[24]

Existing laws in Indiana place some limitations on executing mentally ill defendants,[25] but the mentally ill are not necessarily exempt from execution.[26] In

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15. *See* Baird v. State, 604 N.E.2d 1170, 1177 (Ind. 1992) (reviewing the jury's finding that Baird was guilty instead of legally insane).

16. *See Baird*, 388 F.3d at 1113, 1119 (acknowledging evidence brought at trial and concluding that Baird's delusion "precipitated [the] rationally motiveless" murders).

17. *Baird*, 604 N.E.2d at 1177. Two psychiatrists testified that Baird "was able to appreciate the wrongfulness of his conduct at the time of the commission of the crime," while one psychiatrist testified that he was unable to do so. *Id.* Indiana's legal standard for insanity is whether a person was able "to appreciate the wrongfulness of the conduct" at the time of the crime. IND. CODE § 35-41-3-6 (2017).

18. *Baird*, 604 N.E.2d at 1177.

19. *Baird*, 388 F.3d at 1113. Baird was also convicted of feticide. *Id.*

20. *Id.*

21. *Baird*, 604 N.E.2d at 1182 (summarizing the trial court's findings, including its finding that the aggravating circumstance of Baird committing multiple murders was present).

22. *Id.* Baird sought federal habeas corpus relief on appeal, claiming, among other things, that the Indiana Supreme Court did not appropriately consider his mental illness as a mitigating circumstance. *Baird*, 388 F.3d at 1112.

23. Baird v. State, 831 N.E.2d 109, 113 (Ind. 2005).

24. *See Baird*, 388 F.3d at 1118-20 (deducing that if "Baird [had] been sane he would not have killed his wife and parents" and recognizing that the Indiana Supreme Court had found that his mental illness had influenced his behavior).

25. *See, e.g.*, IND. CODE § 35-36-2-3 (2017) (noting the defense of not responsible by reason of insanity); *id.* § 35-50-2-9(c)(6) (circumstances related to "mental disease or defect" may reduce a capital defendant's sentence from death to life without parole).

26. *See* Overstreet v. State, 877 N.E.2d 144, 177-78 (Ind. 2007) (Boehm, J., concurring)

2017, Indiana legislators introduced Senate Bill 155, proposing a law that would have prohibited the death penalty for certain defendants with severe mental illness,[27] but the bill stalled in a Senate hearing committee.[28] This Note argues that Indiana's current laws do not sufficiently protect the severely mentally ill from execution, and that Indiana should adopt a law similar to that proposed in Senate Bill 155 to better protect this population from receiving the death penalty. This Note proposes that a certain sub-set of capital defendants[29] with mental illness could unfairly receive the death penalty under current Indiana law. Defendants who fall into this sub-set may include defendants with severe mental illnesses such as schizophrenia, depression, and bipolar disorder.[30] Defendants with these disorders may suffer from symptoms such as hallucinations, delusions, disorganized thoughts, and detachment from reality.[31] The American Psychiatric Association defines mental illnesses as "health conditions involving changes in thinking, emotion or behavior" that may impair functioning or cause distress.[32] The sub-set of mentally ill defendants this Note addresses includes only those individuals whose conditions *severely* impair their functioning and, in turn, their ability to act lawfully.

Part I of this Note surveys existing protections available in Indiana for capital

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(noting that neither the U.S. Constitution nor the Indiana Constitution prohibits the death penalty for people with mental illness).

27. Indiana General Assembly, *Senate Bill 155*, IND. GEN. ASSEMBLY: 2017 SESSION, https://iga.in.gov/legislative/2017/bills/senate/155 [perma.cc/RS22-4XUQ] (last visited Oct. 29, 2017).

28. Brigid Curtis Ayer, *Bill to Ban Death Penalty for Those with Serious Mental Illness Fails to Advance*, MESSAGE (Mar. 9, 2017), http://www.themessageonline.org/special_features/article/id/16309 [perma.cc/M75C-W558]. On October 11, 2017, state lawmakers heard testimony regarding similar legislation. Eric Feldman, *Indiana lawmakers could make recommendations to change the state's death penalty law*, TRISTATEHOMEPAGE.COM (Oct. 11, 2017, 5:37 PM), http://www.tristatehomepage.com/news/local-news/indiana-lawmakers-could-make-recommendations-to-change-the-states-death-penalty-law/832956622 [perma.cc/P5JR-Z254]. No bill was introduced in the 2018 session. *See* Indiana General Assembly, *Bills for Session 2018*, IND. GEN. ASSEMBLY: 2018 SESSION, https://iga.in.gov/legislative/2018/bills/ [https://perma.cc/HRV9-VRMV] (last visited Apr. 12, 2018) (not listing a bill related to capital punishment and mental illness).

29. Throughout this Note, the term "capital defendants" refers to defendants on trial for murder who are eligible for the death penalty under Indiana Code section 35-50-2-9 and for whom the state is pursuing the death penalty.

30. *See* Bruce J. Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 B.C. L. REV. 785, 826-29 (2009) (concluding that these disorders will affect an individual's cognitive and volitional ability).

31. *See* George F. Parker, *DSM-5 and Psychotic and Mood Disorders*, 42 J. AM. ACAD. PSYCHIATRY L. 182, 183, 187 (2014) (discussing psychotic disorder symptoms and noting that depression and bipolar disorder can be diagnosed as being "with psychotic features").

32. *What Is Mental Illness?*, AM. PSYCHIATRIC ASS'N, https://www.psychiatry.org/patients-families/what-is-mental-illness [perma.cc/BE6C-PRY4] (last visited Mar. 15, 2017).

defendants with mental illness and highlights the limitations of these protections. Part II explains why executing certain people with mental illness fails to fulfill the goals of punishment. Part III explores why society has not extended the death penalty exemption applied to some classes of people to people with mental illness and argues that Indiana's current law creates a gap that contradicts traditional punishment theory. Part IV details existing support for an exemption and proposes the standard that Indiana should adopt to more thoroughly protect defendants with mental illness from execution.

I. EXISTING PROTECTIONS FOR CAPITAL OFFENDERS WITH MENTAL ILLNESS

A. The Insanity Defense

One defense a capital defendant with mental illness may employ is the affirmative defense of not responsible by reason of insanity (NRI).[33] A defendant who successfully raises this defense would be found not responsible by reason of insanity rather than guilty,[34] and would thus not be eligible for the death penalty.[35] In Indiana, the defendant must prove by a preponderance of the evidence[36] that "as a result of mental disease or defect, he was unable to appreciate the wrongfulness of the conduct at the time of the offense."[37] A preponderance of the evidence means more likely than not, such that the defendant "was more probably legally insane than legally sane."[38] "Mental disease or defect" is defined as "a severely abnormal mental condition that grossly and demonstrably impairs a person's perception, but the term does not include an abnormality manifested only by repeated unlawful or antisocial conduct."[39] If the factfinder—a jury, or a judge in a bench trial—finds the defendant legally insane, it issues a verdict of NRI at the end of the trial phase.[40] Once an NRI verdict is issued, the court holds a commitment hearing.[41] If the individual demonstrates that he is "mentally ill and either dangerous or gravely disabled" at the hearing, the judge may order the individual to receive treatment in a facility or an outpatient setting.[42] The court-ordered placement ends only if the individual is discharged from the facility, or if the court later orders termination of the commitment.[43] The facility may not

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33. IND. CODE § 35-36-2-3 (2017).

34. *Id.*

35. *See id.* § 35-36-2-4 (prescribing procedures for civil commitment, not criminal sentencing, for a defendant found NRI).

36. *Id.* § 35-41-4-1.

37. *Id.* § 35-41-3-6.

38. Galloway v. State, 938 N.E.2d 699, 708 n.7 (Ind. 2010).

39. IND. CODE § 35-41-3-6.

40. *See id.* § 35-36-2-3 (listing the four possible findings of a jury or court for a defendant who has asserted an insanity defense).

41. *Id.* § 35-36-2-4.

42. *Id.* § 12-26-7-5.

43. *Id.*

discharge a defendant, and the court may not end the commitment, unless the individual is no longer "mentally ill and either dangerous or gravely disabled."[44] The rationale behind the insanity defense is that, due to the defendant's insanity, he is unable to form the intent that is required in order for society to punish him.[45]

A successful NRI plea is rare—the insanity defense is utilized in less than one percent of felony cases, with a twenty-five percent success rate.[46] The defense is infrequently utilized partly because it is an extremely difficult standard to meet.[47] The Indiana Supreme Court has specified that a factfinder may reasonably conclude that a defendant is sane even if psychiatric experts unanimously testify that the defendant was legally insane and no contradicting lay witness testimony exists, as long as other evidence could support a finding of sanity.[48] Furthermore, even seemingly bizarre or "irrational" crimes do not necessitate a finding of NRI.[49] The Indiana Court of Appeals has illustrated this concept by citing the defendant's behavior in *Barany v. State*.[50] There, before the defendant shot his girlfriend, he had bitten off her finger and swallowed it, believing her finger contained an "evil worm"; yet the jury found him legally sane.[51] The court in *Barany* upheld the jury's finding, pointing to several facts that could support a finding of sanity: Barany had told police about his girlfriend's "nagging"; a friend reported that Barany appeared "O.K." near the time of the crime; and Barany believed that she was trying to call police when he shot her.[52]

Even when a jury believes that a defendant meets the insanity standard, it may hesitate to find the defendant insane because it believes that he will be released back into society too soon, endangering society.[53] In a recent Indiana

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44. *See id.* § 12-26-15-5 (facility discharge requirements); *id.* § 12-26-12-7 (court order requirements).

45. *See* Galloway v. State, 938 N.E.2d 699, 708 n.6 (Ind. 2010).

46. Mental Health Am. Bd. Dirs., *Position Statement 57: In Support of the Insanity Defense*, MENTAL HEALTH AM. (June 8, 2014), http://www.mentalhealthamerica.net/positions/insanity-defense [https://perma.cc/24SY-M4KH] [hereinafter *Position Statement 57*].

47. *See* Adam Banner, *The James Holmes Trial and the Insanity Defense*, HUFFINGTON POST (June 1, 2015, 6:56 PM), http://www.huffingtonpost.com/adam-banner/the-james-holmes-trial-an_b_7418648.html [perma.cc/W24H-5K5N] (noting that although ninety percent of people who bring an insanity defense are diagnosed with a mental illness, only twenty-five percent of them assert a successful defense).

48. *Galloway*, 938 N.E.2d at 712.

49. Fernbach v. State, 954 N.E.2d 1080, 1087-88 (Ind. Ct. App. 2011).

50. *See id.* (citing 658 N.E.2d 60, 62-64 (Ind. 1995) and highlighting how Barany's behavior was irrational but not legally insane).

51. *Id.* (citing *Barany*, 658 N.E.2d 60, 62-64 (Ind. 1995)). Not long before committing the crime, he was also talking strangely to neighbors, and voices had told him to bite off his girlfriend's finger and kill her. *Barany*, 658 N.E.2d at 62, 67.

52. *Fernbach*, 954 N.E.2d at 1087-88 (citing *Barany*, 658 N.E.2d at 64).

53. Beatrice R. Maidman, Note, *The Legal Insanity Defense: Transforming the Legal Theory into a Medical Standard*, 96 B.U. L. REV. 1831, 1850 (2016); *see, e.g.*, *Galloway*, 938 N.E.2d at 703.

case, the trial court in a bench trial found the defendant Galloway guilty but mentally ill instead of not responsible by reason of insanity, even though the evidence led only to a finding of legal insanity.[54] Galloway had murdered his grandmother partly because he believed his grandmother "was the devil" and was going to kill him.[55] Galloway had first been diagnosed with a mental illness over eighteen years before the murder, and he had been committed to mental health facilities multiple times throughout his life for aggressive and bizarre behavior that resulted from his intense psychotic symptoms.[56] The court found the defendant guilty but mentally ill because it feared that if the defendant was found not responsible by reason of insanity, he would be released back into society and continue to pose a danger to the community.[57]

Indiana's insanity defense standard is narrower than another insanity standard used in several other states.[58] Under Indiana's test, a cognitive insanity test,[59] the defendant must be "unable to appreciate the wrongfulness of the conduct at the time of the offense."[60] The cognitive insanity test has received criticism for excluding people who understand the difference between right and wrong but have other mental limitations that may impact their free will.[61] Another criticism is that cognitive tests restrict evidence such as expert testimony, "depriving the jury of a true picture of the defendant's mental condition."[62] Although twenty-five states use a cognitive test similar to Indiana's, twenty states allow for a finding of insanity under the Model Penal Code standard,[63] which allows for a finding of legal insanity under either a cognitive or volitional test.[64] The Model Penal Code's volitional test provides that a defendant may be found insane if she "lacks

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54. *Galloway*, 938 N.E.2d at 703, 717.

55. *Id.* at 705-06.

56. *Id.* at 704-05.

57. *Id.* at 717. On appeal, the Indiana Supreme Court noted that not finding legal insanity merely because of the fear of the future or concerns about the mental health system was not appropriate and reversed the trial court's decision, finding Galloway NRI. *Id.* at 717-18.

58. Indiana uses a cognitive test, while some states allow for both a cognitive and volitional test. Julie E. Grachek, Note, *The Insanity Defense in the Twenty-First Century: How Recent United States Supreme Court Case Law Can Improve the System*, 81 IND. L.J. 1479, 1485 (2005). Arkansas and Kentucky are examples of states that utilize both tests. ARK. CODE ANN. § 5-2-301 (2017); *id.* § 5-2-312; KY. REV. STAT. ANN. § 504.020 (West 2017).

59. *See* Jane Campbell Moriarty, *Seeing Voices: Potential Neuroscience Contributions to a Reconstruction of Legal Insanity*, 85 FORDHAM L. REV. 599, 607-08 (2016) (noting that the standard of "whether an individual . . . appreciates the wrongfulness of his conduct due to . . . mental illness" is a "cognitively focused standard").

60. IND. CODE § 35-41-3-6 (2017).

61. Grachek, *supra* note 58, at 1492-93.

62. State v. Johnson, 121 R.I. 254, 262 (R.I. 1979), *in* CRIMINAL LAW CASES AND MATERIALS 649, 651 (Joshua Dressler & Stephen P. Garvey eds., West Academic Publishing 7th ed. 2016) (commenting on the M'Naghten rule, a cognitive insanity test).

63. Maidman, *supra* note 53, at 1840.

64. *Position Statement 57*, *supra* note 46.

substantial capacity . . . to conform her conduct to the requirements of law" due to her mental defect at the time of the crime.[65] An insanity standard utilizing both the cognitive and volitional standards receives support because it eradicates the rigid approach of strictly cognitive tests and is "appropriately inclusive."[66] Moreover, psychiatrists often prefer an insanity defense that will allow them to provide extensive testimony relevant to the defendant's mental condition at the time of the crime,[67] and utilizing both the cognitive and volitional standards will allow experts to testify that the defendant meets either standard.

Although some commentators have suggested that the exact insanity test utilized may not impact how factfinders decide on an insanity defense,[68] two Indiana cases help illustrate how excluding the volitional test may lower the chance of a defendant being found NRI.[69] In the first case, a jury found Alan Matheney guilty of murdering his ex-wife while he was on a pass from jail, where he was serving a sentence for a previous crime.[70] He raised an insanity defense, arguing he had killed his ex-wife due to a delusional belief that his ex-wife and a county prosecutor were leading a conspiracy against him.[71] One psychological expert who testified for Matheney at trial did not say whether Matheney met the insanity requirement of being unable to understand the difference between right and wrong.[72] Later, at a post-conviction proceeding for Matheney, she testified that Matheney had a paranoid personality disorder, and that "his delusion was so overwhelming" that he was unable to stop himself from acting unlawfully.[73] She stated that she believed Matheney did "appreciate the wrongfulness" of what he had done, but that his "illness prevented him from conforming his conduct to the requirements of the law."[74]

Similarly, in *Baird v. State*, only one out of multiple experts testified that Baird lacked the capacity to appreciate the wrongfulness of his crime, but *all*

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65. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 346, 350 (Matthew Bender & Co. 7th ed. 2015).

66. *Position Statement 57*, *supra* note 46.

67. Maidman, *supra* note 53, at 1851.

68. *Id.* at 1848-49.

69. *See* Matheney v. Anderson, 253 F.3d 1025, 1033-34, 1041 (7th Cir. 2001) (discussing that a psychiatrist was willing to testify that the defendant met a volitional insanity test but not Indiana's cognitive test); Baird v. State, 831 N.E.2d 109, 112 (Ind. 2005) (noting that all testifying mental health experts declared that the defendant's "ability to conform his actions to . . . the law" was impaired, but that only one testified that the defendant lacked ability "to appreciate the wrongful nature of his conduct").

70. Matheney v. State, 688 N.E.2d 883, 890 (Ind. 1997).

71. *Matheney*, 253 F.3d at 1029. On appeal, his counsel argued that he was unable to assist his counsel because he was so focused on exposing the imaginary "organized, systematic conspiracy" against him. *Matheney*, 688 N.E.2d at 891.

72. *Matheney*, 253 F.3d at 1033.

73. Matheney v. Anderson, 60 F. Supp. 2d 846, 855 (N.D. Ind. 1999), *aff'd*, 253 F.3d 1025 (7th Cir. 2001).

74. *Matheney*, 688 N.E.2d at 898.

experts testified that his mental illness impaired his ability to conform his conduct to the law.[75] Baird had killed his wife and his parents partly due to his delusional beliefs and an obsessive-compulsive disorder.[76] Evidence supporting that Baird understood the wrongfulness of what he had done included lying to his wife's parents and the police about murdering his wife.[77] However, Baird had no apparent motive for committing the murders and was unable to resist a compulsion to commit the murders.[78] Such facts indicate that he could have presented more evidence supporting his volitional incapacity than his cognitive incapacity. Although expert testimony of legal insanity would not have necessarily resulted in a finding of insanity for either Matheney or Baird, the defense probably would have been able to offer more evidence supporting an NRI plea if the definition of insanity had included the volitional prong.

The NRI defense in Indiana is also narrow because it applies only to defendants who were "*unable* to appreciate the wrongfulness" of what they had done.[79] "Unable" shows that the NRI standard includes only defendants completely lacking the capacity to understand what they have done,[80] necessarily indicating that someone who has *some* ability to appreciate what she has done will not be found insane, even if her ability is greatly impaired. Critics of this all-or-nothing standard note that it fails to address the varying degrees of capacity a person could have[81] and conflicts with the psychiatric, medical understanding that responsibility exists on a graded scale.[82] The standard of total incapacity limits the expert testimony that the defendant may bring to support his case.[83] The Model Penal Code offers a standard broader than Indiana's, in which the defendant must lack "substantial capacity"[84] rather than all capacity.

B. The Guilty but Mentally Ill Verdict

If a defendant does not meet the high standard required for insanity,[85] Indiana law permits the jury to deliver a verdict of "guilty but mentally ill" (GBMI)[86] if the defendant has "a psychiatric disorder which substantially disturbs [his]

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75. 831 N.E.2d 109, 112 (Ind. 2005).

76. *Id.* at 113.

77. Baird v. State, 604 N.E.2d 1170, 1177 (Ind. 1992).

78. Baird v. Davis, 388 F.3d 1110, 1113, 1118-19 (7th Cir. 2004).

79. IND. CODE § 35-41-3-6(a) (2017) (emphasis added).

80. *See* DRESSLER, *supra* note 65, at 346-48 (explaining that a requirement that the defendant "did not know that what she was doing was wrong" includes only people who "wholly lack cognition").

81. *Id.* at 348.

82. State v. Johnson, 121 R.I. 254 (R.I. 1979), *in* CRIMINAL LAW CASES AND MATERIALS 649, 651 (Joshua Dressler & Stephen P. Garvey eds., West Academic Publishing 7th ed. 2016).

83. *Id.*

84. MODEL PENAL CODE § 4.01(1) (2016).

85. Gore v. State, 7 N.E.3d 387, 389 (Ind. Ct. App. 2014).

86. IND. CODE § 35-36-2-3(4) (2017).

thinking, feeling, or behavior and impairs [his] ability to function."[87] A verdict of GBMI, however, does not automatically reduce the sentence a defendant receives;[88] thus, a defendant found GBMI is not guaranteed protection from the death penalty. The primary difference between a GBMI verdict and a guilty verdict is that a GBMI defendant must receive psychiatric evaluation and any necessary treatment while serving his sentence.[89] The Indiana Supreme Court has noted that a defendant who is found GBMI is not necessarily exempt from execution, though most capital defendants found GBMI receive a sentence lesser than death.[90]

GBMI statutes have been historically controversial,[91] and critics have alleged that allowing a finding of GBMI as an alternative to a finding of not guilty by reason of insanity could decrease the likelihood of a successful insanity defense for defendants who actually meet the legal insanity standard.[92] Indeed, Indiana passed its GBMI law partly to limit the number of defendants found not guilty by reason of insanity, in response to public outrage after a string of high-profile cases that involved insanity defenses.[93] In one case, the defendant, Anthony Kiritsis, had held a mortgage company executive hostage for sixty-three hours, marching him through downtown Indianapolis in a spectacle that made national television.[94] A jury found Kiritsis legally insane, and within three years, the Indiana General Assembly restructured the insanity defense and established the GBMI verdict.[95] A jury may also hesitate to find a defendant NRI due to concerns about the defendant being released soon after his acquittal and becoming a danger to society.[96] GBMI verdicts thus offer a "jury compromise" in which a jury can simultaneously acknowledge a defendant's mental health needs and ensure that

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87. *Id.* § 35-36-1-1.

88. *Id.* § 35-36-2-5.

89. *Id.*

90. Prowell v. State, 741 N.E.2d 704, 717-18 (Ind. 2001).

91. *See generally* Scott A. Kinsey, *Indiana's Guilty But Mentally Ill Statute: Blueprint to Beguile the Jury*, 57 IND. L.J. 639 (1982) (discussing the shortcomings of Indiana's 1981 GBMI law).

92. Lisa A. Callahan et al., *Measuring the Effects of the Guilty but Mentally Ill (GBMI) Verdict: Georgia's 1982 GBMI Reform*, 16 LAW & HUM. BEHAV. 447, 448 (1992).

93. *Sick justice. Insanity. A defense in disfavor*, NWI.COM (Sept. 15, 1997), http://www.nwitimes.com/uncategorized/sick-justice-insanity-a-defense-in-disfavor/article_0b07537f-7c7a-5627-8816-a629e918c261.html [perma.cc/PS9X-C5FR].

94. *'Tony' Kiritsis dead at 74; Held an Executive Hostage for 63 Hours in Indy in 1977*, 93.1FMWIBC (Jan. 28, 2005), http://www.wibc.com/blogs/tony-kiritsis-dead-74-held-executive-hostage-63-hours-indy-1977 [perma.cc/BB4B-GZGA].

95. *Sick justice. Insanity. A defense in disfavor*, *supra* note 93.

96. *See* Maidman, *supra* note 53, at 1838 (recognizing that dissatisfaction with the insanity defense was historically "due in part to the fear that dangerous defendants would be acquitted . . . and released into society"); *id.* at 1850 (citing a particular case where a juror reported that he did not find a defendant legally insane because the defendant "seemed dangerous").

he is segregated from society.[97] The court in *Galloway v. State*, as previously noted, similarly found the defendant GBMI instead of legally insane because it feared that he would be released back into society too soon and cause more harm.[98]

C. Mitigating Circumstances at the Sentencing Phase

Once a jury finds a capital defendant guilty,[99] the jury may consider the defendant's mental illness as mitigating evidence when determining whether to impose the death penalty during sentencing.[100] The jury may advise a sentence of death or life without parole[101] if at least one statutorily enumerated aggravating circumstance is shown to exist beyond a reasonable doubt.[102] The jury must also determine that the aggravator(s) outweigh any existent mitigator(s) to recommend the death penalty,[103] but it is not required to report on which mitigator(s) it considered during the weighing process.[104] The jury recommends a sentence, and the court must "sentence . . . accordingly," unless the jury cannot agree on a sentence.[105]

To be constitutional, the death penalty may only be imposed if a statutory aggravating circumstance has been proven[106] and if the jury has been allowed to

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97. *See* Bradley D. McGraw et al., *The "Guilty but Mentally Ill" Plea and Verdict: Current State of the Knowledge*, 30 VILL. L. REV. 117, 182 (1985).

98. 938 N.E.2d 699, 717 (Ind. 2010).

99. IND. CODE § 35-50-2-9(d) (2017).

100. *Id.* § 35-50-2-9(e)(l); *see also id.* § 35-50-2-9(c)(8) (allowing the jury to weigh "any . . . circumstances appropriate" in imposing the death penalty).

101. When a jury has decided on the verdict in a case, the same jury recommends the sentence; if the trial did not have a jury, or if the defendant pleaded guilty, then the court decides on the sentence. *Id.* § 35-50-2-9(d).

102. *Id.* § 35-50-2-9(a).

103. *Id.* § 35-50-2-9(l).

104. Weisheit v. State, 26 N.E.3d 3, 20 (Ind. 2015).

105. IND. CODE § 35-50-2-9(e)-(f). Out of twelve inmates on Indiana's death row in 2016, only two were sentenced to death without a jury; thus, this Note utilizes the term "jury" when it discusses the penalty phase. *See* Ind. Pub. Def. Council, *Indiana Death Row Inmates,* IN.GOV (Feb. 14, 2018), https://www.in.gov/ipdc/public/dp_links/indianadeathrowinmates.pdf [perma.cc/U2DB-DVHY] (listing twelve death row inmates). For jury cases, see *Weisheit*, 26 N.E.3d at 6; Isom v. State, 31 N.E.3d 469, 477 (Ind. 2015); Baer v. State, 942 N.E.2d 80, 87 (Ind. 2011); Ward v. State, 903 N.E.2d 946, 950 (Ind.), *adhered to on rehearing*, 908 N.E.2d 595 (2009); Overstreet v. State, 877 N.E.2d 144, 149-50 (Ind. 2007); Ritchie v. State, 875 N.E.2d 706, 712 (Ind. 2007); Kubsch v. State, 866 N.E.2d 726, 729 (Ind. 2007); Stephenson v. State, 864 N.E.2d 1022, 1027 (Ind. 2007); Corcoran v. State, 774 N.E.2d 495, 497 (Ind. 2002); Brown v. State, 577 N.E.2d 221, 224 (Ind. 1991). For cases sentenced by judge, see Gibson v. State, 51 N.E.3d 204, 209 (Ind. 2016), *cert. denied*, 137 S. Ct. 1082 (Mem.) (2017) and Holmes v. State, 671 N.E.2d 841, 845 (Ind. 1996), *abrogated by* Wilkes v. State, 917 N.E.2d 675 (Ind. 2009).

106. Katie Morgan & Michael J. Zydney Mannheimer, *The Impact of Information Overload*

consider any relevant mitigating factors.[107] Indiana's aggravating circumstances include that the defendant intentionally killed the victim during the commission of other certain crimes, the defendant was hired to kill, the defendant had committed another murder, and the defendant killed an on-duty law enforcement officer.[108]

Indiana law enumerates seven specific mitigating circumstances as well as "any other circumstances appropriate for consideration."[109] The two mitigating circumstances that usually relate to mental illness are whether the defendant was "under the influence of extreme mental or emotional disturbance" at the time of the crime and whether "[t]he defendant's capacity to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of law was substantially impaired as a result of mental disease or defect."[110]

The mere presence of mitigating circumstances, however, does not preclude a death penalty sentence: As long as at least one aggravating circumstance outweighs the mitigating factors, the defendant may still be sentenced to death.[111] In *Baird v. State*, for example, the Indiana Supreme Court recognized Baird's mental condition and the fact that he was under "extreme mental or emotional disturbance" as mitigators because his mental illness and delusional thinking had influenced him to murder his parents.[112] The court, however, assigned the mitigators low to medium weight and concluded that the sole aggravating circumstance of Baird committing multiple murders outweighed the mitigators.[113]

The Indiana Supreme Court has provided a non-exhaustive list of factors to be considered when a court assigns weight to a person's mental illness as a mitigator: "(1) the extent of the defendant's inability to control his or her behavior due to the disorder or impairment; (2) overall limitations on functioning; (3) the duration of the mental illness; and (4) the extent of any nexus between the disorder or impairment and the commission of the crime."[114] These factors, however, only need to be applied when a court has specifically found that mental illness exists or when a defendant has been found guilty but mentally ill.[115] Even if the court grants substantial weight for the mental illness in light of these

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on the Capital Jury's Ability to Assess Aggravating and Mitigating Factors, 17 WM. & MARY BILL RTS. J. 1089, 1095 (2009).

107. *Id.* at 1104.

108. IND. CODE § 35-50-2-9(b) (2017). The law includes eighteen aggravators, some of which are further classified. *Id.* One aggravator, for example, is a defendant intentionally murdering while committing any one of eleven different crimes enumerated in the statute. *Id.* § 35-50-2-9(b)(1).

109. *Id.* § 35-50-2-9(c).

110. *Id.*

111. *See id.* § 35-50-2-9(l).

112. 604 N.E.2d 1170, 1182 (Ind. 1992).

113. *See id.* (granting "some mitigating value" to defendant's mental condition, rating other mitigating factors in the low or medium range, and concluding that the aggravating circumstance outweighed the mitigating circumstances).

114. Krempetz v. State, 872 N.E.2d 605, 615 (Ind. 2007).

115. *Id.*

factors, the court could still find that the aggravating factors outweigh the mitigating effect of the mental illness.[116] Moreover, a jury is not required to report on which mitigating circumstances it considered when it weighed the aggravating and mitigating factors.[117] Such wide discretion given to the jury to find for death, even when mental illness is recognized as a mitigating factor, is especially concerning in light of the negative beliefs about mental illness that may influence juries' decisions.[118]

Courts also apply a high standard for overturning how a trial court weighed mitigating and aggravating factors,[119] making it difficult for an appeal on the issue to be successful. The Indiana Supreme Court gives a trial court "great deference" in the weighing of factors, and will only reverse the trial court's decision if the sentence is "clearly, plainly, and obviously unreasonable."[120] Likewise, as the Seventh Circuit has noted, federal courts usually give state courts the discretion to weigh mental illness as a factor during sentencing[121] and grant "exceptionally high" deference to state courts in habeas corpus appeals.[122] The Seventh Circuit articulated its limitations when it upheld Indiana's decision to sentence Arthur Baird to death: "As an original matter we might think it inappropriate to sentence to death a man as seemingly insane as Baird at the time of the murders. But it is not our judgment to make."[123]

In sum, Indiana's current laws do not necessarily protect a person with severe mental illness from execution. First, the insanity defense is a narrow, all-or-nothing standard: a person is either insane (thus, fully excused) or sane (fully culpable).[124] Second, a person with mental illness who is not found legally insane may be found guilty but mentally ill (GBMI).[125] However, the GBMI verdict does not necessarily reduce a defendant's sentence, so a defendant found GBMI may still be eligible for the death penalty.[126] Third, during the penalty phase, impaired capacity because of a defendant's mental illness will not necessarily mitigate the

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116. *See* IND. CODE § 35-50-2-9(l) (allowing a death sentence as long as a statutory aggravator exists and outweighs any mitigating factors).

117. Weisheit v. State, 26 N.E.3d 3, 20 (Ind. 2015).

118. *See* CHRISTOPHER SLOBOGIN, MINDING JUSTICE: LAWS THAT DEPRIVE PEOPLE WITH MENTAL DISABILITY OF LIFE AND LIBERTY 86 (Harvard Univ. Press 2006) (noting empirical studies which suggest that jurors allow bias about mental illness to influence their verdicts).

119. *See* Gibson v. State, 51 N.E.3d 204, 213 (Ind. 2016) (articulating an "abuse of discretion" review standard), *cert. denied*, 137 S. Ct. 1082 (Mem.) (2017) (quoting Thacker v. State, 709 N.E.2d 3, 10 (Ind. 1999).

120. *Id.*

121. Baird v. Davis, 388 F.3d 1110, 1120 (7th Cir. 2004).

122. *Id.* at 1124 (Ripple, J., dissenting).

123. *Id.* at 1120 (majority opinion).

124. *See* Galloway v. State, 938 N.E.2d 699, 711 (Ind. 2010) (stating that "a person is either sane or insane at the time of the crime").

125. IND. CODE § 35-36-2-3 (2017).

126. *See id.* § 35-36-2-5 (requiring that a person found guilty but mentally ill be sentenced "in the same manner" as a defendant found guilty).

defendant's sentence down from death.[127]

II. DETERRENCE, CULPABILITY, AND MENTAL ILLNESS

Two major "social purposes" help justify use of the death penalty: deterrence and retributive theory.[128] If execution fails to "measurably contribute to" these goals, it violates the U.S. Constitution.[129] Deterrence suggests that if a person who has committed a capital crime is punished severely, that punishment will prevent others from committing murder.[130] The U.S. Supreme Court has prohibited the execution of juveniles and intellectually disabled people partly because their execution will not deter future capital crimes.[131] People with intellectual disability will not be deterred for two primary reasons: because they do not typically plan out what they will do before they act, and because they would probably not be able to "process the information of the possibility of execution" and subsequently "control their conduct based upon that information."[132] The Court in *Roper v. Simmons* reasoned that juveniles would be unlikely to conduct a "cost-benefit analysis" and consider the possibility of execution before committing a crime, and that any deterrent effect could be achieved by a sentence of life without parole.[133]

Retributive theory focuses primarily on correcting a social imbalance created by the offender when he committed the crime.[134] According to retributive theory, an offender's punishment "necessarily depends on [his] culpability."[135] Professor Kyron Huigens[136] suggests that two types of culpability actually exist: fault and eligibility.[137] Eligibility is related to the offender's *capabilities*, while fault is related to the offender's *wrongdoing* (that is, related to the crime itself).[138] Fault is the type of culpability at issue in determining whether the defendant has the

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127. *See id.* § 35-50-2-9(l) (allowing jurors to recommend the death penalty as long as one aggravating circumstance outweighs any mitigating factors).

128. *See* Roper v. Simmons, 543 U.S. 551, 571 (2005) (citing Atkins v. Virginia, 536 U.S. 304, 319 (2002)) (noting that retribution and deterrence are the two "social purposes served by the death penalty").

129. *See Atkins*, 536 U.S. 304 at 319 (quoting Enmund v. Florida, 458 U.S. 782, 798 (1982)) (reviewing the constitutionality of executing people with intellectual disability).

130. *Id*.

131. *See id.* at 319-20 (intellectually disabled); *Roper*, 543 U.S. at 572 (juveniles).

132. *Atkins*, 536 U.S. at 319-20.

133. 543 U.S. at 572.

134. Kyron Huigens, *Rethinking the Penalty Phase*, 32 ARIZ. ST. L.J. 1195, 1245-46 (2000).

135. *Atkins*, 536 U.S. at 305.

136. Professor Huigens is a professor at the Cardozo School of Law and is primarily interested in punishment theory. *Kyron James Huigens*, CARDOZO SCH. LAW, https://cardozo.yu.edu/directory/kyron-james-huigens [perma.cc/S9FV-3E99] (last visited Oct. 30, 2017).

137. Huigens, *supra* note 134, at 1228.

138. *Id.* at 1228-29; *see also id.* at 1251 (distinguishing fault as being based on a defendant's "character" and eligibility depending on "capabilities").

necessary mens rea, or intent, to be found guilty of the crime itself.[139] The eligibility strain of culpability is "a necessary condition for punishment" and considers whether a person is able to "govern himself."[140] Eligibility focuses on whether a certain punishment—such as death—is acceptable in light of a person's capabilities.[141]

The death penalty is a particular punishment that should be used only when "the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed[,]"[142] and the U.S. Supreme Court has recognized that people with certain characteristics cannot be culpable enough to receive such extreme punishment.[143] In *Atkins v. Virginia*, the Court prohibited the execution of any person with intellectual disability partly because retribution did not help justify their execution.[144] The Court reasoned that people who have intellectual disabilities have diminished culpability due to their limited capacity.[145] The Court cited characteristics like low impulse control, difficulty communicating with and understanding others, and decreased ability to comprehend information and think logically as characteristics that illustrate reduced culpability in people with intellectual disability.[146] Similarly, in *Roper v. Simmons*, the Court categorically ruled that executing any person under age eighteen is unconstitutional because of his diminished culpability.[147] In *Roper*, susceptibility to immature behavior, vulnerability to negative influences, and lack of a fully developed identity suggested that juveniles are not as culpable as adults.[148] The culpability of both juveniles and people with intellectual disability fits into the eligibility prong of culpability because the rationale for not executing them stems from their personal capacity rather than the crimes they commit.[149] When eligibility plays a role, no matter how heinous a crime is, a defendant should not be sentenced to death if he

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139. *Id.* at 1229.

140. *Id.* at 1251-52.

141. *Id.* at 1254-55.

142. Panetti v. Quarterman, 551 U.S. 930, 958 (2007).

143. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 575 (2005) (holding that executing offenders under age eighteen is a disproportionate punishment); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (concluding that death is unconstitutionally excessive for criminals with mental retardation).

144. 536 U.S. at 319 (noting that retribution was not served because the intellectually disabled are not "the most deserving of execution"). "Mental retardation," as used in *Atkins,* is now generally referred to as "intellectual disability." AM. PSYCHIATRIC ASS'N, DSM-5 INTELLECTUAL DISABILITY 1 (2013), *available at* https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Intellectual-Disability.pdf [perma.cc/P2DX-44U3]. Thus, this Note will use the term "intellectual disability" instead of "mental retardation."

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

146. *Id.*

147. 543 U.S. at 575.

148. Winick, *supra* note 30, at 787 (citing *Roper*, 543 U.S. at 569-70).

149. *See* Huigens, *supra* note 134, at 1259 (distinguishing between eligibility and fault in culpability and noting that age is related to eligibility rather than fault).

is ineligible for execution because of his limited capacity.[150]

In some cases, the law recognizes that mental illness can limit a defendant's capacity to the point that he is ineligible for certain punishment because his culpability is diminished.[151] In *Panetti v. Quarterman*, for example, the Court recognized that executing offenders who are insane at the time of execution is unconstitutional.[152] The Court further clarified that executing a person who does not understand why he is being executed due to his mental incapacity threatens punishment's retributive purpose.[153] Another example—legal insanity at the time of the crime—shows that a person who is completely incapable due to his mental illness[154] is ineligible for punishment altogether.[155] A legally insane person is often committed to a facility for treatment, but the goal of the commitment is public safety, not punishing the defendant.[156] Aside from the insanity defense, mitigating circumstances related to mental illness may help reduce a defendant's sentence down to life,[157] but as this Note argues, mental illness as a mitigator does not always result in a reduced sentence when it should. The Court did not leave the fate of juveniles and people who are intellectually disabled up to a jury's weighing of circumstances because it concluded that such people, due to certain characteristics they possessed, could not be culpable enough to deserve death.[158] The same legal standard should be extended to people with diminished culpability because of their severe mental illness.

III. UNDERSTANDING THE GAP: WHY CURRENT LAW CONFLICTS WITH PUNISHMENT THEORY

A. Comparing Mental Illness to Intellectual Disability

Defendants with severe mental illness share many characteristics with defendants who are intellectually disabled that reduce their culpability.[159] Characteristics unique to mental illness, such as psychotic symptoms or

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150. *See Roper*, 543 U.S. at 573 (declaring that it would not be acceptable for a youth to be sentenced to death even if the youth had committed a "brutal" crime).

151. *See* Huigens, *supra* note 134, at 1239 (discussing that society chooses not to punish a person who has the "incapacity" of insanity).

152. 551 U.S. 930, 934 (2007) (quoting Ford v. Wainwright, 477 U.S. 399, 409-10 (1986)).

153. *Id.* at 958-59.

154. IND. CODE § 35-41-3-6 (2017).

155. *See* Huigens, *supra* note 134, at 1239.

156. *Position Statement 57*, *supra* note 46; *see* Galloway v. State, 938 N.E.2d 699, 708 n.6 (Ind. 2010) (noting that insanity is a defense to a crime).

157. *See* IND. CODE § 35-50-2-9(c) (2017) (listing Indiana's mitigating factors).

158. Winick, *supra* note 30, at 786.

159. Lyn Entzeroth, *The Challenge and Dilemma of Charting a Course to Constitutionally Protect the Severely Mentally Ill Capital Defendant from the Death Penalty*, 44 AKRON L. REV. 529, 557-58 (2011) (comparing various attributes of people with mental illness to juveniles and people with intellectual disability).

delusions, can also impact a defendant's culpability.[160] Many proponents of prohibiting the execution of people with severe mental illness—including supporters of Indiana's 2017 legislation—maintain that the same rationale that the U.S. Supreme Court applied to people with intellectual disability and youth should be extended to people with severe mental illness.[161] The Court, however, has not extended a prohibition to people with mental illness.[162] At the time the Court ruled to prohibit the execution of juveniles and individuals with intellectual disability, a significant number of states had already created similar prohibitions through their legislatures.[163] In contrast, only one state has utilized a similar prohibition for people with mental illness.[164] This section explores the similarities and differences between intellectual disability and mental illness and posits why mental illness has been treated differently from intellectual disability.

Like people with intellectual disability, some people with severe mental illness are less able to relate to other people and think logically.[165] Some people with mental illness have lowered impulse control,[166] as do people with intellectual disability.[167] Like people with intellectual disability,[168] people with mental illness are exposed to potential injustice throughout the criminal process, including difficulty obtaining effective counsel or being less capable of effectively assisting

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160. *See* Winick, *supra* note 30, at 786 (discussing mental disorders and symptoms that may reduce a defendant's culpability).

161. *See, e.g.*, *The Project*, HOOSIER ALL. FOR SERIOUS MENTAL ILLNESS EXEMPTION, http://www.hasmie.org/the-project [perma.cc/ZX73-GRJW] (last visited Oct. 30, 2017) (likening the characteristics of people with serious mental illness to those of juveniles and people with intellectual disability to support an exemption); Mental Health Am. Bd. Dirs., *Position Statement 54: Death Penalty and People with Mental Illnesses*, MENTAL HEALTH AM. (June 14, 2016), http://www.mentalhealthamerica.net/positions/death-penalty [perma.cc/CNR3-KY9G] (citing the rationale for exempting juveniles from execution to support an exemption for people with mental illness) [hereinafter *Position Statement 54*].

162. *See generally* Entzeroth, *supra* note 159 (analyzing why the Court has not established an exemption from execution for defendants with mental illness).

163. *Id.* at 550.

164. *Id.* at 564. Connecticut has since completely abolished the death penalty. Matt Ford, *Connecticut's Death Penalty Stays Dead*, ATLANTIC (May 26, 2016) http://www.theatlantic.com/politics/archive/2016/05/connecticut-death-penalty/484526/ [perma.cc/8LXT-424E].

165. Atkins v. Virginia, 536 U.S. 304, 318 (2002) (intellectual disabilities); Harvard Health Publ'ns, *Schizotypal Personality Disorder*, DRUGS.COM, https://www.drugs.com/health-guide/schizotypal-personality-disorder.html [https://perma.cc/5KEQ-ZWUH] (last visited Nov. 2, 2017) (mental illness).

166. Simone Hoermann et al., *Defining Features Of Personality Disorders: Impulse Control Problems*, MENTALHELP.NET (Dec. 5, 2013), https://www.mentalhelp.net/articles/defining-features-of-personality-disorders-impulse-control-problems/ [perma.cc/84AU-ZLE8].

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

168. *Id.* at 320-21 (mentioning that people with intellectual disability are more likely to give false confessions, are poor witnesses, and may have difficulty providing effective assistance to their counsel).

their counsel.[169] Both people with intellectual disability[170] and people with mental illness are more likely to be victims of crimes compared to the general population,[171] and both are stereotyped as being violent or dangerous.[172] Furthermore, like intellectual disability, mental illness invites a "two-edged sword" that can aggravate instead of mitigate a defendant's sentence,[173] as Part III.B of this Note details.

Certain characteristics of mental illness distinguish it from intellectual disability and may make creating a categorical exemption more difficult to apply to mental illness.[174] To begin with, mental illness is more variable than intellectual disability.[175] Intellectual disability, although it still varies from person to person, manifests in a person's childhood or adolescence and is considered chronic.[176] In contrast, mental illness can manifest at any age, and symptoms can fluctuate throughout a person's lifetime.[177] Such variability precludes a one-size-fits-all exemption from the death penalty because mental illness that is not severe at the time of the crime probably does not reduce the defendant's culpability.

Mental illness also differs from intellectual disability in that intellectual disability requires impaired adaptive functioning or lower-than-average intelligence,[178] but people with mental illness do not necessarily have low intelligence, and may even be more intelligent than average.[179] This distinction

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169. Jordan Smith, *Why Is It So Easy For States To Execute The Mentally Ill?*, INTERCEPT (May 20, 2015, 10:47 AM), https://theintercept.com/2015/05/20/mentally-ill-executed/ [perma.cc/C866-EP87].

170. Leigh Ann Davis, *People with Intellectual Disability in the Criminal Justice System: Victims and Suspects*, ARC (Aug. 2009), http://www.thearc.org/page.aspx?pid=2458 [perma.cc/DP48-CG72].

171. Linda A. Teplin et al., *Crime Victimization in Adults with Severe Mental Illness*, JAMA NETWORK: JAMA PSYCHIATRY (Aug. 2005), https://jamanetwork.com/journals/jamapsychiatry/fullarticle/208861 [perma.cc/MK2V-R8P5].

172. *Atkins*, 536 U.S. at 321 (noting that intellectual disability can facilitate a jury finding future dangerousness of a defendant); *Mental illness and violence*, HARVARD HEALTH PUBL'NS (Jan. 2011), http://www.health.harvard.edu/newsletter_article/mental-illness-and-violence [perma.cc/G4F3-CJHN] (mental illness).

173. *Atkins*, 536 U.S. at 321 (referring to intellectual disability as a "two-edged sword" during the sentencing phase).

174. *See* SLOBOGIN, *supra* note 118, at 87 (noting fear of people with mental illness as a potential explanation for why people with mental illness may still be executed).

175. HOUSE OF DELEGATES, AMERICAN BAR ASSOCIATION RECOMMENDATION NO. 122A 7 (2006), *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_moratorium/mental_illness_policies.authcheckdam.pdf [perma.cc/5NBK-RSQT].

176. AM. PSYCHIATRIC ASS'N, *supra* note 144, at 1-2.

177. *See What Is Mental Illness?*, *supra* note 32 (noting that "mental illness can occur at any age" and can be mild or severe).

178. AM. PSYCHIATRIC ASS'N, *supra* note 144, at 2.

179. Richard Taite, *Is There a Link Between Intelligence and Mental Illness?*, PSYCHOLOGY TODAY (Mar. 10, 2015), https://www.psychologytoday.com/blog/ending-addiction-good/201503/is-

is important because a defendant's ability to plan or think about the consequences of her actions can influence how culpable a court finds the defendant to be.[180] The Court in *Atkins* noted that the impaired cognitive processing skills and limited planning capacity of people with intellectual disability made them unlikely to plan out a murder or adequately consider the consequences of carrying out a crime.[181] In contrast, a mentally ill defendant's intelligence or cognitive ability may make courts hesitant to deem her less culpable.[182] Nonetheless, a person who has intellectually planned out a crime may not be fully culpable if she is also operating under delusional or irrational beliefs.[183] For example, a person who strategizes how to murder her neighbor likely has heightened culpability. However, if she is also operating under the genuine belief that her neighbor is a space alien plotting to destroy the world, her culpability is reduced, even if she is otherwise intelligent.

B. Mental Illness as a "Two-Edged Sword":[184] Stigma's Effect on Sentencing

Like intellectual disability, mental illness can present a "two-edged sword" in the penalty phase.[185] In *Atkins v. Virginia,* the U.S. Supreme Court prohibited the execution of the intellectually disabled partly because intellectual disability—a characteristic that should mitigate a person's sentence—could instead aggravate a defendant's sentence.[186] Similarly, a defendant's mental illness does not always help mitigate his sentence and may even aggravate it.[187] A person with mental illness is even more likely to be feared than someone with intellectual disability,[188] so it follows that mental illness invites a similar double-edged effect.

The idea that people who are mentally ill are violent is a pervasive social

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there-link-between-intelligence-and-mental-illness [perma.cc/P7AU-FN3J].

180. *See* Matheney v. State, 833 N.E.2d 454, 457 (Ind. 2005) (reasoning that a capital defendant was not "extremely mentally and emotionally disturbed" because he was "intelligent and manipulative"); Atkins v. Virginia, 536 U.S. 304, 319-20 (2002) (recognizing that people with intellectual disability are unlikely to plan out a crime or to "process the information of the possibility of execution as a penalty").

181. *Atkins*, 536 U.S. at 319-20.

182. *See, e.g.*, *Matheney*, 833 N.E.2d at 457 (reasoning that a capital defendant was not "extremely mentally and emotionally disturbed" partly because he was "intelligent and manipulative").

183. *See* HOUSE OF DELEGATES, *supra* note 175, at 8 (noting that "irrationality is the core determinant of diminished responsibility").

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

185. *See id.* (referring to intellectual disability as a "two-edged sword" during the sentencing phase).

186. *Id.*

187. *See* SLOBOGIN, *supra* note 118, at 86 (noting that bias about people with mental illness being "abnormally dangerous" influences juror verdicts).

188. *Id.* at 87.

belief often perpetuated by the media.[189] One 2007 study found that U.S. newspaper articles about mental illness were more likely to mention or allude to violence than articles in other countries and noted the presence of a "Culture of Fear" in the United States in relation to mental illness.[190] Moreover, despite increased social awareness and knowledge of mental illness in recent decades, data suggest that the association of dangerousness with mental illness has increased.[191] The desire to maintain "social distance" from people with severe mental illness has also stayed constant.[192] Additionally, believing that mental illness is caused by biological or genetic factors may also lead jurors to assume that people with mental illness will exhibit future dangerousness, aggravating the defendant's sentencing rather than mitigating it.[193]

Given that society associates mental illness with dangerousness,[194] a defendant's mental illness could have a negative rather than positive impact on him during sentencing. Fear of a defendant and a defendant's perceived future dangerousness play a significant role in criminal sentencing.[195] Capital jurors often do not understand or do not believe claims of mental illness.[196] Even if they believe a defendant is mentally ill, they may perceive defendants with a troubled mental history as threatening or otherwise stigmatize them.[197] Although future

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189. Julie Beck, *Untangling Gun Violence from Mental Illness*, ATLANTIC (June 7, 2016), http://www.theatlantic.com/health/archive/2016/06/untangling-gun-violence-from-mental-illness/485906/ [perma.cc/LG6N-RY96].

190. Sigrun Olafsdottir, *Medicalization and Mental Health: The Critique of Medical Expansion, and a Consideration of How Markets, National States, and Citizens Matter, in* THE SAGE HANDBOOK OF MENTAL HEALTH AND ILLNESS 239, 252 (David Pilgrim et al. eds., 2011).

191. Bernice A. Pescosolido, *The Public Stigma of Mental Illness: What Do We Think; What Do We Know; What Can We Prove?* 54 J. HEALTH & SOC. BEHAV. 1, 9-10 (2013).

192. *Id.* Social distance has been studied by measuring whether a person would be willing to be in certain social relationships, like a work relationship or friendship, with a person who has mental illness. *See id.* at 8-9 (explaining that Table 3 include social distance findings and listing the percent of people unwilling to make friends with or work closely with people with various types of mental illness).

193. John Pyun, Comment, *When Neurogenetics Hurts: Examining the Use of Neuroscience and Genetic Evidence in Sentencing Decisions Through Implicit Bias*, 103 CAL. L. REV. 1019, 1041 (2015).

194. SLOBOGIN, *supra* note 118, at 86 (noting that "most of us erroneously view mentally ill offenders to be abnormally dangerous").

195. *See id.* at 87 (noting a study where increased "fear" of a defendant was the primary emotion factoring into jurors' decisions, and that fear was most associated with a defendant who might be described as a "madman," a term likely ascribed to someone exhibiting symptoms of mental illness); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (noting future dangerousness as an aggravating factor during sentencing).

196. *See generally* Leona D. Jochnowitz, *Does Mental Health Mitigating Evidence of Personality Disorders Make a Difference to Jurors in Capital-Sentencing Decisions?*, 50 CRIM. L. BULL. 344 (2014).

197. *Id.*

dangerousness is not an enumerated aggravating circumstance in Indiana, it can be used to determine how much weight is given to an already existing aggravating factor.[198] In *Corcoran v. Neal*, for example, the trial judge sentenced Corcoran to death because the aggravating circumstance of committing multiple murders outweighed the four proven mitigating circumstances.[199] The judge gave the first of these mitigators—that "Corcoran was under the influence of a mental or emotional disturbance at the time of the crimes"—medium weight.[200] The remaining three mitigators were given low weight and were unrelated to his mental illness.[201] The judge gave the sole aggravating circumstance high weight partly because she was persuaded that Corcoran was "very dangerous" and would murder again if he had the chance.[202] A jury may be even more likely than a judge to allow certain factors to unduly influence its sentencing decision because juries may engage in jury nullification, disregarding jury instructions regarding the law.[203] Jury nullification often occurs when a jury acquits a defendant because it sympathizes with the defendant.[204] In the case of mental illness, however, jury nullification could have the opposite effect because jurors fear rather than sympathize with defendants with mental illness.[205] Jurors may thus feasibly recommend execution of a mentally ill defendant even if evidence shows that he is not fully culpable because the jury desires to protect society from the defendant's alleged dangerousness.[206]

Critics of an exemption for mental illness contend that current law, including mental illness acting as a mitigating factor at the sentencing phase, sufficiently prevents the less culpable from being executed.[207] Nonetheless, limited research

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198. *See* Corcoran v. Neal, 783 F.3d 676, 680-81 (7th Cir. 2015) (explaining that a judge may "consider the circumstances of the crime as context for the balancing process," and accepting a trial judge's decision to give "high weight" to a statutory aggravator partly because she believed the defendant was "very dangerous").

199. *Id.* at 679.

200. *Id.*

201. *Id.*

202. *Id.*

203. *See* David Karman, *An Attorney's Balanced Approach to Minimizing Jury Nullification*, 28 GEO. J. LEGAL ETHICS 617, 622 (2015) (discussing jury nullification and noting that a majority of Americans in a study reported they would disregard the law and jury instructions if the law conflicted with their beliefs).

204. *See* Monroe H. Freedman, *Jury Nullification: What It Is, and How to Do It Ethically,* 42 HOFSTRA L. REV. 1125, 1132 (2014) (noting, "[N]ullification depends upon the possibility of getting the jurors . . . to sympathize sufficiently with the defendant").

205. *See* Olafsdottir, *supra* note 190, at 252 (noting a "Culture of Fear" in the United States regarding mental illness).

206. *See* SLOBOGIN, *supra* note 118, at 86 (noting that bias about people with mental illness being "abnormally dangerous" influences juror verdicts).

207. Guest Columnist, *Legal safeguards on death penalty for the mentally ill are already sufficient: John Murphy (Opinion)*, CLEVELAND.COM (Jan. 25, 2017, 10:31 AM), http://www.cleveland.com/opinion/index.ssf/2017/01/legal_safeguards_regarding_dea.html

available on jury deliberations suggests that juror beliefs about mental illness influence how the jurors weigh mental illness as a mitigating factor at the penalty phase.[208] In the first of two Missouri capital cases studied by the Capital Jury Project, a defendant presented evidence of his alleged borderline personality disorder to mitigate his sentencing,[209] but the jury barely considered psychological evidence that had been presented.[210] Psychological testimony for the defendant revealed that the defendant also had a sexual disorder,[211] which the jury perceived as threatening rather than mitigating.[212] In the second case, only one juror considered a defendant's dissociative disorder as mitigation, and no jurors directly discussed the psychological testimony presented at trial.[213] In both cases, jurors gave little weight to the defendant's personality disorders partly because they believed prosecutorial arguments that "mental illness [was] dangerous."[214] Importantly, in the second case studied, the attorney inquired about psychological mitigation and asked potential jurors about their ability to consider psychological testimony during jury selection,[215] suggesting that juror bias against mental illness cannot be fully eliminated through the jury selection process.

Although prohibiting execution of certain people with severe mental illness would take some discretion away from the jury during sentencing, limiting its discretion to sentence a defendant to death when his culpability is reduced due to his mental illness is appropriate. The U.S. Supreme Court rejected an argument regarding jury discretion in *Roper v. Simmons*, when it categorically prohibited the execution of juveniles.[216] There, opponents of the prohibition argued that the jury's ability to determine a defendant's sentence on a case-by-case basis would be harmed if execution of juveniles was altogether prohibited.[217] The Court rejected such an argument, declaring, "An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death."[218] Similarly, the severity of any particular crime should not allow a person to be sentenced to death when his diminished culpability, because of his severe mental illness, warrants him a punishment less than death.

[perma.cc/PW4B-NLBV].

208. *See* Jochnowitz, *supra* note 196, at 355-81 (discussing two cases in which jurors gave little consideration to a defendant's mental illness as a mitigating factor).

209. *Id.* at 358-60.

210. *Id.* at 360-65.

211. *Id.* at 358-60.

212. *Id.* at 360-65.

213. *Id.* at 374-79.

214. *Id.* at 382.

215. *Id.* at 369-72.

216. 543 U.S. 551, 572 (2005).

217. *Id.*

218. *Id.* at 573.

In conclusion, the similarities between intellectual disabilities and mental illness[219] suggest that some defendants with severe mental illness should be exempt from the death penalty because their mental illness diminishes their culpability. However, a blanket exemption for any defendant with mental illness is not sensible due to the unique variability of mental illness.[220] As one commentator has suggested, society's "disproportionate fear of people with mental illness" further explains why society has not extended a death penalty exemption to defendants with mental illness.[221] Additionally, the perception of the mentally ill as violent[222] may lead to mental illness harming a defendant's sentence rather than helping it, even when it is presented as mitigating evidence in a capital trial.

IV. How Indiana Can Bridge the Gap

Indiana should adopt a new legal standard for determining whether a capital defendant with mental illness should receive the death penalty to ensure that defendants whose severe mental illness reduces their culpability are not sentenced to death. Indiana Senate Bill 155, introduced in the 2017 regular legislative session,[223] offers a strong starting point for Indiana's new standard. This section explores existing support for establishing an exemption and explains why the Indiana legislature, not the court system, should establish an exemption. It then reviews Senate Bill 155's requirements and recommends that some, but not all, of Senate Bill 155's requirements be incorporated into Indiana's law.

A. Support for an Exemption for Defendants with Mental Illness

Although courts and legislatures generally have not established an exemption for defendants with severe mental illness,[224] significant support for an exemption exists, including support from organizations such as Mental Health America,[225] the American Civil Liberties Union,[226] and the American Bar Association (ABA).[227] The American Psychiatric Association and the American Psychological

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219. *See* Entzeroth, *supra* note 159, at 557-58 (comparing various attributes of people with mental illness to juveniles and people with intellectual disability).

220. House of Delegates, *supra* note 175, at 7.

221. *See* Slobogin, *supra* note 118, at 87.

222. Beck, *supra* note 189.

223. S.B. 155, 120th Gen. Assemb., 1st Reg. Sess. (Ind. 2017), *available at* https://iga.in.gov/static-documents/8/c/0/4/8c040da2/SB0155.01.INTR.pdf [perma.cc/T2YB-XMGL].

224. Entzeroth, *supra* note 159, at 564, 572 (noting that only one state has banned the execution of a defendant who is mentally ill at the time of the crime and that no state court has "found a blanket exemption" from death for defendants with severe mental illness).

225. *See, e.g.*, *Position Statement 54, supra* note 161.

226. See generally Report: Mental Illness and the Death Penalty, ACLU, https://www.aclu.org/report/report-mental-illness-and-death-penalty [perma.cc/HEQ4-HRL4] (last visited Nov. 2, 2017) (promoting an exemption from execution for individuals with severe mental illness).

227. House of Delegates, *supra* note 175, at 1.

Association have endorsed the ABA's recommendation for an exemption.[228] Nineteen states prohibit capital punishment altogether.[229] Connecticut maintained a law prohibiting the execution of offenders who have impaired mental capacity at the time of the crime[230] before it banned the death penalty.[231] Though Connecticut is the only state to have adopted such an exemption,[232] seven states, including Indiana, introduced 2017 legislation for an exemption.[233] Additionally, a 2015 multi-state poll revealed that sixty-six percent of Americans oppose imposing the death penalty on people with severe mental illness, and seventy-two percent favor an exemption for severe mental illness once they learn more information about how an exemption would work.[234]

Previously introduced legislation in Indiana[235] and support from state organizations[236] show that support for an exemption exists specifically in Indiana. In 2007, the Bowser Commission, an Indiana legislative study committee, recommended that Indiana adopt a statute with an exemption.[237] Although subsequent bills for an exemption that were introduced in 2008,[238] 2009,[239] and 2017[240] failed in hearing committees each year, the resurrection of a bill in 2017 suggests renewed support for an exemption. The Hoosier Alliance for Serious Mental Illness Exemption (HASMIE) also pushed for the adoption of the 2017 bill, [241] garnering support from several organizations in the state, including mental health advocacy groups, veterans' organizations, and religious organizations.[242]

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228. *Id.* at 3.

229. *Death Penalty Fast Facts,* CNN (Oct. 4, 2017, 2:04 PM), http://www.cnn.com/2013/07/19/us/death-penalty-fast-facts/index.html [perma.cc/CXQ3-6SB4].

230. CONN. GEN. STAT. ANN. § 53a-46a (West 2017).

231. Ford, *supra* note 164.

232. Entzeroth, *supra* note 159, at 564.

233. Rebecca Beitsch, *States Consider Barring Death Penalty for Severely Mentally Ill*, GOVERNING STATES & LOCALITIES (Apr. 18, 2017), http://www.governing.com/topics/public-justice-safety/sl-death-penalty-mentally-ill-states.html [perma.cc/ER7F-7RW7].

234. AM. BAR ASS'N, SEVERE MENTAL ILLNESS AND THE DEATH PENALTY 4 (Dec. 2016), *available at* http://www.americanbar.org/content/dam/aba/images/crsj/DPDPRP/SevereMentalIllnessandtheDeathPenalty_WhitePaper.pdf [perma.cc/WV63-HK5D].

235. *See, e.g.*, S.B. 310, 115th Gen. Assemb., 2nd Reg. Sess. (Ind. 2008), *available at* http://www.in.gov/legislative/bills/2008/PDF/IN/IN0310.1.pdf [perma.cc/8MGE-XSGX].

236. *Partners*, HOOSIER ALL. FOR SERIOUS MENTAL ILLNESS EXEMPTION, http://www.hasmie.org/partners [perma.cc/Y5US-27HA] (last visited Oct. 30, 2017).

237. BOWSER COMM'N, FINAL REPORT OF THE BOWSER COMMISSION 1, 3 (2007), *available at* http://www.in.gov/legislative/interim/committee/2007/committees/reports/BCOMAB1.pdf [perma.cc/SF4V-BFDD].

238. Ind. S.B. 310.

239. S.B. 22, 116th Gen. Assemb., 1st Reg. Sess. (Ind. 2009), *available at* http://www.in.gov/legislative/bills/2009/PDF/IN/IN0022.1.pdf [perma.cc/SR6Z-U5S6].

240. Ayer, *supra* note 28.

241. *The Project*, *supra* note 161.

242. *Partners*, *supra* note 236.

Although the Indiana Supreme Court has never created an exemption, one Indiana Supreme Court Justice has advocated for prohibiting execution in cases where a person's mental illness played a significant role in his crime.[243] In his dissent in *Corcoran v. State*, Justice Rucker expressed that he is against the execution of a person with mental illness.[244] He noted that the same rationale that applies to prohibiting the execution of people with an intellectual disability applies to people with mental illness, and that executing them violates the cruel and unusual punishment clause of the Indiana Constitution.[245] Affirming his stance later in *Overstreet v. State*, Justice Rucker stated, "If a person who is mentally ill suffers from the same 'diminished capacities' as a person who is mentally retarded, then logic dictates it would be equally offensive to the prohibition against cruel and unusual punishment to execute that mentally ill person."[246]

The Indiana General Assembly, rather than the courts, should establish the exemption for multiple reasons. Primarily, the Indiana Supreme Court has looked to the Indiana legislature in considering whether a defendant with mental illness being sentenced to death is unconstitutional.[247] The court has reasoned that because the state legislature has not passed a law prohibiting such execution, the "prevailing values" in Indiana imply that executing someone with mental illness would not be cruel and unusual under the Indiana Constitution.[248] Similarly, when the U.S. Supreme Court categorically prohibited the execution of people with intellectual disability and juveniles in *Atkins* and *Roper*, it did so partly because a significant number of states had already established similar prohibitions.[249] Until states begin establishing state-specific prohibitions for defendants who are mentally ill, the Court will probably not establish a national prohibition.[250] Moreover, by adopting an exemption by statute, Indiana will act consistently with how it has historically approached similar death penalty exemptions: the Indiana legislature exempted defendants with intellectual disability[251] and juveniles from execution before the Court established a national exemption for either group.[252]

B. Senate Bill 155 and Final Recommendations for Indiana's New Law

Indiana should adopt most of Senate Bill 155's requirements, but certain

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243. *See* Overstreet v. State, 877 N.E.2d 144, 175 (Ind. 2007) (Rucker, J., dissenting); Baird v. State, 831 N.E.2d 109, 118 (Ind. 2005) (Rucker, J., concurring).

244. 774 N.E.2d 495, 502 (Ind. 2002) (Rucker, J., dissenting).

245. *Id.*

246. 877 N.E.2d at 175.

247. *Id.* at 176-77 (Dickson, J., concurring).

248. *Id.*; *see also id.* at 178 (Boehm, J., concurring).

249. *See* Entzeroth, *supra* note 159, at 574-75.

250. *Id.* at 581.

251. Atkins v. Virginia, 536 U.S. 304, 314 (2002).

252. Roper v. Simmons, 543 U.S. 551, 579 (2005) (listing Indiana as a state that set age eighteen as the minimum age for a defendant to be executed).

aspects of the bill should be changed or more closely examined. This Note discusses the language of Senate Bill 155 and a proposed new law in two distinct categories: (1) the eligibility criteria themselves (that is, the standards a defendant would have to meet to qualify for the exemption); and (2) other considerations, such as whether the court or the jury determine whether the defendant meets the criteria; when in the process the determination is made; and other procedural and evidentiary requirements.

1. Eligibility Criteria.—Senate Bill 155 sets forth that "a court may not impose a death sentence on a person determined . . . to be an individual with a serious mental illness."[253] "Individual with a serious mental illness" is defined as someone:

> who, at the time of the offense, had active symptoms of a serious mental illness that substantially impaired the individual's capacity to: (1) appreciate the nature, consequences, or wrongfulness of the individual's conduct; (2) exercise rational judgment in relation to the individual's conduct; or (3) conform the individual's conduct to the requirements of the law.[254]

Senate Bill 155's criteria largely mirror the American Bar Association's (ABA) recommended standard, which is as follows:

> Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct to the requirements of the law.[255]

Both the ABA and Senate Bill 155 standards exclude disorders in which criminal conduct is the primary symptom as well as impairment caused by voluntary drug and alcohol use.[256] Bills introduced in other states also include eligibility criteria similar to that of Senate Bill 155 and the ABA standard, with minor differences.[257]

Notably, Senate Bill 155 requires that the defendant have "active symptoms of a serious mental illness" at the time of the crime,[258] which restricts who can qualify for the exemption more than the ABA's general "mental disorder or disability" requirement.[259] "Active symptoms" include hallucinations; delusions; manic symptoms; "extremely disorganized thinking;" or "very significant

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253. S.B. 155, 120th Gen. Assemb., 1st Reg. Sess. (Ind. 2017), *available at* https://iga.in.gov/static-documents/8/c/0/4/8c040da2/SB0155.01.INTR.pdf [perma.cc/T2YB-XMGL].

254. *Id.*

255. HOUSE OF DELEGATES, *supra* note 175, at 1.

256. *Id.*; Ind. S.B. 155.

257. *See, e.g.*, H.B. 1522, Gen. Assemb., Reg. Sess. (Va. 2017) (LEXIS).

258. Ind. S.B. 155.

259. HOUSE OF DELELGATES, *supra* note 175, at 6.

disruptions of consciousness, memory, and perception of the environment."[260] Senate Bill 155 further limits eligibility by defining "serious mental illness" as only six specific mental disorders identified in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM),[261] rather than all mental disorders.

An exemption adopting eligibility criteria similar to Senate Bill 155's criteria will ensure that Indiana law becomes more consistent with culpability theory in two significant ways. First, it will expand existing protections for people with mental illness to ensure that a defendant whose mental illness diminishes his culpability will not be executed. Under current law, although mental illness may mitigate sentencing, the jury may still recommend execution even if it finds that "[t]he defendant's capacity to appreciate the criminality of the defendant's conduct . . . was substantially impaired" because of his mental illness.[262] In contrast, under Senate Bill 155's criteria, if a person's ability to appreciate the wrongfulness of his conduct is "substantially impaired," the jury would be precluded from recommending a death sentence.[263] This required sentence reduction would decrease the arbitrary aspect of weighing mental illness as mitigation, thereby reducing the likelihood that potential juror bias and fear of individuals with mental illness will unjustly lead to the defendant's execution. The Senate Bill 155 criteria also expand existing standards by including that execution is prohibited if the defendant's ability to "exercise rational judgment in relation to [his] conduct" is "substantially impaired."[264] Indiana's current enumerated mitigating circumstances lack a similar rationality standard.[265] The rationality piece provides needed emphasis on a defendant's ability to think rationally, rather than just the defendant's ability to plan out a crime, because rationality is crucial to determining a defendant's responsibility.[266]

Second, adopting Senate Bill 155's eligibility criteria will sufficiently limit the exemption so that defendants with mental illness whose mental illness has not decreased their culpability will not qualify for the exemption. Given that the severity of mental illness varies greatly from person to person and throughout a person's lifetime,[267] such limitations are appropriate. The Senate Bill 155 criteria require that the defendant has "active symptoms" of the mental illness at the time of the crime,[268] and that the mental illness be related to the crime.[269] Furthermore,

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260. Ind. S.B. 155.

261. *Id.*

262. IND. CODE § 35-50-2-9(c)(6) (2017) (allowing a jury to recommend death if a statutory aggravating factor outweighs any mitigating factors).

263. Ind. S.B. 155.

264. *Id.*

265. *See* IND. CODE § 35-50-2-9(c) (listing mitigating circumstances).

266. HOUSE OF DELEGATES, *supra* note 175, at 8.

267. *See id.* at 7 (noting that mental disorder symptoms are more variable than symptoms of intellectual disabilities).

268. Ind. S.B. 155.

269. HOUSE OF DELEGATES, *supra* note 175, at 7-8 (explaining how the ABA criteria, similar

it requires a "*serious* mental illness" and that the person's capacity be "*substantially* impaired."[270] Senate Bill 155's approach limits the exemption to impairment resulting from clinical mental illness diagnoses[271] rather than including any mental condition.

Senate Bill 155's requirement limiting eligible mental illness to only six specific enumerated disorders is too restrictive, however.[272] Limiting the exemption to specific illnesses enumerated within the statute risks excluding any new diagnoses that may be developed among mental health experts.[273] Virginia's 2017 legislation offers a better model because it includes eligibility criteria similar to Senate Bill 155's criteria, including "active psychotic symptoms," but it does not require specific diagnoses.[274] Indiana could sufficiently limit the exemption to defendants with diminished culpability by continuing to require certain active symptoms but by more broadly allowing for any diagnosis within the DSM to qualify a defendant.

2. Other Considerations.—In addition to the eligibility criteria a defendant must meet to be exempt from execution, Senate Bill 155 addresses various other procedural and evidentiary requirements.[275] The bill requires the court to determine whether the defendant meets the criteria at a pre-trial hearing and outlines the hearing proceeding.[276] At the hearing, the defendant must prove that he meets the criteria by a preponderance of the evidence.[277] If the court finds that the defendant meets the criteria, then the defendant will not be eligible for the

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to Senate Bill 155's criteria, link the defendant's mental illness to the defendant's criminal conduct).

270. Ind. S.B. 155 (emphasis added).

271. *Id.* (requiring a defendant's mental illness to meet certain Diagnostic and Statistical Manual of Mental Disorders (DSM) diagnosis criteria in order to be exempt from execution). The DSM, produced by the American Psychiatric Association, is the primary source utilized in diagnosing mental disorders and was last revised with the help of over 160 top researchers and clinicians. *DSM-5: Frequently Asked Questions*, AM. PSYCHIATRIC ASS'N, http://www.psychiatry.org/psychiatrists/practice/dsm/feedback-and-questions/frequently-asked-questions [perma.cc/C5LV-885F] (last visited Oct. 30, 2017).

272. Ind. S.B. 155.

273. The DSM's most recent revision included new diagnoses and new symptom criteria for existing diagnoses. Cheryl Lane, *DSM 5: Fifth Edition Of The Diagnostic And Statistical Manual Of Mental Disorders*, PSYWEB.COM, http://www.psyweb.com/content/main-pages/dsm-5-fifth-edition-of-the-diagnostic-and-statistical-manual-of-mental-disorders [perma.cc/C4A5-W6RQ] (last visited Oct. 30, 2017).

274. H.B. 1522, Gen. Assemb., Reg. Sess. (Va. 2017). The bill failed to pass during the 2017 Virginia legislative session. *2017 Session: Bill List: Failed*, VA.'S LEGISLATIVE INFO. SYS., https://lis.virginia.gov/cgi-bin/legp604.exe?171+lst+FAI+HB1464 [perma.cc/X4RZ-FB33] (last visited Nov. 3, 2017).

275. Ind. S.B. 155.

276. *Id.*

277. *Id.*

death penalty.[278]

This Note recommends allowing a jury to determine the defendant's eligibility at the sentencing phase instead of adopting Senate Bill 155's pre-trial hearing determination. Both Virginia's 2017 bill and Connecticut's law require the factfinder to make the determination at the sentencing phase of the trial rather than a pre-trial hearing.[279] Although a pre-trial hearing could have benefits like lower trial costs, [280] it takes too much discretion away from the jury. A jury may harbor harmful beliefs about mental illness,[281] but a jury still represents the "conscience of the community,"[282] so its role should not be completely removed. One speaker echoed this concern at Senate Bill 155's legislative committee hearing when he declared that the bill would allow the judge to dismiss a finding for the death penalty before the case reaches the jury, "taking [the decision] completely away" from the jury.[283]

More research to identify what other requirements should be in Indiana's new law would be beneficial. To begin with, additional research could shed light on whether the burden of proof prescribed in Senate Bill 155, a preponderance of the evidence, is appropriate.[284] Additionally, requirements around how the jury reports on whether it found that the defendant qualifies for the exemption may be needed. Virginia's 2017 bill, for example, requires the jury to sign a form declaring whether it found that the defendant met the eligibility criteria as part of its verdict.[285] Other than the few exceptions addressed in this section, Indiana should enact a law similar to that proposed in Senate Bill 155 to ensure that Indiana law adequately protects defendants whose mental illness has reduced their culpability from being sentenced to death.

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278. *Id.*

279. H.B. 1522, Gen. Assemb., Reg. Sess. (Va. 2017) (LEXIS); CONN. GEN. STAT. ANN. § 53a-46a (West 2017).

280. *See* Bruce J. Winick, *Determining When Severe Mental Illness Should Disqualify a Defendant from Capital Punishment, in* MENTAL DISORDER AND CRIMINAL LAW: RESPONSIBILITY, PUNISHMENT, AND COMPETENCE 45, 57 (Schopp et al. eds., Springer 2009) (discussing reasons supporting a pre-trial determination).

281. *See* SLOBOGIN, *supra* note 118, at 86 (noting that bias about people with mental illness being "abnormally dangerous" influences juror verdicts).

282. William J. Bowers et al., *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making*, 63 WASH. & LEE L. REV. 931, 946 (2006) (quoting Ring v. Arizona, 536 U.S. 584, 615-16 (2002) (Breyer, J., concurring)(quoting Witherspoon v. Illinois 391 U.S. 510, 519 (1968))).

283. Video: *Hearing on S.B. 155 Before the S. Judiciary Comm.*, 120th Gen. Assemb., Reg. Sess. at 3:50 (Feb. 15, 2017), *available at* https://iga.in.gov/information/archives/2017/video/committee_judiciary_4200/ [perma.cc/M45E-ZXKH].

284. S.B. 155, 120th Gen. Assemb., 1st Reg. Sess. (Ind. 2017), *available at* https://iga.in.gov/static-documents/8/c/0/4/8c040da2/SB0155.01.INTR.pdf [perma.cc/T2YB-XMGL].

285. H.B. 1522, Gen. Assemb., Reg. Sess. (Va. 2017) (LEXIS).

CONCLUSION

Although Indiana law provides some mechanisms for ensuring defendants with reduced culpability because of their mental illness do not receive the death penalty, current law leaves a gap in protection. Specifically, the weighing of mitigating circumstances related to mental illness at the sentencing phase may hurt rather than help defendants with mental illness due to stigma surrounding mental illness.[286] Courts have not categorically exempted defendants who are mentally ill from the death penalty and have suggested that legislatures should rule on the matter.[287] Just as it did with the exemptions for intellectual disability[288] and juvenile status,[289] Indiana again has the opportunity to make law before courts follow suit. Indiana should pass a law similar to that proposed in Indiana Senate Bill 155.[290] Such a standard would be consistent with punishment theory rationale and would help curb the negative effects of stigma on the capital sentencing of mentally ill defendants.

Arthur Baird did not find relief from the death penalty through the appeals process, but he was spared from execution when the Indiana Governor Mitch Daniels commuted his sentence to life without parole.[291] Alan Matheney, however, another capital defendant with mental illness, was executed on September 28, 2005.[292] A third defendant with mental illness, Michael Overstreet, remains on death row.[293] In 2014, he was found to be incompetent for execution, and the state has declined to appeal the decision.[294] The cases of *Baird, Matheney,* and *Overstreet* help illustrate how current law treats mental illness in capital cases.

The death penalty is reserved for only the worst of crimes and the most culpable of individuals because it is so severe.[295] This Note has asserted that certain defendants with mental illness have diminished culpability because of

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286. *See* SLOBOGIN, *supra* note 118, at 86 (noting empirical studies which suggest that jurors allow bias about mental illness to influence their verdicts).

287. *See* Entzeroth, *supra* note 159, at 581(concluding that the U.S. Supreme Court will search for multiple state legislative exemptions before finding that the Constitution requires an exemption).

288. *See* Atkins v. Virginia, 536 U.S. 304, 314 (2002).

289. *See* Roper v. Simmons, 543 U.S. 551, 579 (2005).

290. S.B. 155, 120th Gen. Assemb., 1st Reg. Sess. (Ind. 2017), *available at* https://iga.in.gov/static-documents/8/c/0/4/8c040da2/SB0155.01.INTR.pdf [perma.cc/T2YB-XMGL].

291. Warren Mills, *Governor commutes death sentence,* WTHR (Aug. 29, 2005, 1:28 PM), http://www.wthr.com/article/governor-commutes-death-sentence [perma.cc/D4SN-Z8BB].

292. Paul Kasey, *Matheney executed*, WTHR (Sept. 28, 2005, 2:06 AM), http://www.wthr.com/article/matheney-executed [perma.cc/FBN3-B453].

293. Hannah Troyer, *Indiana Won't Appeal Overstreet Execution Ruling*, WFYI (Dec. 9, 2014), http://www.wfyi.org/news/articles/indiana-wont-appeal-overstreet-execution-ruling [perma.cc/L6MA-KESD].

294. *Id.*

295. Kennedy v. Louisiana, 554 U.S. 407, 420 (2008).

their mental illness. The extreme punishment of death is disproportionate for them because they fall below the level of "extreme culpability."[296] By adopting the standard proposed in this Note, Indiana will more fully ensure that individuals who have diminished culpability because of their mental illness will be exempt from execution.

296. *Id.*