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THE GUILTY BUT MENTALLY ILL VERDICT: POLITICAL EXPEDIENCY AT THE EXPENSE OF MORAL PRINCIPLE

MARK A. WOODMANSEE*

I. INTRODUCTION

On March 30, 1981, John W. Hinckley, Jr. fired several gunshots at the President of the United States, Ronald Reagan. One of those bullets entered the President's chest, wounding him almost fatally.1 Other bullets from Hinckley's weapon struck members of the President's staff and security detail.2 For his attempt on the President's life, Hinckley was prosecuted under 18 U.S.C. § 1751.3 Hinckley asserted a diminished capacity defense4 and a jury found him not guilty by reason of insanity.5 Although the assassination attempt itself shocked the nation, Hinckley's June 21, 1982 acquittal produced further upheaval throughout society and the legal community.6 Through his actions and his subsequent insanity acquittal, John Hinckley

* B.A., 1993, University of Notre Dame; J.D. Candidate, 1996, Notre Dame Law School; Thomas J. White Scholar, 1994-96. I am grateful to Professor John H. Robinson for his helpful comments and suggestions. I dedicate this article to the memory of my late mother, Annette L. Woodmansee. She taught me to live "with firmness in the right as God gives us to see the right." May her soul, through the mercy of God, rest in peace.

2. See Douglas Feaver, Three Men Shot at the Side of Their President, WASH. POST, March 31, 1981, at A7. Reagan's press secretary, James S. Brady, Secret Service agent Timothy J. McArthry, and District of Columbia police officer Thomas K. Delehanty were wounded in Hinckley's attack. Brady was shot in the head and suffered serious injuries as a result of the wound.
unwittingly fueled an ongoing debate that focused on mental illness and its implications for criminal defendants.

The controversy that surrounded the Hinckley case intensified a debate about the insanity defense that had begun prior to March of 1981. Although the traditional notion of the insanity defense experienced substantial change as a result of the American Law Institute's 1962 Model Penal Code, the outcome of San Francisco's 1979 Dan White trial renewed calls for reform. On November 27, 1978, Dan White, a former San Francisco City Supervisor, shot and killed both San Francisco Mayor George Moscone and fellow Supervisor Harvey Milk. White, apparently angered over Moscone's refusal to reappoint him as supervisor, confronted the mayor in his office prior to a press conference at which Moscone had planned to announce the new supervisor. White shot Moscone four times. He then reloaded his pistol, ran to Milk's office, and shot him five times. White was charged with two counts of first degree murder and the prosecutor alleged special circumstances for purposes of later seeking the


A person is responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law.

Id. Addressing the significance of the Model Penal Code's position, Professor Norman Finkel notes that the Code "expresses a strong preference for imposing criminal liability only if there is proof of awareness that one is committing the conduct or causing the result required for the crime at issue." According to Finkel, the Code "permits evidence of mental abnormality to be introduced not only on the insanity issue, but also on the issue of whether the accused had the mens rea associated with the alleged crime." See Norman J. Finkel & Christopher Slobogin, Insanity, Justification, and Culpability: Toward a Unifying Schema, 19 Law & Hum. Behav. 447, 448 (1995). For a description of the insanity defense and its evolution, see, e.g., Joshua Dressler, Understanding Criminal Law 299-304 (1987); Norman J. Finkel, Therapy and Ethics: The Courtship of Law and Psychology 116-34 (1980); G.A. Smith & J.A. Hall, Evaluating Michigan's Guilty But Mentally Ill Verdict: An Empirical Study, 16 U. Mich. J. L. Ref. 77, n.3 (1982).


9. White had previously resigned from his post as City Supervisor on November 10. Several days later, White reconsidered his decision and sought to withdraw his resignation. White's colleague Harvey Milk, however, apparently convinced Mayor Moscone not to reappoint White. On November 26, 1978, a journalist informed White that the mayor in fact had decided not to reappoint him and would name White's successor at a press conference on the following day — November 27, 1978. See Salter supra, note 8, at i; George P. Fletcher, With Justice For Some 12-13 (1995).

10. Salter, supra note 8, at i.
death penalty. Asserting a defense of diminished capacity, defense lawyers argued that White’s severe depression precluded a conviction for first degree murder and urged jurors to convict White only of voluntary manslaughter. On May 21, 1979, the jurors rejected the prosecutor’s request for a murder conviction; they found White guilty of voluntary manslaughter. The verdict precipitated a night of violent riots in the streets of San Francisco and provided reformers with fertile ground upon which to call for new laws governing diminished capacity defenses.

11. Id. at 9. In his opening statement, the prosecutor asserted that the evidence would “support the charges of murder in the first degree and the special circumstances which have been alleged here.” See also Duffy Jennings, Dan White Jury Hears the Final Arguments, S. F. CHRON., May 16, 1979, at 1.

12. See BLACK’S LAW DICTIONARY 458 (6th ed. 1990). BLACK’S describes a diminished capacity doctrine which “recognizes that although an accused was not suffering from a mental disease or defect when the offense was committed sufficient to exonerate him from all criminal responsibility, his mental capacity may have been diminished by intoxication, trauma, or mental disease so that he did not possess the specific mental state or intent essential to the particular offense charged.” Id. See also, FLETCHER, supra note 9, at 179 (A diminished capacity defense “makes no claim about the rectitude of the action; the claim is merely that in view of his mental condition the culprit [in cases in which he has been charged with murder] should be found guilty of the lesser offense of manslaughter.”); Peter Arenella, The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage, 77 COLUM. L. REV. 827 (1977).

13. Jennings, supra note 11. In proffering its diminished capacity argument, the defense focused on whether or not White’s mental condition at the time of the crime left him blame-worthy for the two murders. During the course of its case, the defense presented evidence to establish that White suffered from depression. The defense argued that White’s diet during the days leading up to the crime—a high-sugar diet which included large quantities of junk food—caused White to act violently. Dr. Martin Blinder, testifying for the defense, claimed that such diets could “precipitate anti-social and even violent behavior.” See FLETCHER, supra note 9, at 30-32. During the course of his testimony, Dr. Blinder concluded that “if it were not for all the tremendous pressures on him the weeks prior to the shooting, and perhaps if it were not for the ingestion of this aggravating factor, this junk food... I would suspect that these homicides would not have taken place.” SALTER, supra note 8, at 191. Blinder’s argument that “White killed because he had been eating too much junk food” quickly became known facetiously as the “Twinkie Defense.” FLETCHER, supra note 9, at 31-32.


15. Katy Butler, Anatomy Of Gay Riot, S. F. CHRON., May 23, 1979, at 1. See also FLETCHER, supra note 9, at 15. Fletcher summarizes the public outrage that followed White’s conviction for manslaughter:

The mitigation of Dan White’s condemnation set off delayed shock waves. San Francisco had reacted to the killings of November 27 with a show of peaceful solidarity. Yet on May 21, 1979, the night of the verdict, the disappointment doubled. Feeling betrayed by a system
John Hinckley's acquittal in 1982 once again focused national attention on the diminished capacity defense and thus reignited the reform movement.

The ensuing debate provided the impetus for a variety of legislative reforms (both at the state and the national level) that attempted to address the public's concern about the penal system's approach to mentally ill defendants. Although many different alternative reforms were discussed and ultimately passed in a number of jurisdictions, this article will focus primarily on the "guilty but mentally ill verdict" (GBMI). Thirteen states enacted a form of the guilty but mentally ill verdict during the period that followed the trials of Dan White and John Hinckley. In order to find a criminal defendant "guilty but mentally ill," a jury must determine that (1) the defendant is guilty of the offense charged; and (2) the defendant was mentally ill at the time he committed the offense. A "guilty but mentally ill" verdict holds a defendant criminally responsible for his wrongful acts. As a result, a GBMI offender is sentenced as if he had been found "guilty," or fully blameworthy, for the offense. In theory, a GBMI verdict purports to provide the GBMI prisoner with the necessary mental health treatment. In reality, however, GBMI offenders seldom receive mental health treatment during the

they thought might work, about 5,000 gay men gathered to release their rage in the city's face.

FLETCHER, supra note 9, at 15.

16. See Henry J. Steadman et al., Before and After Hinckley: Evaluating Insanity Defense Reform 39 (1993). In discussing the debate that followed Hinckley's acquittal, the authors state, "[t]he reform following John Hinckley's acquittal in 1982 represented legislative efforts to restore a balance in the operation of the insanity defense between individual rights and public protection, a balance that the public would deem acceptable." Id.

17. Other legislative reforms (aside from the guilty but mentally ill verdict) involved measures that proposed abolishing the insanity defense, modifying the 'test of insanity,' altering the burden of proof for the insanity defense, and revising the commitment and release procedures for insanity acquitees. Id. at 34-45.


20. See, e.g., Smith & Hall, supra note 7, at 78; Dressler, supra note 7, at 316-317. A "not guilty by reason of insanity" (NGRI) verdict, by contrast, does not hold the defendant criminally liable for his wrongful acts. The NGRI
course of their prison sentences.\textsuperscript{21} In order to understand the GBMI verdict, it is first necessary to examine the verdict within the context of the entire debate and the reform movement of the early 1980's.

Although focusing on the attempted assassination of Reagan as the "high water mark" for the reform movement may appear to oversimplify the development of the guilty but mentally ill verdict, the significance of Hinckley and its effects cannot be dismissed. On July 19, 1982, Dan Quayle, then a senator from Indiana, summarized the public's mood at a hearing before the United States Senate Committee on the Judiciary. Introducing a bill which proposed reforming the federal insanity defense, Quayle commended the committee's chairman for moving to "strike while the iron is hot."\textsuperscript{22} Similarly, legislatures at both the national and state level capitalized on public sentiment that favored reducing the frequency with which the insanity defense was used. During the twelve year period between 1978 and 1990, a total of 124 different attempts to reform the insanity defense occurred in 34 jurisdictions. Eighty per cent of these reforms were enacted shortly after Hinckley's acquittal.\textsuperscript{23}

The history of legislative reform in this area appears to have been motivated in large measure by the public outrage that was displayed throughout many jurisdictions after Hinckley's acquittal. Many of the legislative initiatives that emerged in the post-Hinckley reform movement were intended to address the public's concerns about the use of diminished capacity defenses.\textsuperscript{24} To a defendant is acquitted outright and may then be committed to a mental health institution.

\textsuperscript{21} See infra notes 43-47, 66 and accompanying text.


\textsuperscript{23} See Steadman et al., supra note 16, at 35. The authors also state that of the 34 jurisdictions that enacted these various reforms (including altering the burden of proof, changing the test of legal insanity, and revising commitment and release procedures), "[t]hree states adopted the GBMI verdict during the period of the Hinckley case, and eight adopted it shortly after his June 1982 acquittal." \textit{Id.} at 38. Furthermore, they also emphasize that "[f]ew of these reforms could be construed as liberalizing the defense; nearly all were aimed at making the insanity defense a less attractive option for the defendant." \textit{Id.} at 35.

\textsuperscript{24} An example of these reforms, the guilty but mentally ill verdict, will be discussed as an outgrowth of the Hinckley controversy.
large extent, however, these initiatives were not conceived in a political vacuum or in an atmosphere devoid of public pressures.\textsuperscript{25} The events following the trial of Dan White illustrate how public sentiment can influence and shape such legislative decision-making. This Article argues that such influences do not necessarily produce penal statutes that conform to the tenets of American criminal law jurisprudence.

The concept of a guilty but mentally ill verdict affects the manner in which our penal system administers justice to mentally ill individuals — a matter that implicates principles of law, ethics and medicine. As a political solution to a legal, ethical and medical problem, the adequacy of such legislative reforms must be evaluated carefully. Legal and ethical problems require adherence to principles of justice and morality. Addressing the importance of the corresponding relationship between criminal responsibility and the distribution of punishment, Professor H. L. A. Hart noted that the admission of "excusing conditions" such as mental illness "is required by distinct principles of Justice which restrict the extent to which general social aims may be pursued at the cost of individuals."\textsuperscript{26} In a criminal justice system that punishes blameworthy harmful conduct and shields blameless offenders from punishment, any device that threatens this principle must be subjected to careful scrutiny — and deservedly so. Politically popular solutions to these problems do not necessarily conform to "contemporary standards of decency"\textsuperscript{27} that are "implicit in the concept of ordered liberty."\textsuperscript{28} Because the GBMI verdict implicates questions of justice that are central to the integrity of our legal system, these reforms must be evaluated to ensure that legislators properly balanced the competing concerns of public safety and the rights of mentally ill defendants.

\textsuperscript{25} See, e.g., 'Dan White Bill,' Weaker Now, Gets Past Assembly, S.F. EXAMINER, Sept. 11, 1979, at 7 ("Outrage over [White's] sentence led to demonstrations in San Francisco's streets and demands for legislation tightening evidentiary rules on such defenses."). During debate in the California Assembly over a bill restricting the use of diminished capacity defenses, Assemblyman Alister McAlister, a supporter of tighter restrictions, suggested that, "this is the time for us to ... reverse these outrageous decisions and reassert legislative authority." \textit{Id.} In calling for a reversal of "these outrageous decisions," McAlister also was referring to a trend of cases from the California Supreme Court. These cases had construed the meaning of premeditation and deliberation (for purposes of California's murder statute) to include the requirement that the defendant could "maturely and meaningfully reflect upon the gravity of his contemplated act." See, e.g., People v. Wolff, 394 P.2d. 959 (Cal. 1964).

\textsuperscript{26} H.L.A. HART, \textit{PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW} 17 (1968).

\textsuperscript{27} Estelle v. Gamble, 429 U.S. 97, 102 (1976) (citations omitted).

This Article will examine the operation of the guilty but mentally ill verdict that emerged as a popular alternative from the rush to reform the insanity defense. In particular, it will focus on whether or not the verdict allows jurors to evade their primary responsibility in a criminal trial — viz., the task of judging the moral culpability of a criminal defendant. Although a brief discussion of limited psychological issues will prove to be both relevant and necessary to this analysis, this Article does not purport to address adequately the clinical issues that arise from this discipline. This Article will, however, examine the level of discernment employed by legislators and other contributors to the policy-making debate. In doing so, the Article will focus on the sufficiency with which the reformers addressed the legal and ethical concerns at the foundation of the debate.

Part II of this Article will present some background on the insanity defense and will analyze the different statutory versions of the guilty but mentally ill verdict enacted by several jurisdictions. Part II will further examine the context in which this type of legislation was passed. Part III of this Article will examine the ethical or moral questions implicated in this discussion of the insanity defense, the GBMI verdict, and the subsequent disposition and treatment of mentally ill defendants. Part III will also discuss various theories of culpability and punishment and then will examine how the GBMI verdict corresponds to the concerns of each. Part IV will discuss case law from various GBMI states and will evaluate a prisoner's right to mental health treatment. Part IV also will analyze Eighth Amendment cruel and unusual punishment arguments that arise from the denial of psychological or psychiatric treatment. Finally, Part V of this Article will conclude with policy proposals and legislative options that address the ethical concerns raised in the preceding sections. This proposal seeks to restore to the jury its original task: examining the defendant's mental state for the purposes of judging his culpability and responsibility for the offense. By removing treatment and dispositional considerations from the realm of the jury — decisions that are best reserved for mental health professionals — the revised verdict will ensure that jurors render an honest judgment on a defendant's culpability. This goal may be achieved by eliminating the guilty but mentally ill verdict's false dichotomy — one that purports to consider the defendant's mental illness for purposes of both culpability and sentencing.
II. THE GBMI VERDICT AND THE INSANITY DEFENSE

A. "Hinckley Plus" - The Impetus for GBMI

The acquittal of John Hinckley, although extremely important as both a symbol and a source of the public's frustration and concern, did not stand alone in the debate over the insanity defense. Several other factors that either predated or coincided with Hinckley's acquittal focused the attention of the legal community (and that of society as a whole) on how the penal system addressed issues of mental illness. Paramount among these concerns was the widely held public perception that insanity acquittees might return to society after being confined in a mental health care facility for only a relatively short period. Developments in the fields of law and psychology have intensified this belief. Discussing the "special plea of insanity," Professor Norval Morris notes that "psychiatric practice and constitutional decisions have facilitated the earlier release of those found not guilty by reason of insanity than when the back wards of mental hospitals held them for periods longer, on the average, than they would have served had they been convicted of their crimes." As a result of this perception, many jurisdictions acted to curtail occurrences of NGRI acquittees being returned to society after only a short period of confinement.

The state of Georgia, for example, enacted its GBMI verdict to prevent insanity acquittees from gaining an "early release" from mental health institutions:

As in Michigan, the GBMI verdict was adopted in Georgia by the legislature as a response to a court ruling in which the procedural safeguards for defendants acquitted on the grounds of insanity were broadened. The GBMI verdict was passed shortly after a U.S. District Court ruling in Benham v. Edwards (1980) that overturned the state's practice of automatically committing all persons who had success-

29. See Norval Morris, Madness and the Criminal Law 29-86 (1982). Professor Morris discusses several underlying problems that plagued the insanity defense and the modern system in the pre-Hinckley period. Among these problems, Morris cites society's concern that insanity acquittees would be released prematurely from mental health institutions. This perception was in relation to the potential penal incarceration that the acquittee could have faced if found simply "guilty."

30. Id. at 34-35 ("Again, public anxiety fueled political concern that this defense was becoming a contrivance, a subterfuge, and that even where it was validly pleaded the public should not be expected to bear the risk of further criminal acts by those who escaped punishment because of their mental illness.").

fully raised the insanity defense. The court ruled that Georgia’s procedures were unconstitutional. The enactment of Georgia’s GBMI statute is a “clear example of state efforts to safeguard the public interest in the wake of a series of judicial rulings that broadened the procedural safeguards of insanity defendants.” It is only against this background — the motivations of the movement to reform the insanity defense — that the GBMI verdict may be evaluated properly.

A recent New York study suggests that some of the fears at the heart of the reform movement’s momentum may have been misplaced. According to the study, insanity acquittees in certain categories actually were confined for longer periods than those defendants who had been found guilty of the same offenses. Steadman et al. conducted a study on the length of periods for which various types of insanity acquittees (NGRI) and convicts (guilty) were confined. They concluded that for offenses described as “other violent crimes” such as rape, kidnapping and assault (but not including murder), “insanity acquittees were confined for longer periods of time than those found guilty on the same charges.” In fact, insanity acquittees served nearly twice as long as those found guilty. According to the study, the

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32. Steadman et al., supra note 16, at 104-105 (citing Benham v. Edwards, 501 F. Supp. 1050 (N.D. Ga. 1980)). The district court in Benham invalidated Georgia’s civil commitment procedures which automatically committed all defendants who were found not guilty by reason of insanity. Furthermore, the Benham decision also rejected Georgia’s presumption of continuing insanity that governed the state’s release procedures for insanity acquittees. After the court ordered hearings for all insanity acquittees to determine whether or not they met involuntary commitment standards, “55 of the 127 insanity acquittees confined [in Georgia] were released.” Steadman et al., supra note 16, at 104-105.

33. Steadman et al., supra note 16, at 104-105 (“The cumulative effects of these rulings mandated that the commitment and release procedures of insanity acquittees closely resemble those required for civil commitments.”).

34. Id. at 98.

35. Id. The Steadman study examined the periods of confinement for both insanity acquittees and convicts in three categories of crimes: murder, other violent crimes (physical assault, rape, and kidnapping), and non-violent crimes (robbery, property offenses, and other minor offenses). According to the study:

We also compared the lengths of confinement of defendants pleading insanity who were found guilty with those acquitted NGRI. Contrary to popular belief, insanity acquittees in New York were confined as long or longer than those found guilty. Although there was no difference in the length of confinement of insanity acquittees and those found guilty of murder, there were significant differences for the other two categories, other violent crimes and nonviolent crimes.
same trend held true for non-violent crimes (e.g., property offenses and robbery). In cases of murder (categorized in the study as "violent crime") the length of confinement for those defendants found guilty and for insanity acquittees was nearly identical.  

The possibility that the reform's motivating factors were falsely held may influence how one assesses the products of reform. The factual predicate for the reform movement — viz., concern about insanity acquittees gaining early release — was central to arguments that legislative solutions properly balanced the competing interests of public safety and the individual rights of mentally ill defendants. If insanity acquittees were in fact confined for longer periods than those found guilty, then public safety was not threatened to the degree that many reform proponents had argued. If this proposition is true, legislators improperly compromised the rights of mentally ill defendants to compensate for an erroneous or overstated fear.  

Other misperceptions also may have fueled attempts to reform the insanity defense in the early 1980's. Many of these stimuli, although factually inaccurate, were accepted by society and by the legal and legislative communities. This factor solidifies the need to examine the reform movement and the effects

For these crimes, insanity acquittees were confined for longer periods of time than those found guilty on similar charges. The median length of stay for those found NGRI for other violent offenses was 5.25 years compared to 2.7 years for those found guilty — nearly twice as long. Similarly, for nonviolent offenses, the median length of stay for NGRI acquittees was 2.8 years compared to 8.5 months for those found guilty — nearly four times as long. It is important to note that the long lengths of stay for insanity acquittees was not due to the (insanity defense) reform; we found no changes in length of confinement due to the reform.

Id. at 98 (emphasis in original).

36. Id.

37. See supra notes 29-33 and accompanying text.

38. See John Q. LaFond and Mary Durham, Cognitive Dissonance: Have Insanity and Civil Commitment Reforms Made a Difference?, 39 VILL. L. REV. 92-96 (1994). LaFond and Durham cite numerous studies and statistics which demonstrate the breadth of the public's misinformation with respect to the insanity defense. Specifically, the authors accentuate the common misperceptions that the insanity defense is used more often and with greater success than is actually the case. See id. at 92 & n.100 - n.104. LaFond and Durham assert that:

[A] recent study of eight American cities found that the insanity plea was used in only one per cent of felony cases. Of these felons who plead insanity, only about twenty-six per cent are successful in convincing a judge and jury to excuse them from their crime. Although it is rarely used, and seldom successful, attorneys, judges,
that it has had on the penal system — specifically the rights of mentally ill defendants. Although calls for reform were fueled by emotion and popular sentiment in favor of safeguarding public safety, prudence and justice mandate that we examine whether or not the individual rights of mentally ill defendants were improperly sacrificed. This discussion will necessarily focus on how jurors in a GBMI jurisdiction regard the GBMI offender’s assertion of mental illness. If jurors examine the GBMI offender’s mental state at the time he committed the offense for the purpose of deciding treatment or post-guilt phase disposition, then the GBMI verdict corrupts the jurors’ role. If, however, jurors examine the GBMI defendant’s mental state at the time he committed the offense for the purpose of judging the defendant’s culpability and criminal responsibility, then the GBMI verdict may be classified as a “proper” jury device.

B. The Role of the Jurors: With and Without a GBMI Option

Against a background of public sentiment in favor of reforming the insanity defense, many jurisdictions enacted the guilty but mentally ill verdict. The GBMI verdict contributes an additional dynamic to the already difficult task that faces jurors in a criminal trial. In a system without a GBMI option, a jury may choose from only two options other than the “not guilty” verdict — “guilty” or “not guilty by reason of insanity” (NGRI) — when confronted with a defendant who asserts a diminished capacity defense in the face of evidence that establishes beyond a reasonable doubt that the defendant engaged in the conduct alleged in the indictment. Critics of this two-choice system argue that jurors are precluded from addressing “shades of culpability” that they detect while assessing a defendant’s mental illness. Professor Norman J. Finkel notes that “traditional insanity tests... ask for an all-or-none culpability decision: in essence, the jury must find the defendant [who engaged in the forbidden conduct] either guilty or NGRI.” Finkel also claims that this “all-or-none” approach “fails to reflect the complex culpability judgments that

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39. Specifically, thirteen states enacted a form of the GBMI verdict. Michigan was the first to pass such a statute in 1975. After Michigan, the other twelve states to enact the GBMI verdict were: Alaska, Delaware, Georgia, Illinois, Indiana, Kentucky, Montana, New Mexico, Pennsylvania, South Carolina, South Dakota, and Utah. See statutes cited supra note 18.

40. Finkel & Slobogin, supra note 7, at 449 (emphasis added).
The decision that faces jurors is indeed a difficult one. This difficult decision — assessing the defendant's culpability — must be made in order for the criminal justice system to operate effectively. As part of a system that shields blameless offenders from punishment, jurors assume the responsibility of safeguarding the rights of mentally ill defendants. At the same time, the community's interest in punishing blameworthy defendants for their harmful conduct also rests with the members of the jury. If these two competing interests of the penal system are to be addressed, then jurors, despite the difficult nature of the task, must render an honest judgment regarding the culpability and criminal responsibility of mentally ill defendants.

Addressing the concerns of those who criticize the "all-or-none" culpability decision in a two-choice system, the guilty but mentally ill verdict presents jurors with a third option. While the details of the statute vary according to jurisdiction, the disposition of the defendant who is found guilty but mentally ill generally remains unchanged. By finding the defendant guilty of the offense charged, the GBMI option allows jurors to address the harmful act committed against society. At the same time, the verdict also allows jurors — by finding that the defendant suffered from a mental illness at the time he committed the offense and by labelling him "mentally ill" — to address their hesitations about punishing a mentally ill defendant. The guilty but mentally ill verdict is therefore a more rigid verdict than not guilty by reason of insanity. While the defendant found NGRI will likely be committed to a treatment facility and therefore may become eligible for release, the GBMI defendant, if convicted, may serve the statutory maximum prison sentence.

41. *Id.* at 450. Finkel has recently elaborated on the nature of what he calls the "all-or-none" approach of a two-choice system. According to Finkel, "[i]f people see 'grey' but insanity is described as 'black-or-white,' then jurors have another problem: they must fit 'grey' into one of two categories, neither of which matches their judgment." Norman J. Finkel, *Culpability and Commonsense Justice: Lessons Learned Betwixt Murder and Madness*, 10 *Notre Dame J. L. Ethics & Pub. Pol'y* 11, 40 (1996).

42. For statutory purposes, it is important to note that the jury determination of mental illness under the GBMI verdict falls below the definition of legal insanity. The difference between the two terms — and how medicine and law define or diagnose the two — is not exactly clear. This inability to distinguish the terms and, more importantly, the clinical conditions themselves, suggest the inconsistent and arbitrary nature of GBMI verdicts. See *infra* notes 52-54 and accompanying text.

43. *See* LaFond and Durham, *supra* note 38, at 71.
As a result, the GBMI verdict may alleviate jurors' fears that they have not adequately addressed the defendant's mental illness. Although this third option — GBMI — may address the concerns of critics such as Finkel who argue that jurors detect "shades of culpability," the dangers of the verdict outweigh its advantages. An additional option for jurors, such as the GBMI verdict, allows them to "hedge their bets" and evade their responsibility. When presented with evidence of mental illness, many jurors may hesitate to punish an individual whom they view as less blameworthy than the severity of a guilty verdict would otherwise indicate. Similarly, jurors may hesitate to acquit a mentally ill defendant due to the possibility that he may readily return to society uncured. This difficult decision, the assessment of the defendant's culpability, must be made for the criminal justice system to operate effectively. In its current form, the guilty but mentally ill verdict allows jurors to evade this task of judging whether or not a defendant's mental illness negates — or at the very least reduces — culpability and criminal responsibility. The GBMI verdict examines the defendant's mental illness at the time of the offense for the purpose of treatment (and sentencing) rather than for the purpose of determining his criminal responsibility. As a result, the GBMI verdict compromises a major premise of the Anglo-American jury system and Anglo-American criminal law.

In addition to these concerns, the significance attached to the jury's finding of mental illness is also suspect when it is the product of a GBMI verdict. Despite a jury's determination that the defendant was "mentally ill," a GBMI defendant is sentenced as if he had been found simply "guilty." Steadman et al. correctly state that "[d]efendants found GBMI are sentenced in the same manner as others who have been convicted. GBMI laws vary as to the requirements for the provision of mental health care during incarceration."44 The last sentence of this statement is perhaps the most troubling aspect of the guilty but mentally ill verdict. The logistical considerations of delivering mental health treatment to a GBMI prisoner — provisions that specify who is to receive mental health treatment once placed into the system, and what type of treatment is to be administered — are seldom sufficiently enumerated under the current statutes. In fact, some jurisdictions have adopted versions of the GBMI statute which do not guarantee that the jury's determination of mental illness will ever be addressed after the guilt phase of the trial:

44. Steadman et al., supra note 16, at 38 (emphasis added).
If a defendant is found GBMI, he may be sent either to a psychiatric facility for treatment or to prison for punishment. . . . An even harsher version of the GBMI defense allows the jury to convict the defendant while also expressing its opinion that he was mentally ill at the time of the offense. Following conviction, offenders found GBMI may, but need not, be offered psychiatric treatment while incarcerated.45

In most jurisdictions, the GBMI statute fails to guarantee psychiatric treatment for the defendant who has been adjudicated mentally ill.46 In practice, the treatment provisions in most GBMI statutes are rendered illusory by the manner in which the statute itself operates. Perhaps most disturbing is the reality that “[c]ontrary to the expectation that accompanied GBMI legislation, GBMI offenders are no more likely to receive treatment than mentally ill offenders in the general inmate population who have not been found GBMI.”47 As a result, the guilty but mentally ill verdict raises serious ethical and legal concerns. By allowing jurors to evade their primary responsibility (judging the defendant’s culpability for his actions), and by failing to guarantee mental health treatment, the GBMI verdict detracts from the effectiveness and integrity of the criminal justice system.

C. Varying Structures of the GBMI Statute

Most GBMI inmates discover the harsh reality of the GBMI verdict after they are sentenced and placed into the correctional system. The source of this reality is the failure of most states to guarantee psychiatric treatment to GBMI inmates. This failure can be traced to the structure and the language of the various GBMI statutes. This aspect of insanity defense reform remains among the most troubling for legislators who seek to strike a proper balance between the competing interests at issue: public safety and the rights of the mentally ill defendant. The difficulty inherent in such a task is readily apparent when one examines the thirteen different GBMI statutes that are on the books.

Although the treatment clauses in differing versions of the GBMI statutes contain substantial variations, the basic structural elements of the guilty but mentally ill verdict remain largely uniform from jurisdiction to jurisdiction. Three basic elements are

45. LaFond and Durham, supra note 38, at 84 (emphasis added).
46. Id. at 103.
47. Id. (“GBMI offenders are eligible for treatment in most states only if a post-conviction mental health evaluation indicates such a need and, then, only if such resources are available to provide it.”) (emphasis added).
common to nearly all thirteen GBMI statutes. The statutes require the trier of fact to address all three elements before finding a defendant guilty but mentally ill. New Mexico's guilty but mentally ill statute, for example, clearly illustrates the necessary elements:

When a defendant has asserted a defense of insanity, the court may find the defendant guilty but mentally ill if after hearing all of the evidence the court finds beyond a reasonable doubt that the defendant:

(1) is guilty of the offense charged;
(2) was mentally ill at the time of the commission of the offense; and
(3) was not legally insane at the time of the commission of the offense.\(^4^8\)

Although nearly all thirteen of the GBMI jurisdictions retain these basic and common statutory elements, several jurisdictions vary the burden of proof required for the second and third prongs of the statute.\(^4^9\) Most states, however, require that all three elements must be proven beyond a reasonable doubt. Other states, such as South Carolina, require the defendant to prove, by a preponderance of the evidence, that he was mentally ill at the time he committed the offense.\(^5^0\) Still other jurisdictions completely eliminate this third prong (that "the defendant was not legally insane at the time of the commission of the offense") from the statutory scheme.\(^5^1\)

Throughout this discussion of the guilty but mentally ill verdict, it is important to note the distinction between "legal insanity" and "mental illness." New Mexico, for example, distinguishes the two classifications within the text of its statutes:

"[M]entally ill" means a substantial disorder of thought, mood or behavior which afflicted a person at the time of


\(^{49}\) This article will not examine Due Process arguments that stem from shifting the burden to the criminal defendant on the issue of mental illness. For an examination of these arguments see, e.g., Note, The Guilty But Mentally Ill Verdict and Due Process, 92 Yale L. J. 475 (1983).

\(^{50}\) See, e.g., S.C. Code Ann. § 17-24-20(B) (Law. Co-op. Supp. 1994). The South Carolina statute illustrates this dichotomy:

To return a verdict of "guilty but mentally ill" the burden of proof is upon the State to prove beyond a reasonable doubt to the trier of fact that the defendant committed the crime, and the burden of proof is upon the defendant to prove by a preponderance of the evidence that when he committed the crime he was mentally ill . . ."

Id. (emphasis added).

the commission of the offense and which impaired that person's judgment, but not to the extent that he did not know what he was doing or understand the consequences of his act or did not know that his act was wrong or could not prevent himself from committing the act.  

This distinction between "mental illness" and "legal insanity" is important to the determination of which defendants will meet the eligibility requirements under each statute. In practice, however, this distinction is not easily applied. Professor Finkel has discussed the difficulty inherent in defining the differences between "mental illness" and "legal insanity." Finkel believes that the two terms have become separated and identifiable exclusively with only one discipline (either medicine or law, respectively). As a result, "medicalized definitions of 'mental illness' and 'insanity' leave these terms outside ordinary thinking, removing insanity from its proper moral context." The GBMI verdict's expectation that jurors will be able to draw such a distinction is

52. N.M. STAT. ANN. § 31-9-3(a) (Michie 1984 & Supp. 1994). Kentucky's GBMI statute also draws a clear definitional distinction between "mental illness" and "legal insanity." According to the Kentucky legislature's definition:

"Mental illness" means substantially impaired capacity to use self-control, judgment, or discretion in the conduct of one's affairs and social relations associated with maladaptive behavior or reduction in emotional symptoms where impaired capacity or maladaptive behavior, or emotional symptoms can be related to physiological, psychological, or other factors.

KY. REV. STAT. ANN. § 504.060 (Michie/Bobbs-Merrill 1990). The Kentucky statute also defines "insanity" to mean "that as a result of mental incapacitation, lack of substantial capacity either to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of the law." Id.

53. See NORMAN J. FINKEL, INSANITY ON TRIAL 73 (1988). Finkel explains this phenomenon and notes that it has become generally accepted by some. The historical courtship and developing contention between the disciplines of law and psychology seems to have produced an understanding that "insanity" is a legal, not psychiatric, concept. In the process of differentiating "insanity" from "mental illness," a corollary has emerged and gained the status, in some quarters, of a self-evident truth: the corollary asserts that mental disease is a medical concept, and one that the medio-psychological expert is uniquely, if not solely, qualified to address. Some are no doubt content with this decoupling. After all, the error of the alienists — of conflating "the two quite distinct concepts" of legal insanity and mental illness — has been undone. . . .

Id.

54. Finkel, supra note 41, at 36. Finkel also points to arguments advocating a "commonsense" perspective on the definition or test for legal insanity — one which moves away from medicalized, symptom-based tests for mental illness and insanity. This approach would reflect a "proper moral
therefore problematic. If experts trained in the discipline of psychology grapple with this distinction, assigning such a task to lay jurors introduces confusion into the system. As the New Mexico statute indicates, a defendant who at the time of the commission of an offense was not legally insane but was "suffering from a mental illness is not relieved of criminal responsibility for his conduct and may be found guilty but mentally ill." This distinction forms the basis for continuing to hold GBMI defendants morally blameworthy for their actions despite the jury's finding of mental illness. The validity of this distinction stands at the center of the debate over the guilty but mentally ill verdict and the culpability constraint on the Anglo-American system of criminal justice — an issue that will be addressed in greater detail in Section III.C. of this Article.

Another forceful objection to the guilty but mentally ill verdict relates to shortcomings in the delivery of psychological or psychiatric treatment to mentally ill prisoners. The procedural vagueness which legislatures built into their GBMI statutes highlights a disturbing trend. The overwhelming majority of jurisdictions vest broad discretion in the various correctional or mental health departments to determine the need for psychiatric treatment. Consequently, such treatment is not mandated in a GBMI scheme despite a jury verdict stating that the defendant was mentally ill at the time of the offense. This aspect of the GBMI verdict raises serious questions about the propriety of such statutes. This is not to suggest that jurors ought to diagnose the GBMI defendant's mental state at the time of the trial; nor does it suggest that jurors should have the final word as to how the GBMI defendant ought to be treated for a mental illness. Jurors should not be mislead, however, by an illusory statutory provision which suggests, but often fails to deliver, mental health treatment for GBMI inmates.

The approach taken by the thirteen guilty but mentally ill statutes with respect to sentencing and treatment can be divided, for the purpose of analysis, into two categories. Each of the thirteen statutes begins its sentencing and treatment provision with substantially the same prefatory phrase. Basically, each statute provides that "[t]he court may impose any sentence upon a defendant who has been convicted of the same offense without a judgment, resting on the moral principles that underlie ordinary people's understanding of sane and insane." Id. at 37.


finding of mental illness."57 Following this clause, however, the two types of statutes differ greatly in their sentencing and treatment provisions. The difference relates to the manner in which a jurisdiction approaches the delivery of mental health treatment and to the deference which it gives to correctional or mental health administrators. The fatal flaw in the GBMI system occurs when GBMI offenders do not receive psychiatric or psychological treatment. These jurisdictions (those that defer to correctional agencies the judgment of whether a GBMI defendant should receive mental health treatment) often permit the jury's determination of mental illness to be superseded by the opinion of correctional administrators. As a matter of medical ethics, this arrangement is entirely appropriate. Jurors who expect GBMI defendants to receive such treatment, however, are mislead by the system. This reality in effect renders the jury's judgment on the issue of mental illness illusory and compromises the integrity of the GBMI verdict. The jury's finding may be rendered "illusory" because no significance (aside from mere semantics) is attached to the label. In the end, the jury's determination that the defendant was mentally ill neither guarantees mental health treatment nor mitigates the defendant's legal culpability.

Of the two types of statutory schemes, the best type of GBMI statute guarantees that psychiatric or psychological treatment will be delivered to each defendant who is found guilty but mentally ill. Only three of the thirteen GBMI jurisdictions have structured their statutes in such a manner as to comply with this goal.58 Alaska's GBMI statute, for example, provides that:

The Department of Corrections shall provide mental health treatment to a defendant found guilty but mentally ill. The treatment must continue until the defendant no longer suffers from a mental disease or defect that causes the defendant to be dangerous to the public peace or safety.59

Jurisdictions with GBMI statutes similar to Alaska's will be designated, for the purpose of this article, as "Type I" jurisdictions. Kentucky and South Carolina have enacted GBMI statutes that


58. The three states are Alaska, Kentucky and South Carolina.

are substantially similar to Alaska's statute. The text of the Alaska statute also stipulates that a defendant receiving treatment under the GBMI statute may not be released and must serve the remainder of his or her sentence after treatment has terminated. At a minimum, the three Type I jurisdictions, although they do not specify precisely the levels of treatment that are required, guarantee that the jury's finding of mental illness will be honored. Furthermore, the three Type I jurisdictions assure that providing treatment to defendants will take priority over bare penal incarceration for their offenses.

The second type of guilty but mentally ill statute appears in the ten remaining GBMI jurisdictions ("Type II" jurisdictions). Type I jurisdictions, best represented by South Carolina's GBMI statute, emphasize the goal of treating the GBMI offender to the same degree that they emphasize incarceration. South Carolina, for example, pledges first to treat the GBMI offender and then to incarcerate him. Conversely, Type II jurisdictions primarily emphasize the initial incarceration of the defendant. In addition, Type II jurisdictions fail to guarantee that mental health professionals will address the jury's finding of mental illness. The vast majority of Type II jurisdictions have enacted GBMI statutes which provide that:

The court may impose any sentence upon a defendant which could be imposed pursuant to law upon a defendant who has been convicted of the same offense without a finding of mental illness; provided that if the defendant is sen-


The court shall sentence a defendant found guilty but mentally ill at the time of the offense to the local jail or to the Department of Corrections in the same manner as a defendant found guilty. If the defendant is found guilty but mentally ill, treatment shall be provided the defendant until the treating professional determines that treatment is no longer necessary or until the expiration of his sentence, whichever occurs first.


If the sentence imposed upon the (GBMI) defendant includes the incarceration of the defendant, the defendant must first be taken to a facility designated by the Department of Corrections for treatment and retained there until in the opinion of the staff at that facility the defendant may safely be moved to the general population of the Department of Corrections to serve the remainder of his sentence.


61. Type II jurisdictions include Delaware, Georgia, Illinois, Indiana, Michigan, Montana, New Mexico, Pennsylvania, South Dakota, and Utah.

tenced to the custody of the corrections department, the department shall examine the nature, extent, continuance and treatment of the defendant’s mental illness and shall provide psychiatric, psychological, and other counseling and treatment for the defendant as it deems necessary.  

Indeed, most of the Type II jurisdictions require the Department of Corrections to examine the GBMI defendant and provide such treatment as “it deems necessary” or “as it deems psychiatrically indicated.” Georgia, for example, states that once a GBMI offender is in a penal facility, he “shall be further evaluated and treated within the limits of state funds appropriated” and as “psychiatrically indicated.” By qualifying and conditioning the requirement for mental health treatment, many Type II states erode the effectiveness of the GBMI verdict. These statutes weaken a state’s ability to properly address the treatment needs of offenders who are neither legally insane nor fully blameworthy for their offenses.

The pivotal phrase “as it deems necessary” distinguishes the procedural operation of Type II jurisdictions from that found in Type I states. This phrase effectively enables Type II jurisdictions to disregard the jury’s determination that the defendant was mentally ill at the time the offense was committed. If a jury finds a defendant guilty but mentally ill, and the state corrections department later determines that the defendant does not need treatment, the GBMI verdict has been rendered illusory. In this situation, the disposition of the GBMI offender will mirror that of a defendant who is simply found “guilty” of the offense. The objection to the GBMI verdict is therefore clear: the GBMI verdict has no real effect apart from merely distinguishing GBMI offenders from other prisoners by labeling them “guilty but mentally ill.” As a result, jurors who believe that they had distinguished the GBMI defendant from the guilty defendant would discover (if jurors were informed of what happens to the defendant after their verdict was rendered) that the system treats the two classes of defendants almost identically. In its operation (especially in Type II jurisdictions) the GBMI verdict poses procedural obstacles to delivering mental health treatment to a defendant whom the jury has judged to be mentally ill.

64. GA. CODE ANN. § 17-7-131(g)(2) (1985) (emphasis added).
It is important to note that a jury's determination of mental illness does not always comport with the finding of the mental health expert who examines the defendant in a correctional or mental health care facility. These mental health exams do not always expose the need for mental health treatment, nor do they guarantee its delivery. Although I will concede that ethical considerations preclude a mental health care expert from treating a patient based solely on the opinion of a lay jury, the GBMI system nevertheless must honor the jury's determination of mental illness at some meaningful level. If the GBMI scheme fails to ensure that state officials will address (for the purpose of treating the GBMI inmate) the jury's determination of mental illness, then at the very least, the issue of mental illness must be addressed for the purpose of judging the defendant's culpability. The question of culpability — a question that examines the defendant's capacity to choose and to act — implicates the extent to which the penal system ought to punish criminal defendants. In order to determine whether or not the GBMI verdict comports with Anglo-American standards of justice, it is necessary to examine the GBMI scheme and whether it compromises the jury's role of judging the defendant's culpability. In order to answer the question of whether or not the GBMI verdict should be retained, critics and opponents must evaluate how well the statute meets its objectives, and how well it balances the competing interests of the community.

III. A Matter of Principle: Culpability, Ethics, and the GBMI Verdict

A. The Guilty But Mentally Ill Verdict Has Failed to Achieve Its Goals

The viability of the guilty but mentally ill option depends upon whether the GBMI statutes properly balance the competing interests of public safety and the rights of individual defendants. The guilty but mentally ill verdict was enacted primarily to ease public concern and fear over the number of NGRI defendants who are acquitted and who could potentially gain their release shortly after being committed. In addition, the GBMI verdict

66. See LaFond and Durham, supra note 38, at 109 ("Although at least ninety per cent of GBMI offenders actually receive post-conviction mental health evaluations, studies indicate that some form of treatment is recommended in only 64% - 72% of cases.").

67. See McGraw et al., supra note 65, at 121. McGraw summarizes the goals of the GBMI verdict and offers several reasons why such statutes were enacted:
ostensibly addresses issues related to the defendant's mental health and treatment needs. The guilty but mentally ill verdict has failed to meet both of these goals and therefore should not continue in its current form. Although the GBMI verdict has succeeded in providing jurors with an attractive option to either a NGRI verdict or a simple "guilty" verdict, in practice legislators have failed to provide jurors with an option that actually delivers what it promises. Although the GBMI verdict provides a label (guilty but mentally ill) that is less severe than "guilty," the verdict often provides defendants with a sentence that is no less harsh than that which a guilty verdict would provide.

The American Bar Association in 1989 published its Criminal Justice Mental Health Standards, in which it stated that "[s]tatutes which supplant or supplement the verdict of not guilty by reason of mental nonresponsibility [insanity] with a verdict of guilty but mentally ill should not be enacted." After raising preliminary questions about the constitutionality of a GBMI option, the ABA standards also assert that GBMI statutes have failed to accomplish their goals. Citing a 1982 Michigan study on that state's GBMI verdict, the ABA noted that "the number of nonresponsibility acquittals in Michigan since passage of the 1975 GBMI statute has actually increased. Ironically, it is likely that one reason for this increase has been the GBMI verdict itself."

Unlike the NGRI and "guilty but insane" verdicts, which hold the defendant blameless, a GBMI verdict holds the defendant criminally responsible for the offense. Thus, it allows imposition of the same sentence that could be given a defendant found guilty of the offense, yet promises mental health evaluation or treatment during the term of the sentence. Prompted by highly publicized cases... legislators hoped that the GBMI verdict would offer jurors an attractive alternative to the NGRI verdict and thereby prevent the early release of dangerous insanity acquittees.

Id.

68. AMERICAN BAR ASSOCIATION, ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS § 7-6.10, at 389 (1989).

69. Id. at 391-392 (arguing that many GBMI statutes may be unconstitutional on their face since they do not 'accord exculpatory significance to even the type of gross psychosis that would preclude requisite mens rea').


71. AMERICAN BAR ASSOCIATION, supra note 68, § 7-6.10, at 392 (noting that "[d]efendants who ordinarily would not have pleaded mental nonresponsibility [insanity] may now do so, on the theory that even if they are unsuccessful, on the responsibility issue they may avoid outright conviction and imprisonment through a GBMI finding."). Similarly, in his 1982 testimony before the U.S. Senate Judiciary Committee, Rudolph Giuliani, at the time
Although the increase in NGRI acquittals over the six-year period was negligible, the Michigan study concluded that "to the extent that the insanity defense remains unaffected by the GBMI verdict, the GBMI statute has failed to meet its goal of reducing NGRI acquittals." South Dakota, for example, enacted its GBMI statute for the precise purpose of reducing the number of criminal defendants who are found not guilty by reason of insanity. According to the ABA, however, adding the GBMI option encourages defendants to plead mental nonresponsibility. These defendants, hoping to be found at least guilty but mentally ill, may actually receive an erroneous NGRI acquittal. By increasing the pool of defendants who plead mental nonresponsibility, the GBMI option may increase the likelihood of NGRI acquittals.

Trends and statistics such as those found in the state of Michigan (and cited by the American Bar Association) indicate that the guilty but mentally ill verdict has failed to reduce both the number of defendants who assert the insanity defense and the number of defendants who are found not guilty by reason of insanity. Thus, as to the first prong of the competing interests

Associate Attorney General of the United States, stated, "[t]hat is why we have real reservations about the 'guilty but mentally ill' approach. It's just inherently confusing and unless you define 'mentally ill' narrowly it's going to actually, in our view, expand the number of situations in which you could assert insanity . . . ." See Senate Hearings, supra note 22, at 45.

The Michigan study conducted by Smith and Hall examined the number of NGRI acquittals during the four-year period (1971-1975) prior to the enactment of the GBMI verdict, and the number of NGRI acquittals in the six-year period (1976-1981) after the GBMI verdict was enacted. According to the results, in the four years prior to implementation of the GBMI verdict an average of 0.025% of adult males charged with crimes were found NGRI. Similarly, after six years with the GBMI verdict the study found an average 0.026% of adult males charged with crimes were found NGRI. See Smith & Hall, supra note 7, at 93.


Robinson v. Solem, 432 N.W.2d 246, 248 (S.D. 1988). The Supreme Court of South Dakota determined that "our legislature intended to provide an alternative verdict available to a jury to reduce the number of offenders who were erroneously found not guilty by reason of insanity." Id. (emphasis added).

See INGO KEILITZ ET AL., THE INSANITY DEFENSE AND ITS ALTERNATIVES: A GUIDE FOR POLICYMAKERS 43 (1984). Summarizing a study of Michigan's GBMI verdict, Keilitz writes that "[p]roponents and critics of the GBMI verdict anticipated that the verdict would cause a substantial decrease in the number of NGRI acquittals. An empirical analysis of the GBMI verdict indicates that the verdict has not functioned as expected. . . . Thus, to the extent the GBMI verdict was intended to decrease NGRI acquittals, it has failed." Id.
which the GBMI verdict seeks to balance — public safety — the legislative initiative has not accomplished its goal. Similarly, the GBMI verdict also has failed to safeguard the rights of mentally ill defendants and inmates. By requiring mental health treatment only when the state “deems it necessary” or is able to afford it, many GBMI jurisdictions (especially those designated as Type II jurisdictions) effectively subordinate treatment needs to the goal of punitive incarceration. In fact, GBMI offenders receive mental health treatment in only two-thirds of all cases. In addition to Eighth Amendment considerations and the failure to guarantee mental health treatment, the GBMI option, as an improper jury device, also threatens the rights of defendants and the integrity of the judicial system.

B. Confusing the System: The GBMI Option and Standards of Justice

Observers of the criminal justice system may yield to the temptation of disregarding how the guilty but mentally ill verdict affects a key member of the judicial system: the juror. Throughout this discussion of the GBMI verdict the juror has been mentioned frequently. Despite an inclination to focus primarily on the parties “directly” involved in the criminal litigation (i.e., the defendant and society), we must eschew a similar inclination to minimize the impact that this additional verdict may have on our jury system. Despite the relative simplicity of most GBMI statutes and their wording, the task assigned to the jury is often complex. In any jury system (whether it be a two-choice system or a three-choice system), jurors are asked to make difficult

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76. See supra notes 44-47 and accompanying text (discussing the likelihood that many GBMI offenders, once in the prison system, will not be treated any differently than those offenders who have been found guilty).

77. See supra notes 61-66 and accompanying text (discussing conditions under which some states will offer mental health treatment to GBMI offenders). Georgia, for example, states that GBMI offenders shall be further treated “within the limits of state funds appropriated.”

78. See LaFond and Durham, supra note 38, at 103 (noting that treatment is recommended in only 64% to 72% of all GBMI cases in which the offender has received a mental health evaluation).

79. Eighth Amendment questions concerning GBMI offenders’ constitutional right to mental health treatment will be discussed in section IV of this Article.

80. See Finkel, supra note 41, at 40-43. Finkel speaks of the choices (other than a simple “guilty” verdict) that are available to jurors when confronted with a mentally ill defendant. Specifically, the two choice system allows for a “not guilty” verdict or a “not guilty by reason of insanity.” The three-choice system offers jurors “not guilty,” “not guilty by reason of insanity,” and “guilty but mentally ill” or some other form of a “diminished responsibility” verdict.
judgments about the culpability of a defendant. When presented a third option of guilty but mentally ill, jurors may be tempted to select the "middle ground" or the "easy way out" that a GBMI verdict offers.81 The ABA, calling the jury's task (of judging the defendant's culpability) in an insanity trial "essentially a moral judgment,"82 stated that "the guilty but mentally ill verdict offers no help in the difficult decision of assessing a defendant's criminal responsibility."83

This difficult task that jurors face — viz., judging the culpability of the criminal defendant — is compounded by a statutory distinction that remains troublesome even for experts in the mental health field. Each of the thirteen GBMI jurisdictions distinguishes between "mental illness" and "insanity." Professor Finkel asserts that the absence of a refined definition of "mental illness" "bedevils the discipline of psychology as well" as laypersons.84 The complex issue of assessing the defendant's culpability or blameworthiness should not be confused by distinctions and legislative creations that are often misleading. The addition of the guilty but mentally ill verdict introduces a potentially dangerous element into juries' processes of deliberation. Mindful of the competing interests at issue (public safety and the individual rights of a defendant), jurors, when asked to label a mentally ill defendant who they believe committed an offense either "guilty," "mentally ill," or "legally insane," may choose the "safer" option of GBMI. Jurors who hesitate to sentence a nonresponsible defendant to prison, or acquit a guilty offender on the grounds of insanity, may allay those concerns by choosing the GBMI

81. See The Insanity Defense: ABA and APA Proposals for Change, 7 MENTAL DISABILITY REP. 136, 144 (1983) (hereinafter ABA and APA Proposals). But see Finkel, supra note 41, at 40-42. Finkel contradicts such claims that jurors use the GBMI verdict as an "easy way out" of making difficult assessments of a defendant's culpability. He notes that critics have argued against a verdict that offers jurors a third option. These critics, according to Finkel, assert that the GBMI verdict may lead to erroneous convictions of criminal defendants who, because of their reduced mental capacity, ought to be exculpated. Finkel takes issue with a 1987 study that produced a GBMI verdict in 66.7% of all hypothetical cases that were submitted to the subject-jurors. He cites his own 1989 study in which 41% of all hypothetical cases resulted in a verdict of "Diminished Responsibility." Noting that his numbers were a "far cry" from the 66.7% figure in the 1987 study, Finkel concludes that his study "does not immediately suggest overuse" of such diminished responsibility verdicts. Finkel, supra note 41, at 41 (construing Caton F. Roberts et al., Implicit Theories of Criminal Responsibility: Decision Making and the Insanity Defense, 11 LAW & HUM. BEHAV. 207 (1987)).

82. See ABA and APA Proposals, supra note 81, at 141.

83. Id.

84. See Finkel, supra note 53, at 74.
option which guarantees that a defendant will serve some portion of a prison term.

By "hedging their bets" and selecting the GBMI option, jurors may in fact be acting under a false belief that a GBMI offender will actually receive treatment for the mental illness that they have noted. Stripped of the "guilty but mentally ill" label, the GBMI verdict leaves a prisoner in substantially the same situation as would a "guilty" verdict. The National Mental Health Association recognized this problem in a 1983 study of the guilty but mentally ill verdict. According to the NMHA, "[i]f persons convicted under either statute ('guilty but mentally ill' and 'guilty') are treated the same in terms of disposition, we have developed different verdicts without any distinction. This may further mislead juries into believing that a 'guilty but mentally ill' verdict will somehow insure treatment and at the same time protect the community."85 Providing jurors with an instruction stating that a GBMI verdict would not guarantee psychiatric treatment for the imprisoned GBMI defendant merely illustrates, rather than solves, the nature of the problem with the verdict.

Addressing these problems with GBMI, the American Bar Association has charged that the verdict is "at best confusing and at worst extremely prejudicial."86 The ABA made this assertion in light of the "strong possibility that jurors, seeing little distinction between these competing terminologies ('mentally ill' and 'insane') will choose the guilty but mentally ill verdict solely because it appears to result in longer confinement."87 Seizing upon the identical criticism of the GBMI verdict, Professor Norval Morris, albeit with a sarcastic tone, characterizes the confusing nature of the statutory tests for "insanity" and "guilty but mentally ill" as follows:

"Guilty but mentally ill" supplants "not guilty by reason of insanity." Juries must find beyond a reasonable doubt that the accused had the substantial capacity to appreciate the wrongfulness of his conduct and to conform to the law's demands but that he was suffering from a substantial disorder of thought or mood which significantly impaired his judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life. Forgive the rep-

86. See AMERICAN BAR ASSOCIATION, supra note 68, at 393. Specifically, the ABA referred to the typical GBMI instruction that directs when defendants should be found "mentally ill" or "insane."
87. Id.
petition, but these are not easy distinctions — it is like trying to think of a very large gray animal with a trunk without thinking of an elephant. But, as I say, juries can do it — probably because they are informed to the consequences of each verdict. 88

As Morris suggests, the guilty but mentally ill verdict is problematic because it allows jurors to evade the difficult task that is asked of them: judging whether or not the defendant was culpable for his actions and therefore ought to be punished. The GBMI verdict, by allowing jurors to label the defendant "mentally ill" but failing to provide a meaningful distinction in the defendant’s post-trial disposition (vis-à-vis the defendant found "guilty"), leads jurors to believe falsely that they have satisfactorily addressed the defendant’s assertion of mental illness. This possibility threatens the rights of the mentally ill defendant and compromises the integrity of the criminal justice system.

Finally, these dangers raise questions as to whether the guilty but mentally ill option should even be presented to jurors. The American Psychiatric Association, in a 1982 statement, commented that "a jury verdict is an awkward device for making dispositional decisions concerning a person’s need for mental health treatment." 89 Decisions about a defendant’s need for mental health treatment are best reserved for those qualified in the discipline of psychology or psychiatric care. Such decisions, requiring diagnostic experience and clinical knowledge, should not be entrusted to laypersons unskilled in the technical and specialized fields of mental health science. In evaluating the guilty but mentally ill verdict, the American Bar Association classified the GBMI option as an improper verdict. 90 According to the ABA:

[T]he GBMI verdict is deficient for another important theoretical reason: It is not a proper verdict at all. Rather it is a dispositional mechanism transferred to the guilt determination phase of the criminal process .... [A ] jury determination of mental illness at the time of a charged offense is relevant not to criminal responsibility or culpability but to whether the accused person might receive treatment after they have been sentenced. 91

88. Morris, supra note 29, at 84-85.
89. Keilitz, supra note 75, at 45 (quoting The Insanity Defense, ABA and APA Proposals for Change, 7 MENTAL DISABILITY LAW REP. 144 (1983)).
90. See American Bar Association, supra note 68, at 393.
91. Id. at 393-94.
The GBMI verdict loses sight of the jury’s responsibility. By examining a defendant’s state of mind at the time of the alleged offense, jurors must determine whether the defendant possessed the requisite culpable state of mind. This determination will ultimately factor into the jurors’ decision either to hold the defendant criminally responsible or to acquit the defendant. Through their verdict, the jurors are asked to render judgment on whether the defendant was culpable and should be held criminally responsible for his wrongful acts. The jury’s verdict rendered during the guilt phase of a criminal trial should not be a forum through which the jury offers sentencing and treatment recommendations.

This criticism strikes at the heart of concerns about the guilty but mentally ill verdict. Jurors are assigned the task of assessing the moral blameworthiness of a defendant, but the GBMI verdict hinders their progress in this undertaking. By offering jurors a “middle ground” of no practical or operational significance, the GBMI scheme corrupts the determination of the defendant’s culpability. As a result, the GBMI verdict impermissibly allows jurors to circumvent their responsibilities.

C. Circumventing the Cornerstone of Criminal Justice: The Culpability Constraint

In evaluating the legitimacy of the GBMI verdict within the constraints of the Anglo-American concept of culpability, one must contemplate the various factors that serve to exculpate criminal defendants. If severe mental illness negates the defendant’s culpability for his forbidden acts, it would be unjust to punish such a defendant as if he was fully culpable. Similarly, if a defendant suffers from a lesser degree of mental illness that reduces (but does not negate completely) his culpability, it would be equally unjust to punish that defendant as if he was fully culpable. Criminal defendants ought to be punished for their forbidden acts only to the extent that they are culpable for such actions. Stated otherwise, the degree of punishment must be proportional to the degree of the defendant’s culpability. In order to address these inquiries, it is first necessary to understand why society punishes wrongdoers for their forbidden acts.

92. See e.g., PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY & BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 83 (1995). Professors Robinson and Darley state that “liability is properly reserved for violations of sufficient seriousness committed with sufficient culpability to justify condemnation as criminal.” Id.
At their most basic level, issues of culpability involve questions that pervade the criminal law: why does the system punish wrongdoers and what types of wrongdoers ought not the system punish? The jurisprudential principles that are embedded in the criminal law condition criminal responsibility for serious crimes on whether the individual deserves moral blame for his actions. In assessing whether an actor is deserving of moral blame for such conduct, the criminal law requires that jurors evaluate the actor’s capacity to choose and to act. H. L. A. Hart noted that “[i]n all advanced legal systems liability to conviction for serious crimes is made dependant, not only on the offender having done these outward acts which the law forbids, but on his having done them in a certain frame of mind or with a certain will.” If a criminal defendant suffers from an impaired mental state which affects his capacity to choose and to act, then the penal system cannot hold the wrongdoer fully liable (or fully blameworthy) for violating the community’s behavioral norms. In the case of the GBMI verdict the jury clearly states that, in their judgment, the defendant was mentally ill at the time he committed the offense for which he has been charged. Although this degree of mental illness may not completely negate the defendant’s culpability, certainly the GBMI defendant cannot be viewed as having the same degree of responsibility as the defendant who was not mentally ill at the time he committed the offense.

Criminal defendants are punished not only for their wrongful conduct, but also for choosing to violate the community’s behavioral norms. Jurors therefore must assess the defendant’s mental condition — his capacity to make conscious and knowing choices — prior to evaluating whether or not the defendant is fully blameworthy for his wrongful actions. Professor John Finnis argues that society punishes wrongdoers to “restore an order of

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93. Serious crimes here refer to “mala in se crimes punishable by prolonged confinement or death.” Peter Arenella, Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability, 39 UCLA L. Rev. 1511, 1513 (1992). “Mala in se crimes refer to conduct that is inherently wrong: behavior that breaches community moral norms independent of its illegality. These crimes include murder, rape, arson, larceny, and assault.” Id. at 1513 n.3.

94. Id. at 1517.

95. Id. at 1518.

96. H.L.A. HART, THE MORALITY OF THE CRIMINAL LAW 6 (1964). Hart illustrated this concept through an example: “if you kill a man, this is not punishable as murder in most civilised jurisdictions if you do it unintentionally... or while suffering from certain forms of mental abnormality.” Id.

97. See Arenella, supra note 93, at 1518.
fairness which was disrupted by the criminal's criminal act." When an individual chooses to act in such a manner that infringes upon the rights of others in the community, these actions may be construed as the result of a "choice to take advantage of following one's own preferences rather than restraining oneself to remain within that fair order." In order to restore "the disrupted order of fairness," society must punish the individual by denying him of his unjust gain. Continuing his argument, Finnis next asserts that "since that advantage consisted at least primarily in (wrongful) freedom of choice and action, the appropriate means of restoring the order of fairness is by depriving the criminal of his freedom of choice and action." In this view of why society punishes (as argued by Finnis), the emphasis is on the freedom of choice and action that the wrongdoer exercised — a wrongful exercise of choice by an individual who "really could have chosen otherwise." If the wrongdoer's conscious choice to act in a forbidden manner controls how and why society punishes, then whom society ought to punish must depend on whether or not a wrongdoer was capable of making such a choice.

Those defendants who act contrary to the community's behavioral norms should be punished if they are fully blameworthy for their actions. Conversely, those criminal defendants who, despite their wrongful actions, are incapable of choosing to follow their own preferences should not be punished to the same extent as those defendants who choose consciously to subordinate society's interests to their own. According to Professor Hart, excluding conditions such as mental illness are "required by distinct principles of Justice which restrict the extent to which general social aims may be pursued at the cost of

99. Id.
100. Id. See also John Finnis, Natural Law and Natural Rights 262-263 (1980). Finnis elaborates on this theory of why society punishes wrongdoers:
   For when someone, who really could have chosen otherwise, manifests in action a preference . . . for his own interests, his own freedom of choice and action, as against the common interests and the legally defined common way-of-action, then in and by the very action he gains a certain sort of advantage over those who have restrained themselves, restricted their pursuit of their own interests, in order to abide by the law.
   Id. (emphasis added).
101. Id.
individuals." This concept — the culpability constraint — frames the issues of who ought to be punished and whether there are limitations on whom society may punish.

The realities surrounding the guilty but mentally ill verdict, and the lack of guaranteed treatment for those defendants who are convicted upon a jury finding of "mentally ill," demonstrate that punishment is the dominant effect of a GBMI verdict and sentence. In this sense, the GBMI verdict serves retributive goals and should not be presented to the public and to jurors as primarily rehabilitative. Such attempts are disingenuous, and as Professor Finkel notes, "[r]ehabilitation is a secondary end (of the GBMI verdict), at best; to my way of thinking, treatment is something that can be offered to a defendant serving time, but it should neither be made mandatory nor the primary reason for confining." As it stands, the GBMI verdict is an unnecessary option. Judges currently possess the authority to order mental health treatment for those defendants who asserted mental illness at trial but were nonetheless found "guilty." When confronted with a defendant who asserts mental illness, many jurors may struggle with the choice of sentencing a "nonresponsible" defendant to prison or acquitting a guilty offender on the grounds of insanity. As Finkel notes, however, the search for the "middle ground" or the desire to address the mental health needs of the defendant should not drive the decision to confine him.

In examining the proper role of the GBMI verdict, as well as its proper goals, one must analyze the verdict in relation to the constraints that are placed on the criminal justice system's ability to punish individuals. As discussed above, the culpability constraint on the penal system allows society to punish defendants only to a limited extent: the degree of punishment must be proportional to the degree of the defendant's moral responsibility for a wrongful act. In discussing the justification for punish-
ment, Hart emphasized the importance of the relationship between punishment and criminal responsibility:

At the conviction stage, if punishment is to be justified at all, the criminal’s act must be that of a responsible agent: that is, it must be the act of one who could have kept the law which he has broken. And at the sentencing stage, the punishment must bear some sort of relationship to the act: it must in some sense “fit” or be “proportionate.”

Jurisdictions that attempted to balance the competing interests of public safety and the rights of mentally ill defendants by passing the guilty but mentally ill verdict violated this culpability constraint on the Anglo-American penal system. Although GBMI defendants are acknowledged to have suffered from a mental illness at the time of the offense, the degree of punishment that they receive is not reduced to correspond with a reduced level of mental responsibility.

In relation to the culpability constraint on punishment, the GBMI verdict is flawed because it punishes mentally ill defendants to a greater degree than their level of culpability permits. This criticism may be illustrated through the creation of two scales: one which measures a defendant’s culpability or blameworthiness, and a second which measures the degree of punishment imposed on a criminal defendant. The “culpability scale” contains two polar opposites — representing the extremes of culpability. On the extreme left of the scale, we place the concepts of legal insanity and nonresponsibility as represented in a “not guilty by reason of insanity” verdict. At the other end of the “culpability scale” — the extreme right — we place the concept of complete mental responsibility, or blame, as represented in a “guilty” verdict. In the middle of the “culpability scale” rests the notion of mental illness as represented in the verdict of “guilty but mentally ill.” By placing this designation in the middle of the scale, the GBMI scheme suggests that the guilty but mentally ill defendant is neither fully responsible nor completely exculpated (or excused from responsibility). Therefore, the GBMI verdict indicates a level of culpability below that level represented in a “guilty” verdict.

If it does not suggest a reduced level of culpability (in relation to the guilty verdict), then the GBMI verdict is no different from a simple guilty verdict, and the designation of “guilty but

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is something more than a symptom on which diagnosis and prognosis may be based. It has an altogether different status.

*Id.*

107. *Id.*
mentally ill" is superfluous. The claim that the GBMI verdict (if it does not reflect a reduced degree of culpability) is no different from a simple guilty verdict follows from our earlier examination of the GBMI verdict and the manner in which GBMI defendants receive (or do not receive) mental health treatment.\footnote{108} The GBMI verdict is not an appropriate sentencing or diagnostic tool; decisions on whether and how to treat a defendant who has been found guilty but mentally ill ultimately rest, in practice, with corrections officials and mental health professionals. Provisions for treating a GBMI inmate for mental illness are nearly identical to the manner in which other defendants (those who were found simply guilty) receive mental health treatment. Therefore, since the GBMI verdict does not provide different treatment and sentencing provisions, the GBMI label must reflect a reduced level of responsibility. If it does not, the GBMI verdict serves no purpose — becoming instead a vestigial organ on the penal system’s body that should be amputated.

The second consideration in the relationship between responsibility and punishment involves the “punishment scale.” The “punishment scale” also contains two extremes. On the extreme left end of the scale the criminal defendant, because of his nonresponsibility, is not punished. Although the defendant later may be committed to a mental health institution for treatment, the defendant is not punished (in the traditional sense) through incarceration in the correctional system.\footnote{109} On the opposite end of the “punishment scale” (the extreme right), we place the manner in which the penal system currently punishes ‘fully blameworthy’ defendants — those found GBMI and guilty. The defendants in this category of punishment face lengthy incarceration or the death penalty. The deficiency in the GBMI verdict is illustrated once the two scales are viewed together. The GBMI defendant, although he falls somewhere in the middle of the “culpability scale,” is punished in accordance with the extreme right of the “punishment scale.” Although the GBMI

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\footnote{108}{See discussion supra part II.}

\footnote{109}{In analyzing the concept of punishment, H. L. A. Hart outlined several factors that are necessary for punishment:

[1] Punishment must involve pain or other consequences normally considered unpleasant.
[2] It must be for an offense against legal rules.
[3] It must be of an actual or supposed offender for his offense.
[4] It must be intentionally administered by human beings other than the Offender.
[5] It must be imposed and administered by an authority constituted by a legal system against which the offense is committed.

Hart, supra note 26, at 4-5.}
defendant's culpability must be reduced by his mental illness (thus moving him more toward the extreme left — nonresponsibility — of the "culpability scale"), his level of punishment is not reduced in corresponding fashion. This failure of the GBMI statute is best illustrated by the GBMI defendant's continuing eligibility for the death penalty.\textsuperscript{110} By punishing the GBMI defendant \textit{as if he was guilty},\textsuperscript{111} the penal system ignores the defendant's reduced level of culpability. In so doing, the GBMI jurisdictions violate the culpability constraint of Anglo-American criminal law by not reducing the level of punishment to correspond with the defendant's reduced degree of criminal responsibility.

D. GBMI and the Mental Health Power/Criminal Law Power Dichotomy

The flaw in the GBMI verdict, from a "culpability perspective," exists in the "hybrid nature"\textsuperscript{112} of the verdict. The GBMI verdict appears to synthesize both rehabilitative goals and retributive goals. Professor Norval Morris, however, cautions that such hybrids are dangerous due to the different factors which define and limit the distinct goals found in the verdict: retribution and rehabilitation.\textsuperscript{113} In drawing a distinction between the "criminal law power" and the "mental health power" of the state,\textsuperscript{114} Professor Morris notes that each has a different limiting principle and a different objective purpose.\textsuperscript{115} When the two powers are confused (as they are in the GBMI verdict), Morris claims that the different limiting principles cannot be reconciled and that "injustice and inefficiency result."\textsuperscript{116} This is unquestionably the case in the GBMI jurisdictions. The question of the defendant's mental condition at the time of the offense should be reserved

\textsuperscript{112} See AMERICAN BAR ASSOCIATION, supra note 68, § 7-6.10, at 394.
\textsuperscript{113} See Morris, supra note 29, at 30.
\textsuperscript{114} Id. Morris identifies these as the only two powers by which society may deprive and individual of his or her liberty. These two powers have different prerequisites that must be met for them to be invoked:
To imprison — that he has been convicted of a crime and that his imprisonment is both deserved and socially desirable; and To commit to a mental hospital — that he is mentally ill or retarded and that he is a danger to others or to himself or is incapable of caring for himself.
Id.
\textsuperscript{115} Id.
\textsuperscript{116} Id.
solely for evaluating the degree of criminal responsibility to which the defendant should be held. This issue should not be addressed by a jury for the purpose of choosing treatment or sentencing options.

The injustice arising from the GBMI verdict may be attributed to the consolidation of the mental health and criminal law powers of the state. The intended end of the GBMI verdict, whether it invokes the criminal law power or the mental health power, is not readily discernible at first glance. The confusion may be traced to the conflict between the limiting factor, as Morris describes them, of each power. The criminal law power (limited by the “concept of the maximum deserved punishment for what the offender did”\textsuperscript{1}\textsuperscript{17} and the mental health power (limited by the “concept of mental health treatment that is needed to remedy the illness and to alleviate any dangers”)\textsuperscript{1}\textsuperscript{18} are controlled by separate principles, and any attempt to combine the two powers creates conflict between the limiting principle of each. This tension yields a verdict which, in practice, applies an incomplete version of each power. In its outward appearance, the GBMI verdict focuses on both of these powers; the verdict therefore lacks clear guidance and direction as to which factors should govern its implementation.

In relation to the culpability constraint — viz., we may punish an individual only to the extent that he or she is responsible for his or her wrongful actions — the GBMI verdict raises serious concerns. In analyzing the GBMI option, Professor Morris asks:

Can it survive the challenge of analytic principle? I think not. It seems to me on its face and in its operation a means of drawing [i.e., pulling or removing] such acquitting and destigmatizing teeth as were left in the special defense of insanity . . . while pretending to preserve the moral values embedded in the ideas underlying that special defense.

No one is deceived, certainly not the prisoner.\textsuperscript{1}\textsuperscript{19}

This concern cannot be dismissed blithely as insignificant in light of the reality that many GBMI prisoners will never receive psychological or psychiatric treatment for their mental illnesses. In effect, although the jury found that the defendant was mentally ill at the time of the offense, the GBMI prisoner is punished retribu-

\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} Id. at 85-86. Professor Morris isolates the approach that must be taken when examining issues of “principle underlying the responsibility of the mentally ill.” Id. at 54. Morris states, “[t]he issues are basically legal, moral, and political, not medical or psychological.” Id.
tively, in a manner nearly identical to how the system punishes a defendant who has been found "guilty" (without a finding of mental illness). Such a result is highly inconsistent with society's standards of criminal justice, and with the standards by which the penal system deals with mentally ill defendants.

Under most GBMI statutes, a prisoner who is treated for mental illness must be returned to the department of corrections to complete the balance of his sentence once the treatment is completed.120 This approach punishes the GBMI prisoner, once "cured," on the basis of a "relation back" theory of culpability. Although the GBMI defendant was found (by a jury verdict of GBMI) to have been mentally ill at the time of the offense, the prisoner who is returned to the general prison population subsequently will be punished for the very offense he committed while mentally ill. Once the GBMI offender's treatment is completed, his "now cured" mental state serves as the basis for punishing him as if he had been found guilty — or as if he had not suffered from mental illness at the time of the crime. The GBMI verdict therefore violates the culpability constraint on our criminal justice system. The jury's determination that the defendant was mentally ill at the time of the offense, a judgment relating to the defendant's culpability, does not mitigate (in the case of the GBMI jurisdiction) the extent to which the defendant will be punished. In fact, unless we disregard the jury's determination that the defendant was mentally ill at the time of the offense, the defendant is punished to a greater extent than his culpability. Commenting on this facet of the GBMI verdict, the ABA stated that, "[i]f in fact the defendant is so mentally diseased or defective as to be not criminally responsible for the offending act, it would be morally obtuse to assign criminal liability. The factfinder's answer should not be 'yes, but . . . .'"121 By allowing punishment that exceeds the defendant's criminal responsibility, the GBMI verdict is indeed "moral sleight-of-hand."122

In this instance, the confusion over the intended goals of GBMI presents difficulties in terms of how our community views questions of culpability. The basic issue is one of moral principle: can the Anglo-American system of justice tolerate a verdict

120. See, e.g., S.C. CODE ANN. § 17-24-70(A) (Law. Co-op. Supp. 1994). The South Carolina statute, for example, provides that if a GBMI prisoner receives treatment for a mental illness, he must be returned to prison if "in the opinion of the staff at the facility the defendant may safely be moved to the general population of the Department of Corrections to serve the remainder of his sentence." Id.
121. ABA and APA Proposals, supra note 81, at 141.
122. Id.
that punishes defendants who were mentally ill (at the time they committed a crime) the same as it punishes defendants who were not suffering from mental illness? This notion of justice is grounded in a system which attempts to guarantee that punishment is imposed in a consistent manner. Part of this consistency requires that individuals may be punished only to the extent that they are culpable for their wrongful acts. When this constraint upon our system is violated, the system sacrifices its moral integrity. By accepting the guilty but mentally ill verdict in thirteen states, the criminal justice system has yielded to political expediency rather than holding to moral principle.

IV. RIGHT TO MENTAL HEALTH TREATMENT AND THE EIGHTH AMENDMENT

A. Discretionary Versus Mandatory Mental Health Treatment

Section III of this Article discussed the practical difficulties which the guilty but mentally ill verdict creates, via the jury system and in relation to the culpability constraint, for our criminal justice system. In addition to those practical and jurisprudential issues, the guilty but mentally ill verdict must also face constitutional arguments. Although Due Process arguments raise legitimate constitutional questions about the viability of the GBMI verdict, this section of the Article explores Eighth Amendment questions related to a mentally ill offender's right to mental health treatment. If the GBMI verdict is to be retained as a meaningful and permissible jury option, states must address the absence of guaranteed mental health treatment. A fundamental problem with the guilty but mentally ill option is the failure of states to assure that all GBMI offenders will receive psychological or psychiatric treatment. The structure and wording of the various treatment provisions of GBMI statutes allow for too much discretion on the part of correctional department


124. "Permissible" here refers to the manner in which the GBMI verdict comports or fails to comport with the culpability constraint on our system of criminal punishment. This verdict’s viability also includes assurances that the jury examine the defendant’s mental state (at the time of the commission of the alleged offense) for purposes of judging only the defendant’s culpability (as it applies to whether the defendant may be held criminally responsible for his wrongful acts), rather than concerns about incarceration and treatment (dispositional concerns).

125. For a plan in which I propose altering the GBMI verdict and system, see infra section V.

126. See supra part II.C.
officials. Eighth Amendment concerns address the degree of significance, if any, that will be attached to a jury's determination of mental illness.

In a 1988 decision from the Supreme Court of South Dakota, Robinson v. Solem, the court noted that "[i]n finding a defendant mentally ill under South Dakota's GBMI statute, judge or jury does not find that treatment is needed, but only that the offender has a psychiatric disorder of thought, mood, or behavior which impairs his or her judgment." Writing for the court, Judge Steele then stated that "[t]here is no constitutional right to treatment merely because of that finding." In light of this finding, the court next reasoned that the "essential test" for whether an offender will receive either psychiatric or psychological treatment "is one of medical necessity and not simply treatment which may be considered as merely desirable." In casting aside the significance of the jury's findings on the issue of mental illness, the court illustrated the nature of the problem with GBMI verdicts — that the jury's opinion neither reduces the defendant's level of culpability nor provides him mental health treatment. The purpose of the GBMI verdict, to provide juries with an additional option for those offenders whom they judge to have been suffering from mental illness at the time they committed the offense (although more responsible than NGRI defendants), has been thwarted. In the absence of a guarantee that these GBMI offenders will be treated for mental illness, the GBMI defendant will in essence be treated no differently from an offender who is found simply "guilty."

In his dissent from the court's opinion in Robinson, Justice Henderson opined that South Dakota's GBMI statute was unconstitutional because it failed to guarantee that GBMI defendants would receive psychological or psychiatric treatment. According to Justice Henderson, South Dakota's GBMI statute was flawed because a defendant "may be treated later, but this is left entirely to the discretion of the board of charities and corrections. Even

127. 432 N.W.2d 246 (S.D. 1988).
128. Id. at 249.
129. Id.
130. Id.
131. See Morris, supra note 29, at 85. Professor Morris reiterates the apparent futility of the GBMI verdict in such cases: "Since in Michigan any mentally ill prisoner may, with appropriate consent, be transferred to a mental health hospital, the distinctions between 'guilty' and 'guilty but mentally ill' are not of translucent clarity." Id. Professor Morris then explains that the distinction becomes meaningless since "[b]oth groups may be given psychiatric treatment in both types of institutions and for the same maximum periods. The punishment . . . may be the same." Id.
if treatment is determined to be necessary and available, the prisoner can be allowed to sit and rot without treatment . . . .”

Although some jurisdictions (“Type I” jurisdictions) have GBMI statues that operate more efficiently than others (by requiring that some treatment must be given), many statutes entrust the corrections facilities with far too much discretion in this decision.

Although one may view this statutory structure as drawing a distinction between medical judgments (related to treatment considerations) and legal judgments (relating to jurors assessment of the defendant’s culpability), the practical result points to the failure of the verdict. If the jury’s judgment of mental illness were reserved solely for the issue of the defendant’s culpability, the level of punishment imposed on a GBMI offender would be lesser than the level of punishment imposed on the offender who was found guilty (without an indication of mental illness). In practice, a state official may find that a GBMI defendant is not mentally ill and does not need treatment; this determination is made despite the fact that the jury found that the defendant was mentally ill. As a matter of principle, and as a matter of public policy, states should not provide jurors with a GBMI option that essentially renders meaningless a significant component of their verdict and decision.

B. A Right to Treatment? The Failure to Treat and Eighth Amendment Arguments

Two factors: the vast discretion given to prison and corrections officials under GBMI statutes, and the words of Judge Steele in Robinson that “[t]here is no constitutional right to treatment merely because of [the jury finding of mental illness],” require that we examine whether GBMI prisoners have a constitutional right to mental health treatment. In 1976, the Supreme Court of the United States, through Justice Thurgood Marshall’s opinion in Estelle v. Gamble, proffered its analysis for Eighth Amendment standards of cruel and unusual punishment.

132. Robinson, 492 N.W.2d at 253 (Henderson, J., dissenting).
133. The South Dakota statute, for example, does not mandate that treatment must be given even when it is deemed necessary by the appropriate officials. The statute states, “he shall undergo further examination and may be given the treatment that is psychiatrically indicated for his mental illness.” S.D. CODIFIED LAWS ANN. § 23A-27-38 (Supp. 1995) (emphasis added). Michigan, another Type II jurisdiction, mandates that a GBMI prisoner “shall . . . be given such treatment as is psychiatrically indicated . . . . ” MICH. COMP. LAWS § 768.36(3) (1982) (emphasis added).
134. Robinson, 492 N.W.2d at 249.
According to the Court, the "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment" to the United States Constitution. In outlining the Eighth Amendment standards for medical care in prisons, the United States District Court for the District of Arizona, in Casey v. Lewis, held that "these requirements [Eighth Amendment arguments on prisoners' right to treatment] apply to physical, dental and mental health." The District Court in Casey applied the Supreme Court's current Eighth Amendment analysis — articulating the standards from Estelle — in ruling that a prison's inadequate mental health treatment system violated the Eighth Amendment's ban on cruel and unusual punishment.

In light of modern Eighth Amendment analysis, it would appear that Judge Steele's assertion that there is no right to treatment based on a jury's finding of mental illness was perhaps premature. The focal point of Eighth Amendment analysis, in terms of the constitutionality of the GBMI verdict, is the exploration of whether the state's failure to provide psychiatric or psychological treatment to GBMI defendants may be classified as "deliberate indifference to serious medical needs" of the prisoners. The question is particularly important to the analysis of the statutory schemata established in Type II GBMI jurisdictions. The structure of Type II statutes, such as Georgia's or South Dakota's, provides for deference to the discretion of corrections officials. These statutes place the ultimate judgment on the decision of whether or not to treat GBMI offenders with corrections officials even in those cases where a mental health assessment has indicated that the GBMI prisoner requires care. Such a statutory framework presents problems for the GBMI verdict. Under the Supreme Court's analysis in Estelle, as extrapolated by courts to include mental health needs, GBMI prisoners may indeed claim a right to mental health treatment — an Eighth Amendment claim that the denial of needed mental health treatment violates constitutional prohibitions against cruel and unusual punishment.

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136. *Id.* at 104 (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)).
138. *Id.* at 1544 (quoting Hoptowit v. Ray, 682 F.2d 1237, 1253 (9th Cir. 1982)). The court in Casey also stated that "[o]fficials can be held liable for their failure to implement a proper mental health care program or failure to adequately train or supervise subordinates." *Casey*, 834 F. Supp. at 1544.
139. The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII (emphasis added).
The Arizona District Court, in its 1993 *Casey* decision, ruled that mentally ill prisoners properly stated a section 1983 civil rights action when they alleged that prison officials violated their constitutional rights by denying them adequate mental health treatment. The basis for the court's decision was its belief that denying mental health treatment to mentally ill prisoners was a violation of their Eighth Amendment Constitutional rights. The court determined that these prisoners experienced "unacceptable" delays in both the assessment and treatment of their serious mental health needs. The court further noted that prisoners who were "locked down" as a result of behavioral problems that had remained either unassessed or untreated were "provided improper mental health care or no mental health care." The court ruled that such conduct by prison officials (in failing to treat properly the mental illnesses of prison inmates) "clearly rises to the level of deliberate indifference to the serious mental health needs of the inmates and violates their constitutional rights to be free from cruel and unusual punishment." Although Eighth Amendment analysis in most GBMI cases will not focus on the treatment of prisoners who are "locked down" for behavioral problems, the central issue in these cases, as with *Casey*, remains the denial of mental health treatment to prisoners who require such care. In Type II jurisdictions such as South Dakota and Georgia, where treatment is discretionary despite findings from both a jury and a mental health examination (findings which indicate that the prisoner suffers from some mental illness), the conduct of the prison officials may rise to the level of "substantial indifference" to the prisoner's mental health needs. According to the Supreme Court in *Estelle*, the underlying test is whether or not the failure to treat mentally ill prisoners is consistent with "broad and idealistic concepts of dignity, civi-
lized standards, humanity, and decency." In his *Estelle* opinion, Justice Marshall also stated that "[t]hese elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration." Justice Marshall noted that unnecessary suffering is inconsistent with "contemporary standards of decency as manifested in modern legislation." According to Justice Marshall, this standard codifies the view that justice requires society to care for prisoners who, by reason of deprivation of their liberty, cannot adequately care for themselves.

Applying this inquiry on both a constitutional and a public policy level, the guilty but mentally ill verdict, specifically the GBMI version in some Type II jurisdictions, fails the analysis that the Supreme Court articulated in *Estelle*. Dissenting from the South Dakota Supreme Court's opinion in *Robinson v. Solem*, Justice Henderson posed the pivotal question. Henderson asked "[h]ow well does (the South Dakota GBMI statute) compare to the 'evolving standards of decency that mark the progress of a maturing society?'" His answer: "[i]t fails miserably, representing no less than a throwback to the days when insane asylums were storage pens and little more." That most state GBMI statutes fail to guarantee that prisoners found "guilty but mentally ill" will be treated creates, at a minimum, the possibility that prisons will become nothing more than storage facilities for inmates with serious mental illnesses. Such a prospect, a realistic one, does not comport with society's standards of decency. On the contrary, the possibility chills one's sense of decency and justice.

V. CONCLUSIONS — A PROPOSAL FOR REFORM

The guilty but mentally ill verdict came into being in a climate of fear and confusion. Fearful solutions do not, however, produce sound public policy on issues that implicate questions of moral principle. The competing goals of the insanity defense reform movement — public safety and the rights of mentally ill

145. *Estelle*, 429 U.S. at 102 (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)).
147. *Id.*
148. *Id.* at 103-04.
150. *Id.*
151. See supra notes 44-47 and accompanying text (discussing the lack of assurances that mentally ill inmates will receive psychological or psychiatric treatment that is necessary or indicated).
defendants — were not given equal weight in the legislative process. Nearly fourteen years after the dust from Hinckley has settled, the GBMI option must be carefully evaluated, in an atmosphere removed from the fears and pressures that characterized the movement in the early 1980's.

The GBMI verdict, as an additional option for jurors, undermines the integrity of our criminal justice system and its standards. Enacted for the stated purpose of reducing the number of erroneous NGRI acquittals and providing mental health treatment to mentally ill defendants, the verdict has accomplished neither of these goals. The number of NGRI acquittals remains unchanged or increases in systems that have added the GBMI option. Furthermore, the GBMI verdict does not guarantee that mentally ill GBMI offenders will receive mental health treatment. As Part III of this Article demonstrated, the stark reality of the GBMI verdict is that GBMI prisoners rarely receive psychiatric or psychological treatment. As a result, GBMI prisoners are often punished in a manner identical to those prisoners who were found "guilty."

Aside from failing to achieve its stated goals, the GBMI verdict also presents a dilemma in terms of culpability principles. The GBMI verdict offers jurors a "middle ground" and entices them to evade their responsibility of judging the defendant's blameworthiness. This task, albeit a difficult one, safeguards the integrity of our criminal justice system. The American Psychiatric Association described the role of jurors in deciding cases as "vital to set... societal ideas about responsibility and nonresponsibility."\(^{152}\) Noting that the GBMI option allows jurors to avoid deciding this issue, the APA stated that "[a]n important symbolic function of the criminal law is lost through the 'guilty but mentally ill' approach."\(^{153}\)

In order to restore and safeguard the integrity of our criminal justice system, the guilty but mentally ill verdict should be eliminated as a jury option. Presently, the GBMI verdict fails to abide by the culpability constraint on the criminal law and penal statutes: the degree of punishment that criminal defendants receive must be proportional to their level of culpability. Although the GBMI defendant is labelled "mentally ill" (suggesting a lesser degree of mental responsibility) the GBMI inmate receives the same degree of punishment as a defendant found guilty (without any mental illness or impairment) of the same offense. The GBMI option should therefore be eliminated.

\(^{152}\) \textit{ABA and APA Proposals, supra} note 81, at 144.
\(^{153}\) \textit{Id.}
This prospect, however, does not appear realistic due to the political pressures which led to the verdict's enactment in the early 1980's. NGRI acquittees may no longer be held in mental health institutions while the public is assured that they will never be released back into society. As a result, public pressure remains for legislators to safeguard the rights of the community — first by reducing the number of criminal defendants who assert the insanity defense, and second, by ensuring that those mentally ill defendants will be removed from society at-large. A more realistic approach to the problem, therefore, is to reform the GBMI verdict. Meaningful reform of the GBMI verdict must restore to the jury the role of evaluating the defendant's mental illness for the purpose of assessing his criminal responsibility. These changes must be made in order that the verdict will conform with the underlying moral concerns for the justice of jury verdicts.

First, the guilty but mentally ill verdict must attach some significance to the jury's determination that the defendant was mentally ill at the time he committed the offense. Although the jury's finding cannot dictate a mental health expert's diagnosis or treatment of the GBMI offender, the jury's verdict — specifically its finding that the defendant was mentally ill — must hold some efficacy at the guilt phase of the trial. Implicit in the jury's opinion that the defendant was mentally ill at the time he committed the offense is a determination that he was not completely blameworthy for his wrongful actions — that he was less culpable than a "normal" defendant who was found simply "guilty." If this assertion is not true, then the GBMI verdict is superfluous; the option of GBMI creates a meaningless distinction that should not be retained. Therefore, a verdict of "guilty but mentally ill" should mitigate the sentence which the defendant receives. By mitigating the GBMI offender's punishment, the verdict would address the defendant's mental illness in a meaningful way at the guilt phase of the trial. In doing so (mitigating the GBMI offender's punishment or sentence — even if the GBMI defendant no longer suffers from mental illness), the GBMI jurisdictions will adhere to the culpability constraint on the Anglo-American system of punishment. The degree of punishment, once reduced from the statutory sentence that is imposed on guilty offenders, would then be proportional to the GBMI defendant's reduced level of culpability as indicated by his mental illness.

Second, to remove the risk of misleading jurors, the GBMI verdict must guarantee that the state will provide mental health treatment to defendants who are mentally ill at the time they are sentenced. This determination cannot be made, however, based
simply on the jury’s finding of mental illness. Although the jury found evidence of mental illness, this indicates only that the defendant suffered from mental illness at the time of the offense. Such a determination is not dispositive of whether the defendant should receive mental health treatment at the time he is sentenced. In addition, ethical considerations preclude a mental health professional from evaluating and treating patients based solely on the opinion of a layperson. Therefore, the guilty but mentally ill verdict should mandate that the GBMI offender receive a mental health evaluation prior to sentencing. If the defendant suffers from mental illness at this time (as determined by the mental health evaluation), the statute must guarantee that the prisoner will receive proper mental health treatment. Once treated, if the defendant no longer requires further mental health attention, he should then be returned to the general prison population to complete the balance of his mitigated sentence.

These provisions, especially mitigating the GBMI offender’s sentence, would tailor the retributive aspect of the GBMI verdict so it conforms with the culpability constraint on punishment. The GBMI statute (as reformed) would guarantee that GBMI offenders receive treatment if, at the sentencing phase, they are deemed to suffer from mental illness. The verdict would simultaneously limit the extent to which GBMI offenders are punished if they no longer suffer from mental illness. The end result, therefore, would produce a GBMI statute that adheres to the culpability constraint on punishment — a statute that punishes offenders only to the extent that they were culpable at the time they committed the wrongful act. The proposed statute would strike a proper balance between the competing concerns of public safety and the rights of individual defendants. Although the GBMI statute does not reduce the number of defendants who are found not guilty by reason of insanity (NGRI), this proposed statute would weigh more carefully the rights of mentally ill defendants. This measure would preserve the integrity of the criminal justice system and address the needs of mentally ill defendants in a spirit of moral fidelity.
APPENDIX

If the GBMI option must be retained, states should modify the statutory language in order to conform with the concerns raised in this Article. The following is a proposed legislative option which addresses these issues — specifically by reducing the degree of punishment to correspond with a reduced level of culpability.

Proposed Model Statute

If a verdict of Guilty But Mentally Ill (as authorized by the previous section) is returned against a defendant in a criminal case, the following shall occur prior to sentencing:

(A) The defendant shall undergo a mental health evaluation to be administered by a qualified, court-appointed mental health care expert. The purpose of the examination shall be to determine whether the defendant continues to suffer from a mental illness as defined in the previous section.

(B) If the court-ordered mental health evaluation indicates that the defendant continues to suffer from a mental illness as defined in the previous section, then the defendant must be placed in a mental health care facility for the purpose of treating the mental illness. The defendant shall remain in such mental health care facility either

(1) for the duration of his sentence; or
(2) until the mental health care professionals at such facility determine that the defendant no longer suffers from the mental illness that was diagnosed under subsection (A) of this section.

(C) A defendant who under subsection (B) has been placed in a mental health care facility may be released from such facility subject to the following conditions:

(1) A defendant who under section (B)(2) of this section no longer suffers from a mental illness shall be transferred to the Department of Corrections. The defendant must serve the balance of his prison term as sentenced under subsection (D) of this section.

(2) A defendant who under subsection (B)(1) of this section has remained in a mental health care facility for the duration of his prison term as sentenced under subsection (D) of this section shall be discharged from the facility unless a mental health evaluation determines that the defendant is eligible for civil commitment
because he suffers from a mental illness and poses a danger either to himself or society.

(D) If a defendant has been found Guilty But Mentally Ill under the previous section, and pursuant to a mental health evaluation under subsection (A) of this section, does not suffer from a mental illness, then the court shall sentence the defendant as follows:

(1) The Guilty But Mentally Ill defendant shall be sentenced as if he had been found guilty, except that,

(a) the length of the prison term shall be reduced and correspond to the defendant's reduced level of responsibility caused by his mental illness at the time of the offense; and

(b) at no time shall the Guilty But Mentally Ill defendant receive the statutory maximum allowed for his criminal offense.