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1985]

THE "GUILTY BUT MENTALLY ILL" PLEA AND VERDICT:
CURRENT STATE OF THE KNOWLEDGE*

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*This article is an interim report of the Guilty But Mentally Ill Project, conducted by the Institute on Mental Disability and the Law of the National Center for State Courts and commissioned by the National Institute of Justice, United States Department of Justice.** The purpose of the Project is to study the antecedents, implementation, and consequences of the "guilty but mentally ill" plea and verdict throughout the country. This article describes the results of the Project's initial efforts to ascertain that which currently is known about the alternative plea and verdict.*** Three sources of information are explored comprehensively: statutory law, case law, and social science research. The authors first examine the relevant statutes of the states that have enacted guilty but mentally ill legislation; they have compiled tables that present these statutes and allow for valuable comparison among the state provisions. The authors next trace the judicial development of the guilty but mentally ill plea and verdict as expressed in state appellate court decisions. Finally, the authors an-*

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*** A subsequent report describes the results of the Project's empirical study of the implementation and impact of the guilty but mentally ill plea and verdict. See INSTITUTE ON MENTAL DISABILITY AND THE LAW, THE GUILTY BUT MENTALLY ILL VERDICT: AN EMPIRICAL STUDY (1985) (available from the National Center for State Courts).

Points of view and opinions expressed in this article are those of the authors and are not necessarily those of the National Institute of Justice, the United States Department of Justice, or the National Center for State Courts.

alyze the empirical research that has been done regarding the practical consequences of the guilty but mentally ill laws.

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I. INTRODUCTION

Punishment deters not only sane men but also eccentric men, whose supposed involuntary acts are really

produced by a diseased brain capable of being acted upon by external influence.

A knowledge that they would be protected by an acquittal on the grounds of insanity will encourage these men to commit desperate acts, while on the other hand certainty that they will not escape punishment will terrify them into a peaceful attitude—toward others.

Queen Victoria, 1882¹

THE criminal law's efforts to place mentally disabled defendants in a separate category from other defendants can be traced back centuries.² By the beginning of the nineteenth century, the criminal law of England treated the insane much as they are treated today in the United States—a successful insanity defense resulted in acquittal and, usually, confinement in a mental hospital.³

Throughout its history, the insanity defense has faced opposition. One form of opposition has been the adoption of an alternative verdict that acknowledges a defendant's unsound mind at the time of the misconduct yet does not absolve him or her of criminal responsibility. Such a verdict may either supplant or supplement the verdict of "not guilty by reason of insanity." Queen Victoria's displeasure with the acquittal by reason of insanity of notorious defendants like James Hadfield, who in 1800 attempted to murder King George III,⁴ Daniel M'Naghten, who in 1843 attempted to assassinate the British Prime Minister Sir Robert Peel,⁵ and Roderick MacLean, who in 1882 attempted to kill Queen Victoria herself,⁶ led to passage of the Trial of Lunatics

1. Letter from Queen Victoria to Prime Minister Gladstone (April 23, 1882), *quoted in* N. WALKER, *CRIME AND INSANITY IN ENGLAND* 189 (1968).

2. *See* D.H.L. HERMANN, *THE INSANITY DEFENSE: PHILOSOPHICAL, HISTORICAL, AND LEGAL PERSPECTIVES* (1983) (reviewing the evolution and justification of the insanity defense through a discussion of responsibility and punishment theories in criminal law); N. WALKER, *supra* note 1 (tracing the history of the English penal system's approach to the insanity defense from the tenth to the twentieth century).

3. *See* Criminal Lunatics Act, 1800, 40 Geo. 3, ch. 94.

4. *Hadfield's Case*, 27 St. Tr. [Howell] 1281 (K.B. 1800).

5. *M'Naghten's Case*, 8 Eng. Rep. 718 (H.L. 1843).

6. *See* Robey, *Guilty But Mentally Ill*, 6 BULL. AM. ACAD. PSYCHIATRY & L. 374, 377 (1978); S.L. Golding & C. Roberts, *The Interface of Ethical and Clinical Decision-Making: An Historical and Empirical Analysis of the Attribution of Criminal Responsibility* 7-8 (1984) (available from Dep't of Psychology, Univ. of Illinois at Urbana-Champaign) (unpublished manuscript).

Act in 1883.⁷ This act supplanted the verdict of not guilty by reason of insanity with that of “guilty but insane.”⁸

Almost a hundred years passed before any jurisdiction in the United States followed the English lead by adopting an alternative verdict. In 1975, in response to extreme public outcry over the release of approximately 150 insanity acquittees following the Michigan Supreme Court’s decision in *People v. McQuillan*,⁹ Michigan became the first state to enact a “guilty but mentally ill” (GBMI) statute.¹⁰ This enactment has served as a prototype for other states. By 1984, eleven states had followed Michigan’s lead and adopted a GBMI verdict to be considered alongside the traditional verdicts of guilty, not guilty, and not guilty by reason of insanity (NGRI).¹¹ At least eleven other states have considered or are considering adopting similar legislation.¹² In 1982, numer-

7. Trial of Lunatics Act, 1883, 46 & 47 Vict., ch. 38 (repealed by Criminal Procedure (Insanity) Act, 1964, ch. 84).

8. *Id.* Under this act, a person determined to be “insane, so as not to be responsible, according to law, for his actions at the time when the act was done” would be found “guilty of the act or omission charged against him, but . . . insane . . . at the time when he did the act or made the omission.” *Id.* § 2(1). A person receiving this special verdict was to be “kept in custody as a criminal lunatic” in accordance with the same “rules or orders . . . having reference to a person or persons acquitted on the ground of insanity.” *Id.* § 2(2), (4). Thus, a “guilty but insane” finding had the same dispositional consequences as a “not guilty by reason of insanity” verdict; both resulted in acquittal. *See id.* § 2(4). It is therefore arguable whether the Trial of Lunatics Act of 1883 effected any more than a change in semantics. *See Felstead v. Rex*, 1914 A.C. 534 (guilty but insane verdict is an acquittal, not a conviction).

9. 393 Mich. 511, 221 N.W.2d 569 (1974). For a discussion of *McQuillan*, see *infra* notes 25-29 and accompanying text.

10. Act of Aug. 6, 1975, No. 180, § 36, 1975 Mich. Pub. Acts 387 (codified at MICH. COMP. LAWS § 768.36 (1982)). For an account of the GBMI verdict’s development in Michigan, see Project, *Evaluating Michigan’s Guilty but Mentally Ill Verdict: An Empirical Study*, 16 U. MICH. J.L. REF. 77, 80-85 (1982) (for purposes of clarity, textual references to this authority will be to Gare Smith and James Hall, the student authors of this study).

11. *See* ALASKA STAT. § 12.47.030 (Supp. 1984); DEL CODE ANN. tit. 11, § 408 (Supp. 1982); GA. CODE ANN. § 17-7-131 (Supp. 1984); ILL. ANN. STAT. ch. 38, § 115-2(b) (Smith-Hurd Supp. 1983-84); IND. CODE ANN. § 35-35-2-1 (West Supp. 1984); KY. REV. STAT. § 504.120 (Supp. 1984); N.M. STAT. ANN. § 31-9-3 (1984); 18 PA. CONS. STAT. ANN. § 314 (Purdon 1983); 1984 S.C. Acts 396; S.D. CODIFIED LAWS ANN. § 23A-7-2 (Supp. 1983); UTAH CODE ANN. § 77-13-1 (Supp. 1983).

12. *See, e.g.*, S.B. 323, 7th Leg., 2d Reg. Sess. (Fla. 1982) (defeated in committee); H.B. 710, 7th Leg., 2d Reg. Sess. (Fla. 1982) (defeated in committee); S.B. 2073-80, 10th Reg. Sess. (Hawaii 1980) (passed House, defeated in Senate committee); H.F. 24, 70th Gen. Assem., Reg. Sess. (Iowa 1983) (legislation withdrawn); S.B. 806, Reg. Sess. (Md. 1978); S.B. 11765, 203d Sess. (N.Y. 1980); S.B. 4013, 202d Sess. (N.Y. 1979); S.B. 7185, 201st Sess. (N.Y. 1978); H.B. 9705, 201st Sess. (N.Y. 1978); S.B. 148, 114th Gen. Assem., Reg. Sess. (Ohio 1982) (defeated in committee); S.B. 297, 113 Gen. Assem., Reg. Sess. (Ohio

ous bills that included various versions of the GBMI verdict were introduced in the United States Congress.¹³ The ready acceptance of the GBMI verdict by twelve states within the short span of eight years has made it the most popular of the proposed solutions to perceived defects in the traditional insanity defense.¹⁴

Unlike the NGRI and "guilty but insane" verdicts, which hold the defendant blameless,¹⁵ 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, usually resulting in acquittals of defendants perceived to be threats to public safety yet found to be insane, legislators hoped that the GBMI verdict would offer juries an attractive alternative to the NGRI verdict and thereby prevent the early release of dangerous insanity acquittees.¹⁶

Despite its rapid adoption in twelve states, the GBMI verdict has been criticized roundly by scholars and professionals as conceptually flawed and procedurally problematic. Several professional organizations have taken positions opposing the verdict.¹⁷

1979); S.B. 169, Reg. Sess. (N.H. 1979) (referred to study in the Senate); H.B. 234, 57th Biennial Sess. (Vt. 1983) (defeated in committee); H.B. 398, Reg. Sess. (Va. 1982) (defeated in committee); S.B. 107, 66th Reg. Sess. (W. Va. 1983) (amended by committee, reported to Senate, rejected at third reading).

13. See, e.g., S. 2672, H.R. 5395, H.R. 6653, H.R. 6702, H.R. 6709, H.R. 6716, H.R. 6717, H.R. 6718, H.R. 6726, H.R. 6742, H.R. 6947, H.R. 6949, 97th Cong., 2d Sess. (1982). For a reference to congressional hearings on the GBMI verdict, see *infra* note 33.

14. A few states have adopted laws reminiscent of the Trial of Lunatics Act of 1883. For a discussion of this act, see *supra* note 7-8 and accompanying text. Maryland has judicially developed a "guilty but insane" verdict. For a discussion of this verdict, see *infra* notes 46-56 and accompanying text. Oregon now has a "guilty except for insanity" verdict. See H.B. 2075, 62d Or. Legis. Assem., Reg. Sess. (1983). Connecticut enacted and later repealed a "guilty but not criminally responsible" verdict. See CONN. GEN. STAT. § 53a-13 (Supp. 1983) (amended 1983). After repealing this verdict, the Connecticut legislature reenacted the earlier affirmative defense that defendant "lacked substantial capacity, as a result of mental disease or defect, either to appreciate the wrongfulness of his conduct or to control his conduct within the requirements of the law." Compare *id.* with CONN. GEN. STAT. § 53a-13 (1972). All these verdicts have the same dispositional consequences as an NGRI verdict.

15. For a discussion of these exculpating verdicts, see *supra* notes 8, 11-12 & 14 and accompanying text.

16. For a further discussion of dangerousness of acquittees as a motive for GBMI legislation, see *infra* notes 24-33 and accompanying text.

17. See ABA STANDING COMM. ON ASS'N STANDARDS FOR CRIMINAL JUSTICE, FIRST TENTATIVE DRAFT: CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 295-97 (1983) (Standard 7-6.10(b) (forms of verdict) [hereinafter cited as ABA STANDING COMM.]; NAT'L MENTAL HEALTH ASS'N, MYTHS & REALITIES: A REPORT OF

The American Bar Association, for example, has adopted as an official policy the standard recommended by its Standing Committee on Association Standards for Criminal Justice. The Committee recommended that “[s]tatutes which supplant or supplement the verdict of not guilty by reason of insanity with a verdict of guilty but mentally ill should not be enacted.”¹⁸ The commentary accompanying this standard concludes:

The “guilty but mentally ill” verdict offers no help in the difficult question of assessing a defendant’s criminal responsibility. This determination in insanity cases is essentially a moral judgment. If 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 “guilty but mentally ill” verdict also lacks utility in the forward-looking determination regarding disposition. Guilty defendants should be found guilty. Disposition questions, including questions concerning the appropriate form of correctional treatment, should be handled by the sentencing tribunal and by correctional authorities. Enlightened societal self-interest suggests that all felony convicts should receive professional mental health and mental retardation screening and that, whenever indicated, those convicts should receive mental health therapy. Identifying convicts in need of such treatment or habilitation and following up that identification process with actual treatment has nothing to do with the form of verdict.¹⁹

Except for a recently completed study of Michigan’s GBMI verdict,²⁰ no empirical data on the operation and practical consequences of the GBMI plea and verdict have been reported. Indeed, beyond law review articles on the statutory provisions of a few states,²¹ no comprehensive picture of the GBMI plea and ver-

THE NAT’L COMM’N ON THE INSANITY DEFENSE 32-34 (1983); American Psychiatric Ass’n, *Statement on the Insanity Defense* (Dec. 1982), published in AMERICAN PSYCHIATRIC ASS’N, *ISSUES IN FORENSIC PSYCHIATRY* (1984); American Psychological Ass’n, *Text of Position on Insanity Defense*, 15(3) APA MONITOR 11 (1984).

18. ABA STANDING COMM., *supra* note 17, at 295. This standard reflects the policy enacted by the ABA’s House of Delegates on February 9, 1983.

19. *Id.* at 297.

20. See Project, *supra* note 10.

21. Because Michigan has had the longest experience with the GBMI verdict, its statutes have been the subject of the most extensive legal analyses. See, e.g., Brown & Wittner, *1978 Annual Survey of Michigan Law: Criminal Law*, 25

dict as currently used by the adopting states has been offered.

The purpose of this article is to present a comprehensive description of the current state of the knowledge about the GBMI plea and verdict. Three sources of knowledge will be explored: statutory law, case law, and social science research. The first section of this article describes the relevant substantive standards, definitions, and procedural mechanics of the GBMI plea and verdict as prescribed by the statutes of the states that have enacted GBMI legislation. The accompanying tables present the various GBMI laws, allow a comparison of provisions for the plea and verdict across jurisdictions, and provide guidance for those legislatures considering adoption of GBMI statutes or modification of existing GBMI provisions. The second section briefly traces the judicial development of the GBMI laws as expressed in appellate court rulings. Finally, as a prelude to a more systematic study of the uses and consequences of the GBMI plea and verdict as envisioned by a number of professional groups,²² the third section reviews the current state of empirically-based research in this area and discusses the salient issues surrounding the operation of the GBMI plea and verdict that warrant more extensive study.

WAYNE L. REV. 335 (1979); Corrigan & Grano, *1976 Annual Survey of Michigan Law: Criminal Law*, 23 WAYNE L. REV. 473 (1977); Sherman, *Guilty But Mentally Ill: A Retreat from the Insanity Defense*, 7 AM. J.L. & MED. 237 (1981); Van Hoek, *1980 Annual Survey of Michigan Law: Criminal Law*, 27 WAYNE L. REV. 657 (1981); Comment, *Guilty But Mentally Ill: An Historical and Constitutional Analysis*, 53 J. URB. L. 471 (1976) [hereinafter cited as Comment, *Historical and Constitutional Analysis*]; Comment, *Insanity—Guilty But Mentally Ill—Diminished Capacity: An Aggregate Approach to Madness*, 12 J. MAR. J. PRAC. & PROC. 351 (1979); Comment, *The Constitutionality of Michigan's Guilty But Mentally Ill Verdict*, 12 U. MICH. J.L. REF. 188 (1978); Note, *Guilty But Mentally Ill: A Critical Analysis*, 14 RUTGERS L.J. 453 (1982) [hereinafter cited as Note, *GBMI*].

Reviews of GBMI provisions in other states, however, have begun to appear in law reviews. See, e.g., Stelzner & Piatt, *The Guilty But Mentally Ill Verdict and Plea in New Mexico*, 13 N.M.L. REV. 99 (1983); Comment, *Guilty But Mentally Ill: A Reasonable Compromise for Pennsylvania*, 85 DICK. L. REV. 289 (1981); Comment, *Guilty But Mentally Ill: Broadening the Scope of Criminal Responsibility*, 44 OHIO ST. L.J. 797 (1983); Note, *Indiana's Guilty But Mentally Ill Statute: Blueprint to Beguile the Jury*, 57 IND. L.J. 639 (1982) [hereinafter cited as Note, *Indiana's GBMI*].

22. The American Psychiatric Association's Committee on Legal Issues, for example, adopted the recommendation that the APA "reserve judgment about use of the verdict of guilty but mentally ill to supplement the verdict of not guilty by reason of insanity until such time as empirical research on the effects of this supplementary verdict form is available." American Psychological Ass'n, *More on Insanity Reform*, Div. of Psychology and Law Newsletter, Summer 1983, at 6, 7, col. 1 (emphasis in original). See also NAT'L MENTAL HEALTH ASS'N, *supra* note 17, at 44; I. KEILITZ & J.P. FULTON, *THE INSANITY DEFENSE AND ITS ALTERNATIVES: A GUIDE FOR POLICYMAKERS* 46 (1984).

II. LEGISLATIVE DEVELOPMENTS

A. *Legislative Purposes*

The GBMI concept made its debut in the United States in 1975 when Michigan enacted its GBMI statute.²³ The primary purposes of the legislation were to curtail the assertion of the insanity defense, to reduce the incidence of insanity acquittals, and to protect society by incarcerating mentally disturbed, dangerous defendants who might otherwise be found NGRI and released shortly thereafter.²⁴ In *People v. McQuillan*,²⁵ the Michigan Supreme Court struck down the state's automatic commitment statute because it provided stricter standards and procedures for insanity acquittees than for persons civilly committed as dangerous and mentally ill. The court ordered that the approximately 270 insanity acquittees,²⁶ previously committed automatically, and still hospitalized at that time, be provided judicial hearings to ensure that they met the civil commitment standards (present mental illness, dangerousness, or inability to meet basic needs).²⁷ Many of the patients were subsequently released because they failed to meet these criteria for involuntary civil commitment.²⁸ Shortly after their release, two former patients committed violent crimes; one raped two women and the other murdered his wife. The resulting public outcry spurred the Michigan legislature to adopt the GBMI plea and verdict.²⁹

In 1981, largely in response to a highly publicized case in which the defendant raised the insanity defense after committing a violent offense,³⁰ Indiana became the second state to enact GBMI legislation.³¹ Similarly, the trial and acquittal of John W.

23. Act of Aug. 6, 1975, No. 180, § 36, 1975 Mich. Pub. Acts 387 (codified at MICH. COMP. LAWS § 768.36 (1982)) (defendant may be found "guilty but mentally ill" if the trier of fact finds beyond a reasonable doubt that the defendant: (1) "is guilty of an offense;" (2) "was mentally ill at the time of the commission of that offense;" and (3) "was not legally insane at the time of the commission of that offense").

24. See Project, *supra* note 10, at 83-85.

25. 392 Mich. 511, 221 N.W.2d 569 (1974).

26. See Project, *supra* note 10, at 82.

27. 392 Mich. at 547, 221 N.W.2d at 586.

28. See Project, *supra* note 10, at 82-83.

29. *Id.* See also Comment, *Historical and Constitutional Analysis*, *supra* note 21, at 482-83.

30. *State v. Judy*, ___ Ind. ___, 416 N.E.2d 95 (1981). See Note, *Indiana's GBMI*, *supra* note 21, at 639.

31. Act of Sept. 1, 1982, 1981 Ind. Acts 298, § 4 (codified at IND. CODE ANN. § 35-35-2-1 (West Supp. 1984)).

Hinckley, Jr. for his shooting of President Ronald Reagan³² apparently influenced many federal and state legislators to introduce GBMI legislation.³³

Related to the legislative intent to close the perceived loophole whereby responsible defendants escape punishment for their misconduct is the intent to offer juries a compromise verdict permitting both condemnation of a defendant's actions and acknowledgment of his or her need for mental health treatment.³⁴ The Michigan Court of Appeals has stated that the GBMI verdict was enacted as an "in-between classification."³⁵ Jurors reaching this verdict could feel satisfied that the public was protected and that the defendant would be provided with treatment. Jurors reportedly have felt constrained by the limited choice between acquittal on the grounds of insanity and a finding of guilty.³⁶ For example, when questioned about their decision following John Hinckley's trial, several jurors stated they would have preferred having the option of a GBMI verdict available to them.³⁷

The treatment and punishment goals of the GBMI verdict have been seriously questioned on both conceptual and practical grounds. For example, the National Mental Health Association has stated:

[The GBMI] verdict does not ensure in any way that persons found guilty under it, as opposed to persons found simply guilty, will be treated any differently when the trial is over. If persons convicted under either statute are treated the same in terms of disposition, we have developed different verdicts without any distinction. This

32. *United States v. Hinckley*, 672 F.2d 115 (D.C. Cir. 1982) (finding Hinckley NGRI).

33. See Note, *GBMI*, *supra* note 21, at 453 n.3 ("The dissatisfaction with the Hinckley verdict created an atmosphere that was ripe for adoption of alternatives to the insanity defense. The day after the Hinckley verdict, the Delaware legislature passed a bill adopting the GBMI verdict."). See also *Limiting the Insanity Defense: Hearings Before the Subcomm. on Criminal Law of the Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982) (hearings on S. 818, S. 1106, S. 1558, S. 1995, S. 2658, S. 2669) [hereinafter cited as *Subcommittee Hearings*]; *The Insanity Defense: Hearings Before the Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982) (hearings on S. 818, S. 1106, S. 1558, S. 2669, S. 2672, S. 2678, S. 2745, S. 2780) [hereinafter cited as *Committee Hearings*].

34. See Note, *Indiana's GBMI*, *supra* note 21, at 645-46.

35. *People v. Jackson*, 80 Mich. App. 244, 246, 263 N.W.2d 44, 45 (1977).

36. See R. SIMON, *THE JURY AND THE DEFENSE OF INSANITY* 144-45 (1967). For a further discussion of jury decisionmaking in insanity cases, see *infra* notes 293-315 and accompanying text.

37. *Subcommittee Hearings*, *supra* note 33, at 155-70.

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.³⁸

B. *Current GBMI Statutes*

Tables 1, 2, and 3 present the GBMI statutes of twelve states in effect at this writing.³⁹ The tables reveal basic similarities as well as critical differences among the versions of the GBMI plea and verdict adopted by the twelve states. For the sake of clarity and brevity, many of the entries in the tables have been abridged or paraphrased. Special care has been taken, however, either to duplicate the wording of a particular statutory passage or to paraphrase its meaning precisely, especially if shades of meaning may be particularly important, as in the statutory standards and definitions presented in Table 1.

Provisions relating to an individual state’s GBMI plea and verdict may appear in several places in that state’s statutes. Except for the NGRI provisions in Table 1, a statutory provision is noted in the tables only if the state has a relevant provision that expressly applies to GBMI defendants or convicts. Provisions not explicitly applicable to GBMI defendants or convicts are not included even though, in practice, they may apply. For example, the general sentencing provisions to which *all* offenders, not just

38. NAT’L MENTAL HEALTH ASS’N, *supra* note 17, at 34. Another commentator has noted that:

[the GBMI verdict] implies a false promise to the jury that a guilty but mentally ill defendant will be punished for his crime and at the same time compassionately treated for his mental illness, thereby satisfying competing social policies of the criminal law—responsibility and treatment. However, such a ruling in actuality guarantees no such treatment for defendants convicted under it. A “guilty but mentally ill” offender is simply a “guilty” offender for purposes of disposition upon conviction.

Note, *Indiana’s GBMI*, *supra* note 21, at 646. For a further discussion of criticism of the GBMI verdict, see *supra* notes 17-19 and accompanying text.

39. In constructing the tables, the most current versions of the relevant statutes available to the authors were used. The tables give statutory citations by section number only, without identifying the statutory compilations or indicating the year of the volume, replacement volume, supplement, or legislative service. The citations refer to the following compilations, which are current through the volume indicated: ALASKA STAT. (1983 Advance Legislative Service, II); DEL. CODE ANN. tit. 11 (Supp. 1982); GA. CODE ANN. (Supp. 1984); ILL. ANN. STAT. ch. 38 (Smith-Hurd Supp. 1983-84); IND. CODE ANN. (West Supp. 1984); KY. REV. STAT. (Supp. 1984); MICH. COMP. LAWS ANN. (1982); N.M. STAT. ANN. (Supp. 1984); PA. CONS. STAT. ANN. (1983 Legis. Ser., III Purdon); 1984 S.C. Acts 396; S.D. CODIFIED LAWS ANN. (Supp. 1983); UTAH CODE ANN. (Supp. 1983).

those found GBMI, are subject are not reflected in Table 3. Similarly, entries under "Probation" and "Parole" are included only if special provisions are made for GBMI offenders.

Table 1 is meant to facilitate comparison of the GBMI and NGRI statutory standards and definitions applicable in the twelve states. In Alaska, Delaware, and South Carolina, for example, a defendant may not be found NGRI on the ground that he or she lacked the behavioral control to conform his or her conduct to the requirements of the law, but may be found GBMI on that basis. The GBMI standards of these three states thus encompass a much broader concept of mental disease or defect than do the NGRI standards; the GBMI concept includes characterizations of "irresistible impulse" and "volitional capacity," while the NGRI concept focuses instead on the extent to which a defendant could appreciate the wrongfulness of his conduct.⁴⁰ Illinois, on the other hand, allows a finding of NGRI on the basis of volitional impairment, but disallows a finding of GBMI on that basis. The NGRI and GBMI verdicts in these states thus appear to be uniformly distinguishable by the types of mental aberration upon which they can be based. In Alaska, Delaware, and South Carolina, but not in Illinois, criminal responsibility may be assigned to a defendant even if he or she suffered from mental aberration that impaired behavioral control or willpower. Whether such basic similarities and sharp distinctions among the formulations of the GBMI verdict reflect different legislative purposes is unclear. It is also unclear whether juries and judges will be any better than the legislatures at sorting out the types and degrees of mental impairment applicable to the GBMI and NGRI verdicts.⁴¹

40. See ABA STANDING COMM., *supra* note 17, at 264-73 (in 1983, the ABA endorsed an NGRI standard that focused on the lack of "appreciation" of criminal wrongdoing and rejected "volitional" incapacity as an independent basis for exculpation).

41. See Stelzner & Piatt, *supra* note 21, at 106. In discussing the similarities and differences between the GBMI and NGRI verdicts, the authors state that: [t]he jury's meaningful choice between the two verdicts might be difficult due to the jury's confusion over the similarities and differences in the definitions of the two alternatives. Both verdicts require two showings—a mental condition and a consequence caused by that condition.

The conditions may be similar; the requisite results quite different.

Id. See also Note, *GBMI*, *supra* note 21, at 471 ("The overlap of these definitions makes a meaningful choice between the two verdicts a difficult task to assign to a lay jury.").

TABLE 1
 GUILTY BUT MENTALLY ILL AND NOT GUILTY BY REASON OF INSANITY:
 STATUTORY STANDARDS AND DEFINITIONS

STATE	GBM ¹ Standard	Mental Illness ² Defined	NGRI ³ Standard	Insanity ⁴ Defined
ALASKA	†As a result of mental disease or defect, lacked substantial capacity either to appreciate wrongfulness of the conduct or to conform conduct to the requirements of law. § 12.47.030.	†A disorder of thought, or mood that substantially impairs judgment, behavior, capacity to recognize reality, or ability to cope with ordinary demands of life; includes mental retardation. § 12.47.130(3).	†Unable, as a result of mental disease or defect, to appreciate the nature and quality of the criminal conduct. § 12.47.010(a).	Same as "Mental Illness Defined."
DELAWARE	Psychiatric disorder substantially disturbed thinking, feeling or behavior and/or left person with insufficient willpower to choose whether to do act. § 401(b).	None	As a result of mental illness or mental defect, lacked substantial capacity to appreciate the wrongfulness of conduct. § 401(a).	None
GEORGIA	None	†A disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with ordinary demands of life; includes mental retardation. § 17-7-131(a)(2). See § 17-7-131(c)(2).	Did not have mental capacity to distinguish between right and wrong in relation to the act, omission, or negligence. § 16-3-2. Because of mental disease, injury, or congenital deficiency, acted as did because of a delusional compulsion as to the act which overmastered will to resist committing the crime. § 16-3-3.	†Meeting the criteria of § 16-3-2 or § 16-3-3 (see "NGRI Standard"), § 17-7-131(a)(1).
ILLINOIS	Not insane but suffering from a mental illness § 6-2(c).	A substantial disorder of thought, mood, or behavior which impairs judgment, but not to extent unable to appreciate wrongfulness of behavior or conform conduct to the requirements of law. § 6-2(d).	†As a result of mental disease or mental defect, lacked substantial capacity either to appreciate the criminality of conduct or to conform conduct to the requirements of law. § 6-2(a).	Lacks substantial capacity either to appreciate the criminality of conduct or to conform conduct to the requirements of law as a result of mental disorder or mental defect. § 1005-1-11.
INDIANA	None	A psychiatric disorder which substantially disturbs thinking, feeling, or behavior and impairs ability to function; includes mental retardation. § 35-36-1-1.	†As a result of mental disease or defect, lacked substantial capacity either to appreciate the wrongfulness of the conduct or to conform conduct to the requirements of law. § 35-41-3-6.	The defense set out in § 35-41-3-6 (see "NGRI Standard"), § 35-36-1-1.
KENTUCKY	None	Substantially impaired capacity to use self-control, judgment, or discretion in conducting one's affairs and social relations, associated with maladaptive behavior or recognized emotional symptoms where condition can be related to physiological, psychological, or social factors. § 504.060.	†As a result of mental disease or defect, lacked substantial capacity either to appreciate the criminality of the conduct or to conform conduct to the requirements of law. § 504.020(1).	As a result of mental condition, lacks substantial capacity either to appreciate the criminality of conduct or to conform conduct to the requirements of law. § 504.060(4).

MICHIGAN	None	> A substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life. § 330.1400a.	As a result of mental illness or mental retardation, lacked substantial capacity either to appreciate the wrongfulness of the conduct or to conform conduct to the requirements of law. § 768.21a(1).	Same as "Mental Illness Defined." See § 768.21a(1). Also, "mental retardation" means significantly subaverage general intellectual functioning which originates during the developmental period and is associated with impairment in adaptive behavior. § 330.1500(g). See § 768.21a(1).
NEW MEXICO	None	A substantial disorder of thought, mood, or behavior which impaired judgment, but not to extent that defendant 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. § 31-9-3A.	None	No
PENNSYLVANIA	None	As a result of mental disease or defect, lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. § 314(c)(1).	<i>M'Naghten</i> rule applies. Did not repeal or otherwise abrogate the common law defense of insanity. § 314(d).	Laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act or, if he did know it, he did not know he was doing what was wrong. § 314(c)(2).
SOUTH CAROLINA	Had capacity to distinguish moral or legal right from moral or legal wrong and to recognize act as being morally or legally wrong, but because of mental disease or defect lacked sufficient capacity to conform conduct to the requirements of law. § 2(A).	None	As a result of mental disease or defect lacked capacity to distinguish moral or legal right from moral or legal wrong and to recognize the particular act charged as morally or legally wrong. § 1(A).	No
SOUTH DAKOTA	None	A substantial psychiatric disorder of thought, mood or behavior which affects a person at the time of the offense and which impairs a person's judgment, but not to the extent that he is incapable of knowing the wrongfulness of his act. § 22-1-2(22).	Insane at the time of the act charged. § 22-3-1(9).	The condition of a person temporarily or partially deprived of reason, upon proof that at the time of committing the act charged, he was incapable of knowing its wrongfulness. § 22-1-2(18A).
UTAH	None	A psychiatric disorder as defined by the current Diagnostic and Statistical Manual of Mental Disorders which substantially impairs mental, emotional, behavioral, or related functioning. § 64-7-28(1).	As a result of mental illness, lacked the mental state required as an element of the offense charged. § 76-2-305(1).	"Mental illness" means a mental disease or defect. Mental defect may be a congenital condition or one the result of injury or a residual effect of a physical or mental disease. § 76-2-305(3).

¹Table entry, or portion thereof, represents the general import of the provision, although details are excluded.

²> Table entry arguably applies to GBMI defendants, although the provision does not expressly apply.

³GBMI (Guilty but Mentally Ill) includes "Guilty but Mentally Ill at the Time of the Crime," "Guilty and Mentally Ill," and "Not Guilty of the Crime Charged but Guilty of a Lesser Included Offense and Mentally Ill," as applicable.

⁴Includes "mentally ill," "mental disease or defect," and "psychiatric disorder," when such terms are used in GBMI context.

⁵NGRI (Not Guilty by Reason of Insanity). If no statutory standard exists, one may have been established by case law.

⁶Includes "mental disease or defect," "mental capacity," "delusional compulsion," and similar terms, when such terms are used in NGRI context. If no statutory definition exists, one may have been established by case law.

TABLE 2
GUILTY BUT MENTALLY ILL PROCEDURES FROM PLEADING TO FINDING★

STATE	Plea Available		Prerequisites to Acceptance of Plea ¹	Plea Agreements	Finding ² Available	
	No	Yes			Yes ³	
ALASKA			Not applicable.	Not applicable.	Yes ³	\$ 12.47.040(a).
DELAWARE	Yes § 408(a).		Trier of fact must examine all appropriate reports (including the presentence investigation), hold a hearing on mental illness issue, and be satisfied defendant was mentally ill at time of offense. If trier is not so satisfied, plea is stricken or withdrawn and defendant has right to trial by jury or new judge. § 408(a).		Yes	§ 408(a).
GEORGIA	Only in felony cases. See § 17-7-131(b), (g).		Not specified.			Only in felony cases. § 17-7-131(b).
ILLINOIS	Yes § 115-2(b).		Defendant must be examined by clinical psychologist or psychiatrist and waive right to trial; judge must review examination report(s), hold hearing on mental health issue, and be satisfied there is a factual basis for the plea. § 115-2(b).		Yes	§ 115-3(c).
INDIANA	Yes § 35-35-2-1.		In every case, court must address defendant and determine that plea is voluntary and must be satisfied there is a factual basis for plea. § 35-35-1-3. †In felony case, court must address defendant to determine if he understands nature of charge, inform him regarding waiver of certain rights and duration of sentence, and determine if prosecutor and defendant have executed recommendation. In misdemeanor case, defendant may waive rights without first being addressed. § 35-35-1-2. If unrepresented by counsel, defendant must have freely and knowingly waived right to counsel. § 35-35-1-1. †Subject		Yes	§ 35-36-2-3.

<p>KENTUCKY</p>	<p>Yes § 504.130(2).</p>	<p>to conditions, defendant may withdraw plea. § 35.35-1-4. Defendant must waive right to trial and court must find that defendant was mentally ill at time of the crime. § 504.130(2).</p>	<p>Yes § 504.120.</p>
<p>MICHIGAN</p>	<p>Only in felony cases. See §§ 768.36(2), .20a(1).</p>	<p>Defendant must assert insanity defense and waive right to trial. Prosecutor must approve of acceptance of plea. Judge must, with defendant's consent, examine report(s) of center for forensic psychiatry or other qualified personnel regarding whether defendant was insane, mentally ill, or mentally retarded at time of offense; hold hearing on issue of defendant's mental illness; and be satisfied that defendant was mentally ill. § 768.36(2).</p>	<p>Only in felony cases. See §§ 768.36(1), .20a(1).</p>
<p>NEW MEXICO</p>	<p>Yes § 31-9-3B; Crim. P. R. 21(c).</p>	<p>Clinical psychologist or psychiatrist must examine defendant. Court must review examination reports, hold a hearing on issue of defendant's mental condition, and be satisfied there is a factual basis that defendant was mentally ill at time of offense. § 31-9-3C. †Court must address defendant in open court to inform him and determine his understanding of nature of charge, duration of sentence, pleading rights, and waiver of right to trial, and to determine that the plea is voluntary. Crim. P. R. 21(e), (f), (h). Verbatim record of proceedings required. Crim. P. R. 21(i).</p>	<p>Yes § 31-9-3B.</p>

†Table entry, or portion thereof, represents the general import of the provision, although details are excluded.
 *Table 2 consists of eight columns. The final four columns—Prerequisites to Finding, Burden of Proof Regarding Mental Illness, Jury Instructions, and Mental Examinations—appear *infra* at 133-35.
 †Includes procedures for withdrawal of plea, if withdrawal is permitted by statute.
 ‡Includes judgment of court, in absence of GBMI plea, and verdict of jury.
 §Alaska also permits a post-conviction finding of GBMI. If insanity defense was not raised and evidence of mental illness was not admitted, following conviction, defendant, prosecutor, or court may raise GBMI issue. At a hearing it must be shown by a preponderance of the evidence that defendant is GBMI. § 12.47.060.
 (Continued)

TABLE 2 (CONTINUED)

STATE	Plea Available	Prerequisites to Acceptance of Plea ¹	Plea Agreements	Finding ² Available
PENNSYLVANIA	Yes § 314(b).	Defendant must waive right to trial. Judge must examine all reports prepared pursuant to the Rules of Criminal Procedure, hold hearing on mental illness issue, and be satisfied defendant was mentally ill at time of offense. If judge refuses to accept plea, defendant may withdraw plea and has right to trial by jury or new judge. § 314(b).		Yes § 314(a).
SOUTH CAROLINA	Yes § 7.	Not specified.		Only during adjudication phase of trial, not during sentencing phase. §§ 2(C), 3.
SOUTH DAKOTA	Yes § 23A-7-2.	If defendant intends to introduce expert testimony relating to mental illness, he shall notify prosecutor not less than 30 days before trial, or at a later time if court directs, and file copy with clerk. § 23A-10-3. If defendant fails to give notice, court shall exclude the testimony. § 23A-10-5. In felony case, licensed psychiatrist must examine defendant, court must examine psychiatric reports and hold hearing on defendant's mental condition; if there is a factual basis, court can conclude defendant was mentally ill at time of offense. ¹ Court must address defendant in open court to inform him and determine his understanding of nature of charge, duration of sentence and certain due process rights, and to determine that the plea is voluntary. In misdemeanor case, defense attorney may enter plea and court may impose sentence immediately. §§ 23A-7-4, -7-5. See § 23A-7-16.	*Court must inquire whether defendant's plea results from prior discussions between prosecutor and defendant or his attorney. § 23A-7-5. See § 23A-7-16.	Yes § 23A-26-14.
UTAH	Yes §§ 77-13-1, -35-11.	¹ Court may order defendant evaluated at Utah state hospital or other suitable facility. Court must: hold hearing within a reasonable time on mental illness claim; find that plea is voluntary.	Court must make finding regarding whether plea is a result of a prior plea discussion and agreement and, if so, what agreement was reached. § 77-35-11(c)(6). See § 77-35-21.3(1).	Yes ⁴ § 77-35-21(a).

that defendant knowingly waives certain due process rights, and that defendant knows duration of sentence; advise defendant that a GBMI plea is not a contingent plea and that if defendant is found not to be mentally ill, a guilty plea otherwise lawfully made remains a valid plea; and conclude that defendant is currently mentally ill. § 77-35-21.5(1). See § 77-35-11(e).

TABLE 2 (CONTINUED)★★

STATE	Prerequisites to Finding	Burden of Proof Regarding Mental Illness ³	Jury Instructions	Mental Examinations ⁶
ALASKA	Assertion of insanity defense or admissibility of evidence of mental disease or defect. § 12.47.040(a). If NGRI verdict is reached as to charged offense because of reasonable doubt regarding culpable mental state that is an element of the crime, defendant is automatically GBMI of lesser included offense. § 12.47.020(G).	Preponderance of the evidence. § 12.47.040(b).	When court instructs jury regarding possible verdicts, it shall also instruct regarding dispositions available upon a GBMI or NGRI verdict. § 12-47.040(c).	†Court must appoint two qualified psychiatrists or two certified forensic psychologists to examine defendant and report on his mental condition. Court may order defendant committed to a secure facility for examination up to 60 days or longer if necessary. § 12.47.070.
DELAWARE	Trier of fact must examine all appropriate reports (including the presentence investigation), hold a hearing on mental illness issue, and be satisfied defendant was mentally ill at time of offense. § 408(g).	Not specified.	At the conclusion of trial, where warranted by the evidence, charge to the jury should include instructions regarding the GBMI verdict. § 3905.	*Trier of fact must examine all appropriate reports, including the presentence investigation. § 408(a).

†Table entry, or portion thereof, represents the general import of the provision, although details are excluded.

*Although entry reflects a special GBMI provision (i.e., one that expressly applies to GBMI defendants), the provision is vague.

★★The first four columns of Table 2 appear *infra* at 130-33.

¹Includes procedures for withdrawal of plea, if withdrawal is permitted by statute.

²Alaska also permits a post-conviction finding of GBMI. If insanity defense was not raised and evidence of mental illness was not admitted, following conviction, defendant, prosecutor, or court may raise a GBMI issue. At a hearing it must be shown by a preponderance of the evidence that defendant is GBMI. § 12.47.060.

³Unless otherwise specified, cited provisions are silent regarding which party bears the articulated burden of proof.

⁶Includes only mental examinations which occur before the acceptance of a GBMI plea or the rendering of a GBMI finding. Provisions for subsequent examinations are presented in TABLE 3.

(Continued)

TABLE 2 (CONTINUED)

STATE	Prerequisites To Finding	Burden of Proof Regarding Mental Illness ³	Jury Instructions	Mental Examinations ⁶
GEORGIA	Defendant must assert insanity defense. § 17-7-131(b). Trier of fact must find that defendant is guilty of crime charged and was mentally ill or mentally retarded at time of crime. § 17-7-131(c)(2).	Beyond a reasonable doubt. § 17-7-131(c)(2).	If defendant contends he was insane or otherwise mentally incompetent at time they may consider NGRI and GBMI verdicts. § 17-7-131(c).	
ILLINOIS	Defendant must assert insanity defense. § 115-3(c). Court must find that defendant is guilty of offense charged, and was mentally ill at time of offense, and was not legally insane at the time. § 115-3(c).	Beyond a reasonable doubt. § 115-3(c).	When defendant has asserted insanity defense, the court, when warranted by the evidence, shall provide jury with a special GBMI verdict form as to each offense charged and shall separately instruct the jury that a GBMI verdict may be returned instead of a general verdict, but that such a verdict requires finding beyond a reasonable doubt that defendant committed the acts charged, was not legally insane at the time, but was mentally ill. § 115-4(f).	¹ Before or during trial a GBMI plea may be accepted if defendant has undergone an examination by a clinical psychologist or psychiatrist. § 115-2(b). [†] In certain circumstances, court shall, on motion of the state, order defendant to submit to examination. § 115-6.
INDIANA	Defendant must assert insanity defense. § 35-36-2-3.	Not specified.		¹ When notice of an insanity defense is filed, court must appoint 2 or 3 competent, disinterested psychiatrists to examine defendant and to testify. § 35-36-2-2. Prosecution may move for mental examination after defendant files notice of intent to introduce evidence of mental illness. § 504.070. See "Prerequisites to Finding."
KENTUCKY	At least 20 days before trial, defendant must file written notice of intent to introduce evidence of mental illness. § 504.070. Defendant must provide evidence at trial of his mental illness or insanity at time of offense. § 504.120. Prosecution must prove that defendant is guilty of an offense; defendant must prove he was mentally ill at time of offense. § 504.130(1).	Defendant must prove mental illness by a preponderance of the evidence. § 504.130(1)(b).		
MICHIGAN	Defendant must assert insanity defense and trier of fact must find that defendant is guilty of an offense, was mentally ill at time of offense, and was not legally insane at the time. § 768.36(1).	Beyond a reasonable doubt. § 768.36(1).	At the conclusion of trial, if warranted by the evidence, the court shall instruct the jury to consider separately the issues of the presence of mental illness and of insanity, and shall instruct as to the verdicts of guilty, GBMI, NCRI, and not guilty. § 768.29a(2).	[•] Before accepting GBMI plea, judge must examine report(s) of center for forensic psychiatry or other qualified personnel regarding whether defendant was insane, mentally ill, or mentally retarded at time of offense. § 768.36(2). See § 768.20a(2).
NEW MEXICO	Defendant must assert insanity defense and court must find that defendant is guilty of the offense charged, and was mentally ill at time of offense, and was	Beyond a reasonable doubt. § 31-9-3D.	When defendant has asserted insanity defense, the court, where warranted by the evidence, shall provide jury with a special GBMI verdict form and shall	Before court may accept a GBMI plea, clinical psychologist or psychiatrist must examine defendant. § 31-9-3C.

not legally insane at the time. § 31-9-3D.

separately instruct the jury that a GBMI verdict may be returned instead of a verdict of guilty or not guilty, and that such a verdict requires finding beyond a reasonable doubt that defendant committed the offense charged, was not legally insane at the time, but was mentally ill. § 31-9-3E.

<p>PENNSYLVANIA</p> <p>Defendant must assert insanity defense and trier of fact must find that defendant is guilty of an offense, and was mentally ill at time of offense, and was not legally insane at the time. § 314(a).</p>	<p>Beyond a reasonable doubt. § 314(a).</p>	<p>*Before trial judge may accept GBMI plea, he must examine all reports prepared pursuant to the Rules of Criminal Procedure. § 314(b).</p>
<p>SOUTH CAROLINA</p> <p>Defendant must sufficiently raise insanity defense or introduce sufficient evidence of mental disease or defect. § 3. State must prove beyond a reasonable doubt to the trier of fact that defendant committed the crime and the defendant must prove that when he committed the crime he was mentally ill under the GBMI standard. § 2(B).</p>	<p>Defendant must prove mental illness under the GBMI standard by a preponderance of the evidence. § 2(B).</p>	
<p>SOUTH DAKOTA</p> <p>If defendant intends to introduce expert testimony relating to mental illness, he shall notify prosecutor not less than 30 days before trial, or at a later time if court directs, and file copy with clerk. § 23A-10-3. If defendant fails to give notice, court shall exclude the testimony. § 23A-10-5. Defendant must assert insanity defense; trier of fact must find that defendant is guilty of an offense, was mentally ill at time of offense, and was not insane at the time. § 23A-26-14.</p>	<p>Beyond a reasonable doubt. § 23A-26-14.</p>	<p>If defense of insanity or mental illness presented during trial, court shall provide jury with a special GBMI verdict form for each offense and shall instruct that a GBMI verdict may be returned instead of a general verdict. Court shall also instruct that the verdict requires finding beyond a reasonable doubt that defendant committed the offense, was not insane at the time, but mentally ill. § 23A-25-13.</p> <p>Court may not accept a GBMI plea until defendant has been examined by a licensed psychiatrist. § 23A-7-16.</p>
<p>UTAH</p> <p>Defendant must assert insanity defense. § 77-35-21.5(2).</p>	<p>Not specified.</p>	<p>†Upon a GBMI plea, court may order defendant evaluated at Utah state hospital or other suitable facility. § 77-35-21.5(1).</p> <p>‡Defendant asserts insanity defense, court shall instruct jury that they may find defendant GBMI or guilty of a lesser offense due to mental illness but not such illness as would warrant full exoneration. § 77-35-21.5(2).</p>

†Table entry, or portion thereof, represents the general import of the provision, although details are excluded.

*Although entry reflects a special GBMI provision (i.e., one that expressly applies to GBMI defendants), the provision is vague.

‡Unless otherwise specified, cited provisions are silent regarding which party bears the articulated burden of proof.

†Includes only mental examinations which occur before the acceptance of a GBMI plea or the rendering of a GBMI finding. Provisions for subsequent examinations are presented in TABLE 3.

‡New Mexico has standardized jury instructions for GBMI and NGRI cases. See Uniform Jury Instructions/Criminal §§ 41.00, 41.01, 41.02.

TABLE 3
GUILTY BUT MENTALLY ILL PROCEDURES SENTENCING THROUGH RELEASE★

STATE	Sentencing Procedure	Mental Examinations ¹	Rights of GBMI Convicts	Custody and Treatment After Sentencing
ALASKA	Court shall sentence defendant as provided by law. § 12.47.050(a).			The Department of Mental Health and Social Services shall provide mental health treatment to a defendant found GBMI, and shall determine the course of treatment. § 12.47.050(b).
DELAWARE	Court may impose any sentence on GBMI defendant which may lawfully be imposed upon any defendant for the same offense. § 408(b).	Defendant shall undergo such further evaluation as is psychiatrically indicated. § 408(b).	Defendant may refuse in writing to take any drugs prescribed for treatment of his mental illness, except when refusal will endanger life of defendant, or the lives or property of other persons with whom the defendant has contact. § 408(b). Defendant is not eligible for any privileges not permitted in writing by the Commissioner (including on-grounds and off-grounds privileges) until eligible for parole. § 408(c).	Defendant is committed to custody of Department of Corrections with Commissioner having exclusive jurisdiction over defendant in all security matters. Defendant shall receive such immediate and temporary treatment as psychiatrically indicated. Commissioner shall confine defendant in Delaware state hospital. Treatment decisions are the joint responsibility of the Director of Mental Health and the hospital staff. § 408(b).
GEORGIA	Court shall sentence GBMI defendant in same manner as a defendant found guilty of the offense. § 17-7-131(g).	If defendant is committed to an appropriate penal facility, he shall be further evaluated. § 17-7-131(g).		If defendant is committed to an appropriate penal facility, he shall be evaluated and then treated, within the limits of state funds appropriated therefor, in such manner as is psychiatrically indicated. Treatment may be provided by penal facility or Department of Human Resources after transfer. § 17-7-131(g).
ILLINOIS	Court may impose any sentence which could be imposed on non-GBMI defendant convicted of same offense. Court may order presentence investigation of any defendant, but shall order a written presentence report in felony cases. Court shall conduct a sentencing hearing. § 1005-2-6(a).	Presentence investigation shall include mental examination when so ordered by court. See §§ 1005-3-2(b), 2-6(a). Periodic examinations required after commitment to Department of Corrections. § 1005-2-6(b).		If court imposes a sentence of imprisonment, Department of Corrections shall provide such treatment as it determines necessary. § 1005-2-6(b). See "Transfer Among Facilities."
INDIANA	Court shall sentence defendant in same manner as a defendant found guilty of the offense. § 35-36-3-5(a).	If defendant is committed to the department of correction, he shall be further evaluated. § 35-36-2-5(b).		If defendant is committed to the department of correction, he shall be further evaluated and treated as psychiatrically indicated. Treatment

may be by the department of correction or the department of mental health after transfer. § 35-36-2-5(b). See "Transfer Among Facilities."

<p>KENTUCKY</p>	<p>Court shall sentence defendant in same manner as a defendant found guilty. § 504.150.</p>	<p>Court shall appoint at least one psychologist or psychiatrist to examine, treat, and report on defendant's mental condition at time of sentencing. § 504-140.</p>	<p>See "Duration of Treatment or GBMI Status."</p>
<p>MICHIGAN</p>	<p>Court shall impose any sentence which could be imposed upon a defendant convicted of the same offense. § 768.36(3).</p>	<p>If defendant is committed to the custody of the department of corrections, he shall undergo further evaluation. § 768.36(5).</p>	<p>If defendant is committed to the custody of the department of corrections, he shall undergo further evaluation and be given such treatment as is psychiatrically indicated for his mental illness or retardation. Treatment may be provided by the department of corrections or the department of mental health after transfer. § 768.36(3). See "Transfer Among Facilities."</p>
<p>NEW MEXICO</p>	<p>Court may impose any sentence which could be imposed upon a defendant convicted of the same offense. § 31-9-4.</p>	<p>If defendant is sentenced to the custody of the corrections department, the department shall examine the nature, extent, continuance, and treatment of defendant's mental illness. § 31-9-4.</p>	<p>The corrections department shall provide psychiatric, psychological, and other counseling and treatment for defendant as it deems necessary. § 31-9-4.</p>
<p>PENNSYLVANIA</p>	<p>Court may impose any sentence which may be imposed upon any defendant convicted of the same offense. Before imposing sentence, court shall hear testimony and make a finding of whether defendant at time of sentencing is severely mentally disabled and in need of treatment. § 9727(a).</p>	<p></p>	<p>*Defendant is committed to Bureau of Correction. § 9727(b)(2). Consistent with available resources defendant shall be provided such treatment as is psychiatrically or psychologically indicated. Treatment may be provided by the Bureau of Correction, the county, or the Department of Public Welfare in accordance with the "Mental Health Procedures Act." †The cost of treatment is borne by the Commonwealth. § 9727(b).</p>

*Table 3 consists of eight columns. The final four columns—Transfer Among Facilities, Duration of Treatment or GBMI Status, Probation, and Parole—appear *infra* at 139-41.

†Table entry, or portion thereof, represents the general import of the provision, although details are excluded.

*Table entry, or portion thereof, reflects a special GBMI provision, but the provision is vague.

†Includes only mental examinations which occur after the acceptance of a GBMI plea or the rendering of a GBMI finding. Provisions for prior examinations are presented in TABLE 2.

(Continued)

TABLE 3 (CONTINUED)

STATE	Sentencing Procedure	Mental Examinations †	Rights of GBMI Convicts	Custody and Treatment After Sentencing
SOUTH CAROLINA	Courts shall impose any sentence which could be imposed upon a defendant pleading or found guilty of the same charge. § 23A-27-38.			If defendant's sentence includes incarceration, the defendant shall first be taken to a facility designated by the Department of Corrections for treatment. § 7(A).
SOUTH DAKOTA	Courts shall impose any sentence which could be imposed upon a defendant pleading or found guilty of the same charge. § 23A-27-38.	If defendant is sentenced to the state penitentiary, he shall undergo further examination. § 23A-27-38.		If defendant is sentenced to the state penitentiary, he shall undergo further evaluation and may be given treatment that is psychiatrically indicated. If treatment is available, it may be provided through facilities under the jurisdiction of the board of charities and corrections. § 23A-27-38.
UTAH	Court shall impose any sentence which could be imposed upon a defendant convicted of same offense. Before sentencing, the court shall conduct a hearing to determine defendant's present mental state. § 77-35-21.5(3). If court finds defendant is currently mentally ill, it shall sentence him as a mentally ill offender. § 77-35-21.5(2). †Court shall order hospitalization if it finds by clear and convincing evidence: that defendant is mentally ill and, therefore, poses an immediate physical danger to others or self or lacks ability to provide the basic necessities of life; that defendant lacks ability to engage in a rational decision-making process regarding acceptance of treatment; that there is no appropriate treatment alternative to hospitalization; and that the hospital can provide adequate and appropriate treatment. § 77-35-21.5(4).		If defendant is hospitalized for an indefinite period [see "Duration of Treatment or GBMI Status"], he is entitled to petition the sentencing court for a rehearing at 6-month intervals. § 77-35-21.5(6).	Court may order hospitalization at the Utah state hospital or other suitable facility. § 77-35-21.5(4). See "Sentencing Procedure."

TABLE 3 (CONTINUED)★★

STATE	Transfer Among Facilities	Duration of Treatment of GBMI Status	Probation	Parole
ALASKA		Treatment must continue until defendant no longer suffers from a mental disease or defect that causes him to be dangerous to the public peace or safety. When treatment terminates, defendant is required to serve remainder of sentence imposed. †Not less than 30 days before expiration of sentence; involuntary civil commitment proceedings should be commenced if defendant is still receiving treatment or is still dangerous. § 12.47.050(b), (c), (e). ²		Notwithstanding any contrary provision of law, a GBMI convict receiving treatment may not be released on furlough, work release, or parole. § 12.47.050(d).
DELAWARE	See "Duration of Treatment or GBMI Status." The Delaware State Hospital, or other residential treatment facility to which defendant is committed, has authority to discharge defendant and return him to physical custody of Commissioner if facility believes discharge is in defendant's best interests. § 408(b). †If the discharge is before expiration of defendant's sentence, facility shall transmit a report on defendant's mental condition to the Commissioner and the Parole Board. § 408(c).	If defendant is placed on probation, court, upon Attorney General's recommendation, shall make treatment a condition of probation. Reports specified by trial judge shall be filed with probation officer and sentencing court. Treatment provided by state agency or, with sentencing court's approval and at individual expense, by private agency. § 409(c).		†Prerelease or parole status is under same terms and laws applicable to any other offender. Counseling or treatment may be a condition of such status. § 409(a), (b).
GEORGIA	Transfer is pursuant to procedures in regulations of the Department of Offender Rehabilitation and the Department of Human Resources. § 17-7-131(g)(2).			
ILLINOIS	†Department of Corrections may transfer custody to Department of Mental Health and Developmental Disabilities, which shall return defendant when sentence has not expired and hospitalization is no longer needed. § 1005-2-6(c), (d)(1).	†When Department of Corrections notifies Director of Mental Health and Developmental Disabilities of the expiration of the sentence of a transferred defendant, if defendant requires further hospitalization, the Department of Mental Health and Developmental Disabilities shall file a petition for involuntary civil commitment. § 1005-2-6(d)(2).	If defendant is on probation under the "State-wide Probation Act," court may require defendant to undergo available treatment as a condition of probation. Provider of services may charge defendant fees. § 17-7-131(h).	

★★Table 3 consists of eight columns. The first four columns appear *supra* at 136-38.
 †Table entry, or portion thereof, represents the general import of the provision, although details are excluded.
 •Table entry, or portion thereof, reflects a special GBMI provision, but the provision is vague.
 †Includes only mental examinations which occur after the acceptance of a GBMI plea or the rendering of a GBMI finding. Provisions for prior examinations are presented in TABLE 2.
²Alaska statute provides that nothing in the GBMI provisions restricts mental health treatment of non-GBMI convicts. See § 12.47.055.
 (Continued)

TABLE 3 (CONTINUED)

STATE	Transfer Among Facilities	Duration of Treatment of CBMI Status	Probation	Parole
INDIANA	Defendant may be transferred to the department of mental health under § 16-14-8. ³ § 35-36-2-5(b)(2).		†If defendant is placed on probation, court may require that he undergo treatment. § 35-36-2-5(c).	
KENTUCKY		Treatment shall be provided defendant until he is no longer mentally ill or until expiration of his sentence, whichever occurs first. § 504.150.	Treatment shall be a condition of probation, shock probation, conditional discharge, parole, or conditional release so long as defendant is mentally ill. § 504.150(2).	See "Probation."
MICHIGAN	Defendant may be transferred to the department of mental health under § 330.2000 or § 330.2002. ⁴ § 768.36(3).	†If defendant is discharged before expiration of sentence, he shall be returned to the state correctional facility for balance of sentence. § 768.36(3). Discharge occurs whenever defendant ceases to require intensive care or treatment or when criminal sentence expires. §§ 768.36(3), 330.2006(1)(a),(b). At least 14 days before expiration of sentence, head of department of mental health facility may file involuntary civil commitment petition. §§ 768.36(3), 330.2006(3).	†If defendant shall be a condition of probation, upon recommendation of the center for forensic psychiatry, shall make treatment a condition of probation. Probation should continue for not less than 5 years. Treatment is provided by a department of mental health facility, or with court approval and at individual expense, by a private agency. Reports should be filed every 3 months. § 768.36(4).	†If defendant is placed on parole, upon recommendation of the treating facility, treatment shall be a condition of parole. While considering parole, the parole board should consult the treating facility and obtain reports on defendant's condition. § 768.36(3).
NEW MEXICO				
PENNSYLVANIA	*Defendant may be transferred to a mental health facility. § 9727(b)(2). "Duration of Treatment or CBMI Status."	†When treating facility discharges defendant prior to expiration of his maximum sentence, it shall transmit a report to the Board of Probation and Parole, the correctional facility, or the county jail to which the defendant is being returned. § 9727(c).	†When placing defendant on probation, court may, upon recommendation of the district attorney or upon its own initiative, make treatment a condition of probation. Probation should continue for the maximum period permitted by law. Treatment shall be by a Department of Public Welfare-approved facility, or with sentencing court's approval and at individual's expense, by private parties. § 9727(f).	†A defendant discharged from treatment may be placed on pre-release or parole status under the same terms and laws applicable to any other defendant. Treatment may be required as a condition. Paroling authority shall consult with treating facility when considering parole. § 9727(d), (e).
SOUTH CAROLINA	See "Duration of Treatment or CBMI Status."	A defendant whose sentence includes incarceration shall remain at the designated treatment facility until in the opinion of the facility staff the defendant may safely be moved to the general population of the Department of Corrections to serve the remainder	If the sentence includes a probationary sentence, judge may impose such conditions and restrictions upon the defendant's release as he deems necessary for the safety of the defendant and of the community. § 7(B). †Solicitor shall notify local	

of his sentence. § 7(A).
 probation office of release pursuant to probationary sentence and probation office shall monitor defendant, file reports, and provide notice if defendant violates terms of release. Court may hold hearing on violation and order hospitalization if needed. § 8.

§ If defendant is placed on probation, the sentencing court, upon recommendation of a licensed psychiatrist, shall make treatment a condition of probation. § 23A-27-40. Treatment shall be provided by local mental health agencies if available, or by a facility under the jurisdiction of the board of charities and corrections. Defendant must pay for the treatment unless he is indigent. § 23A-27-41.

§ If defendant is placed on probation, trial judge shall make treatment a condition of probation if defendant is shown to be treatable and facilities exist for treatment of defendant on probation status. Probation shall not be for less than 5 years, or until expiration of sentence, whichever comes first, and shall not be reduced without sentencing court considering a current mental status report. § 77-35-21.5(9).

§ If board of pardons considers parole, board shall consult the treating facility and a report on defendant's condition may be filed with the board. Defendant shall remain hospitalized pending board's decision. If defendant is placed on parole, treatment shall, upon hospital's recommendation, be made a condition of parole. Parole shall not be for less than 5 years, or until expiration of sentence, whichever comes first, and shall not be reduced without board of pardon's considering current mental status report. § 77-35-21.5(8).

§ If a treating facility discharges defendant prior to expiration of his sentence, it shall forward to the board of pardons and paroles a report on defendant's condition. § 23A-27-39.

The board of charities and corrections may transfer defendant from the penitentiary to other facilities under its jurisdiction and return defendant to the penitentiary after completion of treatment for the balance of defendant's sentence. § 23A-27-38.

§ Hospitalization shall not exceed 6 months without a review hearing. If at the review hearing the court finds by clear and convincing evidence that the conditions of § 77-35-21.5(4) [see "Sentencing Procedure"] will last for an indeterminate period, it may order an indefinite period of hospitalization, which shall in no circumstance be longer than the maximum sentence imposed. § 77-35-21.5(5), (7).

§ If hospital proposes to discharge defendant prior to expiration of sentence, the board of pardons shall direct that defendant serve any or all of unexpired term of sentence at the Utah state prison, or place defendant on parole. § 77-35-21.5(8).

†Table entry, or portion thereof, represents the general import of the provision, although details are excluded.
 *Table entry, or portion thereof, reflects a special GBMI, but the provision is vague.
 ‡Section 16-4-8 has been repealed.
 §Sections 330.2000 and 330.2002 have been repealed.

Tables 2 and 3 present special GBMI procedural provisions that apply from the initial pleading stage through the ultimate release of an offender. Table 2 differentiates the procedures applicable when a defendant pleads GBMI from those applicable when a defendant does not enter such a plea but the court or jury instead finds him or her GBMI after trial. Prerequisites to the court's acceptance of a GBMI plea are very different from the prerequisites to a GBMI finding in most states. The provisions relating to the burden of proof regarding mental illness reflected in Table 2 are illustrative of the variety of GBMI statutes among the twelve states. Only Kentucky and South Carolina specify which party bears the burden of proof; six states require proof beyond a reasonable doubt, three require a preponderance of the evidence, and three are silent on the issue.

Table 3 presents statutory provisions applicable during the time of sentencing, incarceration, and the eventual release of an offender by means of probation and parole. Of particular note are the uniform provisions among the states allowing imposition on a GBMI convict of any sentence that could be imposed on any other defendant convicted of the same offense. That the GBMI sentencing provisions do not expressly preclude imposition of the death penalty may present the courts with a conflict between the rehabilitative ideals of the GBMI legislation and the possible imposition of the death penalty.⁴²

The next section of this article explores the judicial development of the GBMI plea and verdict. Most of the cases discussed therein resulted from conflicts or questions arising after GBMI legislation was enacted in a particular state.

III. JUDICIAL DEVELOPMENTS

As of the fall of 1984, approximately 90 appellate level decisions involving or discussing the GBMI plea or verdict have been rendered in this country.⁴³ The vast majority of these decisions

42. For a further discussion of the relationship between the death penalty and GBMI legislation, see *infra* note 122.

43. See *Gorton v. Johnson*, 100 F.R.D. 801 (E.D. Mich. 1984); *Ball v. State*, 167 Ga. App. 546, 306 S.E.2d 353 (1983) (the state statute requires the trial judge to instruct the jury that "not guilty by reason of insanity" and "guilty but mentally ill" verdicts are part of the jury's choices), *rev'd*, 251 Ga. 840, 310 S.E.2d 516 (1984); *Jackson v. State*, 166 Ga. App. 477, 304 S.E.2d 560 (1983) (although mentally ill at the time the offense was committed defendant is guilty because he knew the difference between right and wrong); *Kirkland v. State*, 166 Ga. App. 478, 304 S.E.2d 561 (1983) (use of "guilty but mentally ill" verdict was not an unconstitutional application of *ex post facto* law); *People v. Kaeding*, 98 Ill.

understandably come from Michigan, the state having the longest

2d 237, 456 N.E.2d 11 (1983); *People v. De Wit*, 123 Ill. App. 3d 723, 463 N.E.2d 742 (1984); *People v. Neely*, 121 Ill. App. 3d 616, 459 N.E.2d 1115 (1984); *People v. Gore*, 116 Ill. App. 3d 780, 452 N.E.2d 583 (1983); *People v. Lillard*, 116 Ill. App. 3d 1062, 449 N.E.2d 938 (1983); *People v. Dalby*, 115 Ill. App. 3d 35, 450 N.E.2d 31 (1983) (no *ex post facto* limitation applies to the verdict of guilty but mentally ill); *People v. Marshall*, 114 Ill. App. 3d 217, 448 N.E.2d 969 (1983) (GBMI defendants have "no separate constitutional right to treatment for their mental health problem beyond the constitutional right to minimally adequate medical care which is applicable to all prisoners"); *People v. Testa*, 114 Ill. App. 3d 695, 449 N.E.2d 164 (1983) (defendant cannot ask for a subsequent hearing to determine mental status, and therefore cannot be found guilty but mentally ill if he did not initially plead insanity); *Schiro v. State*, — Ind. —, 451 N.E.2d 1047, *cert. denied*, 104 S. Ct. 510 (1983); *Taylor v. State*, — Ind. —, 440 N.E.2d 1109 (1982) (the definitions of "insane" and "mentally ill" are not so vague and susceptible to misinterpretation so as to render them the same); *Turner v. Turner*, — Ind. App. —, 454 N.E.2d 1247 (1983); *Stader v. State*, — Ind. App. —, 453 N.E.2d 1032 (1983); *Gall v. Commonwealth*, 607 S.W.2d 97 (Ky. 1980), *cert. denied*, 450 U.S. 989 (1981); *Pouncey v. State*, 297 Md. 264, 465 A.2d 475 (1983) (deciding whether a defendant can be found both guilty of a crime and insane at the time of commission); *Langworthy v. State*, 284 Md. 588, 399 A.2d 578 (1979); *People v. Robinson*, 417 Mich. 231, 331 N.W.2d 226 (1983); *People v. Murphy*, 416 Mich. 453, 331 N.W.2d 152 (1982) (the "prosecution failed to present sufficient evidence to convince a rational trier of fact that the defendant was sane at the time he committed the acts alleged"); *People v. Langworthy*, 416 Mich. 630, 331 N.W.2d 171 (1982); *People v. Booth*, 414 Mich. 343, 324 N.W.2d 741 (1982) (a defendant who suffers from amnesia regarding events of the crime may enter plea of guilty but mentally ill); *People v. Cocuzza*, 413 Mich. 78, 318 N.W.2d 465 (1982), *rev'g* 105 Mich. App. 761, 307 N.W.2d 414 (1981); *People v. McDonald*, 409 Mich. 110, 293 N.W.2d 588 (1980), *aff'g* 86 Mich. App. 5, 272 N.W.2d 179 (1978); *People v. McLeod*, 407 Mich. 632, 288 N.W.2d 909 (1980) (a constitutional statute cannot be rendered unconstitutional simply because the Department of Corrections failed to comply with the statutory mandate for evaluation and treatment of GBMI defendant); *People v. Helzer*, 404 Mich. 410, 273 N.W.2d 44 (1978); *People v. Darden*, 132 Mich. App. 154, 346 N.W.2d 915 (1984); *People v. John*, 129 Mich. App. 664, 341 N.W.2d 861 (1983); *People v. Williams*, 129 Mich. App. 648, 341 N.W.2d 854 (1983) (*per curiam*); *People v. Siebers*, 129 Mich. App. 465, 341 N.W.2d 530 (1983); *People v. Doyle*, 129 Mich. App. 145, 342 N.W.2d 560 (1983); *People v. Clark*, 129 Mich. App. 119, 341 N.W.2d 248 (1983); *People v. Kinard*, 129 Mich. App. 94, 341 N.W.2d 820 (1983); *People v. Toner*, 125 Mich. App. 439, 336 N.W.2d 22 (1983) (a writ of mandamus, rather than a hearing before a sentencing court, is the proper remedy for a complaint of insufficient treatment for a GBMI defendant); *People v. Delaughter*, 124 Mich. App. 356, 335 N.W.2d 37 (1983); *People v. Caldwell*, 122 Mich. App. 618, 333 N.W.2d 105 (1983); *People v. Davis*, 122 Mich. App. 597, 333 N.W.2d 99 (1983); *People v. Wehrer*, 121 Mich. App. 501, 329 N.W.2d 37 (1982); *People v. Leblanc*, 120 Mich. App. 343, 327 N.W.2d 471 (1982); *People v. Frost*, 120 Mich. App. 328, 328 N.W.2d 44 (1982); *People v. Fisher*, 119 Mich. App. 445, 326 N.W.2d 537 (1982); *People v. Korona*, 119 Mich. App. 369, 326 N.W.2d 143 (1982); *People v. Gasco*, 119 Mich. App. 143, 326 N.W.2d 397 (1982) (*per curiam*); *People v. Smith*, 119 Mich. App. 91, 326 N.W.2d 434 (1982); *People v. Giuchici*, 118 Mich. App. 252, 324 N.W.2d 593 (1982); *People v. Thompson*, 117 Mich. App. 210, 323 N.W.2d 656 (1982); *People v. Shively*, 116 Mich. App. 323, 323 N.W.2d 383 (1982); *People v. Blue*, 114 Mich. App. 137, 318 N.W.2d 498 (1982); *People v. Bazzi*, 113 Mich. App. 606, 318 N.W.2d 484 (1981) ("[b]efore accepting the plea of [GBMI] the court must directly question the defendant to determine whether he

experience with the alternative verdict. Many of these decisions

is guilty of the offense"); *People v. Linzey*, 112 Mich. App. 374, 315 N.W.2d 550 (1981); *People v. Fultz*, 111 Mich. App. 587, 314 N.W.2d 702 (1981) (the court must determine that the defendant was not legally insane at the time of the offense for the GBMI verdict to apply: insanity is an "extreme of mental illness"); *People v. Broadnax*, 111 Mich. App. 46, 314 N.W.2d 522 (1981); *People v. Rone*, 109 Mich. App. 702, 311 N.W.2d 835 (1981); *People v. Henry*, 107 Mich. App. 632, 309 N.W.2d 922 (1981); *People v. Ritsema*, 105 Mich. App. 602, 307 N.W.2d 380 (1981) (although jury instruction that failed to include GBMI verdict was erroneous, retrial was unnecessary because jury found defendant sane and treatment could be provided if deemed necessary by Department of Corrections); *People v. Gasco*, 104 Mich. App. 594, 305 N.W.2d 552 (1981); *People v. Mack*, 104 Mich. App. 560, 305 N.W.2d 264 (1981) (remand for determination of whether defendant was receiving proper treatment); *People v. Rone*, 101 Mich. App. 811, 300 N.W.2d 705 (1980), *vacated*, 411 Mich. 984, 311 N.W.2d 702 (1981); *People v. Murphy*, 100 Mich. App. 413, 299 N.W.2d 51 (1980) (because prosecution failed to prove sanity beyond a reasonable doubt, GBMI verdict has to be reversed and the case remanded for an entry of NGRI), *aff'd*, 416 Mich. 453, 331 N.W.2d 152 (1982); *People v. Drossart*, 99 Mich. App. 66, 297 N.W.2d 863 (1980) (in terms of criminal responsibility, definitions of mental illness must come from the law, not the medical sciences); *People v. Philpot*, 98 Mich. App. 257, 296 N.W.2d 229 (1980); *People v. Hicks*, 96 Mich. App. 610, 293 N.W.2d 646 (1980); *People v. Girard*, 96 Mich. App. 594, 293 N.W.2d 639 (1980) (the jury instruction on the definition of legal insanity was erroneous because the definition was based on common law rather than statutory language); *People v. Willis*, 96 Mich. App. 350, 292 N.W.2d 145 (1980); *People v. Thomas*, 96 Mich. App. 210, 292 N.W.2d 523 (1980); *People v. Seefeld*, 95 Mich. App. 197, 290 N.W.2d 123 (1980); *People v. Gemill*, 95 Mich. App. 139, 290 N.W.2d 104 (1980); *People v. Parney*, 98 Mich. App. 571, 296 N.W.2d 568 (1979); *People v. Tenbrink*, 93 Mich. App. 326, 287 N.W.2d 223 (1979) (reversal was not warranted by defendant's complaint of improper psychiatric treatment; the proper remedy was a writ of mandamus to Department of Corrections); *People v. Ramsey*, 89 Mich. App. 468, 280 N.W.2d 565 (1979); *People v. Crawford*, 89 Mich. App. 30, 279 N.W.2d 560 (1979) (a defendant may be found legally sane if he has the "substantial capacity to appreciate the wrongfulness of his conduct" and has the ability "to conform his conduct to the requirements of the law"); *People v. Sorna*, 88 Mich. App. 351, 276 N.W.2d 892 (1979); *People v. Sharif*, 87 Mich. App. 196, 274 N.W.2d 17 (1978) (defendant is not necessarily entitled to treatment because the GBMI verdict is based on a finding of mental illness at the time the offense was committed and not thereafter); *People v. Long*, 86 Mich. App. 676, 273 N.W.2d 519 (1978) (the procedure for making a GBMI plea is the same as that for making a guilty plea except for the additional finding of mental illness), *rev'd sub nom.* *People v. Booth*, 414 Mich. 343, 324 N.W.2d 741 (1982); *People v. Booth*, 86 Mich. App. 646, 273 N.W.2d 510 (1978) (a preliminary examination transcript does not establish a factual basis for defendant's GBMI plea), *rev'd*, 414 Mich. 343, 324 N.W.2d 741 (1982); *People v. Mangiapane*, 85 Mich. App. 379, 271 N.W.2d 240 (1978); *People v. Staggs*, 85 Mich. App. 304, 271 N.W.2d 211 (1978); *People v. Mikulin*, 84 Mich. App. 705, 270 N.W.2d 500 (1978); *People v. Darwall*, 82 Mich. App. 652, 267 N.W.2d 472 (1978) (the verdicts of GBMI and NGRI do not unconstitutionally shift the burden of proof on defendant because the burden is on the people to prove beyond a reasonable doubt that defendant was sane); *People v. Jackson*, 80 Mich. App. 244, 263 N.W.2d 44 (1977); *People v. McLeod*, 77 Mich. App. 327, 258 N.W.2d 214 (1977), *aff'd*, 407 Mich. 632, 288 N.W.2d 909 (1980); *Novosel v. Helgemoe*, 118 N.H. 115, 384 A.2d 124 (1978); *State v. Page*, 100 N.M. 788, 676 P.2d 1353 (1984); *State v. Garcia*, 99 N.M. 466, 659 P.2d 918

concern issues having little, if any, significance to the development of the GBMI plea and verdict.⁴⁴ This section reviews only those appellate court pronouncements that apparently are significant regarding the constitutionality, as well as the substantive and procedural development, of the GBMI plea and verdict. First, however, we contrast the American progeny of the English Trial of Lunatics Act.⁴⁵

A. Maryland's "Guilty But Insane" Verdict

The Maryland Court of Appeals has recognized a "guilty but insane" verdict on two occasions. Although at first glance this judicially-fashioned verdict appears to be similar to GBMI, more careful scrutiny reveals that it is essentially equivalent to the traditional NGRI verdict. In *Langworthy v. State*,⁴⁶ the court found that a guilty verdict is not inconsistent with a special verdict of insanity. The issue before the court was whether the intermediate appellate court had erred in dismissing the defendant's appeal from a rape conviction on the grounds that the trial court's special finding of insanity was tantamount to an acquittal.⁴⁷ In holding that the conviction was appealable, the court of appeals stated: "[T]he clear legislative intent regarding the successful interposition of a plea of insanity is not that an accused is to be found not guilty of the criminal act it was proved he committed, but that he shall not be punished therefor."⁴⁸ The court also cited Maryland Rule of Procedure 731a, which states that a defendant "may plead not guilty, guilty, or, with the consent of the court, *nolo contendere*. In addition to any of these pleas, the defendant may interpose the defense of insanity as permitted by law."⁴⁹ Thus, although the court held that a defendant found guilty of the crime charged, yet successful in asserting an insanity

(1983); *Commonwealth v. Musolino*, 320 Pa. Super. 425, 467 A.2d 605 (1983); *State v. Stacy*, 601 S.W.2d 696 (Tenn. 1980).

44. See, e.g., *People v. Cocuzza*, 413 Mich. 78, 318 N.W.2d 465 (1982) (whether trial judge who presided over prior incomplete guilty plea proceedings must *sua sponte* disqualify himself from conducting the same defendant's subsequent bench trial); *People v. McDonald*, 409 Mich. 110, 293 N.W.2d 588 (1980) (whether usage and application of common law definition of rape to only male defendants represent an arbitrary classification and violate due process).

45. For a discussion of the Trial of Lunatics Act, see *supra* notes 7-8 and accompanying text.

46. 284 Md. 588, 399 A.2d 578 (1979).

47. *Id.* at 598-99, 399 A.2d at 583-84.

48. *Id.* at 598, 399 A.2d at 584. See MD. ANN. CODE art. 59, § 25(b) (1972) (repealed 1982).

49. 284 Md. at 591-92, 399 A.2d at 580.

defense, could appeal from the conviction, implicit in that holding is a finding that a guilty verdict is not inconsistent with an insanity verdict.

In *Pouncey v. State*,⁵⁰ the Maryland Court of Appeals held specifically that a defendant may be found guilty but insane. The defendant had drowned her five-year-old son because she believed that the devil was pursuing him and that the only way to prevent her son from going to hell was to kill him. In holding that the defendant was properly found both guilty of murder and legally insane at the time of the offense, the court relied on the rationale of *Langworthy* and stated that “a finding of insanity is not tantamount to an absence of mens rea, or inconsistent with a general intent to commit a crime.”⁵¹

Bearing a striking similarity to the nineteenth century Trial of Lunatics Act,⁵² Maryland’s judicially-developed guilty but insane verdict appears merely to replace the NGRI language with language that suggests blameworthiness. The dispositional consequences of a guilty but insane finding are not different from those of a finding of NGRI.⁵³ Although predicated on a finding of guilt, the consequences are nonresponsibility for the criminal conduct and no punishment under the criminal law. The court, in its discretion, may either release the defendant or commit him or her for treatment in a mental institution until it is determined that release would not constitute a danger to the individual or others.⁵⁴ Semantics aside, Maryland’s judicially-developed guilty but insane verdict is clearly distinguishable from the legislatively-developed GBMI verdict described in the previous section of this article,⁵⁵ and it is almost indistinguishable from the traditional NGRI verdict that the GBMI verdict was meant to supplement. The same is true of the Oregon and Connecticut variations of the guilty but insane verdict.⁵⁶ We now turn to the judicial development of the GBMI plea and verdict.

50. 297 Md. 264, 465 A.2d 475 (1983).

51. *Id.* at 269, 465 A.2d at 478.

52. For a discussion of the Trial of Lunatics Act, see *supra* notes 7-8 and accompanying text.

53. See *Langworthy*, 284 Md. at 593-94, 399 A.2d at 581-82.

54. *Id.* at 594, 399 A.2d at 582.

55. For a discussion of the legislative development of the GBMI verdict, see *supra* notes 23-42 and accompanying text.

56. For a discussion of the Oregon and Connecticut versions, see *supra* note 14.

B. *Constitutional Questions*

Constitutional challenges to GBMI statutes have ranged from equal protection and due process arguments to arguments based on prohibitions against cruel and unusual punishment and *ex post facto* laws. These challenges have been predicated on both federal and state constitutional protections.⁵⁷ The relevant Michigan case law addresses the issues of equal protection,⁵⁸ due process,⁵⁹ and cruel and unusual punishment.⁶⁰ Indiana case law deals only with equal protection⁶¹ and due process challenges,⁶² while Illinois case law reveals challenges based on due process guarantees⁶³ and the federal constitutional prohibition against *ex post facto* laws.⁶⁴ Georgia case law involves only *ex post facto* law challenges.⁶⁵ To date, the Illinois, Indiana, and Michigan statutes have withstood constitutional attack in the supreme courts of those states,⁶⁶ while the Georgia statute has been reviewed only by the intermediate appellate court.⁶⁷

57. For example, in a 1978 decision, the Michigan Court of Appeals rejected the defendant's argument that the Michigan GBMI statute was violative of the Michigan Constitution's single object clause, Article 4, Section 24, which required that no law embrace more than one object. *People v. Sharif*, 87 Mich. App. 196, 274 N.W.2d 17 (1978). The defendant argued that the statute provided for both treatment and parole of GBMI offenders. *Id.* at 199, 274 N.W.2d at 19. The court stated that a statute may include provisions that implement its principal object, which, in this case, was to provide for judgments and sentences of offenders. *Id.*

In other cases, defendants have asserted concurrent violations of state and federal constitutional provisions. *See, e.g., People v. Marshall*, 114 Ill. App. 3d 217, 448 N.E.2d 969 (1983) (defendant argued GBMI statute was violative of state and federal prohibitions against *ex post facto* laws).

58. *See, e.g., People v. McLeod*, 407 Mich. 632, 288 N.W.2d 909 (1980); *People v. Sharif*, 87 Mich. App. 196, 274 N.W.2d 17 (1978); *People v. Darwall*, 82 Mich. App. 652, 267 N.W.2d 472 (1978).

59. *See People v. McLeod*, 407 Mich. 632, 651, 288 N.W.2d 909, 914 (1980) (court addressed whether defendant, who did not receive psychiatric treatment, was denied due process of law under statute specifically granting to GBMI defendants the right to such treatment).

60. *See id.* at 651, 288 N.W.2d at 914.

61. *See Taylor v. State*, ___ Ind. ___, 440 N.E.2d 1109 (1982).

62. *See id.* at ___, 440 N.E.2d at 1111.

63. *See People v. De Wit*, 123 Ill. App. 3d 723, 463 N.E.2d 742 (1984); *People v. Kaeding*, 98 Ill. 2d 237, 456 N.E.2d 11 (1983).

64. *See People v. De Wit*, 123 Ill. App. 3d 723, 463 N.E.2d 742 (1984); *People v. Dalby*, 115 Ill. App. 3d 35, 450 N.E.2d 31 (1983); *People v. Marshall*, 114 Ill. App. 3d 217, 448 N.E.2d 969 (1983).

65. *See Kirkland v. State*, 166 Ga. App. 478, 304 S.E.2d 561 (1983).

66. *See People v. Kaeding*, 98 Ill. 2d 237, 456 N.E.2d 11 (1983); *Taylor v. State*, ___ Ind. ___, 440 N.E.2d 1109 (1982); *People v. McLeod*, 407 Mich. 632, 288 N.W.2d 909 (1980).

67. *See Kirkland v. State*, 166 Ga. App. 478, 304 S.E.2d 561 (1983).

1. *Equal Protection*

The basic premise of equal protection challenges against GBMI statutes is that they create irrational classifications leading to discrimination against defendants found GBMI.⁶⁸ In Michigan, a variety of equal protection arguments have been advanced. In *People v. Darwall*,⁶⁹ for example, the defendant argued that it was discriminatory to subject mentally ill defendants pleading insanity to the risk of GBMI verdicts, while similar defendants may escape GBMI verdicts by not pleading insanity.⁷⁰ The court of appeals rejected this argument, stating that the statute bears a reasonable relationship to the state's valid interests in protecting the public and in treating mentally ill criminals.⁷¹

The Michigan Court of Appeals rejected another equal protection argument in *People v. Sharif*.⁷² The defendant contended that he was denied equal protection because he did not receive a hearing before treatment, yet prisoners transferred to the department of mental health were entitled to such hearings.⁷³ The court rejected this argument, reasoning that the purpose of such a hearing was to determine if treatment could best be provided by a mental health facility rather than a correctional facility and that GBMI offenders did receive evaluations before treatment.⁷⁴ Thus, the court stated, it was reasonable for the legislature to require a hearing only for those offenders whom corrections officials were considering transferring to a mental health facility.⁷⁵

A third general type of equal protection challenge, based on the overlap of definitional criteria for NGRI and GBMI, is that no reasonable basis exists for allowing the incarceration of GBMI defendants and the exculpation of NGRI defendants. The Michigan

68. See *People v. Rone*, 109 Mich. App. 702, 715-16, 311 N.W.2d 835, 841 (1981); *People v. Ramsey*, 89 Mich. App. 468, 472, 280 N.W.2d 565, 566 (1979); *People v. Sorna*, 88 Mich. App. 351, 359-60, 276 N.W.2d 892, 896 (1979); *People v. Darwall*, 82 Mich. App. 652, 661, 267 N.W.2d 472, 476 (1978); *People v. Jackson*, 80 Mich. App. 244, 245-46, 263 N.W.2d 44, 44-45 (1977).

69. 82 Mich. App. 652, 267 N.W.2d 472 (1978).

70. *Id.* at 661, 267 N.W.2d at 476.

71. *Id.* The Michigan Court of Appeals previously had stated that the legislature need not provide an all-inclusive classification for defendants who are both guilty and mentally ill. *People v. Jackson*, 80 Mich. App. 244, 245-46, 263 N.W.2d 44, 45 (1977).

72. 87 Mich. App. 196, 274 N.W.2d 17 (1978).

73. *Id.* at 200, 274 N.W.2d at 19-20.

74. *Id.* at 200-01, 274 N.W.2d at 20.

75. *Id.*

Court of Appeals considered this argument in *People v. Sorna*.⁷⁶ The defendant claimed that it was "irrational to consider a defendant found 'mentally ill' to be criminally responsible for his acts while excusing a person adjudged 'legally insane' from similar responsibility."⁷⁷ The court rejected this contention and held that the GBMI statute merely established an "intermediate category to deal with situations where a defendant's mental illness does not deprive him of substantial capacity sufficient to satisfy the insanity test The fact that these distinctions may not appear clear cut does not warrant a finding of no rational basis to make them" ⁷⁸

A similar argument was rejected in Indiana in *Taylor v. State*.⁷⁹ In *Taylor*, the defendant argued that Indiana's GBMI statute violated his equal protection and due process rights because "the definitions of 'insanity' and 'mentally ill' are so vague and susceptible to misinterpretation by persons of ordinary intelligence that the verdicts [of NGRI and GBMI] are one and the same."⁸⁰ In rejecting this challenge, the Supreme Court of Indiana stated that even though the two definitions⁸¹ involve similar behavioral char-

76. 88 Mich. App. 351, 359-60, 276 N.W.2d 892, 896 (1979). See also *People v. Darden*, 132 Mich. App. 154, 346 N.W.2d 915 (1984).

77. 88 Mich. App. at 360, 276 N.W.2d at 896.

78. *Id.* In holding that these admittedly vague and allegedly "irrational" distinctions were necessary and therefore legitimate, the court cited the language of a 1973 United States Supreme Court decision: "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." *Id.* (quoting *McGinnis v. Royster*, 410 U.S. 263, 270 (1973)).

79. — Ind. —, —, 440 N.E.2d 1109, 1111-13 (1982).

80. *Id.* at —, 440 N.E.2d at 1111. According to the defendant, the vagueness of statutory terms necessarily resulted in an "arbitrary and selective application of the two subsections," while denying him reasonable notice of the charge against him and subjecting him "to the whim of the jury." *Id.*

81. Indiana's statutory definition of "insanity" is included within its insanity defense as follows:

(a) A person is not responsible for having engaged in prohibited conduct if, as a result of mental disease or defect, he lacked substantial capacity either to appreciate the wrongfulness of the conduct or to conform his conduct to the requirements of law.

(b) "Mental disease or defect" does not include an abnormality manifested only by repeated unlawful or antisocial conduct.

IND. CODE § 35-41-3-6 (1978). "Mentally ill," on the other hand, is defined as follows:

["Mentally ill" means having] a psychiatric disorder which substantially disturbs a person's thinking, feeling, or behavior and impairs the person's ability to function. For the purposes of this chapter, "mental[ly] ill[]" may include . . . any mental retardation, alcoholism, or addiction to narcotics or dangerous drugs.

Id. § 16-14-9.1-(a) (1984), cited in *id.* § 35-5-2-3(c) (1978).

acteristics, the two do not describe the same mental condition.⁸² Thus, although the two terms do overlap, “the existence of a mental disease or deficiency does not *ipso facto* render a defendant legally insane.”⁸³

In *People v. Kaeding*,⁸⁴ the defendant raised a fourth type of equal protection argument by asserting that the applicable statutes invidiously discriminated against incarcerated GBMI offenders vis-a-vis GBMI probationers. The defendant construed the applicable statutes as requiring the sentencing court to prescribe the specific mental health treatment for every GBMI offender not sentenced to prison but giving the Department of Corrections the discretion to treat or not to treat GBMI inmates.⁸⁵ The Illinois Supreme Court rejected this argument, stating that the defendant had misconstrued the provisions which required only that the probationer submit to treatment.⁸⁶ The court said that the only difference between the way incarcerated and nonincarcerated defendants are treated is that the entity empowered to make treatment decisions is different in each case. It added that allocation of this decisionmaking power to the entity having custody and responsibility for supervising the offender was rationally related to one of the purposes of the statutes, that is, to “prescribe sanctions proportionate to the seriousness of the offenses and permit the recognition of differences in rehabilitation possibilities among individual offenders.”⁸⁷ The court found that no fundamental right or suspect classification was involved and accordingly held that the statutes did not deprive GBMI inmates of equal protection of the laws.⁸⁸

82. — Ind. at —, 440 N.E. at 1111.

83. *Id.* The court noted that “legal” insanity only had meaning when evaluated in the context of criminal intent, stating that “[f]or purposes of criminal law, the focal point always has been whether any particular defendant acted with the intent and culpability for which the imposition of criminal penalties was justified.” *Id.*

84. 98 Ill. 2d 237, 456 N.E.2d 11 (1983).

85. *Id.* at 244, 456 N.E.2d at 15-16.

86. *Id.* at 244-45, 456 N.E.2d at 16. In rejecting the defendant’s interpretation of the statute, the court reasoned as follows: “In our judgment the legislature did not intend that either the court or the Department would be required to utilize limited resources, facilities and skilled personnel in treating those defendants, imprisoned or otherwise, for whom treatment would not be helpful.” *Id.*

87. *Id.* at 247, 456 N.E.2d at 17 (quoting ILL. REV. STAT. ch. 38, § 1001-1-2(a) (1981)).

88. *Id.* The court limited its analysis to determining whether the statute was rationally related to a legitimate state purpose. Close scrutiny of statutes to insure that they are “tailored narrowly” to a state purpose, according to the court, was reserved for cases in which the legislation either threatened fundamental

In *People v. McLeod*,⁸⁹ the Michigan Supreme Court seemingly laid to rest all possible equal protection challenges to that state's GBMI statute. The defendant in *McLeod* claimed that the legislatively-created GBMI classification must be substantially related to a compelling state interest, not just rationally related as required by the court of appeals in *Darwall* and *Sorna*.⁹⁰ The court found, however, that because persons found GBMI necessarily have been found guilty beyond a reasonable doubt, they have "no right to the exercise of unfettered liberty."⁹¹ Similarly, the "mentally ill" classification has none of the marks of a suspect class.⁹² Consequently, the classification did not deprive those found GBMI of any fundamental right nor did it implicate any special status that would require strict scrutiny by the courts. The court held, therefore, that the constitutionality of the GBMI classification must be upheld if it rationally furthers the legislative objective.⁹³ The court found that "this classification rationally furthers the legislative object of providing supervised mental health treatment and care to guilty but mentally ill defendants."⁹⁴

2. *Due Process*

The GBMI statutes of Michigan, Indiana, and Illinois have thus far withstood due process challenges.⁹⁵ In Michigan, these challenges have been based on *People v. McQuillan*⁹⁶ and federal authority,⁹⁷ both of which suggest that insanity acquittees are en-

constitutional rights or was directed at a particular "suspect" group. *Id.* at 245-46, 456 N.E.2d at 16.

89. 407 Mich. 632, 288 N.W.2d 909 (1980).

90. For a discussion of these cases, see *supra* notes 69-71 & 76-78 and accompanying text.

91. 407 Mich. at 663, 288 N.W.2d at 919.

92. *Id.* The court listed the "traditional indicia of suspectness" as follows: "[T]he class is saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.* n.9.

93. *Id.* at 663, 288 N.W.2d at 919. Strict scrutiny of the Michigan statute would probably have led to different results in *McLeod* and the prior equal protection cases because the statute was admittedly underinclusive.

94. *Id.*

95. See *People v. Kaeding*, 98 Ill. 2d 237, 456 N.E.2d 11 (1983); *Taylor v. State*, ___ Ind. ___, 440 N.E.2d 1109 (1982); *People v. McLeod*, 407 Mich. 632, 288 N.W.2d 909 (1980); *People v. Sharif*, 87 Mich. App. 196, 274 N.W.2d 17 (1978).

96. 392 Mich. 511, 221 N.W.2d 569 (1974). For a discussion of *McQuillan*, see *supra* notes 25-29 and accompanying text.

97. See *Baxstrom v. Herold*, 383 U.S. 107 (1966); *Bolton v. Harris*, 395 F.2d 642 (D.C. Cir. 1968).

titled to hearings regarding their then-present mental conditions before being sentenced to involuntary mental treatment because insanity at the time of the offense cannot be presumed to continue to the time of sentencing. The defendant in *People v. McLeod* argued that due process entitled GBMI defendants to a presentence hearing regarding present mental condition.⁹⁸ The Michigan Supreme Court rejected this argument by distinguishing between the liberty interests of GBMI convicts and NGRI acquittees. The court stated that NGRI acquittees are entitled to such a hearing under *McQuillan* because an NGRI verdict only establishes a reasonable doubt regarding a defendant's sanity at the time of the crime. Thus, involuntary commitment of NGRI acquittees without a finding regarding present mental condition constitutes a significant restriction on their right to liberty, a right that GBMI convicts do not possess because they "have been found beyond a reasonable doubt to have been 1) guilty of an offense, 2) mentally ill at the time of the commission of the offense, and 3) not legally insane at the time of the offense."⁹⁹ The court concluded that due process is satisfied if, prior to sentencing, the court receives a report regarding the GBMI defendant's present mental state.¹⁰⁰

In Indiana, the allegedly "broad and vague" definitions of "mental illness" and "insanity" also have been challenged on due process grounds. In *Taylor v. State*,¹⁰¹ the defendant based his equal protection and due process arguments on this perceived definitional difficulty.¹⁰² As previously discussed, the Supreme Court of Indiana rejected these arguments.¹⁰³

The Illinois Appellate Court also has rejected a defendant's definitional argument, which was couched in terms of jury confusion. In *People v. De Wit*,¹⁰⁴ a defendant previously found GBMI of murder contended that, because of the definitional overlap be-

98. 407 Mich. at 659, 288 N.W.2d at 917.

99. *Id.* The court defined the limited right to liberty of GBMI convicts as follows: "They no longer have a right to unfettered liberty. They have been convicted of a crime. Their only interest is in obtaining a term of probation similar to other persons convicted of the same crime." *Id.*

100. *Id.* at 660, 288 N.W.2d at 918.

101. — Ind. —, 440 N.E.2d 1109 (1982). *Accord* *People v. Sharif*, 87 Mich. App. 196, 274 N.W.2d 17 (1978). For a further discussion of *Sharif*, see *supra* notes 72-75 and accompanying text.

102. For a further discussion of the defendant's arguments and the court's treatment of them, see *supra* notes 80-83 and accompanying text.

103. — Ind. at —, 440 N.E.2d at 1111.

104. 123 Ill. App. 3d 723, 463 N.E.2d 742 (1984). For other courts' treatment of jury confusion, see *infra* notes 178-83 and accompanying text.

tween "mental illness" and "insanity," the statutes failed to provide adequate standards to enable the jury to arrive at a fair verdict. He asserted that this deficiency promoted jury confusion, encouraged a GBMI verdict as a compromise, and thus rendered the GBMI provision unconstitutional on its face,¹⁰⁵ depriving him of due process. The state argued that, since the insanity defense came into existence, juries have been making implicit findings of whether a defendant is insane or is suffering from less severe mental illness. The GBMI provision, said the state, merely made the finding explicit.¹⁰⁶ The state also asserted that the provision actually reduced jury confusion by clarifying the legal meaning of "insanity," which had acquired a less precise meaning in common usage.¹⁰⁷ The court found the state's arguments persuasive. It held that the GBMI provision expressed its requirements in simple and clear language and that it provided sufficiently definite standards.¹⁰⁸ The court added that the possibility of a compromise verdict was not a constitutional infirmity under these circumstances.¹⁰⁹

In *People v. Kaeding*,¹¹⁰ the Illinois Supreme Court rejected with little discussion the defendant's argument that the court should strictly scrutinize the disputed GBMI statute because the statute implicated "the fundamental right to fair treatment in criminal proceedings guaranteed by due process."¹¹¹ The court held that due process did not encompass a right to supervision of incarcerated GBMI offenders by the sentencing court rather than by the Department of Corrections.¹¹² Even though the defendant did not argue that GBMI inmates were a suspect class, the court stated that such an argument would lack merit.¹¹³ In the absence of a fundamental right or suspect classification, the court upheld the Illinois GBMI statute as rationally related to a legitimate state

105. 123 Ill. App. 3d at 735, 463 N.E.2d at 750.

106. *Id.*

107. *Id.* The state noted that the comparison between the requirements of NGRI and GBMI verdicts clarified the meaning of insanity and thereby helped the jury in reaching a decision. *Id.*

108. *Id.* at 736, 463 N.E.2d at 750.

109. *Id.* In reaching this conclusion, the court reasoned that the jury must still make a determination regarding "whether a defendant is guilty or legally insane based upon the evidence at trial." *Id.*

110. 98 Ill. 2d 237, 456 N.E.2d 11 (1983). For a further discussion of *Kaeding*, see *supra* notes 84-88 and accompanying text.

111. 98 Ill. 2d at 244-46, 456 N.E.2d at 15-17.

112. *Id.* at 246, 456 N.E.2d at 17.

113. *Id.*

interest.¹¹⁴

3. *Cruel and Unusual Punishment*

An eighth amendment challenge alleging cruel and unusual punishment has been made against a GBMI statute on only two occasions. One such challenge arose in a Michigan trial court in *People v. McLeod*.¹¹⁵ After conducting hearings regarding the types and availability of mental health treatment necessary for the defendant, the recorder's court set aside a GBMI verdict, declaring the verdict form a nullity.¹¹⁶ Because neither the Department of Corrections nor the Department of Mental Health would provide the treatment that the defendant needed, the court found that compliance with the statute was impossible.¹¹⁷ It reasoned that if the stated purpose of the GBMI statute was treatment of mentally ill criminals, failure to treat amounted to cruel and unusual punishment in violation of the eighth amendment.¹¹⁸ The Michigan Supreme Court avoided this issue by finding that the evidence in the trial record was insufficient to sustain the challenge to the statute.¹¹⁹ When the cruel and unusual punishment challenge was raised a second time, in Indiana, the Indiana Court of Appeals summarily dismissed it, saying that the proper remedy was a writ of mandamus or a civil rights action under section 1983,¹²⁰ not a direct appeal.¹²¹ Thus, the question remains unresolved.¹²²

114. *Id.* at 247, 456 N.E.2d at 17. For a further discussion of the court's application of the rational relation test in *Kaeding*, see *supra* notes 87-88 and accompanying text.

115. See *McLeod*, 407 Mich. at 648-49, 288 N.W.2d at 912. For a further discussion of *McLeod*, see *supra* notes 89-94 and accompanying text.

116. 407 Mich. at 649, 288 N.W.2d at 913.

117. *Id.* In addition to the finding that these departments would not provide the necessary treatment for the defendant, the recorder's court noted that "conditions within the Department of Corrections, as described by the Department's psychiatrist, posed an immediate threat of irreparable harm to defendant." *Id.* at 648-49, 288 N.W.2d at 912-13.

118. *Id.* at 655, 288 N.W.2d at 915. See also D.H.J. HERMANN, *supra* note 2, at 96-99.

119. 407 Mich. at 655, 288 N.W.2d at 915. The court reasoned that it was impossible for a trial court fairly to determine *prior* to commitment whether the Department of Corrections would comply with the statute *after* commitment. *Id.* at 654-55, 288 N.W.2d at 915.

120. 42 U.S.C. § 1983 (1982). For the text of § 1983, see *infra* note 215.

121. *Stader v. State*, ___ Ind. App. ___, ___, 453 N.E.2d 1032, 1036 (1983).

122. Another possible eighth amendment challenge is pending in Indiana. An Indiana trial court recently sentenced a defendant found GBMI of murder to die in the electric chair. Harris, *Harris Given Death Penalty in Precedent-Setting Case*, Indianapolis News, Feb. 10, 1984, at 1, col. 1. This case raises the question of

4. Ex Post Facto Laws

In Georgia and Illinois, the retroactive application of newly enacted GBMI statutes to defendants who committed crimes prior to their enactment has precipitated challenges based on the constitutional prohibition against *ex post facto* laws.¹²³ In *Kirkland v. State*,¹²⁴ the defendant claimed that retroactive application of the Georgia GBMI statute unconstitutionally deprived her of an NGRI verdict. The Georgia Court of Appeals upheld the verdict, reasoning that it did not increase her punishment but, rather, had an ameliorative effect.¹²⁵ The court stated that a GBMI verdict “decidedly lessens the stigma of criminal guilt and provides for the treatment of [the defendant’s] mental illness.”¹²⁶ It added that “[w]here the verdict is authorized by the evidence, the application of the ‘guilty but mentally ill’ act is procedural, not substantive; it leaves untouched the substantive right to the insanity plea as an absolute defense.”¹²⁷ The court concluded that the GBMI verdict was not an *ex post facto* law.

In *People v. Marshall*,¹²⁸ the Illinois Appellate Court used a similar rationale in upholding application of the GBMI statute even though the defendant’s crime took place seven months before the statute’s enactment.¹²⁹ The court stated that the application of the GBMI statute in this case did not increase the defendant’s punishment, but merely altered the conditions of

whether mental illness, adjudged as part of the GBMI conviction, should mitigate against the death penalty. Of the twelve states having GBMI statutes, all but Alaska and Michigan permit the death sentence. All these GBMI statutes permit the sentencing court to impose any sentence that could be imposed on a guilty defendant. See Table 3.

123. An *ex post facto* law is a law passed after the occurrence of a fact or deed, which retrospectively changes the legal consequences of the fact or deed. BLACK’S LAW DICTIONARY 529 (5th ed. 1979). For example, a law that increases the punishment for a prior act is an *ex post facto* law. The United States Constitution, as well as the state constitutions of Georgia and Illinois, expressly prohibit the passing of *ex post facto* laws. See U.S. CONST. art. I, § 9, cl. 3; GA. CONST. art. I, § 1, para. 10; ILL. CONST. art. I, § 16.

124. 166 Ga. App. 478, 482, 304 S.E.2d 561, 565 (1983).

125. *Id.* at 482, 304 S.E.2d at 565. The court noted that being found guilty but mentally ill “reduces or modifies the penalty of a guilty verdict.” *Id.*

126. *Id.*

127. *Id.* The court thus added defendant’s continuing right to the insanity plea to its lengthy list of benefits conferred on a defendant by the retroactive application of the GBMI statute, noting that, “[i]f the verdict of guilty is authorized by the evidence, the accused is given an additional advantage when the guilty but mentally ill statute is applied.” *Id.*

128. 114 Ill. App. 3d 217, 448 N.E.2d 969 (1983).

129. *Id.* at 234-35; 448 N.E.2d at 980-81.

confinement by ensuring adequate mental health treatment.¹³⁰ The court reasoned that “[s]tatutes which change the conditions under which punishment for an offense is imposed, but which do not significantly alter the fundamental nature of the punishment, are not *ex post facto* laws.”¹³¹

The court in *Marshall* faced another *ex post facto* law argument. The defendant asserted that the GBMI statute had the possible effect of making criminal an action that previously was innocent by depriving her of available defenses.¹³² Specifically, if she had known that asserting the insanity defense opened the door to a possible GBMI verdict, she might have used a self-defense or lack-of-specific-intent defense instead.¹³³ The court rebuffed this argument, stating that a statute that does not “completely” deprive a defendant of an available defense is not an *ex post facto* law.¹³⁴

C. Substantive and Procedural Provisions

1. Pleading Procedures

Both the Michigan Supreme Court and the Michigan Court of Appeals have rendered decisions construing the statutory provision for acceptance of a GBMI plea.¹³⁵ In *People v. Booth*,¹³⁶ two

130. *Id.* The Illinois statute regarding the sentencing and treatment of defendants found GBMI provides in pertinent part:

(b) If the court imposes a sentence of imprisonment upon a defendant who has been found guilty but mentally ill, the defendant shall be committed to the Department of Corrections, which shall cause periodic inquiry and examination to be made concerning the nature, extent, continuance, and treatment of the defendant's mental illness. The Department of Corrections shall provide such psychiatric, psychological, or other counseling and treatment for the defendant as it determines necessary.

(c) The Department of Corrections may transfer the defendant's custody to the Department of Mental Health and Developmental Disabilities in accordance with the provisions of Section 3-8-5 of this Act.

ILL. ANN. STAT. ch. 38, § 1005-2-6 (Smith-Hurd 1982).

131. 114 Ill. App. 3d at 234, 448 N.E.2d at 981 (citations omitted).

132. *Id.* at 235, 448 N.E.2d at 981.

133. *Id.* A defendant may be found GBMI in Illinois only if he or she has asserted the insanity defense at trial. ILL. ANN. STAT. ch. 38, § 115-3(c) (Smith-Hurd Supp. 1983-1984).

134. 114 Ill. App. 3d at 235, 448 N.E.2d at 981. The court noted that although it is well settled that a statute that “completely” deprives the defendant of a defense that was available at the time of the offense is an *ex post facto* law, no cases hold that a statute that “merely makes the assertion of certain defenses less desirable than they would have been at the time of an offense” constitutes an *ex post facto* law. *Id.*

135. See *People v. Booth*, 414 Mich. 343, 324 N.W.2d 741 (1982); *People v. Williams*, 129 Mich. App. 648, 341 N.W.2d 854 (1983) (per curiam); *People v.*

defendants pleaded GBMI to charges of first-degree criminal sexual conduct. At trial, the defendants were unable to recall some of the events surrounding the perpetration of the crime. The trial judge therefore referred to the preliminary examination transcript in concluding that a sufficient factual basis for acceptance of the pleas existed.¹³⁷ On appeal to the Michigan Supreme Court, the issue was

whether a defendant who is unable to recall some or all of the events surrounding the commission of a particular crime may enter a plea of guilty but mentally ill to that crime, and, if so, what procedure is to be utilized at the plea-taking proceeding to establish a factual basis for the plea.¹³⁸

The court concluded that a forgetful defendant could plead GBMI and that a trial court could consider a transcript of the preliminary examination or trial testimony, if any, but that in all other respects a court should follow the procedures applicable to guilty pleas.¹³⁹ The court reasoned that to deny forgetful defendants the opportunity to plead GBMI and, thereby, to receive the mental health treatment due them would undercut the legislative intent behind the GBMI statutes.¹⁴⁰ The court upheld both defendants' convictions.¹⁴¹

Siebers, 129 Mich. App. 465, 341 N.W.2d 530 (1983); *People v. Bazzi*, 113 Mich. App. 606, 318 N.W.2d 484 (1981) (per curiam); *People v. Fultz*, 111 Mich. App. 587, 314 N.W.2d 702 (1981); *People v. Seefeld*, 95 Mich. App. 197, 290 N.W.2d 123 (1980); *People v. Long*, 86 Mich. App. 676, 273 N.W.2d 519 (1979), *rev'd sub nom.* *People v. Booth*, 414 Mich. 343, 324 N.W.2d 741 (1982).

136. 414 Mich. 343, 350, 324 N.W.2d 741, 744 (1982).

137. *Id.* at 351, 324 N.W.2d at 744. Each defendant separately acknowledged on the record his belief that, based on the facts available to him, he was in fact guilty of the crime for which his plea was being offered. *Id.*

138. *Id.* at 348, 324 N.W.2d at 743.

139. *Id.* at 348-49, 324 N.W.2d at 743. The court apparently was addressing only procedures applicable to the "guilty" aspect of a "guilty but mentally ill" plea-taking proceeding. Although the court failed to address how the determination of mental illness fits into the procedures for accepting a guilty plea, it stated that the GBMI statutory language "suggests that . . . questions of mental illness must be determined in addition to the usual questions of criminal liability" *Id.* at 356, 324 N.W.2d at 746. It also cited § 768.36(2) of the Michigan Compiled Laws, which requires the judge to examine psychiatric reports, hold a hearing on the mental illness issue, and be satisfied that the defendant was mentally ill at the time of the offense. *Id.* (citing MICH. COMP. LAWS ANN. § 768.36(2) (West 1982)).

140. *Id.* at 354, 324 N.W.2d at 745-46.

141. *Id.* at 364, 324 N.W.2d at 750. The court said that the standard of review to be applied by an appellate court in reviewing the adequacy of a plea's factual basis is "whether the trier of fact could properly convict on the facts"

In *People v. Bazzi*,¹⁴² the Michigan Court of Appeals also considered whether a forgetful defendant could plead GBMI. The court stated that external evidence could be used to establish the factual basis for certain elements of an offense¹⁴³ and proceeded to outline the required plea-taking procedure. The court must (1) directly question the defendant to determine if he or she is guilty of the offense, (2) examine psychiatric reports,¹⁴⁴ and (3) hold a hearing to determine if the defendant was mentally ill at the time of the offense.¹⁴⁵ This result is consistent with *Booth*, which was decided after *Bazzi*.

Arguably, however, *Booth* only addressed the factual basis for the "guilt" determination in a GBMI plea-taking procedure.¹⁴⁶ In *Bazzi* and *People v. Fultz*,¹⁴⁷ the court of appeals directly addressed the "mental illness" determination. The defendant in *Bazzi* challenged the factual basis of the mental illness finding, arguing that while two independent examiners concluded that he was insane at the time of the crime, the Center for Forensic Psychiatry concluded that he was neither mentally ill nor insane.¹⁴⁸ The court rejected this challenge, stating that although none of the examiners concluded that the defendant was mentally ill but *not* insane, psychiatric evaluations admitted as evidence serve only as an aid

elicited from defendant at the plea-taking proceeding, or from alternate reliable sources." *Id.* at 360, 324 N.W.2d at 748 (quoting *People v. Haack*, 396 Mich. 367, 376-77, 240 N.W.2d 704, 709 (1976)).

142. 113 Mich. App. 606, 608, 318 N.W.2d 484, 485 (1981) (per curiam).

143. *Id.* The basic elements of the offense were established through the testimony of the defendant who, in response to direct questioning by the court, testified that he shot his wife with a .38-caliber gun that he had purchased on the street, and that he knew it was wrong to kill someone. The defendant did not know, however, whether his wife had died as a result of the gunshot wounds. The court then introduced external evidence in the form of autopsy reports to determine the cause of death. *Id.*

144. *Accord* *People v. Seefeld*, 95 Mich. App. 197, 199, 290 N.W.2d 123, 124-25 (1980). *But see* *People v. Williams*, 129 Mich. App. 648, 649, 341 N.W.2d 854, 855 (1983) (court need not examine reports if defendant fails to assert insanity defense).

145. 113 Mich. App. at 608-09, 318 N.W.2d at 485.

146. For a discussion of *Booth*, see *supra* notes 136-41 and accompanying text.

147. 111 Mich. App. 587, 314 N.W.2d 702 (1981).

148. 113 Mich. App. at 609, 318 N.W.2d at 485-86. The Center for Forensic Psychiatry and the independent examiners disagreed only regarding the defendant's mental state at the time of the offense. The Center concluded that "while defendant had experienced several medical and personal problems resulting in severe depressive reaction which required several terms of hospitalization in a mental institution, he was neither mentally ill nor insane at the time the offense was committed." *Id.*, 318 N.W.2d at 485.

to the court.¹⁴⁹ The substance of the psychiatric reports and the defendant's testimony supported the trial court's decision.¹⁵⁰

In *People v. Fultz*, however, the court did find the factual basis for a mental illness finding to be insufficient.¹⁵¹ Erroneously citing section 768.36(1) of the Michigan Compiled Laws,¹⁵² the court stated that, before accepting a GBMI plea, the trier of fact must find beyond a reasonable doubt that the defendant is guilty, was mentally ill at the time of the crime, and was not insane.¹⁵³ The only evidence in the record of the defendant's mental state was the forensic report that said he was insane.¹⁵⁴ The court held that a finding of no insanity was essential to a GBMI plea and that such a finding was not supported by the record.¹⁵⁵

2. *Burden of Proof*

Two decisions have addressed the prosecution's burden to prove a defendant's sanity beyond a reasonable doubt before a GBMI finding may be entered following a trial on the merits. A jury found the defendant in *People v. Murphy*¹⁵⁶ GBMI of breaking and entering an occupied dwelling with intent to commit a felony and of first-degree criminal sexual conduct. The Michigan Court of Appeals stated that the prosecution improperly had introduced evidence regarding the defendant's sanity because a defendant is presumed sane until he introduces contrary evidence and because the prosecution failed to lay a proper foundation for introduction of the evidence.¹⁵⁷ Without this inadmissible evidence—testimony by the arresting police officers that they had observed no abnormal behavior during the arrest—the record was devoid of

149. *Id.* at 609, 318 N.W.2d at 486.

150. *Id.* For a summary of defendant's testimony, see *supra* note 143.

151. 111 Mich. App. at 591, 314 N.W.2d at 704.

152. The court was incorrect in citing § 768.36(1) because the prerequisites listed in that subsection apply only to a GBMI finding following a trial on the merits. The court should have cited subsection (2), which applies to GBMI pleas and does not require an affirmative finding that the defendant is not insane. The prosecution correctly argued that no finding of sanity is required for a court to accept a GBMI plea. *Id.* at 590, 314 N.W.2d at 704.

153. *Id.* at 590, 314 N.W.2d at 703.

154. *Id.* at 591, 314 N.W.2d at 704.

155. *Id.* *Contra* *People v. Williams*, 129 Mich. App. 648, 649, 341 N.W.2d 854, 855 (1983) (no specific finding of insanity required if defendant does not raise the issue).

156. 100 Mich. App. 413, 415, 299 N.W.2d 51, 52 (1980), *aff'd*, 416 Mich. 453, 331 N.W.2d 152 (1982).

157. *Id.* The court held that this evidence was admitted "without a proper foundation" because of the police officers' "lack of ample opportunity to observe the accused." *Id.*

evidence that the defendant was sane.¹⁵⁸ Expert testimony subsequently introduced by both the prosecution and the defense strongly supported an insanity finding.¹⁵⁹ Thus, the court held that the prosecution had failed to meet its burden of proving sanity beyond a reasonable doubt.¹⁶⁰ The Supreme Court of Michigan affirmed.¹⁶¹ The court stated that even if the prosecution's evidence of sanity were admissible, its probative value was insufficient to convince a rational trier of fact that the defendant was sane.¹⁶² The court said that, to some extent, the evidence necessary to prove sanity beyond a reasonable doubt is determined by the strength of the case for insanity.¹⁶³ Because of the strong showing of insanity, the police officers' testimony was insufficient.

In *People v. Gore*,¹⁶⁴ the defendant appealed from the trial judge's finding that he was GBMI of attempted indecent liberties with a child. The defendant asserted that the state failed to rebut his insanity defense beyond a reasonable doubt.¹⁶⁵ The Illinois Court of Appeals concluded that although an expert witness believed a valid insanity defense existed, the trial court was not required to accept this conclusion.¹⁶⁶ The court stated that the trial court's finding of sanity was "not so improbable or unsatisfactory as to create a reasonable doubt of the defendant's sanity."¹⁶⁷

158. *Id.*

159. *Id.* The court noted that there was "no evidence on this record that [the defendant] was sane, since the expert witnesses of both the prosecution and the defense testified that he was in fact insane." *Id.*

160. *Id.* at 416, 299 N.W.2d at 53. See MICH. COMP. LAWS ANN. § 768.36(1)(c) (West 1982).

161. 416 Mich. 453, 331 N.W.2d 152 (1982).

162. *Id.* at 456, 331 N.W.2d at 153-54. The court explained that "[t]he relevant question is whether, after viewing all of the evidence in the light most favorable to the prosecutor, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 456, 331 N.W.2d at 154.

163. *Id.* at 464, 331 N.W.2d at 157. See also *supra* text accompanying note 158. A defendant in a criminal proceeding is presumed sane. Once he introduces any evidence of insanity, however, the burden shifts to the prosecution to establish his sanity beyond a reasonable doubt. It follows that "merely some evidence of sanity may be sufficient to meet some evidence of insanity and yet wholly insufficient to meet substantial evidence of insanity." *Id.*

164. 116 Ill. App. 3d 780, 781, 452 N.E.2d 583, 585 (1983).

165. *Id.* at 786, 452 N.E.2d at 588.

166. *Id.* The trial court's decision not to accept the statement of the expert witness was not without reason. The expert made the statement in a letter to the assistant state's attorney more than five months after examining the defendant for competency to stand trial. Moreover, the expert indicated that he would want to examine the defendant again if he were to testify on the question of insanity. *Id.*

167. *Id.*

3. *Jury Instructions*

Case law on GBMI jury instructions has focused on the following three issues: (1) whether instructions on the GBMI verdict are mandatory or permissible; (2) whether GBMI instructions confuse a jury and lead to a compromise verdict; and (3) whether the verdict's dispositional consequences may be included in the instructions. Courts in Michigan, New Mexico, Illinois, and Indiana have all addressed at least one of these issues.

In *People v. Girard*,¹⁶⁸ the Michigan Court of Appeals observed that whenever a defendant asserts an insanity defense, the trial court at the conclusion of trial must instruct "(1) that the jury is to consider separately the issues of the presence or absence of mental illness and the presence or absence of legal insanity, and (2) on the possible verdicts of guilty, guilty but mentally ill, not guilty by reason of insanity, and not guilty."¹⁶⁹ In *People v. Ritsema*,¹⁷⁰ the trial court granted the defendant's request that the GBMI instruction be omitted. The Michigan Court of Appeals held that whenever the evidence supports an instruction on the insanity defense the relevant statute made the GBMI instruction mandatory and thus not subject to waiver by the defendant.¹⁷¹ The court said, however, that retrial was unnecessary to remedy the trial court's error.¹⁷² It reasoned that the only prejudice suffered by the guilty defendant was in not being entitled to the mental health evaluation and treatment required after a GBMI verdict.¹⁷³ To eliminate this prejudice the court amended the defendant's sentence to require psychiatric evaluation and indicated treatment.¹⁷⁴

168. 96 Mich. App. 594, 293 N.W.2d 639 (1980).

169. *Id.* at 596-97, 293 N.W.2d at 641 (citing MICH. COMP. LAWS ANN. § 768.29a(2) (West 1982)). See also *People v. Mikulin*, 84 Mich. App. 705, 709, 270 N.W.2d 500, 501-02 (1978) (GBMI instruction required whenever an NGRI instruction is warranted by the evidence).

170. 105 Mich. App. 602, 307 N.W.2d 380 (1981).

171. *Id.* at 612, 307 N.W.2d at 385. Accord *People v. Thomas*, 96 Mich. App. 210, 221, 292 N.W.2d 523, 527 (1980).

172. 105 Mich. App. at 612, 307 N.W.2d at 385. The court believed retrial was unnecessary because the defendant had been tried and found guilty of the offense charged. The jury had not believed that he was insane. *Id.*

173. *Id.*

174. *Id.* at 613, 307 N.W.2d at 385. In a later decision, the Michigan Court of Appeals criticized its own decision in *Ritsema* that the trial court's error did not require reversal. See *People v. Gasco*, 119 Mich. App. 143, 326 N.W.2d 397 (1982) (per curiam). With minimal discussion, the court said in *Gasco* that the *Ritsema* decision was "unsound." *Id.* at 146-47, 326 N.W.2d at 399. In *Gasco*, the court reversed a guilty finding, stating that the trial court's erroneous instruction on the definition of "sanity" left the jury with discretion to find the defendant

The Court of Appeals of New Mexico has addressed the narrow issue of whether a GBMI instruction may be given in the absence of an NGRI instruction.¹⁷⁵ The relevant statute provides that when a defendant has asserted an insanity defense, the court should instruct the jury regarding the GBMI verdict if such an instruction is warranted by the evidence.¹⁷⁶ The court interpreted this provision as not precluding such an instruction if, although the defendant did not plead insanity, he did request an instruction regarding his inability to form the requisite *mens rea* to commit a criminal offense.¹⁷⁷

The issue of juror confusion has been addressed in three Michigan cases¹⁷⁸ and one Illinois case.¹⁷⁹ *People v. Thomas*¹⁸⁰ is illustrative. The defendant in this case argued that the trial court erroneously instructed the jury on the GBMI verdict because the instruction "unconstitutionally confuses the jury in its resolution of the issue of criminal responsibility and encourages a compromise verdict."¹⁸¹ The court of appeals noted that the instruction was required by statute and that the trial court complied with the statute by giving the standard criminal jury instructions, which offered sufficient guidance to the jury.¹⁸² The court found no evi-

either guilty or GBMI. *Id.* at 146, 326 N.W.2d at 399. The court concluded: "Thus, the verdict of guilty [did] not preclude the possibility that the jury thought defendant was mentally ill." *Id.* at 146, 326 N.W.2d at 399. The *Gasco* opinion leaves unclear what it was in the instruction that resulted in the jury's discretion or why the *Ritsema* remedy was unsound.

175. See *State v. Page*, 100 N.M. 788, 676 P.2d 1353 (1984).

176. N.M. STAT. ANN. § 31-9-3E (1984). The relevant portion of the statute provides as follows:

When a defendant has asserted a defense of insanity, the court, where warranted by the evidence, shall provide the jury with a special verdict form of guilty but mentally ill and shall separately instruct the jury that a verdict of guilty but mentally ill may be returned instead of a verdict of guilty or not guilty, and that such a verdict requires a finding by the jury beyond a reasonable doubt that the defendant committed the offense charged and that the defendant was not legally insane at the time of the commission of the offense but that he was mentally ill at that time.

Id.

177. 100 N.M. at ___, 676 P.2d at 1356.

178. See *People v. Delaughter*, 124 Mich. App. 356, 335 N.W.2d 37 (1983); *People v. Thomas*, 96 Mich. App. 210, 292 N.W.2d 523 (1980); *People v. Sorna*, 88 Mich. App. 351, 276 N.W.2d 892 (1979).

179. See *People v. De Wit*, 123 Ill. App. 3d 723, 463 N.E.2d 742 (1984). For a discussion of *De Wit*, see *supra* notes 104-09 and accompanying text.

180. 96 Mich. App. 210, 292 N.W.2d 523 (1980).

181. *Id.* at 220, 292 N.W.2d at 527.

182. *Id.* at 221, 292 N.W.2d at 527. The Michigan GBMI statute is clear with respect to jury instructions:

dence that the jury was misled.¹⁸³

Whether a court may instruct a jury regarding the consequences of a GBMI verdict was addressed in Indiana in *Stader v. State*.¹⁸⁴ The defendant alleged that the trial court erred by refusing jury instructions on the consequences of a GBMI or NGRI verdict.¹⁸⁵ The court of appeals held that no error had occurred.¹⁸⁶ As a general rule, "it is erroneous to inform the jury of the possible penalties which may be imposed upon conviction."¹⁸⁷ A trial court has discretion, however, to instruct a jury on the consequences of a verdict if it deems it necessary.¹⁸⁸ Such an instruction is mandatory if "an erroneous view of the applicable laws becomes implanted in the minds of jurors."¹⁸⁹ In applying these rules, the court stated that the jury had not been presented with an erroneous statement of the law and that it was within the trial court's discretion to refuse the instruction.¹⁹⁰

In *People v. Tenbrink*,¹⁹¹ a Michigan trial court *sua sponte* instructed the jury regarding the possible dispositions after GBMI and NGRI verdicts.¹⁹² Because the defendant failed to make a timely objection to the instruction, the Michigan Court of Appeals said it would only reverse to prevent manifest injustice.¹⁹³ Under these circumstances, the court said the instruction was proper, adopting the rationale of *Lyles v. United States*.¹⁹⁴ In *Lyles*, the

If the defendant asserts a defense of insanity in compliance with section 20a, the defendant may be found "guilty but mentally ill" if, after trial, the trier of fact finds all of the following beyond a reasonable doubt:

- (a) That the defendant is guilty of an offense.
- (b) That the defendant was mentally ill at the time of the commission of that offense.
- (c) That the defendant was not legally insane at the time of the commission of that offense.

MICH. COMP. LAWS § 768.36(1) (1975).

183. 96 Mich. App. at 221, 292 N.W.2d at 527.

184. — Ind. App. —, 453 N.E.2d 1032 (1983).

185. *Id.* at —, 453 N.E.2d at 1035-36.

186. *Id.* at —, 453 N.E.2d at 1036.

187. *Id.* (citing *State v. Williams*, — Ind. —, 430 N.E.2d 756 (1982)).

188. *Id.* (citing *Montague v. State*, 266 Ind. 51, 360 N.E.2d 181 (1977); *Lockridge v. State*, 263 Ind. 678, 338 N.E.2d 275 (1975)).

189. *Id.* (citing *Dipert v. State*, 259 Ind. 260, 286 N.E.2d 405 (1972)).

190. *Id.*

191. 93 Mich. App. 326, 287 N.W.2d 223 (1979).

192. *Id.* at 328, 287 N.W.2d at 224.

193. *Id.*

194. *Id.* at 330-31, 287 N.W.2d at 224-25 (citing *Lyles v. United States*, 254 F.2d 725 (D.C. Cir. 1957), *cert. denied*, 356 U.S. 961 (1958), *cert. denied*, 362 U.S. 943 (1960), *cert. denied*, 368 U.S. 992 (1962)).

United States Court of Appeals for the District of Columbia had distinguished guilty verdict instructions, which could not include dispositional information, from NGRI instructions, which could.¹⁹⁵ The court in *Lyles* had reasoned:

Jurors, in common with people in general, are aware of the meanings of verdicts of guilty and not guilty. It is common knowledge that a verdict of not guilty means the prisoner goes free and that a verdict of guilty means that he is subject to such punishment as the court may impose. But a verdict of not guilty by reason of insanity has no such commonly understood meaning. . . . We think the jury has a right to know the meaning of this possible verdict as accurately as it knows by common knowledge the meaning of the other two possible verdicts.¹⁹⁶

The Michigan Court of Appeals concluded in *Tenbrink* that this rationale applied equally to NGRI and GBMI dispositional instructions and that, absent timely objection by defense counsel, the instructions were proper.¹⁹⁷ The court did not suggest whether its decision would have been different had defense counsel objected to the instructions.

4. *Inconsistent Verdicts*

Another issue the Michigan Court of Appeals has addressed is the appropriate remedy for situations in which a jury reaches two legally inconsistent verdicts. In *People v. Philpot*,¹⁹⁸ the jury found the defendant guilty of assault with intent to murder and GBMI of possession of a firearm in the commission of a felony.¹⁹⁹ The court held that the inconsistency should be remedied by adding the “but mentally ill” language to the assault conviction with leave to the prosecution to seek a new trial on the assault charge.²⁰⁰ It reasoned that a legislative purpose of the GBMI

195. *Lyles*, 254 F.2d at 728-29, quoted in *Tenbrink*, 93 Mich. App. at 328, 287 N.W.2d at 224.

196. *Id.* at 728.

197. *Tenbrink*, 93 Mich. App. at 330-31, 287 N.W.2d at 224-25.

198. 98 Mich. App. 257, 296 N.W.2d 229 (1980).

199. *Id.* at 261, 296 N.W.2d at 230-31.

200. *Id.* at 260, 296 N.W.2d at 230. The majority responded in a footnote to an argument set forth in the dissenting opinion that such a remedy usurped the power of the jury:

We disagree with Judge Riley’s position that this holding amounts to a substitution of our judgment of what is best for the defendant for

statute was to provide help to defendants who have committed crimes while suffering from mental illness, and that the present defendant could benefit from treatment beyond the relatively short sentence imposed for the firearm conviction.²⁰¹ Judge Riley dissented on this point, stating that the "fact that the evaluation and treatment triggered by such a finding would be beneficial to the accused is irrelevant. We should not substitute our judgment of what is 'best' for the defendant for that of the jury."²⁰² Normally, he stated he would advocate vacating of the firearm conviction, but because the relevant sentence was nearly expired, such action was unnecessary.²⁰³ More recently, in *People v. Blue*,²⁰⁴ the court followed the *Philpot* majority opinion, but chose not to correct the inconsistent verdicts because the resulting sentences were coextensive and treatment would be provided throughout their term.²⁰⁵

Thus, inconsistent guilty and GBMI verdicts have not troubled the courts. The courts have not yet decided, however, whether inconsistent NGRI and GBMI verdicts would be so easily handled. An Alaska statute provides that if a defendant is found NGRI because reasonable doubt exists regarding the requisite *mens rea*, yet all other elements of the offense are satisfied, the defendant automatically should be found GBMI of any lesser included offense of which he or she is convicted.²⁰⁶ This provision, however, does not govern if NGRI and GBMI verdicts are re-

the judgment of the jury. The jury found defendant guilty but mentally ill on one charge but unexplicably omitted the finding of mental illness on the other. Faced with such an inconsistency, we must side with one or the other of the jury's apparent findings, and we believe that sound policy dictates siding with the finding of mental illness. Accordingly, rather than substituting our judgment for that of the jury, we are merely giving the judgment of the jury its proper scope.

Id. at 261 n.2, 296 N.W.2d at 231 n.2.

201. *Id.* at 261, 296 N.W.2d at 230-31.

202. *Id.* at 264, 296 N.W.2d at 232 (Riley, J., concurring in part and dissenting in part). For a summary of the majority's response to this argument, see *supra* note 200.

203. 98 Mich. App. at 265, 296 N.W.2d at 232 (Riley, J., concurring in part and dissenting in part).

204. 114 Mich. App. 137, 318 N.W.2d 498 (1982).

205. *Id.* at 142, 318 N.W.2d at 499-500. *Blue*, however, can be distinguished from *Philpot*. In *Blue*, the two verdicts resulted from two separate trials, leading the court to conclude that the inconsistency was "of no significance." *Id.* at 142, 318 N.W.2d at 500.

206. ALASKA STAT. § 12.47.020(c) (1984). Upon completion of the sentence for the lesser included offense, a hearing is held to determine if, based on the acquittal for the greater offense, further commitment is necessary. *Id.*

turned on separate counts. No other states have a similar provision.

5. *Right to Treatment*

Although allegations based upon lack of adequate treatment have been rejected as a basis for constitutional attack on GBMI statutes,²⁰⁷ several courts have recognized a qualified statutory right to treatment. For example, the Supreme Court of Michigan has recognized an “unequivocal statutory right” to such treatment as is psychiatrically indicated for mental illness or retardation.²⁰⁸ Specifically, the GBMI statute requires treatment, but only when indicated by mental health screening and evaluation performed by correctional officials.²⁰⁹ No court, however, has yet overturned a GBMI conviction of, or provided postconviction relief to, a defendant asserting that he or she has received no treatment. In *People v. Tenbrink*,²¹⁰ the defendant contended that if the Department of Corrections is unable to provide the required psychiatric care in a particular case, the conviction is rendered invalid and must be reversed. The Michigan Court of Appeals disagreed.²¹¹ The court stated that the proper remedy was a writ of mandamus to enforce the Department of Corrections’ duty, not a reversal of the conviction.²¹²

In *Stader v. State*,²¹³ the Indiana Court of Appeals similarly found that lack of treatment was relevant not to “the legality of . . . incarceration, but merely the conditions of . . . detention.”²¹⁴

207. See *Marshall*, 114 Ill. App. 3d at 233, 448 N.E.2d at 980 (GBMI inmates have no separate constitutional right to mental health treatment beyond the constitutional right to minimally adequate medical care applicable to all prisoners); *McLeod*, 407 Mich. at 655, 288 N.W.2d at 915 (“Department of Corrections’ noncompliance with the statutory mandate for evaluation and treatment cannot render an otherwise constitutional statute unconstitutional.”).

208. *McLeod*, 407 Mich. at 652, 288 N.W.2d at 914. See also *Philpot*, 98 Mich. App. at 261, 296 N.W.2d at 230.

209. *McLeod*, 407 Mich. at 652, 288 N.W.2d at 914. See also *Kaeding*, 98 Ill. 2d at 243-44, 456 N.E.2d at 15-16; *Marshall*, 114 Ill. App. 3d at 232-33, 448 N.E.2d at 979-80. Cf. *Sharif*, 87 Mich. App. at 199, 274 N.W.2d at 19 (trial court disclaimed its own authority to assure that Department of Corrections would evaluate and treat defendants and stated it could only recommend such treatment).

210. 98 Mich. App. at 331, 287 N.W.2d at 225.

211. *Id.*

212. *Id.* Accord *People v. Siebers*, 129 Mich. App. 465, 469, 341 N.W.2d 530, 532 (1983); *People v. Toner*, 125 Mich. App. 439, 441, 336 N.W.2d 22, 23-24 (1983); *People v. Willsie*, 96 Mich. App. 350, 355, 292 N.W.2d 145, 147 (1980); *People v. Sorna*, 88 Mich. App. 351, 362, 276 N.W.2d 892, 897 (1979).

213. — Ind. App. —, 453 N.E.2d 1032 (1983).

214. *Id.* at —, 453 N.E.2d at 1036 (emphasis in original).

Accordingly, this issue could not properly be raised on direct appeal. The court went slightly beyond the Michigan Court of Appeals' finding in *Tenbrink*, however, by stating that an inmate may challenge the conditions of custody by not only a petition for writ of mandamus, but also a civil rights action under section 1983.²¹⁵ Taken together, these decisions suggest the limited nature of the statutory right to treatment afforded to GBMI offenders.

A potentially significant challenge to the application of the right to receive "such treatment as is psychiatrically indicated" is currently pending in Michigan. In *Gorton v. Johnson*,²¹⁶ the plaintiffs alleged

that all persons who have been convicted under the GBMI statute have not been provided treatment that is "psychiatrically indicated," because the Department of Corrections lacks the resources to provide any psychiatric treatment whatsoever to any prisoners other than those who present the most extreme disciplinary problems.²¹⁷

The plaintiffs in *Gorton* are GBMI inmates who sought class certification under Federal Rule of Civil Procedure 23(b)(2).²¹⁸ The defendants, the Department of Corrections and its director,

215. *Id.* See also *Pruitt v. Joiner*, 182 Ind. App. 218, 222, 395 N.E.2d 276, 278-79 (1979).

Section 1983 of title 42 provides in pertinent part:

Every person who, under color of any statute, regulation, custom, or usage of any State . . . subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1982). Thus, under *Stader*, an inmate may bring an action under § 1983 against prison officials to challenge the conditions of his or her prison life. Cf. *Preiser v. Rodriguez*, 411 U.S. 475 (1973) (the sole federal remedy when prisoner challenges fact or duration of imprisonment is writ of habeas corpus).

216. 100 F.R.D. 801 (E.D. Mich. 1984).

217. *Id.* at 801-02.

218. *Id.* at 802. The court found preliminarily that the plaintiffs had met the requirements for class certification under rule 23(a). *Id.* Rule 23(a) provides:

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a). The central controversy of the case centered on whether

among others, argued that class certification was improper because each inmate presented unique treatment problems and because the court would be unable to fashion an equitable remedy applicable to all members of the class.²¹⁹ The United States District Court for the Eastern District of Michigan granted the plaintiffs' motion for class certification, but only as to "those issues of institutional policy, practice, process, and procedure that are 'generally applicable' to all members of the proposed class," and not as to actual acts of evaluation and treatment that are a function of individual disorders.²²⁰ Specifically, the court in *Gorton* considered itself competent to

determine whether the Department of Corrections, as a threshold matter, has instituted policies which render the provision of psychiatrically indicated treatment impossible, regardless of the particular needs and problems of the individual class members and whether the defendants have policies, practices, processes, and procedures to evaluate and provide psychiatrically indicated treatment.²²¹

Gorton is the first reported class action suit challenging any facet of a GBMI statute's application.

6. Probation

In *People v. McLeod*,²²² the defendant's final challenge to Michigan's GBMI statute addressed the probation provision, which provides in pertinent part: "The period of probation shall not be for less than 5 years and shall not be shortened without receipt and consideration of a forensic psychiatric report by the

the plaintiffs had met the requirements of rule 23(b)(2). 100 F.R.D. at 802-04. Rule 23(b)(2) states in pertinent part:

(b) *Class Actions Maintainable*. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

.
(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole

FED. R. CIV. P. 23(b)(2).

219. 100 F.R.D. at 802.

220. *Id.* at 803.

221. *Id.*

222. 407 Mich. 432, 288 N.W.2d 909 (1980). For a discussion of the equal protection, due process, and cruel and unusual punishment challenges in *McLeod*, see *supra* notes 89-94, 98-100 & 115-19 and accompanying text.

sentencing court.”²²³ The defendant argued that the five-year minimum period of probation denied GBMI offenders equal protection by adversely affecting their fundamental liberty interests vis-a-vis defendants found guilty of the same offenses, without a compelling state interest for the differing treatment.²²⁴ As discussed earlier,²²⁵ the Michigan Supreme Court found no fundamental right or suspect classification that would require strict scrutiny of the provision.²²⁶ The court noted that the statute authorized a sentencing court to discontinue the normal five-year period of probation on the defendant’s motion when the treatment is no longer needed,²²⁷ thus creating a “rebuttable five-year period” of probation.²²⁸ The court upheld the provision as rationally furthering the legislative objective of providing supervised mental health treatment for GBMI probationers.²²⁹

D. Conclusion

The various challenges waged against GBMI statutes since 1977—substantive, procedural, and constitutional—have resulted in the judiciary approving and preserving the legislative purposes of providing treatment to mentally disturbed offenders and of protecting the public from mentally disturbed and dangerous offenders. During this testing period, the courts have had little negative to say about the GBMI legislation. In concluding that the statutes rationally further proper legislative objectives, the courts have not looked beyond the verdict to see if GBMI offenders actually received beneficial mental health treatment. In the near future, such concerns may be addressed in writ of mandamus or civil rights proceedings arising in the various states. Empirical research may provide another forum for more comprehensive analysis of such concerns.

IV. EMPIRICAL RESEARCH

Whether a measure relating to the public welfare is arbi-

223. MICH. COMP. LAWS ANN. § 768.36(4) (West 1982).

224. 407 Mich. at 656-57, 288 N.W.2d at 916.

225. See *supra* notes 89-94 and accompanying text.

226. 407 Mich. at 663, 288 N.W.2d at 919.

227. *Id.* at 661, 288 N.W.2d at 918 (citing MICH. COMP. LAWS ANN. § 768.36(4) (1982)).

228. *Id.* at 664, 288 N.W.2d at 919.

229. *Id.* For a discussion of the traditional indicia of what constitutes a suspect class, see *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

trary or unreasonable, whether it has no substantial relation to the end proposed is obviously not to be determined by assumptions or by *a priori* reasoning. The judgment should be based upon a consideration of relevant facts, actual or possible—*Ex facto jus oritur*. That ancient rule must prevail in order that we may have a system of living law.²³⁰

The previous sections of this article summarized the legislative and judicial development of the GBMI plea and verdict. Legislative and judicial mandates for legal and policy reform are distinguishable from the impact on practice that results.²³¹ This article would be incomplete without a look beyond legislative and judicial directives to the practical consequences that follow. The actual implementation of the GBMI plea and verdict and their effects on both individuals and components of the criminal justice system have not been examined extensively. Legal reform, informed public policy, and practice should depend, at least in part, on the results of scientific research.²³² Whether the GBMI plea and verdict have undercut the insanity defense, facilitated the provision of mental health treatment to mentally disturbed offenders, offered juries an equitable alternative to NGRI and guilty verdicts, and served the interest of societal protection remain to be examined empirically. The purposes of this section are to examine the limited empirical research in this area and to place the GBMI plea and verdict in an appropriate framework for scientific inquiry.

A. *Curtailement of the Insanity Defense*

The major purpose of the GBMI plea and verdict appears to

230. *Adams v. Tanner*, 244 U.S. 590, 600 (1917) (Brandeis, J., dissenting).

231. See Lottman, *Enforcement of Judicial Decrees: Now Comes the Hard Part*, 1 MENTAL DISABILITY L. REP. 69 (1976); Lottman, *Whatever Happened to Kenneth Donaldson?*, 1 MENTAL DISABILITY L. REP. 288 (1977). Another authority has commented

that as important as reforms in legal policies (viz., the "law on the books") certainly are, these accomplishments must not be confused with the end result (viz., the "law in practice"). It is therefore essential that a wide range of evaluative research efforts be undertaken to ascertain the outcomes stemming from various policy and programmatic changes.

Shah, *Legal and Mental Health System Interactions: Major Developments and Research Needs*, 4 INT'L J.L. & PSYCHIATRY 219, 255-56 (1981).

232. Shuman, *Decisionmaking under conditions of uncertainty*, 67 JUDICATURE 326 (1984).

be to curtail use of the insanity defense.²³³ To date, attempts to appraise whether the GBMI plea and verdict have accomplished this purpose have centered primarily on Michigan's nine-year experience. Ames Robey, a psychiatrist who was one of the original drafters of Michigan's GBMI statutes,²³⁴ stated three years after passage of the new law that the "dire predictions by some lawyers that the NGRI acquittal would fall into disuse have not been borne out."²³⁵ Although Robey provided only sketchy data to support his conclusions, he stated that after the Michigan law took effect the rate of NGRI acquittals did drop somewhat,²³⁶ but that the number of referrals for criminal responsibility evaluations at the Michigan Center for Forensic Psychiatry actually jumped dramatically,²³⁷ and that the percentage of defendants found civilly committable rose.²³⁸

Other Michigan researchers suggest that the proportion of defendants found NGRI following insanity pleas in Michigan remained relatively stable following the introduction of the GBMI plea and verdict in 1975.²³⁹ Criss and Racine, researchers at the Center for Forensic Psychiatry, found that between 1976 and 1979, the proportion of defendants who were examined for criminal responsibility at the Center and were subsequently acquitted by reason of insanity ranged from 6.6% (N=49) in 1978 to 8.6% (N=48) in 1977 (mean=8.1%).²⁴⁰ Criss and Racine were unable to collect reliable comparative data for the period before the law's

233. For a discussion of this purpose, see *supra* notes 24-33 and accompanying text.

234. Robey, *supra* note 6, at 374-75.

235. *Id.* at 380.

236. *Id.* at 379-80. Robey stated that he knew of 21 cases in which GBMI pleas were offered and accepted "in lieu of almost certain NGRI verdicts." *Id.*

237. *Id.* at 380. Robey stated:

In 1974, before the law was passed, there were 49 evaluations for criminal responsibility performed at the Forensic Center. After the law took effect, in the remaining five months of 1975, there were 93 such referrals. By June 1, 1978, after the law had been extant for less than three years, a similar five month period had 271 referrals, for an average of over 50 per month.

Id.

238. *Id.*

239. See Criss & Racine, *Impact of Change in Legal Standard for Those Adjudicated Not Guilty by Reason of Insanity 1975-1979*, 8 BULL. AM. ACAD. PSYCHIATRY & L. 261, 265 (1980); Project, *supra* note 10, at 93; S.C. Bank, In Defense of GBMI, Presentation at the Convention of the American Psychology-Law Society, Chicago (Oct. 6-8, 1983) (available at *Villanova Law Review*).

240. Criss & Racine, *supra* note 239, at 264-65. Of the 2,389 individuals evaluated by the Forensic Center between 1974 and 1979, 223 (8.1%) were subsequently found NGRI. *Id.* at 265.

enactment. Based on more current data, Smith and Hall reported a range of 5.0% (N=54) in 1981 to 8.4% (N=47) in 1977 (mean=6.7%) between 1976 and 1982.²⁴¹ These findings suggest that the availability of the GBMI plea and verdict does not necessarily result in fewer NGRI acquittals.

Two points might be considered in interpreting these findings. First, the conclusions of Smith and Hall and, to a lesser extent, Criss and Racine, regarding the GBMI law's effect on the incidence of NGRI acquittals were based upon proportional comparisons of arrest figures. Recognizing that comparisons of raw numbers of GBMI findings and NGRI acquittals may be misleading,²⁴² Smith and Hall compared the number of defendants found NGRI with the total number of arrests in Michigan.²⁴³ From 1972 to 1982, the percentage of adult males arrested who were ultimately found NGRI ranged from 0.012% in 1976 to 0.035% in 1979.²⁴⁴ Similarly, Criss and Racine based some of their conclusions about the frequency of NGRI acquittals in Michigan on proportional comparisons of NGRI acquittals and arrests for index offenses.²⁴⁵ For example, they stated that only 0.11% of all individuals arrested in Michigan for index offenses raised the insanity defense.²⁴⁶ This comparison excludes at least 15.7% of the 223 NGRI acquittees in the study population, that is, those acquitted of charges that were not index offenses.²⁴⁷

Arrest figures may not be the most appropriate base for calculating such percentages in studies of the NGRI and GBMI verdict. Arrests may not result in prosecutions for a variety of reasons. For example, the arresting agency may not file formal charges or the prosecuting attorney may decide not to pursue the case. Research on the use of the insanity defense and related alternatives should examine the outcome of court processing, which is several steps removed from law enforcement activity. Future research in this area might use criminal filings and dispositions as a more appropriate basis of comparison.

A second and perhaps more important consideration in eval-

241. Project, *supra* note 10, at 93, 107 (Appendix A, Table B).

242. *Id.* at 92 n.66.

243. *Id.* at 107 (Appendix A, Table A).

244. *Id.*

245. Criss & Racine, *supra* note 239, at 264-66. Index offenses include murder, rape, robbery, aggravated assault, breaking and entering, larceny, and auto theft. *Id.* at 271 n.13.

246. *Id.* at 264.

247. *See id.* at 265 (Table 3—Criminal Charges of NGRI Population).

uating the research concerning the effect of the GBMI laws on the incidence of NGRI acquittals is that it is preliminary. Although this formative research is valuable, further study of the effects of the GBMI plea and verdict on NGRI acquittals requires a more complex form of analysis. It is possible, for example, that an apparent decrease in the proportion of NGRI acquittals may be due to events that occurred concomitant with the enactment of GBMI legislation. The strength of a researcher's conclusions depends on whether the researcher was aware of such rival phenomena and was able to discount competing hypotheses.²⁴⁸

For example, observers have noted a number of legislative changes accompanying the introduction of the GBMI plea and verdict in Michigan that have potential confounding effects. These changes include new definitions of mental illness and insanity, a procedural timetable for defendants wishing to plead insanity, and new guidelines for short-term detention and release of insanity acquittees.²⁴⁹ Another authority noted that the 1975 Michigan statutory revisions also mandated that the Center for Forensic Psychiatry act as the state's centralized facility for conducting forensic evaluations.²⁵⁰ Future research should explore the possibility that such collateral changes, occurring with the enactment of GBMI laws, have a discrete effect on the increase or decrease in the proportion of defendants found NGRI or on the types of individuals acquitted on the basis of insanity.

The confounding effect of events preceding the enactment of GBMI laws also should be considered in analyzing research on GBMI legislation and its effects. Once again, an example from Michigan is instructive. After the United States Supreme Court's decision in *Dusky v. United States*²⁵¹ and subsequent lower court

248. See generally D.T. CAMPBELL & J.C. STANLEY, EXPERIMENTAL AND QUASI-EXPERIMENTAL DESIGNS FOR RESEARCH (1966).

249. MICH. COMP. LAWS ANN. §§ 330.1400a, 2050 (West 1980), §§ 768.21a(1), .20a (West 1982). See Note, *GBMI*, *supra* note 21, at 458 n.40, 471; R.C. Petrella, Guilty But Mentally Ill—A Negative View 2-3, Presentation at the Convention of the American Psychology-Law Society, Chicago (Oct. 6-8, 1983) (available at *Villanova Law Review*).

250. I.K. Packer, Guilty But Mentally Ill in Michigan: Its History and Practice, Presentation at the Convention of the American Psychology-Law Society, Chicago (Oct. 6-8, 1983) (available at *Villanova Law Review*); Petrella, *supra* note 249, at 2.

251. 362 U.S. 402 (1960). In *Dusky*, the Supreme Court reversed the defendant's conviction on the grounds that the record did not support finding defendant competent to stand trial. The test of such competency, stated the Court, "must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." *Id.* at 402.

decisions involving challenges to the extended commitment of defendants found incompetent to stand trial, Michigan enacted statutes that clarified the relevant NGRI criteria and revised the NGRI release provisions.²⁵² As a result, hundreds of individuals previously found incompetent to stand trial were returned to the Michigan courts for disposition of their cases. According to Robey, these changes caused NGRI verdicts to increase from only 12 in 1967, to 203 by mid-1973.²⁵³ A study of the effects of the GBMI plea and verdict on the insanity defense that includes comparisons of NGRI findings before and after GBMI enactment should take this type of increase in the NGRI population into account.

To understand the effects of definitional and procedural changes on NGRI and GBMI findings, a comprehensive study design is essential. At minimum, the task of identifying competing hypotheses should encompass a review of pertinent court rulings, statutory changes, and organizational and administrative changes. The methodology should be designed to measure systemic effects. Alternative explanations also should be addressed, in recognition of the fact that potentially confounding variables or factors affecting generalizability will differ among states. For example, as noted previously, the effect of the GBMI plea and verdict on insanity acquittals in Michigan may be related significantly to the centralized evaluation responsibilities of the Center for Forensic Psychiatry.²⁵⁴

B. *Displacement*

To further test the conclusion that the GBMI laws did not undercut the insanity defense, a conclusion that was contrary to the expectations of legislators who supported the GBMI laws,²⁵⁵ Smith and Hall questioned whether defendants who were adjudicated GBMI would have been found NGRI or guilty had the GBMI findings been available.²⁵⁶ In the absence of the GBMI

252. Act of July 1, 1966, No. 175, § 1, 1966 Mich. Pub. Acts 195 (repealed 1974); Act of July 12, 1966, No. 266, § 1, 1966 Mich. Pub. Acts 378 (repealed 1974). See Robey, *supra* note 6, at 374-75.

253. See Robey, *supra* note 6, at 374. Dr. Robey also stated that less than half of these 203 commitments were "both medically and legally appropriate." *Id.* at 374-75 (footnote omitted).

254. See Packer, *supra* note 250, at 2; Petrella, *supra* note 250, at 2; Project, *supra* note 10, at 104.

255. For a discussion of the expectations of Michigan legislators who supported the bill, see *supra* notes 24-29 and accompanying text.

256. See Project, *supra* note 10, at 95-100. This question was also posed in a

finding, all defendants would receive one of three traditional findings: guilty, not guilty, or NGRI. The addition of the GBMI finding necessarily displaces some defendants from one or more of these categories. If the GBMI laws reduce the incidence of NGRI acquittals, displacement of defendants from the NGRI category would occur. On the other hand, if the GBMI finding has little or no effect on NGRI findings, one instead would expect displacement from the guilty group.

Smith and Hall attempted to answer this displacement question by comparing samples of GBMI, NGRI, and guilty offenders in Michigan on the basis of selected demographic variables. The results of their discriminant analysis²⁵⁷ indicated that the GBMI group more closely resembled the guilty group on six variables (drug use, previous psychiatric treatment, criminal history, sexual offenses, employment status, and education) and the NGRI group on two variables (age and prior referrals for forensic evaluation).²⁵⁸ Smith and Hall cautiously concluded that "the majority of GBMI defendants were more similar to the guilty group than the NGRI group. It is thus likely that at least a majority of the GBMI defendants would have been found guilty in the absence of the GBMI statute."²⁵⁹

Several technical questions can be raised about the methodology Smith and Hall used to reach this conclusion. First, Smith and Hall measured only the type of drug use, not the extent and duration of use.²⁶⁰ Data on the type of drug use is more useful than no information at all, yet grouping occasional users of hallucinogens, for example, with daily users of the drugs may result in misleading comparisons. Occasional drug users may differ a great deal from habitual users, psychologically and otherwise. It thus remains to be seen whether GBMI offenders more closely resemble NGRI acquittees or guilty offenders when the extent and duration of drug use within the three groups are compared.

Second, Smith and Hall operationalized previous psychiatric

very recent study of simulated juror decisionmaking. For a discussion of this study, see *infra* notes 287-89 and accompanying text.

257. "Discriminant analysis" is a statistical technique used to find the linear combination of variables that best discriminates between or among two or more groups of cases. See generally W. KLECKA, DISCRIMINANT ANALYSIS 7-8 (1980).

258. Project, *supra* note 10, at 98-99.

259. *Id.* at 100.

260. See *id.* at 96 n.93. According to the Forensic Center, reference to alcohol or drug use in the psychiatrists' report underlying the Smith & Hall study was made any time a defendant reported at least "occasional" use. *Id.* See also *id.* at 111 (Appendix A, Table I showing types of drug use).

contacts and prior criminal history by counting the number of contacts and charges.²⁶¹ They did not differentiate the types of psychiatric contacts—such as voluntary or involuntary, outpatient or inpatient—or the charges that resulted in convictions. Important differences may exist between someone who voluntarily sought family counseling at a community mental health center on one occasion and someone who was involuntarily committed as dangerous to himself or others. The number of previous criminal charges filed should be used and interpreted carefully, realizing that charges often do not result in convictions, as previously noted.²⁶² Further, in response to Smith and Hall's scheme in which offenders with three auto theft charges could be grouped with those with one prior manslaughter charge, it might be enlightening to explore more fully the effect of the seriousness of prior criminal activity.²⁶³

Third, questions arise from the discriminant analysis Smith and Hall used to address the displacement issue. The variables and the analytical steps employed in their analysis may not fulfill the underlying assumptions and requirements of the technique. For example, Smith and Hall describe initial bivariate analyses,²⁶⁴ yet do not indicate whether further analyses, such as examinations for spuriousness or intercorrelation among variables, were conducted prior to the discriminant analysis. Further, discriminant analysis is a statistical technique for analyzing interval level data. Typically, analysts using the technique can make adjustments that provide reliable results when discrete data are used.²⁶⁵

261. *Id.* at 110-11 (Appendix A, Tables H & J). These tables list numbers of "prior criminal charges" and "previous psychiatric contacts" under GBMI, NGRI, and guilty verdict headings.

262. Data collected from corrections files, at least data on prior felony convictions for which commitment occurred, might offer a useful, more direct measure of official criminal history, especially if supplemented by misdemeanor conviction and probation records.

263. For a discussion of the effect of the severity of criminal activity on jury decisionmaking, see *infra* notes 297-99 and accompanying text.

264. Project, *supra* note 10, at 95-96. These "two-way" analyses expressed each variable used in the study (such as race, age, and education) in both real numbers and percentages for each verdict group, in an attempt "to determine which variables were most significant in differentiating between the verdicts." *Id.* at 96-97. It is assumed that a chi-square test was used in these analyses. Chi-square is equal to the sum of the quotients obtained by dividing the square of the difference between the observed and theoretical values of a quantity by the theoretical value. See J.L. BRUNING & B.L. KINTZ, COMPUTATIONAL HANDBOOK OF STATISTICS 207-09 (1968).

265. See M. GOLDSTEIN & W.R. DILLON, DISCRETE DISCRIMINANT ANALYSIS 4-10 (1978), W. KLECKA, *supra* note 257.

Smith and Hall describe no such adjustments in their analysis.²⁶⁶

Smith and Hall did note that their displacement analysis might be suspect if the post-GBMI population of NGRI acquittees were different from the pre-GBMI population.²⁶⁷ Relying upon earlier research, however, Smith and Hall presumed that defendants acquitted on the basis of insanity between 1975 and 1979 were "quite similar" to those acquitted between 1967 and 1972.²⁶⁸ Our examination of the data produced by that earlier research, particularly that of Cooke and Sikorski,²⁶⁹ reveals that the study populations did differ in several significant ways.²⁷⁰

If the GBMI laws have displaced NGRI defendants, one might expect a change in the NGRI population as a result. Comparison of the data presented by Cooke and Sikorski²⁷¹ and Criss and Racine²⁷² suggests that at least some of the less seriously disturbed and more violent offenders may have been screened out of the NGRI population as a result of the availability of the GBMI alternative in Michigan. In addition, changes may have occurred in the racial composition and mental health diagnoses of the same

266. See Project, *supra* note 10, at 96-100.

267. *Id.* at 96 n.98.

268. *Id.* (citing Criss & Racine, *supra* note 239, at 263).

269. Cooke & Sikorski, *Factors Affecting Length of Hospitalization in Persons Adjudicated Not Guilty by Reason of Insanity*, 2 BULL. AM. ACAD. PSYCHIATRY & L. 251 (1974).

270. See Criss & Racine, *supra* note 239, at 263-69; Cooke & Sikorski, *supra* note 261, at 252-59. The table set forth below uses the Cooke & Sikorski and Criss & Racine studies to demonstrate the changes in the NGRI study populations from 1967-1972 to 1975-1979.

Cooke and Sikorski (1967-1972)	Criss and Racine (1975-1979)	Comments
1) 32.3% of the NGRI population was black	44.8% of the NGRI population was black	The 13.9% decrease among whites and similar increase among blacks reported by Criss and Racine apparently resulted from subtracting percentages across populations rather than calculating a percentage change.
2) 45.5% had prior psychiatric hospitalizations	65.9% had prior psychiatric hospitalizations	
3) 59.9% were acquitted of murder	29.6% were acquitted of murder	Suggests that the insanity defense is being utilized for wider range of offenses. Also, women comprised 15% of Criss and Racine's study population yet 30% of those acquitted of murder.
4) 24.5% diagnosed as having personality disorders	21.8% diagnosed as having personality disorders	The aggregate data mask the fact that the number of acquittees diagnosed as having personality disorders decreased from 43.8% in 1975 to 12.2% in 1979.

271. Cooke & Sikorski, *supra* note 269, at 253-54.

272. Criss & Racine, *supra* note 239, at 265, 268-69.

population.²⁷³

The design of additional research in this area would be strengthened by incorporating psychiatric diagnosis as an independent variable and by including pre- and post-GBMI groups for purposes of comparison. The displacement question once again highlights the need to examine competing explanations of observed effects.

In summary, the data from Smith and Hall's Michigan study suggest that the GBMI laws have not displaced offenders as proponents expected. However, such data are formative, not necessarily conclusive. Conclusions based on data from Michigan may not generalize to other states. In addition, statistical questions about the analysis employed may require replication of the findings. Finally, a more complex and comprehensive research design is necessary to consider and possibly refute competing hypotheses.

C. *Effect on the Criminal Justice Process*

Although a major purpose of GBMI legislation is to protect society by incarcerating defendants who might otherwise be released following NGRI findings, proponents of such legislation also have intended that the GBMI plea and verdict simplify criminal proceedings. For example, supporters of GBMI legislation suggested that it would greatly simplify jury deliberations.²⁷⁴ This section explores the limited research regarding whether the GBMI plea and verdict does simplify criminal proceedings, and poses questions that might be addressed in future research.

1. *Plea Bargaining*

If an insanity acquittal appears unlikely, plea bargaining may result in a GBMI plea.²⁷⁵ A defendant may agree to a GBMI plea

273. For a chart examining some of these changes, see *supra* note 270.

274. See MICHIGAN HOUSE OF REPRESENTATIVES ANALYSIS SECTION, THIRD ANALYSIS OF MICH. H.B. 4363 3, 78th Leg., July 15, 1975. See also Robey, *supra* note 6, at 378 (Michigan GBMI statute enables trier of fact to distinguish between exculpable defendants and those whose mental illness is ancillary to crime committed).

275. Stelzner & Piatt, *supra* note 21, at 101. Stelzner and Piatt discuss New Mexico's GBMI statute, which requires that before a court may accept defendant's GBMI plea, the court must "receive psychological or psychiatric reports on the defendant, hold a hearing and satisfy itself that 'there is a factual basis that the defendant was mentally ill at the time of the offense.'" *Id.* (quoting N.M. STAT. ANN. § 31-9-3(c) (1984)). See also MICH. COMP. LAWS ANN. § 768.36(a) (West 1982) (judge may not accept GBMI plea unless satisfied that defendant was mentally ill at the time of the offense).

because he or she expects mental treatment or believes that a GBMI finding might result in more advantageous sentencing than a guilty finding.²⁷⁶ Whether such expectations are reasonable has yet to be tested.

Based on a limited survey of attorneys that had handled GBMI cases,²⁷⁷ Smith and Hall found that 61% (N=36) of GBMI findings in Michigan were obtained through plea bargains.²⁷⁸ Because many criminal cases are resolved regularly through plea bargaining, this finding is not surprising. That such a large proportion of GBMI findings result from pleas before judges, however, appears to be an unintended result, since GBMI literature suggests that legislators primarily intended to provide juries, rather than judges, with an alternative finding.²⁷⁹ Thus, the role of plea bargaining in obtaining a GBMI finding ought to be examined systematically. Such an examination should include the frequency with which such bargaining occurs and the effect it has on sentencing.

2. *Involvement of Psychiatric Experts*

The widespread use of psychiatrists and psychologists as expert witnesses and the often confusing, technical nature of their testimony have spawned considerable opposition to the insanity defense. Criticism has focused on two major concerns: (1) the imprecise methods upon which such testimony is based; and (2) the perceived tendency of mental health experts to usurp the function of the judge or jury by providing conclusory opinions.²⁸⁰

One purpose of GBMI legislation is to rectify these problems by reducing the involvement of mental health experts. One authority has suggested that the availability of the GBMI verdict might serve to ease the pressure on psychiatrists to force mental health diagnoses into strict legal categories inappropriately.²⁸¹ Others have suggested, however, that instead of reducing the involvement of psychiatric experts, the GBMI verdict perpetuates and in fact expands their involvement.²⁸²

276. Petrella, *supra* note 249, at 4-5; Robey, *supra* note 6, at 379-80; Stelzner & Piatt, *supra* note 21, at 101.

277. See Project, *supra* note 10, at 93 n.73.

278. *Id.* at 94, 108 (Appendix A, Table C).

279. See *id.* at 94. In practice, judges appear to use the finding as frequently as juries. *Id.*

280. I. KEILITZ & J.P. FULTON, *supra* note 22, at 18.

281. See Bank, *supra* note 240, at 4.

282. Hermann & Sor, *Convicting or Confining? Alternative Directions in Insanity*

Smith and Hall surveyed 36 attorneys who represented defendants found GBMI and 38 attorneys who represented defendants found NGRI. They concluded that mental health experts were involved significantly in both NGRI and GBMI cases in Michigan.²⁸³ More specifically, their findings indicated that NGRI defendants "may characteristically be more reliant upon expert testimony in bench trials" than are GBMI defendants, and that "both NGRI and GBMI defendants rely heavily upon testimony from private psychiatrists in the absence of Forensic Center testimony."²⁸⁴

Methodological limitations, however, restrict the ability to generalize from Smith and Hall's findings. First, the attorney samples were small. Second, the effect of the Forensic Center testimony on the verdicts was not assessed; rather, the effect of the Forensic Center's pretrial evaluation recommendations were analyzed. Third, the sample of attorneys was skewed because no attorney who unsuccessfully represented his or her client was included.²⁸⁵ Consequently, no data were presented on the use of expert testimony in cases in which defendants were found guilty after raising the insanity defense.

In sum, although Smith and Hall assessed the influence of Michigan's Center for Forensic Psychiatry, they shed little light on the impact that the GBMI plea and verdict have had on the involvement of mental health experts in general. To determine whether the use of mental health experts has decreased as a result of GBMI legislation, pre- and post-GBMI comparisons need to be made. Once these comparisons are completed, the effects of such expert involvement on the finding, treatment, and length of confinement in GBMI cases will remain to be examined.

3. *Bench Versus Jury Trials*

A secondary purpose of the GBMI verdict is to simplify jury

Law Reform: Guilty But Mentally Ill Versus New Rules for Release of Insanity Acquittees, 1983 B.Y.U. L. REV. 499, 572-73.

283. See Project, *supra* note 10, at 93 n.73, 94-95.

284. *Id.* at 95. See also *id.* at 108 (Appendix A, Table D—Use of Expert Psychiatric Witnesses in NGRI and GBMI Trials). As described by Smith and Hall, to be found GBMI or NGRI, a defendant must plead insanity and undergo a psychiatric examination at Michigan's Forensic Center. *Id.* at 94. A Forensic Center examiner then will testify for or against the defendant's NGRI acquittal at trial. *Id.*

285. *Id.* at 93 n.73.

deliberations.²⁸⁶ Smith and Hall, again, provide the only published findings in this area. Their data, which are based on the survey responses of 74 defense attorneys, align information on the case outcomes (GBMI and NGRI) with the method of adjudication employed (plea, bench trial, or jury trial). Smith and Hall concluded that “defendants found GBMI after trial were evenly divided between bench and jury trials.”²⁸⁷ Whether juries tend to find defendants GBMI rather than NGRI cannot, however, be determined simply by counting the methods of adjudication or comparing raw frequencies of jury outcomes.²⁸⁸ In an attempt to make a determination, we conducted a chi-square test using Smith and Hall’s data. Our calculations²⁸⁹ indicate that the proportion of defendants found NGRI in bench trials (89%) was significantly greater than those found GBMI in bench trials (50%). Furthermore, the proportion of defendants that juries determined to be NGRI (11%) was significantly smaller than the proportion of those found GBMI (50%). A statistically significant

286. See *id.* at 94 n.33, 93; Petrella, *supra* note 249, at 4; Robey, *supra* note 6, at 378.

287. Project, *supra* note 10, at 94.

288. See Hermann & Sor, *supra* note 282, at 577.

289. Excluding defendants who pleaded GBMI (we have already addressed the plea bargaining issue and focus here solely on bench and jury trials), and accepting Smith and Hall’s contention that NGRI acquittals are not reached through plea bargaining, Smith and Hall’s data can be presented as follows:

Verdict	Type of Trial		
	Bench	Jury	
GBMI (N=14)	7 (17%) [50%]	7 (64%) [50%]	[100%]
NGRI (N=38)	34 (83%) [89%]	4 (36%) [11%]	[100%]
	41 (100%)	11 (100%)	

[] Indicates row percentages.

() Indicates column percentages.

$\chi^2 = 8.863$

df = 1

p < .01

See Project, *supra* note 10, at 108 (Appendix A, Table C). Correction for continuity was made during calculation due to the small cell sizes. The above table is presented according to the logic of causal relationships among variables to increase interpretative value. As displayed, the data suggest that the type of trial affects the verdict rendered. Conversely, many tables that Smith and Hall presented suggest that the verdict affects age, crime location, prior criminal charges, and so forth. *Id.* at 109-13. This effect makes interpretation difficult and ignores the time sequence relevant to possible causal relationships. See E. BABBIE, *THE PRACTICE OF SOCIAL RESEARCH* 382-87 (1983); H.M. BLALOCK, *SOCIAL STATISTICS* (rev. 2d ed. 1979). See also Hermann & Sor, *supra* note 282, at 576-78; Stelzner & Piatt, *supra* note 21, at 110.

difference exists in the proportion of individuals found GBMI as opposed to NGRI by type of trial, suggesting a relationship between type of trial and finding. A larger sample and further analysis examining the effect of other variables on the relationship would be required, however, before one could draw conclusions. Smith and Hall's data may well support Hermann and Sor's hypothesis that juries tend to find defendants who raise the insanity defense GBMI rather than NGRI.²⁹⁰

4. *Jury Decisionmaking*

Juries torn between an NGRI verdict, with its perceived threat to public safety, and the standard guilty verdict may view the GBMI verdict as an attractive compromise.²⁹¹ A jury may either intentionally use the GBMI verdict when it is unable to reach a consensus on whether an NGRI verdict or a GBMI verdict is appropriate, or it may mistakenly use it because of confusion over the meaning of the two verdicts.²⁹²

The potential for "jury compromise" has been discussed by a number of commentators. Several authorities have suggested that instructions to the jury regarding dispositional consequences may contribute to compromise verdicts.²⁹³ According to Fullin and Fosdal, for example, jurors believe that an individual found GBMI will serve a specified sentence in prison but that an insanity acquittee may be released depending on the outcome of a post-trial evaluation.²⁹⁴ Petrella²⁹⁵ as well as Hermann and Sor²⁹⁶ have hypothesized that if jurors believe a defendant found GBMI will receive treatment, a GBMI finding is more likely. Therefore, jurors may opt for the GBMI verdict based on the perception that psychiatric treatment will be combined with incarceration. The GBMI verdict, then, is perceived as achieving the dual objectives of promising treatment and ensuring the defendant's segregation from society.

In a recent study, Roberts and Golding simulated jurors'

290. See Hermann & Sor, *supra* note 282, at 565, 571.

291. See Stelzner & Piatt, *supra* note 21, at 110; Note, *GBMI*, *supra* note 21, at 469.

292. Note, *supra* note 21, at 469.

293. See *id.*; Hermann & Sor, *supra* note 282, at 571.

294. J. Fullin & F. Fosdal, *Guilty But Mentally Ill Verdict and Disposition*, Memorandum to Insanity Defense Committee 10-11, Wisconsin Judicial Council (Sept. 12, 1980) (unpublished memorandum).

295. Petrella, *supra* note 249, at 5.

296. Hermann & Sor, *supra* note 282, at 571.

decisionmaking by asking 181 undergraduate students attending the University of Illinois to choose among the verdicts of NGRI, guilty, and GBMI in response to 16 vignettes describing the facts and circumstances of a murder case.²⁹⁷ Each of the vignettes included the same description of a fictitious victim and the circumstances of his life but varied in the description of the defendant's mental disorder and the alleged crime. Three types of mental disorder were represented, although without diagnostic labels: antisocial personality disorder, schizotypal personality disorder, and paranoid schizophrenia. The alleged crime varied in "bizarreness" (in the bizarre version, the victim's heart is cut out; in the "nonbizarre" version, the victim dies of a stab wound) and "planfulness," two aspects of a crime that Golding and Roberts hypothesized are emphasized by jurors.²⁹⁸

To assess the effect of various decisional alternatives on the verdicts reached, students were asked to consider the "facts of the case" presented by the vignettes under two conditions. In Condition I they could choose only between the two traditional verdicts of guilty and NGRI; in Condition II they could choose among guilty, NGRI, and GBMI.

The results of the study indicate that jurors' attribution of criminal responsibility is, not surprisingly, fundamentally related to the severity of a defendant's mental disorder and, in a more complex manner, to aspects of the *actus reus*. Regardless of whether the students had GBMI among their verdict choices, more schizophrenic defendants were judged NGRI than were the defendants with "less severe" mental disorders (i.e., antisocial or schizotypal personalities).²⁹⁹ Though not unrelated to the mental disorder of the defendant, and depending upon whether GBMI was among the verdict options, the students' attribution of criminal responsibility tended to be greater the more the defendant deliberately planned his actions and the more bizarre the crime.

An overwhelming majority of the students (86%) believed

297. See C.F. Roberts & S.L. Golding, *An Empirical Analysis of the Attribution of Criminal and Moral Responsibility Under the "Guilty But Mentally Ill" Option* (1984) (available from Dept. of Psychology, Univ. of Illinois at Urbana-Champaign) (unpublished manuscript). The study was also reported in C.F. Roberts & S.L. Golding, *Insanity, Responsibility, and the Morality of Guilty But Mentally Ill* (paper delivered during Paper Session, *The Insanity Defense: Public Opinion and Public Policy*, at the Meeting of the American Psychological Ass'n in Toronto, Canada, Aug. 25, 1984).

298. See Golding & Roberts, *supra* note 6, at 3-4. See also Roberts & Golding, *supra* note 297.

299. Golding & Roberts, *supra* note 6, at 11.

that the "GBMI sentencing alternative was moral, just, and an adequate means of providing for the treatment needs of mentally ill offenders."³⁰⁰ This sentiment was reflected in their verdicts. The students were two-and-one-half times more likely to use the GBMI verdict than either the guilty or NGRI verdict. Those who chose the GBMI verdict also tended to be more confident in their choice.³⁰¹ The more disordered defendants were more likely to be found GBMI than guilty. The same was true for the defendants who committed crimes in a bizarre fashion.³⁰²

When given the GBMI option in Condition II, the students tended to find GBMI most of those defendants with personality disorders who were adjudged guilty in Condition I.³⁰³ This displacement effect is consistent with the results of Smith and Hall's study of actual cases in Michigan.³⁰⁴ Displacement of guilty verdicts with GBMI verdicts between Condition I and II, however, did not occur in cases involving defendants with severe disorders, "such as in the prototypic insanity vignette where an obvious paranoid schizophrenic individual with delusion related to the victim is combined with a relative lack of planfulness."³⁰⁵ Ninety-five percent of the students found such a defendant NGRI when GBMI was not a sentencing option available to them; however, when the GBMI option was available, only 18% of the students found the same defendant NGRI, while 77% found him GBMI.³⁰⁶ Hence, GBMI verdicts displaced NGRI findings. Apparently, most of the subjects of Golding and Roberts' study, like Queen Victoria a hundred years ago, considered it just to attribute criminal guilt even to a psychotic defendant whose unplanned offense was caused by a delusional system.³⁰⁷

This displacement of NGRI acquittals with GBMI verdicts, although generally consistent with the purposes of GBMI legislation, is in contrast to the data collected in Michigan, where NGRI acquittals appear undisturbed by the availability of the GBMI al-

300. *Id.* at 12.

301. *Id.* at 11-12.

302. *Id.* at 11.

303. *Id.* at Figure 3.

304. For a discussion of Smith and Hall's displacement study, see *supra* notes 256-59 and accompanying text.

305. Golding & Roberts, *supra* note 6, at 12.

306. *Id.*

307. For a discussion of Queen Victoria's view, see *supra* note 1 and accompanying text.

ternative.³⁰⁸ One possible explanation of this difference, mentioned by Golding and Roberts,³⁰⁹ is that the data collected by Smith and Hall in Michigan represent findings reached primarily by bench trials or plea bargains and based on mental health evaluations performed by Michigan's Center for Forensic Psychiatry, rather than findings reached by students simulating jurors' decisionmaking. Given the relative rarity of NGRI acquittals in Michigan, another explanation for this difference may be that few actual NGRI verdicts existed to displace in Michigan. This also is a plausible explanation for Golding and Roberts' failure to find a shift from NGRI to GBMI verdicts in cases involving defendants with personality disorders.³¹⁰

In what is perhaps the most comprehensive study on jury decisionmaking in insanity cases concluded before enactment of GBMI legislation,³¹¹ Simon suggests that the compromise provided by the then unavailable GBMI verdict is precisely what jurors desire:

Many of the jurors [studied] felt constrained by the verdict limitations placed upon them by the court. They would like to have a way of easing the choice between acquitting the defendant on grounds of insanity and finding him guilty. The former designation goes further than they want to go in distinguishing the defendant from the ordinary criminal, and the latter allows for no distinction. In many instances the jury would have liked to declare the defendant guilty, but insane. That kind of verdict would permit the jurors to condemn the defendant's behavior . . . [and fulfill] . . . their desire to commit the defendant to an institution that both punished and treated.³¹²

If jurors base their decisions on public safety concerns and their belief that needed treatment will be provided, instead of on the legal requirements for insanity and nonresponsibility, defendants who qualify for NGRI acquittals may be denied legally appropriate findings.³¹³ Robey reviewed 57 Michigan GBMI cases,

308. For a discussion of displacement in Michigan, see *supra* notes 233-41 and accompanying text.

309. See Golding & Roberts, *supra* note 6, at 10-11.

310. See *id.* at Figure 3.

311. R. SIMON, *supra* note 36.

312. *Id.* at 1780.

313. See Hermann & Sor, *supra* note 282, at 517; Note, *GBMI*, *supra* note 21,

however, and concluded that only two GBMI convicts were denied insanity acquittals improperly because jurors feared possible release following an NGRI finding.³¹⁴ Robey, however, presents neither the criteria used in his review nor the basis for his conclusion.

In her studies of jury decisionmaking published in 1967, Simon found that instructions regarding the dispositional consequences of an NGRI finding do not significantly affect a jury's choice between NGRI and guilty verdicts.³¹⁵ It remains to be seen how this relationship is affected by availability of the GBMI verdict.

5. Sentencing

No reported data focus on the effect a GBMI finding has on the sentence imposed. Whether the adjudication of mental illness as part of a GBMI finding shortens or lengthens an offender's sentence may be answered by comparing the sentences imposed on offenders found GBMI and guilty after raising the insanity defense with the sentences imposed on defendants who did not raise the insanity defense but were convicted of comparable crimes. The results may be similar to those reported by Braff and her colleagues, who found that defendants found guilty after entering NGRI pleas received significantly longer sentences than those who had not asserted the defense.³¹⁶ Interestingly, defendants who plead NGRI risk a greater chance of being institutionalized, regardless of whether their plea is successful, than defendants who never enter the plea.³¹⁷

at 470-71 (jury should be instructed to focus upon defendant's mental condition only in evaluating his culpability, not in considering collateral issues).

314. Robey, *supra* note 6, at 380.

315. R. SIMON, *supra* note 36, at 92-93. The validity of this finding has been questioned. See Morris, Bozzetti, Rusk & Read, *Whither Thou Goest? An Inquiry Into Jurors' Perceptions of the Consequences of a Successful Insanity Defense*, 14 SAN DIEGO L. REV. 1058, 1060-61 (1977); Schwartz, *Should Juries Be Informed of the Consequences of the Insanity Verdict?*, 8 J. PSYCHIATRY & L. 167, 174 (1980).

316. Braff, Arvanites & Steadman, *Detention Patterns of Successful and Unsuccessful Insanity Defendants*, 21 CRIMINOLOGY 439 (1983). See also Rodriguez, LeWinn & Perlin, *The Insanity Defense Under Siege: Legislative Assaults and Legal Rejoinders*, 14 RUTGERS L.J. 397, 401-02 & n.32 (1983).

317. Braff, Arvanites & Steadman, *supra* note 316, at 446. *But cf.* Pasewark, Pantle & Steadman, *Detention and Rearrest Rates of Persons Found Not Guilty by Reason of Insanity and Convicted Felons*, 139 AM. J. PSYCHIATRY 892, 893-94 (1982) (hospitalization time for NGRI acquittees in New York was the same as imprisonment periods of felons who had pleaded guilty to the same criminal act between 1965 and 1971, but between 1971 and 1973 acquittees were confined for shorter periods (533 days) than felons convicted of similar offenses (837 days)).

Generally, a sentencing judge may impose any sentence on a GBMI defendant that could be imposed on a guilty defendant.³¹⁸ At least one commentator has suggested that the provision of probation following a GBMI finding may offer advantages both to the public and to the defendant that an NGRI verdict does not offer.³¹⁹ If an NGRI acquittal is likely in a particular case, a prosecutor may wish to offer GBMI conviction and probation with treatment in a plea bargain. A defendant may view such an offer as acceptable because favorable disposition is assured. The public may favor GBMI conviction with probation over NGRI acquittal because of the assurance of some protection during a period of mandatory treatment and supervision of the defendant by the criminal justice system.³²⁰ How frequently courts grant probation and what factors influence the granting of probation to GBMI offenders, however, have not yet been determined.

D. *Disposition of the GBMI Offender*

1. *Provision of Treatment*

Despite the widespread belief that a GBMI finding guarantees an offender mental health treatment, a review of the relevant statutes³²¹ indicates that the finding does not ensure treatment beyond that available to other offenders. Most GBMI statutes, with the possible exceptions of the Alaska and Utah statutes,³²² give discretion to the correctional or mental health facility having custody of the offender to provide treatment "as it deems necessary" or "as is psychiatrically indicated."³²³ The Georgia statute includes the caveat that treatment shall be provided "within the limits of state funds appropriated therefore."³²⁴ As a statutory matter, therefore, GBMI offenders may be no more likely to receive treatment than other offenders.³²⁵

There are several possible explanations for the difference between the number of GBMI offenders determined to be mentally

318. For a discussion of sentencing procedures in the eleven states with GBMI statutes examined in this article, see Table 3.

319. See Robey, *supra* note 6, at 379.

320. *Id.*

321. For an analysis of the special procedural GBMI provisions in the twelve states under consideration in this article, see Table 3.

322. For an analysis of the Alaska and Utah statutes, see Table 3.

323. See *id.*

324. GA. CODE ANN. § 17-7-131(g) (Supp. 1984).

325. See Hermann & Sor, *supra* note 282, at 578-79; Project, *supra* note 10, at 105 n.137.

ill during criminal proceedings and the number of those who actually receive treatment after conviction. Generally, a GBMI finding is based on mental illness at the time of the offense,³²⁶ while postconviction mental health evaluation focuses on an offender's present mental health treatment needs.³²⁷ The diagnoses of mental disorder may change over time as a function of changes in the offender's condition or environment, as well as differences in the policies and practices of pre- and postconviction mental health evaluations. Another explanation, which may be related to the first, is based upon research showing that mental health treatment received by NGRI acquittees during pretrial detention following a finding of incompetence to stand trial may result in a reduced need for treatment after an NGRI acquittal.³²⁸ Likewise, in the case of GBMI offenders, treatment under similar circumstances may result in an improvement in an offender's mental condition and a decreased need for treatment following conviction.³²⁹ A third possible explanation is that some defendants entering GBMI pleas, especially when such pleas are unchallenged by the prosecution, may not be treatable or may not need treatment. Finally, treatment simply may be unavailable to GBMI offenders in the correctional system.³³⁰

Adding the GBMI alternative to the traditional array of verdicts may mislead offenders, their attorneys, the courts, and the public by building false treatment expectations.³³¹ A review of the frequency of treatment provided to GBMI offenders and the nature of that treatment is necessary to determine whether legislative revisions or additional appropriations for treatment are needed. Variables that might influence the provision of postconviction treatment, including pretrial treatment, correctional resources, and the use and effect of transfer provisions, should also

326. *But see* Utah Code Ann. § 77-35-21.5 (Supp. 1983) (court must determine if defendant is "currently mentally ill").

327. *See* Petrella, *supra* note 249, at 8.

328. *See* Criss & Racine, *supra* note 239, at 266.

329. Petrella, *supra* note 249, at 8.

330. *See* *People v. McLeod*, 407 Mich. 632, 667-68 n.5, 288 N.W.2d 909, 921 n.5 (1980) (Levin, J., concurring). A psychiatrist in the Michigan Department of Corrections, the only full-time psychiatrist for a prison population of 12,000 in 1980, indicated that he attended to offenders only if they presented extreme management problems. Treatment generally was provided only to patients who were psychotic or suicidal, and it consisted mainly of crisis intervention. *Id.* *See also* Project, *supra* note 10, at 89 n.49. For a further discussion of the lack of treatment for GBMI offenders, *see supra* note 38 and accompanying text.

331. *See* Fullin & Fosdal, *supra* note 294, at 10-11.

be examined. This research should be structured to allow for comparisons among states.

2. *Length of Confinement and Release*

No available data address how long GBMI offenders are incarcerated or how their confinement compares with: (1) that of offenders found guilty who did not raise the insanity defense; (2) that of offenders who raised the insanity defense or pleaded GBMI but were found guilty; and (3) the length of hospitalization of NGRI acquittees. In Erie County, New York, Braff and her associates found no statistically significant difference in the length of institutionalization between defendants hospitalized following an insanity acquittal and those incarcerated after unsuccessfully raising an insanity defense.³³² It is possible that this finding may not be supported in a comparison among GBMI offenders and the three groups noted above.

Factors related to the release of GBMI offenders into the community are of obvious interest to policymakers. Confinement for a specified period in the name of societal protection was an underlying objective in the creation of the GBMI finding.³³³ In most states, GBMI offenders do not face the prospect of indefinite commitment³³⁴ that insanity acquittees may face.³³⁵ Unlike NGRI acquittees, however, GBMI offenders cannot petition for release.³³⁶ Exploration of such differences may provide valuable information on the GBMI laws' success regarding punishment and public protection.

The effect on recidivism of mental health treatment provided GBMI offenders is particularly important to policymakers and practitioners. Treatment provided during incarceration may facilitate an offender's successful return to society. Hermann and Sor have hypothesized that mentally ill offenders may be more

332. See Braff, Arvanities & Steadman, *supra* note 316, at 443-44. For a discussion of Braff's study, see *supra* notes 316-17 and accompanying text. It should be noted that Braff and her associates were unable to draw conclusions concerning any variations among misdemeanants due to the small size of the population.

333. For a discussion of this objective, see *supra* notes 23-38 and accompanying text.

334. *But cf.* ALASKA STAT. § 12.47.050(e) (Supp. 1983); ILL. ANN. STAT. ch. 38, § 1005-2-6(d)(2) (Smith-Hurd 1982); MICH. COMP. LAWS ANN. § 330.2006(3) (West 1980), § 768.36(3) (West 1982) (authorizing initiation of involuntary civil commitment at expiration of sentence).

335. See *Jones v. United States*, 103 S. Ct. 3043, 3051 (1983) (such indefinite commitment not violative of due process).

336. Petrella, *supra* note 249, at 2.

violent following release from prison if they have not received mental health treatment.³³⁷ Also important are the effects of parole decisions and a state's sentencing structure on the release of GBMI offenders.

Recidivism and public safety may best be studied using data collected in Michigan. The enactment of GBMI legislation in other states may be too recent for the collection of any meaningful data on recidivism.

V. CONCLUSION

Guilt, mental illness, and insanity are characterizations of behavior, but they also reflect the differences among proposals about how to handle persons so characterized. Traditionally, the guilty are punished and the mentally ill are treated. Good intentions aside, it is difficult to do both. The struggle with this moral dilemma and the practical problems it entails are reflected in the legislative and judicial developments of the GBMI plea and verdict reviewed in this article. Despite widespread criticism from scholars and professionals that the GBMI alternative is ill-conceived, constitutionally unsound, redundant, and unnecessary in practice, and despite early returns from social science research suggesting that the laws do little to undercut the traditional insanity defense, and do even less to enhance available treatment options for mentally disordered offenders, the GBMI laws seem to be alive and well in at least twelve states. They have survived constitutional attacks in Michigan, Indiana, Illinois, and Georgia, and seem likely to overcome similar challenges in other states.

While "first-generation" substantive issues, such as the conceptual soundness and constitutional validity of the GBMI plea and verdict, will remain controversial, "second-generation" issues³³⁸ that deal with procedures and practices are likely to be preeminent as the focus of attention moves from legislative and judicial mandates to that which has actually been accomplished by

337. Hermann & Sor, *supra* note 282, at 582-83.

338. See D. WEXLER, *MENTAL HEALTH LAW: MAJOR ISSUES* 257-61 (1981). These second generation issues include: (1) accomplishing effective deinstitutionalization and avoiding merely "dumping" patients into substandard boarding homes; (2) upgrading and enforcing standards for nursing homes and board-and-care facilities; (3) dealing with zoning laws that exclude group homes for the mentally disabled from certain areas and attempt to concentrate these homes in "social service ghettos"; (4) combatting practices of discrimination in housing, education, and employment among the mentally ill; and (5) dealing with mentally disabled individuals who are not well integrated into society, and who consequently confront the criminal justice system periodically. *Id.* at 257.

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those mandates.³³⁹ As Professor David B. Wexler has noted, “policy makers are perhaps most likely to become informed of actual practices and of workable alternatives by mental health law scholars and students who undertake empirical investigations of mental health law in operation and who compare and contrast the workings of one system with the workings of alternative systems in operation elsewhere.”³⁴⁰

339. *See generally* Shah, *supra* note 231, at 255.

340. D. WEXLER, *supra* note 338, at 260.

