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Indiana's Guilty But Mentally Ill Statute: Blueprint to Beguile the Jury

In recent years the Indiana legislature has drastically revised the insanity defense to restrict the circumstances in which it can be pleaded successfully by defendants in criminal trials. In 1978, the legislature shifted the burden of proving insanity by a preponderance of the evidence to the defendant,[1] largely in response to the much-publicized case of *State v. Kiritsis*.[2] In 1981, Indiana became the second state to pass a controversial "guilty but mentally ill" statute,[3] primarily due to public reaction surrounding the case of *State v. Judy*.[4]

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[1] IND. CODE § 35-41-4-1 (1982). The constitutionality of this type of law was seemingly approved by the Supreme Court in Leland v. Oregon, 343 U.S. 790 (1952), in which the Court upheld an Oregon statute requiring a criminal defendant to prove his insanity beyond a reasonable doubt. In that case, the defendant argued that the statute required him to establish his innocence by disproving beyond a reasonable doubt elements of the crime necessary to a guilty verdict, in violation of the due process clause of the fourteenth amendment of the Constitution. *Id.* at 793. The Court disagreed, stating that the prosecution was required to prove beyond a reasonable doubt every element of the crime charged, including deliberation, malice, and intent. *Id.* at 794-95. It held that the insanity defense is a broader concept than any specific element of the criminal offense, *see* text accompanying note 15 *infra*, and that the state is thereby permitted to require the defendant to affirmatively demonstrate his insanity, a separate legal issue from whether he committed the crime, to avoid criminal liability. 343 U.S. at 795-96. *See also* Rivera v. Delaware, 351 A.2d 561, *appeal dismissed*, 429 U.S. 877 (1976) (Brennan, J., and Marshall, J., dissenting); Basham v. State, ___ Ind. ___, ___, 422 N.E.2d 1206, 1209 (1981); Norris v. State, ___ Ind. ___, ___, 419 N.E.2d 129, 134 (1981); Price v. State, ___ Ind. ___, ___, 412 N.E.2d 783, 784-85 (1980).

[2] 269 Ind. 550, 381 N.E.2d 1245 (1978). In that case, the defendant kidnapped an Indianapolis business executive and held him at gunpoint before the television cameras of the nation. Press, *The Insanity Plea on Trial*, NEWSWEEK May 24, 1982, at 56, 59; Indianapolis Star, Feb. 9, 1977, at 1, col. 5. Indiana law at the time of trial provided that when a defendant entered a plea of not responsible by reason of insanity, the burden of proving sanity beyond a reasonable doubt was on the state. IND. CODE § 35-41-4-1 (1976) (repealed 1978); Avery v. State, 269 Ind. 432, 381 N.E.2d 1226 (1978). After *Kiritsis*, which resulted in an insanity verdict for the defendant, Indianapolis Star, Oct. 22, 1977, at 1, col. 1, a proposal to shift the burden of proving insanity by a preponderance of the evidence to the defendant, dubbed the "Kiritsis Bill," Indianapolis News, Sept. 11, 1980, at 19, col. 1, passed overwhelmingly in the legislature.

[3] IND. CODE § 35-36-2-3 (1982). Michigan was the first state to enact such a statute. MICH. COMP. LAWS ANN. § 768.36 (1975). After Indiana adopted this law, four other states, Georgia, Illinois, Delaware, and New Mexico, enacted similar statutes. Leo, *Is the System Guilty?*, TIME, July 5, 1982, at 26, 27. Moreover, a large number of other states are considering adopting such a proposal. Press, *supra* note 2, at 56.

[4] ___ Ind. ___, 416 N.E.2d 95 (1981). The case involved the murder of a mother and her three small children. Concerned citizens, alarmed by the possibility that the defendant would be found not responsible by reason of insanity and thus not held accountable for his crimes, formed a group, "Protect the Innocent," which lobbied extensively for the passage of the guilty but mentally ill provision. Indianapolis News, Sept. 11, 1980, at 19, col. 1. Ironically, the defendant was convicted by the jury, ___ Ind. at ___, 416 N.E.2d at 100, and executed for committing the murders.

These changes in the criminal law were a response to a public perception that the insanity defense constitutes a loophole within the criminal justice system. The public views the insanity defense as a means for the defendant to avoid criminal responsibility for his misconduct, thereby undermining the functioning of the legal system.[5] This belief is reinforced when the public sees a defendant who has committed a violent crime released to society a short time after the jury has rendered a verdict that he was not responsible by reason of insanity.[6] The belief is further reinforced when the defendant commits another violent crime after his release.[7] Consequently, the Indiana legislature enacted the guilty but mentally ill statute to limit the ability of defendants to successfully plead insanity as a defense to avoid responsibility for their criminal acts.

This note focuses on the guilty but mentally ill provision, arguing that it is an objectionable device to confront perceived abuses in the use of the insanity defense by defendants in criminal trials. The statute is unnecessary because it neither helps the jury in rendering a decision against a defendant nor affects the treatment he receives after he has been convicted. Moreover, the new law works to deceive juries into rejecting valid insanity pleas of defendants. It implies to jurors that a guilty but mental-

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[5] *See* McCall v. States, 77 Ind. 715, 718, 408 N.E.2d 1218, 1221 (1980) (insanity defense is "uniquely subject to being feigned"); Moore v. State, 260 Ind. 154, 157-58, 293 N.E.2d 28, 30 (1973); H. FINGARETTE, THE MEANING OF CRIMINAL INSANITY 6 (1972); A. GOLDSTEIN, THE INSANITY DEFENSE 3 (1967); R. SIMON, THE JURY AND THE DEFENSE OF INSANITY 144-45 (1967); Bronson, *On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen*, 42 U. COLO. L. REV. 1, 7-8 & n.34 (1970) (in study of jurors' attitudes, nearly 81% of jurors believed that "[t]he insanity defense is a loophole allowing too many guilty men to go free"); N.Y. Times, June 24, 1982, at 15, col. 1 (in national survey, more than 75% of respondents favored abolition of insanity defense); Address by Pete Katic, Indiana State Representative (Nov. 21, 1980) (speech by legislator who presented guilty but mentally ill proposal before Indiana legislature) (tape available at *Indiana Law Journal* office). Public response to the acquittal by reason of insanity of John Hinckley, Jr., for attempting to kill President Reagan exemplifies the outrage that such verdicts provoke. *See, e.g.*, Leo, *supra* note 3, at 26; Taylor, *The Hinckley Riddle: Outrage on Acquittal Focuses on Confusion Created by Combining Psychiatry and Law*, N.Y. Times, June 24, 1982, § D, at 21, col. 1; Valente & Kiesnan, *Hinckley Verdict Prompts Hill Attack on Insanity Defense*, Wash. Post, June 23, 1982, at 1, col. 1.

[6] For example, in 1979 Leonard Smith shot and killed major league baseball player Lyman Bostock in Gary, Indiana. Indianapolis Star, Sept. 25, 1978, at 1, col. 1. Smith was arrested and charged with murder. *Id.* At the trial, the jury accepted his plea of insanity and rendered a verdict that he was not responsible for his actions when he committed the crime. *Id.*, Nov. 17, 1979, at 40, col. 1. A commitment hearing was conducted to determine his mental state after trial, and the judge committed him to the Indiana Department of Mental Health for treatment. *Id.*, Dec. 9, 1979, § 3, at 18, col. 2. Less than seven months after his trial, psychiatrists determined that he was not insane and released him. *Id.*, June 21, 1980, at 21, col. 1.

[7] In Michigan, for example, two men who had been acquitted from crimes by reason of insanity were later released from state hospitals after they were found to have recovered their sanity. Comment, *Guilty But Mentally Ill: An Historical and Constitutional Analysis*, 53 J. URB. L. 471, 482-83 (1976). Soon after their release, one of the men raped two women; the other murdered his wife. *Id. See also* Leo, *supra* note 3; *By Reason of Insanity*, ABC News 20/20 Transcript, Show #216, Apr. 29, 1982, at 1-3.

ly ill defendant will be held reponsibile for his criminal acts and at the same time singled out as one who needs treatment. In actuality, however, such a verdict is simply a guilty decision. All offenders, "guilty" and "guilty but mentally ill" alike, are treated similarly upon conviction. For these reasons, the statute should be repealed.

A COMPARISON OF THE "INSANE" AND "GUILTY BUT MENTALLY ILL" PROVISIONS

Prior to the enactment of the guilty but mentally ill statute, a jury had a duty to find a defendant guilty, not guilty, or not responsible by reason of insanity.[8] Indiana's recognition of insanity as a bar to criminal responsibility mirrors the overwhelming practice of legal systems in the English-speaking world: the insanity defense is a time-honored tradition that is well rooted in the Anglo-American system of criminal law.[9]

This widespread acceptance of the insanity defense has been justified on at least two grounds. One theory is that a showing of insanity negates various elements of a criminal offense.[10] For example, criminal law generally requires that the defendant evince some form of intent or *mens rea* to commit a crime.[11] In order to sustain a criminal conviction, the prosecution must prove that the defendant possessed this requisite degree of culpability. One view of insanity, incorporated in Indiana's test,[12] is that insanity eliminates the defendant's capacity to formulate the mental element of the offense.[13] Under this view, if an insanity defense is established, the prosecution cannot prove an essential element of the crime.

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[8] IND. CODE § 35-5-2-3 (1976) (repealed 1981).

[9] S. GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW 125 (1925); 8 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW (1926); R. PERKINS, CRIMINAL LAW 850-52 (2d ed. 1969). *See generally* J. BIGGS, THE GUILTY MIND 79-117 (1955); H. FINGARETTE, *supra* note 5, at 5; R. SIMON, *supra* note 5, at 16-33; Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?*, 72 YALE L.J. 853 (1963).

[10] W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 36, at 269-70 (1972); *see* G. FLETCHER, RETHINKING CRIMINAL LAW § 10.4.4, at 836 (1978).

[11] *See generally* G. FLETCHER, *supra* note 10, § 6.5; A. GOLDSTEIN, *supra* note 5, at 15-16, 203; W. LAFAVE & A. SCOTT, *supra* note 10, § 27; Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107; Saltzman, *Strict Criminal Liability and the United States Constitution: Substantive Criminal Law Due Process*, 24 WAYNE L. REV. 1571 (1978).

[12] *See* note 16 & accompanying text *infra*.

[13] McCall v. State, ___ Ind. ___, ___, 408 N.E.2d 1218, 1220 (1980). To the extent that a finding of insanity negates a defendant's ability to possess the *mens rea* necessary for the crime, whether the Constitution requires the insanity defense depends on the constitutionality of the *mens rea* requirement itself. If a state can constitutionally abolish the requirement of *mens rea*, and did abolish it, evidence of the defendant's insanity at the time of the offense would be irrelevant to criminal conviction because intent would no longer be an element of the crime. The Supreme Court has thus far failed to articulate a definitive *mens rea* requirement. Packer, *supra* note 11, at 107 ("*Mens rea* is an important requirement, except sometimes.") Most commentators, however, argue in favor of such a requirement, at least in the case of serious crimes. *See* authorities cited note 11 *supra*.

Another way to conceptualize the insanity defense in the American legal system is to view it as an illness or condition that excuses a person afflicted with such a disease from the sanctions of the criminal law.[14] Such a view acknowledges that an insane person may commit a criminal act; however, it postulates that he should not be punished for that conduct because to do so would not properly serve the purposes of the criminal law, namely deterrence, rehabilitation, restraint, and retribution.[15] Such persons lack moral blameworthiness necessary for punishment in a civilized society.

Indiana's insanity statute states: "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."[16] Under this insanity test, a defendant who suffers from a "mental disease or defect" may be relieved of criminal responsibility for his acts. In order to prove such a disease or defect, the defendant is not required to prove that he lacked complete mental capacity, but only that he lacked substantial ability to understand the illegality of his conduct or to control his actions.[17]

The new "guilty but mentally ill" statute attempts to identify yet another degree of mental incapacity. "Mental illness" in Indiana is defined as a "psychiatric disorder which substantially disturbs a person's thinking, feeling, or behavior and impairs the person's ability to function."[18] It includes, among other conditions, "any mental retardation, epilepsy, alcoholism, or addiction to narcotics or dangerous drugs."[19]

The difference between "insanity" and "mental illness" lies in their scope. Mental illness, as defined in Indiana, is a much broader concept than insanity. The definitions overlap one another because all individuals who are legally insane are also mentally ill; however, not all mentally ill persons are insane. Under Indiana law, a "guilty but mentally ill" defendant is one who suffers from a degree of mental illness that does not eliminate his ability at the time of the crime to form the required *mens rea* or to conform his actions to the requirements of the law.[20]

Another difference between the two classifications involves the defen-

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[14] G. FLETCHER, *supra* note 10, § 10.4.4, at 836.

[15] W. LAFAVE & A. SCOTT, *supra* note 10, § 36, at 271-72.

[16] IND. CODE. § 35-41-3-6(a) (1982). This definition of insanity is a codification of the American Law Institute's test for insanity, which was adopted by the federal courts in United States v. Freeman, 357 F.2d 606 (2d Cir. 1966). The Indiana Supreme Court adopted this test for insanity in Hill v. State, 252 Ind. 601, 251 N.E.2d 429 (1969).

[17] However, "mental disease or defect" does not include abnormalities evidenced only by "repeated unlawful or antisocial conduct." IND. CODE § 35-41-3-6-(b)(1982).

[18] *Id.* § 35-36-1-1 (1982).

[19] *Id.* § 16-14-9.1-1.

[20] *See id.* § 35-36-2-5(a) (1982).

dant's responsibility to society. A verdict that the defendant was not responsible by reason of insanity in theory does not hold the defendant accountable for his conduct; he is neither imprisoned nor placed on probation.[21] Instead of imposing a sentence, the court holds a commitment hearing at the earliest opportunity after the trial to determine whether the defendant is currently mentally ill and dangerous to himself or others.[22] On the basis of this determination, the judge either commits the defendant for treatment of his mental illness or releases him to society.[23] If the defendant is committed, he may be discharged from that commitment only by order of the court.[24]

When a defendant is found guilty but mentally ill or enters a plea to that effect, however, he is sentenced by the judge in the same manner as a defendant found guilty.[25] If he is imprisoned, he is evaluated further by the Indiana Department of Correction and treated in a manner psychiatrically proper for his mental illness.[26] Although a defendant found guilty but mentally ill is treated for his mental illness, he is incarcerated or placed on probation for the term of his sentence if he is later found to be mentally sound.[27] Therefore, unlike the defendant found not responsible by reason of insanity, the guilty but mentally ill defendant is imprisoned for his criminal conduct, despite the fact that he suffered from a degree of mental illness at the time he committed the crime.

THEORETICAL EFFECTS OF THE GUILTY BUT MENTALLY ILL STATUTE ON THE JURY

The guilty but mentally ill statute, as a matter of theory, does not affect the jury's determination of whether a defendant is insane. Before this provision became effective, Indiana law did not recognize all degrees of mental illness as insanity. Instead, the law recognized that some forms of mental illness exist which do not eliminate a defendant's ability to form the necessary criminal *mens rea* or to control his actions. For example, heavy use of alcohol over an extended period of time is not a valid basis for applying the insanity defense unless the jury finds that "a defendant's extensive abuse of alcohol and consequent mental degeneration has in fact resulted in insanity."[28] Similarly, behavioral and emotional problems

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[21] *See id.* § 35-36-2-4(b) (1982).
[22] *See id.* § 35-36-2-4(a) (1982).
[23] *Id.*
[24] *Id.* § 35-36-2-4(b).
[25] *Id.* § 35-36-2-5(a) (1982).
[26] *Id.* § 35-36-2-5(b).
[27] *Id.*; *id.* § 11-10-4-3(d) (1982).
[28] Anderson v. State, ___ Ind. App. ___, ___. 380 N.E.2d 606, 608-09 (1978); *accord*, Jackson v. State, ___ Ind. ___, ___, 402 N.E.2d 947, 949-50 (1980); Feller v. State, 264 Ind. 541, 543, 348 N.E.2d 8, 12 (1976); Fisher v. State, 64 Ind. 435, 441-42 (1878).

resulting from low intelligence[29] or personality disorders[30] have been held not to constitute insanity and therefore do not relieve defendants from criminal responsibility. These holdings demonstrate that before the enactment of the guilty but mentally ill provision, a jury could find that a defendant was mentally ill but not insane for purposes of negating criminal responsibility.

The guilty but mentally ill statute in theory does not alter the traditional decisionmaking process of the jury regarding insanity. Rather, it merely creates a subcategory of the general guilty verdict. The jury still must determine whether the defendant's mental illness constituted insanity. A finding of insanity, despite the new law, is still within the province of the jury. Thus, as a matter of theory, this new provision will not curb abuses in the insanity defense because it does not restrict the circumstances in which it can be applied by the jury.

EFFECTS ON TREATMENT OF OFFENDERS

In addition to not affecting the power of the jury to determine the issue of insanity, the guilty but mentally ill statute does nothing after the verdict is rendered against a defendant. This is because Indiana provides a statutory right of treatment to all offenders, regardless of whether they were adjudged guilty or guilty but mentally ill at trial.[31]

Indiana statutes provide that if any prisoner is found to be mentally ill, the Department of Correction must either provide him with necessary treatment or transfer him to the Indiana Department of Mental Health or a mental health facility.[32] Furthermore, a prisoner who believes himself to be mentally ill and in need of treatment may be transferred to the Department of Mental Health or a mental health facility if a Department of Correction psychiatrist determines that the prisoner is in fact mentally ill and in need of such care.[33]

The psychiatric treatment of guilty but mentally ill offenders in Indiana is no different from that afforded to guilty offenders who are later found to be mentally ill. A guilty but mentally ill verdict is not a finding by the jury that the defendant is presently mentally ill,[34] but is only a ver-

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[29] Wilson v. State, 263 Ind. 469, 484, 333 N.E.2d 755, 763 (1974); Hashfield v. State, 247 Ind. 95, 103, 210 N.E.2d 429, 434 (1965), *cert. denied*, 384 U.S. 921 (1966); Conway v. State, 118 Ind. 482, 490, 21 N.E. 285, 287 (1889).

[30] Crane v. State, 269 Ind. 299, 304, 380 N.E.2d 89, 93 (1978); James v. State, 265 Ind. 384, 392, 354 N.E.2d 236, 242 (1976); Swain v. State, 215 Ind. 259, 268, 18 N.E.2d 921, 924, *cert. denied*, 306 U.S. 660 (1939).

[31] IND. CODE §§ 35-36-2-5, 11-10-4-2 (1982).

[32] *Id.* § 11-10-4-2. The Department of Correction may also contract with local, state, or federal agencies or with other public or private organizations to provide treatment for the prisoner. *Id.*

[33] *Id.* § 11-10-4-4.

[34] *Id.* § 35-36-2-3(4).

dict that he was mentally ill when he committed the offense.[35] Such a verdict therefore does not ensure that the defendant will receive psychiatric treatment. The current mental state of one judged guilty but mentally ill must still be determined by Department of Correction psychiatrists, and treatment is provided only at their discretion.[36] Consequently, the guilty but mentally ill statute adds nothing to the practice of providing psychiatric treatment to guilty offenders who are incarcerated for their crimes.

PRACTICAL EFFECTS OF THE GUILTY BUT MENTALLY ILL STATUTE

Although the guilty but mentally ill statute theoretically does not affect the jury's resolution of insanity claims,[37] in reality it will alter the jury's decision of whether to find a defendant not responsible by reason of insanity. It will do so because in practice jurors do not always reach decisions in the manner which criminal theory dictates. Jurors often do not understand the theoretical distinctions between differing mental states.[38] Moreover, some verdicts are based on how jurors "feel" about a particular defendant.[39] A jury often renders its decision on the basis of intangible factors that are unrelated to the question of whether the defendant possessed the necessary *mens rea* or the ability to control his actions. Thus, in rendering its verdict, the jury considers such factors as the type of treatment the defendant will receive,[40] the grievousness of the crime committed[41] and the amount of sympathy it holds for the defendant.[42] These kinds of considerations raise competing values among jurors. On the one hand, they do not wish to find defendants not responsible by reason of insanity when discretionary release procedures allow violent individuals

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[35] *Id.*

[36] *Id.* § 35-36-2-5(b). In Michigan, where a guilty but mentally ill statute has been in effect since 1975, more than 75% of all guilty but mentally ill offenders have been incarcerated without any treatment. Press, *supra* note 2, at 60.

[37] *See* text accompanying notes 28-30 *supra.*

[38] A. GOLDSTEIN, *supra* note 5, at 28; H. KALVEN & H. ZEISEL, THE AMERICAN JURY 8 (1971); R. SIMON, *supra* note 5, at 200.

[39] In a comprehensive study of 3,576 jury trials, conducted to determine the extent of the disagreement between judge and jury as decisionmakers, it was concluded that "when the jury reaches a different conclusion from the judge on the same evidence, it does so . . . because it gives recognition to values which fall outside the official rules." H. KALVEN & H. ZEISEL, *supra* note 38, at 495. *See also* A. GOLDSTEIN, *supra* note 5, at 5; R. SIMON, *supra* note 5, at 170-71; H. WEIHOFEN, THE URGE TO PUNISH 44-48 (1956); Sannito & Arnolds, *Jury Study Results: Factors at work*, 5 TRIAL DIPLOMACY J. 6 (1982); Address by the Honorable James Clements, Senior Judge, Lake County Superior Court, Criminal Division, Crown Point, Indiana (Nov. 21, 1980) (concerning guilty but mentally ill provision) (tape available at Indiana Law Journal office).

[40] *See* note 44 *infra.*

[41] A. GOLDSTEIN, *supra* note 5, at 24; Sannito & Arnolds, *supra* note 39, at 9.

[42] *By Reason of Insanity, supra* note 7, at 3.

to go free.[43] Many jurors believe that the insanity defense runs counter to a social policy which demands that persons be held accountable for their criminal misconduct. On the other hand, a jury is also hesitant to find a defendant guilty when he is obviously mentally ill, even though the degree of his mental illness may not be sufficient to constitute insanity.

The guilty but mentally ill statute is precisely the type of compromise verdict the jury is looking for, one which seemingly allows it to condemn a defendant's behavior while singling him out as a person who needs treatment.[44] In reality, however, it will dupe the jury into rejecting valid insanity claims raised by defendants, thereby depriving truly insane defendants of their rights to plead insanity successfully.

CONCLUSION

Indiana's guilty but mentally ill statute is an anomaly in the law. Enacted to curb abuses in the use of the insanity defense by defendants in criminal trials, or the perception of abuses, it does nothing to assist the jury in rendering a verdict against a defendant or to affect the treatment he receives upon conviction. Instead, this legislation leads jurors to reject valid insanity claims of defendants. It 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. For these reasons, this statute should be repealed.

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[43] *See* notes 5-7 & accompanying text *supra*.

[44] An extensive examination of the factors that influence the opinions and decisions of individual jurors and juries as collective bodies suggested that they are genuinely concerned about the defendant's fate. *See* R. SIMON, *supra* note 5. The study noted that many jurors felt constrained by the verdict limitations that were placed upon them by the court, and would have preferred to return a verdict representing a compromise between acquitting a defendant on the grounds of insanity and finding him guilty. *Id.* at 178. The study stated: "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 at the same time grant him a special dispensation." *Id.* The guilty but mentally ill statute on its face seems to provide such a compromise verdict for the jury; however, a finding of guilty but mentally ill guarantees no special treatment for the defendant convicted under it, *see* notes 31-36 & accompanying text *supra*.