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The Constitutionality of Michigan's Guilty But Mentally Ill Verdict

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THE CONSTITUTIONALITY OF MICHIGAN'S GUILTY BUT MENTALLY ILL VERDICT

In 1975, the Michigan Code of Criminal Procedure was amended to provide that the trier of fact may find a criminal defendant "guilty but mentally ill" (GBMI).[1] As a result, a criminal defendant in Michigan may now be found either guilty, not guilty, GBMI, or "not guilty by reason of insanity" (NGRI).[2] Under this scheme, criminal defendants who have committed an offense should be found GBMI if mentally ill but not legally insane; those who are legally insane should be found NGRI.

The GBMI verdict is without precedent either in Michigan or in other jurisdictions.[3] The decision in *People v. McQuillan*[4] provided the direct impetus for the enactment of the GBMI statute.[5] The *McQuillan* court construed Michigan's automatic commitment statute[6] as requiring a hearing before commitment to determine if one found NGRI were *presently* insane.[7] The court also required that hearings be held to determine the present sanity of all those automatically committed prior to the *McQuillan* decision. Responding to the concern that these hearings were resulting in the release of dangerous people,[8] the Michigan legislature promptly adopted the GBMI provision.

This article will assess the constitutionality of the statute providing for a GBMI verdict by examining the likely impact of this sta-

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[1] MICH. COMP. LAWS ANN. § 768.36 (West Supp. 1977). A defendant may be found GBMI only if he has asserted a defense of insanity. See note 64 and accompanying text *infra*.

[2] MICH. COMP. LAWS ANN. § 768.29a(2) (West Supp. 1977).

[3] People v. McLeod, No. 76-01672, slip op. at 10 (Recorder's Court of Detroit), *rev'd*, 77 Mich. App. 327, 258 N.W. 2d 214 (1977). The "guilty but insane" verdict in England, unlike the GBMI verdict, was one of acquittal. R. PERKINS, CRIMINAL LAW 886 (2d ed. 1969).

[4] 392 Mich. 511, 221 N.W. 2d 569 (1974).

[5] MICH. HOUSE LEG. ANALYSIS SECTION, THIRD ANALYSIS OF MICH. H.B. 4363, 78th Leg. (July 15, 1975); Note, *Guilty But Mentally Ill: An Historical and Constitutional Analysis*, 53 J. URB. L. 471, 483 (1976).

[6] MICH. COMP. LAWS ANN. § 767.27b (1968) (repealed 1974) provided: "Any person, who is tried for a crime and is acquitted by the court or jury by reason of insanity, shall be committed immediately by order of the court to the department of mental health for treatment in an appropriate state hospital . . . ."

[7] The NGRI verdict requires a determination that the defendant was insane as of the time of the crime. *McQuillan* required that *present* insanity also be determined before one found NGRI is committed.

[8] Within a year after the *McQuillan* decision, 64 inmates were released from state hospitals having been found presently sane. Two of those released later committed violent crimes. Note, *supra* note 5, at 471-72.

tute on the constitutional rights of legally insane defendants.[9] Part I will briefly outline the relevant provisions of the GBMI statute. Part II will consider whether legally insane defendants have a constitutional right to an insanity defense. Part III will then argue that some defendants, though legally insane at the time they committed allegedly criminal acts, will nevertheless be found GBMI rather than NGRI.

I. PROVISIONS OF THE "GUILTY BUT MENTALLY ILL" STATUTE

A defendant may be found GBMI if the trier of fact determines beyond a reasonable doubt that the defendant is guilty of an offense, was mentally ill at the time he committed the offense, but was not legally insane at the time he committed the offense.[10] In addition to creating the GBMI verdict, the Michigan legislature has provided statutory definitions of the terms "mental illness" and "legal insanity."[11] Mental illness is defined as "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."[12] A person is legally insane "if, as a result of mental illness [as statutorily defined], or as a result of men-

[9] This article will not consider two other constitutional attacks that have been aimed at certain aspects of the GBMI statute. First, the article will not discuss the arguments inspired by the provision requiring that if a defendant found GBMI is placed on probation, "[t]he 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 sentencing court." MICH. COMP. LAWS ANN. § 768.36(4) (West Supp. 1977). In People v. McLeod, No. 76-01672 (Recorder's Court of Detroit), *rev'd*, 77 Mich. App. 327, 258 N.W. 2d 214 (1977), the trial court found that this provision denied those found GBMI equal protection of the laws because those convicted under general guilty verdicts face no similar minimum probation term. It has been argued, however, that those found GBMI are not similarly situated to those found guilty and may thus be treated differently. Brief for Appellant at 8, People v. McLeod, 77 Mich. App. 327, 258 N.W. 2d 214 (1977).

Second, this article will not discuss the treatment provisions of the GBMI statute, MICH. COMP. LAWS ANN. § 768.36(3) (West Supp. 1977). In *McLeod*, the trial court held that the defendant had a statutory and constitutional right to adequate treatment. The trial court found, however, that the defendant would not receive the treatment to which he was entitled under the statute if placed in prison, and that the likelihood of transfer to the Department of Mental Health was small. Thus, the court held MCLA § 768.36(3) to be legally "inert," because compliance with its treatment provisions was impossible due to inadequate facilities in the Michigan Corrections and Mental Health Departments. In reversing, the court of appeals found that "matters relating to post-sentence treatment, or lack of treatment, [were] prematurely raised" since the defendant had not yet been sentenced. 77 Mich. App. at 330, 258 N.W. 2d at 216.

[10] MICH. COMP. LAWS ANN. § 768.36(1) (West Supp. 1977).

[11] The definition of legal insanity is contained in the public act that also provides for the GBMI verdict: 1975 Mich. Pub. Acts, No. 180, § 1, Eff. Aug. 6, 1975. The definition of mental illness is contained in 1975 Mich. Pub. Acts, No. 179, § 1, Eff. Aug. 6, 1975. Neither Public Act 180 nor Public Act 179 would have taken effect unless both were enacted into law.

[12] MICH. COMP. LAWS ANN. § 330.1400a (1977).

tal retardation [as statutorily defined],[13] that person lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law."[14]

Under current Michigan law, a defendant found NGRI is immediately committed to the custody of the Center for Forensic Psychiatry for not more than sixty days.[15] The Center evaluates the defendant's present mental condition, and reports to the court on whether he meets the criteria for civil commitment.[16] After a judicial hearing, the defendant is either committed or discharged.[17]

By contrast, a defendant found GBMI is to be given such treatment as is indicated for any present mental illness.[18] In addition, the GBMI defendant receives a sentence that could be imposed upon a defendant who was simply found "guilty" of the same offense. If sentenced to a prison term, the GBMI defendant "is committed to the custody of the department of corrections [for] further evaluation [and] such treatment as is psychiatrically indicated."[19] If treatment is found necessary, it may be provided by the Corrections Department, or by the Department of Mental Health,[20] although a defendant discharged from the Department of Mental Health is returned to the Department of Corrections to serve the balance of his sentence.[21] If the GBMI defendant is placed on probation, "the trial judge, upon recommendation of the center for forensic psychiatry, shall make treatment a condition of probation."[22]

The degree of criminal culpability required for one found GBMI is the same as that required for one found "guilty. " Although the "but mentally ill" portion of the verdict seeks to control disposition, to a great extent it merely duplicates pre-existing statutes that provide psychiatric evaluations and mental health services for all convicted persons.[23] Consequently, the GBMI verdict is substan-

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[13] " 'Mentally retarded' means significantly subaverage general intellectual functioning which originates during the developmental period and is associated with impairment in adaptive behavior." MICH. COMP. LAWS ANN. § 330.1500(g) (1975).

[14] MICH. COMP. LAWS ANN. § 768.21a (West Supp. 1977). Michigan's definition of legal insanity is substantially the same as that found in § 4.01(1) of the ALI Model Penal Code, which provides: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law."

[15] MICH. COMP. LAWS ANN. § 330.2050 (1977).

[16] These criteria are set forth in MICH. COMP. LAWS ANN. §§ 330.1401, .1515 (1977).

[17] MICH. COMP. LAWS ANN. § 330.2050 (1977).

[18] *Id.* § 768.36(3).

[19] *Id.* § 768.36(3).

[20] Transfer of prisoners from corrections facilities to mental health facilities may be made pursuant to MICH. COMP. LAWS ANN. § 330.2000 (1977).

[21] *Id.* § 768.36(3).

[22] *Id.* § 768.36(4).

[23] *See, e.g.*, MICH. COMP. LAWS ANN. §§ 791.267, 330.2000 (1977). *See also* Schwartz,

tially the same as the "guilty" verdict, since the consequences to the defendant may be identical whether he is convicted under one verdict or the other. At most, the GBMI verdict may help ensure that convicted defendants who need treatment for mental illness will receive it.[24]

II. CONSTITUTIONAL RIGHT TO AN INSANITY DEFENSE

By offering juries the GBMI verdict, the Michigan legislature has effectively deprived some legally insane defendants of an insanity defense.[25] This deprivation is unconstitutional if an insanity defense is constitutionally required.

A. Due Process Considerations

The United States Supreme Court has never clearly decided whether an insanity defense is constitutionally mandated.[26] The two state supreme courts that have considered this issue, however, have held that it would be unconstitutional to abolish the insanity defense.[27] In *State v. Strasburg*,[28] a statute providing that insanity is no defense to a criminal charge was held by the Washington Supreme Court to violate the due process clause of the state constitution,[29] a clause virtually identical to the one contained in the federal constitution.[30] The court reasoned that criminal intent is a re-

Moving Backward Confidently, 54 MICH. B.J. 847, 848-49 (1975); Letter from Laurence Gilbert to state Senator Basil W. Brown (June 3, 1975) (contained in Michigan House Judiciary Committee file for House Bill 4363 (1975)).

[24] *But see* note 9 *supra*.

[25] *See* notes 59 - 75 and accompanying text *infra*.

[26] Dershowitz, *Abolishing the Insanity Defense: The Most Significant Feature of the Administration's Proposed Criminal Code - An Essay*, 9 CRIM. L. BULL. 434, 437 (1973). The Court's failure to directly address this issue may be explained by the fact that insanity is presently recognized as a defense in every state. Note, *Constitutional Limitations on Allocating the Burden of Proof of Insanity to the Defendant in Murder Cases*, 56 B.U. L. REV. 499, 499 n.2 (1976). Moreover, few attempts have ever been made to abolish the defense. *See* notes 27-33 and accompanying text *infra*.

[27] A third state supreme court decision, State v. Lange, 168 La. 958, 123 So. 639 (1929), considered a Louisiana statute providing that upon a plea of insanity, a lunacy commission had absolute power to determine whether the defendant was presently insane or was insane when the offense was committed. The court held that the defense of insanity must be tried by a jury.

[28] 60 Wash. 106, 110 P. 1021 (1910).

[29] WASH. CONST. art. 1, § 3 provides: "No person shall be deprived of life, liberty, or property without due process of law."

[30] U.S. CONST. amend. XIV, § 1 provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property without due process of law . . . ."

quired element of any crime, and that an insane person is incapable of forming the requisite intent. Similarly, in *Sinclair v. State*,[31] the Mississippi Supreme Court held that a statute abolishing the insanity defense in murder cases violated the state due process provision,[32] which also is nearly identical to the federal due process clause. A concurring judge concluded that the challenged statute also violated the due process and equal protection clauses of the federal constitution.[33]

History supports the view that due process includes the right to an insanity defense. From the earliest period of the common law, insanity has been recognized as a complete defense to a criminal charge.[34] Thus, the defense was firmly established by the time the United States Constitution was adopted, and has remained a fundamental part of American criminal law.[35] The due process clause of the fourteenth amendment was intended in part to protect certain fundamental rights long recognized under the common law.[36] Thus, because it is so basic to the American legal system,[37] the insanity defense is arguably protected by the fourteenth amendment.

B. Lack of Mens Rea

A further argument supporting the view that the insanity defense is of constitutional magnitude is that legally insane persons are incapable of possessing the criminal intent or mens rea constitutionally essential to a finding of guilt.[38] However, courts disagree as to

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[31] 161 Miss. 142, 132 So. 581 (1931) (per curiam).

[32] MISS. CONST. art. 3, § 14 provides: "No person shall be deprived of life, liberty, or property except by due process of law."

[33] 161 Miss. at 164-69, 132 So. at 586-87 (Ethridge, J., concurring).

[34] State v. Strasbourg, 60 Wash. 106, 107, 110 P. 1021, 1022 (1910). Absolute "madness" began to be recognized as a complete defense to a criminal charge during the fourteenth century in England. R. PERKINS, CRIMINAL LAW 851 (2d ed. 1969).

[35] A. GOLDSTEIN, THE INSANITY DEFENSE 11 (1967). *See* note 26 *supra*.

[36] Powell v. Alabama, 287 U.S. 45, 65 (1932); Butler v. Perry, 240 U.S. 328, 333 (1916). In *Powell*, the Court observed:

> One test which has been applied to determine whether due process of law has been accorded in given instances is to ascertain what were the settled usages and modes of proceeding under the common and statute law of England before the Declaration of Independence, subject, however, to the qualification that they be shown not to have been unsuited to the civil and political conditions of our ancestors by having been followed in this country after it became a nation.

287 U.S. at 65.

[37] Johnson v. Louisiana, 406 U.S. 356, 372 n. 9 (1972)(Powell, J. concurring); Duncan v. Louisiana, 391 U.S. 145 (1968). Justice Harlan, dissenting in *Duncan*, states that the critical factor is not that a particular right is found in the Bill of Rights, but that it is deemed to be fundamental. 391 U.S. at 179.

[38] *See* State v. Strasbourg, 60 Wash. 106, 110 P. 1021 (1910); H. WEIHOFEN, INSANITY AS A

whether insanity and mens rea can co-exist. Insanity may be viewed either as evidence casting doubt on the mental element of an offense, or as a kind of affirmative defense. Arguably these two positions are mutually exclusive, because without the element of mens rea there would be no crime and no need for an insanity defense.[39] Despite the incompatibility of these two views of insanity, there are court decisions supporting each.

The first view is suggested by *Davis v. United States,*[40] where the Court, quoting Blackstone, said: " 'So that to constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will.' "[41] The *Davis* Court concluded that insanity and mens rea cannot co-exist. Many later federal and state courts have reiterated this conclusion.[42]

The second view is suggested by *Leland v. Oregon,*[43] where the Court stated that the *Davis* holding was only a prudential rule for federal courts and not a constitutional doctrine. The Court went on to sustain a conviction under an Oregon procedure whereby the defendant, in order to successfully assert the insanity defense, was required to prove his insanity beyond a reasonable doubt. Under this procedure the jury could find that the facts constituting a crime, including the mental element, were established and yet also find that the defendant was legally insane. Thus, contrary to *Davis,* the *Leland* holding implies that mens rea and insanity can co-exist. Some recent court opinions contain similar language.[44]

DEFENSE IN CRIMINAL LAW 427 (1933). Certain "strict liability" or "negligent" crimes are clearly constitutional, although they require no finding of mens rea. Still, it is possible that mens rea is a required element of, at least, traditional common law offenses. *See generally* Morissette v. United States, 342 U.S. 246 (1952).

[39] Goldstein & Katz, *Abolish the "Insanity Defense" - Why Not?,* 72 YALE L.J. 853, 862-63 (1963). *But see* note 38 *supra.*

[40] 160 U.S. 469 (1895).

[41] *Id.* at 484.

[42] *E.g.,* United States v. McCracken, 488 F. 2d 406, 409 (5th Cir. 1974) ('The defendant's sanity is always an element of the offense charged."); Easter v. District of Columbia, 361 F. 2d 50, 52 (D.C. Cir. 1966) ("Thus, an insane person who does the act is not guilty of the crime."); Hartford v. United States, 362 F.2d 63, 64 (9th Cir. 1966) ("A person who is not legally sane at the time the act was committed may not be convicted of a crime for committing that act."); Commonwealth v. Vogel, 440 Pa. 1, 15, 268 A. 2d 89, 91 (1970) (Roberts, J., concurring) ("I therefore cannot agree with the assertion that '[a]n individual may *intentionally* kill someone, with malice aforethought,' even though he is legally insane, i.e., legally incapable of forming the intention."); People v. Garbutt, 17 Mich. 9,21 (1868) ("[T]here can be no criminal intent when the mental condition of the party accused is such that he is incapable of forming one.").

[43] 343 U.S. 790 (1952).

[44] *E.g.,* Mullaney v. Wilbur, 421 U.S. 684, 706 (1975) (Rehnquist, J., concurring) ("[T]he existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime."); Patterson v. New York, 432 U.S. 197, 206 (1977) ("[O]nce the facts constituting a crime are established beyond a reasonable doubt, based on all the evidence including the evidence of the defendant's mental

The judicial disagreement over whether mens rea and insanity can co-exist may stem in part from differing definitions of mens rea. This term may connote that criminal culpability requires a guilty mind or a vicious will, or it may be understood merely to define the specific mental state necessary to constitute a crime.[45]

As a practical matter, it is clear that, at a minimum, the presence of insanity substantially overlaps with the absence of the mental state essential to crime. This overlap is most plainly evident in states that require the issue of insanity to be tried separately from the issue of guilt. In these states, the evidence admissible at the hearing on guilt to show the defendant's mental state at the time of the crime is substantially the same as the evidence admissible at the hearing on the defendant's sanity.[46]

A precise statement of the relationship between legal insanity and mens rea is beyond the scope of this article. These concepts are so intertwined, however, that if mens rea is a constitutionally required element of criminal offenses, then a legally insane defendant has a constitutional right to be acquitted. The Supreme Court has suggested that mens rea is constitutionally required. In *Patterson v. New York,*[47] the Court was confronted with a New York statute[48] that required a murder defendant, in order to limit conviction to manslaughter, to prove by a preponderance of the evidence that he acted under the influence of extreme emotional disturbance. In an earlier case, *Mullaney v. Wilbur,*[49] the Court had held unconstitutional a Maine statute requiring a person accused of murder to prove that he acted in the heat of passion to rebut the statutory presumption of "malice aforethought." The Court reasoned in *Mullaney* that the Maine scheme improperly shifted to the defendant the burden of disproving a fact essential to the offense charged.[50] In *Patterson,* however, the Court upheld the challenged statute because it did not expressly list malice aforethought as an element of

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state, the State may refuse to sustain the affirmative defense of insanity unless demonstrated by a preponderance of the evidence."); United States ex rel. Tate v. Powell, 325 F. Supp. 333, 335 (1971) ("[T]here is no constitutional interdiction that would prevent a state from fashioning its own rule whereby sanity is not an ingredient of the crime, but is instead an affirmative defense designed to avoid punishment.").

[45] *See* Note, *Mens Rea and Insanity,* 28 ME. L. REV. 500 (1977).

[46] Louisell & Hazard, *Insanity as a Defense: The Bifurcated Trial,* 49 CALIF. L. REV. 805 (1961); Weihofen, *Procedure for Determining Defendant's Mental Condition Under the American Law Institute's Model Penal Code,* 29 TEMP. L.Q. 235, 245 (1956). The authors of the former article conclude that the separate trial procedure in California "was based on an inaccurate premise of law. It assumed that the issue of guilt and the issue of mental condition are separable. We submit that reason shows they are not separable, and that experience confirms this conclusion." Louisell & Hazard, *supra* at 830.

[47] 432 U.S. 197 (1977).

[48] N.Y. PENAL LAW § 125.25 (McKinney).

[49] 421 U.S. 684 (1975).

[50] *See In re* Winship, 397 U.S. 358 (1970).

murder and thus did not require the defendant to negate any element of the crime.

Justice Powell, dissenting in *Patterson*, asserted that the only "facts" that the majority found necessary to constitute a crime are those that appear on the face of the statute as a part of the definition of the crime.[51] Justice Powell hypothesized that, under the majority opinion, a state could define murder as mere physical contact between the defendant and the victim leading to the victim's death, and could require the defendant to prove an absence of culpable mens rea as an affirmative defense.[52] Justice Powell stated, however, that he had "no doubt that the Court would find some way to strike down a formalistically correct statute as egregious as the one hypothesized."[53] Indeed, the majority opinion observed that "there are obviously constitutional limits beyond which the States may not go" in labeling elements of crimes as affirmative defenses.[54] Prior to *Patterson*, one commentator examining recent Supreme Court decisions concluded that the Constitution imposes a requirement of mens rea.[55] The Court has never clearly determined which crimes require a mental element,[56] but clearly the Court would invalidate a legislative attempt to eliminate mens rea as an element of all crimes.[57] This conclusion suggests that the Court would likewise invalidate any legislative attempt to abolish the insanity defense, since it bears so directly upon the element of mens rea.[58]

Abolition of an insanity defense would most likely be unconstitutional. Therefore, the GBMI statute is unconstitutional if it effectively deprives some defendants of their constitutional right to an insanity defense. It will be argued below that jury confusion caused by the GBMI statute will result in GBMI verdicts for some defendants who were legally insane when they committed allegedly criminal acts.

III. EFFECT OF THE GBMI STATUTE

A. Confusion

When the trier of fact is a jury, it is likely that some defendants will be convicted under a GBMI verdict who, in the absence of a

[51] 432 U.S. at 221-22.
[52] *Id.* at 224 n.8.
[53] *Id.* at 225 n.9.
[54] *Id.* at 210.
[55] Tushnet, *Constitutional Limitation of Substantive Criminal Law: An Examination of the Meaning of Mullaney v. Wilbur*, 55 B.U.L. REV. 775 (1975).
[56] Morissette v. United States, 342 U.S. 246, 260 (1952).
[57] *See* H. WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 478 (1954).
[58] *See* notes 38-46 and accompanying text *supra*.

GBMI option, would have been acquited under a NGRI verdict.[59] This is because a jury is likely to confuse the GBMI standard of mental illness with the NGRI standard of legal insanity.

The statutory definitions of legal insanity and mental illness overlap substantially. To be found GBMI, a defendant must have been mentally ill, but not legally insane, when he committed the offense.[60] Yet it is hard to imagine "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"[61] that may not also be a substantial incapacity "either to appreciate the wrongfulness of . . . conduct or to conform . . . conduct to the requirements of law."[62]

General mental illness in many cases can be easily distinguished from legal insanity. For example, one suffering from kleptomania may still be able to conform his conduct to the law prohibiting rape.[63] On the other hand, legal insanity and the mental illness required for the GBMI verdict may be very difficult to distinguish; the question of whether a kleptomaniac was legally insane or merely mentally ill when he committed a theft offense is an extremely close one. Yet it is precisely these close questions that juries considering a GBMI verdict will have to answer. Importantly, a jury can only render a GBMI verdict if the defendant has asserted an insanity defense[64] and thus has raised the issue of his ability to control the specific conduct forming the basis of the charged offense. In effect, a defendant asserting a defense of insanity "triggers" the guilty but mentally ill verdict and submits the issue of the degree of his mental impairment to the jury.

Given the confusion engendered by the enormous overlap between the definitions of mental illness and legal insanity, the likelihood is strong that juries will return GBMI verdicts instead of NGRI verdicts. By convicting the defendant, the jury can condemn his behavior and keep a potentially dangerous individual in custody. However, by also finding the defendant mentally ill, the jury may believe that their verdict will ensure special treatment for him[65] and will carry a lesser stigma than a regular "guilty" verdict.

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[59] It is also possible that some defendants will be convicted under GBMI verdicts who otherwise would have been found "guilty". This possibility raises no constitutional questions, however, since the GBMI verdict is substantially the same as the "guilty" verdict. See notes 23 & 24 and accompanying text *supra*.

[60] *See* note 10 and accompanying text *supra*.

[61] This is the statutory definition of mental illness. *See* note 12 and accompanying text *supra*.

[62] This is the statutory definition of legal insanity. *See* note 14 and accompanying text *supra*.

[63] United States v. Brawner, 471 F. 2d 969, 991 (D.C. Cir. 1972).

[64] MICH. COMP. LAWS ANN. § 768.36(1)(West Supp. 1977).

[65] *But see* notes 23 & 24 and accompanying text *supra*.

Observations of experimental juries have revealed that a GBMI option is exactly the type of "middle ground" between the verdicts of "guilty" and NGRI that many jurors would prefer.[66] Especially in serious cases, jurors understandably may be hesitant to accept the insanity defense,[67] since to do so might result in the defendant's release from custody.[68] The GBMI verdict allows the jury to distinguish the defendant from the ordinary "guilty" criminal, while ensuring that the defendant's conduct will be condemned.

Studies further suggest that jury discussions commonly center on what will happen to the defendant as the result of a given verdict.[69] Michigan juries are entitled to instructions before they deliberate that a verdict of NGRI may result in the defendant's early discharge from custody.[70] It is highly likely that instructions on the consequences of the GBMI verdict will also be given.[71] Thus, the jurors may be told that a GBMI verdict will always result in treatment coupled with incarceration or probation. Knowledge that the

[66] R. SIMON, THE JURY AND THE DEFENSE OF INSANITY 178 (1967). The tendency of jurors to compromise their differences is clearly evident in cases involving lesser included offenses. Where only one offense is charged, the jury may consider themselves faced with an all-or-nothing choice between conviction and acquittal. Where two or three offenses are charged, however, the jury may opt for a middle ground by convicting for a lesser offense. Such compromise could occur either where jurors who favor conviction on a greater offense split their differences with jurors who favor acquittal, or where the jury simply takes the easier course of compromise rather than fully debating the defendant's guilt or innocence of all the offenses charged. *See* Price v. Georgia, 398 U.S. 323, 331 (1970); United States v. Harary, 457 F.2d 471, 479 (2d Cir. 1972); People v. Gessinger, 238 Mich. 625, 628-29, 214 N.W. 184, 185 (1927). Just as a lesser included offense gives the jury a third, intermediate choice besides conviction of a greater offense and outright acquittal, the GBMI verdict provides the jury with a compromise between the verdicts of "guilty" and NGRI.

[67] Buzynski v. Oliver, 538 F.2d 6, 10 (1st Cir. 1976).

[68] *See* notes 15-17 and accompanying text *supra*.

[69] Weihofen, *Procedure For Determining Defendant's Mental Condition Under The American Law Institute's Model Penal Code*, 29 TEMP. L.Q. 235, 247 (1956). Professor Weihofen here discusses the results of a jury project conducted by the University of Chicago Law School.

[70] People v. Martin, 386 Mich. 407, 192 N.W. 2d 215 (1971); People v. Cole, 382 Mich. 695, 172 N.W. 2d 354 (1969). The instruction suggested by MICH. CRIM. JURY INSTR. 7:8:07 (1977) implies, and the alternative instruction specifically states, "[i]f, after a hearing before the Probate Court, the defendant is found not to be mentally ill or not to be a person requiring treatment, the defendant shall be discharged [from custody]." MICH. CRIM. JURY INSTR. 7:8:08 (1977).

[71] In *People v. Cole*, 382 Mich. 695, 172 N.W. 2d 354 (1969), the court concluded that juries would not otherwise understand how the defendant would be affected by an NGRI verdict, and therefore held that the jury may be informed of the consequences of this verdict. The reasoning in *Cole* is equally applicable to a GBMI verdict. Additionally, MICH. CRIM. JURY INSTR. 7:8:10(15) (1977) suggests that the following instruction be given:

> In most respects a verdict of guilty but mentally ill is the same as a verdict of guilty. The defendant may be imprisoned for the same period of time as he would if he were found guilty. [Alternatively, he could be placed on probation for a period of time the same as or greater than he would be if found guilty.] The distinction is that the verdict of guilty but mentally ill imposes upon the Department of Corrections an obligation to provide appropriate psychiatric treatment during the period of imprisonment or while the defendant is on probation.

defendant will not go completely free probably increases the attractiveness of the GBMI verdict.[72]

B. Arbitrariness

A GBMI statute is not necessary to ensure that convicted persons will receive treatment for mental illness. Michigan statutes in existence before the enactment of the GBMI statute already required that mental health services be provided to convicted persons.[73] If the Michigan Legislature was convinced that juries should decide who needs treatment for mental illness, it could have established some type of bifurcated procedure whereby the issue of mental illness would not be resolved by the jury simultaneously with the issue of "guilt". The effect of the present scheme, however, is that some defendants who would have been acquited as legally insane under prior law will now be convicted under GBMI verdicts[74] because of *unnecessary* jury confusion.

The effect of the GBMI statute is to invite Michigan juries to choose between NGRI and GBMI verdicts to determine disposition. The confusion engendered by the overlap between the definitions of mental illness and legal insanity will result in verdicts of GBMI in cases where the defendant would otherwise have been found NGRI if no GBMI option existed.[75] As such, the GBMI statute seriously conflicts with the insanity defense. By retaining that defense despite the enactment of the GBMI statute, the legislature signified that it still finds it socially valuable not to hold insane persons responsible for criminal acts. However, the GBMI verdict will effectively deprive some legally insane persons of their statutory and constitutional right to an acquittal by reason of insanity.

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[72] Weihofen, *supra* note 69, at 247. Professor Weihofen reports that many jurors who are disposed toward insanity verdicts are persuaded to change their minds by the argument that a defendant declared to be insane would go "scot free."

[73] *See* note 23 and accompanying text *supra*.

[74] *See* notes 59-72 and accompanying text *supra*.

[75] The Michigan Legislature may have intended to give juries precisely this discretion. A proposal by Professor Perkins for a "guilty but insane" verdict was contained in the Michigan House Judiciary Committee file for House Bill 4363 (1975), which later became 1975 Mich. Pub. Acts, No. 180. Professor Perkins has suggested that such a verdict would allow juries to convict defendants who nevertheless should not suffer the penalty normally provided for the offense. Thus, the jury would not be forced to "acquit one who is obviously guilty." R. PERKINS, CRIMINAL LAW 887-88 (2d ed. 1969). The Michigan Legislature was most likely not concerned about ensuring treatment for mentally ill defendants when it passed the GBMI statute. The statute does not ask a jury to determine a defendant's *present* mental condition and need for treatment. To support a GBMI verdict, the statute requires that the jury must find the defendant mentally ill, but not legally insane, *at the time of the commission of the offense*. Thus, the apparent purpose of the GBMI statute was to encourage juries to opt for GBMI verdicts so as to ensure that dangerous people would remain in custody. See note 8 and accompanying text *supra*.

IV. CONCLUSION

A GBMI verdict is nearly identical in its consequences to a verdict of "guilty". The confusion stemming from the overlap between the statutory definitions of "mental illness" and "legal insanity" and the tendency of jurors to compromise are certain to cause some legally insane defendants to be found GBMI. Consequently, the GBMI statute will deprive these legally insane defendants not only of their statutory rights but also of their colorable constitutional right to acquittal. For this reason, the GBMI statute violates the due process clause of the United States Constitution.

Invalidating the GBMI statute need not result in the release of dangerous mentally ill persons. Since under current law, the automatic commitment following a NGRI verdict is only temporary, prosecutors have more incentive than in the past to contest insanity defenses vigorously. Thus, inappropriate NGRI verdicts should occur less often.[76] Appropriate NGRI verdicts may still result, after a hearing, in civil commitment of the defendant for an appropriate period.

–John M. Grostic

[76] Letter from Laurence Gilbert, *supra* note 23.