# INSANITY-PLEA BARGAINS: A CONSTITUTIONALLY AND PRACTICALLY GOOD IDEA?

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## INTRODUCTION

Think about Andrea Yates' case. In 2001, Andrea Yates, suffering from postpartum depression, believed that she was possessed by Satan and was causing her children irreparable and eternal damage. Yates drowned her five children in a bathtub, killing them. Yates was initially deemed "sane" at her first trial and sentenced to life in prison with the possibility of parole after forty years. However, on appeal, Yates' conviction was reversed. On retrial, Yates was found not guilty by reason of insanity (NGRI) and was committed to a mental health hospital, where she has remained ever since.[1] If she had pleaded NGRI through a plea bargain earlier, Andrea Yates would have received mental health treatment sooner, rather than incarceration. A NGRI plea bargain would have saved the government time and money and averted her and her family from years of trauma.

Plea bargaining is ubiquitous in the United States criminal legal system. Ninety-four percent of felony cases and ninety-nine percent of misdemeanor cases end in guilty pleas.[2] Some estimate that seventy-five

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[1] *See generally* Deborah W. Denno, *Who is Andrea Yates? A Short Story About Insanity*, 10 DUKE J. GENDER L. & POL'Y 1 (2003) (providing a complete account of the *Yates* case); Jean K. Gilles Phillips & Rebecca E. Woodman, *The Insanity of the Mens Rea Model: Due Process and the Abolition of the Insanity Defense*, 28 PACE L. REV. 455, 456 (2008) (discussing the outcome of the *Yates* case); Theodore Y. Blumoff, *Rationality, Insanity, and the Insanity Defense: Reflections on the Limits of Reason*, 39 LAW & PSYCH. REV. 161 (2015) (discussing *M'Naghten* and *Yates* in the context of rationality, insanity, and the insanity defense).

[2] Stephanos Bibas, *Designing Plea Bargaining from the Ground Up: Accuracy and Fairness Without Trials as Backstops*, 57 WM. & MARY L. REV. 1055, 1058, 1058 n.6, 1059 (2016).

percent of all guilty pleas are a plea bargain with the government.[3] Mental illness is also prevalent in the United States, affecting over fifty percent of people at some point in their lifetime.[4]

Given the prevalence of mental health issues in America, one may assume that the criminal legal system recognizes and responds to defendants' mental illnesses. Indeed, the criminal legal system developed two responsive pleas—Not Guilty by Reason of Insanity (NGRI) and Guilty But Mentally Ill (GBMI). At first glance, these pleas seem beneficial.[5] Defendants who lack the moral or cognitive capacity to behave rationally should not be—and are not—held responsible for their actions.

Yet, we rarely observe NGRI / GBMI plea bargains. Why is this the case? Are there statutory or constitutional barriers to such plea bargains? If not, should more defendants enter into them? There has been an abundance of scholarship surrounding both plea bargaining and the insanity defense, but no scholar has fully explored their interaction and what happens when a defendant pleads NGRI / GBMI through a plea bargain. This Comment seeks to bridge this gap. This may be an "empirically unimportant" matter due to the infrequency of the insanity defense. However, it is a philosophically and socially important one.[6] There is an inherent tension with the insanity defense: balancing individual liberty and public safety with the societal belief that individuals with severe mental health conditions deserve treatment. There is no clear answer on how to balance both sides of this tension, and there is an increasing

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3 *See* Transcript of Oral Argument at 61–62, Class v. United States, 138 S. Ct. 798 (2018) (No. 16-424), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-424_8l8c.pdf [https://perma.cc/G9MA-BYS2] (implying that about seventy-five percent of pleas involve a plea bargain with the government since about twenty-five percent of the pleas are open pleas that do not involve plea bargains with the government).

4 *About Mental Health*, CDC, https://www.cdc.gov/mentalhealth/learn/index.htm [https://perma.cc/79FA-6X57] (last visited June 28, 2021).

5 In this Comment I use the term "plea" or "plea bargain" to refer to a plea or plea bargain that is the final adjudication of the case, similar to a trial verdict, and not a plea that a defendant may enter at an arraignment.

6 *See* Cynthia G. Hawkins-León, *"Literature As Law": The History of the Insanity Plea and A Fictional Application Within the Law & Literature Canon*, 72 TEMP. L. REV. 381, 407 (1999) (highlighting that the American Psychiatric Association Insanity Defense Work Group deemed the issue "empirically unimportant" because the insanity defense is used in less than one percent of all felony cases, but "admitted it was a philosophically important matter").

prevalence of both mental illness and plea bargaining in the American criminal justice system. Further, there are concerns that plea bargains disproportionately harm poor and minority defendants. As society demands more equity in the criminal justice system, we should pay attention to the effect on defendants.

This Comment argues that structural and functional limits cause the infrequency of NGRI / GBMI plea bargains. Despite the value of mental health treatment, the possibility of indefinite commitment can deter insane defendants who do not want a permanent loss of liberty.[7] Therefore, reforms to the system must be made before more defendants should enter into these pleas.

Specifically, there are few constitutional barriers to entering into NGRI / GBMI plea bargains, and states are free to codify their insanity defenses.[8] Thus, I argue that practical limits—the risk of lifetime involuntary commitment, defendants' lack of competency to enter into the plea or stand trial in the first place, and the dearth of institutional support—are the cause. With the current system, including ineffective mental health hospitals and a lack of protections for defendants, I believe that most defendants should not agree to these pleas. NGRI / GBMI plea bargains implicate liberty risks, and defendants should be wary of the possibility of permanently bargaining away their freedom.[9] However, if reforms to the system are made, for some defendants, NGRI / GBMI pleas *may* be a good idea to help the defendant get necessary treatment. Improving mental health hospitals are the first step, but I believe more needs to be done to

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7 In this comment I use the term "insanity" or "insane" to describe legal insanity, not medical insanity. Legal insanity is the theory that a person with a mental or cognitive incapacity cannot be held responsible for their actions because they cannot appreciate the nature and quality or the wrongfulness of his or her conduct or conform his or her conduct to the law. *See* Stephen J. Morse & Morris B. Hoffman, *The Uneasy Entente Between Legal Insanity & Mens Rea: Beyond* Clark v. Arizona, 97 J. CRIM. L. & CRIMINOLOGY 1071, 1091-92 (2007). The exact test for legal insanity varies by jurisdiction. *Id.* at 1092. I do note there is a disconnect between legal and medical terminology. Generally, the question of sanity or insanity is a legal question, not a medical one. *Id.* at 1093. In medical terminology, "insanity" is generally no longer used. *See* Ralph Slovenko, *The Meaning of Mental Illness in Criminal Responsibility*, 5 J. LEGAL MED. 1984 1, 4. Instead, the term now encompasses a wide range of medical disorders, including bipolar disorder, schizophrenia, and other psychosis disorders. *See id.* at 17, 20.

8 *See generally* Part IIIA, *infra*.

9 *See generally* Part IIIB, *infra*.

protect the defendant's constitutional rights and interests. This Comment ends with some reform proposals, including ending sentence bargains for NGRI / GBMI pleas, appointing guardians *ad litem* for defendants, implementing time-limited commitment or outpatient therapy, and amending the process for release decisions.

The Comment begins in Part I with an overview of plea bargaining and mental illness in the United States. Part II delves into how insanity pleas work, including whether there are any constitutional limits. Part III examines insanity-plea bargains and any statutory or constitutional barriers to them. It further explores why we are not seeing NGRI / GBMI plea bargains as often as one would think, and offers normative analysis of potential reforms to the system.

## I. PLEA BARGAINS AND MENTAL ILLNESS IN THE UNITED STATES

### *A. The Plea-Bargaining System*

Many people view plea bargaining as an inherent aspect of the American criminal legal system.[10] Rather, plea bargaining as a system did not arise until the beginning of the nineteenth century.[11] One of the earliest examples of plea bargaining as a system was in liquor-law prosecutions and murder cases in Middlesex County, Massachusetts.[12] By the end of the nineteenth century, plea bargaining nearly occupied the field—guilty pleas accounted for about eighty-seven percent of criminal adjudications in Middlesex County, Massachusetts.[13]

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10 *See* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 860 (2000) ("Plea bargaining, once it took hold, possessed a power of its own. That power derived ultimately from the individual power of those whose interests plea bargaining served, but in its collective form, that power made plea bargaining a dominant force in the evolution of modern American criminal procedure.").

11 *Id*. at 864 (describing the rise of plea bargaining in the United States in the nineteenth century); *see generally* John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC'Y REV. 261, 261-62 (1979) (defining plea bargaining in the United States through a historical lens).

12 Fisher, *supra* note 10, at 864 ("During the first three-quarters or so of the nineteenth century, plea bargaining in Massachusetts advanced mainly in the realm of liquor-law prosecutions and murder cases . . . .").

13 *Id.* at 986-87. For the prosecutor and the judge, plea bargaining did not just relieve them of a growing workload; but also "spared the prosecutor the risk of loss and the judge the risk of reversal." *Id.* at 866-67. Moreover, defendants benefit from plea bargaining since it eliminates the risk of a trial. Towards the end of the twentieth century, plea bargaining took on a new life.

Today, pleas account for nearly ninety-four percent of felony cases, and about ninety-nine percent of misdemeanor cases, and plea-bargaining occurs at both the state and federal level.[14] Despite this prevalence, there is not much research on what percentage of those cases are plea agreements with a stipulated sentence versus "open pleas." The Assistant Solicitor General once estimated this number at about seventy-five percent of all pleas in the federal system, with open pleas being about twenty-five percent.[15] Plea bargaining is often called a "necessary evil" in the criminal legal system.[16] The Supreme Court recognized the proliferation of plea bargaining in *Lafler v. Cooper* and *Missouri v. Frye*.[17] Justice Kennedy, writing for the majority, noted while there is no constitutional right to a plea bargain, nearly ninety-five percent of convictions result from a plea.[18]

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With the promulgation of sentencing guidelines, judges began to lose control of discretionary sentencing, and plea bargaining was a way to hold on to that power. In other words, plea bargaining served the interests of power by protecting the reputation and legitimacy of the actors and the system as a whole. *Id.*

14 Stephanos Bibas, *Designing Plea Bargaining from the Ground Up: Accuracy and Fairness Without Trials as Backstops*, 57 WM. & MARY L. REV. 1055, 1058, 1058 n.6, 1059 (2016).

15 *See* Transcript of Oral Argument at 61–62, Class v. United States, 138 S. Ct. 798 (2018) (No. 16-424), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-424_8l8c.pdf [https://perma.cc/G9MA-BYS2] (informing the Supreme Court that about twenty-five percent of the pleas in the federal system are open pleas and do not involve plea bargains with the government). In an open plea, the defendant just pleads guilty to the charges, with no promises or compromises from the prosecutor.

16 MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 157-62 (1978) (discussing the inevitability of plea bargaining and how the abolition is unlikely).

17 Before 2012, plea bargaining was not explicitly recognized by the Supreme Court as inherent to the system in such a way that required certain constitutional protections. Lafler v. Cooper, 566 U.S. 156, 170 (2012) (internal citations omitted) ("[T]he reality [is] that criminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. . . . As explained in *Frye*, the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences."); Missouri v. Frye, 566 U.S. 134, 144 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L. J. 1909, 1912 (1992)) ("That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system."); *see also* Stephanos Bibas, *Taming Negotiated Justice*, 122 YALE L.J. ONLINE 35 (2012), (discussing the implications of the *Lafler* and *Frye* decisions, and how the Supreme Court recognized the importance of plea bargaining in the criminal justice system).

18 *Frye*, 566 U.S. at 143 ("[R]ecognizing pleas account for nearly 95 percent of all criminal convictions") (citing to Padilla v. Kentucky, 559 U.S. 356, 372 (2010)).

The plea-bargaining system has some notable shortcomings. Plea bargaining may induce convictions of innocent people.[19] Arguably, this disproportionately affects poor people and people of color who do not have the necessary resources to hire defense attorneys, investigators, and experts to investigate and put on a defense.[20] Instead, innocent defendants are overwhelmingly "pressured" into plea bargaining because of the incentives, including to reduce the risk they could be found guilty at trial and be convicted of a more serious crime, resulting in a harsher sentence.[21] If plea bargaining is going to be the norm in our criminal legal system, we need to think about ways to make the process more fair, equitable, and just, without compromising accuracy.[22]

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19 *See* Emily Yoffe, *Innocence Is Irrelevant*, THE ATLANTIC, (Sept. 2017), https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/ [https://perma.cc/Y2CJ-R47P] (noting that "[p]lea bargaining has become so coercive that many innocent people feel they have no option but to plead guilty."); *see, e.g.*, Jed S. Rakoff, *Why Innocent People Plead Guilty*, THE NEW YORK REVIEW OF BOOKS 1, 3-4 (Nov. 20, 2014), https://www.nacdl.org/getattachment/8e5437e4-79b2-4535-b26c-9fa266de7de8/why-innocent-people-plead-guilty-_-jrakoff_ny-review-of-books-2014.pdf [https://perma.cc/2E7E-NK3Z] (describing how plea bargaining has evolved over time and how defendants are typically under pressure to agree to the first plea bargain offered, even if they think it is unfair).

20 *See* Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1191 (2018) (finding striking racial disparities between white and black defendants in plea bargaining in Wisconsin, including how "white defendants who face initial felony charges are approximately fifteen percent more likely than black defendants to end up being convicted of a misdemeanor instead"); Yoffe, *supra* note 19 at 70 (highlighting how many defendants lack the resources to make bail and secure their freedom, so many feel compelled to take the plea deal the prosecutor offers, even if they are innocent).

21 Bibas, *supra* note 14, at 1060 ("Though perhaps hard to believe, innocent people sometimes buckle under the overwhelming pressures and incentives to plead guilty.")

22 While an important topic, this discussion is beyond the scope of this Comment. For more information, see Stephanos Bibas, *Designing Plea Bargaining from the Ground Up: Accuracy and Fairness Without Trials as Backstops*, 57 WM. & MARY L. REV. 1055 (2016) for a discussion of different principles to reform the plea bargaining system with safeguards for fair procedures and accurate outcomes and Stephanos Bibas, *Bringing Moral Values into a Flawed Plea Bargaining System*, 88 CORNELL L. REV. 1425 (2003) for a response to Albert Alschuler's position on plea bargaining and proposing additional reforms to make the plea bargaining system more honest and straightforward.

*B. Mental Illness in the System*

Likewise, mental illness is widespread in society, as most people will be diagnosed with a mental illness or disorder at some point in their lifetime.[23] About one in five adults experience some form of mental illness each year.[24] Further, about one in twenty adults experience some form of severe mental illness each year, such as schizophrenia, bipolar disorder, or major depression.[25] About forty-six percent of adults with a mental illness and sixty-four percent of adults with a severe mental illness received treatment in 2020.[26] In the criminal legal system, it is estimated that about two in five incarcerated people have a history of mental illness, but nearly three in five of those incarcerated people with a history of mental illness do not receive mental health treatment while incarcerated.[27]

Given the prevalence of plea bargaining and mental illness, one must wonder how the two interact. Criminal law doctrine traditionally connects mental illness to guilt because notions of criminal punishment tell us that we should not punish someone where we cannot impose blame, and a person who lacks reason cannot be subject to blame.[28] An insane person lacks the moral or cognitive capacity to understand and respond to reason, and thus is not a responsible moral agent.[29] Because we do not blame and

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23 *About Mental Health*, CDC, https://www.cdc.gov/mentalhealth/learn/index.htm [https://perma.cc/79FA-6X57] (last visited June 28, 2021) ("More than 50% will be diagnosed with a mental illness or disorder at some point in their lifetime.").

24 National Alliance on Mental Illness (NAMI), *Mental Health By the Numbers*, https://www.nami.org/mhstats [https://perma.cc/85J5-PF5Q] (last visited Feb. 2022); *About Mental Health*, CDC, https://www.cdc.gov/mentalhealth/learn/index.htm [https://perma.cc/JT9L-V7FZ] (last visited June 28, 2021).

25 NAMI, *supra* note 24.

26 NAMI, *supra* note 24.

27 NAMI, *supra* note 24 (providing statistical facts about mental illness and the criminal justice system).

28 *See* Holloway v. United States, 148 F.2d 665, 666-67 (D.C. Cir. 1945) ("This ordinary sense of justice still operates in terms of punishment. To punish a man who lacks the power to reason is as undignified and unworthy as punishing an inanimate object or an animal. A man who cannot reason cannot be subject to blame. Our collective conscience does not allow punishment where it cannot impose blame."). *See also* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 323 (8th ed. 2018) (discussing the retributivist rationale for the insanity defense).

29 *See* Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777, 780-83 (1985) (explaining the moral and fundamental basis of the insanity defense); DRESSLER, *supra* note 28, at 322-23 (providing different rationales for the insanity defense using retributivist and utilitarian arguments).

punish those who are not responsible moral agents and cannot act with reason, we should not blame and punish insane defendants.[30] Consequently, jurisdictions adopted insanity defenses through a plea of NGRI / GBMI.

One might imagine, given the prevalence of both plea bargaining and mental illness in the criminal justice system, that many plea bargains would involve a stipulated finding of NGRI / GBMI, and an agreed-upon course of treatment, but it is unclear if this is the case. Overall, the insanity defense is only raised in about one percent of cases, and is not often successful when raised.[31] However, research estimates about seventy percent of cases that end with an adjudication of NGRI / GBMI are resolved through a plea bargain.[32] The dearth of scholarship and empirical data about NGRI / GBMI plea bargains raises a series of questions: Are there any constitutional or statutory limits on NGRI / GBMI plea bargains? If not, is there another reason why we do not often see NGRI /

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30 *See* Morse, *supra* note 29, at 780-83 (discussing the moral basis for the insanity defense and how it is immoral and unjust to hold responsible and punish a person who was crazy at the time of the offense).

31 Colin Miller, *Plea Agreements as Constitutional Contracts*, 97 N.C. L. REV. 31, 65 (2018) ("Only about one percent of felony defendants raise the insanity defense*.").* *See* Lisa A. Callahan, et al., *The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 331, 337 (1991) (explaining "that the vast majority of people who [use] the insanity defense [are] seriously mentally ill.").

32 In 1997, Stephen Lally argued that this number was about seventy percent, but given the proliferation of plea bargaining in the criminal legal system, the number could be higher in 2023. Stephen Lally, *Drawing a Clear Line Between Criminals and the Criminally Insane*, WASH. POST, Nov. 23, 1997, at C02, https://www.washingtonpost.com/wp-srv/local/longterm/aron/expert1123.htm [https://perma.cc/ALW9-P2VG]; *but see* Carmen Cirincione, *Revisiting the Insanity Defense: Contested or Consensus?*, 24 BULL. AM. ACAD. PSYCHIATRY & L. 165, 174-75 (1996) (finding that in 1996 approximately forty-three percent of insanity cases were plea bargains, and bench trials were just as common as plea bargains in insanity plea data from seven states). *See* Hawkins-León, *supra* note 6, at 406 (reporting that the NGRI / GBMI plea is rare, but "evidence suggests it is used frequently in plea bargaining. One particular study found that 78% of the defense attorneys and 64% of the prosecutors who responded to inquiries admitted that 'the insanity defense was successfully used in plea bargaining cases in which they were involved.'"). Part of this issue, as discussed in Part III, *infra*, is that there is no collective database on insanity adjudications and whether they were a plea agreement or jury trial. *See* Mac McClelland, *When 'Not Guilty' is a Life Sentence*, N.Y. TIMES MAG. (Sept. 27, 2017), https://www.nytimes.com/2017/09/27/magazine/when-not-guilty-is-a-life-sentence.html [https://perma.cc/V3J3-ED5P] (noting that about ninety percent of NGRI verdicts are plea deals); Callahan, et al., *supra* note 31, at 337 (looking at the rates of insanity pleas across eight different states).

GBMI plea bargains? Is it a good or bad thing that we do not often see NGRI / GBMI plea bargains? The next Part explains insanity pleas through historical and constitutional dimensions, and Part III presents a more descriptive analysis of NGRI / GBMI plea bargains and why we are not seeing them as often as one would think. I conclude by offering a normative analysis of how to improve the system.

## II. INSANITY PLEAS

The insanity defense has its roots in English common law. However, the insanity defense in the United States gained notoriety in the last sixty-five years.[33] As society gained more knowledge about mental illness, the United States saw an expansion of the insanity defense to allow for broader conceptions of insanity through different tests and then a retraction in the wake of John Hinckley's assassination attempt of President Reagan.[34]

### *A. History of the Insanity Defense*

To understand the insanity defense, one must start with *M'Naghten*. In 1843, Daniel M'Naghten was charged with murder after he intentionally killed a person whom he believed was the Tory Prime Minister, Sir Robert Peel, but instead was Peel's secretary, Edward Drummond.[35] M'Naghten delusionally believed that the Tory Party wanted to kill him and was later found NGRI.[36] After this case, Queen Victoria implored the House of Lords to give an opinion on the rationale.[37] Lord Chief Justice Tindall declared "in all cases" a defendant may establish his or her insanity if he or she proves that, at the time of committing the act, the defendant was "labouring [sic] under such a defect of reason, from disease of the mind, as

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33 *See, e.g.*, Denno, *supra* note 1, at 1-2 (discussing the Yates case as an example of the use of the insanity defense).

34 *See generally* Blumoff, *supra* note 1, at 183-85.

35 Stephen J. Morse, *Mental Disorder and Criminal Law*, 101 J. CRIM. L. & CRIMINOLOGY 885, 921 (2011) (explaining the facts of the *M'Naghten* case).

36 *Id.*

37 *See* Hawkins-León, *supra* note 6, at 391 (telling how, after the *M'Naghten* verdict, Queen Victoria raised questions regarding the acquittal and asked the House of Lords to ask "the judges of the common-law courts to give an opinion on the rationale behind the verdict").

not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."[38]

Essentially, the *M'Naghten* test focuses on whether the defendant understood the nature of his behavior (the "cognitive capacity" prong) or whether the defendant knew what he was doing was wrong (the "moral capacity" prong).[39] The *M'Naghten* test was widely adopted throughout the United States and revolutionized how society thinks about moral culpability and punishment for crimes and cemented its place in the criminal law.[40] Many jurisdictions adopted either one or both prongs of *M'Naghten* or use *M'Naghten* coupled with a volitional capacity prong.[41]

In the 1960s, jurisdictions widely adopted the American Law Institute's Model Penal Code (MPC) test since it allowed for more flexibility with mental illnesses and treatment.[42] Found in MPC § 4.01, the MPC test states: "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."[43] The MPC test incorporates *M'Naghten*'s cognitive capacity prong ("appreciate the criminality [wrongfulness] of his conduct"), but also broadens the test via a volitional component from the Irresistible Impulse test (the "conformity" prong).[44] Professor Hawkins-León noted that the MPC test "focuses on the defendant's understanding of his conduct and on the defendant's ability to control his actions."[45] Unlike *M'Naghten*, the MPC test absolves a defendant

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38 *Id.* at 391-92.

39 *See* Morse, *supra* note 35, at 925 (explaining how different jurisdictions can codify different variants of the insanity defense).

40 *M'Naghten* cemented the importance of moral culpability in the criminal law, as the law has long recognized that criminal punishment is not appropriate for those who, by reason of insanity, cannot tell right from wrong. Several jurisdictions in the United States adopted the *M'Naghten* formulation shortly after. R. Michael Shoptaw, Comment, M'Naghten *is a Fundamental Right: Why Abolishing the Traditional Insanity Defense Violates Due Process*, 84 MISS. L.J. 1101, 1107 (2015).

41 *See id.* at 1107-09 (exploring different variations on the insanity defense among states); *see also* Morse, *supra* note 35, at 925 (discussing the difference between the "cognitive" *M'Naghten* standard, and the alternative "control" test).

42 *See* Blumoff, *supra* note 1, at 184 (discussing the breadth of the MPC standard).

43 MODEL PENAL CODE § 4.01 (AM. L. INST. 1962).

44 Hawkins-León, *supra* note 6, at 397 (descrbing "[t]he ALI test [as] contain[ing] a cognitive prong from the M'Naghten Rule and a volitional component of the irresistible-impulse test.").

45 *Id.*

from criminal responsibility when the defendant knows what he is doing (and knows what he is doing is wrong), but is driven to crime by delusions.[46]

However, the MPC test fell out of favor after John Hinckley, Jr. was found NGRI and committed to St. Elizabeth's Psychiatric Hospital for attempting to assassinate President Reagan.[47] Notably, the burden of proof for the insanity defense was on "the government to prove beyond a reasonable doubt that Hinckley was sane" at the time of the offense.[48] The *Hinckley* NGRI acquittal sparked a national conversation about the appropriateness of the insanity defense.[49] Many states reverted back to *M'Naghten*.[50] A few states took measures to severely limit,[51] or abolish,[52] the affirmative insanity defense.

46 *See id.* (explaining the MPC test and how it differentiates from other insanity tests).

47 On March 30, 1981, Hinckley shot President Reagan, his Press Secretary, a Secret Service agent, and a Metropolitan Police Department officer. *Id.* at 400-01. Hinckley was found NGRI with the MPC test. *Id*. Additionally, post-*Hinckley*, many states "shifted the burden of proof to the defendant," as well as reformed their statutory insanity defenses to eliminate the volitional prong and adopt standards closer to the *M'Naghten* test. *Id.* at 402; *see also* Blumoff, *supra* note 1, at 184-85 ("The jurisprudential retreat from the new learning that held sway in a majority of the states—from a more treatment-oriented, forgiving MPC test to ever-narrowing variations on *M'Naghten*—is well-known. It followed the public outrage that arose when John Hinckley was acquitted following the shooting of President Reagan and members of his entourage in March 1981.").

48 *See generally* Hawkins-León, *supra* note 6, at 400-01 (giving additional background to the *Hinckley* case and ultimate verdict).

49 There was a national push to abolish the insanity defense following the *Hinckley* verdict. Many people argued that the insanity defense should be abolished, including then-Attorney General William French Smith and President Ronald Reagan. *See, e.g.*, *Ideas and Trends; Taking Aim at Insanity Defense*, N.Y. TIMES, (July 25, 1982), http://www.nytimes.com/1982/07/25/weekinreview/ideas-and-trends-taking-aim-at-insanity-defense.html [https://perma.cc/3LFT-T59H] (reporting on public statements made by Attorney General Smith and President Reagan regarding abolishing the insanity defense). However, other scholars, including Professor Stephen Morse, pushed back on this proposition, arguing that due process constitutionally requires some formulation of a complete affirmative defense of insanity for each defendant. *See, e.g.*, Morse, *supra* note 35, at 926 (discussing the "compelling constitutional argument . . . [for the] necessity of the insanity defense"); *see, e.g.*, Gilles Phillips & Woodman, *supra* note 1, at 459-60 n. 28 (exploring different approaches and tests that states use for their insanity defense).

50 *See* Blumoff, *supra* note 1, at 184-85 (outlining the jurisprudential retreat from the MPC to *M'Naghten* following the public outrage to John Hinckley shooting President Reagan).

51 For example, Alaska re-adopted the *M'Naghten* test, but "drastically narrowed the definition of legal insanity, shifted the burden onto the defendant, and added an alternative verdict of 'guilty but mentally ill.'" Suzan E. DeBusk, *Alaska's Insanity Defense and the "Guilty but Mentally Ill" Verdict*, 4 ALASKA L. REV. 171, 171-72 (1987). There no longer is a statutory provision in Alaska that allows a defendant who does not appreciate the wrongfulness of his conduct to plead not guilty by

### *B. Contemporary Approaches*

Today, the federal and state governments take a handful of different approaches to the insanity defense. The federal government adopted *M'Naghten*.[53] Among the states, there are four primary regimes: the *M'Naghten* test, the MPC test, the Irresistible Impulse test, and the Durham Rule.[54] As discussed above, the *M'Naghten* test was widely adopted by states

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reason of insanity, and the Alaska Supreme Court decisively concluded that Alaska's insanity statute "enact[ed] only the first prong of the *M'Naghten* test." State v. Patterson, 740 P.2d 944, 949 (Alaska 1987); *see, e.g.*, ALASKA STAT. § 12.47.010(a) (2022) (stating that "it is an affirmative defense that when the defendant engaged in the criminal conduct, the defendant was unable, as a result of a mental disease or defect, to appreciate the nature and quality of that conduct."); *see also* Andrew P. March, Note, *Insanity in Alaska*, 98 GEO. L.J. 1481, 1498-99 (2010) (examining Alaska's insanity defense embodied in Alaska Statute section 12.47.010(a)).

52 *See, e.g.*, Jessica Harrison, Comment, *Idaho's Abolition of the Insanity Defense—an Ineffective, Costly, and Unconstitutional Eradication*, 51 IDAHO L. REV. 575, 585 n. 128 (2015) ("The states that have abolished the insanity defense include Idaho, Montana, Utah, Kansas, and Nevada."). For example, before *Hinckley*, Idaho codified the MPC test as its statutory test for insanity. *Id.* at 588-89. However, in 1982, shortly after Hinckley's NGRI acquittal, the Idaho legislature abolished the affirmative insanity defense. IDAHO CODE ANN. § 18-207(1) (West 2022) ("Mental condition shall not be a defense to any charge of criminal conduct"). Thus, Idaho has essentially adopted the Mens Rea Model, where evidence of mental insanity is allowed in for the purpose of showing that the defendant lacked the required criminal intent (i.e.: mens rea) for the crime charged. Harrison, *supra* note 52, at 585. *See* KAN. STAT. ANN. §21-5209 (2011) (abolishing the insanity defense in Kansas); *see also* MONT. CODE ANN. §46-14-102 (West 2021) (abolishing the insanity defense in Montana); UTAH CODE ANN. § 76-2-305 (West 2016) (abolishing the insanity defense in Utah). Nevada's state legislature also attempted to abolish the insanity defense, but this was struck down as unconstitutional by the Nevada Supreme Court. Finger v. State, 27 P.3d 66, 68, 84 (2001) (holding that "legal insanity is a well-established and fundamental principle of the law of the United States," and the insanity defense recognizes not convicting people of crimes when they lack the understanding that their conduct was wrong or the "mental capacity to form the applicable intent to commit the crime").

53 Congress passed the Insanity Defense Reform Act of 1984 ("IDRA") in response to *Hinckley*, eliminating the volitional portion of the insanity defense and implementing a *M'Naghten* standard at the federal level. IDRA's rationale was to redress "a glaring deficiency in our federal criminal legal system—the abuse of the insanity defense." Hawkins-León, *supra* note 6, at 403. *See also* 18 U.S.C. § 17 (1986) (defining the insanity defense as "an affirmative defense to a prosecution . . . that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts.").

54 *See* Morse, *supra* note 35, at 925 (stating that "[m]ost [states] have some variant of the 'cognitive' *M'Naghten* standard, which asks whether as a result of mental disorder the defendant did not know the nature and quality of his act or did not know right from wrong."). *See generally* INGO KEILITZ & JUNIUS P. FULTON, THE INSANITY DEFENSE AND ITS ALTERNATIVES: A GUIDE FOR

after its restatement in 1843. States may use one or both prongs of the *M'Naghten* test.[55] A handful of states still use the MPC test,[56] although, as discussed, the MPC test fell out of favor following the *Hinckley* acquittal for being too broad.[57]

The third test, the Irresistible Impulse test, focuses on whether the defendant can exercise self-control.[58] The Irresistible Impulse test provides that defendants must present sufficient evidence to prove the existence of a mental illness and that the mental illness caused the inability to control one's actions or conform one's conduct to the law.[59] This volitional test is not used widely on its own. As discussed above, it is often seen in

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POLICYMAKERS 1-8 (1984) (providing an overview of the insanity defense and the different approaches used in the United States).

55 For example, Kansas eliminated *M'Naghten* and defendants are not allowed to introduce evidence that because of a mental illness, the defendant was unable to tell the difference between right and wrong. Instead, defendants can only use evidence of mental illness to show they lacked mens rea. Fredrick E. Vars, *Of Death and Delusion: What Survives* Kahler v. Kansas?, 169 U. PA. L. REV. ONLINE 90, 91 (2020). Nonetheless, Arizona only allows defendants to use evidence of insanity when the defendant is "afflicted with a mental disease or defect of such severity that [he or she] did not know the criminal act was wrong." ARIZ. REV. STAT. ANN. § 13-502(A) (2021). Arizona's test essentially removes the mens rea prong from the insanity defense, is much narrower than other constructions of *M'Naghten*, and is solely concerned with whether the defendant understood the immorality of his actions. Michael Stoll, Note, *Miles to Go Before We Sleep: Arizona's "Guilty Except Insane" Approach to the Insanity Defense and Its Unrealized Promise*, 97 GEO. L.J. 1767, 1777-79 (2009). *Cf.* N.Y. PENAL LAW § 40.15 (McKinney 1984) ("[I]t is an affirmative defense that when the defendant engaged in the proscribed conduct, he lacked criminal responsibility by reason of mental disease or defect. Such lack of criminal responsibility means that at the time of such conduct, as a result of mental disease or defect, he lacked substantial capacity to know or appreciate either: 1. The nature and consequences of such conduct; or 2. That such conduct was wrong.").

56 *See e.g.*, MODEL PENAL CODE § 4.01 (AM. L. INST. 1962); *see also* Hawkins-León, *supra* note 6, at 402. (stating that "by 1990, twenty states had implemented the ALI [MPC] test . . . .")

57 *See* Hawkins-León, *supra* note 6, at 402 (discussing how over half of the states adopted some form of the restrictive M'Naghten test following the *Hinckley* verdict); Blumoff, *supra* note 1, at 184-85 (explaining the retreat from a "more treatment-oriented, forgiving MPC test to ever-narrowing variations on *M'Naghten*").

58 Hawkins-León, *supra* note 6 at 395 ("The central focus of the [Irresistible Impulse] test is the ability of the defendant to exercise self-control."); Gilles Phillips & Woodman, *supra* note 1 at 459-460 n. 28 (describing the "irresistible impulse" test as a volitional standard regarding one's inability to control their actions due to mental illness).

59 *See* Edwin R. Keedy, *Irresistible Impulse as a Defense in the Criminal Law*, 100 U. PA. L. REV. 956, 958-59 (1952) (explaining the history and theory behind the Irresistible Impulse test); Hawkins-León, *supra* note 6 at 393 ("Consequently, the question posed in accordance with the irresistible impulse test was whether mental illness had robbed the defendant of the capacity to control his behavior.").

combination with the *M'Naghten* test, and was incorporated into the MPC test in the "control" prong.[60]

The final test, the Durham Rule or "product test," focuses on whether the defendant's actions were because of a mental illness. The Durham Rule, from *Durham v. United States*, provides that a criminal defendant cannot be convicted of a crime if the act was the product of a mental disease or defect that the defendant had at the time of the incident.[61] Notably, this test covers "whether the accused acted because of a mental disorder, and not whether he displayed particular symptoms which medical science has long recognized do not necessarily, or even typically, accompany even the most serious mental disorder."[62] Nevertheless, federal courts and all but one state (New Hampshire) reject the Durham Rule as being too broad.[63]

The federal government and the states have also adopted alternative verdicts for defendants who adequately make out an insanity defense. Most prominently is Not Guilty by Reason of Insanity (NGRI).[64] If a defendant is found or pleads NGRI, the federal government and the states typically provide for the defendant's involuntary commitment to a mental health

60 *See supra* note 44 and accompanying text.

61 Durham v. United States, 214 F.2d 862, 874-75 (D.C. Cir. 1954) ("It is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."); Hawkins-León, *supra* note 6 at 395-97 (explaining the *Durham* case and the resulting test adopted by the District of Columbia Circuit).

62 *Durham*, 214 F.2d at 876.

63 *See* Gilles Phillips & Woodman, *supra* note 1 at 459-460 n. 28 (discussing how "New Hampshire is the only state which follows the Durham rule").

64 The federal government and most states allow for a verdict of NGRI. The federal government's statutory provision for NGRI is codified at 18 U.S.C. § 4242. A typical state statute is like Ohio's, codified at OHIO REV. CODE ANN. § 2945.40(a), or Florida's, codified at FLA. STAT. § 916.15(1), providing a verdict of "not guilty by reason of insanity." OHIO REV. CODE ANN. § 2945.40(f) (West 2016); FLA. STAT. ANN. § 916.15(2) (West 2020). The only states that have abolished the affirmative insanity defense are Montana, Utah, Kansas, and Idaho. Some states, like Arizona, provide for a verdict of "Guilty Except Insane," where, as discussed in Part IIB, *infra*, are similar but also different from NGRI verdicts. *See generally* Bailey Wendzel, Note, *Not Guilty, Yet Continuously Confined: Reforming the Insanity Defense*, 57 AM. CRIM. L. REV. 391, 393 (2020) (reviewing NGRI pleas and discussing possible reforms, such as when an NGRI individual reaches the maximum penal sentence, their release should be governed by similar standards to involuntary commitment laws for civil mental health commitments).

institution until the defendant is no longer a danger to society.[65] This commitment may be longer than the criminal sentence the defendant was facing for the crimes, and the Supreme Court has held that extending this commitment is not unconstitutional.[66]

A handful of states, including Michigan and Pennsylvania, adopted an alternative verdict for insane defendants. Titled "Guilty But Mentally Ill" (GBMI), these verdicts functionally are similar to NGRI verdicts, where the defendant is involuntarily committed in a mental health institution after adjudication of their case.[67] However, formally, GBMI verdicts are very different. With GBMI, the defendant is still found guilty and receives a sentence, but the defendant "was 'mentally ill' at the time of the crime" and receives psychiatric care in prison or in a mental health institution.[68] If the defendant is "cured while in custody, [he] must complete the prison

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65 *See, e.g.*, 18 U.S.C. § 4243(a) ("If a person is found not guilty only by reason of insanity at the time of the offense charged, he shall be committed to a suitable facility until such time as he is eligible for release . . . ."); OHIO REV. CODE ANN. § 2945.40(f) (West 2016) (providing for commitment to "a hospital, facility, or agency" for treatment); FLA. STAT. ANN. § 916.15(2) (West 2020) (allowing for the involuntary commitment of a defendant who is found NGRI).

66 Jones v. United States, 463 U.S. 354, 368-70 (1983) (holding that the Due Process Clause permitted confinement of an insane defendant for longer than if incarcerated). *See also* People v. Soiu, 106 Cal. App. 4th 1191, 1194-95 (2003) (stating that, following a hearing, extending the sentence of commitment for an insane defendant who poses a danger of physical harm to others is not unreasonable or unconstitutional). However, the Supreme Court has held that the continued civil confinement of an insane defendant who has regained their sanity violates the Due Process Clause. Foucha v. Louisiana, 504 U.S. 71, 77 (1992) ("[T]he acquittee may be held as long as he is both mentally ill and dangerous, but no longer.").

67 *See, e.g.*, MICH. COMP. LAWS ANN. § 768.36 (West 2014) (allowing a defendant to be found "guilty but mentally ill"); 18 PA. STAT. AND CONS. STAT. ANN. §314 (West 1982) (codifying GBMI as when the person is guilty of an offense and was mentally ill, but "not legally insane, at the time of the commission of the offense"). Interestingly, Pennsylvania did not repeal or abrogate the "common law defense of insanity (M'Naghten's Rule)" in adopting this statute. 18 PA. STAT. AND CONS. STAT. ANN. §314(d) (West 1982). Other jurisdictions call it "Guilty Except Insane" or "Guilty But Insane." As Professor Morse points out, sometimes criminal defendants found GBMI may not receive mental health treatment through involuntary commitment but may be sentenced to prison instead or executed via capital punishment. "[W]hen a GBMI convict is hospitalized and successfully treated, he is returned to prison to complete his sentence, just like any other convicted offender." Stephen J. Morse & Morris B. Hoffman, *The Uneasy Entente Between Legal Insanity & Mens Rea: Beyond* Clark v. Arizona, 97 J. CRIM. L. & CRIMINOLOGY 1071, 1122-23 (2007).

68 DRESSLER, *supra* note 28 at § 25.07 (giving an outline of the GBMI verdict and how it differs from NGRI).

sentence."[69] Professor Morse and Professor Hoffman argue GBMI verdicts are a "'third-way' fraud."[70] Despite what the statutory language says, GBMI verdicts have "nothing to do with responsibility," as the defendant is still found guilty, and thus fully culpable for their actions, even though, due to their mental illness and lack of moral capacity, they should not be.[71]

The consequences of a NGRI / GBMI verdict arguably circumvent what we think is permissible with incarceration. If a defendant is incarcerated for longer than the judge's imposed sentence, there would likely be numerous Eighth Amendment and due process challenges calling for the defendant's release because there are strict limits on punishment.[72] But, for NGRI / GBMI pleas, our conceptions of justice allow the continued commitment of a defendant because of their mental illness. We justify it through public welfare, where confinement is treatment, not punishment.[73] This raises constitutional and due process concerns.

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69 *Id.*

70 *See* Morse & Hoffman, *supra* note 67 at 1122 ("In short, GBMI is a politically expedient 'third-way' fraud. It has nothing to do with responsibility and nothing to do with treatment.").

71 *See id.* at 1122-1123 (discussing how GBMI verdicts have nothing to do with culpability and criminal responsibility);

> GBMI is a fraudulent verdict because it does not address any issue relevant to just criminal blame and punishment and it has the potential to deflect juries from proper insanity acquittals because they do not understand the insanity defense or fear that it will cause the release of a dangerous offender.

Morse, *supra* note 35 at 934.

72 *See* Moore v. Tartler, 986 F.2d 682, 686 (3d Cir. 1993) (holding that the detention of an inmate "beyond the termination of his sentence . . . violate[s] the [E]ighth [A]mendment's proscription against cruel and unusual punishment" if the "incarceration [is] without penological justification."). Judges have substantial discretion in their sentencing decisions. However, our conceptions of due process would likely prohibit a defendant from being incarcerated for longer than the judge's sentence imposed. The Supreme Court, in decisions such as Vitek v. Jones, 445 U.S. 480, 496-497 (1980), and Jackson v. Indiana, 406 U.S. 715, 731 (1972), held that convicted prisoners do not lose all constitutional rights and involuntary commitment involves a tremendous loss of individual liberty which requires due process protection. *See generally* Mark G. Cooper, Foucha v. Louisiana*: Insanity Acquittees & Due Process Protection*, 1993 DET. COLL. L. REV. 979, 979-80 (1993) (discussing the *Foucha* decision and how it extended the Fourteenth Amendment's protection of liberty for insane defendants).

73 *See* Robert Greenwald, *Disposition of the Insane Defendant after "Acquittal"—The Long Road from Commitment to Release*, 59 J. CRIM. L. & CRIMINOLOGY 583, 584-85 (1969) ("After an acquittal by reason of insanity, the offender is still regarded as mentally ill and one over whom control should be exerted for the protection of the public. This consideration allows the state to commit the defendant with little or no adjudication of his present mental condition. However, central to this

### *C. Constitutional Limits*

The insanity defense implicates constitutional concerns. It is morally wrong to convict and punish someone who was not morally responsible for the crime.[74] Notions of criminal punishment tell us we should not punish someone where we cannot impose blame, and a person who lacks reason cannot be subject to blame.[75] An insane person is not a responsible moral agent, because they lack the moral or cognitive capacity to understand and respond to reason.[76] Thus, insane people who do not have the moral or cognitive capacity for rationality should not be held responsible.[77] Consequently, it is unfair to blame and punish an insane person for a crime, because they lack rationality and moral responsibility.

However, the Supreme Court has never held that the insanity defense is required by substantive due process, and has recently narrowed what states

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rationale, unlike that corresponding to other rationales for commitment, is treatment—not mere confinement—for the defendant."); *see also* Lally, *supra* note 32 (writing that for insane defendants found NGRI, virtually none remain free and "many spend more time confined in a locked mental hospital than sane criminals who are convicted of similar acts and imprisoned for them.").

74 *See* Morse, *supra* note 29 at 783 ("In sum, the moral basis of the insanity defense is that there is no just punishment without desert and no desert without responsibility. Responsibility is, in turn, based on minimal cognitive and volitional competence. Thus, an actor who lacks such competence is not responsible, does not deserve punishment, and cannot justly be punished.").
Arguably, it is also a due process violation to convict and punish someone who is not morally responsible for the crime, but the current Supreme Court likely disagrees. *See, e.g.*, Clark v. Arizona, 548 U.S. 735, 742 (2006) (holding Arizona's narrowing of the insanity defense and exclusion of evidence of mental illness and incapacity did not violate due process); Delling v. Idaho, 568 U.S. 1038, 1041 (2012) (Breyer, J., dissenting from denial of certiorari) ("I would grant the petition for certiorari to consider whether Idaho's modification of the insanity defense is consistent with the Fourteenth Amendment's Due Process Clause."); Kahler v. Kansas, 140 S. Ct. 1021, 1024-25 (2020) (holding that the Due Process Clause does not require a state to adopt an insanity defense for a "defendant who, because of mental illness, could not tell right from wrong").

75 Holloway v. United States, 148 F.2d 665, 666-67 (D.C. Cir. 1945) ("To punish a man who lacks the power to reason is as undignified and unworthy as punishing an inanimate object or an animal. A man who cannot reason cannot be subject to blame. Our collective conscience does not allow punishment where it cannot impose blame.").

76 *See supra* notes 28-30 and accompanying text. As Professor Joshua Dressler explains: "[P]unishment is dependent on moral desert; moral desert is dependent on moral responsibility for one's actions; and moral responsibility for one's actions is dependent on the essential attributes of personhood, namely rationality and self-control. Insane people, however, lack essential attributes of personhood." DRESSLER, *supra* note 28 at 323, § 25.03.

77 Professor Morse has "long argued that the capacity for rationality is the fundamental criterion for responsibility." Morse, *supra* note 35 at 936.

must include in their insanity defenses.[78] The best way to describe the Court's jurisprudence in this area is that "no . . . formulation [of insanity] has evolved into a baseline for due process."[79]

In *Clark v. Arizona*, Eric Clark shot and killed a police officer who had pulled him over.[80] Clark claimed he lacked the mens rea because he did not intend to kill a human being and did not know the victim was a police officer, as he was suffering from paranoid schizophrenia and had delusions that the victim was a space alien impersonating a police officer and was threatening him.[81] Nevertheless, the Court held that the Due Process Clause permits a state (1) to channel evidence into an affirmative insanity defense, and (2) to limit its insanity defense to the second *M'Naghten* prong.[82]

In *Delling v. Idaho,* the Court had the opportunity to determine "whether the Fourteenth or Eighth Amendment mandates the availability of an affirmative insanity defense. . . ."[83] This was an issue the Supreme Court reserved in *Clark*, and was of importance here because Idaho had abolished the insanity defense, which Delling argued violated his constitutional

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78 *Id.* at 925-26.

79 Tyler Ellis, Comment, *Mental Illness, Legal Culpability, & Due Process: Why the Fourteenth Amendment Allows States to Choose A Mens Rea Insanity Defense over a* M'Naghten *Approach*, 84 MISS. L.J. 215, 230-31 (2014) (discussing the history of the insanity defense, particularly *M'Naghten* and the Mens Rea Model).

80 Clark v. Arizona, 548 U.S. 735, 743 (2006) (recounting the facts of the case).

81 *Id.* at 743-45. Arizona law, however, prohibited Clark from introducing evidence of his mental disorder to show that he lacked the requisite mens rea; it required him to channel any expert evidence about his mental disorder into Arizona's affirmative insanity defense, which required Clark to prove that at the time of his act he did not know what he was doing was wrong (the second, "moral capacity" prong of *M'Naghten*). *Id.* at 745-46.

82 *Id.* at 771-72. There was notable backlash surrounding the Court's decision in *Clark*. Some scholars criticized the decision as confusing the insanity defense with the mens rea requirement. *See, e.g.*, Susan D. Rozelle, *Fear and Loathing in Insanity Law: Explaining the Otherwise Inexplicable* Clark v. Arizona, 58 CASE W. RSRV. L. REV. 19, 47-48 (2007) (noting that "[t]he difficulty arises from a misunderstanding of the relationship between insanity and mens rea"); Morse & Hoffman, *supra* note 67 at 1101-02 (arguing the Supreme Court confounded mens rea and insanity and got the answer wrong). Other scholars went further in their criticisms and argued that the Mens Rea Model itself, like Arizona's insanity statute, is unconstitutional. *See, e.g.*, Gilles Phillips & Woodman, *supra* note 1 at 461 (arguing the Mens Rea Model is unconstitutional because it abolishes an essential category of mens rea which is concerned with legal capacity as a precondition for criminal responsibility).

83 Petition for Writ of Certiorari at 9, Delling v. Idaho, 568 U.S. 1038 (2012) (No. 11-1515) (asking the Supreme Court for a writ of certiorari to determine the answer to this question).

rights.[84] In 2007, John Joseph Delling went on a "crime spree" during a trip out West, killing two of his former classmates and wounding a third man.[85] Although he understood what he was doing, he believed he acted in self-defense, as he became delusional and believed that people he knew were trying to destroy his brain and steal his "energy."[86] Delling had a history of mental illness and violence, including paranoid schizophrenia.[87] However, the Supreme Court denied certiorari, despite a powerful dissent from Justice Breyer, who argued the Court should have granted the writ of certiorari because of the long-standing prohibition on criminal punishment for those who, because of insanity, cannot tell right from wrong.[88] Delling is now serving a sentence of life in prison without the possibility of parole, even though his lawyers argued that he would have received treatment and a more lenient sentence with an insanity plea.[89]

Most recently, in *Kahler v. Kansas*, the Supreme Court held that the Due Process Clause does not require a state to adopt an insanity test that turns on a defendant's ability to recognize that his crime was morally wrong.[90]

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84 *Clark*, 548 U.S. at 752 n.20 ("We have never held that the Constitution mandates an insanity defense, nor have we held that the Constitution does not so require. This case does not call upon us to decide the matter."); Petition for Writ of Certiorari at 9, *Delling*, 568 U.S. 1038 (No. 11-1515) (arguing that Delling's case was ideal to resolve "whether the Constitution mandates an insanity defense").

85 Robert Barnes, *Supreme Court is asked to find that insanity defense is a constitutional right*, WASH. POST (July 22, 2012), https://www.washingtonpost.com/politics/supreme-court-is-asked-to-find-that-insanity-defense-is-a-constitutional-right/2012/07/22/gJQAKNbr2W_story.html [https://perma.cc/GJD5-H6T4] (providing background information on Delling's case).

86 *Id.* (internal quotation marks omitted).

87 Tommy Simmons, *Idaho is one of only 4 states without a criminal insanity defense*, ASSOCIATED PRESS (Nov. 26, 2018), https://apnews.com/article/us-supreme-court-idaho-60db857842844928baebcb7614cf70ca [https://perma.cc/VG9L-UTED] (giving additional information on Delling's case and Idaho's "lack of an insanity defense"); Rebecca Boone, *Classmate Slaying Suspect Called Erratic*, WASH. POST (Apr. 11, 2007, 8:15 PM), http://www.washingtonpost.com/wp-dyn/content/article/2007/04/11/AR2007041101994.html [https://perma.cc/G6UK-K84N] (reporting contemporaneously on Delling's case).

88 Delling v. Idaho, 568 U.S. 1038, 1041 (Breyer, J., dissenting from denial of certiorari) (stating that he would have granted the petition for certiorari).

89 Simmons, *supra* note 87 (discussing the Supreme Court's holding in Delling's case); Petition for Writ of Certiorari at 7, 14-15, Delling v. Idaho, 568 U.S. 1038 (2012) (No. 11-1515) (describing Delling's sentence of life without parole, and how he was held in solitary confinement with no guarantee of having access to mental health treatment).

90 Kahler v. Kansas, 140 S. Ct. 1021, 1024 (2020) (narrowing the doctrine outlined in *Clark*); Stephen J. Morse & Richard J. Bonnie, *Don't abolish the insanity defense*, THE HILL (May 18, 2020, 9:00 AM), https://thehill.com/opinion/judiciary/497726-don't-abolish-the-insanity-defense

James Kraig Kahler shot his wife Karen, Karen's grandmother, and both of his daughters but allowed his son to flee unharmed.[91] Kahler was convicted of capital murder.[92] Kahler argued Kansas unconstitutionally abolished the insanity defense in violation of the Fourteenth Amendment's Due Process Clause because Kansas allowed the conviction of an insane person who cannot tell right from wrong.[93] The Court disagreed and declined to require states to adopt a specific version of the insanity defense.[94] The Court indicated that no single version of the insanity defense has become so ingrained in American law as to be "fundamental," and states retained the authority to define the precise relationship between criminal culpability and mental illness.[95] Therefore, states were free to choose how to codify their insanity defenses, and whether to allow defendants to raise the insanity defense in the first place.

Many scholars, including Professor Stephen Morse, criticized the *Kahler* decision, arguing that the Supreme Court "gave a green light to every state . . . to effectively abolish the insanity defense."[96] Professor Morse's fears are legitimate. It is worth noting that since *Hinckley*, there has been momentum to abolish the insanity defense.[97] Based on *Clark* and *Kahler*, more states could constitutionally take measures to limit or eliminate the affirmative insanity defense, but as of the writing of this Comment, none have so far.

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[https://perma.cc/89FG-XK5S] (providing a scholarly account of why the Supreme Court was incorrect in *Kahler*).

91 *Kahler*, 140 S. Ct. at 1026-27 (stating the facts in Kahler's case).

92 *Id.* at 1027.

93 *Id.* at 1027. Kansas' insanity statute states that a defendant may show that, "as a result of mental disease or defect, [the defendant] lacked the culpable mental state required as an element of the offense charged." *Id.* at 1025. In other words, Kansas' statute eliminates the *M'Naghten* test and only permits a defendant to raise mental illness at sentencing to lessen his punishment. *Id.*; KAN. STAT. ANN. §21-5209 (West 2011).

94 *Kahler*, 140 S. Ct. at 1037.

95 *Id.* at 1029.

96 Morse & Bonnie, *supra* note 90 (opining that the Supreme Court was incorrect in *Kahler* in allowing states to erase "a deeply rooted legal principle . . . from American law.").

97 *See supra* note 49 and accompanying discussion. This argument has potentially gained more ground in the wake of *Kahler*, but since *Hinckley*, only four states (Montana, Utah, Kansas, and Idaho) have officially abolished the affirmative insanity defense, and the federal government still has it on the books. Moreover, Arizona and Alaska have not abolished the defense, but rather narrowed the scope of what is permissible.

## III. Analysis of Insanity-Plea Bargains

With the prevalence of mental illness and plea bargaining in the criminal legal system, one would expect to see NGRI / GBMI plea bargains more often. However, this is not the case. The insanity defense is rarely used and is not usually successful when raised.[98] Is there a reason why so few defendants enter into NGRI / GBMI plea bargains? Are there any constitutional or statutory barriers to doing so? Finally, if there are no constitutional or statutory barriers to entering into these plea bargains, should more defendants do so? This section seeks to answer these questions.

### *A. Constitutional Limits?*

An initial question is whether there are any constitutional constraints to entering into NGRI / GBMI plea bargains. A potential barrier is that due process requires a knowing and voluntary plea,[99] but when the defendant does not have full mental capacity, the plea may not be fully knowing and voluntary.[100] If the defendant has questionable mental capacity and wants to plead NGRI or even guilty, the court must engage in a number of inquiries to ensure that the defendant enters into the plea knowingly and voluntarily.[101]

These are three separate, but related, inquiries. If the defendant has questionable mental capacity and wants to plead NGRI or guilty, the first question to ask is whether they are competent enough to enter into the plea

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98 Miller, *supra* note 31 at 65 (noting "about one percent of felony defendants raise the insanity defense").

99 Brady v. United States, 397 U.S. 742, 748 (1970) ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.").

100 Robert Schehr, Ph.D. & Chelsea French, *Mental Competency Law & Plea Bargaining: A Neurophenomenological Critique*, 79 ALB. L. REV. 1091, 1097-98 (2016) (arguing that a related concern to knowing and voluntary pleas relates to mental competency and whether the defendant fully understands the direct consequences of the plea).

101 *See Brady*, 397 U.S. at 748 (requiring any waiver of constitutional rights through a plea to be entered into knowingly and voluntarily); Boykin v. Alabama, 395 U.S. 238, 243 n.5 (1969) (listing the Due Process Clause requirements for a guilty plea); *see also* Schehr & French, *supra* note 100 at 1103-04 (noting that this voluntariness determination fails to consider scientific and phenomenological factors).

or stand trial.[102] It is not the case that a person who was insane at the time of the crime is necessarily incompetent to stand trial. The person may have been insane at the time that they allegedly committed the crime, but now (with the help of medication and/or treatment) is competent enough to enter into a plea or stand trial.[103] The second inquiry regards the actual insanity plea or defense itself. This inquiry is an *ex post* one, whereby the adjudicator has to determine whether the person was insane at the time that they committed the crime: that they did not understand what they were doing or did not understand what they were doing was wrong.[104] These two inquiries, while overlapping, are looking at two distinct points in time. The third inquiry is the knowing and voluntary plea to a final verdict to adjudicate the case. "Traditional" guilty pleas, whereby the defendant pleads guilty to the charges through an open plea or a plea bargain, must be made knowing and voluntary.[105] The judge must confirm that the defendant understands the waiver of several federal constitutional rights when entering into a plea bargain.[106] If this does not occur, or the defendant does not understand, then the plea is invalid. Thus, all inquiries consider the defendant's mental capacity.[107]

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102 Schehr & French, *supra* note 100 at 1113 ("Due process requires that a defendant must enter a guilty plea 'knowingly and voluntarily,' as such a plea can only be valid if the defendant is 'competent' at the time the defendant entered the plea."); McClelland, *supra* note 32 (discussing how plea hearings work and noting that if a defendant is not competent, the defendant will be "committed for rehabilitation").

103 Schehr & French, *supra* note 100 at 1113 ("A defendant's ability to enter a plea knowingly and voluntarily determines a defendant's competence.").

104 *See* Morse, *supra* note 35 at 895 ("For example, a criminal defendant will not be incompetent to stand trial solely because he or she suffers from a mental disorder. The defendant must additionally not understand the charges against him or not be able to assist counsel. A defendant raising the insanity defense must also not know the nature and quality of his act or the difference between right and wrong. Defendants who cannot satisfy these further criteria are not competent or responsible because they are not rational.").

105 Brady v. United States, 397 U.S. 742, 748 (1970) (requiring a judge to verify that waivers of constitutional rights when a defendant enters into a plea must be knowing and voluntary, "with sufficient awareness of the relevant circumstances and likely consequences").

106 Boykin v. Alabama, 395 U.S. 238, 242-43 (1969) (holding that the defendant must be aware of the Fifth and Sixth Amendment rights that he is waiving by entering into the plea, including the right to a trial by jury, the right to confront one's witnesses, and the privilege against self-incrimination)

107 18 U.S.C § 17 (codifying *M'Naghten*, a two-prong approach discussed in Part II, *supra*). Arguably, the mental competency approach for plea bargaining is insufficient to "properly discern the true nature of human comprehension and decision-making, thereby throwing into question whether

There is no blanket constitutional prohibition on NGRI / GBMI plea bargains because federal and state courts permit defendants to enter into NGRI / GBMI pleas. No court, thus far, has implied any absolute due process ban on NGRI / GBMI pleas. Thus, since they are facially constitutional, the question arises whether there are any other constitutional or statutory limits for NGRI / GBMI pleas and plea bargains, and if so, whether they contribute to the infrequency of NGRI / GBMI plea bargains.

Courts have implied one important constitutional procedural right with NGRI / GBMI pleas. Like "traditional" guilty pleas, NGRI / GBMI pleas must also be made knowingly, intelligently, and voluntarily.[108] For example, in *DuPerry v. Kirk*, Adam DuPerry brought a petition for a writ of habeas corpus challenging his continued confinement.[109] DuPerry argued that when he entered into his NGRI plea for felony arson, his waiver of constitutional rights was not knowing and voluntary because he did not know that pleading NGRI included the possibility of involuntary confinement for up to the maximum sentence of the charges, or even indefinitely.[110] The United States District Court for the District of Connecticut held that NGRI pleas operate in the same way that

and to what extent a criminal defendant is culpable and fully cognizant of the gravity of the situation confronting him." Schehr & French, *supra* note 100 at 1116-17.

108 The Supreme Court has not explicitly ruled on this, but the *Brady* and *Boykin* principles are also implicated in NGRI / GBMI plea bargaining. *Brady*, 397 U.S. at 758 (requiring a plea to be made "voluntarily and intelligently"); *Boykin*, 395 U.S. at 242-43 (requiring the defendant to understand the Fifth and Sixth Amendment rights that he gives up when he enters into a plea); *see* DuPerry v. Kirk, 563 F. Supp. 2d 370, 383-85 (D. Conn. 2008) (finding defendant's waiver of fundamental constitutional rights when entering into a NGRI plea was not knowing and voluntary).

109 DuPerry was under the jurisdiction of the Connecticut Department of Mental Health and Addiction Services' Psychiatric Security Review Board (PSRB). The PSRB is "charged with the custody of persons found not guilty by reason of mental disease or defect." This case did not technically involve a plea bargain but rather an agreed-to non-adversarial proceeding in the form of a bench trial. Per the agreement with the prosecutor, "once DuPerry waived his right to a jury trial, [the prosecutor] would present the state's evidence of the *prima facie* case against DuPerry, and [defense counsel] would put forward his psychiatric evidence supporting a NGRI defense", and "[n]either side would contest the other's evidence." *DuPerry*, 563 F. Supp. 2d at 370-72.

110 If DuPerry had pleaded guilty, he would have faced only twelve years of confinement, but since he pleaded NGRI, he potentially faced more severe consequences. *Id.* at 388. It is constitutionally permissible to involuntarily confine an insane defendant for longer than the sentence would have been, as long as the defendant entered into the plea agreement knowingly and voluntarily. *Id.*

"traditional" guilty pleas do, including a waiver of constitutional rights and the knowledge of the consequences of involuntary confinement.[111] With NGRI / GBMI pleas, courts must tell defendants the possible implications of these pleas, including that one may be committed to a mental health institution for longer than their possible prison sentence if they had pleaded guilty.[112] Since DuPerry was unaware of these consequences, his NGRI plea was constitutionally invalid.[113] Accordingly, NGRI / GBMI pleas, like "traditional" guilty pleas, must be made knowingly, intelligently, and voluntarily to be constitutionally valid.[114]

Similarly, in *People v. McIntyre*, McIntyre argued that he "was improperly advised of the consequences of his [NGRI] plea", and "the extended commitment order violated the terms of his [NGRI] plea bargain."[115] McIntyre stabbed another patient with a steak knife while committed to the state hospital for an unrelated NGRI plea of voluntary manslaughter.[116] McIntyre entered into a NGRI plea bargain, pleading to charges of assault with a deadly weapon and causing great bodily injury.[117] During the proceedings, the district attorney advised McIntyre verbally and in writing of the maximum consequences of the plea, which were seven years (four

111 *Id.*; People v. McIntyre, 257 Cal. Rptr. 271, 274 (Ct. App. 1989), *modified* (May 2, 1989); *see also* Greenwald, *supra* note 73 at 583 ("In virtually every state, a successful insanity defense does not bring freedom with it but triggers potentially indeterminate detention.").

112 *See Jones*, 463 U.S. at 368-70 (holding the Due Process Clause permitted the government to confine the defendant "to a mental institution until . . . he regained his sanity or was no longer a danger to himself or society"). One major implication of these NGRI / GBMI pleas is that the defendant may be indefinitely committed to a mental health institution. Due process requires the defendant to be informed of and understand these consequences, and, if the defendant *does* understand these consequences, the Constitution permits indefinite confinement of the defendant. *DuPerry*, 563 F. Supp. 2d at 388; *McIntyre*, 257 Cal. Rptr. at 273-74.

113 *DuPerry*, 563 F. Supp. 2d at 388 (finding the NGRI plea was not knowing and voluntary, and thus invalid).

114 As long as the NGRI / GBMI plea was knowing and voluntary, with an understanding of the potential consequences, a NGRI / GBMI plea can impose a term of involuntary confinement for longer than the sentence would have been, and possibly indefinitely. Brady v. United States, 397 U.S. 742, 748 (1970); Boykin v. Alabama, 395 U.S. 238, 242-43 (1969). The defendant must be aware of the potential of indefinite commitment. *DuPerry*, 563 F. Supp. 2d at 388; *see also* McClelland, *supra* note 32 (explaining insane defendants can be committed "in perpetuity.").

115 *McIntyre*, 257 Cal. Rptr. at 273.

116 *Id.* at 272.

117 *Id.*

years for the assault charge and three years for the enhancement).[118] McIntyre was "committed to Patton State Hospital until such time as his sanity has been restored . . . period not to exceed the maximum period of time that he could have been imprisoned."[119] After McIntyre served seven years in the state mental hospital, the prosecutor petitioned the trial court to extend the patient's commitment.[120] McIntyre's motion to dismiss was denied and the petition to extend commitment was granted.[121]

On appeal, the California Court of Appeal reversed the judgment and ordered McIntyre's release, finding that McIntyre was misinformed about the maximum consequences of the plea.[122] "[T]he prosecutor and the [trial] court told him the maximum confinement period was seven years," and did not say anything about the possibility that the defendant, if found insane, could be committed for life.[123] This was a prejudicial error and violated the constitutional requirement that the defendant must know of the direct consequences of the plea, including the possible maximum sentence (here, lifetime commitment).[124] As prior California case law had

118 *Id.* at 272-73. The criminal sentence was memorialized in the signed plea agreement and verbally at the hearing. *Id.* at 272. Further, the plea "agreement included a chart depicting the 'maximum total punishment' [McIntyre] could receive as seven years. (Four years for the assault charge and three years for the enhancement.)" *Id.* at 273.

119 *Id.* (internal quotation marks omitted).

120 *Id.*

121 *Id.*

122 *Id.* at 277-78. The court also held that the petition and commitment order did not violate the terms of the NGRI plea bargain. *Id.* at 274. Using principles of contract law, the court reasoned that the NGRI plea bargain did not contain any "unkept promise" that the defendant was "entitled to specific performance of." *Id.* McIntyre's plea bargain only stated that "appellant would concede his guilt and the district attorney would concede appellant's insanity." *Id.* The court held McIntyre's plea bargain did not contain any sentence bargain, and the district attorney's statements to McIntyre about the maximum term of the offense were neither "promises nor unkept concessions," but simply "were an accurate statement of the maximum punishment." *Id.* In other words, extending the commitment of the defendant beyond the sentence set forth in the NGRI plea bargain and the commitment order itself did not violate the terms of either the NGRI / GBMI plea agreement because it was not a promise of a specific sentence. *Id.*

123 *Id.* This is similar to the holding in *DuPerry*. 563 F. Supp. 2d at 388-89 (explaining that "the NGRI plea must be vacated" because "DuPerry was unaware that pleading NGRI opened him to the possibility of involuntary confinement for up to the maximum term of the act charged—twenty-five years—or even indefinitely").

124 *McIntyre*, 257 Cal. Rptr. at 277. The court noted that "any defendant who pleads not guilty by reason of insanity be advised that he thereby runs a risk of a possible lifetime commitment." *Id.* at 276 (citing *In re* Yurko, 10 Cal. 3d 857, 519 P.2d 561 (1974)).

established, the purpose of advising the defendant of the indeterminate consequences is to ensure fundamental fairness and protect our "basic notions of due process."[125] It is fair if the defendant pleads NGRI, knowledgeable about the possibility of risked liberty.[126] But, McIntyre's NGRI plea was not knowing and voluntary, and thus it was unfair.[127]

The *Brady* and *Boykin* requirements of a knowing and voluntary plea appears to be the only constitutional limits on NGRI / GBMI plea bargains.[128] For an NGRI / GBMI plea bargain to be knowing and voluntary, due process requires that the defendant is aware of the possible consequences of the NGRI / GBMI plea bargain, including the possibility that the defendant may be involuntarily committed to a mental hospital for the rest of their life, as exemplified by *DuPerry* and *McIntyre*.[129] The only statutory limitation on such pleas is that the defendant must meet the state's

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125 *Id.* at 276-77 (reviewing prior California case law and finding that it applied retroactively to McIntyre's NGRI plea).

126 However, it is unfair if the defendant pleads NGRI and does not know of this possibility. *Id.* at 277 (finding prejudicial error to not advise the defendant of the possibility of indefinite commitment by pleading NGRI).

127 *Id.* at 277-78. The California Court of Appeal also evaluated McIntyre's claim that, in seeking to extend his commitment, the state violated the contractual terms of his plea bargain. *Id.* at 273-74. The court rejected this claim, but its reasoning on this point is tenuous. The prosecutor, the court, and the plea agreement all presented the maximum sentence as seven years and did not say anything about the possibility of indefinite commitment. This is an unkept promise under the principles of contract law. McIntyre should have also been released on those grounds, not just that he was unaware of the possibility of indefinite commitment. If the accepted plea agreement states it, all parties, including the court, must abide by it. However, because the Court of Appeal construed this as a "statement" of the consequences, and not a sentence bargain, there was no promise or unkept concession. *Id.* at 274.

128 Brady v. United States, 397 U.S. 742, 748 (1970) (holding a defendant's guilty plea is not invalid under the Fifth Amendment if it is knowing, voluntary, and intelligent); Boykin v. Alabama, 395 U.S. 238, 243-44 (1969) (holding that it was reversible error for the trial judge to enter the "guilty plea without an affirmative showing that" the plea was knowing and voluntary and the defendant understood the waiver of his constitutional rights).

129 *DuPerry*, , 563 F. Supp. 2d at 388-89 (finding that a NGRI plea must be entered into knowing and voluntary, "with a complete understanding of the potential consequences"); *McIntyre*, 257 Cal. Rptr. at 277 (holding "the court's failure to advise [defendant] he could be committed to a state hospital for life constituted prejudicial error"); *see also* People v. Harris, No. A112183, 2007 WL 1252779, at *1 (Cal. Ct. App. May 1, 2007) (finding that the revocation of defendant's outpatient status and return to an inpatient program based on defendant's mental status and relapses of cocaine abuse did not violate the terms of an NGRI plea bargain).

codification of its affirmative insanity defense, which, as discussed, can vary by state.[130]

In sum, there are few constitutional and statutory limitations on NGRI / GBMI plea bargains. So, why do we not see more NGRI / GBMI plea bargains?

### *B. Practical Limits*

On its face, it seems like a great bargain: the defendant avoids time in prison and instead goes to a mental hospital where he receives treatment.[131] Society recognizes that they are not morally culpable and blameworthy in the same way that a "traditional" criminal defendant may be.[132] Those with serious mental illnesses lack moral capacity, and society recognizes the need to treat them accordingly by offering them treatment instead of a jail sentence.[133]

But, NGRI / GBMI plea bargains impose a risk that the defendant will be committed to a mental health institution for longer than the maximum criminal sentence, including potentially indefinitely.[134] Although getting mental health treatment is important, defendants do not want to risk this

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130 The Supreme Court held in *Kahler* that each state is free to create its own codification of the insanity defense. Kahler v. Kansas, 140 S. Ct. 1024, 1029 (2020). Therefore, there is no blanket prohibition on NGRI / GBMI plea bargains unless the state chooses to eliminate them.

131 However, some have argued that this extended commitment to mental health facilities punishes people for having a mental illness. The idea is supposed to be that someone is involuntary committed only if they're getting treatment, and only if the treatment is likely to restore sanity, but according to Michael Bien, a lawyer who sued the California prison system on behalf of mentally ill prisoners, this system ends up punishing people for their status of having a mental illness. McClelland, *supra* note 32.

132 *See* Morse, *supra* note 29 at 783 (discussing "the moral basis of the insanity defense").

133 *See, e.g.*, Greenwald, *supra* note 73 at 583-85 (discussing how "the insanity defense relieves the offending actor of criminal responsibility", but instead of freedom, "triggers potentially indeterminate detention" through treatment); McClelland, *supra* note 32 ("In almost all states, N.G.R.I. means automatic commitment to a psychiatric facility.").

134 *See DuPerry,* 563 F. Supp. 2d at 388 ("The consequences DuPerry faced by pleading NGRI were as severe as pleading guilty, and as it turns out, have been more severe. If DuPerry had decided to plead guilty, as part of his plea bargain with the state he would have faced only a twelve-year period of confinement, yet his NGRI plea has subjected him to confinement for the past twenty years."); *McIntyre*, 257 Cal. Rptr. at 276 (discussing the possibility that "a successful assertion of the [NGRI] plea could result in an indefinite commitment in a state hospital for a 90–day minimum and a lifetime maximum."). *See also* Greenwald, *supra* note 73 at 583 ("[A] successful insanity defense does not bring freedom with it but triggers potentially indeterminate detention.").

outcome.[135] For many defendants, a few years in prison seems like a better deal than the possibility of lifetime commitment. Typically, plea bargains are beneficial for reducing the risks of trial, but NGRI / GBMI plea bargains inherently add risk by keeping the door open for involuntary lifetime commitment. Therefore, it feels like a calculated gamble with the defendant's liberty at the end of the day and one that many defendants may not want to risk.[136]

Furthermore, we do not see NGRI / GBMI plea bargains because a substantial percentage of insane defendants are not competent to enter into a plea in the first place. As discussed, the judge must do a competency evaluation of the defendant before the defendant enters a plea or stands for trial. If an insane defendant is not competent to stand trial or enter into a plea, the trial judge must grant a continuance until the defendant is competent.[137] A number of insane defendants are likely incompetent to enter into a plea or stand trial.[138] Presumably, if you can show a long-term

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135 *See* Wendzel, *supra* note 64 at 394 (arguing that "[d]espite the lack of scientific support" for indefinite confinement, the Supreme Court has upheld the indefinite commitment of NGRI individuals in psychiatric institutions); James Ellis, *The Consequences of The Insanity Defense: Proposals to Reform Post-Acquittal Commitment Laws*, 35 CATH. U. L. REV. 961, 981 n.91 (1986) ("The possibility of prolonged confinement in excess of the maximum sentence obviously will reduce the desirability of plea bargaining for defendants in insanity defense cases."). Additionally, mental health institutions arguably do not give patients substantive mental health treatment. Many argue that historically, these institutions are prison-like and do not help patients who need long-term treatment. *See infra* note 157 and accompanying text.

136 *See, e.g.*, Morse, *supra* note 35 at 932 (arguing few defendants would want to raise the insanity defense because there is no effective treatment and thus the defendant would face lifetime commitment in a mental health hospital); McClelland, *supra* note 32 (exploring NGRI pleas through the viewpoint of an insane defendant committed for over two decades in a mental hospital in New York, including his admission that he should not have taken the plea).

137 *See* Schehr & French, supra note 100, at 1113 (outlining the difference "between competency to stand trial and competency to plead guilty"); McClelland, *supra* note 32 ("A defendant may be found incompetent to stand trial and committed for rehabilitation if she isn't stable enough or intellectually capable of participating in the proceedings.")

138 *See* Victoria Churchville, *Judge Rejects Guilty Plea, Urges Insanity Defense*, WASH. POST (Mar. 24, 1989), https://www.washingtonpost.com/archive/local/1989/03/24/judge-rejects-guilty-plea-urges-insanity-defense/7e230cdc-a89e-4ad2-96c2-2c39c9225690/ [https://perma.cc/88TM-ZFHG] (considering an example where the judge rejected a defendant's guilty plea and urged him to use the insanity defense); Morse, *supra* note 35 at 910-14 (describing how the competency proceedings work and how, in most cases, the judge will simply "rubberstamp the evaluator's conclusion that the defendant is incompetent"). *But see* Ellis, *supra* note 135 at 970 (arguing that "a defendant's mental state at the time of the crime may be inadequate as a description of his [or her] mental state" at his or her competency hearing).

insanity defense and plausibly enter into an NGRI / GBMI plea bargain, it can be hard to convince the judge that you have the capacity to enter into the plea in the first place.[139] Even if the defendant and the prosecutor agree on an NGRI / GBMI plea bargain, the judge does not necessarily have to accept the plea bargain if the judge does not find the defendant competent.[140]

Accordingly, there is an argument that there is a disparity as to which insane defendants can take advantage of the NGRI / GBMI plea. Some insane defendants may be able to take advantage of NGRI / GBMI pleas, such as if the defendant has a severe psychotic disorder (for example, schizophrenia or bipolar disorder), but on their medications, they are competent to enter into the NGRI / GBMI plea.[141] However, for those with a more severe psychotic disorder or disability that is less treatable, they may not be judged competent to take advantage of the NGRI / GBMI plea.[142] Certain defendants may not be competent enough to stand trial or plead NGRI / GBMI in the first place, regardless of whether the prosecutor would agree to a plea bargain.[143]

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139 *See* Wendzel, *supra* note 64 at 395 (discussing how defendants are incompetent to stand trial in the first place "if they are not stable enough to participate in the proceedings"); Churchville, *supra* note 138.

140 *But see* Morse, *supra* note 35 at 911 n.94 (noting that the judge typically will go along with the conclusion of incompetency, including agreeing with the evaluator's recommendation in ninety-two percent of cases).

141 *Id.* at 913-14 (describing how certain psychotic disorders are more treatable and if the defendant "responds well to . . . medication and regains reasonable cognitive control," the defendant may be adjudged competent to stand trial, with the help of additional educational interventions).

142 *See id.* at 913 ("Developmental disability itself cannot be treated, but it is possible through educational techniques to teach a defendant some of the communication or other cognitive skills, such as an understanding of the criminal process, necessary to restore trial competence. If such interventions are provided soon and with reasonable intensity, the treating personnel can discover in a matter of months and perhaps only weeks if the defendant is capable of learning the necessary skills."); *see also* Debra A. Pinals, *Where Two Roads Meet: Restoration of Competence to Stand Trial from a Clinical Perspective*, 31 NEW ENG. J. CRIM. & CIVIL CONFINEMENT 81, 104 (2005) (arguing defendants with an intellectual disability are less likely to attain competence compared to those with a mental illness).

143 *See, e.g.*, Ellis, *supra* note 135, at 970 (explaining how the substantial length of time between the commission of the offense and trial can impact the defendant's competency and mental illness); Henry F. Fradella, *From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post-*Clark *Era*, 18 U. FLA. J.L. & PUB. POL'Y 7, 34 n.166 (2007) ("It should be noted that empirical research has shown that the abolition of the insanity defense resulted in a 'statistically significant increase in the number of defendants found permanently incompetent to stand trial.'")

One would presume that NGRI / GBMI plea bargains would be more prevalent with the expansion of plea bargains. However, this may not be the case. There is little data on the insanity defense and NGRI / GBMI plea bargains. Although most criminal cases are pleas, NGRI / GBMI plea bargains probably are a small percentage.

These practical limitations hindering NGRI / GBMI plea bargains are not aided by the little institutional support for defendants and defense counsel. The insanity defense is practically hard to meet and a number of states have limited or abolished the insanity defense.[144] Defendants may not meet the requisite burden of proof and thus cannot take advantage of the NGRI / GBMI plea. A lack of resources also exacerbates this problem. Most defendants are represented by public defenders who are overworked and underpaid.[145] Accordingly, many public defenders stick to a "meet 'em and greet 'em and plead 'em" strategy, where defense counsel meets with the defendant for just a few minutes before the defendant appears in front of a judge and pleads.[146] Defendants are not having contact with and

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(citing Michael L. Perlin, *"The Borderline Which Separated You From Me": The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375, 1423 n.316 (1997)); Jamie Stengle, *Why insanity cases are so hard to win*, BUSINESS INSIDER (Feb. 25, 2015, 8:40 PM), https://www.businessinsider.com/why-insanity-cases-are-so-hard-to-win-2015-2 [https://perma.cc/5R8W-DH8L] (discussing how difficult it is to win when arguing an insanity defense).

144 *See, e.g.*, Fradella, *supra* note 143, at 25, 28 (explaining how "four states . . . abolished the insanity defense altogether" after *Hinckley*); Candice Madsen, *Law professors explain why insanity defense is difficult to prove*, KSL.COM (Nov. 28, 2010, 5:47 PM), https://www.ksl.com/article/13443510/law-professors-explain-why-insanity-defense-is-difficult-to-prove [https://perma.cc/CE4R-UMAB] (explaining how it is hard to prove insanity when using the insanity defense); Stengle, *supra* note 143 (describing the difficulties associated with winning an insanity defense).

145 *See, e.g.*, Phil McCausland, *Public defenders nationwide say they're overworked and underfunded*, NBC NEWS (Dec. 11, 2017, 5:22 AM, updated 5:55 AM), https://www.nbcnews.com/news/us-news/public-defenders-nationwide-say-they-re-overworked-underfunded-n828111 [https://perma.cc/QX4R-33XS] (describing the public defender system as understaffed and underfunded in states across the country); Yoffe, *supra* note 19 (finding "[a]bout 80 percent of defendants are eligible for court-appointed attorneys . . . who don't have the time or resources to bring many . . . cases to trial").

146 Yoffe, *supra* note 19; Lisa Kern Griffin, *State Incentives, Plea Bargaining Regulation, and the Failed Market for Indigent Defense*, 80 LAW & CONTEMP. PROBS. 83, 95 (2017) (explaining how defendants may "have a five-minute meeting with a defense lawyer before entering a guilty plea and facing substantial penalties," and thus "have insufficient information to make rational choice[s]."); *see also* McCausland, *supra* note 145 ("When the public defender has hundreds of cases assigned to them, there's no way they can put the time and the effort into what's required.").

building trust with their attorneys, to the point where defense counsel may not know anything about the defendant and his mental capacity, and whether an insanity plea bargain may work.[147] For many defendants, the insanity defense is infeasible.[148]

These structural and functional limitations are likely driving the infrequency of NGRI / GBMI plea bargains. There is an inherent tension with NBRI / GBMI pleas: "balancing individual liberty, public safety, and our belief that individuals with mental health conditions deserve treatment."[149] We want mentally ill defendants to get treatment, which happens when the defendant pleads NGRI / GBMI. However, NGRI / GBMI pleas and plea bargains can lead defendants to be indefinitely committed to a mental health institution.[150] Additionally, the NGRI / GBMI standard can be difficult to meet, since judges may be reluctant to find insane defendants competent to stand trial or enter into the plea in the first place.[151] Even if the defendant and the prosecutor agree to an NGRI / GBMI plea bargain, the judge may not accept it if the judge finds that the defendant is incompetent to stand trial or enter into the plea knowingly and voluntarily.[152] Finally, these structural and functional limitations are

147 *See, e.g.*, McCausland, *supra* note 145 ("The lack of resources means they don't have the time to build proper defenses, and they're sometimes forced to leave charged people in jail for long periods of time until they can address a particular case.").

148 *See, e.g.*, Henry Weihofen, *Eliminating the Battle of Experts in Criminal Insanity Cases*, 48 MICH. L. REV. 961, 967 (1950) (discussing how most juries will choose to believe a hospital report's conclusions as to insanity over an expert witness hired by either the defense counsel or prosecutor); Madsen, *supra* note 144 (explaining how the insanity defense is rarely used and not very successful).

149 *See* Wendzel, *supra* note 64, at 391 (arguing the insanity defense entwines individual liberty and public safety with the idea that "individuals with mental health conditions deserve treatment").

150 DuPerry v. Kirk, 563 F. Supp. 2d 370, 388 (D. Conn. 2008) (providing one example of a defendant who was unaware that "pleading NGRI opened up the possibility of involuntary [indefinite] confinement"); People v. McIntyre, 257 Cal. Rptr. 271, 274 (Ct. App. 1989), *modified* (May 2, 1989) (holding that the trial court's failure to advise the defendant of the possibility of involuntary commitment for life constituted prejudicial error).

151 *See, e.g.*, Wendzel, *supra* note 64, at 395 (discussing how defendants may not be competent to stand trial in the first place); Morse, *supra* note 35, at 911 ("[I]n most cases, the judge will simply rubberstamp the evaluator's conclusion that the defendant is incompetent."); McClelland, *supra* note 32 (describing how the competency evaluation is subjective and "doctors are more likely to find minorities incompetent to stand trial").

152 *See, e.g.*, Schehr & French, *supra* note 100, at 1181 (arguing that, with a sparse case file, it is unlikely that a judge could accurately assess a defendant's mental capacity and neurophenomenological character); Morse, *supra* note 35, at 911 (discussing how judges and

exacerbated by little institutional support for defense counsel and defendants. The insanity defense statutorily is difficult to meet, and defense counsel generally does not spend much time with their clients before getting them to plead, offering little opportunity to assess the defendant's mental health and whether an NGRI / GBMI plea is appropriate.[153] Although NGRI / GBMI pleas have very few constitutional and statutory limitations, the structural and functional limitations restrict the number of NGRI / GBMI pleas.

Should more defendants enter into such plea bargains? This is not an easy question, as one can see the tension between the value in ensuring those who need treatment are able to get it with the cost of the defendant's liberty and freedom interests.[154] We care about public safety and ensuring those who need treatment get it—but at the same time, we care about individual liberty and freedom. Often, prisons lack mental health facilities, and over half of the people with a history of mental illness do not receive mental health treatment while incarcerated.[155] Incarcerated persons with mental illness do not always have access to mental health treatment, including screening, frequent access to providers, and access to medications and programs that support recovery.[156]

However, inpatient mental health hospitals may not be a better alternative as they are infamously ineffective and historically seen as

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attorneys must raise the issue of incompetence at any point during the proceedings and judges will typically go along with the recommendation of incompetency).

153 *See, e.g.*, McCausland, *supra* note 145 (discussing how public defenders offices have a lack of resources and, as a result, often cannot prepare effective and proper defenses); Richard J. Bonnie, et al., *Decision-Making in Criminal Defense: An Empirical Study of Insanity Pleas and the Impact of Doubted Client Competence*, 87 J. CRIM. L. & CRIMINOLOGY 48, 58 (1996) (performing an empirical study on decision-making with insanity defense cases and finding little client involvement).

154 *See* Wendzel, *supra* note 64, at 391 (arguing the insanity defense has long been in a balancing act between "individual liberty, public safety and our idea that individuals with mental health conditions deserve treatment."); McClelland, *supra* note 32 (showing the reality of the tension between a mother and her son, who pleaded NGRI and now, two decades later, regrets taking the plea).

155 NAMI, *Mental Health Treatment While Incarcerated*, https://www.nami.org/Advocacy/Policy-Priorities/Improving-Health/Mental-Health-Treatment-While-Incarcerated [https://perma.cc/Q29Z-PX82] (last visited Apr. 9, 2022) (providing facts surrounding mental illness and incarcerated persons).

156 *Id.*

"inhumane."[157] Studies and investigations found patients were subject to "dirty wards, undue use of force, and a lack of respect bordering on rudeness."[158] Furthermore, there is a shortage of mental health hospitals and treatment options, leading to a mental health crisis where those suffering from serious psychological problems are unable to get treatment due to a lack of funding and options.[159] The idea that there is this "great treatment waiting" for defendants at mental health hospitals is a farce; the reality is that mental health facilities vary widely and a large number of mentally ill people cannot get treatment.[160]

Moreover, similar to prisons, inpatient mental health hospitals implicate liberty and freedom concerns. Incarcerating people for any period of time, especially extended periods, infringes on the person's liberty interests. With NGRI / GBMI pleas and plea bargains, the defendant can be involuntarily committed in the mental health institution for longer than the original

157 James Meikle, *Mental health services 'often inhumane'*, THE GUARDIAN (Nov. 20, 2011, 7:10 PM), https://www.theguardian.com/society/2011/nov/21/mental-health-services-inhumane-report [https://perma.cc/N5ZK-P2EP] (reporting that mental health hospitals have a lot of problems, including people who experience mental health emergencies may be unable to access help at all).

158 *Id.*

159 *Id.*; Morgan C. Shields, et al., *Patient Safety In Inpatient Psychiatry: A Remaining Frontier For Health Policy*, 37 HEALTH AFFAIRS 1853, 1853 (Nov. 2018), https://www.healthaffairs.org/doi/epdf/10.1377/hlthaff.2018.0718 [https://perma.cc/4NE7-9CZ9] (calling attention to patient harm in inpatient psychiatric settings); Samantha Raphelson, *How The Loss Of U.S. Psychiatric Hospitals Led To A Mental Health Crisis*, NPR (Nov. 30, 2017, 1:15 PM), https://www.npr.org/2017/11/30/567477160/how-the-loss-of-u-s-psychiatric-hospitals-led-to-a-mental-health-crisis [https://perma.cc/4M5P-F8PU] (discussing the lack of treatment options available); Christie Thompson, *When Going to the Hospital Is Just as Bad as Jail*, MARSHALL PROJECT (Nov. 8, 2020), https://www.themarshallproject.org/2020/11/08/when-going-to-the-hospital-is-just-as-bad-as-jail [https://perma.cc/BJ4M-E3XM] (finding that mentally ill black Americans are forced into traumatic emergency room stays, which are arguably just as traumatizing as being arrested, and did not connect them with any follow-up treatment); Liz Kowalczyk, *Families trusted this hospital chain to care for their relatives. It systematically failed them*, THE BOSTON GLOBE (June 10, 2017, 7:11 PM), https://www.bostonglobe.com/metro/2017/06/10/arbour/AcXKAWbi6WLj8bwGBS2GFJ/story.html [https://perma.cc/727H-82GY] (exploring the horrific failures of one state psychiatric hospital, including the death of multiple patients).

160 Meikle, *supra* note 157; Christine Herman, *Most Inmates With Mental Illness Still Wait For Decent Care*, HEALTH NEWS: NPR (Feb. 3, 2019, 7:00 AM), https://www.npr.org/sections/health-shots/2019/02/03/690872394/most-inmates-with-mental-illness-still-wait-for-decent-care [https://perma.cc/NND4-4QGB] (looking at different mental health facilities and their inadequacies in providing effective treatment to patients).

sentence—including potentially indefinitely.[161] This should give us great pause. NGRI / GBMI plea bargains concern people's liberty, and we should be aware of anything that seems to infringe on that. Moreover, since this commitment determination is *ex post*, some defendants may not want to "buy into" this system and enter into a negotiation where they have very little bargaining power with a fundamentally unclear outcome.[162] At the end of the day, a NGRI / GBMI plea bargain is a calculated gamble, and not every defendant will want to take that risk.

On balance, it is *not* better for more defendants to enter into these NGRI / GBMI pleas *unless* there are reforms to the system. Although insane defendants should receive necessary mental health treatment, inpatient mental health institutions are ineffective and can cause more harm than good. Moreover, there is a risk of indefinite commitment to a mental health institution and a loss of liberty. Some treatment in these mental health hospitals may be better than no treatment in prison, but the risk of permanent loss of liberty is too great to bear. If NGRI / GBMI pleas help more defendants get the necessary treatment, then they can be beneficial for the individual defendants and society-at-large. However, we must implement reforms to the system to protect defendants and their liberty interests.

### *C. Alternative Methods and Reforms to the System*

As discussed, there is an inherent tension with NGRI / GBI pleas bargains. There is value in ensuring defendants are receiving necessary mental health treatment, but there is a cost to the defendant's liberty with the possibility of indefinite commitment to a mental health institution.[163]

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161 *See e.g.*, McClelland, *supra* note 32 (providing an example of an insane defendant who was involuntarily committed to a mental health hospital for over twenty years).

162 Furthermore, many scholars have noted the increasing power imbalances with the entire plea bargaining system, where prosecutors now have essentially unilateral power. Some scholars have discussed how plea bargaining as an institution has proliferated because of the system serving the interests of power and the power of the various actors who stood to gain from plea bargaining. *See* Fisher, *supra* note 10, at 864-68. Other scholars have called plea bargaining a necessary evil and ultimately concluded that plea bargaining is just inherently part of our criminal legal system. *See* HEUMANN, *supra* note 16, at 153, 157-60.

163 *See* Wendzel, *supra* note 64, at 391 ("Though very few individuals are found not guilty by reason of insanity (NGRI), the insanity defense has long been caught in a contentious balancing act; one

With this calculated gamble and inherent risks, especially with the possibility of indefinite commitment, we need alternative methods and reforms to NGRI / GBMI plea bargaining. Improving mental health institutions to provide for better, more effective treatment is critical to the committed individuals.[164] However, it is not necessarily a solution to protect the defendant's rights when entering into NGRI / GBMI plea bargains.

For the validity of NGRI / GBMI plea bargains, *DuPerry* and *McIntyre* highlight important requirements. Due process requires a knowing and voluntary plea, with knowledge of the direct consequences of the plea. Extending the defendant's commitment beyond the possible maximum sentence for conviction of the offense charged does not violate the terms of either the NGRI / GBMI plea agreement or the defendant's constitutional rights, as long as the defendant is aware of the maximum sentence—the possibility of involuntary lifetime commitment—when he first enters into the NGRI / GBMI plea bargain.[165] Prosecutors and judges must be careful with NGRI / GBMI pleas, ensuring that the agreements explicitly state (and the defendant is aware of) the possibility of indefinite commitment. This must be not only in the plea agreement, but also incorporated into the plea colloquy. That way, it is on the record, the defendant has multiple

that involves balancing individual liberty, public safety, and our belief that individuals with mental health conditions deserve treatment.").

164 *See* McClelland, *supra* note 32 (discussing how different mental health hospitals across the country vary and how many are lacking in effective treatment options); *see also* Georgia Lee Sims, *The Criminalization of Mental Illness: How Theoretical Failures Create Real Problems in the Criminal Justice System*, 62 VAND. L. REV. 1053, 1056 (2009) ("[A]rguing that the U.S. criminal justice system fail[s] to achieve any articulated purpose of punishment when [it] provide[s] inadequate mental health resources to incarcerated persons suffering from mental disorders", and emphasiz[es] a rehabilitative approach that uses insight from the juvenile justice system is the best way to serve all people with mental disorders in the adult criminal justice system"); Amanda Joy Peters & Indira Azizi Lex, *Improving Insanity Aftercare*, 42 MITCHELL HAMLINE L. REV. 564, 567 (2016) (discussing how there are flaws with the insanity aftercare process, including "inadequate support, poor communication between the supervisors and agencies responsible for the acquittee, and lack of continuity between inpatient and outpatient care").

165 *See* DuPerry v. Kirk, 563 F. Supp. 2d 370, 388 (D. Conn. 2008) (depicting an occasion where the defendant did not plead NGRI knowingly and "with a complete understanding of the potential consequences"); *see also* People v. McIntyre, 257 Cal. Rptr. 271, 274 (Ct. App. 1989), *modified* (May 2, 1989) (holding that the defendant knowingly and with a complete understanding of the potential circumstances accepted the plea bargain).

opportunities to understand the consequences, and the judge can address any of the defendant's hesitations.

Furthermore, NGRI / GBMI plea bargains should not include any sentence bargains. With NGRI / GBMI plea bargains, any sentence bargain or promise of a specific sentence is unfair since the defendant can be committed for longer than agreed to, in violation of contract law principles.[166] In other words, NGRI / GBMI plea bargains should only include charge bargains, where the defendant will agree to plead NGRI / GBMI to specific charges. If the parties want to include a sentence bargain, it must incorporate language that the defendant will be committed for a specific period, and after that, the defendant shall be regularly evaluated at certain points to determine if they still require commitment.[167] In other words, there should be no language that the defendant will be committed for a certain number of years without including language of the possibility that the defendant will continue to be committed, and if so, the defendant will have regular evaluations. The defendant must fully understand and agree to the consequences of pleading NGRI / GBMI, including the possibility of lifetime involuntary commitment.

Moreover, we should include guardians *ad litem* in the plea bargaining process for insane defendants. Guardians *ad litem* are often appointed in child custody disputes to provide the court with a neutral third party who can objectively evaluate what arrangements will best address the child's needs and safety.[168] With insane defendants and plea bargaining, a

166 *See supra* note 127 and accompanying text. While I agree with the outcome in *People v. McIntyre*, I believe the California Court of Appeal's reasoning is tenuous. The agreement stated a maximum term of seven years, and the district attorney confirmed this. *McIntyre*, 257 Cal. Rptr. at 273. However, the Court of Appeal wrongly determined that there was no unkept promise and the petition to extend commitment did not violate the plea agreement. *Id.* at 274.

167 For example, the defendant could have regular evaluations every six months or once per year to determine if they are sane and can be released.

168 *See* Codie Dukes, *Your Client or Opposing Party is Incompetent: Appointment of Guardian Ad Litem for Incompetent Litigant in California*, TYSON & MENDES (Apr. 27, 2018), https://www.tysonmendes.com/client-opposing-party-incompetent-appointment-guardian-ad-litem-incompetent-litigant-california/ [https://perma.cc/PL77-QZEC] (discussing the use of guardians *ad litem* in proceedings in California); Caroline Kunitake, *Guardian Ad Litems Are A Better Choice To Help The Mentally Ill Than Public Defenders*, HONOLULU CIVIL BEAT (Apr. 26, 2021), https://www.civilbeat.org/2021/04/guardian-ad-litems-are-a-better-choice-to-help-the-mentally-ill-than-public-defenders/ [https://perma.cc/7J9D-VDFP] (giving a personal account on how a guardian *ad litem* would have helped her incompetent uncle).

guardian *ad litem* can be an appointed neutral person who ensures the defendant's best interests are protected and the defendant understands the process and the potential consequences.[169] Furthermore, the guardian *ad litem* can help defendants and the courts make an informed decision, such as presenting evidence of the defendant's mental illness or advocating on the defendant's behalf.[170] As defense attorneys do not always have the time, training, or resources to invest in an insane client, a guardian *ad litem* can protect the defendant's due process rights.[171]

Furthermore, when the defendant pleads NGRI / GBMI, it is impossible to make an *ex-ante* determination of what the defendant's mental state will be in years from now when the defendant is considered for release from the mental hospital. However, ensuring that the release decision is made with the input of both the prosecutor and the defense attorney, in combination with the mental health experts (and possibly a guardian *ad litem*), will provide a system for protecting both society's interest and the defendant's.[172] There is a loss of liberty at stake here, and we must ensure the trial judge will be able to weigh all of the evidence and appropriately balance the protection of both the defendant's and society's rights.[173] Additionally, including automatic regular evaluations while the defendant is committed, providing the defendant with full due process protections, and continuing supervision by the trial court for the treatment and release of an insane defendant is critical in protecting the defendant's rights.[174]

Although sentence bargains should not be allowed for NGRI / GBMI plea bargains,[175] if a defendant's liberty interests are more important than providing mental health treatment, an alternative option is time-limited

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169 *See supra* note 168 and accompanying text.

170 *See supra* note 168 and accompanying text.

171 *See supra* note 168 and accompanying text.

172 Edward Zorinsky, *The Insanity Defense: Recommendations for Reform*, 4 DET. C.L. REV. 1525, 1531 (1983) (proposing reforms to the insanity defense, including procedures for maintaining jurisdiction and supervision of an insane defendant by the trial court).

173 *Id.* at 1532 (attempting to propose fair compromises to reform the insanity defense).

174 *See* Morse, *supra* note 35, at 904-05 (proposing that "defendant[s] should have full due process protections and the right to periodic review").

175 *See supra* notes 127, 166 and accompanying text. Sentence bargains are unfair to defendants based on the principles of contract law.

treatment.[176] Like incarceration, where we imprison a defendant for a period of time based on the goals of punishment, here, the insane defendant is involuntarily committed to a mental health hospital for a set period of time, but for purposes of treatment.[177] Yet, when an insane defendant has completed their time in involuntary commitment but is not healed, it raises questions about public safety and whether the defendant is a continuing danger to society.[178] If not fully competent, the defendant could commit further crimes. However, many defendants are currently not receiving treatment or the current inpatient treatment options are ineffective. Thus, permitting time-limited treatment could be the first step in reforming the system. For instance, we could impose a set time for involuntary commitment, and provide for an automatic review hearing at the end of the period, where the government has the burden to prove the defendant is still insane and needs treatment.[179]

Another alternative is providing outpatient treatment for insane defendants. Outpatient treatment is more flexible and private than inpatient treatment, allowing for more access to treatment and ensuring quality treatment options for defendants.[180] Moreover, outpatient treatment eliminates the liberty concerns surrounding the indefinite

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176 This may be unlikely, as society cares about public safety, even at the expense of the defendant's liberty interests. *See* Wendzel, *supra* note 64, at 404-05 (discussing how we prioritize public safety concerns when determining release for an insane defendant); *see also* Morse, *supra* note 35, at 961 (arguing for "limited terms of confinement for non-violent insanity acquittees" because they are neither traditionally culpable nor dangerous); *see also* Ellis, *supra* note 135, at 1019 ("If the price for keeping the defense is a system of special commitment that excludes procedural protections in order to insure invariable long-term or permanent confinement, it is not clear whether this is preferable to a system that convicts some individuals who are currently eligible for the defense.").

177 *See* Morse, *supra* note 35, at 961 (arguing for "limited terms of confinement for non-violent insanity acquittees").

178 *See id.* at 904 (acknowledging in these instances, where "the defendant poses a continuing danger to the community," we can use involuntary civil commitment).

179 *See id.* at 904-05, 963 (proposing that defendants should have "full due process protections and the right to frequent [automatic] review", with the burden of persuasion on the government to prove legal insanity); *see also* Wendzel, *supra* note 64, at 402-03 (arguing that once an individual has "reached their maximum penal sentence" and considered for release, the burden of proof for continued confinement should be on the government).

180 *See* Wendzel, *supra* note 64, at 406 ("[T]reatment in traditional community outpatient mental health settings promotes individual autonomy, is more cost-effective, and promotes recovery."). As discussed throughout this Comment, inpatient options are notoriously ineffective.

commitment of a defendant to a mental hospital.[181] With outpatient treatment, they are not incarcerated or involuntarily committed. Instead, the defendant can live a relatively "normal" life, including living at home, obtaining a job, and getting an education or vocational training. Yet, there are concerns with outpatient treatment, including the fact that it is less immersive and entirely voluntary. Defendants may not show up for sessions or take medication on their own, thus leading to incompletion of the necessary treatment and the potential to further commit crimes.[182] Furthermore, if the defendant pleaded NGRI / GBMI to a violent or serious crime, public safety concerns may outweigh the ideals of freedom and release for the insane defendant.[183]

For NGRI / GBMI pleas in general, legislatures must provide for better statutory protections.[184] Insane defendants are particularly vulnerable; thus we must ensure we are protecting their rights and ensuring procedural fairness when entering into plea bargains. Jurisdictions must recodify how the insanity defense works, including providing for automatic evidentiary hearings, expert reports, and psychological testing when a defendant wants to plead to the insanity defense. Implementing these procedural safeguards will ensure that every defendant pleads NGRI / GBMI can equitably do so, as it will alleviate the burden on public defenders who typically do not have the resources or the time to prepare affirmative defenses.[185]

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181 *See id.*; *see also* Ellis, *supra* note 135, at 1010 ("[T]he most appropriate response may be to cause the individual to undergo appropriate therapy on an outpatient basis. Such an individual is not sufficiently dangerous to justify institutionalization.").

182 *See* Harrison, *supra* note 52, at 577 (giving an example of an insane defendant who was non-compliant with his outpatient treatment, causing his mental health to deteriorate and causing him to be aggressive and violent).

183 *See* Wendzel, *supra* note 64, at 391-92 (discussing the various public safety concerns surrounding involuntary commitment).

184 *See, e.g.*, Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1180 & 1203 n.74 (1975) (arguing that "[a] more workable answer [to reform] lies in reforming the guilty-plea system itself"). However, some scholars have argued that some formulations of the insanity defense (such as Kansas's) are unfair to defendants. *See, e.g.*, Morse & Bonnie, *supra* note 90 ("Kansas's alternative promotes injustice and is no substitute for an independent insanity defense."). Some scholars further argue abolition of the insanity defense is unacceptable and there is no adequate alternative for legal insanity. *See, e.g.*, Morse, supra note 35, at 932 ("Abolition of the insanity defense is simply unfair and there is no adequate substitute for it.").

185 This allows public defenders to put their already limited resources towards other investigative tools and other, more complicated cases. We should give public defenders more funding and resources (including better salaries and hiring more public defenders) to provide better quality

A broader question is whether these kinds of pleas are a good idea. From a structural perspective, NGRI / GBMI pleas are beneficial to society, even though they are rarely used compared to "traditional" plea bargaining. Society expects people to behave rationally and does not want to punish those who lack moral responsibility for their actions because they were unable to act rationally at the time.[186] Insane defendants are unable to behave rationally, are less blameworthy, and should not be punished.[187] Furthermore, as a society, we do not let them run free where they can harm others.[188] Rather, we use the power of the state to commit them to mental health institutions where they can receive treatment.[189]

For an individual defendant, NGRI / GBMI plea bargains *may* be a good idea. NGRI / GBMI pleas can help defendants get the necessary mental health treatment in mental health hospitals, even if the treatment is notoriously known as "inhumane."[190] Nevertheless, some treatment can be better than no treatment, for if we imprison insane defendants, there is often a lack of treatment options.[191] Therefore, from a literal sense, the defendant, by entering into an NGRI / GBMI plea, can put the defendant on the road to healing and treatment. If the defendant successfully completes the treatment programs in the mental hospital, whereby the supervisors agree that the defendant is no longer "insane," this affords the defendant an opportunity to re-enter society and hopefully start a productive, successful life.

However, the NGRI / GBMI plea bargain is a risk, and reforms to the system are needed.[192] Defendants are bargaining away their liberty with

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representation and alleviate their prodigious workload. *See, e.g.*, Griffin, *supra* note 146, at 92 (arguing defense lawyers are traditionally underfunded and need more resources to spend more than just a few minutes with clients).

186 *See supra* note 74 and accompanying text.

187 *See supra* note 74 and accompanying text.

188 *See, e.g.*, Wendzel, *supra* note 64, at 410 n.152 (positing that involuntary treatment should be limited to instances where persons pose a serious risk of physical harm to themselves or others).

189 *See* Lally, *supra* note 32 (providing a first-hand account of a mental health professional who worked in a mental health hospital evaluating criminals who were potentially eligible for the insanity defense).

190 *See supra* notes 157-160 and accompanying text.

191 *See* Sims, *supra* note 164, at 1083 (arguing that the abundance of inappropriate punishment schemes and the lack of appropriate treatment suggests the current system is failing these defendants).

192 *See generally* Wendzel, *supra* note 64, at 392-93 (proposing reforms to the insanity defense).

the possibility of involuntary indefinite commitment in a mental health hospital—a determination that is made *ex-post*. A chance of indefinite commitment may not be desirable for every defendant, especially those concerned about their liberty. However, allowing defendants who want to take the risk by agreeing to an NGRI / GBMI plea bargain to make those choices and do it in an informed, knowledgeable manner protects defendants and the integrity of the criminal justice system as a whole.[193]

Moreover, from a sociological perspective, these pleas, even if not a full admission of guilt, can reflect true insight and the start of healing for the defendant. As discussed in Part IIB, *supra*, NGRI / GBMI pleas are not a full admission of guilt because the defendant lacks the requisite moral culpability. Nevertheless, to enter into the NGRI / GBMI plea in the first place, the defendant must be competent enough to stand trial or enter into the plea knowingly and voluntarily.[194] Therefore, the defendant must have enough mental capacity to take responsibility and recognize, *ex-post*, the wrongfulness of his or her actions.[195] While in treatment, the defendant may be able to further gain insight and begin the start of the healing process.[196]

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193 This is a controversial notion, as some have argued that the proliferation of plea bargaining has undermined the integrity of the criminal justice system by getting rid of the constitutional right to a trial. *See* Yoffe, *supra* note 19 ("Plea bargaining has become so coercive that many innocent people feel they have no option but to plead guilty."). However, abiding by *Brady* and ensuring defendants enter into a plea knowingly and voluntarily, with the constitutional protections afforded under *Boykin*, prevents defendants from being coerced into pleading guilty to a crime that they may truly be innocent of. This is important for NGRI / GBMI plea bargains, not just "traditional" guilty pleas. Allowing defendants to knowingly and voluntarily plead NGRI / GBMI and receive the necessary treatment not only helps the defendants personally, but also prevents undue coercion from influencing the criminal justice system as a whole. *See generally* Margaret M. Vaughan, *I Swear That I'm Guilty, So Help Me God: The Oath in Rule 11 Proceedings*, 46 FORDHAM L. REV. 1242, 1243, 1247, 1248 (1978) (exploring how Rule 11 pleas work with respect to putting the defendant under oath); James R. Acker & Sishi Wu, *"I Did It, but . . . I Didn't": When Rejected Affirmative Defenses Produce Wrongful Convictions*, 98 NEB. L. REV. 578, 579 (2020) (examining wrongful convictions that occur after "the erroneous rejection of an affirmative defense", including insanity).

194 *See supra* note 137 and accompanying text.

195 *See* Lally, *supra* note 32 (discussing how this issue of moral responsibility would often be the focus of NGRI evaluations and therapy sessions for insane defendants); McClelland, *supra* note 32 (providing an example of an insane defendant who began to acknowledge the wrongfulness of his actions through treatment at a mental health hospital after pleading NGRI).

196 *See* Lally, *supra* note 32 (giving an example of a man found NGRI, who, while in therapy, was able to develop a sense of moral responsibility for his actions).

At the end of the day, if there is an incompetent defendant who cannot enter an NGRI / GBMI plea, these pleas could be still better than the alternatives. For a defendant who is not competent to enter into the plea, the defendant enters into treatment until such time that the defendant is competent to do so.[197] Society is not just leaving these defendants "running free" on the streets or holding them in prison cells where they receive no treatment and support, but rather putting them into mental hospitals to possibly get the treatment that they need.[198]

Furthermore, there is limited data on insanity pleas, and better data collection is necessary. Likely, states do not keep a running database on which defendants ultimately plead NGRI / GBMI through a plea bargain. In reality, the actual percentage of NGRI / GBMI pleas could be much higher than originally thought. The only time it may be referenced on legal research databases such as LexisNexis or Westlaw is if there is a direct appeal or a collateral review petition, which is extremely rare, considering the common waiver in plea bargaining of the defendant's right to appeal. Of the cases out there, the decisions probably do not provide all of the facts about the case or sentence. Thus, there is limited research on how often NGRI / GBMI plea bargaining occurs. It would be useful to have a 50-state survey on NGRI / GBMI plea bargains or encourage states to actively keep a database on which defendants plead NGRI / GBMI through plea bargains.

## CONCLUSION

The constitutional requirements for "traditional" guilty pleas under *Brady* and *Boykin* apply to NGRI / GBMI plea bargains, including a knowing and voluntary plea with an understanding of the possible consequences of the NGRI / GBMI plea bargain. Defendants must understand the possibility they will be committed to a mental institution until they regain their sanity. The Supreme Court held in *Jones* that involuntary commitment beyond the original sentence does not violate the

197 *See supra* note 137 and accompanying text.

198 *See supra* note 188 and accompanying text. I will note the previous discussion about the ineffectiveness of these mental health hospitals. However, I do believe that some treatment is better than no treatment.

Due Process Clause. However, the Supreme Court held in *Foucha* the continued confinement of someone who has regained their sanity violates the Due Process Clause.

Despite the very few constitutional and statutory limits on NGRI / GBMI pleas and plea bargains, we do not explicitly see NGRI / GBMI pleas very often. Likely, the infrequency of NGRI / GBMI pleas is a result of the structural and functional limitations of the system, including the risk of lifetime involuntary commitment, the defendants are not competent to enter into the plea or stand trial in the first place, and the lack of institutional support. Despite the value of getting mental health treatment, the possibility of being indefinitely committed can deter insane defendants who do not want to risk their liberty.

Most defendants should not agree to these pleas because of the ineffective mental health hospitals and a lack of protections for defendants. NGRI / GBMI pleas pose inherent liberty risks, and defendants should be wary of permanently bargaining away their freedom in an *ex-post* determination. However, if we make systemic changes, then for some defendants, NGRI / GBMI pleas *may* be a good idea to help the defendant get the necessary treatment. Improving mental health hospitals are the first step, but more needs to be done to protect the defendant's constitutional rights and interests. This Comment proposes several options, including ending sentence bargains for NGRI / GBMI pleas, appointing guardians *ad litem* for insane defendants, implementing time-limited commitments or outpatient therapy, and reforming release decisions. However, it remains to be seen if jurisdictions will take the initiative.