Punishing the Insane: The Verdict of Guilty but Mentally Ill

John D. Melville, MD, and David Naimark, MD

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> It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill.—United States Supreme Court[1]

The defense of not guilty by reason of insanity (NGRI) has been a part of English jurisprudence at least since the reign of King Aethelred in the 10th century and today is an important aspect of American law. Some form of insanity defense appears to be an element of due process. Those states that have successfully abolished the insanity defense provide for introduction of psychiatric testimony mitigating the *mens rea* element of a crime. After 10 centuries, the defense is still controversial: the concept that a person could commit an illegal act and "get off easy" offends our public conscience. The fact that NGRI defendants spend longer in confinement than similarly charged and convicted persons[2] does little to assuage this concern.

In response, 14 states have attempted to reduce NGRI verdicts by allowing the alternative verdict of guilty but mentally ill (GBMI). The stated purpose of this verdict is to reduce the number of successful insanity defenses by offering an intermediate verdict between guilty and NGRI.[3] However, several reviews have demonstrated that GBMI has failed to reduce the number of NGRI verdicts.[4,5] In addition, we are concerned that GBMI confuses and deceives jurors by offering an apparently intermediate verdict that may result in punishment more severe than would have resulted from a guilty verdict.

Dr. Melville is a Resident in an Internal Medicine/Pediatrics program, Akron General Medical Center and Children's Hospital Medical Center of Akron, Ohio. Dr. Naimark is Acting Supervising Psychiatrist, Forensic Psychiatry Clinic, San Diego County Courthouse, San Diego, CA. Address correspondence to: David Naimark, Forensic Psychiatry Clinic, San Diego County Courthouse, 220 W. Broadway, Room 1003, San Diego, CA 92101. E-mail: davidnaimark@hotmail.com

GBMI Confuses Jurors

Elwork *et al.*[6] report that jurors typically comprehend 50 percent of the jury instructions on insanity. GBMI may exacerbate this problem by adding a further subtle distinction to the degree of mental illness.

It is instructive to examine definitions in Alaska's statutes as an illustrative example of potential confusion. Regarding insanity: "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. . ."[7] Regarding GBMI: "[T]he defendant lacked, as a result of a mental disease or defect, the substantial capacity either to appreciate the wrongfulness of that conduct or to conform that conduct to the requirements of law."[8]

These definitions require the jury to make a very fine distinction. Jurors, lacking formal legal training, are likely to have their own definitions of "substantial capacity," "nature," "quality," and "wrongfulness." Alaska is one of the few states that provide a descriptive statute regarding GBMI. Some states define GBMI as "not insane but. . .suffering from a mental illness"[9] or similar language. The jury is left to its own devices to decide what constitutes a mental illness and which mental illnesses might merit special treatment.

This latitude suggests juries may use GBMI as a shortcut verdict, thereby avoiding the difficult moral and social issues raised by an insanity defense. This finding is supported by experiments using contrived trials before mock juries. Roberts *et al.*[10] note that GBMI is used by mock juries in cases involving mental illness 2.5 times as often as guilty or NGRI and further note that the rate of GBMI verdicts is unaffected by the severity of the defendant's mental illness. Finkel[11] demonstrated that the presence or ab-

sence of a specific definition of GBMI does not change verdict outcomes.

GBMI Deceives Juries

The most important argument against the GBMI verdict is that it deceives juries. Research[11,12] indicates that juries view GBMI as an intermediate verdict for persons not quite as culpable as guilty, but more culpable than NGRI. This constitutes deception, because the punishment attached is more severe than would be rendered in a simple guilty verdict.

The authors reviewed the statutes governing sentencing of GBMI convicts in the 14 states permitting the verdict. No state requires mitigation of sentence as a result of a verdict of GBMI, and such a verdict does not prevent even the death penalty.[11] Furthermore, each state imposes additional requirements on GBMI convicts, most commonly requiring treatment as a condition of parole. Extra parole conditions are often defended as necessary to protect the public, despite the well-established fact that mentally ill offenders have less recidivism than mentally normal criminals.[5] GBMI does not ensure proper psychiatric treatment, because the courts have required prisons to provide adequate psychiatric treatment to all inmates, GBMI or not.

The GBMI convict must endure additional punishments. In most states, the GBMI convict can be confined to a prison psychiatric ward without a judicial determination of present disability. Psychiatric wards are more restrictive than the general cell block, and there is a stigma attached to inpatient psychiatric treatment both inside and outside prison. GBMI convicts who are committed to the state hospitals often do not receive good-behavior time credits afforded other inmates. Finally, GBMI convicts are often committed civilly at the end of their sentences.

Some readers will no doubt argue that additional treatment is beneficent and therefore not punishment. We do not argue with the important societal duty to care for persons who have mental illness, regardless of whether they have committed crimes, nor do we argue that involuntary commitment is inappropriate in providing treatment. However, when treatment is imposed as part of a criminal proceeding, it becomes an additional condition on a convict's freedom—an additional punishment.

Rather than an intermediate sentence, GBMI represents the worst of both guilty and NGRI outcomes. The GBMI defendant is sentenced as though fully culpable and is sent to prison with the stigma of mental illness. Such defendants are denied a hearing to explore their current mental state (which is guaranteed to NGRI aquittees) and thus may be forced to undergo unnecessary psychiatric treatment. If the defendant is awarded parole, it is on stricter terms than the guilty convict. At any point during or after parole, the state can commence civil commitment proceedings as though the defendant had been found insane.

Conclusion: Satisfying the Public Outcry

Law does not exist in a vacuum, but is usually an expression of the underlying ethic of the sovereign. The insanity defense represents a necessary conflict between two fundamental American values: justice for criminals and compassion for the ill. Juries, as the representatives of the sovereign people of the United States, are the appropriate body to balance these two values and apply them to a specific case.

However, GBMI hijacks the jury to attain a political end. The jury is given an alternative verdict, which they are falsely told is intermediate. This results in a double injustice. First, a juror may use GBMI as a shortcut around the difficult conflicts in ethics presented by the insanity defense. Second, defendants found by juries to be only partially culpable receive a sentence more severe than those found fully culpable.

The GBMI verdict should be abolished because it attempts to fix a system that is not broken. NGRI, like any law, is occasionally abused, but that is not a reason to replace a system that allows juries to weigh carefully our most important values with one that misleads juries and manipulates the result.

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