Mens Rea, Competency to Stand Trial, and Guilty but Mentally Ill

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The recent U.S. Supreme Court case of *Kahler v. Kansas* determined that the Kansas *mens rea* laws were sufficient to stand as the state's only insanity defense statute. In this issue of The Journal, Landess and Holoyda describe the legal reasoning that led to this decision and the persistent concerns about the wisdom of the decision. This commentary is meant to serve as a mirror image to Landess and Holoyda's article, as it focuses on the impact of *Kahler* on severely mentally ill individuals faced with criminal charges in the four *mens rea* states: Montana, Idaho, Utah, and Kansas. The authors assert that the absence of a traditional insanity defense disrupts the criminal justice process, adds the pressure of greater numbers of individuals pushed into the competency-to-stand-trial and competency-restoration systems, resurrects the guilty but mentally ill verdict from the condemnation of history, and forces people with serious mental iillness into prisons without any evidence that the prisons are up to the task of adequately caring for them.

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In *Kahler v. Kansas*,[1] the Supreme Court ruled that Kansas, and by extension all other states, can decide the language of the state's insanity defense statutes and permit a traditional insanity defense or a *mens rea* statute or both, as long as there is at least one statute in the state that might lead to acquittal based on insanity. Kansas recognizes only a *mens rea* insanity defense. In this issue of The Journal, Landess and Holoyda[2] provide an analysis and critique of the Supreme Court's legal reasoning in *Kahler* as it dismissed hundreds of years of debate about mental illness and the criminal law. The *Kahler* decision likely has settled the question for some time to come.

In 1983, Steadman and Braff[3] published an article that outlined a systematic agenda for the study of insanity acquittees designed to stimulate research on individual and system characteristics related to the insanity defense. A similar agenda is now needed in the four *mens rea* states regarding individuals with serious mental illness in the criminal justice system. We expect that the subject characteristics in any new study will resemble closely the literature now available on insanity acquittees,[4] but the *mens rea* states will focus on jails and prisons (rather than on state hospitals), conditional release, and housing programs.

A Review of the *Mens Rea* States

There have been few studies focused on individuals with mental illness involved in the criminal justice system in these states. We suspect that as the numbers of insanity acquittals dwindle, there will be more defendants found incompetent to stand trial and thus stalled, or guilty but mentally ill (GBMI), which will result in incarceration.

The Treatment Advocacy Center (TAC) has published a number of reports comparing the states in various areas related to their mental health and criminal justice systems. Two of the TAC's analyses are most relevant to this commentary. The first, published in 2016,[5] focused on the combined number of civil and forensic hospital beds and on the adequacy of this number in each state compared with a target number related to the state population. Of the four *mens rea* states, Idaho ranked the lowest with 21 percent of the target, while Montana ranked the highest with 34 percent of the target. In a second report, published in 2017,[6] the TAC graded each state's attempts to enact a system that decreases the rearrest

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of individuals with serious mental illness who have committed major crimes. The TAC graded the four *mens rea* states as follows: Utah (C–), Kansas (D+), Montana (D–), and Idaho (F) (Ref. 6, p 3). This analysis suggests that each of these states has inadequate numbers of state hospital beds and lacks systems to manage those with serious mental illness who are facing criminal charges.

The only research found involving a *mens rea* state was a study of Montana by Steadman and colleagues,[7] published in 1993. That study was designed to investigate changes in the insanity defense brought about when John Hinckley, Jr., was tried for the shooting of President Reagan. Montana was one of six states studied because of its 1979 replacement of a traditional insanity defense with a *mens rea* statute as the only route to an insanity acquittal. This shift foreshadowed outcomes regarding the management and treatment of severely mentally ill individuals charged with crimes in the other *mens rea* states.

As part of the larger study, Callahan *et al.*[8] focused on insanity pleas and not guilty by reason of insanity (NGRI) acquittals in each study state. The six-year study period for Montana included three years before and three years after the 1979 adoption of the *mens rea* reform. During this period, Montana had a high total rate of insanity pleas but the lowest rate of insanity acquittals among the eight states considered, reflecting the abolition of a traditional insanity defense in the middle of the study period.

Steadman and colleagues[9] also found that, in the three years prior to 1979, there were 21 NGRI verdicts, while in the three years after, there were only two. These data demonstrate a marked reduction in the likelihood of an insanity acquittal when a *mens rea* statute was adopted. Also notable was that, in the three years prior to the reform, eight individuals had their charges dismissed, while in the post-reform study period this number was 30. Further investigation led to the finding that two-thirds of these 30 individuals were hospitalized involuntarily as incompetent to stand trial (IST). According to the investigators: "Another way to view these data is to conclude that the mental health system has simply been manipulated to produce a functional equivalent for formal insanity acquittals" (Ref. 7, p 360). At the time of the study, the vehicle for hospitalization was incompetency to stand trial. The long-term outcome for these individuals might well have been criminal conviction or a finding of not restorable and either civil commitment or release.

Idaho

An article published in 2019 in the *Idaho Press*[10] described a man with chronic mental illness who was charged with aggravated battery. He was found IST, and when he was deemed competent, the state prosecutor reported that the man was returned to court with a statement from the hospital that he should be tried as quickly as possible before his mental state deteriorated to the point where he was again incompetent. The same case was described some six months later in the context of the defense possibly raising a *mens rea* insanity defense.[11] The article noted the anticipated forthcoming decision in the *Kahler* case[1] amid the backdrop of three of the eight people in Ada County (i.e., in the Boise area) charged with first or second degree murder since April 2018 being found IST and a fourth awaiting a competency hearing.

Utah

Utah adopted a *mens rea* insanity defense in 1983[12] as part of the post-Hinckley reforms. In a small study[13] following the adoption of *mens rea* as the only insanity test, Heinbecker noted that, in the two years following the adoption of the *mens rea* defense, there were seven successful insanity verdicts and that all seven of the verdicts were agreed to as negotiated pleas without actually applying the new statute. Harkins[14] later reported that, in the seven years between 2012 and 2018, there were a total of 10 *mens rea* insanity verdicts while 231 individuals were found GBMI, including 29 who were charged with first-degree or capital felonies.

Landess and Holoyda[2] mention the attempted reforms undertaken by Utah State Representative Carol Moss, who introduced HB 167[15] in the 2020 Utah Legislature after one of her constituents with severe mental illness killed his parents. After being found IST, this man was ultimately found NGRI under a *mens rea* defense. Representative Moss's proposal was an amendment to the *mens rea* statutes proposing the restoration of *M' Naughten* language limited to first-degree murder or capital felonies. Ultimately, the bill failed and was reported not likely to be brought up again following the *Kahler* decision.[16]

Utah also had considerable problems with concerns related to competency to stand trial because of the limited bed availability in the state hospital. On September 8, 2015, the Disability Law Center of Utah filed a class action lawsuit in federal court[17] focused on jail detainees found IST who were incarcerated for inordinate lengths of time while waiting for a restoration bed at the state hospital. The plaintiffs documented that the waitlist doubled each year from 2012 to 2015, resulting in 56 jail detainees in 2015 waiting for a bed who received "little or no treatment" while in jail.[17] The case reached a settlement agreement between the parties that promised to reduce greatly the wait times for hospital transfer.[18] In a comprehensive investigative report published in 2017 in the *Deseret News*, Chen and Romero[19] revealed the significant human costs related to competency restoration delays.

Kansas

Kansas has a long history of problems in its care of mentally ill persons in state institutions, as documented in a 1948 report by the Kansas State Board of Health entitled *A Study in Neglect*.[20] Eighteen years later, an article from Kansas Health Institute stated, "[D]espite some improvements, care has waxed and waned, leaving many at the mercy of the criminal justice system" (Ref. 21, p 1). From 2011 to 2018, state budgets for all governmental services, including public mental health institutional and community care, were eroded severely by cuts in line with the political philosophy of the state's governors and legislature. In 2019, Patrick Miller, an assistant professor of political science at the University of Kansas, described Kansas' prisons as in crisis generally but especially for individuals who are mentally ill.[22]

Discussion

Although this commentary is limited by a lack of organized empirical data, it seems clear that the insanity defense in the *mens rea* states is almost a relic of the past. If this assertion is confirmed, then the practice of criminal law was altered dramatically in these states. The traditional insanity defense statutes operate as a type of fulcrum in the preparation of defense strategy. A possibly viable insanity defense could have provided an advantage in negotiating with the prosecutor for a plea bargain, or otherwise led to raising a formal insanity defense at trial. The amicus brief in *Kahler* from the criminal defense attorneys of Idaho and Montana, supported by those from Utah and Kansas, is particularly instructive in detailing the problems created within the criminal justice system for persons with mental illness who are served poorly in jails and prisons following the abolition of the traditional insanity defenses and the adoption of the *mens rea* defenses.[23]

The results from studies by Steadman and colleagues[7–9] clearly foreshadowed later developments in which competency to stand trial and competency restoration statutes became a convenient way to manage detainees who are mentally ill. For the most serious and potentially dangerous individuals charged with crimes, competency evaluation and restoration services in jails or hospitals provide security for the public and some respite for prosecutors and defense attorneys who do not object necessarily to this pause, considering their heavy caseloads and the resultant opportunity to pursue goals in their legal strategy for the case. States also do not seem to object to the extensive use of competency proceedings as an intermediate solution to a possible troubling conclusion to a case that might result in a finding of IST and not restorable,[2] a legally unsatisfactory situation with no clear cut solution to a potentially never-ending case.[3]

Competency to stand trial and competency restoration represent national crises in the relationship that typically exists between jails and state hospitals.[24] This landscape is characterized by too few beds and too many individuals who are mentally ill waiting in jail for an evaluation or restoration bed. We know from the 2016 TAC report[5] that the four *mens rea* states do not have enough psychiatric hospital beds to meet the needs of people with severe mental illness. Whether a decrease in the use of insanity defenses nationally increases the demand for competency beds is worthy of further investigation.

Utah recently settled a class action suit resulting from the prolonged time that jail detainees spent waiting for a bed in the Utah State Hospital.[18] While our review of available data suggests similar scenarios in each of the *mens rea* states, we have insufficient empirical data to evaluate to what extent this is the case. This lack of data is another crucial part of a future research agenda.

In addition to competency to stand trial, data reported from Utah from 2012 to 2018 revealed that

there were only 10 reported successful *mens rea* insanity defenses compared with 231 GBMI verdicts, which most likely resulted in these individuals going to prison or perhaps to probation or parole. Again, we have no further information about the disposition of these cases. This review, however, points to the fact that GBMI verdicts now play a critical role in the disposition of those not meeting the insanity standard in *mens rea* states, likely because defendants had enough capacity to intend to commit a crime (i.e., the requisite *mens rea*) but little more.

GBMI statutes are not new. They were designed originally to facilitate treatment of individuals falling short of the traditional insanity defenses while also addressing public safety concerns. Created in 1966 in Michigan, the GBMI verdict was established for cases where a defendant committed a criminal act, was mentally ill, and did not merit exculpation based on the state's insanity test.[25] A 1982 article by Smith and Hall[26] summarizes the legislative intent of the GBMI verdict as an attempt to "allow juries to provide mentally ill defendants with mental health treatment while ensuring penal detention of defendants following their inpatient treatment for mental illnesses" (Ref. 26, p 85).

While the objectives of GBMI statutes included confinement of mentally disordered offenders to protect the public, a reduction of the number of offenders found NGRI, and access to treatment for the offender, Palmer and Hazelrigg[27] found that, in actuality, these benefits were not achieved. At present, we have no real information regarding the extent to which individuals now found GBMI are treated while incarcerated in the *mens rea* states or if they are released on parole with well-managed conditional release plans. Again, from the TAC report[6] that graded these states, comprehensive care for the GBMI population may be unlikely.

In conclusion, in the post-*Kahler* era, an investigation of all aspects of the disposition of individuals experiencing serious mental illness and charged with crimes in the *mens rea* states is needed. First, insanity verdicts should be investigated, even if they represent only a small component of the study. Second, emphasis should be placed on those undergoing competency evaluation and restoration and the resulting final outcomes. Third, there should be a focus on individuals with severe mental illness who are sent to prison as either guilty or GBMI to determine whether they receive psychiatric treatment in prison or are transferred to a psychiatric hospital for treatment. Finally, there should be a focus on forensic outpatient services for defendants found GBMI that are based on careful conditional release planning and monitoring after release from prison, and these services should be similar to programs developed for insanity acquittees.[28] Empirical data regarding these concerns may inform future decisions the next time a *Kahler v. Kansas* insanity defense case is in the spotlight.

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