

FEAR, INSANITY, AND LOATHING IN NEVADA*

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INTRODUCTION

Roughly an hour before his attempted assassination of then-President Ronald Reagan on March 30, 1981, John Hinckley Jr. wrote a letter to Jodie

* *Cf.* HUNTER S. THOMPSON, FEAR AND LOATHING IN LAS VEGAS: A SAVAGE JOURNEY TO THE HEART OF THE AMERICAN DREAM (1971).

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Foster.¹ In it, he detailed his assassination plan, dedicating it solely to the actress.² He then left his room at the Washington Hilton Hotel and fired six shots at the President.³ With the country watching closely, Hinckley's trial and subsequent "not guilty by reason of insanity" (NGRI) verdict marked a distinct period of reform regarding the so-called "insanity" defense and the relationship between mental health and the law.⁴

By all accounts, Hinckley had a fairly normal childhood, born to a middle-class family in Oklahoma.⁵ His fascination and obsession with Jodie Foster did not start until 1976, during a viewing of the film *Taxi Driver* in which Foster plays a child prostitute.⁶ In 1980, Hinckley followed her to New Haven, Connecticut, where Foster was attending Yale University.⁷ He tried to communicate with her by phone and littered her dorm mailbox with love letters.⁸ His pursuit of Foster would prove to be unsuccessful, and he ultimately left New Haven with little acknowledgement from the actress.⁹

Hinckley's troubles did not end after his departure from Connecticut. Later in the year, Hinckley attempted to overdose on Valium, prompting his parents to arrange for him to meet a psychiatrist.¹⁰ The first two visits were positive, with reports of Hinckley's mood improving for the better.¹¹ However, the psychiatrist remained ignorant to Hinckley's deep obsession with Foster and the violent inclinations simmering in his head. Consequently, Hinckley's overall mental health did not improve.¹²

On the morning of March 30, 1981, Hinckley put the letter to Foster in his suitcase and left the luggage in his hotel room.¹³ The letter plainly stated Hinckley's intention to "get" Reagan as a way to secure Foster's affection.¹⁴ "As you well know by now," the letter read, "I love you very much. . . . I would abandon this idea of getting Reagan in a second if I could only win your heart and live out the rest of my life with you, whether it be in total obscurity or whatever."¹⁵ To

¹ JAMES W. CLARKE, ON BEING MAD OR MERELY ANGRY: JOHN W. HINCKLEY, JR., AND OTHER DANGEROUS PEOPLE 58–59 (1990).

² *Id.*

³ *See id.* at 59.

⁴ Lisa Callahan et al., *Insanity Defense Reform in the United States—Post-Hinckley*, 11 MENTAL & PHYSICAL DISABILITY L. REP. 54, 54 (1987).

⁵ *See* CLARKE, *supra* note 1, at 15–16 ("The soft cushion of family affluence and the comfortable material life it assured suggested little to be bitter about.").

⁶ *Id.* at 35.

⁷ *Id.* at 38.

⁸ *Id.* at 38–39.

⁹ *Id.* at 39.

¹⁰ *Id.* at 43.

¹¹ *Id.*

¹² *Id.* at 58.

¹³ *Id.* at 5–6, 58.

¹⁴ *Id.* at 58.

¹⁵ *Id.*

“get” Reagan, Hinckley tracked down the President outside of a venue where President Reagan had just finished giving a speech.¹⁶ Outside the lobby, as President Reagan approached his limousine, Hinckley fired six shots at the president and his Secret Service security detail.¹⁷ Fortunately, his attempt on Reagan’s life proved as unsuccessful as his courting of Jodie Foster.¹⁸ Hinckley was quickly arrested, charged, and put on trial.¹⁹

It was clear that Hinckley suffered from mental illness.²⁰ The issue was whether Hinckley was *legally* insane, such that he could satisfy his plea of NGRI.²¹ At the time, the test for insanity in federal courts allowed Hinckley to be found legally insane if he “lack[ed] substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.”²² His defense presented testimony of three psychiatrists and one psychologist to paint a picture of, as lead counsel of the defense team stated, “a very sympathetic . . . young man who was friendless, had a terrible sense of hopelessness, and was totally without the requisite mental capacity to appreciate . . . the wrongfulness of his conduct.”²³ Ultimately, the jury determined Hinckley did not appreciate the wrongfulness of his conduct and returned a NGRI verdict.²⁴ He was subsequently transferred to St. Elizabeth’s Hospital, a mental health facility, where he stayed until his release in 2016.²⁵

The public’s reaction to the verdict was unfavorable, to say the least, and created a widespread call for tougher laws on the insanity defense.²⁶ A poll administered after the verdict found that “76 percent of those questioned said

¹⁶ *Id.* at 6.

¹⁷ *Id.* at 6–7.

¹⁸ *Id.* at 10.

¹⁹ Douglas O. Linder, *The Trial of John W. Hinckley, Jr.*, FAMOUS TRIALS, <https://famous-trials.com/johnhinckley/537-home> [<https://perma.cc/UN7K-BW2D>].

²⁰ Vincent J. Fuller, *United States v. John W. Hinckley Jr. (1982)*, 33 LOY. L.A. L. REV. 699, 699 (2000). Vincent Fuller served as lead counsel for John Hinckley in the *United States v. Hinckley* trial. *Id.*

²¹ Linder, *supra* note 19.

²² Fuller, *supra* note 20, at 699.

²³ *Id.* at 701.

²⁴ Linder, *supra* note 19.

²⁵ Elizabeth Chuck, *John Hinckley Freed from Mental Hospital 35 Years After Reagan Assassination Attempt*, NBC NEWS (Sept. 10, 2016, 8:46 AM), <https://www.nbcnews.com/news/us-news/john-hinckley-freed-mental-hospital-35-years-after-reagan-assassination-n646076> [<https://perma.cc/FM5Z-EL5N>]. Hinckley was released under court supervision and was required to continue psychiatric treatment. *Id.* In September 2021, a federal judge approved Hinckley’s unconditional release starting in June of 2022, provided there are no new concerns before that time. See Carrie Johnson, *John Hinckley, Who Shot President Reagan, Wins Unconditional Release*, NPR (Sept. 27, 2021, 11:11 AM), <https://www.npr.org/2021/09/27/1040872498/john-hinckley-unconditional-release> [<https://perma.cc/783T-TXW3>].

²⁶ The Associated Press, *Hinckley Acquittal Brings Moves to Change Insanity Defense*, N.Y. TIMES, June 24, 1982, at 21.

justice had not been done in the Hinckley case.²⁷ Another study found that respondents felt the verdict was unfair and that Hinckley was not insane.²⁸ In the three years after Hinckley's verdict, there was a considerable increase in reforms to the insanity defense—with twenty-five states making such changes.²⁹ A common legislative reform by the states was the creation of the “guilty but mentally ill” (GBMI) verdict.³⁰ The idea behind GBMI was to provide an alternative to the insanity defense—allowing juries to recognize a defendant's mental illness while still assigning legal culpability.³¹ In theory, a defendant found guilty but mentally ill would be convicted and incarcerated, rather than institutionalized, and still receive mental health treatment.³²

Interestingly, Nevada was not one of the states to make changes to the insanity defense within the aforementioned study period.³³ Nevada did not propose any changes to the insanity defense until 1995, though the legislature referenced the Hinckley verdict as an example of why such reform was needed.³⁴ A 1995 bill began a turbulent cycle of differing law regarding insanity defense in Nevada that ultimately stagnated in 2007.³⁵ Today, through various court cases and statute revisions, Nevada seems to have settled on allowing both the not guilty by reason of insanity defense and the guilty but mentally ill verdict.³⁶

This Note argues that the two verdicts cannot coexist as they currently do in Nevada. The issue lies in how the courts will differentiate between a mental illness that rises to the standard of legal insanity and mental illness that does not reach that same standard. While a NGRI verdict ends with a defendant in a mental health facility, both a guilty verdict and a guilty but mentally ill verdict place the defendant in prison. This Note argues the redundancy between the two guilty verdicts must render one of them superfluous—particularly in a state like Nevada that allows acquittal by insanity. Part I will provide a brief history and background on the insanity defense throughout the country. Part II will summarize Nevada's own tumultuous history with the insanity defense statute and how the current system works. Finally, Part III will argue that the guilty but mentally ill

²⁷ Valerie P. Hans & Dan Slater, *John Hinckley, Jr. and the Insanity Defense: The Public's Verdict*, 47 PUB. OP. Q. 202, 202 (1983) (quoting *ABC News Nightline: Insanity Plea on Trial* (ABC television broadcast June 22, 1982)).

²⁸ *Id.*

²⁹ Callahan et al., *supra* note 4, at 54–55.

³⁰ *Id.* at 55. See also Christopher Slobogin, *The Guilty but Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*, 53 GEO. WASH. L. REV. 494, 495 (1985).

³¹ Slobogin, *supra* note 30, at 495.

³² *Id.*

³³ Callahan et al., *supra* note 4, at 56 tbl.1.

³⁴ *Minutes of the S. Comm. on Judiciary April 4, 1995*, 1995 Leg., 68th Sess. (Nev. 1995) [hereinafter *April 4 Minutes*]. (The transcript of the committee meeting correctly identifies Hinckley as the attempted assassin of President Reagan, but incorrectly spells his last name as “Hinkley.”)

³⁵ *Minutes of the Assemb. Comm. on Judiciary March 20, 2007*, 2007 Leg., 74th Sess., at 6, 27 (Nev. 2007) [hereinafter *March 20 Minutes*].

³⁶ *Id.* at 6, 8.

verdict should not have been readopted by the Nevada legislature and also explore more equitable, if any, reforms for those who commit crime and live with mental illness.

I. A BRIEF HISTORY OF THE INSANITY DEFENSE

A. *The Man, the Test, the Legacy—the Origins of the M’Naghten Test*

The legal concept of insanity is rooted in the recognition that individuals with certain mental capacities may not understand when their conduct violates societal legal or moral standards.³⁷ Most crimes, either established by statute or common law, consist of a mental component in addition to the criminal act itself.³⁸ This mental component, or *mens rea*, generally requires a criminal intent, which must be proven as a material element of the offense.³⁹ Thus, legal insanity happens when a person cannot form such criminal intent.⁴⁰

The majority of the states, including Nevada, test legal insanity using a standard created by an English trial from 1843.⁴¹ Daniel M’Naghten (sometimes spelled “M’Naughton”⁴² or “McNaughton”⁴³) suffered from paranoid delusions that caused him to believe the British Prime Minister and other high-ranking members of the British government were conspiring to kill him.⁴⁴ In an attempt to neutralize the perceived threat, M’Naghten traveled to London intending to assassinate Prime Minister Robert Peel by shooting into his carriage.⁴⁵ However, in a stroke of luck, Peel inexplicably rode in the Queen’s carriage that day.⁴⁶ When M’Naghten shot into the Prime Minister’s carriage, he killed Peel’s secretary instead.⁴⁷

The criminal trial would focus on M’Naghten’s delusions and the right/wrong test for insanity.⁴⁸ M’Naghten was ultimately found not guilty, on this ground of insanity.⁴⁹ As with *United States v. Hinckley*, the case’s spiritual successor over a century later, the verdict was met with public disapproval and calls for change.⁵⁰ As a result, the common-law court judges were brought before

³⁷ *Finger v. State*, 27 P.3d 66, 71 (Nev. 2001).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Rudolph J. Gerber, *The Insanity Defense Revisited*, 1984 ARIZ. STATE L.J. 83, 84 (1984).

⁴² RICHARD BOUSFIELD & RICHARD MERRETT, REPORT OF THE TRIAL OF DANIEL M’NAUGHTON (1843).

⁴³ *April 4 Minutes*, *supra* note 34.

⁴⁴ Gerber, *supra* note 41, at 84.

⁴⁵ *Id.* at 84–85.

⁴⁶ *Id.* at 85.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 86.

⁵⁰ *Finger v. State*, 27 P.3d 66, 72, 74 (Nev. 2001).

Queen Victoria and the House of Lords to discuss and amend the concept of legal insanity.⁵¹ Collectively, the judges established new criteria for jurors to determine if a defendant could be eligible for an insanity defense, provided a defendant could prove that

at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as 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.⁵²

Thus, the M’Naghten test was born.⁵³ The test, sometimes referred to as the M’Naghten Rule, allows for a defendant to be acquitted by reasons of insanity if a defendant’s mental illness impeded him or her from understanding the nature of his or her actions, or if it prevented him or her from knowing his or her action is wrong.⁵⁴ Ironically, using the test that bears his name, the common-law judges determined that M’Naghten should not have been found legally insane.⁵⁵ It was clear that he understood his actions—evident by the fact that he prepared a trip from his home in Scotland for the planned assassination.⁵⁶ Additionally, his paranoid delusions of persecution did not legally or morally justify the killing and did not prevent him from knowing his actions were morally or legally wrong.⁵⁷

This concept of a strict uniform rule to determine insanity spread to other British courts and across the sea to the United States, which quickly embraced the standard.⁵⁸ In 1851, the test was adopted by the federal court system and the majority of the state courts had followed suit.⁵⁹ The M’Naghten test remained the predominate test for insanity up until the early 1960s.⁶⁰ However, unsurprisingly, several scholars felt that a test conceived in the nineteenth century was not consistent with advances in society, medicine, and psychology.⁶¹ New discoveries and accepted theories of psychology highlighted the M’Naghten test’s deficiencies, which in turn created a need for revision of the legal test for insanity.⁶²

⁵¹ *Id.* at 72. M’Naghten’s Case (1843) 8 Eng. Rep. 718, 719.

⁵² *M’Naghten’s Case*, 8 Eng. Rep. at 722.

⁵³ Gerber, *supra* note 41, at 89.

⁵⁴ *Finger*, 27 P.3d at 72.

⁵⁵ *Id.* at 73.

⁵⁶ *See id.* at 72–73.

⁵⁷ *See id.*

⁵⁸ Kenneth J. Weiss & Neha Gupta, *America’s First M’Naghten Defense and the Origin of the Black Rage Syndrome*, 46 J. AM. ACAD. PSYCHIATRY L. 503, 503 (2018).

⁵⁹ Kimberly Collins et al., *The Hinckley Trial’s Effect on the Insanity Defense*, FAMOUS TRIALS, <https://famous-trials.com/johnhinckley/540-insanity> [perma.cc/W3ZE-SMHG].

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Finger v. State*, 27 P.3d 66, 73 (Nev. 2001).

B. Criticism and Alternative Tests of Legal Insanity

Because insanity is a legal term, not a medical term, there is a distinct fissure between law and medicine when it comes to the insanity defense. A psychologist or psychiatrist called to testify on a defendant's sanity must translate a medical diagnosis of mental illness to a judgment on a defendant's ability to know "right and wrong."⁶³ This problem is bolstered by the lack of definitions of the terms for which doctors are to make their judgments.⁶⁴ "Disease of the mind," "know," and "wrong" are all undefined by the test, leaving it up to the individual courts to determine their meaning.⁶⁵ It then falls on the psychologist or psychiatrist called before the court to discern how a defendant's mental illness relates to these definitions and how it affected a defendant's perception of right and wrong.⁶⁶ As a result, American psychiatrists and psychologists have expressed widespread dissatisfaction for the M'Naghten test.⁶⁷

Another common criticism of the M'Naghten test is its basis in an obsolete theory.⁶⁸ Its emphasis on a defendant's cognitive capacity to understand the nature of his crime is a product of the time's leading psychological theories.⁶⁹ If an individual could differentiate right from wrong, the belief of the time was that he should be able to make rational decisions based on that judgment.⁷⁰ Essentially, sanity and insanity are based only on one's "ability to appreciate, know, or distinguish right from wrong."⁷¹ The test requires an all-or-nothing approach to a defendant's cognitive capacity—a theory that has largely been rejected by modern psychology.⁷² Currently, the commonly accepted psychological theory is that the mind and personality are integrated in a combination of cognitive capacity, volition, impulse, the subconscious, and the environment.⁷³ A person may know the act is wrong through his or her cognitive capacity, but still commit it as a result of mental illness affecting another aspect of his or her personality.⁷⁴

⁶³ Gerber, *supra* note 41, at 89.

⁶⁴ *Id.* at 93.

⁶⁵ *Id.*; see also R. Michael Shoptaw, Comment, *M'Naghten is a Fundamental Right: Why Abolishing the Traditional Insanity Defense Violates Due Process*, 84 MISS. L.J. 1101, 1109 (2015).

⁶⁶ Gerber, *supra* note 41, at 89.

⁶⁷ Dale E. Bennett, *The Insanity Defense—a Perplexing Problem of Criminal Justice*, 16 LA. L. REV. 484, 485 (1956).

⁶⁸ See Gerber, *supra* note 41, at 92.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Henry T. Miller, Comment, *Recent Changes in Criminal Law: The Federal Insanity Defense*, 46 LA. L. REV. 337, 342 (1985).

⁷² See Gerber, *supra* note 41, at 92.

⁷³ *Id.*

⁷⁴ Beatrice R. Maidman, *The Legal Insanity Defense: Transforming the Legal Theory into a Medical Standard*, 96 B.U. L. REV. 1831, 1836 (2016).

1. *Broadening and Narrowing the Standard for Insanity*

To address these shortcomings, courts and legal organizations began to formulate new standards for insanity.⁷⁵ One standard, often used in tandem with the M’Naghten test, is the irresistible impulse test.⁷⁶ A way to recognize the aforementioned integrated mind and personality, the irresistible impulse test reconciles the idea that someone may know their action is wrong but is unable to stop themselves from acting because of their mental illness.⁷⁷ A defendant is legally insane if his or her mental illness causes a need to commit the illegal act, and he or she then acts on that need.⁷⁸ A common way of explaining this is the “police-man at the elbow” test, in which a defendant is legally insane if he or she would have committed the same illegal act even if there was a police officer grabbing his or her elbow.⁷⁹

In 1954, the Circuit Court of Appeals for the District of Columbia expanded the test for insanity.⁸⁰ In the case of *Durham v. United States*, the court decided that a person could not be held legally responsible for actions that are a direct result of his or her mental illness.⁸¹ In *Durham*, the defendant was convicted of breaking into a house.⁸² Because of his extensive mental health history, as well as other evidence presented at the trial, the court found that, if not for his mental illness, he would not have attempted the break in.⁸³ For a defendant to be found insane under the Durham test, the defendant had to both have a mental illness and the illness had to be the cause of his or her illegal act.⁸⁴ Unlike its predecessors, the test did not require an assessment of a defendant’s knowledge of right or wrong in relation to the criminal act.⁸⁵ This test had its own share of criticism, mostly for being too expansive,⁸⁶ and the circuit court abandoned the test in 1972.⁸⁷

In 1962, the American Law Institute (ALI) proposed its own test, combining elements of M’Naghten, the irresistible impulse test, and the Durham test.⁸⁸ The ALI test states that a person is not responsible for criminal conduct if, at the time the act was committed, the person’s mental illness caused him or her to not

⁷⁵ See Miller, *supra* note 71, at 337–38.

⁷⁶ Charles L. Cetti, Comment, *M’Naghten Rule v. Irresistible Impulse Test*, 14 MERCER L. REV. 418, 419 (1963).

⁷⁷ *Id.*

⁷⁸ *Finger v. State*, 27 P.3d 66, 73 (Nev. 2001).

⁷⁹ Andrew Donohue et al., *Legal Insanity: Assessment of the Inability to Refrain*, 5 PSYCHIATRY 58, 61 (2008).

⁸⁰ *Durham v. United States*, 214 F.2d 862, 876 (D.C. Cir. 1954).

⁸¹ *Id.*

⁸² *Id.* at 864.

⁸³ See *id.* at 866–69.

⁸⁴ See *id.* at 876.

⁸⁵ *Id.*

⁸⁶ *Finger v. State*, 27 P.3d 66, 73 (Nev. 2001).

⁸⁷ Collins et al., *supra* note 59.

⁸⁸ *Finger*, 27 P.3d at 73–74.

understand the criminality of the conduct.⁸⁹ Unlike the M’Naghten test, a person does not have to be completely incapacitated to be considered legally insane, but still needs to experience a substantial impairment of mental capacity.⁹⁰ Compare this to the Durham test, which allowed for any amount of impairment caused by a mental illness to qualify as insane.⁹¹ The ALI provided a happy middle ground between the restrictive M’Naghten test and the liberal Durham test.⁹² In turn, the ALI test took over as the preeminent test for insanity in the state and federal courts.⁹³

It was under the ALI test that the court acquitted John Hinckley Jr. by reasons of insanity in 1982.⁹⁴ As previously explored, the Hinckley assassination attempt on President Reagan and subsequent acquittal by reasons of insanity thrust the insanity defense into the spotlight.⁹⁵ The public was outraged that a man caught on camera trying to kill the President would not spend the rest of his life in prison.⁹⁶ At the time, there was no authority for federal courts to civilly commit a defendant acquitted by reason of insanity.⁹⁷ The trial judge in Hinckley’s case used a District of Columbia statute to commit Hinckley to a mental health facility, until a further hearing determined if he constituted a danger to himself or to others.⁹⁸ Hinckley then received the right to request a rehearing on his mental status every six months.⁹⁹ Hinckley remained in the same mental health facility until 2016, when he was released under court supervision with the requirement to continue psychiatric treatment.¹⁰⁰

⁸⁹ MODEL PENAL CODE § 4.01 (AM. L. INST. 2020) (Mental Disease or Defect Excluding Responsibility).

⁹⁰ *Finger*, 27 P.3d at 74.

⁹¹ *Id.*; see also *Durham v. United States*, 214 F.2d 862, 874–76 (D.C. Cir. 1954).

⁹² *Finger*, 27 P.3d at 74.

⁹³ Collins et al., *supra* note 59.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Chuck, *supra* note 25.

⁹⁷ CATHERINE MARION, CONG. RSCH. SERV., 82-ID, THE INSANITY DEFENSE: AN OVERVIEW AND LEGISLATIVE PROPOSALS 2 (1982).

⁹⁸ *Id.*

⁹⁹ Laura A. Kiernan et al., *Hinckley Found Not Guilty, Insane*, WASH. POST (Jun. 22, 1982), <https://www.washingtonpost.com/archive/politics/1982/06/22/hinckley-found-not-guilty-in-sane/939fafa6-9441-4579-bb04-39da0d287e2d> [<https://perma.cc/R6BS-6Q2T>].

¹⁰⁰ Chuck, *supra* note 25. Amazingly, Hinckley has seemingly found success, whether morbidly curious or otherwise, as a singer on YouTube. EJ Dickson, *He Tried to Kill a President. Then YouTube Made Money Off Him*, ROLLING STONE (June 4, 2021, 3:37 PM), <https://www.rollingstone.com/culture/culture-news/john-hinckley-youtube-channel-monetization-1178214> [<https://perma.cc/98UH-QY85>]. The article incorrectly identifies Hinckley as a “convicted presidential assassin.” *Id.* However, as already stated, Hinckley was acquitted of the crime and was also unsuccessful in his assassination attempt at the time, though one of the victims of the shooting, Press Secretary James Brady, was critically injured and had to use a wheelchair up until his death in 2014, which was ruled as a homicide. Bill Chappell, *James Brady’s Death Is Ruled a Homicide*, NPR (Aug. 8, 2014, 6:33 PM), <https://www.npr.org/sections/thetwo-way/2014/08/08/338949267/james-brady-s-death-is-ruled-a-homicide> [<https://perma.cc/9P9R-R4PP>]. Hinckley’s newfound internet presence is the result of a

Following Hinckley's acquittal by reason of insanity and the accompanying public outcry, Congress passed the Insanity Defense Reform Act of 1984 (IDRA) in an effort placate the critics.¹⁰¹ Congressional testimony conceded that "much of the concern was prompted by many popular myths about the defense," but Congress felt there was the need for reform "in order to restore public confidence in the criminal justice system."¹⁰² The Subcommittee on Criminal Justice and the Judiciary Committee called the ALI's broadness into question, specifically the volitional prong of the test.¹⁰³ Some of the significant provisions of the IDRA included, in addition to removing the volitional prong, eliminating the defense of diminished capacity and creating the specific verdict of "not guilty only by reason of insanity."¹⁰⁴ It also rectified the insanity defense's sentencing limbo by requiring federal commitment of those found NGRI.¹⁰⁵ Additionally, the Act placed the burden of proof on the defendant to establish insanity by clear and convincing evidence.¹⁰⁶

The proposed reform of the insanity verdict did not end there. Separate from the federal law, the states each have their own legislation for state crimes.¹⁰⁷ States reassessed their own legislation surrounding the insanity defense, with many adopting similar commitment requirements to the federal system.¹⁰⁸ Another popular, though misguided, solution some states have adopted is that of the "guilty but mentally ill" verdict.¹⁰⁹

lawsuit in which a judge allowed Hinckley to publicly display his art, including his writing, paintings, and music. Michael Levenson, *John Hinckley Can Publicly Display His Artwork, Judge Rules*, N.Y. TIMES (Oct. 29, 2020), <https://www.nytimes.com/2020/10/29/us/john-hinckley-art.html> [<https://perma.cc/HDA6-2H8X>]. However, any royalties or profits Hinckley receives from his art must comply with the terms of several civil suits from victims of the shooting. *See id.*

¹⁰¹ Michelle R. Prejean, Comment, "Texas Law Made This Mad Woman Sane," 42 HOUS. L. REV. 1487, 1494–96 (2006).

¹⁰² 130 CONG. REC. 25840 (1984) (statement of John Conyers Jr., Mich. Rep.).

¹⁰³ *Id.*

¹⁰⁴ *Criminal Resource Manual § 634: Insanity Defense Reform Act of 1984*, U.S. DEP'T OF JUST. ARCHIVES, <https://www.justice.gov/archives/jm/criminal-resource-manual-634-insanity-defense-reform-act-1984> [<https://perma.cc/DPE2-JQVQ>] (Jan. 22, 2020) [hereinafter *Criminal Resource Manual*].

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* Interestingly, the IDRA actually lowered the evidentiary standard for a finding of insanity from beyond a reasonable doubt to clear and convincing evidence. *Finger v. State*, 27 P.3d 66, 74 (Nev. 2001).

¹⁰⁷ *Comparing Federal & State Courts*, U.S. COURTS, <https://www.uscourts.gov/about-federal-courts/court-role-and-structure/comparing-federal-state-courts> [<https://perma.cc/4VQR-KL6Q>].

¹⁰⁸ Callahan et al., *supra* note 4, at 55.

¹⁰⁹ *Id.* at 54–55.

2. *Guilty but Mentally Ill—a New, but Not Improved, Insanity Verdict*

While the guilty but mentally ill (GBMI) verdict failed at the federal level, it thrived in various state legislatures.¹¹⁰ The verdict emanated from the public's perceived necessity to reduce the amount of acquittals by reason of insanity.¹¹¹ The alleged abuse of the insanity defense symbolized the loss of social control and the failure of law and order as a whole.¹¹² As a middle ground between a NGRJ acquittal and a straight guilty verdict, the GBMI verdict allowed the courts to find a defendant guilty, therefore committing him or her to some form of criminal punishment, while also acknowledging and treating the mental illness of the defendant.¹¹³ A defendant could be found GBMI if a fact-finder finds the defendant was (1) guilty of the crime, (2) mentally ill at the time of the crime, and (3) not legally insane at the time of the crime.¹¹⁴ Someone who is convicted under a GBMI verdict would be eligible for mental health treatment while in prison.¹¹⁵ Ideally, the GBMI verdict would give comfort to the public because someone who committed a crime would still be subject to punishment that included separation from the general population.

The verdict itself precedes the *Hinckley* trial by almost ten years—Michigan enacted the first GBMI statute in 1975.¹¹⁶ However, *Hinckley's* acquittal certainly helped in increasing the verdict's popularity.¹¹⁷ By 1985, eleven states had enacted GBMI verdicts, either during the *Hinckley* trial or in the years following his acquittal.¹¹⁸ Furthermore, several other states proposed or planned to introduce a GBMI statute.¹¹⁹ Advocates for the verdict stated, “[I]t’s a necessary tool that ensures that people who commit horrible crimes will be made to pay the consequences.”¹²⁰

¹¹⁰ Compare U.S. DEP’T OF JUST., ATTORNEY GENERAL’S TASK FORCE ON VIOLENT CRIME: FINAL REPORT 54 (1981) [hereinafter TASK FORCE], and 18 U.S.C. § 17, with Callahan et al., *supra* note 4, at 55.

¹¹¹ Linda C. Fentiman, “*Guilty but Mentally Ill*”: *The Real Verdict Is Guilty*, 26 B.C. L. REV. 601, 615 (1985).

¹¹² Michael L. Perlin, *Myths, Realities, and the Political World: The Anthropology of Insanity Defense Attitudes*, 24 BULL. AM. ACAD. PSYCHIATRY L. 5, 9 (1996).

¹¹³ Note, *The Guilty but Mentally Ill Verdict and Due Process*, 92 YALE L.J. 475, 475 (1983).

¹¹⁴ *Id.* at 476.

¹¹⁵ Slobogin, *supra* note 30, at 495.

¹¹⁶ MICH. COMP. LAWS § 768.36 (2014).

¹¹⁷ See Slobogin, *supra* note 30, at 498 n.20 (“According to a survey conducted by the National Center for State Courts, Delaware, Pennsylvania, South Dakota, and Utah adopted the guilty but mentally ill verdict partly because of the outrage over the *Hinckley* verdict.” (citations omitted)).

¹¹⁸ Callahan et al., *supra* note 4, at 56 tbl.1.

¹¹⁹ The Associated Press, *supra* note 26, at 21 (“Legislation to abolish the insanity defense or create the ‘guilty but insane’ alternative has been proposed or will be introduced in Alabama, Colorado, Connecticut, Florida, Hawaii, Iowa, Kansas, Missouri, Nebraska, New Jersey, Oregon, Pennsylvania, Tennessee, Texas, Virginia, Washington, Wisconsin and Wyoming.”).

¹²⁰ Janan Hanna, “*Guilty but Mentally Ill*” *Verdict Upheld by Court*, CHI. TRIB. (Apr. 23, 1999), <https://www.chicagotribune.com/news/ct-xpm-1999-04-23-9904230166-story.html> [h

The GBMI verdict is not without its faults and seemingly exists only as a way to placate public outrage. The deficiencies in the verdict will be explored later in this Note. Specifically, as seen in Nevada, the flawed nature of having both the GBMI verdict and the NGRI acquittal.

II. NEVADA'S TURBULENT INSANITY DEFENSE HISTORY

A. *Abolition and Reinstatement of the Insanity Defense*

As mentioned above, Nevada would not propose reform to the state's insanity defense statute until more than ten years after Reagan's assassination attempt.¹²¹ Nevada has historically used the M'Naghten rule to determine what constitutes legal insanity,¹²² as well as the M'Naghten guideline for evaluating delusions.¹²³ A defendant was required to establish his or her insanity by a preponderance of the evidence.¹²⁴ If there was a NGRI acquittal, the defendant would be committed to a mental health facility and would only be released when a judge determined he or she was no longer mentally ill and not a danger to themselves or others.¹²⁵ Nevada's laws of legal insanity conformed to the standard set of legal insanity rules under the M'Naghten test and adhered to a narrow view of the defense.¹²⁶

In 1995, the Nevada Legislature considered several amendments that would abolish the criminal defense of insanity altogether.¹²⁷ Reform was necessary, one senator argued, because of "a prevalent perception that the criminal justice system does not effectively hold people responsible for their conduct."¹²⁸ The legislature enacted Senate Bill 314 (SB 314) which abolished the insanity defense and replaced it with the GBMI plea.¹²⁹

At the time, like most states, use of the insanity defense in Nevada was rare.¹³⁰ One proponent of abolishing the defense testified that in his twenty years of experience as a judge, he could only remember one case raising the insanity

<https://perma.cc/FDX8-HHPM>].

¹²¹ *April 4 Minutes*, *supra* note 34.

¹²² *See Williams v. State*, 451 P.2d 848, 851 (Nev. 1969) (holding "M'Naghten's rule is the proper test").

¹²³ *See State v. Lewis*, 22 P. 241, 252 (Nev. 1889) (finding if the reasoning behind the act would have been justified had those facts actually existed, then the act is not criminal because of the person's insanity).

¹²⁴ *See Gallegos v. State*, 446 P.2d 656, 657 (Nev. 1968) (holding the trial court's use of the preponderance of the evidence standard to prove insanity was proper).

¹²⁵ *See Finger v. State*, 27 P.3d 66, 76 (Nev. 2001) (discussing former NEV. REV. STAT. § 175.521 (1994)).

¹²⁶ *Id.*

¹²⁷ *April 4 Minutes*, *supra* note 34.

¹²⁸ *Id.*

¹²⁹ *See id.* (quoting a senator's suggestion of the usefulness of "consider[ing] an allowance for guilty but insane").

¹³⁰ *Id.*

defense.¹³¹ The judge emphasized the cost associated with the singular case, mostly due to the cost of expert witnesses to diagnose the defendant raising insanity.¹³² Though SB 314 was passed and signed into law, it was not without its critics.¹³³ A Washoe County public defender testified during the Senate hearing that the bill “thr[ew] out the baby with the bath water” and that “[d]enying a person the opportunity to offer a defense which calls attention to medical and scientific facts now accepted denies due process rights.”¹³⁴

Still, the insanity defense was abolished in Nevada, and the term insanity was deleted from the statutes that defined criminal culpability and defenses.¹³⁵ Insanity as it related to liability was now only found in Section 193.220 of the Nevada Revised Statutes, which stated, “No act committed by a person while in a state of insanity or voluntary intoxication shall be deemed less criminal by reason of his condition, but . . . the fact of his insanity or intoxication may be taken into consideration in determining the purpose, motive or intent.”¹³⁶ The insanity defense did not become a true controversy again until the case of *Finger v. State*, with NRS 193.220 being a central issue to the case.¹³⁷

In 1996, Frederick Finger was accused of murdering his mother by stabbing her in the head with a kitchen knife.¹³⁸ Finger had an extensive history of mental illness, dating back to 1972 when he was diagnosed with “schizophrenia, manic depressive disorder with homicidal and suicidal tendencies, intermittent explosive disorder and paranoia.”¹³⁹ Finger also suffered from hallucinations and had been institutionalized several times prior.¹⁴⁰ The district court denied his request to enter a plea of NGRI, subsequent to the abolition of the plea the year prior.¹⁴¹ Originally, he declined to enter any plea after his NGRI plea was denied, causing the district court to enter a not guilty plea for him and to set a date for trial.¹⁴² He then decided “there were no issues to be resolved by a trial,” and pleaded GBMI to a lesser charge of second-degree murder to raise the constitutional argument on the insanity defense through an appeal.¹⁴³

In Finger’s appeal to the Supreme Court of Nevada, he alleged that the abolition of the insanity defense violated the Eighth and Fourteenth Amendments of the U.S. Constitution, as well as Sections 6 and 8(5) of Article 1 of the Nevada

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Finger v. State*, 27 P.3d 66, 70–71 (Nev. 2001).

¹³⁶ *Id.* at 71 (emphasis omitted) (citing NEV. REV. STAT. § 193.220 (2001)).

¹³⁷ *Id.* at 68, 71.

¹³⁸ *Id.* at 68.

¹³⁹ *Id.* at 69.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 70.

¹⁴² *Id.*

¹⁴³ *Id.*

Constitution.¹⁴⁴ He additionally argued that the use of the term “insanity” in NRS 193.220, combined with the elimination of the insanity defense, “permits persons to be convicted of crimes even though they did not possess the mental ability to form the criminal intent designated as an element of an offense.”¹⁴⁵ The statute was apparent in its contradictions—it recognized that insanity *can* be used to determine whether or not an element of a crime has been proven beyond a reasonable doubt yet also stated that someone cannot be acquitted as a result of that insanity.¹⁴⁶

The State argued that NRS 193.220 allowed a defendant “to introduce evidence regarding insanity as it relates to the ability of the defendant to form intent.”¹⁴⁷ Though insanity could not be raised as an affirmative defense, it could show that an individual lacked the required intent to commit the crime and therefore could not be convicted.¹⁴⁸ The Court determined that the State’s interpretation of this *mens rea* model was incorrect.¹⁴⁹ Knowledge that an action is “wrong” is generally not an element of a crime, even if the crime requires specific intent.¹⁵⁰ The *mens rea* model only requires a culpable state of mind regarding the crime itself, not regarding whether the act is illegal or wrong.¹⁵¹

The Court also found that the basis for the amendment abolishing the insanity defense was likely the result of confusing case law and inaccurate explanations of what constituted legal insanity in Nevada.¹⁵² It appeared that juries and expert witnesses were not instructed on the delusional analysis of M’Naghten; instead, they were only given the basic rule.¹⁵³ This contributed to confusion surrounding the standard for insanity, as “the Legislature could not determine whether the court had intended to expand M’Naghten informally without adopting some new test for legal insanity or if the court had simply improperly analyzed those cases”¹⁵⁴ Proponents for the amendment did not provide specific case names to illustrate the alleged abuse of the insanity defense, instead using anecdotes to make their point.¹⁵⁵ Furthermore, the legal definitions of insanity given at the hearing for the amendment were not those of the M’Naghten standard.¹⁵⁶ By not discussing Nevada’s insanity defense using the standard set forth in the M’Naghten test, and therefore not discussing the standard that would be

¹⁴⁴ *Id.* at 68.

¹⁴⁵ *Id.* at 71.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 79.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Mens Rea*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/mens_rea [<https://perma.cc/C3TW-6WDF>].

¹⁵² *See Finger*, 27 P.3d at 77.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

used at trial, it was difficult for the legislature to get an accurate depiction of Nevada's insanity laws.¹⁵⁷

Additionally, the Court found that “due process requires that a defendant be able to present evidence and argue that he or she lacked the *mens rea* to commit the criminal act.”¹⁵⁸ The Court noted that criminal intent is so integral to American criminal law, the public outrage of the Hinckley acquittal was not enough to persuade Congress to abolish the insanity defense at the federal level.¹⁵⁹ Using the doctrine of historic practice, the Court analyzed whether legal insanity was a fundamental principle under the Due Process Clause. The Court determined that the concept of *mens rea* and the insanity defense were too interconnected to have one without the other—because the prosecution must prove the *mens rea* of the crime, it stands to reason that there also exists a concept that negates the *mens rea*.¹⁶⁰ Legal insanity itself, the Court concluded, is a fundamental principle under the Due Process Clause.¹⁶¹ Therefore, it was unconstitutional for the Legislature to abolish insanity as a complete defense.¹⁶²

Finally, the Court examined if the GBMI plea created by SB 314 should remain intact.¹⁶³ Based on Nevada case law, an entire law should be invalidated when “provisions of an act cannot be severed without defeating the whole scope and object of the law.”¹⁶⁴ The GBMI plea broadened the scope of legal insanity when read in conjunction with the language of NRS 193.200, in direct contradiction with the purpose of the law.¹⁶⁵ The Court concluded that the entire Act should be rejected and all statutes that were modified by SB 314 should be converted to the prior versions.¹⁶⁶ Thus, the GBMI plea was no more.

With the repeal of SB 314, the Court stated Finger was entitled to withdraw his plea of guilty but mentally ill and enter a plea of insanity.¹⁶⁷ The broader repercussions of *Finger* changed the landscape of the insanity defense in Nevada. It established legal insanity as a constitutional right under both the U.S. and Nevada State Constitution, forbidding the legislature from abolishing the defense.¹⁶⁸

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 80.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 84.

¹⁶³ *Id.*

¹⁶⁴ *Id.* (analyzing *Binegar v. District Court*, 915 P.2d 889 (Nev. 1996)).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 85.

¹⁶⁸ *Id.* at 86.

Given Nevada's biennial legislative session,¹⁶⁹ the NGRI verdict was not added back into law until 2003.¹⁷⁰ The bill passed with little fanfare, though the insanity defense's notoriously confusing definition and application were still at issue during the Judiciary Committee's meeting.¹⁷¹ Several assembly members questioned the placement and evaluation of a person found not guilty by reason of insanity.¹⁷² Ben Graham, of the Nevada District Attorney's Association, remarked, "[T]his deals strictly with the [use of the] M'Naghten Rule for defense at criminal trials. What we do with these souls afterwards, I think the medical people take over from there."¹⁷³

B. *The Return of the Guilty but Mentally Ill Plea*

A few months after the Nevada Supreme Court decided the insanity defense's fate, a separate murder case transpired that would bring the GBMI verdict back to the forefront. In October 2001, Michael Kane stabbed John Trowbridge several times, killing him.¹⁷⁴ Kane was under the influence of LSD at the time of the murder and was later diagnosed as a paranoid schizophrenic by the defense's psychologist.¹⁷⁵ Kane was influenced by an insane delusion that he was under attack, causing him to use his knife in a perceived act of self-defense.¹⁷⁶ Kane's psychological troubles continued past his arrest, prompting a brief stint in a psychiatric hospital while awaiting trial.¹⁷⁷ Over the next couple of years, Kane's inconsistent medication use caused his behavior to waver between violently delusional and mentally competent enough to stand trial.¹⁷⁸ Kane faced trial for first-degree murder in 2004, where he pleaded NGRI.¹⁷⁹ Both the prosecution and the defense agreed Kane suffered from genuine mental illness.¹⁸⁰ Kane's attorney stated, "The [insanity] defense doesn't mean anything if you can't use it in cases like this."¹⁸¹ Kane's case ended up being the first real test of the holding

¹⁶⁹ LEGIS. COUNS. BUREAU, THE 2021–2022 GUIDE TO THE NEVADA LEGISLATURE 20 (23d ed. 2021) (explaining that the Nevada Legislature meets biennially on the odd-numbered year).

¹⁷⁰ NEV. REV. STAT. § 174.035 (2003).

¹⁷¹ *Minutes of the Assembl. Comm. on Judiciary April 9, 2003*, 2003 Leg., 72d Sess. (Nev. 2003).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Matt Pordum, *Insanity Defense Accepted; Kane Acquitted of Murder*, LAS VEGAS SUN (Sept. 15, 2004, 9:39 AM), <https://lasvegassun.com/news/2004/sep/15/insanity-defense-accepted-kane-acquitted-of-murder> [<https://perma.cc/JA2A-GEK7>].

¹⁷⁵ Stephanie Simon, *A Killer's Insanity, Cured*, L.A. TIMES (July 31, 2005, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2005-jul-31-na-insanity31-story.html> [<https://perma.cc/RMJ5-GA3E>].

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

of *Finger* and the reinstated insanity laws.¹⁸² It also epitomized several common themes with the public perception of the insanity defense: specifically, a misunderstanding of the law, combined with the dissonance between the legal meaning of insanity and its normal usage, and a call for reform to the defense as a whole.

1. *A “Mentally Ill Person” Versus a Person with a “Mental Illness”*

Kane was acquitted by reason of insanity,¹⁸³ and his acquittal meant the court had ninety days to determine if there was clear and convincing evidence that he was mentally ill.¹⁸⁴ It was Nevada’s first acquittal due to insanity in almost a decade.¹⁸⁵ If found mentally ill, the court would order Kane’s commitment to the custody of the Administrator of the Division of Mental Health and Developmental Services.¹⁸⁶ Kane was sent to Lake’s Crossing, a maximum-security psychiatric facility in Sparks, Nevada.¹⁸⁷ While there, the state evaluated him every six months¹⁸⁸ to determine if he had recovered from his mental illness or improved to the point he could no longer be considered a “mentally ill person.”¹⁸⁹

Ten months after Kane’s acquittal by reason of insanity, the practitioners at Lake’s Crossing determined Kane was no longer a mentally ill person.¹⁹⁰ As a result, the state would begin the process to determine if Kane should be released back into society, starting with a competency hearing.¹⁹¹ The presiding judge, District Judge Jennifer Togliatti, ruled the Lake’s Crossing practitioners must review the expert psychological testimony from Kane’s trial and then reevaluate him to see if they reach the same conclusion.¹⁹² Kane’s release was subsequently delayed for roughly four years.¹⁹³

¹⁸² See Pordum, *supra* note 174.

¹⁸³ *Id.*

¹⁸⁴ NEV. REV. STAT. § 175.539(2) (2021).

¹⁸⁵ GLENN PUIT, *WITCH: THE TRUE STORY OF LAS VEGAS’S MOST NOTORIOUS FEMALE KILLER* 295–96 (2005).

¹⁸⁶ § 175.539(2).

¹⁸⁷ *Lake’s Crossing Center for Mentally Disordered Offenders Overview*, DEP’T HEALTH & HUM. SERVS. NEV. DIV. PUB. & BEHAV. HEALTH (May 28, 2015), http://dpbh.nv.gov/About/Overview/Lake_s_Crossing_Center_Overview [<https://perma.cc/U67E-GZCQ>].

¹⁸⁸ See NEV. REV. STAT. § 178.450(2) (2003) (providing that reports must be submitted “at 6-month intervals” for non-misdemeanors).

¹⁸⁹ See *id.* § 175.539 (describing evaluation standard).

¹⁹⁰ Matt Pordum, *Doctors Say Man Acquitted of Murder No Longer Mentally Ill*, LAS VEGAS SUN (June 21, 2005, 11:08 AM), <https://lasvegassun.com/news/2005/jun/21/doctors-say-man-acquitted-of-murder-no-longer-ment> [<https://perma.cc/M2AK-3FBG>].

¹⁹¹ Minutes for Evidentiary Hearing, *State v. Kane*, No. 02C182563 (Clark Cnty. D. Ct. filed Mar. 26, 2002).

¹⁹² *Id.*

¹⁹³ See David Kihara, *Man Who Killed in ‘01 To Be Freed from Facility*, LAS VEGAS REV. J. (Mar. 20, 2008, 9:00 PM), <https://reviewjournal.com/news/man-who-killed-in-01-to-be-free-d-from-facility> [<https://perma.cc/GN9K-D7DT>] (explaining that the stabbing occurred in 2001 and Kane’s verdict occurred in 2004).

The idea that a killer could walk free stirred up controversy, despite its gross oversimplification of Kane's situation. This was evident in the news media covering the case. An LA Times article titled, "A Killer's Insanity, Cured" supplied almost sarcastic commentary, stating, "[Kane] jumped a friend without provocation and stabbed him. The jury found Kane not guilty by reason of insanity; he was sent to a psychiatric hospital. *There he made a remarkable recovery.*"¹⁹⁴ The article went on to ask, "[Should] a fleeting diagnosis of insanity . . . be enough to keep a killer out of prison[?]"¹⁹⁵ The Las Vegas Sun, a local newspaper, ran an article regarding Kane's then-upcoming competency hearing with the headline, "Doctors Say Man Acquitted of Murder No Longer Mentally Ill."¹⁹⁶ None of these statements are technically incorrect. However, they all lack the nuance necessary when examining a complex defense like that of insanity. NGRI is rooted in abstract and often confusing legal concepts that require careful examination and use of language.

Much of this conflict stems from the differences between words as defined by statute and how those same words are used in everyday vernacular. Consider the term "mentally ill person." The law at the time of Kane's case defined "mentally ill person" as

any person whose capacity to exercise self-control, judgment and discretion in the conduct of his affairs and social relations or to care for his personal *needs is diminished, as a result of a mental illness*, to the extent that *he presents a clear and present danger of harm to himself or others.*¹⁹⁷

Merriam-Webster, on the other hand, does not have a definition for the term "mentally ill person." The closest term is "mental illness," which is defined as "any of a broad range of medical conditions . . . that are marked primarily by sufficient disorganization of personality, mind, or emotions to impair normal psychological functioning and cause marked distress or disability . . ." ¹⁹⁸

The key difference between the two definitions is the person presenting a clear and present danger of harm to themselves or others. Under the law at the time, a person could still have a diagnosable mental illness, but not be considered a "mentally ill person," if they did not present such a danger. However, the non-legal use of mentally ill does not usually carry such a connotation. Instead, a "mentally ill person" commonly refers to a person with any mental illness. As a result, the report that Kane was no longer considered a "mentally ill person" under the definition of the law transformed into a scenario where Kane was no longer mentally ill *at all*. Using these terms interchangeably was not just limited to news reports. Kane's attorney, Deputy Public Defender Scott Coffee, was

¹⁹⁴ Simon, *supra* note 175 (emphasis added).

¹⁹⁵ *Id.*

¹⁹⁶ Pordum, *supra* note 190.

¹⁹⁷ NEV. REV. STAT. § 433A.115(1) (West, Westlaw through Ch. 2 (End) of the 33d Special Session (2021)) (emphasis added).

¹⁹⁸ *Mental Illness*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/mental%20illness> [<https://perma.cc/BV9P-PNZH>].

quoted saying that Kane was “not mentally ill and at this point it’s safe for him to return to society”¹⁹⁹

Conflating the two definitions reinforces the idea that mental illness for the purpose of insanity is a temporary or “fleeting”²⁰⁰ condition—something that a person could be cured of after a short stint in a mental hospital. This idea is in stark contrast to the medically accepted idea that mental illnesses cannot be cured, only treated and managed.²⁰¹ Assigning the notion of impermanence to mental illness for the purpose of an insanity plea can also bolster the impression that it can and will be faked. In Kane’s case, one of the detectives handling his case said in a news article that “[t]here’s nothing wrong with this kid His next stop should be Hollywood.”²⁰²

2. *More Calls for Reform*

Kane’s potential release also jumpstarted a campaign to reform the legislation surrounding the insanity defense, led by the victim’s mother, Robbin Trowbridge-Benko.²⁰³ At the time of her campaign, Kane’s future in psychiatric care was still undetermined.²⁰⁴ However, Trowbridge-Benko’s objection to his release largely stemmed from the lack of aftercare for those found NGRI.²⁰⁵ She criticized the Nevada Legislature, stating that when it reinstated the NGRI plea, it did not consider the possibility that a person who was acquitted due to insanity would make a recovery and be released without further monitoring.²⁰⁶

Eventually, Trowbridge-Benko obtained an audience with the legislature’s Subcommittee to Study Sentencing and Pardons, Parole and Probation.²⁰⁷ Some

¹⁹⁹ Pordum, *supra* note 190.

²⁰⁰ Simon, *supra* note 175.

²⁰¹ NAT’L INSTS. OF HEALTH, CURRICULUM SUPP. SER. NBK20369, INFORMATION ABOUT MENTAL ILLNESS AND THE BRAIN (2007), <https://www.ncbi.nlm.nih.gov/books/NBK20369> [<https://perma.cc/M7LV-FL7W>]; *Is Mental Illness Curable?*, MENTAL HEALTH AM., <https://screening.mhanational.org/content/mental-illness-curable> [<https://perma.cc/W57D-3D2P>]; *Mental Illness*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/mental-illness/diagnosis-treatment/drc-20374974> [<https://perma.cc/6XJK-HN7K>]; see *Frequently Asked Questions*, NAT’L ALL. MENTAL ILLNESS, <https://www.nami.org/FAQ/General-Information-FAQ/Can-people-recover-from-mental-illness-Is-there-a> [perma.cc/BJ69-YHFR] (discussing illness management and relief).

²⁰² Simon, *supra* note 175.

²⁰³ Matt Pordum, *Mother of 23-year-old Man Killed by Kane Calls on Lawmakers*, LAS VEGAS SUN, (Aug. 8, 2005, 9:27 AM), <https://lasvegassun.com/news/2005/aug/08/mother-of-23-year-old-man-killed-by-kane-calls-on/> [<https://perma.cc/39QY-8W5C>].

²⁰⁴ *Id.*

²⁰⁵ Pordum, *supra* note 190 (“‘Either the doctors were wrong then or now,’ Trowbridge-Benko said. ‘Someone was wrong and that decision might put a murdering thug back on the street, without a record. He’ll be on the same playing field as you and me.’”).

²⁰⁶ See *id.* (discussing Trowbridge-Benko’s “suggestions as to how the law could be changed”).

²⁰⁷ SUMMARY MINUTES & ACTION REP. BEFORE THE NEV. LEG. SUBCOMM. TO STUDY SENT’G & PARDONS, & PAROLE & PROB., 2005 A.C.R., 73d Interim Sess. (Nev. 2005).

of her proposed reform included monitored release, mandatory risk assessment, and lifetime court jurisdiction of those found NGRI.²⁰⁸ At the time, Nevada was the only state where a person would not have to enter a monitored release program after release from psychiatric care following a NGRI acquittal.²⁰⁹ Kane's trial attorney also acknowledged the potential benefit of a monitored release program and risk assessment.²¹⁰ Kane's case made it likely a proposal of reinstating the guilty but mentally ill plea would be among the testimony presented at the Subcommittee's hearing.²¹¹

In 2007, the Assembly Committee on Judiciary met to discuss the new Assembly Bill (A.B.) 193 that would reinstate the GBMI verdict.²¹² After testimony from the Nevada District Attorneys Association, the Nevada Attorneys for Criminal Justice, and the American Civil Liberties Union,²¹³ the Assembly Committee on Judiciary proposed an amended bill, which added:

[T]he language in the M'Naghten standard for not guilty by reason of insanity [would] include a disease or defect of the mind rather than using the word "insanity" to define insanity. Another change made is that a plea of guilty but mentally ill could only be taken up in trial upon a plea of not guilty by reason of insanity. Additionally, it requires that a defendant who is deemed mentally ill receive treatment from the Department of Corrections (NDOC).²¹⁴

The amended bill passed unanimously through the Assembly and passed to the Senate.²¹⁵ The Senate amended A.B. 193 to include the language of another bill, A.B. 369, which changed the standard of treatment for someone found NGRI.²¹⁶ The bill passed unanimously through the Senate as well²¹⁷ and was ultimately signed into law.²¹⁸ A defendant is currently able to plead the following: not guilty, guilty, guilty but mentally ill.²¹⁹ A defendant can also receive a verdict of guilty but mentally ill, provided the defendant entered a plea of not guilty by reason of insanity.²²⁰ The addition of GBMI brought the conclusion of an almost twelve-year journey. However, while this convoluted campaign was arguably paved with good intentions, it was an attempt to fix a problem so rare that it almost does not exist.

²⁰⁸ *Id.* at 13, 17, 26.

²⁰⁹ Pordum, *supra* note 203.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *March 20 Minutes*, *supra* note 35.

²¹³ *Id.*

²¹⁴ *Minutes of the Meeting of the Assemb. Comm. on Judiciary April 12, 2007*, 2007 Leg., 74th Sess. (Nev. 2007).

²¹⁵ *Assemb. 2007-75*, 74th Sess., at 1456 (Nev. 2007).

²¹⁶ *See Minutes of the S. Comm. on Judiciary May 15, 2007*, 74th Sess., at 20 (Nev. 2007) (describing that "S.B. 380 is A.B. 193 and A.B. 369 combined").

²¹⁷ *Assemb. 2007-110*, 74th Sess., at 4471 (Nev. 2007).

²¹⁸ NEV. REV. STAT. § 174.035 (2017).

²¹⁹ *Id.*

²²⁰ NEV. REV. STAT. § 175.533 (2017).

III. INSANITY (WHAT IS IT GOOD FOR?)

As explored above, Nevada is not unique in its quest to tame the controversial insanity defense. Eleven other states have adopted a version of the guilty but mentally ill verdict.²²¹ Back in 1981, the Attorney General's Task Force on Violent Crime stated that this verdict would ensure that the defendant who is incarcerated would receive treatment for their mental illness.²²² On its face, the existence of the GBMI verdict fills the public safety gap purportedly left by the NGRI verdict. Unfortunately, the GBMI verdict fails in concept and in practice, particularly as it exists alongside the well-established insanity defense.

The only meaningful result of having both verdicts is confusing the jury and doing a disservice to the defendant. As such, the GBMI verdict should be eliminated. That is not to say the insanity defense is a perfect solution to handling mentally ill offenders. However, the perception that the verdict of NGRI is a "problem" that can only be fixed with radical reform is inaccurate.

A. *An Unnecessary Coexistence*

One of the fundamental principles of the American justice system is recognizing criminal behavior as punishable only if the act is blameworthy and lacking justification.²²³ The purpose of a criminal trial is to make those determinations of the defendant's actions.²²⁴ Of course, the defendant's mental state and/or illness assists with that determination.²²⁵

The GBMI verdict is an attempt to create a middle ground between acquittal because of insanity and a guilty verdict of someone with a mental illness.²²⁶ The verdict allows jurors to hold a defendant criminally culpable, while also acknowledging his or her mental illness.²²⁷ However, the verdict is rooted in a

²²¹ 18 PA. CONS. STAT. § 314 (1982); MICH. COMP. LAWS § 768.36 (1975); IND. CODE ANN. § 35-36-2-5 (West, Westlaw through the 2021 First Regular Session of the 122d General Assembly); ALASKA STAT. § 12.47.050 (2020); S.C. CODE ANN. § 17-24-20 (West, Westlaw through 2021 Act No. 116); DEL. CODE ANN. 11, § 408 (West, Westlaw through ch. 266 of the 151st General Assembly (2021-2022)); KY. REV. STAT. ANN. § 504.130 (West, Westlaw through the end of the 2021 regular and special sessions); S.D. CODIFIED LAWS § 23A-25-13 (West, Westlaw through 2021 1st Special Session); 730 ILL. COMP. STAT. ANN. 5/5-2-6 (West, Westlaw through P.A. 102-691 of the 2021 Reg. Sess.); GA. CODE ANN. § 17-7-131 (West, Westlaw through legislation passed at the 2021 Regular and 1st Special Sessions of the Georgia General Assembly); 1953 UTAH LAWS § 77-16a-103 (2011).

²²² See TASK FORCE, *supra* note 110, at 54.

²²³ Slobogin, *supra* note 30, at 517-18; see also Erin Elizabeth Cotrone, *The Guilty but Mentally Ill Verdict: Assessing the Impact of Informing Jurors of Verdict Consequences* (Nov. 9, 2016) (Ph.D. dissertation, University of South Florida) (ProQuest).

²²⁴ Slobogin, *supra* note 30, at 517.

²²⁵ See generally MODEL PENAL CODE § 2.02 (AM. L. INST. 1985) (providing an overview of the general mental state requirements for a defendant's culpability).

²²⁶ Hanna, *supra* note 120.

²²⁷ See Cotrone, *supra* note 223, at 3 (critiquing the GBMI verdict as holding individuals responsible while not guaranteeing mental health treatment).

misunderstanding of an insanity acquittal.²²⁸ The central premise of the GBMI is based on the idea that those who are found NGRI are let loose into the general population, presumably to commit more heinous crimes.²²⁹ It may be understandable that the general public will have or has an uneasiness of designating a verdict of not guilty to the man who attempted to kill the president—never mind the fact that Hinckley spent more time civilly committed than not.²³⁰ Indeed, that is the mindset that informed the decision to reinstate the verdict in Nevada.²³¹ However, as mentioned above, the IDRA addressed this concern by requiring civil commitment following a NGRI verdict.²³² The commitment requirement was also the most common reform of the insanity defense by states following the Hinckley trial.²³³

Even still, the risk of recidivism by an acquittee found insane and then released is considerable, with some studies placing the number between six and twenty percent.²³⁴ However, these numbers are less than or comparable to the recidivism rates of all released felons.²³⁵ Those who are found NGRI and subsequently released are not measurably more dangerous than their convicted, non-insane peers.²³⁶ For those found GBMI, they are eligible for parole once their minimum time has been served, depending on the perceived level of dangerousness.²³⁷ The unfortunate truth is recidivism can happen despite the criminal justice system's best efforts. Predicting long-term dangers and the likelihood to reoffend is a science that has not yet been perfected.²³⁸ Attempting to thwart any crimes can really only be successful through lifelong incarceration or commitment, which goes against the model of the modern society.²³⁹

²²⁸ See Note, *supra* note 113, at 477–78.

²²⁹ See Slobogin, *supra* note 30, at 497–98.

²³⁰ See Chuck, *supra* note 25.

²³¹ Pordum, *supra* note 174.

²³² See *Criminal Resource Manual*, *supra* note 104.

²³³ Callahan et al., *supra* note 4, at 55.

²³⁴ See Slobogin, *supra* note 30, at 502 (citing Richard Pasewark et al., *The Insanity Plea in New York State, 1965–1976*, 51 N.Y. STATE B.J. 186, 221–22 (1979); William R. Morrow & Donald B. Peterson, *Follow-up of Discharged Offenders—“Not Guilty by Reason of Insanity” and “Criminal Sexual Psychopaths,”* 57 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 31, 33 (1966); Richard A. Pasewark et al., *Detention and Rearrest Rates of Persons Found Not Guilty by Reason of Insanity and Convicted Felons*, 139 AM. J. PSYCHIATRY 892, 893–94 (1982); Betty L. Phillips & Richard A. Pasewark, *Insanity Plea in Connecticut*, 8 BULL. AM. ACAD. PSYCHIATRY & L. 335, 340 (1980)).

²³⁵ *Id.* at 502–03.

²³⁶ *Id.* at 504.

²³⁷ See Randy Borum & Solomon M. Fulero, *Empirical Research on the Insanity Defense and Attempted Reforms: Evidence Toward Informed Policy*, 23 L. & HUM. BEHAV. 117, 126 (1999).

²³⁸ Sophia Bushwick, *Will Past Criminals Reoffend? Humans Are Terrible at Guessing, and Computers Aren't Much Better*, SCI. AM. (Feb. 14, 2020), <https://www.scientificamerican.com/article/will-past-criminals-reoffend-humans-are-terrible-at-guessing-and-computers-arent-much-better> [https://perma.cc/B5AB-VXUE].

²³⁹ See Slobogin, *supra* note 30, at 503–04.

Furthermore, a person found NGRI can serve mental health commitments that can last nearly as long or longer than a prison sentence.²⁴⁰ The federal law marks release not by a specific timeframe, but instead a vague measure of the person's likelihood to create "a substantial risk of bodily injury to another person or serious damage of property of another due to a present mental disease or defect."²⁴¹ In a 1992 case, the Supreme Court held that a state "must establish insanity *and* dangerousness by clear and convincing evidence in order to confine an insane convict."²⁴² Establishing insanity and dangerousness is therefore subject to a lower evidentiary standard than the beyond a reasonable doubt standard required to convict a defendant.²⁴³ In Nevada, the language of the insanity statute presents a similar vague release standard that allows for confusion from the public.²⁴⁴

Another common talking point from champions of the GBMI verdict is the view of a NGRI defense as an apparent "Get Out of Jail Free" card, allowing an "insane" criminal to continue to wreak havoc on the general public.²⁴⁵ Again, this appears to originate from a general misunderstanding of the verdict and the punishment that comes with it.²⁴⁶ Defendants use the insanity defense at a remarkably rare rate, with most jurisdictions counting its use at less than one percent of all verdicts.²⁴⁷ Even when it is utilized, it is seldom successful.²⁴⁸

The publicity surrounding the cases utilizing the insanity defense makes the defense seem much more common than the statistics report.²⁴⁹ These newsworthy cases lend themselves to sensationalized stories and tend to be of the type of crime that shocks the public's conscience. As such, the insanity defense pops up in quite a few "household name" criminal cases. Andrea Yates, who was accused of drowning her five children, was acquitted by reason of insanity on her appeal

²⁴⁰ Mac McClelland, *When 'Not Guilty' Is a Life Sentence*, N.Y. TIMES (Sept. 27, 2017), <https://www.nytimes.com/2017/09/27/magazine/when-not-guilty-is-a-life-sentence.html> [<https://perma.cc/W9QJ-PS6C>].

²⁴¹ 18 U.S.C. § 4243(e).

²⁴² *Foucha v. Louisiana*, 504 U.S. 71, 86 (1992) (emphasis added).

²⁴³ *Evidentiary Standards and Burdens of Proof in Legal Proceedings*, JUSTIA, <https://www.justia.com/trials-litigation/lawsuits-and-the-court-process/evidentiary-standards-and-burdens-of-proof> [<https://perma.cc/4V8Z-MYWT>].

²⁴⁴ See *supra* notes 189–91 and accompanying text.

²⁴⁵ See Slobogin, *supra* note 30, at 504 (providing scenarios where one is much more likely to be able to get out of jail compared to using the insanity defense).

²⁴⁶ See Slobogin, *supra* note 30, at 498–500.

²⁴⁷ Borum & Fulero, *supra* note 237, at 378.

²⁴⁸ *Id.* ("In a survey of seven states, the rate of insanity pleas ranged from .29 to 1.73 with an average of .85 (less than 1 percent) per 100 felony indictments. The aggregated success rate for insanity pleas in that survey was 28.1 percent. Similar findings have emerged from at least two other studies. A four-state study reported that the rate of success for insanity pleas across all states was 22.71 percent, and a national survey reported that the median success rate for insanity pleas was one acquittal for every 6.5 pleas (approximately 15 percent)." (citations omitted)).

²⁴⁹ *Id.*

due to the jury finding that her mental illness caused her to think it was necessary to kill her children in order to “save their souls from eternal damnation.”²⁵⁰ Jeffrey Dahmer attempted to plead insanity and, though his plea was ultimately unsuccessful, a Time magazine article speculated that if he were found insane he could begin seeking release from a state mental hospital after only one year.²⁵¹ James Holmes, who was responsible for twelve deaths in a Colorado movie theater, was allowed to raise an insanity defense, though the jury ultimately found him guilty.²⁵² In Nevada, the suspect in the fatal shooting of a Nevada Highway Patrol sergeant intended to enter a plea of NGRI, though later entered a GBMI plea.²⁵³

Additionally, it is important to note how the existence of both verdicts psychologically affects jurors. Several studies and research literature have indicated that the inclusion of the GBMI option creates jury confusion. One study found that only 4.2% of highly educated jurors could identify the definitions and consequences between NGRI and GBMI verdicts.²⁵⁴ As seen with the Kane murder case in Nevada, it is difficult to inform people outside the legal community of the difference between the definition of legal insanity, mental illness, and a mentally ill person.²⁵⁵

Potential jurors may end up misapplying the GBMI test, ultimately convicting someone who would have otherwise been acquitted by reasons of insanity.²⁵⁶ One study presented mock jurors with sixteen cases describing a mentally ill defendant with various mental disorders and varying levels of planning and bizarreness.²⁵⁷ In cases in which the defendant portrayed delusions and lack of planning,

²⁵⁰ Dale Lezon et al., *Jury Finds Yates Insane, Not Guilty*, CHRON. (Jul. 26, 2006), <https://www.chron.com/news/article/Jury-finds-Yates-insane-not-guilty-1857308.php> [<https://perma.cc/6TMY-WYES>].

²⁵¹ Anastasia Toufexis, *Trials: Do Mad Acts a Madman Make?*, TIME (Feb. 3, 1992), <http://content.time.com/time/subscriber/article/0,33009,974814,00.html> [<https://perma.cc/UE85-NTPF>].

²⁵² Ben Markus, *Jury Rejects Insanity Defense for Theater Shooter, Who May Get Death Penalty*, NPR (July 17, 2015, 5:09 AM), <https://www.npr.org/2015/07/17/423740561/jury-rejects-insanity-defense-for-theater-shooter-who-may-get-death-penalty> [<https://perma.cc/KJZ4-QGBE>].

²⁵³ *Insanity Plea Entered in Slaying of NHP Trooper*, ELKO DAILY (Feb. 4, 2021), https://elko-daily.com/news/local/crime-and-courts/insanity-plea-entered-in-slaying-of-nhp-trooper/article_42eb0e3a-deaa-59c1-ae3-5524ac8445e8.html [<https://perma.cc/D5DE-KGCR>]; Rio Laccanlale, *‘I Had Shot Him.’ Man Pleads Guilty in Highway Patrol Sergeant’s Killing*, LAS VEGAS REV. J. (July 26, 2021, 11:44 AM), <https://www.reviewjournal.com/crime/courts/i-had-shot-him-man-pleads-guilty-in-highway-patrol-sergeants-killing-2406919> [<https://perma.cc/B6EG-ZJJR>].

²⁵⁴ Cotrone, *supra* note 223 (citing Lisa M. Sloat & Richard L. Frierson, *Juror Knowledge and Attitudes Regarding Mental Illness Verdicts*, 33 J. AM. ACAD. PSYCHIATRY L., 208 (2005)).

²⁵⁵ PUIT, *supra* note 185, at 295–96; *see also* Slobogin, *supra* note 30, at 509.

²⁵⁶ *See* Slobogin, *supra* note 30, at 509.

²⁵⁷ Canton F. Roberts et al., *Implicit Theories of Criminal Responsibility: Decision Making and the Insanity Defense*, 11 L. & HUM. BEHAV. 207, 212 (1987).

ninety-five percent of the mock jurors returned with a verdict of NGRI.²⁵⁸ However, when presented with the option of GBMI, eighteen percent of mock jurors returned with a verdict of NGRI for the exact same defendant.²⁵⁹ The majority of mock jurors agreed that the GBMI was an adequate alternative for providing treatment to mentally ill offenders.²⁶⁰ A similar study demonstrated comparable results—mock NGRI verdicts decreased from sixty percent to thirty-five percent when presented with the option of GBMI.²⁶¹

However, the GBMI verdict can actually do a disservice to a mentally ill defendant, despite the jurors' good intentions. Studies examining the effect of GBMI suggest that defendants convicted with a GBMI verdict receive longer prison sentences than those who plead insanity but were found guilty.²⁶² Interviews with Alaska's Department of Corrections also indicated that *no* inmate who was convicted under a GBMI verdict in Alaska has received parole.²⁶³ Moreover, there is an increasing²⁶⁴ amount²⁶⁵ of evidence²⁶⁶ that a GBMI verdict does not affect the treatment provided to a mentally ill prisoner. In Nevada, when the legislature reinstated the GBMI verdict, it did not allocate funding for additional mental health treatment.²⁶⁷ One study of GBMI inmates in Georgia found that out of the 150 who had been convicted under that verdict, only three were given care amounting to more than the existing provisions given to prisoners who required inpatient care.²⁶⁸ Given that the promise of mental health treatment is one of the main reasons juries favor GBMI verdicts, the lack of adequate treatment for these defendants renders the verdict purposeless.

Finally, mental health professionals and legal scholars generally disagree with the adoption of the GBMI verdict.²⁶⁹ The American Psychiatric Association stated that the GBMI verdict gives juries the "easy way out" by allowing them "to avoid grappling with difficult issues of guilt and innocence . . ."²⁷⁰ Leonard S. Rubenstein, a lawyer and professor of practice at Johns Hopkins Bloomberg

²⁵⁸ *Id.* at 222.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 226.

²⁶¹ Canton F. Roberts & Stephen L. Golding, *The Social Construction of Criminal Responsibility and Insanity*, 15 L. & HUM. BEHAV. 349, 360 tbl.1 (1991).

²⁶² SARA GORDON ET AL., REVIEW OF ALASKA MENTAL HEALTH STATUTES 32 (2016).

²⁶³ *Id.* at 32–33.

²⁶⁴ Fentiman, *supra* note 111, at 632.

²⁶⁵ GORDON ET AL., *supra* note 262, at 33.

²⁶⁶ Borum & Fulero, *supra* note 237, at 384.

²⁶⁷ *John's Law Gives Mom Some Peace*, LAS VEGAS REV. J. (Oct. 1, 2007, 9:00 PM), <https://www.reviewjournal.com/news/johns-law-gives-mom-some-peace/> [<https://perma.cc/S5Z9-UCVX>].

²⁶⁸ Borum & Fulero, *supra* note 237, at 384.

²⁶⁹ Natalie Jacewicz, *'Guilty but Mentally Ill' Doesn't Protect Against Harsh Sentences*, NPR (Aug. 2, 2016, 1:22 PM), <https://www.npr.org/sections/health-shots/2016/08/02/486632201/guilty-but-mentally-ill-doesnt-protect-against-harsh-sentences> [perma.cc/ST4U-D3YB].

²⁷⁰ Cotrone, *supra* note 223, at 24 (quoting AM. PSYCHIATRIC ASS'N, STATEMENT ON THE INSANITY DEFENSE AS APPROVED BY THE BOARD OF TRUSTEES (1982)).

School of Public Health, authored a scathing op-ed criticizing the verdict stating, “It is as if Congress were to enact a law that permitted a verdict of ‘guilty but from a deprived background’ or, for that matter, ‘guilty but short.’”²⁷¹ Mental Health America, a nonprofit dedicated to addressing the needs of those with mental illness, called the GBMI verdict “unjust, ineffective, and misleading.”²⁷²

“It is a truth [almost] universally acknowledged”²⁷³ by those in the medical and legal industries that the guilty but mentally ill verdict is an unnecessary verdict with no discernible positive effect on the defendants it purports to assist. The premise of the GBMI verdict is based on a misunderstanding of the complex specifics required when analyzing criminal culpability. The “mentally ill” component of the verdict exists only to comfort both the public and juries. As noble as the campaign for the GBMI verdict was in Nevada, it created a redundancy and confusion at the expense of mentally ill offenders. However, there is room for discussions on improving and reforming the NGRI plea.

B. *Conditional Release as Informed Reform*

Perhaps the greatest sin coming out of the attention surrounding the GBMI verdict is how it distracts from meaningful discussion on how to reform the insanity defense. Indeed, even the conversation surrounding Nevada’s 2007 insanity defense and GBMI laws make only brief mention of the revised standards for release for a defendant found NGRI.²⁷⁴ The revised Nevada Statute regarding release removes the confusing language describing the defendant as a “mentally ill person” and instead allows for

[d]ischarge from commitment if the person establishes by a preponderance of the evidence that the person would not be a danger, as a result of any mental disorder, to himself or herself or to the person or property of another if discharged; or . . . [c]onditional release from commitment if the person establishes by a preponderance of the evidence that the person would not be a danger, as a result of any mental disorder, to himself or herself or to the person or property of another if released from commitment with conditions imposed by the court in consultation with the Division.²⁷⁵

Conditional release programs have been successful in several states, allowing for the monitoring of individuals found NGRI with intervention prior to possible recidivism.²⁷⁶ A 1992 study found twenty-seven percent of California

²⁷¹ Leonard S. Rubenstein, *Against ‘Guilty but Mentally Ill,’* N.Y. TIMES (Aug. 5, 1982), <https://www.nytimes.com/1982/08/05/opinion/against-guilty-but-mentally-ill.html> [<https://perma.cc/4R2P-S995>].

²⁷² *Position Statement 57: In Support of the Insanity Defense*, MENTAL HEALTH AM., <https://www.mhanational.org/issues/position-statement-57-support-insanity-defense> [<https://perma.cc/2MUM-6K36>].

²⁷³ JANE AUSTEN, *PRIDE AND PREJUDICE* 1 (1813).

²⁷⁴ See *Minutes of the S. Comm. on Judiciary*, 1995 Leg., 68th Sess. (Nev. 1995).

²⁷⁵ NEV. REV. STAT. § 178.467(2) (2007).

²⁷⁶ Borum & Fulero, *supra* note 237, at 390.

NGRI acquittees who were unconditionally released were rearrested, compared to five percent of their conditionally released counterparts.²⁷⁷ Naturally, conditional release programs are also imperfect. The American Civil Liberties Union of Nevada criticized the state's current conditional release law, calling it unconstitutional.²⁷⁸ The organization argues that the state has no authority to continue to hold and monitor a person who has been acquitted and found to not be a danger to themselves or others.²⁷⁹ However, that is a separate argument from the one presented in this Note.

In reality, many offenders who may have been found NGRI and might benefit from a conditional release program will never make it that far. The existence of the GBMI verdict likely provides enough of a detour for attorneys and juries to reroute the fate of such defendants. And while conditional release programs hold their own issues, at least such programs are informed by a better understanding of the law and its effect on mentally ill offenders. In comparison, the GBMI verdict, particularly in Nevada, appears to be a knee-jerk effort to deal with the uncomfortable intersection of mental health and criminal acts.

CONCLUSION

The insanity defense has a long and complicated history at both the federal and the state level. Nevada in particular has suffered from a capricious attitude toward how to legally handle mentally ill offenders. However, the solution is not to create a redundant and impractical verdict such as the GBMI verdict. Instead, the focus should be on examining methods on how to improve the insanity defense as it currently exists, such as implementing conditional release programs and improving services available to mentally ill offenders.

²⁷⁷ *Id.*

²⁷⁸ See *John's Law Gives Mom Some Peace*, *supra* note 267.

²⁷⁹ *Id.*

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