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A Critical Analysis of The Not Guilty by Reason of Insanity Plea and a Proposal for Reform

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Abstract

"It has long been accepted that the defence of insanity, in Anglo American law, is unsatisfactory and in need of reform" (Hathaway, 2009, pg. 310). Since its emergence, the Not Guilty by Reason of Insanity defence has been proven to be most problematic and contentious. The premise of this research is to critically analyse this defence and discuss alternative approaches, primarily the Guilty but Mentally Ill verdict. In order to do so, this paper will discuss the limitations and problems affiliated with the insanity defence such as, misuse and abuse, inconsistency, and reliability. Many argue that the defence is remarkably outdated as it first originated in 1843. The discussed limitations illustrate the requirement for amendment of the insanity defence. The most recognised alternative approach is the GBMI verdict which was introduced following ample public vexation with the insanity defence. GBMI has not been adopted worldwide and is a relatively new statute. An important note regarding the GBMI verdict is that it is not intended to abolish the insanity defence, merely to evolve and improve the defence. It has been discerned that the GBMI has an abundant number of advantages, be that as it may, it still requires further research and work.

This paper also acknowledges the possibility of the abolition of the insanity plea. In order to evaluate the benefits and downfalls of the elimination of the insanity defence, the Idaho case study is deliberated. The benefits and disadvantages of abolishing the defence will be discussed and analysed. On account of such, it will be concluded that eliminating a form of the insanity defence from the criminal justice system is not a viable option.

Following the research conducted, it has been discovered that the United States has conducted the most reform and amendment on the insanity defence as it is the only jurisdiction to adopt the guilty but mentally ill approach and some States have even opted to abolish the not guilty by reason of insanity defence. The majority of cases in this paper are from instances in the United States. Ireland and the United Kingdom have very few examples of cases on the topic as they both predominantly follow the standard not guilty by reason of insanity ruling. Further findings of this paper demonstrate that the Not Guilty by Reason of Insanity Defence is in fact outdated and in need of reform, however the solution is not a simple fix, there is not one sole solution to reforming and improving the insanity defence.

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- Criminal Lunatics (Ireland) Act 1838
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Chapter One

Introduction

"The disposition of persons acquitted on insanity grounds will always cast a shadow on the insanity debate" – Richard Singer 1985

The insanity defence has been a topic of contention since its implementation following the introduction of the M'Naghten rule in 1843. The primary objective of this research is to explore and critically analyse the current legislation and proceedings of the Not Guilty by Reason of Insanity (NGRI) Defence and propose alternative approach, predominantly, the Guilty but Mentally Ill (GBMI) verdict. By adopting the GMBI approach, the criminal act has not been negated, and yet the mental capacity of the defendant/offender has still been acknowledged. In this way an offender can receive the adequate treatment and or punishment the require and the crime does not go unrecognised/unjustified. The purpose of this research is to demonstrate that although an offender/defendant suffers from mental health difficulties, their criminal accountability can still be recognised. The principle arguments of this thesis will be that, the current NGRI plea is outdated and problematic, i.e. there are considerable amounts of issues and limitations associated with the current legislation and proceedings surrounding the insanity plea. A poignant issue is that there is contention and difficulty in the defining of 'insanity' and the ability to declare one as 'insane'. The primary reason as to why the GBMI approach should be utilised is that the GBMI approach is more inclusive as it demonstrates to the families of the victims that the criminal justice system is not disregarding the crime that was committed and yet an offender can gain access to the mental treatment they need. Globally, the legislation and criminal proceedings surrounding the insanity plea differentiate and there is not one single global definition of 'legal insanity'. Therefore, different jurisdictions conduct different procedures for dealing with cases involving the NGRI defence. This makes the topic more difficult and contentious.

In order to thoroughly research the proposed question, this paper will firstly discuss and review the literature and legislation available on both the NGRI plea and alternative approaches, i.e., GBMI. The limitations and problems that have arisen from the insanity will be discussed and reviewed to testify as to why the current NGRI defence requires reform and the reason why abolition has been suggested. Subsequently, examples of GBMI and its practise will be

examined in order to demonstrate why it is an appropriate alternative to the insanity defence and how it is to a greater extent, more beneficial to all parties involved. For instance, if the offender is deemed as guilty but their mental illness is recognised, they can receive the adequate treatment and the victims, or the families of a victim can receive some form of justice. As opposed to the original insanity defence where an offender is declared not guilty and criminal responsibility is negated. Case studies will be analysed by way of showing areas where the NGRI defence has been abolished and replaced by alternate approaches. This paper will highlight both the issues and benefits of the GBMI verdict to analyse if it is a suitable alternative to dealing with offenders who are believed to be mentally ill. Both desk-based and empirical researched will be conducted to critically evaluate the NGRI defence. Evidence will be collected from examples of cases in Ireland and in other jurisdictions to examine the legislation surrounding the insanity defence in a global perspective. In order to comprehensively evaluate the defence, different jurisdictions and statutes will be compared and contrasted such as Ireland, the United Kingdom and the United States. Due to the controversies that have emerged from the insanity defence, the possibility of abolition has been erected. Case studies will be inspected to establish if the elimination of the insanity defence from criminal law is appropriate.

Furthermore, examples of proposals for alternatives to the Not Guilty by Reason of Insanity defence will be analysed and evaluated. Examples of possible alternative approaches to the insanity defence include, conditional release programmes, less restrictive approach with regards to the guilty but mentally ill verdict and abolishing the insanity defence for certain acquittee recidivists. The above proposals will be evaluated critically and thoroughly.

Chapter Two

Literature Review

Introduction

This chapter provides a synopsis into the literature applicable to the history of the Not Guilty by Reason of Insanity Plea (NGRI), the origin and introduction of the M'Naghtan rule, the Guilty but Mentally Ill alternative approach, and also the legislation surrounding NGRI defence. As previously outlined, the research question and purpose of this paper is to critically analyse the Not Guilty by Reason of Insanity Defence and to propose and analyse alternate approaches to reform and improve the defence. In order to address the question above, a significant volume of literature on the subject will be thoroughly analysed and critiqued. It has been found that a considerable amount of literature discussing and reviewing the NGRI plea takes a historical approach. Therefore, the sources used in this research will be predominantly historical. Much of the literature available on the defence asks the questions, "is the defence being overused, does it excuse criminal responsibility? And, whether the defence should be abolished" (Weiner, 1980). Much of the literature available on the insanity defence is displays the want and need of reform of the defence. There is an evident gap in the research and available literature to promote the Guilty but Mentally Ill (GBMI) alternative to the insanity plea, as it is a relatively new aspect and has only been employed in a number of states in the United States. However, the research and literature that is currently available is useful and insightful. Previous studies conducted on the insanity defence predominantly focus on the offender's ability to stand trial as opposed to whether or not they should be held accountable for their crime.

Why was the Insanity Plea introduced?

Firstly, it is important to note that mental illness has been a notorious criminal justice problem for centuries that required action. The term 'guilty' is the paramount matter of contention in this research. It has been proven to be most difficult and contentious to define insanity and to declare one as insane. Most studies and literature available focus on the ableness of the offender to stand for trial as opposed to focusing on their status of guilt. Previous literature on the insanity plea fails to acknowledge this aspect and to ask the question as to why this is the case. As previously discussed, this research will demonstrate why the NGRI plea should be reformed and perhaps retitled to Guilty but Mentally Ill

(GBMI), or any of the other examples that have been forementioned to enhance the defence. Presently, the English dictionary describes guilt as “having been convicted of a crime or having admitted the commission of a crime” (Hill & Hill, 1980). In order to punish one for committing a crime, there must be guilt present. Thus, this paper ponders the questions that if a not guilty verdict is reached, does the offence go unpunished and is the chance of recidivism increased? In criminal law, there are three elements that determine the establishment of guilt, Mens Rea, Actus Reus, and Causation, “to establish at one is guilty of a crime, the law typically requires proof that an individual engaged in proscribed unlawful conduct and did so with unlawful intent” (Borum, 2005, pg. 193). Due to this, the court must decide if an offender is either guilty or insane, this method is quite restrictive for a jury and the courts. On account of such, the NGRI plea was implemented to aid those who were deemed mentally unwell and unable to take accountability for their crime and if it appeared that establishing guilt would be too challenging. Borum (2005, pg. 194) claims that the law recognises that there are instances where one is incapable of making rational choices due to severe mental illness. However, here Borum fails to mention that the implementation of the insanity defence is not as simple as the court recognising that an offender may suffer from an ailment such as mental health difficulties. It must be established that the offender was impotent to cease from committing the crime. There are limitations to this as most early research as well as current research fails to recognise that just because an offender was suffering a mental illness or was unaware of the criminal activity they were committing, their involvement and guilt should not be negated. Henceforth, the Guilty but Mentally Ill approach was introduced. Again, Borum (2005, pg. 194) states that the law also recognises that “there are some individuals who have some form of severe mental illness or disability that impairs their ability to accurately perceives reality and to make rational and reasonable inferences”. In his work, the author is recognising that there is need for the insanity plea in law. As conformed by Borum (2005, pg.194), if an individual suffers from the ailments mentioned above, their “moral and legal culpability is diminished”. If perhaps the conditions above are met, the offender is then deemed as not guilty and criminal responsibility is negated. This literature provides a clear and concise definition of the NGRI plea, however, similarly to supplementary research and literature on the defence, what is fails to do is acknowledge both the benefits and downfalls of the insanity plea. The early pieces of literature on the insanity plea claim that it was originally imposed to discuss the ableness of the offender to be tried. On account of this, it is evident that such literature does not incorporate the guilt of the offender or the extent of the crime.

M’Naghten Rule

The M’Naghten rule also known as the ‘right or wrong test’ was established by the House of Lords in M'Naghten's case in 1843 (Coleman & Davidson, 1978, pg. 599). This ‘rule’ was brought about due to the defendant’s attempt to kill the Prime Minister and instead killed his secretary. The trial judge instructed the jury to acquit if the defendant was "not sensible" at that time. This was the onset of the insanity defence as it was found that the defendant was too mentally feeble to take responsibility for the crime. The jury found the defendant not guilty, and on questions propounded by the House of Lords, 15 English judges stated the accused was not guilty if he were "labouring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act that he was doing; or if he did know it, that he did not know he was doing what was wrong. “The jurors ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved 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” (Slovenko, 2009, pg.171). The principal reason for introducing the M’Naghten rule was to protect the public from the ‘insane’. Even though this piece is good in its description of the M’Naghten ruling, it fails to determine whether or not is it a successful rule.

Coleman and Davidson (1978, pg. 599) are successful in their inclusion of the comparison of the interpretations of both a judge and a mental health professional in a case involving a suspected mentally ill offender, this approach is not included in most pieces of literature on the M’Naghten Rule. It is conformed that the judge believes the basic philosophy of criminal law is that a person who has been convicted of commission of a crime must be punished. He must be punished because he has been found to be a wicked man who should suffer retribution for his misdeeds. . .Thus, the legal norm involves a moral standard, and the primary objectives of the law are punishment and social defence. Whereas the psychiatrist on the other hand appraises the defendant's condition as a medical problem. He has other concerns such as questions as, whether the man has a mental illness for which he needs treatment, if so, what kind of treatment; and the extent to which treatment can be expected to cure or alleviate his illness. He

is not concerned with moral judgments or with punishing the defendant (Shartel & Plant, 1960, pg. 455). In their writing, Shartel and Plant (1960, pg. 455) efficiently describe the opinions of both the judge and mental health professional which is lacking in most literature. Rix (2018) takes a derogatory approach to analysing the M'Naghten Rules. By using three separate cases where the rules where used, he demonstrates the frustrations and difficulties they involve. The rules caused such confusion and complications because "the parts of the 'test' that relate to the consequences of the defect of reasoning have become known as the 'nature and quality' limb and the 'wrongfulness' (or 'wrongness') limb (Rix, 2018). Because of this, it was therefore strenuous for the courts to determine wrongfulness and guilt. The M'Naghten rule is acknowledged globally, "almost all of the world's legal systems recognize the "M'Naghten" exception to criminal responsibility: the inability to appreciate the wrongfulness of action." This exception rests on the assumption that punishment is morally justified only if the defendant was able to choose whether to do wrong. Jurists and jurisdictions differ, however, on whether to extend M'Naghten′s logic to cases where the defendant understood the wrongfulness of an act but was incapable of resisting an impulse to commit it. Prior research has and the majority of the literature available on the M'Naghten Rule simply describes its origin and its function. However, there is a diminutive amount of literature which questions and ridicules the rule. As there is a lacking in research critiquing and questioning the M'Naghten Rule, such literature is welcomed. Rix (2018) is successful in his writing with regards to the issues and obstacles that arisen from the implementation of the M'Naghten Rule in 1843. The previous research on the M'Naghten Rule is quite restricted as there is little information available regarding any improvements or reform to the rule.

Empirical research has revealed that the public strongly believe that the defence of insanity is overused (Perlin, 1996). As previously discussed, the implementation of the M'Naghten rule was done so in order to protect the public from the 'insane'.

Now when a man premeditates a wicked design that produces death, and executes that design, if he is a sane being, if he is what the law calls a sane man, not that he may be partially insane, not that he may be eccentric, and not that he may be unable to control his will power if he is in a passion or rage because of some real or imaginary grievance he may have received — I say, if you find him in that condition and you find these other things attending the act, you would necessarily find the existence of the attributes of the crime of murder known as `wilfulness' and malice aforethought" [*Davis v. United States 1895*].

The Baumhammer Shootings

Previous literature clearly states that the insanity defence should be utilised when an offender was not 'of sound mind' and was therefore unable to refrain from committing the offence. However, there has been an ample amount of literature published that demonstrates the misuse of the insanity plea. Such literature discusses the public's unrest with the defence and the problems associated with it, which will be examined in a later chapter. In their writing, Erickson and Erickson (2008), discuss instances where the insanity plea gas been used correctly. This is a much-welcomed approach as it accurately describes and highlights the misuse/abuse of the insanity plea and demonstrates its correct use. … effectively describes insanity as "a legal term with a definition that represents a moral conception of insanity and responsibility…insanity is a person acting under a 'defect of reason', or 'disease of the mind'" (Erickson & Erickson, 2008).

Literature on the Baumhammer shootings in Pennsylvania in 2000, demonstrates that just because an offender is regarded as mentally ill does not necessarily mean they are insane and therefore can still be deemed culpable for their crime. As previously discussed, a significant amount of literature on the insanity plea claims that offender can claim insanity and their criminal responsibility can be negated if they were unable to refrain from committing the or were unaware of the severity of their actions. Contrastingly to previous and most research on the insanity plea, Erickson and Erickson (2018), describe circumstances where one is deemed as mentally ill, but they are not permitted to claim the insanity defence as it was concluded that the offender was "controlled, deliberate, calculating, and selective in picking out his victims while avoiding attention and successfully eluding police". Therefore, the offender was unable to claim the insanity defence was it was discovered that, though he might have been of sound mind at the time of the offence, his crime was planned and premeditated, hence he was versed of his criminal actions. The prosecution for the case initially called for the insanity plea, however, the offender Richard Baumhammer was charged with first-degree murder and attempted murder. Erikson and Erikson's writing is articulate and coherent in their explanation as to why the offender was not eligible for the insanity defence. The authors provide an enlightening background into the reasoning why the offender was unable to claim insanity. It was reported in their literature that "there was a lack of continuing and perhaps involuntary psychiatric care for Richard Baumhammer that may have pre-vented the shootings, and there

was the state's restrictive definition for insanity that resulted in incarceration rather than treatment and confinement in a mental hospital". This piece of writing correlates with other examples of literature that discuss the lack of clarity in outlining the term insanity which causes great difficulty with regards to the insanity defence.

Irish Legislation on NGRI Defence

In 1838, a piece of legislation, the Criminal Lunatics (Ireland) Act 1838, was passed in Ireland, which occurred due to the killing of a director of the Bank of Ireland by an individual with apparent mental illness. It was noted that the offender who had a suspected mental deficiency required mental treatment as opposed to confinement in prison. "In international context, Ireland's Criminal Lunatics (Ireland) Act of 1838 was by no means an isolated development but formed part of a broader trend toward reform of legislation providing for the mentally ill and, especially, mentally ill offenders" (Barnicle, 2003).

Presently, the Criminal Law (Insanity) Act 2006 covers the NGRI defence in Ireland. Under this legislation, one can be found Not Guilty by Reason of Insanity if " an accused person is tried for an offence and, in the case if the District Court or Special Criminal Court, the court or, in any other case, the jury finds that the accused person committed the act alleged against him or her and, having heard evidence relating to the mental condition of the accused given by a consultant psychiatrist, finds that:

a) the accused person was suffering at the time from a mental disorder, and

b) the mental disorder was such that the accused person ought not to be held responsible for the act alleged by reason of the fact that he or she

c) did not know the nature and quality of the act or did not know what he or she was doing was wrong or was unable to refrain from committing the act.

The above legislation was implemented in order to determine the ableness of an offender to stand for trial and face the consequences of their actions. The Criminal Law (Insanity) Act 2006 was enacted 28 years after the Henchy report, finally came into force on 1 June 2006 and introduces significant changes to the law in this area (Whelan, 2007). The current Irish legislation on the correlation of mental health and offending is quite vague, the legislation simply states that one may be negated from criminal accountability if they are deemed 'unfit for trial or were in an unfit state of mind during the time of the offence', however, the circumstances are not as straight forward as that. In this specific piece by Whelan (2007), compares the Irish legislation on the insanity defence on that of other jurisdictions. "In some other jurisdictions,

mental health courts have been established to cope with the complexity of the interaction between criminal law and mental health" (Erickson et al., 2006). Perhaps the researchers are suggesting in his analysis of mental health courts that Ireland should establish such.
Whelan (2007) demonstrates the pitfalls and predicaments faced by those trying to determine the ability of an offender to be tried for their crime. It was reported by Barnicle (2003), that "the Irish rules concerning the defence of insanity are outdated and clearly in need of reform". Moreover, as there has been an increase in the research surrounding the legislation behind the insanity defence, there is little research to date discussing the legislation surrounding those who are found to suffer from a mental illness, however, do not fit in the category of insane or do not meet the sufficient criteria to claim the insanity defence.

Previous literature and research on the insanity plea and diminished responsibility in Ireland tend to be contentious and contradictory. For instance, it has been stated that the insanity plea and diminished responsibility in Ireland is "elliptical almost to the point of nonsense (Griew, 1986) inaccurate (Gordon, 2000) and essentially illogical" (Wootten, 1960), however, Kennefick (2011), claims that "the Irish legislature deemed it appropriate to incorporate the partial defence into Irish law." A significant amount of literature available on the Irish legislation surrounding the insanity defence, discusses the lack of clarity in relation to the aftermath of an offender being awarded the insanity defence. In her writing, Kennefick (2011), discloses that "the statement is further challenged by the apparent unpopularity of the insanity defence in Ireland, as illustrated by *DPP v Redmond* [2006] in this case, the accused purposefully did not plead "not guilty by reason of insanity" on the basis that he would prefer to have a definite sentence rather than a situation whereby he would be detained at the pleasure of the government in the Central Mental Hospital under the Trial of Lunatics Act 1883. Although a successful plea of insanity no longer results in automatic detention under the 2006 Act, uncertainty as to the consequences of such a verdict remains" (Kennefick, 2011). As a notorious amount of research has demonstrated, there is a lack of clarity in the legal definition of insanity and the Irish legislation does not differ in their vagueness of the definition of insanity. Comparably to her work in 2011, Kennefick (2008), comments on the discrepancies between the opinion of researchers on the 2006 Insanity Act. "Some commentators would argue that 'insanity' is a relic of an old and now outdated forensic and clinical nosology which has long since passed out of the medical lexicon and is manifestly out of place in a society that seeks to avoid language with any pejorative connotation" (Casey & Craven, 1999). As conformed by said authors, "'insanity' is best regarded as a legal tag without any diagnostic or therapeutic value, and its characterisation is a

source of bewilderment to medical practitioners". Whereas, others, however, "are of the view that the concept of insanity in a legal context is a perfectly valid and absolute doctrine in its own right" (Griffin J, *Doyle v Wicklow County Council [1974*]). This therefore demonstrates that a significant proportion available on the Insanity plea and the legislation on it in Ireland is rather contradictory and argumentative. A more thorough and systematic analysis of the literature in Ireland is to be recommended and explored.

Guilty But Mentally Ill

This section presents a review of recent literature on the alternative to the insanity defence, Guilty but Mentally Ill. As mentioned previously, the literature on GBMI is less consistent than the literature and research on NGRI. This approach remains briefly addressed in the literature. Nonetheless, studies have found that, "in the face of public concerns for longer and more secure detention of defendants acquitted by reason of insanity, one of the more popular revisions of insanity defence procedures in the United States during the past 15 years has been the GBMI verdict" (Callahan et al., 1992) Said authors explain the public's dismay surrounding the insanity plea and their eagerness for reform. Fentiman and McGraw et al. (1985) are clear in their optimism towards the GBMI verdict, "in general, the courts' reaction to the GBMI verdict has been overwhelmingly supportive. To date, the GBMI verdict has withstood challenges on the grounds of equal protection, due process, cruel and unusual punishment, ex post facto law, and right to treatment" (Fentiman et al., 1985). Former literature on the GBMI verdict fails to clearly establish why the verdict was introduced in the first place. In 1987, Keilitz stated that the plea was introduced to allow for an alternative verdict for the jury and to ensure public safety by possibly reducing the likelihood of the acquittal of dangerous offenders. Advocates of GBMI reform believe that this law will protect the public by reducing the number of insanity acquittals and providing lengthy confinement in prisons for those found GBMI. Keilitz states that "legislators hoped that the GBMI verdict would offer juries an attractive alternative to the verdict of not guilty by reason of insanity and thereby curb the use of the insanity plea and verdict and prevent the early release of dangerous individuals". This reinforces the research question, does the insanity plea require reform? By proposing an alternative approach and demonstrating the success of the GBMI verdict, the literature is proposing that, the insanity plea requires a critical analysis and reform.

Conclusion

In conclusion, the literature above has been thoroughly and effectively critiqued and analysed in order to fully evaluate and critique the Not Guilty by Reason of Insanity Defence and to

discuss an alternative approach, Guilty but Mentally Ill. In sum, the current state of the literature available on the insanity defence is quite outdated and there is a requirement for more recent and relevant research on the topic to be conducted. Similarly, in relation to the alternative, non-standard approach, Guilty but Mentally Ill, there is a severe absence in literature and research available. However, that is not to say that the research and literature that is at hand is not relevant and or useful. The literature that is available on both the current insanity defence/legislation and the GBMI alternative, is quite informative and salutary. From the literature currently available on the insanity defence, it is evident that further investigation and exploration is to be desired to determine the viability and utility of the defence.

Chapter Three

Limitations of the Insanity Plea

Introduction

The previous chapter has demonstrated and defined the verdict of Not Guilty by Reason of Insanity. This chapter will discuss the limitations and controversies of the insanity defence and disclose in the prosecution and sentencing of offenders who suffer from mental health difficulties and how said limitations attribute to the emergence of the GBMI alternative verdict. Historically, the insanity defence has always proven to be contentious and there are numerous difficulties and problems affiliated with the NGRI defence such as, subjectivity and uncertainty, burden of proof, public perception and stigma, insufficient appropriate treatment, overuse/abuse, and inconstancy. The premise of this paper is to evaluate whether or not the insanity defence is fir for purpose and being utilised as intended. Why is it important to analyse the difficulties associated with the insanity defence? It is critical to discuss and evaluate such as by doing so, it highlights the areas that require reform in order to ensure the appropriate use of the defence. This chapter will provide a perceptive insight into the concerns raised above. We firstly must discuss relevance of mental disorders and its role in a legal setting. It has been disclosed that mental disorders among criminal defendants affects every stage of criminal justice process, from investigational issues to competence execution" (Morse, 2011, pg. 889).

Subjectivity, Uncertainty, and Limited Applicability.

It can be argued that subjectivity and uncertainty, and limited applicability are two of the most crucial problems associated with the insanity defence. Firstly, with regards to subjectivity and uncertainty, mental states and mental health capacity are subjective and difficult to measure objectively. Diagnosing mental illnesses and determining the extent to which they impact a person's ability to understand right from wrong can be challenging. This subjectivity can introduce uncertainty into the legal process and make it difficult to establish consistent standards for the insanity defence. These three problems are often intertwined as they all relate to the fact that in can be quite contentious to determine the mental state of an offender at the time of the crime and the determining/distinguishing one as 'insane'. "The variety of legal rules governing the insanity defines in different jurisdictions reflects the interplay of competing justice concerns as well as factual uncertainties" (Schweitzer & Saks, 2011). By this, we are shown that it is challenging to determine and declare legal insanity as there is no one definition

as insane, different countries have dissimilar and contrasting definitions as to who can be deemed as insane and or too mentally unwell to take criminal responsibility. There have been attempts to improve the situation. In order to enhance this predicament neuroscience was introduced in the legal setting, for example the use of MRI. Notwithstanding, this proved to be unsuccessful. “When cognitive neuroscience is brought into the legal system, the complexities deepen” (Schweitzer & Saks, 2011). The jury and counsel might be hoping for the discovery of evidence from the brain that are responsible for criminal behaviour, but there are none and can be none. This is due to the fact that “brain function changes over time, so a test today does not necessarily tell us anything about brain function at the time of the conduct at issue in a criminal case” (Schweitzer & Saks, 2011). Hence, it is once again difficult to determine the mental state of the offender at the time the crime took place. This amplifies the argument that the uncertainty of the insanity plea is a significant issue.

Declaring Insanity

In order for a defendant to be dismissed of their criminal responsibility and achieve a successful insanity plea, they must be declared as legally insane, or it must be established they were unable to refrain from committing the act and were heedless to the fact that what they were doing was wrong. This has been shown to be burdensome in numerous criminal trials. Mitchell (2008) comments that English law regarding the insanity defence fails to provide a useful and appropriate definition of legal insanity and what qualifies as ‘legally insane’. The burden of proof in an insanity case means the onus is on the defence team to prove the defendant was in fact unable to refrain from their actions and was mentally unwell at the time the crime was committed. The legal definition of insanity differentiates globally which in itself causes contention. In the United States, there are disparities amongst the states as to the definition of legal insanity, for instance, in Texas, “the ‘wrong’ referred to in the above statute means legal wrong - whether the defendant knew that his or her conduct was legally wrong” (Meier, 2002, pg. 296), this differs to other interpretations of wrongdoing. As previously mentioned, the M’Naghten test is still utilised for determining whether one should be entitled to the insanity defence or not. The M'Naghten test restricts psychiatric testimony to the narrow scope of a defendant's cognitive capacity and frequently makes it impossible for expert witnesses to describe the complete picture of the defendant's mental illness, (Meier, 2002, pg. 297). The M'Naghten test focuses on whether the accused knew the difference between right and wrong at the time of the offense. Mental illness may leave an individual's cognitive capacity intact,

but the mental illness can affect the person's emotions to the point where the person cannot completely control his or her behaviour (Meier, 2002, pg. 297)

As previously discussed, there is pressing uncertainty in relation to the determining as an offender as 'insane' and determining whether or not they are deemed mentally unwell enough to be unable to take responsibility for their crime. Another element of uncertainty in the insanity plea is concerning the situation of an offender 'creating the conditions of their own defence'. "Common-sense notions of justice dictate that those who create the conditions of their own defence should be held more culpable. Anglo-American criminal law lends credence to such notions by denying justification or excuse to those whose incapacity such as automatism or intoxication has been self-induced. However, no such provision is made for the excusatory defence of insanity" (Mitchell, 2008, pg. 618). Here the author is comparing the legislation/procedure for alcohol related offences and those offence committed by one who claims to be insane or not mentally fit at the time the crime was committed. The use of this comparison establishes how the insanity plea outside of the United States its lacking in its establishment of mens rea, which as formerly acknowledged, is a vital element in determining guilt. It has been concluded that by Lord Diplock in *R. v Caldwell* [1981] "that self-induced intoxication is not a defence to any crime in which recklessness is enough to constitute the requisite mens rea. Such a principle does not appear to hold true for abnormality of mind or insanity caused by intoxication". Again this can be seen in Davis (1881), Stephen, J. stated that "drunkenness is one thing and diseases to which drunkenness leads are different things; and if a man by drunkenness brings on a state of disease which causes such a degree of madness, even for a time, which would have relieved him from responsibility if it had been caused in any other way, then he would not be criminally responsible". Mitchell (2008) exerts the term 'meta-responsibility' (MR) in his report on why uncertainty is a problem with the NGRI defence.

Uncertainty can be used an umbrella term with regards to the insanity plea as it covers a wide range of issues and problems. A further reason as to why uncertainty causes issues for the insanity plea is in relation to sentencing. This topic has proven to be an issue in *Jones v United States [1983].* This was a Supreme Court case in the United States that was concerned with the confinement of an offender at a mental health facility, who was acquitted of criminal charges due to the insanity defence. The apprehension was based on whether or not the "petitioner, who was committed to a mental hospital upon being acquitted of a criminal offense by reason of insanity, must be released because he has been hospitalized for a period longer than he might

have served in prison had he been convicted" (Jones v United States 1983). This case in particular highlights perplexity surrounding the length and extent of the duration of the acquitted in an institution.

Infanticide

Another conspicuous area that poses difficulty for the insanity defence and the uncertainty surrounding it is in relation to infanticide and postpartum depression. Infanticide and postpartum depression also demonstrate misuse and abuse of the NGRI plea. The Oxford dictionary of law (2002) describes infanticide as "the killing of a child under 12 months by his or her natural mother". The criminal act of infanticide is seminal in relation to the insanity defence. This is the case because there has been ample evidence produced that demonstrates that the number of women who commit infanticide who receive a successful insanity defence is low. One of the most significant examples of this is in relation to the case of Andrea Yates. In June 2001, Andrea Yates killed her five children by drowning, afterwards she calmly called her husband and emergency services and immediately confessed what she had done (Lancet World Report, 2006). Initially, Andrea Yates had pleaded not guilty by reason of insanity but was denied and charged with capital murder. She then received a life sentence (Lancet World Report, 2006). The jury ignored her previous mental health concerns which goes against the criteria of the insanity defence. It has been disclosed that Andrea has a long history of mental health difficulties. Shortly after the birth of her first child, "Andrea Yates began to show signs of mental illness, when she had an hallucination that involved a stabbing". This then progressed into a suicide attempt following the birth of her fourth child (Lancet World Report, 2006). A retrial was had an eventually Yates was granted NGRI and was treated in a mental facility. The mere fact that her plea denied in her first trial testifies to the fact that uncertainty and inconsistency are a major issue in the NGRI plea.

The Andrea Yates case "also highlighted the lack of recognition of the potentially deadly consequences of postnatal disorders, and the limitations of the justice system in dealing with individuals who are mentally ill" (Lancet World Report). As confirmed by Meier (2002, pg. 298), Andrea Yates was failed by both the criminal justice and the health system. "Andrea Yates's defence found it difficult to meet the strict standards of the M'Naghten test" (West, 2005). The Andrea Yates case paved the way for the link between infanticide and postpartum depression to be recognised in the criminal justice setting. It is beyond question that infanticide

and mental illnesses such as postpartum depression accentuate the inconsistency and improper use of the insanity plea. A foremost example of this is in relation to Andrea Yates and the murder of her children which was a highly publicized murder The killing of her children due to her severe mental illness "will almost certainly go to trial and also present a steep, up-hill battle for an insanity defence" whereas, "addicts with a history of mental illness and a minor crime are almost a de facto not guilty by reason of insanity acquittal" (Hooper, 2006, pg. 412). This consequently shows that a woman/mother dealing suffering postpartum depression or who has a history of mental illness is more unlikely than an addict to receive an insanity acquittal. In this way, the NGRI defence is not being employed efficiently and consistently.

In a comparable case regarding infanticide, Heather Clark, who killed her own baby was charged with murder. Reported by Nicholas (2023), Heather Clark wrapped her newborn baby in a blanket and abandoned him in the desert, fabricating a story that the baby had been kidnapped. She then confessed three days later to her actions. She was then "convicted under Nevada law of attempted murder, and her defence of insanity did not pass muster under the common law M'Naghten test despite testimony introduced at trial confirming her postpartum psychosis diagnosis." In defiance of the testimony of two psychiatrists and one psychologist at trial stating that Clark suffered from severe postpartum depression, rendering her legally insane at the time of the crime, she was denied the insanity defence and charged with murder. "The jury weighed the evidence and determined that, under the M'Naghtan test, Clark knew the nature and quality of her acts and had the capacity to determine right from wrong when she committed the crime" (Nicholas, 2023). This demonstrates incongruous utilisation of the NGRI plea as her previous mental health difficulties and affirmations from mental health professionals were ignored. Because of this, Clark was imprisoned and did not receive the appropriate treatment she required for her mental illness. The cases of Andrea Yates and Heather Clark exhibit that the wrongful and improper usage of the NGRI defence. This raises concern that the mental health of women particularly women who suffer from postpartum depression are less likely to receive the insanity plea. Thus, the cases sparked a debate regarding the correlation between infanticide and postpartum depression and the insanity plea.

As mentioned above, as a result of the M'Nagthen rule, these severely mentally ill women were dismissed by the criminal justice system. This then alludes to the fact that the M'Naghten rule is too strict and restrictive and outdated. It must be acknowledged that the M'Naghten rule was imposed in a time when mental health was uncharted and rarely discussed or professed. As claimed by Steveson (1947), "it must be noted that the rules were devised at a time (1843)

when there was little scientific psychiatric knowledge, and they dealt only with the intellective aspects of mental function". This point is further confirmed when abolitionists for the defence argue that "the existence of a separate insanity defence appears to be an outdated throwback to a time when our understanding and awareness of mental illness was restricted to the surface level" (Hogg, 2015, pg. 253).

Inconsistency

A further matter of contention in relation to the uncertainty and misuse of the insanity defence is in relation to religious views and insanity. There is prominent evidence to demonstrate that there is a strong interrelationship between an offender claiming they were carrying out a crime/offence for the benefit of religion and the insanity plea. Slovenko (2004, pg. 399) relays that "time and again, when an accused claims to have acted on a religious mission, the defence counsel or court enters an insanity plea". There is great confusion and perturbation surround the connection between religious insanity and the insanity plea. There are those who agree that if an offender claims they were committing an act of God, they therefore are entitled to evoke the insanity defence. This can be seen in *People v Schmidt [1915]* "there are circumstances in which the word 'wrong'. . .. ought not to be limited to a legal wrong if a person has "an insane delusion that God has appeared and ordained the commission of a crime, we think it cannot be said of the offender that he knows that act to be wrong". In contrast to this, it has been said "it is not enough that he has views of right and wrong at variance with those that find expression in the law. The variance must have its origin in some disease of the mind. . .. The devotee of a religious cult that enjoins polygamy or human sacrifice duty is not thereby relieved from responsibility before the law" (Judge Cardozo, [*People v Schmidt 1915]).* The above points demonstrate how there is much ambiguity amongst the insanity plea and religious beliefs. As previously mentioned, one must be able to prove in court they were unable to refrain from the crime they were committing and were unaware that the act they executed was wrong and illegal.

An additional controversy associated with the insanity plea is it to do with the trial proceedings and the jury. Since the outset of the insanity defence due to the John Hinckley Jr. trial. John Hinckley was acquitted by reason of insanity following the shooting of President Ronald Reagan. This was the first time the insanity defence had been used in the United States. It was reported that on the 21st of June 1982, "a jury in Washington DC found John W. Hinckley Jr. not guilty by reason of insanity on all charges arising from his attempted assassination of President Reagan" (Hans & Slater, 1983, pg.202). Subsequently Hans and Slater (1983), state

that no verdict in recent history has "evoked so much public indignation". It has been alleged that the insanity defence "defeats justice, discredits psychiatry, and enrages the public" (Winslade & Ross, 1984). As flagged previously, public unease and apprehension for the insanity defence has factored into the call for abolition and reform of the defence. It has been said that the average lay person opposed the insanity defence as it "allows for violent criminal s to escape justice" (Hooper, 2006, pg. 411). One of the criticisms made about the defence in a court/legal setting is in relation to mental health professionals such as psychiatrists and the lay people i.e., the jury. It has been found that psychiatrists tend to use jargon and medical language to describe the mental state of the defendant. By doing do, the unknowing members of the jury have little choice but to assume that what the defence are arguing is true and therefore the offender is found NGRI. Winslade & Ross (1984) assert that the "public and the jurors in general falsely assume that psychiatry is based on a scientifically tested theory and body of knowledge with definable elements". The authors also contend that "psychiatric testimony consists of speculation derived from theories that lack a scientific basis" Seeing as such theories are portrayed in such technical medical jargon presumably created by experts, "they carry undue weight with the jury, even though lay persons could often observe and evaluate the behaviour in question just as easily as a psychiatrist could". The psychiatric professionals in question and the defence counsel are well versed that the jury and general public are quite unlikely to questions their professional medical opinions. Therefore, this is a significant limitation of the insanity defence. Winslade & Ross (1984) go on to argue further that the specification and criteria for the insanity defence is quite contradictory. In law, it is assumed that one responsible for any criminal act or omissions they commit and proceeds to punish them for their conducts and offence. Contrastingly, psychiatry does not proceed in the same way. "Instead, it assumes that behaviour is deter- mined by prior events or psychological or physiological states to the extent that behaviour is caused by forces beyond a person's control, it does not have a moral dimension" (Winslade & Ross, 1984, pg. 1138). By this, Winslade and Ross (1984) conclude that these "two conflicting assumptions about human freedom and hence about moral responsibility produce the intolerable result that 'guilty' defendants are not convicted because jurors are confused about the human mind". Members of the jury are unable to distinguish between the two and therefore cannot come to an orthodox verdict. According to this deliberation "psychiatric testimony about mental conditions manipulates jurors attempting to determine the defendant's state of mind when the act was committed" (Winslade & Ross, 1984, pg. 1139). Since juries play such a prominent role in such cases, the problems highlighted above clearly illustrate a desideratum for the NGRI defence to be altered and reformed.

Correspondingly, as it has been argued that the general public and jury are inclined to be confused by the medical jargon and terms and believe the mental health professionals, this does not go without scepticism. Acorn (2011, pg. 210) asserts that, "psychiatrists are professionally predisposed both to pathologize troubles behaviour and to expand the diagnostic categories of mental disorder", thus leading to cynicism about the "reliability of their conclusions about the fundamentally moral issue of responsibility". Kesey (1973) also argues that there is a prospect that a defender may be exaggerating or faking their mental illness in order to avoid punitive incarceration and criminal charges. He states, "a related concern is the possibility of faking it, when no other defence is in sight, someone skilled enough to mimic the symptoms of mental illness can potentially convince even prosecution psychiatrists of his or her insanity" (Kesey, 1973). Here, the authors are illustrating how the insanity defence can be used inappropriately for offenders as an alternative defence. Once more, the public's view that the insanity defence is used as a backup when Kachulus (2017, p. 361) says, "defendants are gaming the system in order to grab a get-out-of-jail-free card".

The above inhibitions of the insanity defence are in majority regarding the proceedings and legislation surrounding it. Be that as it may, there is a further momentous issue that arises with the defence. Namely, the reluctance for offenders and defendants to avail of the insanity defence even if they require it. There are numerous reasons as to why a defendant may to opt against pleading NGRI. Firstly, there are some who view the insanity defence as demeaning and contemptible and therefore do not wish to plead it. According to Gardner & Macklem (2004, pg. 215), these defendants "wish to be treated as fully responsible human beings who can explain themselves intelligibly and offer regular justifications and excuses for their actions". In this instance, the defendant does not want to be deemed mentally unwell and would prefer to be trialled as someone who is mentally fit to take responsibility for the crime committed. This is also supported by Mackey & Mitchell (2003) when they disclose "in essence what Gardner and Macklem are telling us is that a diminished responsibility verdict, like insanity, is one to which stigma is attached. This not only perpetuates an unfortunate attitude towards the mentally disordered but also relegates the interest in avoiding a murder conviction as being less important than what is referred to as a defendant's 'interest in being accorded their status as fully-fledged human beings'". Upon research conducted by R.D. Mackay, it has been discovered that the NGRI verdict or also referred to as the 'Special Verdict' carries a "considerable degree of stigma.

Research has indicated that defendants who could potentially pleas insanity would often prefer to plead guilty and risk incarceration, rather than face the stigma of having been found to be 'criminally insane'" (Hogg, 2015, pg. 252). It must be acknowledged that if offenders and defendants are unhappy to plead insanity when they may need it, reform is required.

An additional argument against the insanity defence is the treatment of mentally ill prisoners in incarceration. In the opinion of Hooper (2006), one great argument against the insanity defence "comes from psychiatrists who feel that the State has an obligation to treat mentally ill offenders who are in prison and that by separating out those who are NGRI allows the various prisons to ignore those inmates who were deemed by the courts to not be all that ill". As previously mentioned, there has been upmost difficulty and instability in relation to determining the mental state of an offender, therefore if an offender who suffers from mental health problems is sent to prison, there is a worry that they will be ignored and not obtain the correct treatment for such. Some of the most recent studies have shown prisons to have between half and three quarters of their inmates with some level of mental illness' 6 and are severely underfunded in the area of mental health care (Chron.com, 2005). It is beyond reasonable doubt that the above points bring to light the issues and implications of the insanity plea and how it requires reform.

Additional critiques of the insanity defence include the hostility between the legal and medical parties. Having the presence of both medical and legal professional involved in a case causes much unease and apprehension which hence attributes to the ongoing "philosophical and legal debate, the insanity defence has provided the backdrop for continuing hostilities between the medical and legal professions" (Mickenberg, 1987, pg. 949). This animosity between the two professional bodies can be traced back to "Ever since psychiatric evidence on the issue of criminal responsibility was accepted in the M'Naghten trial, lawyers and judges have vociferously criticized doctors for failing to conform their medical opinions to the needs of the courts" (Mickenberg 1987, pg. 949). This demonstrates that some of the critiques of the insanity plea are simply due to the people involved in the proceedings.

A further critique of the insanity plea is in relation to retribution and liability. In his writing, the Lord Devlin (1969), wrote that "everywhere, the concept of illness expands continually at the expense of the concept of moral responsibility". According to Mickenberg (1987, pg. 959), Lord Devlin was adamantly opposed to and expressed basic retributionist objections to the

existence of an insanity defence. To that end, those who strive against the insanity plea are of the belief that one should take criminal responsibility for their actions. “Questions of mental illness, cognitive or volitional impairment, free will, and moral blameworthiness may be relevant to the imposition of punishment but have no bearing on criminal responsibility” (Mickenberg, 1987, pg. 954), this amplifies the need for change in the defence and a move towards GBMI as it shows that the criminal responsibility should not be negated. Mickenberg (1987, pg. 960) argues that the aspect of criminal responsibility and retribution in terms of the insanity plea are in fact contradictory. She acclaims, “the retributionist position is so radically different from the free will/moral blameworthiness paradigm that rational debate of the relative merits of these two theories is virtually impossible”.

It is imperative that it is acknowledged that the objective of this paper is to critically analyse the NGRI defence. By no means should the insanity plea be completely suppressed and overturned, it should simply be improved and reformed, and should evolve into the GBMI verdict. It has been observed that “in spite of the support for the theoretical concept of an insanity defence, there is enormous dissatisfaction with the manner in which the defence operates” (Pasewark & Pantle, 1979, pg. 223). Hence, there is a yearn for amendment and reform.

As previously mentioned, the insanity defence is quite inconsistent and problematic. For instance, with regards to criminal responsibility and intent to cause harm. This is comparable to juvenile and young offenders. The premise of the NGRI plea is that an offender who suffers from mental illness is conceived to be unable to form criminal intent. This therefore has been compared to the scenario of juvenile and young offending. As explained by Packer (1968), “the reason society holds minors free from criminal liability is not because they are too young to form a criminal intent, but because they are presumed to be too young to make a conscious, moral choice between doing good and doing evil”. It cannot be determined that whether all minors who commit crimes are incapable intending to cause harm or be responsible for the crime. It is clear that the same reasoning has been applied to the insanity defence. Mickenberg (1987) comments that the claims that no criminal intent was present “are a straightforward attack on one of the elements of the crime and successful, they will result in simple verdicts of not guilty”. Once again, the insanity defence is contradicted when it is made evident that “when defendants claim to be NGRI, their mens rea is not an issue, indeed, defendants may assert the insanity defence even if they admit that they had the appropriate mental state for their crimes, for the defence of insanity addresses itself not to mens rea but to moral blameworthiness.”

[Mullaney v. Wilbur 1975]. This therefore encapsulates that the element of mens rea and guilt are not being applied accordingly.

Referring back to the public's concern and discontent with the NGRI plea, there are other issues that have been raised. To cite an instance, there is a radical fear of recidivism from offenders who were acquitted by reason of insanity and who have been released prematurely from mental facilities. Mickenberg (1987), supports this claim by stating "One of the most palpable bases for public distrust of the insanity defence is the widespread fear that defendants found NGRI are quickly released from mental hospitals to commit new crimes against society". There is a lack of evidence available to prove that an offender who is confined to a mental facility is less likely to reoffend after being released. A case that upholds the public's concern of recidivism is the case of Charles L. Meach III. In this case, the offender had been previously acquitted by reason of insanity and was therefore sent to a mental facility (Pasewark & Craig, 1980). Mickenberg (1987) further reports that upon a day release from the facility, the defendant fatally shot four teenagers. On account of this, "proposals were introduced in the state legislature to abolish or restrict the use of the insanity defence, and statewide teleconference hearings were held at which most of the witnesses, citing the Meach case, advocated ending or limiting the availability of insanity as a defence" (Mickenberg, 1987). This in turn led to the proposal for GBMI.

A further failing of the insanity defence can be seen with regards to the case of Andrew Goldstein. It was reported that Goldstein had pushed a young woman out in front of the subway carriage and instantly killed her (Erickson & Erickson, 2008, pg. 24). The reason as to why the case of *People v Goldstein [2005]* demonstrates the failure of the insanity defence is due to the fact that the offender is this case was deemed extremely mentally unwell, but the criminal justice system failed to correctly deal with such. Erickson and Erickson (2008, pg.24) describe how the offender was seen and evaluated by hundreds of medical professionals such as psychiatrists, social workers and therapists. The principle question of this case is why was the offender repeatedly discharged from mental institutions when his it was known how dangerous and violent he could be. This shows the downfall of the correlation between the criminal justice system and the health system (Erickson & Erickson, 2008, pg.24) the two years before Goldstein killed Webdale, he had attacked at least thirteen other people and had been repeatedly hospitalized for his chronic schizophrenia. Eventually, as he had so many admissions to the mental facilities, he was evidently refused an insanity acquittal and was subsequently given a

prison sentence for murder. This shows that the offender did not receive the adequate mental health treatment he required which resulted in him reoffending and being sent to prison.

Conclusion

The above points demonstrate the issues and limitations that are associated with the insanity defence. These arguments have been used to critically analyse the not guilty by reason of insanity defence and demonstrate why alternatives to the defence are being proposed and trialled. These downfalls of the insanity defence can be used as a basis for research to improve the insanity defence. These points highlight the adjustments that must be made in order for the not guilty by reason of insanity defence to be reformed and improved.

Chapter Four

Guilty but Mentally Ill

Introduction

Aforementioned, this paper is a critical analysis of the Not Guilty by Reason of Insanity Defence and discusses an alternative approach of Guilty but Mentally Ill. One of the principal research questions of this paper is why the Guilty but Mentally Ill verdict should be implemented and incorporated into the dealings of court cases involving suspected mentally ill defendants. The intention of this chapter is to determine whether or not the implementation of the GBMI verdict will allude to more harm than good with regards to the insanity defence. The GBMI alternative is a relatively new attitude towards dealing with criminal proceedings involving mentally ill offenders. The Guilty but Mentally Ill alternative was "largely a response to the alleged inadequacies for the procedures of committing and ultimately releasing defendants who have been found not guilty by reason of insanity" (Plaut, 1983, pg. 457). It is vital to note that the GBMI verdict is not universally accepted and recognised at present. This chapter will discuss the history of the GBMI verdict, examples of why this approach should be implemented and examples of successful application. In general, "the courts' reaction to the GBMI verdict has been overwhelmingly supportive" (Callahan, McGreevy & Cirincione, 1992, pg. 448). Currently, the guilty but mentally ill verdict has withstood challenges on the grounds of equal protection, due process, cruel and unusual punishment, ex post facto law, and right to treatment (Fentiman, 1985 & McGraw et al., 1985).

Origins of GBMI

The GBMI verdict was first introduced in 1975 and has been utilised in states such as Michigan, Alaska, Connecticut, Delaware, Georgia, Illinois, Indiana, Kentucky, New Mexico, Pennsylvania, South Dakota, and Utah (Fentiman, 1985, pg. 604). The Guilty but Mentally Ill verdict came into practice on account of the fact that the courts and the public were unsatisfied that an offender was not taking criminal responsibility for their actions. According to Blunt & Stock (1985), "Courts and laymen have traditionally struggled with the concept of an individual not being responsible for his or her own actions. The basic purpose of our criminal law is to serve and protect the public at large". The guilty but mentally ill statute "adds a new dimension to the already complex and confusing problems of the insanity defence and mental health and

statute provides an alternative to the finding of not guilty by reason of insanity" (Mesritz, 1976, pg. 471). The legislation surrounding the GBMI verdict is as follows:

(a) A defendant is guilty but mentally ill if, when the defendant engaged in the criminal conduct, the defendant lacked, as a result of a mental disease or defect, the substantial capacity either to appreciate the wrongfulness of that conduct or to conform that conduct to the requirements of law ....

(b) Evidence of a mental disease or defect that is manifested only by repeated criminal or antisocial conduct is not sufficient to establish that the defendant t was guilty but mentally ill under (a) of this section. (Yale Law Journal, 1983, pg. 476).

Purpose of GBMI

The purpose of the GBMI verdict is twofold, as opposed to the NGRI defence. Fentiman (1985, pg. 602), describes that the primary goal of the verdict is to limit the number of offenders who may be found not guilty by reason of insanity, "thereby increasing the numbers found guilty - albeit mentally ill and who are therefore subject to imprisonment". This ascertains that the aim of the verdict is to ensure offenders and defendants are still deemed as guilt for their crimes, nonetheless, their mental difficulties which may have attributed to their offending are accredited. It has also been proclaimed that the ambition of the guilty but mentally ill verdict is to "permit juries to make an unambiguous statement about the factual guilt, mental condition, and moral responsibility of a defendant" (Mickenberg, 1987, pg. 953). Additionally, the GBMI statute pledges to ensure accessibility of "psychiatric therapy and treatment, in a prison setting, to defendants whose mental illness contributed to their commission of a crime" (Fentiman, 1985, pg. 605). Unlike the NGRI defence, the GBMI approach attempts to satisfy both the goal of protecting the public by keeping dangerous individuals off the streets and simultaneously the goal of helping and treating the mentally ill. Further to previous comments, it has been acknowledged that one of the main issues surrounding the NGRI plea is the general public's opposition. On that account, the GBMI verdict restores the faith of the public in the criminal justice system and its dealings with offenders who are mentally unwell. Mickenberg (1987, pg. 989) illustrates this when explaining that it enables juries to be more confident when convicting such offenders. "Juries should feel more confident in convicting a mentally ill defendant when appropriate, because they are able to recommend treatment and make a mitigating statement concerning mental illness, members of the jury and the public should be satisfied that the issue of moral blameworthiness was resolved by a knowing decision about

the relationship between a defendant's misdeeds and illness". Members of the jury are more comfortable in convicting defendants as they are aware that the defendant can get access to adequate mental treatment all the while receiving a guilty verdict. Kelitiz (1987) ascertains that those in favour of GBMI reform believe that this law will protect the public by reducing the number of insanity acquittals and providing lengthy confinement in prisons for those found GBMI. Again, Kelitiz (1987), states that "legislators hoped that the GBMI verdict would offer juries an attractive alternative to the verdict of not guilty by reason of insanity and thereby curb the use of the insanity plea and verdict and prevent the early release of dangerous individuals".

Why GBMI Should be Implemented.

The failures and misfortunes of the insanity plea have enabled the emergence of the GBMI approach. "Medical science has not progressed to the point where medical experts can testify accurately about a defendant's ability to conform his conduct to a legal standard at the time a crime was committed" (Rathke, 1982, pg. 160). It has also been argued that more importantly, medical experts cannot conclude reliably whether a defendant will repeat his criminal conduct in the future, therefore, sending a defendant who has been acquitted by reason to insanity to a mental treatment facility does not mean the risk of reoffending is diminished. Furthermore, Rathke (1982, pg. 160) claims as long as medical experts are unable to reliably predict the behaviour of the dangerously insane defendant, the insanity defence poses a threat to the community's safety and must be improved and reformed. "Society must protect itself from insane offenders and provide those offenders with psychiatric treatment, this dual objective can best be met by the guilty-but-mentally-ill verdict" (Rathke, 1982, pg. 162). The benefit of the GBMI alternative verdict is that it allows a jury to condemn a defendant's behaviour and keep a potentially dangerous person in custody while acknowledging the defendant's mental state (Rathke, 1982). In addition, Rathke (1982) demonstrates the importance of the GBMI verdict by stating that the jury will believe that by finding the defendant mentally ill, he will receive medical treatment, at the same time, their criminal responsibility has not been negated. "The guilty-but-mentally-ill alternative satisfies the basic goal of criminal law-protection of the community-better than any of the insanity defences and allows the community to condemn the defendant's actions while providing the defendant with psychiatric treatment" (Rathke, 1982). Once again, the leading advantage and merit of the GBMI verdict is underlined by Rathke (1982) when he professes that "the guilty but mentally ill verdict allows the jury to avoid having to choose between the prison and the asylum". This removes the responsibility form the jury as how are they to determine whether or not an offender requires treatment or punitive

measures. More importantly, “the guilty-but-mentally-ill verdict would restore the primary purpose of the criminal justice system-protecting the community from persons who threaten public safety-to its rightful place by having that purpose remain primary in all criminal cases without impinging on the constitutional rights of insane criminal defendants” (Rathke, 1982).

An additional advantage of the guilty but mentally ill verdict is that is presents a “unique use of mental illness within the guilt adjudication process” (Harris 1983). It poses some similarities to the standard NGRI verdict in that it requires a finding that the defendant was mentally ill at the time of the offense. Once again, highlighting that it is not intended to abolish the insanity plea” It differs from the NGRI verdict, in that it requires that the defendant be found guilty of the offense charged, whereas in an acquittal by reason of insanity, a defendant is found to be not guilty. In other words, the GBMI verdict “does not exculpate the defendant as the NGRI verdict does, but rather, like the standard guilty verdict, requires finding the existence of all the elements of the offense definition beyond a reasonable doubt and the lack of any exculpating defence” (Harris, 1983). As disclosed by Harris (1983), “the GBMI legislation itself, as well as the related case law 6 and commentary indicates that this focus on mental illness promotes the purpose of the GBMI verdict in that it guarantees a right to treatment for the mentally ill offender whose mental illness is not sufficiently related to the offense charged to allow a finding of NGRI”. Here, the author is promoting that the GBMI approach allows for offenders to gain access to the treatment they need and also if required, they will receive incarceration and rehabilitation to prevent future recidivism. A vital aspect of the GBMI verdict is that the statute itself “recognizes the need for the expertise of medical professionals in determining the ultimate disposition of the mentally ill criminal offender” (Harris, 1983). Under the GBMI statute, the jury is only identifying the guilty criminal offenders it feels are mentally ill and in need of treatment, the onus is not on members of the jury to determine whether or not a defendant requires treatment in a mental facility or incarceration. Harris (1983) continues to explain that after such guilt has been established, the final decision as to whether the offender is mentally ill and requires transfer to a mental health facility for treatment is made by psychiatrists.

GBMI Verdict in Michigan

As mentioned prior, the GBMI approach is relatively new and is not utilised worldwide. One of the few states in the United States that exert the Guilty but Mentally Ill verdict is Michigan. Michigan was the first state to enact the guilty but mentally ill verdict. The Michigan GBMI

statute was enacted as a result of the Michigan Supreme Court's decision in *People v. McQuillan* (Harris, 1983). Correspondingly to the case of Charles L. Meach III, which has been previously mentioned. There was an incident in Michigan which involved defendants who had been discharged from treatment facilities and had reoffended upon their release. Brown & Wittner (1979) disclose that after John Magee and Ronald Manlen were acquitted by reason of insanity, they were then treated in Michigan mental hospitals. After they were deemed 'no longer dangerous' by the centre for forensic psychology and they were released, before long after their release McGee kicked his wife to death and Manlen raped two women (Caffrey, 2005). On account of this and the public outcry that followed, the guilty but mentally ill verdict was introduced and enacted in Michigan. In order for the new GBMI verdict to be implemented, new legislation had to be drafted. Blunt & Stock (1985) discuss the origin of such statute. They allege that in an analysis of Michigan House Bill Number 4363, which introduced the GBMI legislation, one argument for the bill was that "the new verdict will help a jury. Perhaps because there seems to be a tendency for people to assume that someone that commits a particular offense or crime 'must be insane", juries frequently find defendants in such cases 'not guilty by reason of insanity." (Blunt & Stock, 1985). Here, it is being acknowledged that in some cases the insanity plea is seen a fall back for offenders as members of the jury and general public have to assume they are 'legally insane' or mentally unwell in order to commit such acts. There is no doubt, however, that in some cases defendants are not legally insane, and require punishment and incarceration. The new GBMI verdict provides jurors with an alternative that would ensure that the defendant would not be released before a minimum term has been served, and psychiatric treatment has proved effective." (HLAS, n.d.)

To reiterate some previous comments, the GBMI verdict does not intent to abolish the insanity plea, it is simply an improvement alternative. The GBMI verdict in Michigan does not abolish the insanity defence but supplements it by providing juries with an alternative to the stark choice between "Guilty" and NGRI. Jurors are provided with more choice as opposed to declaring an offender either 'guilty' or 'insane'. In keeping with Smith and Hall (1983), it has been deemed that under the Michigan statute, every defendant who pleads NGRI or GBMI must be examined by doctors at the state's Centre for Forensic Psychiatry. As opposed to the procedure of the majority of states in which the procedure for examining defendants claiming insanity is either haphazard or non-existent, under the Michigan plan each defendant is individually interviewed and given a standardized battery of tests (Mickenberg, 1987). This

therefore exhibits how the implementation of the GMBI approach is more appropriate and practical than the original NGRI plea.

The statute in Michigan calls for the following procedure for the implementation of the GBMI verdict. In order to ensure retribution and justice, a defendant who has been found GBMI may be given the same prison sentence as any defendant who is merely found 'guilty', however, the offender then must be evaluated and provided whatever treatment is indicated for their mental illness (Watkins, 1981). Watkins (1981) also to a greater degree explains that that treatment be provided by Michigan's Department of Corrections or Department of Mental Health. Harris (1983) describes, "upon a finding of GBMI, the court may impose the same prison sentence that would have been imposed had the defendant been given a standard guilty verdict for the offense charged", therefore the offenders criminal responsibility has been recognised. Harris (1983) further explains that if a defendant is deemed to be mentally unwell by psychiatrists and in need of treatment, however, they may be transferred to the Department of Mental Health to obtain the necessary treatment and the length of time spent in the mental health facility is compared to the defendant's prison sentence. This is contrary to the procedure with defendants acquitted by reason of insanity. "A mental health facility that discharges an offender from treatment back into the general prison system must file a report with the parole board explaining the offender's condition, course of treatment, potential for remission, recidivism, and danger to himself or the public" (Watkins, 1981). If he is released on parole or probation, continuation of a course of treatment may be made a condition thereof, and the offender's failure to obey may lead to the revocation of parole or probation. In addition, an offender who is placed on probation must be given a minimum term of five years, which is subject to reduction if the court first considers a forensic psychiatric report on the offender's condition.

Presently, a finding of GBMI may be made only "after the jury decides to reject the insanity defence, thereby establishing that the defendant, although mentally ill, was sufficiently in possession of his faculties to be morally blameworthy for his acts" (Mickenberg, 1987). This in turn demonstrates that the GBMI verdict has not been fully established as in Michigan, an offender cannot plead GBMI at the beginning of their trial. A GBMI holding is therefore considered a criminal conviction equivalent to a verdict of guilty. Mickenberg (1987) also contends that a defendant can also enter a plea of GBMI, which the court may accept after holding an evidentiary hearing on the issue of the defendant's mental condition at the time of the criminal offense. Contrary to the NGRI defence. It is apparent from evidence produced by the Michigan experience, GBMI can solve many, but not all of the problems presented by the

insanity defence. Again, reiterating the fact that is not aimed at abolishing the insanity plea, but to enhance and reform it.

As expected there have been those who oppose and resist the new alternative GBMI verdict. Notwithstanding, the main opposition to the GBMI is the fact that it is untraditional and does not revert back to the historical M'Naghten ruling. Mickenberg (1987) argues that he proposal for the GBMI verdict should not be discarded simply because they would work some change on the traditional structure of the insanity plea. Instead, they should only be rejected if they would alter the defence in a way that would abandon those notions of moral responsibility that are the very reason the insanity verdict exists. The author is stating that if the only issue with the GBMI approach is that is simply goes against traditional procedures and does not negate moral and criminal responsibility, it therefore should not be disdained. "The lesson of the GBMI experience is that the problems posed by the insanity defence will never be solved until persons on both sides of the debate open their minds to the possibilities for reform" (Mickenberg, 1987). There will continue to be opposition for both GBMI and NGRI due to the height of contention associated with the topic of mental health and the law. In general, the GBMI verdict has been accepted. The majority of the opposition has come from the argument that the verdict can be portrayed as unconstitutional. The Yale Law Journal (2003) presents some of the opposing arguments against the verdict. Legal experts and professionals have presented only limited objections to the prevailing GBMI legislation. Some critics of these laws have put forth constitutional viewpoints primarily centred around the potential for jury perplexity or deliberate distortion. These critics contend that the challenge in applying the insanity criterion, along with apprehensions about releasing a criminal who has admitted guilt into society or into a psychiatric facility that could subsequently release them into the community, entices juries to deliver a GBMI verdict for certain defendants, This outcome might not have occurred in the absence of GMBI laws, where an insanity acquittal could have been the outcome (Yale Law Journal, 2003, pg. 478). There is no doubt that a provision as new as the GBMI verdict is going to have issues that are going to be queried and rejected.

An example of a successful GBMI case is the case of John Smith. As indicated in a previous chapter, a defendant who had previous mental health difficulties and consciously did not take their prescribed medication, did not receive the same punishment as someone who voluntarily consumed alcohol and drove under the influence. Misuse of psychotropic medication is not viewed as a mitigating factor with respect to the NGRI plea. However, in relation to the GBMI verdict, the opposite occurs. This is evident in the case of John Smith. John Smith was a

defendant who had “a long and varied history of psychiatric treatment along with one felony and four misdemeanour arrests, decided to voluntarily discontinue his use of psychotropic medication after bis last release from hospitalization” (Blunt & Stock, 1985). It had become evident that following the cease of his medication, John had begun to experience “the psychiatric symptomatology returns and be is convinced that his mind is being controlled by television waves emitting from his neighbor's TV antenna” (Blunt & Stock, 1985). In order to circumvent the effects of this radiation. Mr. Smith lines his windows with aluminium foil. Blunt and Stock (1985) further go on to say that due to unforeseen financial issues, John commits armed robbery in a bank. The defendant had made a conscious decision to commit the offence, albeit suffering from ‘paranoia’. Even though the defendant was mentally ill, “the mental illness was focused in one specific area and did not impair the defendant's capacity to formulate appropriate judgments or effect his capacity to control his behaviour as it relates to the specific charges against him” (Blunt & Stock, 1985). The defendant was therefore found guilty but mentally ill. This particular case attests to the argument that “it is possible for a person to be mentally ill and still appreciate the wrongfulness of his conduct and be able to conform his conduct to the requirements of the law” (Blunt & Stock, 1985). The NGRI defence does not appreciate the fact that an offender can be both mentally ill and capable of understanding the harmfulness of an act concurrently.

One of the most vital elements of the GBMI verdict is that it advocates that mentally ill offenders and prisoners must have access to the adequate mental health treatment they require. The states who followed in the footsteps of Michigan by enacting the GBMI verdict all “require that imprisonment pursuant to a guilty but mentally ill conviction be accompanied by such treatment as is psychiatrically indicated” (Plaut, 1983, pg. 429). The implementation of the GBMI verdict in Michigan has brought about a step towards improving the standard of treatment that offenders and prisoners who suffer from mental health difficulties (Office of Justice Programmes Website). Michigan's 1976 guilty but mentally ill statute provides a substantial statutory right to treatment which the State courts have recognized. While these decisions have had a positive effect on treatment facilities in Michigan's correctional facilities, prison mental health services are still inadequate. Plaut (1983, pg. 445) claims that the United States Supreme Court have acknowledged the eight amendments’ ‘right to medical assistance’ for prisoners, nonetheless it is quite limited. Since the case of Gamble v Estelle, it has been recognised that “although mental and physical care are technically measured under the same

standard, the courts have been far less willing to recognize eighth amendment violations in the mental health area" (Plaut, 1983, pg. 445).

Conclusion

In sum, this chapter describes the origin, purpose, and success rate of the guilty but mentally ill verdict. As is evident above, the GBMI verdict was established and brought about due to the despondency and discontent associated with the NGRI plea. There has been a significant amount of research conducted to demonstrate the usefulness of the GBMI verdict. Needless to say, there is still ample work that needs to be done on the verdict. The guilty but mentally ill alternative verdict is only one of the possible alternatives to the insanity defence, however it is the most discussed and has the most literature published and there has even been legislation enacted for it. There are still plenty of jurisdictions and countries that are opposed to the verdict and what it stands for. The GMBI verdict must be altered and improved before it can be recognised and employed globally. Overall, it has been proven that is it an alternative approach to the NGRI defence without abolishing it.

Chapter Five

The Question of Abolition

Introduction:

Thus far this paper has examined the issues of the NGRI defence and a possible alternative approach, GBMI. It has been made abundantly clear that the purpose of the GBMI alternative verdict was to improve and enhance the insanity defence, not to completely abolish it. This chapter, however, will be examining the long debate of whether or not the insanity plea should be abolished. This chapter will also analyse the case study of Idaho in the United States and its abolition of the insanity defence. Accordingly, the purpose of this chapter will be to determine whether or not it is practical and rational to abolish the insanity defence altogether or would elimination of the defence cause an even greater amount of contention. The abolition of the insanity defence in Idaho was significant as it was "the first time in recent years that an American jurisdiction had eliminated that traditional, common-law defence" (Geis & Meier, 1985, pg. 72). An event as such had never occurred in United States legislation previously. It is of note that the insanity defence cannot be completely abolished and can only be partially eliminated, as mental health issues and 'legal insanity' must be recognised during criminal trial proceedings.

Case Study: Idaho

In 1982, Idaho became the first state in the United States in recent times to abolish the insanity plea in criminal trials (Geis & Meier, 1985, pg. 73). This was on account of unease and discontent with the NRGI defence. Similarly, to the situation in Michigan, as was discussed previously, as was as they too strived for change. However, Idaho took a more extreme approach by abolishing the insanity defence in its entirety. The decision to eradicate any type of insanity defence was due to the abuse and misuse of it. It is evident that the previously mentioned limitation misuse and abuse of the insanity plea has caused reform and revolution. According to Geis and Meier (1985, pg. 73), "the move was the result of thoughtful consideration; it did not stem impulsively from a notorious in- stance of abuse of the plea. Persons in positions of authority in regard to mental health law reform in Idaho had formed a virtual consensus supporting abolition".

As the case with other states and jurisdictions, the notion to abolish the insanity defence in Idaho came to light following the discontent and disgruntlement from the public. In addition, members of local council and government were opposed to the defence. It was upheld that abolishing the insanity defence "would remove confusion from the courtroom as lay jurors try to determine the very complex issues surrounding that determination (Geis & Meier, 1985, pg. 74). Unlike in other jurisdictions, the attorney general was considerably adamant in its elimination. There was a psychiatrist who held very strong views against the insanity defence and wished for it to be demolished. Geis and Meier (1985, pg. 75), discuss the psychiatrist "who had campaigned for a decade for abolition of the insanity defence and had recently testified in court that the claim of a defendant to be insane was 'hog- wash,' and no more than an attempt to 'hoodwink' the jury". According to Geis and Meier (1985, pg. 76) up until the repeal of the insanity defence in Idaho, the M'Nagthen rule was in place. Once again, it can be seen how the M'Naghten rule was deemed to be outdated and change was needed. It was then ruled in *State v White [1969]* that the M'Nagthen rule was abolished in Idaho and a new law was adopted.

As conformed by Geis & Meier (1985), the new 1982 legislation removed the consideration of insanity in criminal trials. This therefore limited court testimonies to matters related to mens rea or other elements of the charged offence. The authors then go on to explain that the new process therefore calls for an offender or defendant to undergo an assessment to determine their ability for the trial and proceedings. If they are deemed unfit, the defendant would be placed in a mental facility and would only stand trial if they had the capacity to take part in the trial had improved. In the event of a guilty verdict, if there were indications that the defendant's mental state would significantly influence sentencing, a psychiatric evaluation would be conducted. The results of the evaluation are therefore submitted to the court. As conformed by Geis and Meier (1985, pg. 76), under the new Idaho legislation, the courts must now determine "the extent to which the defendant is mentally ill, the degree of illness or defect and level of functional impairment; the prognosis for improvement or rehabilitation, he availability of treatment and level of care required; -any risk that the defendant, if at large, may create for the public; and - the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law at the time of the offense charged".

Subsequent to the abolition of the insanity defence in Idaho, a survey was conducted whereby professionals who are generally involved in such criminal proceedings were asked to voice their opinions on the matter. Out of the five psychiatrists who were involved, four of them surprisingly favoured the abolition of the defence (Geis & Meier, 1985, p.77). One of the

psychiatrists who was involved in the survey argued that "mental illness or psychosis, 'should not be an excuse for errant behaviour.'" (Geis & Meier, 1985, pg.77). Here, it is demonstrated that criminal responsibility and guilt should not be negated due to mental illness. Attorney's and other legal professionals were also included in the survey, and it was concluded that the majority of them were supportive of the repeal. One attorney in particular had stated that "In short, the insanity plea was said to have become "a trial tactic with no real basis in the defendant's mental state" (Geis & Meier, 1986, pg. 78).

Aftermath of Abolition

It is vital to establish whether or not the abolition of any form of the insanity defence would be beneficial to mentally ill offenders and the criminal justice system alike. Since the partial abolition of the insanity defence, it has been found that "In some states that previously abolished the insanity defence, the courts have overturned such abolitions, holding that due process of the law requires some kind of formation of an insanity defence" (Harrison, 2015, pg. 583). Thus, these states now have the insanity defence, as required under either the federal Constitution, various state Constitutions, or, in some cases, both" (Harrison, 2015, pg. 856). As stated by Robitscher and Haynes (1982), Washington had become the pioneering State to declare the abolition of the insanity defence as unconstitutional. The authors declare that the pivotal decision was made regarding the case of *State v. Strasbourg*. Subsequently the court concluded that the issue of insanity is intricately tied to the culpability or innocence of a criminal defendant. The court also underscored that even in the context of common law, criminal intent remains a fundamental component of every crime. Consequently, by rejecting the consideration of mental insanity evidence for the determination of criminal intent and by denying the defendant an opportunity to present such evidence to challenge the criminal responsibility, the Strasbourg court found Washington's prohibition of the insanity defence to be unconstitutional (Harrison, 2015, pg. 585). This argument demonstrates the primary reason of the opposition to the abolition of the insanity defence and why mental health, and 'insanity' cannot be erased as a method of defence for criminal intent.

An additional justification as to why the complete eradication of any type of insanity defence from criminal proceedings is unconstitutional and impractical is because of due process. This derived from *Sinclair v State [1931].* The Mississippi Supreme Court, determined in the case

that a statute “maintaining insanity was not a defence to the crime of murder was unconstitutional because it violated state due process” (Sinclair v. State 1931). Harrison (2015, pg. 558) explains that the concurring view relied on history to contest that the insanity defence has been and is afforded constitutional protection since its implementation. Drawing on morality, the ruling in *Sinclair* confirms the historic principle that criminal defendants who do not understand their actions or the consequences of their actions should not be held criminally responsible (Harrison, 2015, pg. 559). The above points demonstrate that the abolition of the insanity defence has been deemed unconstitutional.

An additional argument against the abolition of an insanity defence is with regards to punishment and the relationship between an insanity defence and retribution. As mentioned in earlier chapters, a leading objection to the NGRI insanity plea was the public fear of mentally ill offenders being prematurely released into society and posing further danger. After an offender has received an insanity defence acquittal or has been deemed guilty but mentally ill, they are assumed to be treated for their mental illness’ in the appropriate facility. Consequently, if a form of the insanity defence is abolished, the offender will ultimately see incarcerated in prison. Harrison (2015, pg. 597) gives prominence to the fact that prisons release mentally insane criminals when their sentences are up irrespective of whether or not they still pose a threat to society. Whereas a mental facility will not release a patient until they feel the offender is no longer deemed a threat to society. This contradicts the public’s want to abolish the insanity plea, as it may in fact release dangerous offenders prematurely. It has further been argued that “prisons may, in fact, worsen a mentally insane criminal's condition because prison conditions can be counter-therapeutic” (Human Rights Watch, 2003, pg. 18). Consequently, prisons may release individuals back into society in an even more dangerous state than when they entered prison (Harrison, 2015, pg. 597). Therefore, if mentally unwell offenders are not adequately treated, their chances of recidivism significantly increase, and their mental conditions likely worsen (Harrison, 2015, pg. 597). It is evident here, that the abolition of any form of the insanity plea would be harmful and unfavourable.

The premise of this chapter was to evaluate if abolishing the insanity plea from criminal proceedings would be beneficial or harmful to the criminal justice system. The arguments above advocate for the latter. It has been proven that removing the legal insanity aspect from criminal proceedings is unconstitutional and impractical. If the NGRI plea or GBMI were not available to defendant’s who were mentally ill, these individuals who engaged in criminal behaviour would face a bleak prospect if there were no provision for an insanity defence (Harrison, 2015,

pg. 603) Instead, these offenders would be incarcerated into prisons where there mental well-being would be prone to deteriorate. Furthermore, if they are subsequently reintegrated into society, their worsened mental states elevate the probability of recidivism, resulting in increased state expenditures and a failure to mitigate crime rates (Boone, 2014).

Conclusion

In sum, the above chapter maintains that just because there has been a notable amount of support to abolish the insanity plea, there is ample evidence and publishing available to disregard this argument. The above points have demonstrated that it would be in fact unconstitutional and impractical to remove the element of mental health difficulties in the criminal justice system. Due to these findings, it has been established that other methods of reform must be implemented as abolition is not a viable option.

Chapter Six

Findings and Conclusion

Findings

The Guilty but Mentally Ill verdict has been put forward as an alternative to the NGRI defence in order to improve and reform. Upon analysing the GBMI alternative verdict to the insanity defence, it has been found that thought the GBMI verdict has potential to be of great value, there are areas where improvement is needed. For instance, one of the most eminent elements of the GBMI verdict is that it promises that offenders who have been declared guilty but mentally ill will receive the mental treatment they require while serving their prison sentence. However, it has been revealed that this 'promise' has been quite difficult to uphold as the funding available for mental health facilities in prisons in the United States has proven to be a severe matter of contention. As conformed by Human Rights Watch (2003, pg. 48). One of the major impediments to adequate mental health services available to mentally ill offenders who are incarcerated is quite simply, their cost, providing mental health care is expensive.

The United States Senate Judiciary Committee (2003) have disclosed that, the average prisoner in Pennsylvania costs $80 per day to incarcerate, regardless of their physical or mental health needs. And yet, if a prisoner is mentally ill, the added costs of mental health services, medications, and additional correctional staff boost the average daily cost to $140.149. Unfortunately, with regards to the State of Florida, mental health director Roderick Hall told Human Rights Watch that it was impossible to estimate the amount of money spent by the correctional system on mental health services because "it's not tabulated that way, the state budgets money for health care. The accounting structure doesn't break down between mental health, physical health, and dental health" (Human Rights Watch, 2003, pg. 50) This demonstrates the lack of interest that is involved in maintain health care within the prison system.

Nonetheless, despite the absence of precise figures and data, the evidence that is available implies that the mental health services in Florida have also experienced the effects of financial constraints. The Human Rights Watch (2003, pg. 50) have also disclosed the following information: During a committee meeting of the Correctional Medical Authority in March 2001, it was revealed that Florida's intentions to reduce funding for correctional mental health expenses were outlined. Examples of these reductions were to be achieved through strategies involving cost savings related to vital psychotropic medications. The meeting further delineated that medication distribution would be limited to twice daily in most cases, where feasible, due to resource limitations. The above highlights how the funding issues are impacting on mentally unwell prisoners as they do not have access to the medications they need. The above points prove that is in fact a monetary issue that prevents mentally ill offenders from receiving adequate mental health treatment while serving prison sentences, and it is not the failure of the GBMI verdict. The GBMI verdict's promise to ensure adequate treatment and the right to treatment is failed by a deprivation of prison funding. It is recommended that the controversy surrounding the inefficient funding for mentally unwell prisoners is to be addressed and dealt with.

Proposals to Improve GBMI Verdict

Since the arrival of the GBMI alternative verdict into the courts, it has faced opposition and hostility. Further to researching the guilty but mentally ill verdict, another, more feasible approach to the statute has been unveiled, a Less Restrictive Alternative (LRA). The Yale Law Journal (1983, pg. 494) discloses that "this Note argues that a less restrictive alternative (LRA) to the GBMI law's procedure exists, and that this alternative protects legitimate interests". It is argued that this is an improved version of the GBMI approach. The Yale Law Journal (1983, pg. 495) discusses the process and expectation of the LRA approach: The proposed LRA approach consist of two prerequisites, that the transfer if any prisoner to a mental facility, regardless of whether it is within the prison or the imposition of any compulsory treatment, can only occur after a determination of current necessity and that any therapies accessible to a guilty but mentally ill conviction should also be accessible on a voluntary basis to all inmates who used an insanity defence. This suggested approach which eliminates the GBMI classification, ensures that treatment options are available to at least those who might have fallen under the GBMI designation all the while still managing the allocation of limited treatment resources within the prison. The Yale Journal (2003, pg. 496) further explains that the LRA approach offers a reasonable degree of security for incarnated offenders. It also incorporates the existing

mechanisms that both the prisons administrative authority and the civil police power grant to the state, enabling the smooth operation of institutions and the safeguarding of individuals. Hence, applying the LRA procedure to potentially guilty but mentally ill inmates would impose a minimal burden on the state. It is uncertain whether these inmates would actually pose a security threat. It is also of note that prison inmates exist within a closely controlled and monitored environment, allowing any emerging issues to be promptly identified and dealt with accordingly. Overall, the LRA approach to the GBMI verdict appears to be of upmost value and could perhaps reform and improve the future of the insanity defence. The LRA approach to GBMI could provide assistance in improving the insanity defence.

A Less Restrictive Approach.

There has been support for the less restrictive approach to the insanity defence. This suggested alternative is less prone to generating mistakes in compelled hospitalisation or treatment, primarily because it establishes a requirement for necessity based on up to date and directly acquired information regarding the incarcerated offender. Nevertheless, a prejudiced and counterfactual determination of current necessity of the less restrictive framework is less likely than incorrect treatment administered under the authorisation of a guilty but mentally ill verdict (The Yale Law Review, 2003, pg. 495). Here, the authors are comparing both the GBMI verdict and the LRA to determine which verdict is more likely to cause issues and error. It has been concluded that is in fact the less restrictive approach that has presented as less likely to cause error.

Conditional Release Programmes

As the ambition of this research was to critically analyse the Not Guilty by Reason of Insanity defence and to propose an alternative approach, an additional method for handling mentally ill offenders has been discovered, Conditional Release Programmes. Caffrey (2005, pg. 413) clarifies that, conditional release programmes typically involve the release of an offender with mental health difficulties under medical care or treatment conditions deemed suitable by the court, with the aim of guaranteeing that the inmate will not pose a risk to themselves or others, often involving medication protocols. Several states and Congress in the United States have introduced laws that outline the conditional release of individuals acquitted due to insanity

from psychiatric hospitals (Caffrey, 2005, pg. 413). These release programmes act as a supplementary action the courts can take when dealing with criminal cases involving mentally unwell offenders. According to Griffin, Steadman & Helibrun (1991, pg. 231), "Monitored treatment in the community, also known as conditional release, has been described as the most important advance in the treatment of insanity acquittees in the last decade. It has also been disclosed that This form of care, also referred to as conditional release, incorporates one of the important lessons from the deinstitutionalization of civilly committed patients and it demonstrates that individuals with mental illness can live safely and function effectively outside of hospitals, given the availability of treatment and case management resources in the community (Griffin, Steadman & Helibrun, 1991, pg. 231). As previously discussed, there is a fear amongst the public that offenders and inmates pose a threat to them and should not be released. Thus, the conditional release programmes can demonstrate how this is not the case, and these mentally unwell patients can be mixed into society without posing any danger. In their description of the programme, Griffin, Steadman & Helibrun (1991, pg., 232) ascertain that the programme bears similarities to probation and parole for individuals who have been found guilty of criminal offences. For example, non-compliance with the programme's requirements could lead to various readmittance to a mental health facility. Nevertheless, unlike probations and parole, conditional release does not serve as a punitive measure for crimes. Instead, it involves a series of processes and support services designed to improve community safety and enable suitable treatment within the least restrictive setting. In this regard, it's akin to involuntary outpatient treatment for patients committed on civil grounds. It must be acknowledged that the conditional release programmes can only be deemed as successful if it is "combined with community monitoring, effective treatment, and the realistic option of immediate rehospitalization following signs of mental deterioration or violations of the conditions of release (Griffin, Steadman & Heliburn, 1991, pg. 240). A significant amount of work must be done and upheld to ensure that the conditional release programmes are efficient and favourable. Alike the alternate ways of improving the insanity defence, the conditional release programmes have ample work to do in order for them to be expedient.

Abolishing the Insanity Defence for Certain Acquittee Recidivists

An additional proposal that was announced to improve the insanity defence and perhaps reduce the recidivism amongst defendants who were acquitted by reason of insanity is 'Abolishing the Insanity Defence for Certain Acquitee Recidivist. This proposal was made by Maura Caffrey (2005). The basis of this proposal is that is has more conditions attached to it as opposed to the

original NGRI plea. Caffrey (2005, pg. 27) states that the basis of the proposal is that "if an insanity acquittee, who is judged sane at the time of release from PIAC, subsequently commits a crime while mentally ill, she will be unable to raise the insanity defence". The premise of this proposal is that if an offender is deemed mentally fit to stand trial, they are mentally fit to form criminal intent and take criminal responsibility for the crime. In this instance they therefore cannot claim the insanity defence. The conditions to the above proposal and the formerly mentioned conditional release programme are quite similar. For example, both require the patient/offender to complying with the medications that were prescribed to them following their acquittal. "The acquittee must strictly adhere to the treatment regimen that was developed for her while she was hospitalized, Medication compliance is the single most important factor in avoiding mental ill ness relapse, thus, even if the acquitte dislikes the side effects of her medication, she must continue to take it" (Caffrey, 2005 pg. 425). The author insinuates that her proposal is more appropriate than other suggestions for improving and reforming the insanity defence. She claims that her suggested approach offers a more fitting strategy for addressing certain cases of repeat insanity acquittees compared to the option of readmission to a mental institution. Initially, there are clear distinctions between incarcerating an offender and committing them to a state mental facility. In instances of imprisonment, the offender is held criminally accountable, whereas hospitalisation indicates the absence of such culpability (Caffrey, 2005, pg. 430). She also asserts that under the framework she proposes, the offender would assume a certain level of responsibility for their mental well-being. Furthermore, limiting the option of utilising the insanity defence to only those who are genuinely not responsible for their actions might serve as a more effective deterrent for repeat offenders than the prospect of readmission to a mental institution. As a result of such, this could potentially reduce the recurrence of insanity acquittal relapses (Caffrey, 2005, pg. 431).

Conclusion

Summary

Referring back to the beginning of the paper it was disclosed that the objective of this research was to critically analyse the Not Guilty by Reason of Insanity plea and propose and discuss an alternative verdict Guilty but Mentally Ill. Upon thorough research, it has been discovered that the insanity defence is without a doubt remarkably outdated and is met with ample limitations and issues such as those discussed formerly. The alternative verdict, GBMI comes with its own burdens and limitations, notwithstanding, there is reason to believe that the verdict can be adopted alongside the insanity defence to improve the relationship between mental health and the criminal justice system. This paper illustrates that the GBMI ill verdict has potential to be of utmost importance and value regarding insanity and mental health in the criminal justice system.

In the broader context, the information gathered for this paper is highly significant as it demonstrates the areas in which the NGRI defence is insufficient and lacking and how said problems and limitation have impacted mentally ill offenders and the criminal courts. An additional valuable aspect of this research is that it proposes and critically analyses alternative ways to improve the insanity defence. Not only are new proposals provided and discussed, but this paper also furnishes probable solutions to any issues that arise from these new proposals. This paper contributes to current and ongoing research into the search for ways to improve the insanity defence.

There are of course some limitations to this research, for example, it proved to be quite difficult to source modern literature on the topic as an ample amount of the sources available on the insanity defence are quite venerable. Although, the fact that a large proportion of the literature available on the insanity defence is quite old, reiterates the point that the defence itself is outdated and requires revise and amendment. A further obstacle that was met throughout this research was with regards to the guilty but mentally ill verdict. As discussed previously,

the literature available on the GBMI verdict quite limited as the verdict itself is relatively new and requires further research. That is not to say that the literature that is available is not of substantial value. The findings of this paper demonstrate that although the insanity defence is outdated and flawed, it has an affluence of potential and there is no reason why an updated and reformed insanity defence can be accumulated. The research has also demonstrated that the new proposed approaches to the insanity defence have been restricted to the United States. Therefore, prior to the guilty but mentally ill verdict or the less restrictive approach being introduced and implemented worldwide, major reform and improvement is required for them to be successful. In sum, the objective of this paper was to evaluate the Not Guilty by Reason of Insanity defence critically and thoroughly and to discuss possible alternative approaches to the defence. The above points demonstrate that this paper was successful in doing so, and all the while, duly acknowledging the challenges and obstacles linked with the research. The overall conclusion of this paper is that although the insanity plea retains numerous flaws and issues, it would not be feasible or constitutional to completely remove the element of insanity and mental health as a defence in criminal justice proceedings. It would be considerably more beneficial to amend and better the defence.

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