

# Guilty but Mentally Ill (GBMI) vs. Not Guilty by Reason of Insanity (NGRI):

## An Annotated Bibliography

by Jennifer Kutys and Jennifer Esterman

### Introduction

The mental status of the defendant has long been an issue of interest for legal professionals. Most states have some kind of insanity plea (i.e., Not Guilty by Reason of Insanity [NGRI]). States vary on which guidelines they use to formulate their legislation (most commonly the M’Naghten rule or the American Law Institute’s guidelines for insanity defenses). Regardless of how states develop their standards for the NGRI plea, most have similar outcomes: hospitalization instead of incarceration<sup>1</sup>. However, the question remains, what if a defendant does not meet criteria for the NGRI plea, but was clearly mentally ill at the time of the offense?

For these scenarios, the plea of Guilty but Mentally Ill (GBMI) has become an option. While the GBMI plea has received growing press coverage, it is still only available in a minority of states (just over 20 states at the time of this writing). The increase in press on the GBMI option has largely been in response to highly publicized acquittals based on NGRI verdicts (even though these acquittals are somewhat uncommon)<sup>2</sup>. The GBMI plea is most common when there is clear evidence of either a lack of the defendant’s appreciation for the wrongness of their actions, or a lack of understanding of the consequences of their actions. Because defendants who meet both of these criteria often opt for the NGRI plea, the GBMI plea is typically reserved for those who only meet one criterion. The GBMI plea resembles a standard guilty plea, but denotes the fact that the defendant is in need of mental health treatment in addition to punishment for his/her crime.

Controversy surrounds the GBMI plea. Critics claim that juries are under the impression that the defendant found GBMI receives specialized treatment. In fact, these defendants are sent to the same correction centers as other defendants found guilty of crimes. Most critics rally for the explanation of this fact to juries before they deliberate. Critics further argue that with the over burdened mental health services in prisons today, the odds of GBMI inmates actually receiving any specialized mental health care is very low<sup>3</sup>. On the other hand, supporters of the GBMI plea claim that justice is more served by this trial outcome than in NGRI cases. They claim this is true because inmates who were found guilty but mentally ill are held accountable for their crimes even after they are restored to mental health, unlike individuals who were successful with the NGRI plea<sup>4</sup>.



In recent years, literature has shown that when given the GBMI option, mock jurors are more likely to select that alternative rather than a straight guilty or NGRI verdict<sup>5</sup>. The following is a literature review on recent research regarding both the GBMI and NGRI pleas. It is intended to be a general overview of the available literature on the topic of NGRI pleas versus GBMI pleas.

The authors of this annotated bibliography utilized a rating system ranging from 1 to 5. This rating system is not intended to reflect quality, but instead is intended to reflect usefulness for the authors’ purpose. For example, an article with a rating of ‘5’ would be considered highly useful as a tool for someone interested in learning more about NGRI vs. GBMI pleas or an area within these topics such as juror probability of endorsing these pleas. The audience that would benefit most from each article is mentioned in each annotation. Therefore, an article with a rating of ‘1’ is not a poor quality article, but is an article that did not meet the specific goal of this author at this time (a general, balanced introduction to the topic of NGRI and GBMI pleas). The articles are presented in alphabetical order based on the first author’s last name.

## Annotated Bibliography

**Callahan, L.A., McGreevy, M.A., Cirincione, C., & Steadman, H.J. (1992). Measuring the Effects of the Guilty But Mentally Ill (GMI) Verdict: Georgia's 1982 Reform. *Law And Human Behavior*, 16(4), 447-462.**

The authors, a professor and researcher from Russell Sage College, and researchers from Policy Research Associates in New York, examine the effects of the guilty but mentally ill (GBMI) legislation on the use of the insanity defense in Georgia. The authors begin by presenting information on the background of the GBMI verdict, the debates surrounding the verdict, and how GBMI has affects the use of the "insanity verdict." The authors then present a study in which they examine the data in Georgia of all the defendants that entered insanity pleas before and after the introduction of the GBMI verdict. They conclude, in contrast to prior research, that GBMI decreases the likelihood of an insanity verdict. They also find that defendants that receive the verdict of GBMI are typically white males with a serious mental disorder, charged with murder or robbery, in which an unrelated female victim is involved. Lastly, the results suggest that individuals who receive a verdict of GBMI receive a harsher sentence than someone who plead guilty, making the GBMI plea a less appealing option. This article is useful for someone who is interested in the history of GBMI, and the sentencing differences between someone who received a verdict of guilty verses GBMI. **Rating: 4.5**

**Grisso, T., Borum, R., Edens, J.F., Moye, J., & Otto, R.K. (2003). *Evaluating Competencies: Forensic Assessments and Instruments*. Plenum Publishers: New York.**

The authors, professors at the University of Massachusetts, South Florida, Sam Houston State University, and Harvard Medical School write about the differences between NGRI and GBMI. The authors first explain what is needed to establish that one is guilty of a crime. Then, they discuss the plea of NGRI, the history of NGRI, why it is difficult to convince a jury to render a verdict of NGRI, and the controversy it has created. The authors discuss the history, intent and differences of GBMI as well as the impact it has had on the legal system. This book chapter is extremely useful to someone looking for definitions and background of NGRI and GBMI. **Rating: 5**

**Murdock, D. (Producer). (October 17, 2002). *Frontline: A crime of insanity*. [ Television series ]. Public Broadcasting System (PBS).**

As part of the popular television series, Frontline examines the case of Ralph Tortorici, a man with clear mental illness who was convicted of a violent crime. The episode provides information regarding this specific case and uses the highly publicized case as a means to examine the current insanity pleas. The episode examines issues regarding the mentally ill in jail, and the current state of insanity pleas (including statistics of how often the pleas are used, and so on). This educational series presents the information in an engaging manner while still providing a vast overview of the background of the insanity defense, past issues, and emerging topics within the insanity pleas. This episode is helpful for an individual seeking a general overview of the topic. This is particularly true if the individual is less interested in empirical/documented information and more interested in gaining a general breadth of information associated with the topic. **Rating: 4**

**Poulson, R., Braithwaite, R., Brondino, M., & Wuensch, K. (1997). Mock jurors' insanity defense verdict selections: The role of evidence, attitudes, and verdict options. *Journal of Social Behavior and Personality*, 12(3), 743-758.**

The authors, researchers from major universities in North Carolina, South Carolina, and Georgia, examine the role of evidence, juror attitudes, and possible verdict options presented to jurors in insanity defense selections. The authors begin by reviewing literature that states that juror attitudes (i.e., high on crime-control, high on death penalty support, and so on) have a direct impact on verdict selections. The researchers then present a study suggesting that the examination and evaluation of evidence had the most impact on whether or not jurors vote for a GBMI verdict. Finally, the authors review other factors that affect juror decision-making (i.e., evidential, extralegal, and attitudinal factors). This article is particularly helpful for individuals aiding with the selection of juries when GBMI or NGRI is entered as a plea. **Rating: 5.**

**Poulson, R., Wuensch, K., & Brondino, M. (1998). Factors That Discriminate Among Mock Juror's Verdict Selection: Impact of the Guilty But Mentally Ill Verdict Option. *Criminal Justice and Behavior*, 25(3), 366-381.**

The authors, researchers from major universities in North Carolina and Eastern Carolina, examine the verdicts of college students between two conditions: with or without the guilty but mentally ill verdict being an option. The authors begin the article by providing background information on the controversy of using the insanity defense (NGRI), why the guilty but mentally ill verdict (GBMI) option was created, and research regarding when GBMI is likely to be used instead of the NGRI verdict. The authors then present a rationale for their study, stating that it is still unclear which group of jurors is more likely to vote for the GBMI verdict rather than the NGRI verdict. The authors then present a study that suggests when the verdict of GBMI is available for use, there is a reduction in guilty and NGRI verdicts. The authors also suggest that some of the jurors who used the GBMI verdict held that the defendant would be able to benefit from treatment. This supports previous research findings. This article is particularly helpful for individuals aiding with the selection of juries when GBMI or NGRI is entered as a plea. **Rating: 5**



**Roberts, C.F., Sargent, E.L., & Chan, A.S. (1993). Verdict Selection Processes in Insanity Cases: Juror Construals and the Effects of Guilty But Mentally Ill Instructions. *Law and Human Behavior*, 17(3), 261-275.**

The authors, researchers and professors from State University of New York at Buffalo, examine whether judicial instructions explaining different verdicts increase juror understanding of the verdicts, and therefore create a shift in the verdicts that are given. The authors begin by discussing how jurors normally make decisions in giving a verdict as suggested by previous research. Then, the authors discuss research findings about the differences in juror construal of the different verdicts offered (guilty, NGRI, and GBMI). Finally, they present a study examining juror construal in a case of a severely psychotic man. They conclude that many of the respondents intend their GBMI verdicts to suggest diminished blame and punishment. This article benefits someone trying to understand how jurors understanding of verdicts effects the verdict they render. However, this article is written in a highly academic tone as opposed to a more readable, engaging tone and requires several readings for comprehension. **Rating: 3.5**

**Sloat, L., & Frierson, R. (2005). Juror knowledge and attitudes regarding mental illness pleas. *Journal of the American Academy of Psychiatry and the Law Online*, 33(2), 208-213.**

The authors, a professor at the University of Maryland and a psychiatrist at medical hospital, begin by examining juror knowledge of the difference between GBMI and NGRI pleas. They find that even in highly educated jury pools, very few (less than 5%) can correctly describe the difference. They then present a study examining attitudes and knowledge of jurors regarding mentally ill pleas. The study suggests that most jurors have a vast misunderstanding of both the GBMI and NGRI pleas. Participants also seem to be in support of offering jurors more information before they were asked to sentence a mentally ill defendant. This article offers a cohesive, comprehensive review of basic definitions and attitudes regarding pleas and presents a convincing study regarding juror attitudes. It is recommended for individuals interested in learning more about a general overview of GBMI vs. NGRI pleas, and for those in academia who wish to review quantitative studies regarding these two pleas. It is written in a highly academic tone as opposed to a more readable, engaging tone. **Rating: 4.5**

**Slovenko, R. (1997). Should 'guilty but mentally ill' replace the insanity plea? *Physician's Weekly: Highlights and Analysis of Medical News*, 14(40).**

This article is a short debate between two professionals. First, Abraham Halpern, M.D., a professor of psychiatry at the New York Medical college, argues in support of the GBMI plea replacing the insanity plea. On the other hand, Ralph Solvenko, J.D., Ph.D., a professor of law and psychiatry at Wayne State University, argues against the GBMI plea. The article is a very brief, point-counterpoint argument with facts and opinions supporting each position. This article is particularly helpful for individuals looking for a very brief summary of the proponents and opponents arguments on the issue of GBMI vs. NGRI. This article does not provide a background of either argument nor does it provide references where readers can verify any of the presented arguments. **Rating: 3**

## Endnotes

- <sup>1</sup> Sloat, L., & Frierson, R. (2005). Juror knowledge and attitudes regarding mental illness pleas. *Journal of the American Academy of Psychiatry and the Law Online*, 33(2), 208-213.
- <sup>2</sup> Poulson, R., Braithwaite, R., Brondino, M., & Wuensch, K. (1997). Mock jurors' insanity defense verdict selections: The role of evidence, attitudes, and verdict options. *Journal of Social Behavior and Personality*, 12(3), 743-758.
- <sup>3</sup> Slovenko, R. (1997). Should 'guilty but mentally ill' replace the insanity plea? *Physician's Weekly: Highlights and Analysis of Medical News*, 14(40).
- <sup>4</sup> Murdock, D. (Producer). (October 17, 2002). *Frontline: A crime of insanity*. [ Television series ]. Public Broadcasting System (PBS).
- <sup>5</sup> Sloat, L., & Frierson, R. (2005). Juror knowledge and attitudes regarding mental illness pleas. *Journal of the American Academy of Psychiatry and the Law Online*, 33(2), 208-213.

## References

- Callahan, L.A., McGreevy, M.A., Cirincione, C., & Steadman, H.J. (1992). Measuring the Effects of the Guilty But Mentally Ill (GMI) Verdict: Georgia's 1982 Reform. *Law And Human Behavior*, 16(4), 447-462.
- Grisso, T., Borum, R., Edens, J.F., Moye, J., & Otto, R.K. (2003). *Evaluating Competencies: Forensic Assessments and Instruments*. Plenum Publishers: New York.
- Murdock, D. (Producer). (October 17, 2002). *Frontline: A crime of insanity*. [ Television series ]. Public Broadcasting System (PBS).
- Poulson, R., Braithwaite, R., Brondino, M., & Wuensch, K. (1997). Mock jurors' insanity defense verdict selections: The role of evidence, attitudes, and verdict options. *Journal of Social Behavior and Personality*, 12(3), 743-758.
- Poulson, R., Wuensch, K., & Brondino, M. (1998). Factors That Discriminate Among Mock Juror's Verdict Selection: Impact of the Guilty But Mentally Ill Verdict Option. *Criminal Justice and Behavior*, 25(3), 366-381.
- Roberts, C.F., Sargent, E.L., & Chan, A.S. (1993). Verdict Selection Processes in Insanity Cases: Juror Construals and the Effects of Guilty But Mentally Ill Instructions. *Law and Human Behavior*, 17(3), 261-275.
- Sloat, L., & Frierson, R. (2005). Juror knowledge and attitudes regarding mental illness pleas. *Journal of the American Academy of Psychiatry and the Law Online*, 33(2), 208-213.
- Slovenko, R. (1997). Should 'guilty but mentally ill' replace the insanity plea? *Physician's Weekly: Highlights and Analysis of Medical News*, 14(40).

**Jennifer Kutys [[hinman.4@wright.edu](mailto:hinman.4@wright.edu)] is a doctoral student at Wright State University, School of Professional Psychology in Dayton, Ohio. Her professional interests are in the areas of forensic assessment, severe mental illness, and the effects of bias on decision-making.**

**Jennifer Esterman is a doctoral student at Wright State University, School of Professional Psychology in Dayton, Ohio. Her professional interests are in the areas of cognitive and personality assessment; and working with individuals that have experienced trauma. Jennifer also loves football but that may be irrelevant to the reader.**

We asked three experienced trial consultants to respond. Of the three responses below, one consultant was a novice to the NGRI/GBMI area (Amy Cluff); one consultant had taught students about NGRI/GBMI (Cheryl Lubin) and one consultant had worked on a highly publicized NGRI trial (Karen Hurwitz).

### Amy Cluff responds to the Annotated Bibliography on GBMI and NGRI

Amy Cluff is a Research Associate and Associate Trial Consultant at Bonora D'Andrea, LLC in San Francisco ([www.bonoradandrea.com](http://www.bonoradandrea.com)).

*I am responding to this article from the perspective of a novice in the area of NGRI and GBMI. As such, I found myself needing an elementary foundation in order to proceed—all of the articles in this bibliography seem to assume a level of knowledge that a novice may or may not have.*<sup>a</sup>

My very first time in a courtroom, I observed the jury selection proceedings of a capital case for which the defendant pleaded Not Guilty by Reason of Insanity (NGRI).<sup>b</sup> Something struck me immediately during the voir dire process: the prosecution had an advantage in being able to uncover opposition to the death penalty with relative ease—people with strong opinions seem to have developed them well before being called as a juror. The task for the criminal defense attorney seemed far more difficult because he had to address both death penalty attitudes as well as NGRI claims. Regarding death penalty attitudes, his job was to reveal jurors who believed that anyone who was found guilty of killing another person should automatically be sentenced to death—the “Automatic Death Penalty” or ADP jurors. While this may be a common attitude, I have seen that it is often more difficult to get judges to understand that jurors can and should be excluded on this basis. The criminal defense attorney also had to address the common perception among jurors that NGRI does not offer true punishment sufficient for the crimes committed.

In any case, the criminal defense attorney with a mentally ill client must help jurors to contemplate and then reveal their views on insanity pleas when many may not have considered the subject before that moment. I gained a greater awareness through reading these articles that the NGRI plea is used not only for violent crimes, but also minor assaults, theft or shoplifting, and other misdemeanors.

Jennifer Kutys and Jennifer Esterman have provided in their annotated bibliography sources covering a lot of ground: from the history of Guilty But Mentally Ill (GBMI) and longstanding criticisms, to empirical research providing insights to case and trial strategy as well as jury selection.

For an introduction to the subject that would be especially beneficial to someone who was new to these issues, I would recommend *Evaluating Competencies: Forensic Assessments and Instruments* (Grisso, et al., 2003) and *Measuring the Effects of the Guilty But Mentally Ill (GBMI) Verdict: Georgia's 1982 Reform* (Callahan, et al., 1992). The former article does well in summarizing the NGRI vs. GBMI debate amidst a wealth of information relevant to attorneys working with forensic expert witnesses. The latter article lays a very good foundation and also offers evidence of an increase in risks for defendants who plead NGRI and receive a GBMI verdict. One of the many concerns raised in this article is that jurors, fearing that an NGRI verdict does not ensure public safety, will use the GBMI verdict to convict defendants who are in fact legally insane.



GBMI has been adopted by 14 states in order to satisfy public demands in response to high-profile NGRI acquittals, with the intended goals of reducing NGRI acquittals and ensuring proper mental health care for those convicted. More states may soon join rank (Washington may be next<sup>c</sup>).

For one unfamiliar with the GBMI option, it is helpful to understand the duality that exists. The GBMI plea is a choice for mentally ill defendants wishing to waive their right to a jury trial in the hopes of receiving mental health treatment and a possible lesser sentence.<sup>d</sup> At the same time, the GBMI verdict is a boon for the prosecution in that offering this option to jurors increases the likelihood of a guilty verdict (and a possible harsher sentence) (Grisso, et al., 2003).

For those interested in research on the effects of the GBMI verdict option—specifically that a GBMI verdict option displaces both NGRI and Guilty verdicts significantly, resulting in an overall increase of guilty verdicts while the number of not guilty verdicts is reduced, I recommend these three articles from the bibliography (in rank order):

*Mock Jurors' Insanity Defense Verdict Selections: The Role of Evidence, Attitudes, and Verdict Options* (Poulson, et al., 1997).

*Factors that discriminate among mock jurors' verdict selections: impact of the guilty but mentally ill verdict option* (Poulson, et al., 1998),

*Verdict Selection Processes in Insanity Cases: Juror Construals and the Effects of Guilty But Mentally Ill Instructions* (Roberts, et al., 1993).

An important social policy issue raised by some of the research pertains to the impact of the GBMI sentence on the criminal justice system. Guilty But Mentally Ill creates a new category where criminal intent – a pillar of our criminal justice system – is no longer required. Prosecutors can now gain convictions without demonstrating that the accused had sufficient *mens rea* to commit the crime. This is a potentially dangerous category of criminal sentencing that may open a Pandora's box and result in a withering of Constitutional rights.

The article *Juror Knowledge and Attitudes Regarding Mental Illness Verdicts* (Sloat & Frierson, 2005) is particularly useful for a litigator interested in appellate issues. This piece offers support for the argument that more information should be provided to jurors regarding the impact of the NGRI and GBMI options on the defendant post sentencing. The article *Verdict Selection Processes in Insanity Cases: Juror Construals and the Effects of Guilty But Mentally Ill Instructions* (Roberts, et al., 1993) lends further support on this issue.

The “Point/Counterpoint” piece referenced in this bibliography (Slovenko & Halpern, 1997) is illuminating in that the proponent of GBMI conditions his support on a hefty list of recommended reform measures. This anecdotally adds weight to the already long list of professional organizations (for a partial list, see Grisso, et al., 2003) opposing GBMI.

My impression from reviewing the bibliography sources is that GBMI raises many legal and ethical concerns. I would want to speak directly with prosecutors and defense attorneys about their experiences in court where GBMI has been used. I look forward to the possibility of conducting juror research myself in this area. There is more to be done in evaluating the issues and it seems that of greatest importance is, as always, to educate the public.

## Endnotes

<sup>a</sup> My first Google search brought me to Pennsylvania's Criminal Justice Mental Health Statutes (via the Pennsylvania Commission on Criminal Sentencing website: [http://pcs.la.psu.edu/mentalhealth\\_statutes.pdf](http://pcs.la.psu.edu/mentalhealth_statutes.pdf)). Title 18, Part 1, Chapter 3, §314, helped to put both NGRI and GBMI in proper perspective. These provisions vary from state to state, but this was a helpful start for my basic understanding.

<sup>b</sup> As California is not a state offering a GBMI provision, jurors in the case I observed did not weigh this option.

<sup>c</sup> Hurst, Christopher. (2009, September 28) Washington's justice system needs more verdict options for criminals with mental illness. *The Seattle Times*. Retrieved October 24, 2009 from: [http://seattletimes.nwsourc.com/html/opinion/2009959998\\_guest2ghurst.html](http://seattletimes.nwsourc.com/html/opinion/2009959998_guest2ghurst.html)

<sup>d</sup> A very recent news article on a case involving a GBMI plea:  
Bowen, Jennifer A. (2009, October 10) Guilty but mentally ill: Mamino admits delivering baby into toilet, gets 6 years. *Belleville News-Democrat*. Retrieved October 24, 2009 from: <http://www.bnd.com/news/crime/story/960246.html>

## Cheryl Lubin: A Trial Consultant's Response to Annotated Bibliography on NGRI/GBMI

Cheryl Lubin, J.D., Ph.D (theater) is founder and CEO of Staging Court, Inc., ([www.stagingcourt.com](http://www.stagingcourt.com)) a firm that specializes in client and witness preparation and courtroom communication techniques. She taught mock trial and debate courses at CUNY, and currently hosts "I Witness", a weekly radio show on blog talk live.

The annotated bibliography compiled by Jennifer Kutys and Jennifer Esterman, titled "Guilty But Mentally Ill (GBMI) vs. Not Guilty by Reason of Insanity (NGRI)" contains a solid and succinct introduction to the theoretical and practical aspects of NGRI and GBMI, which are both conceptually conjoined yet inevitably distinct. During my years as a courtroom communications professor at John Jay College of Criminal Justice, I presided over mock trials in which the defendant's mental issue at both the time of the offense and at the start of trial were assigned for argument and rebuttal to pre-law students. The students commenced such "trials" by reading a packet of background information on the history of the insanity defense and "guilty but mentally ill" as it percolated from federal law to the states in the wake of the John Hinckley trial. Every mock trial featured at least one expert witness (a forensic psychiatrist), who would testify on such issues as the "defendant's" mental capacity for trial, the "defendant's" ability to formulate mens rea, and so forth. As I work on preparing expert witnesses for trial in my work today, I have adopted a three-pronged "test" to determine the viability and relevance of materials that would be most useful for litigators to read:

Does the article or book:

- 1) Provide solid background knowledge on the history of NGRI/GBMI for the litigator in such cases?
- 2) Describe (if perhaps only briefly) how juror responses to notorious, high-profile cases have shaped federal and state legislation in this area?;
- 3) Offer a common language and forensic frame of reference with which expert witnesses would likely be familiar?



Evaluating the annotated works through the prism of this "test", I would recommend the following works cited by Kutys and Esterman most strongly for litigators in this area:

*Evaluating Competencies: Forensic Assessments and Instruments* (Grisso, Edens, Moye, & Otto):

While it appears a trifle overweening to contend that "GBMI decreases the likelihood of an insanity verdict" (Kutys and Esterman), I nonetheless endorse this book as a critical foundational text for any litigator who is using an expert witness in such cases. The most useful element in the text is the authors' clear exposition of the updated forensic assessment tests, which every litigator in such cases should know. Trial consultants would do well to advise their attorney clients to review the thorough description of the determining factors in "legal competency" mentioned in this book.

*Measuring the Effects of the Guilty but Mentally Ill (GBMI) Verdict: Georgia's 1982 Reform. Law and Human Behavior*, 1(4), 447-42. While this article's primary emphasis on Georgia's statutes and cases would seem to discourage closer reading by litigators in other states, it is an excellent piece. The text itself is a bit dense and empirical, but litigators would do well to reference it when preparing expert witnesses in NGRI/GBMI cases. Litigators outside of Georgia would of course bear in mind that this is a site-specific study that could be effectively compared and contrasted with the case and statutory law in their own state.

*Frontline: A Crime of Insanity*. This documentary compellingly blends enough personal narrative to engage the litigator and enough historical foundation of NGRI/GBMI to guide them. Litigators might wish to consult Frontline's archives (and other documentary

sources) for instruction on mens rea/GBMI/NGRI cases in which the fact pattern is more closely related to their case (an example would be the Yates case).

*Mock Jurors' Insanity Defense Verdict Selections: The Role of Evidence, Attitudes, and Verdict Options.* This article is by far the most pertinent for any litigator or jury consultant. The piece considers, among other things, jurors' responses to expert testimony in NGRI/GBMI-related cases. While many would concur that expert testimony does indeed affect juror attitudes, this piece takes the reader through an evaluation of the array of such responses.

*Juror Knowledge and Attitudes Regarding Mental Illness Pleas.* This article is a critical reminder for the litigator of just how much high-profile cases might influence juror attitudes in which the mental state of the defendant is in question. The public outcry of the Hinckley case that triggered federal legislation is duly noted and thoroughly covered. Litigators would also find the American Psychiatric Association's stance on GBMI useful, as well as the debates about the appropriateness of modifying jury instructions.

A few other helpful sources I have recommended to my students and clients include:

*The Hinckley Trial and Its Effect on the Insanity Defense.* (Collins, Hinkebein, & Schorgl). This brief article is part of a website devoted to the history of the insanity defense, the debates over "guilty but mentally ill", the Insanity Defense Reform Act of 1984, the Durham Rule, the M'Naghten Test, the Model Penal Code, and much more. The bibliography attached to this article is a goldmine of outstanding foundational sources as well.

*People v. Lantz & Robles.* A case from the Illinois Supreme Court (1999), in which claims about the prejudicial effect of a GBMI plea are thoroughly explored in light of a grave but engaging fact pattern. Most criminal defense attorneys and prosecutors would know this case, but it might be important to review it for its extensive exposition on NGRI/GBMI.

*Legal Insanity: Assessment of the Inability to Refrain.* Donohue, Arya, Fitch, and Hammen. *Psychiatry MMC: A Peer-Reviewed Journal Providing Evidence Based Information to Practicing Clinicians.* March 2008. This is a more recent discussion by a wide swath of professionals on the notion of "volitional control". Most litigators in this area would want to make certain their experts are familiar with the findings in this article, which also features a complete updated bibliography.

### **Karen Hurwitz responds to the Annotated Bibliography on GBMI & NGRI**

Karen Hurwitz, JD, LCSW is principal of Karen Hurwitz & Associates, Legal and Behavioral Consulting. She may be reached at [karenhurwitz@karenhurwitz.com](mailto:karenhurwitz@karenhurwitz.com).

The Andrea Yates trial is one of the more well known insanity trials in recent years. I was fortunate to have had the opportunity to work as a jury consultant for the defense in her retrial, which resulted in a finding of not guilty by reason of insanity (NGRI). Prior to becoming a jury consultant I practiced as an attorney and then a psychotherapist after receiving my MSW. Early in my therapy career I spent a year at a large county psychiatric hospital working with the severely mentally ill, many of whom were under commitment order. Observing and communicating with individuals with severe symptoms of schizophrenia, bipolar disorder and delusional disorder taught me what no textbook could. Based on my experience as a therapist and as a jury consultant who has worked in this area I was asked to provide my opinion on the bibliography as a starting point for a defense attorney and to discuss some of the challenges insanity trials present to the attorney.

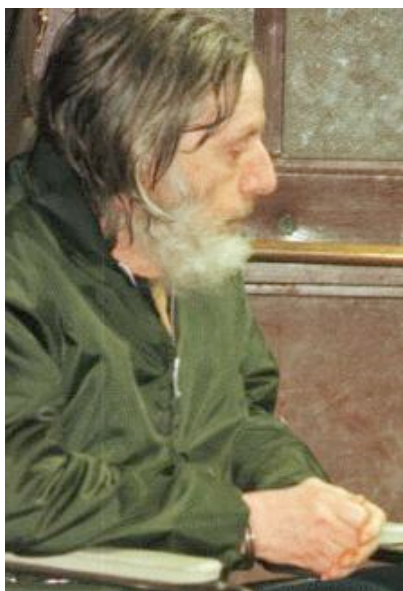
The majority of attorneys taking on an insanity case for the first time have probably not had exposure to severe mental illness. Perhaps your client is the first severely mentally ill person you have met or tried to communicate with. This is where the learning begins. Just as most attorneys have not witnessed this level of mental illness before neither have most jurors. How are you going to help jurors appreciate what it means to be so ill that you drown your own children? And what if your client confesses to drowning her children immediately thereafter? Does that negate the insanity argument? Can anyone who is sane and rational really appreciate what is going on inside the mind of someone who is insane? How do we apply the intended logic and reasoning of a written statute to the mind of



someone that is illogical and irrational and that has turned right and wrong on its head? These are a few of the many challenges that you will face.

So how does an attorney prepare for such a case? The first task is to determine the language of the insanity statute in your jurisdiction. Is it an NGRI statute (or the equivalent of such)? If so, what is the test? Or is it GBMI? Or are both available? If only one type of statute is available then you will not need to spend too much time understanding all of the differences between NGRI and GBMI. Beware that while the statute may sound simple and straightforward on its face it is not!

For example, the Texas NGRI statute in essence is the following: “at the time of the conduct charged, the actor, as a result of severe mental disease or defect, did not know that his conduct was wrong.” Every word of your statute is likely to be a source of debate during the trial. What was the mental state of the defendant at the time of the conduct in question? This is the insanity evaluation, which includes a mental status at time of the offense (MSO). It is a retrospective analysis, trying to reconstruct what was happening in your client’s mind when she acted. This is different from the competency evaluation which analyzes mental status at the time of the evaluation. So, in addition to the statute you need to know what competency and insanity evaluations consist of, how they are different, who should perform them and when they should be done.



What constitutes “severe mental disease or defect”? This is where psychiatric diagnoses come into play. You will need to become very familiar with the diagnoses brought into the trial. This will become especially important during cross examination of the treating doctors and forensic experts. This may include diagnoses that your client received in previous psychiatric treatment, in treatment after the arrest, in the competency evaluation and in the insanity evaluation by both side’s forensic expert. And all of the diagnoses may be different. It is not uncommon for clinicians to view patients differently.

Then, there will be a debate about what it means “to know”. Does that include the ability to understand or appreciate? And what does “wrong” mean? Criminally wrong? Morally wrong? What if your client in her delusional mind believes what she did was right but acknowledges that she knows others will find it wrong? These are the types of nuances that will be front and center during trial. Forensic experts in insanity trials are extremely important. Unlike other types of cases where jurors sometimes disregard both sides’ expert witnesses, that is unlikely in an insanity trial. The jury is going to rely on one of the experts to help them infer what was happening in your client’s mind at the time of the conduct in question.

The goal of Ms. Kutys and Ms. Esterman was to put together a literature review of recent research regarding NGRI and GBMI. Given their goal I believe they provide a good starting point for examining relevant research on this particular topic. The book by Grisso (2003) is the most comprehensive item on their list. The chapter on NGRI reviews the law and the science on insanity as well as addresses some of the challenges discussed above. The book also covers competency and insanity evaluations in detail. Of course there are other books that cover similar topics. For example, [Psychological Evaluations for the Courts: A Handbook for Mental Health Practitioners and Lawyers](#) (2007) by Gary Melton and others appears to cover similar material and is written by both lawyers and psychologists. I think it is worth a review.

The research studies highlight the pitfalls of the GBMI statute and the misconceptions jurors have about it. The Callahan and Poulson (1998) research findings showing that the GBMI option decreases NGRI verdicts are critical if you are in a venue where both statutes are available. The two Poulson studies and the Slovenko study are also helpful for jury selection. Poulson’s (1997) review of the literature showing for example the correlation between juror attitudes in favor of the death penalty and their views against NGRI is extremely important. The research studies draw me in and make me want to know what additional and perhaps more recent research exists on the insanity defense.

In addition to the bibliography I would recommend the following:

- 1) Review of the recent ABA publication [Criminal Mental Health and Disability Law, Evidence and Testimony: A Comprehensive Reference Manual for Lawyers, Judges and Criminal Justice Professionals](#) by John W. Parry, J.D. (2009). It includes chapters on Competency, Insanity and Diminished Culpability, Mental Health Diagnoses and Expert Evidence and Testimony.

2) The latest volume of the DSM, the Diagnostic and Statistical Manual of Mental Disorders. The most current version is the DSM-IV. The DSM is the bible of psychiatric diagnosing. You need to be familiar with all of your client's diagnoses or possible diagnoses. And consult with mental health clinicians when you have questions. Don't be afraid to ask basic questions and don't be intimidated by psychobabble. Keep asking until you get it. If you don't get it, your jury won't get it.

3) Talk to other defense attorneys who have tried insanity cases, especially in jurisdictions with similar statutes. How did they handle the statute? Which forensic experts were especially helpful and respected by the jury?

Your jury pool is going to enter the courtroom highly opinionated on the insanity defense. You will have vocal jurors and angry jurors. In the Yates trial we began with a pool of 120 jurors and everyone had an opinion. There were those who understood mental illness and were sure Ms. Yates was insane. There were those who wanted to give her the harshest punishment available. Even in 2006 approximately 10 % of the pool believed that depression was not an illness and that people should basically get over it. I recall one panel member who said he could understand that the defendant might be crazy if she drowned one child, but to drown five children she had to be a murderer. The jurors will say all kinds of things that defy logic and that is understandable. It is hard to make sense of a mother drowning her own children. It does not make sense. That is the whole point of insanity. You need and want to hear every comment, no matter how crazy or callous it sounds. And if you don't lose a lot of jurors on challenges for cause there is likely a problem in the questioning. This is an area of the law with a high degree of bias.

Citation for this article: *The Jury Expert*, 21(6), 28-37.

## Editor's Note

This is a very cool issue of *The Jury Expert*. We have an array of articles we think you'll find interesting, thought-provoking and fun to read. First, we have a look at gender and race in the courtroom over time and recommendations for how litigators might use this information with reactions from two trial consultants. Then a look at how the internet has been intruding into the courtroom (it isn't just with jurors) and recommendations on how litigators and judges can minimize the impact through clear and specific education and instruction. Third, we have an article on how research into damage assessments can inform settlement negotiations. Following that, we have a introductory bibliography on the GBMI/NGRI verdicts with thoughts from three trial consultants on learning about this specialty niche, educating jurors, and voir dire. We all pay attention when jurors nod. But what does it mean and when should you really pay attention? Read our fifth article and find out. Our sixth article takes lessons an experienced trial consultant has learned over three decades about communication in the courtroom (and more decades on the stage). Learn about common mistakes and best practices as well as the identity of Konstantin Stanislavski.

Most of us already know who Antonin Scalia is but did you know it's not a good idea to 'poke Scalia'? What can litigators learn from observing our Supreme Court in action? And finally, an instructive piece on 3D animation (with lots of examples) accompanied by an overview of the 3D animation process and recommendations on when to use 3D and when to not use it.

November's issue of *The Jury Expert* also features advertising for the very first time. Publishing this journal has been a very exciting undertaking for the American Society of Trial Consultants (ASTC) but not one that has been without cost. We are grateful to our growing readership base and we are especially grateful to those advertisers who believe in us and show their support by advertising on our website and in the downloadable pdf version of [The Jury Expert](#).

Please join us in thanking [ByDesign Legal Graphics, Inc.](#), [Consumer Centers of New York and New Jersey](#), and [Savitz Research Solutions](#) (and visit them on the web via these links or their ads in TJE)! And thanks for reading and commenting on our website.

Rita R. Handrich, Ph.D., Editor  
On Twitter: [@thejuryexpert](#)



*The Jury Expert* [ISSN: 1943-2208] is published  
bimonthly by the:

**American Society of Trial Consultants**  
1941 Greenspring Drive  
Timonium, MD 21093  
Phone: (410) 560-7949  
Fax: (410) 560-2563  
<http://www.astcweb.org/>

*The Jury Expert* logo was designed in 2008 by:  
Vince Plunkett of Persuasium Consulting  
<http://www.persuasium.com/>

## Editors

Rita R. Handrich, PhD — Editor  
[rhandrich@keenetrial.com](mailto:rhandrich@keenetrial.com)

Kevin R. Bouilly, PhD — Associate Editor  
[krebouilly@persuasionstrategies.com](mailto:krbouilly@persuasionstrategies.com)

Ralph Mongeluzo, JD--Advertising Editor  
[ralph@expertvisuals.com](mailto:ralph@expertvisuals.com)

The publisher of *The Jury Expert* is not engaged in rendering legal, accounting, or other professional service. The accuracy of the content of articles included in *The Jury Expert* is the sole responsibility of the authors, not of the publication. The publisher makes no warranty regarding the accuracy, integrity, or continued validity of the facts, allegations or legal authorities contained in any public record documents provided herein.

**ASTC**   
AMERICAN SOCIETY OF TRIAL CONSULTANTS