

**GUILTY, BUT MENTALLY ILL, BUT NOT INSANE? MAKING SENSE OF  
SOUTH CAROLINA’S APPROACH TO MENTALLY ILL OFFENDERS**

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## I. INTRODUCTION

South Carolina is in line with the majority of jurisdictions in the United States by employing the *M’Naghten* test for legal insanity,<sup>1</sup> but its record in approaching mental illness has not always conformed to the status quo. Legislation passed in 1821 made South Carolina the second state in the nation to dedicate funds to the treatment of those with mental illness.<sup>2</sup> Today, it is one of only twelve states in the nation that recognize a “Guilty but Mentally Ill” (GBMI) verdict.<sup>3</sup> While there have been missteps along the way—some caused by errors in logic and others by deficits in knowledge—there is no reason South Carolina cannot be a leader in developing novel solutions to the difficult questions posed by criminal adjudication of mentally ill defendants.

The case described in the following Section illustrates several problems with South Carolina’s current regime. Part II provides a brief background of the relevant law in the United States and identifies the primary models in use today. Part III discusses each of South Carolina’s problems in turn while highlighting the relative benefits of alternative models.

Section III.A posits that the criteria by which mentally ill offenders are categorized in South Carolina are arbitrary and do not comport with modern scientific understandings of mental illness. Section III.B demonstrates the unique pressures placed on juries under the current model and emphasizes the inherent difficulty in requiring lay jurors to engage with complex medical inquiries. Finally, Section III.C concludes by suggesting the development of an interdisciplinary approach to the problem of mentally ill offenders that allows for meaningful input from the scientific community.

### A. *Suzanna Brown Simpson*

Early on the morning of May 14, 2013, thirty-five-year-old Suzanna Brown Simpson crashed her truck into a ditch in what was purportedly a

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1. See WAYNE R. LAFAVE, 1 SUBSTANTIVE CRIMINAL LAW § 7.2(a) n. 7 (3rd ed. 2022) (The *M’Naghten* test is one of several models used in the United States to assess whether an individual qualifies as legally insane for purposes of criminal culpability. The test focuses exclusively on the individual’s mental capacity to differentiate right from wrong.).

2. S.C. Dep’t of Mental Health, *History of the South Carolina Department of Mental Health: 1828–1995*, <https://scdmh.net/wp-content/uploads/2017/11/HistoryofSCDMH.pdf> [<https://perma.cc/LPM9-QVSP>].

3. See Christopher Slobogin, *The Guilty But Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*, 53 GEO. WASH. L. REV. 494, 496 n. 10 (1985).

suicide attempt.<sup>4</sup> Sheriff's deputies responded to the scene, where they worked with paramedics to remove Simpson from the vehicle before EMS transported her to the hospital for treatment.<sup>5</sup> Officers then checked the registration on the truck and proceeded to the listed address.<sup>6</sup>

Upon arrival, officers found Simpson's husband clinging to life in the master bedroom of the home.<sup>7</sup> The bodies of Simpson's five-year-old son and seven-year-old daughter were discovered in their respective bedrooms—both dead, having sustained multiple gunshot wounds to the head.<sup>8</sup> Simpson confessed that same day and was charged with the murder of her children, the attempted murder of her husband, and possession of a weapon during the commission of a violent crime.<sup>9</sup>

At trial, much of the testimony centered around Simpson's significant history of mental illness.<sup>10</sup> The record revealed that Simpson began battling mild depression in college, eventually followed by episodes of post-partum depression.<sup>11</sup> In 2010, Simpson started seeing a psychiatrist, whose notes indicated that Simpson's moods cycled through depression, sleeplessness, confusion, and paranoia.<sup>12</sup> Following what was apparently a psychotic episode in 2012, Simpson was hospitalized for five days and spent another three days in a behavioral health center.<sup>13</sup> Family members and friends recalled Simpson's previous paranoid delusions, and many described her behavior as particularly erratic in the weeks leading up to the incident.<sup>14</sup> Multiple expert witnesses opined that Simpson suffered from schizoaffective disorder bipolar type.<sup>15</sup>

At closing arguments, defense counsel asked the jury to find Simpson not guilty by reason of insanity (NGRI), while the prosecution sought a verdict of guilty but mentally ill (GBMI).<sup>16</sup> In South Carolina, a defendant is NGRI if,

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4. Myra Ruiz, *Jury Reaches Verdict in Trial of Mother Who Killed Her Children*, WYFF4 (June 23, 2016), <https://www.wyff4.com/article/jury-reaches-verdict-in-trial-of-mother-who-killed-her-children/7022864> [<https://perma.cc/TD43-A4PL>].

5. *Id.*

6. *Id.*

7. *State v. Simpson*, 425 S.C. 522, 529, 823 S.E.2d 229, 233 (Ct. App. 2019).

8. *Id.*

9. *Id.*

10. *See id.*

11. *Id.* at 531, 823 S.E.2d at 234.

12. *Id.* at 531–32, 534, 823 S.E.2d at 234, 235.

13. *Id.* at 531, 823 S.E.2d at 234.

14. *See id.* at 530–31, 823 S.E.2d at 233–34.

15. *See id.* at 531–32, 823 S.E.2d at 234–35.

16. Romando Dixon, *Dacusville Woman Sentenced to Consecutive Life Sentences*, GREENVILLE NEWS (June 23, 2016), <https://www.greenvilleonline.com/story/news/2016/06/23/anna-simpson-trial-guilty-life-sentence/86299610/> [<https://perma.cc/CG6F-8GEJ>].

at the time they<sup>17</sup> committed the act, “[they] lacked the capacity to distinguish moral or legal right from moral or legal wrong or to recognize the particular act charged as morally or legally wrong.”<sup>18</sup> A defendant found NGRI is committed to a state mental institution for treatment, and, pending periodic reevaluations, could eventually be deemed fit for release into the public.<sup>19</sup>

On the other hand, a defendant is GBMI if, at the time of the offense, they *did* have the capacity to distinguish right from wrong, but because of their mental condition, lacked the capacity to conform their conduct accordingly.<sup>20</sup> A defendant found GBMI is sentenced according to the offense of which they are convicted before being committed to a state mental institution for treatment.<sup>21</sup> However, even if treatment is deemed successful, the defendant must serve the remainder of their sentence in the state penitentiary.<sup>22</sup>

Thus, both theories of the case recognized that Simpson suffered from at least some degree of mental illness sufficient to warrant something other than a standard verdict. The *Simpson* jury deliberated for only two hours before returning its verdict: Simpson was found guilty on all counts.<sup>23</sup> Notwithstanding the prosecutor’s request for GBMI, the jury made no mention of mental illness, and Simpson was sentenced to life in prison.<sup>24</sup>

### B. *The Issues*

The *Simpson* case raises compelling questions regarding the ethics and efficacy of South Carolina’s model for dealing with mentally ill offenders. First, in light of the prosecution’s request and the substantial evidence to that end, the jury’s unwillingness to return a GBMI verdict may seem a bit surprising. However, the end result is practically the same as if the jury *had* returned a GBMI verdict.<sup>25</sup> As the Supreme Court of South Carolina declared in 2004, “[t]he difference between guilty and GBMI pertains only to post-sentencing medical treatment.”<sup>26</sup> However, today, *all* inmates committed to

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17. At times in this Note, I will use the pronoun “they” and its inflected or derivative forms (their, theirs, themselves) as a generic third-person singular pronoun.

18. S.C. CODE ANN. § 17-24-10(a) (2014).

19. See S.C. CODE ANN. § 17-24-40 (2019).

20. S.C. CODE ANN. § 17-24-20(a) (2013).

21. S.C. CODE ANN. § 17-24-70 (2003).

22. *Id.*

23. Dixon, *supra* note 16.

24. Natalie Jacewicz, ‘*Guilty But Mentally Ill*’ Doesn’t Protect Against Harsh Sentences, NAT’L PUB. RADIO (Aug. 2, 2016), <https://www.npr.org/sections/health-shots/2016/08/02/486632201/guilty-but-mentally-ill-doesnt-protect-against-harsh-sentences> [<https://perma.cc/3T7K-Z4DK>].

25. See S.C. DEP’T CORR., MENTAL HEALTH SERVICES – GENERAL PROVISIONS: POLICY HS-19.04 § 7.7.2 (2016) [hereinafter MENTAL HEALTH SERVICES POLICY].

26. State v. Downs, 361 S.C. 141, 146, 604 S.E.2d 377, 380 (2004).

the South Carolina Department of Corrections (SCDC) receive a preliminary mental health screening and, if necessary, further treatment and evaluation.<sup>27</sup>

Thus, several questions arise regarding whether there is a meaningful difference between the NGRI and GBMI verdicts in South Carolina or whether the distinction is merely one of semantics. For one, is it reasonable to distinguish between the “insane” and the “mentally ill” purely on the basis of volitional capacity? Setting aside the answer to that question, why even include a GBMI option if there is no practical difference between the dispositions of those found guilty and GBMI?

Second, and perhaps most interesting in light of its conclusion, is the fact that the *Simpson* jury reached its decision without knowledge of the consequences of each verdict.<sup>28</sup> South Carolina courts have consistently held that “the consequences of a conviction do not aid the jury in their function which is to determine whether the defendant committed the offense.”<sup>29</sup> The doctrine of jury ignorance plays a critical role in the courts, but coupled with South Carolina’s current four-verdict model, it is worth considering the potential of jury ignorance to distort case outcomes. To what degree might the four-verdict model lead juries to believe in a continuum of culpability and, therefore, a continuum of outcomes that does not in fact exist? Furthermore, are jurors really qualified to judge whether or not a stranger’s mental illness interfered with their volitional capacity?

Third, and most generally, the *Simpson* case calls into question South Carolina’s policy approach to categorizing and sentencing mentally ill offenders. As is the case in all jurisdictions, there is a serious disconnect between the medical and legal fields where there ought to be some consensus.<sup>30</sup> The development of neuroscience has the potential to provide critical insight into the symptoms and mechanisms of different mental illnesses.<sup>31</sup> However, that insight will only materialize into meaningful legal reform if courts pave the way. South Carolina ought to fundamentally reconsider its approach to dealing with mentally ill defendants and adopt an interdisciplinary strategy that will allow for the incorporation of scientific understanding into workable legal standards. Developing a common linguistic scheme through proactive cooperation between leaders in both the medical and legal fields is an important long-term strategy. In the short term, judges and juries have a responsibility to afford expert medical testimony the deference it deserves.

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27. MENTAL HEALTH SERVICES POLICY, *supra* note 25, § 3.1.

28. *See* Jacewicz, *supra* note 24.

29. *State v. Rimert*, 315 S.C. 527, 530, 446 S.E.2d 400, 401 (1994).

30. *See* Joshua W. Buckholtz & David L. Faigman, *Promises, Promises for Neuroscience and Law*, 24 CURRENT BIOLOGY (SPECIAL ISSUE) R861, R862 (2014).

31. *See* Arian Petoft, *Neurolaw: A Brief Introduction*, 14 IRANIAN J. NEUROLOGY 53, 54 (2015).

## II. BACKGROUND

Courts have long struggled to reconcile traditional notions of criminal culpability with society's evolving understanding of mental illness.<sup>32</sup> Balancing the competing policy aims of criminal punishment—deterrence, retribution, incapacitation, and rehabilitation<sup>33</sup>—is a complicated task on its own. More complicated is the task of balancing those policies where the defendant, due to a mental health condition, does not conform to society's baseline assumptions about the way people think and behave. Over time, courts in the United States have developed various frameworks that attempt to solve the problems posed by mentally ill offenders.<sup>34</sup> This Section will provide a brief history of the law as well as an explanation of the predominant models in use today.

### A. *The M'Naghten Test*

The primary test for legal insanity in the United States, borrowed from the courts of England, is the "*M'Naghten* test."<sup>35</sup> The test, as articulated in the original case, is as follows:

[T]o establish a defence [sic] on the ground of insanity, it must be clearly proved that at the time of committing [sic] the act the party accused was labouring [sic] 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 as not to know that what he was doing was wrong.<sup>36</sup>

Critically, the *M'Naghten* test is solely cognitive.<sup>37</sup> In its simplest form, the test asks whether or not the defendant had the mental capacity to differentiate between right and wrong at the time they committed the act—or, stated differently, whether the defendant had knowledge of right or wrong at the time they committed the act.

Under the *M'Naghten* test, a defendant who understood that what they were doing was morally or legally wrong—even if they lacked total control over their actions—is disqualified from raising the affirmative defense of NGRI.<sup>38</sup> Because the test lacks a volitional component, the threshold for

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32. See, e.g., *State v. Johnson*, 399 A.2d 469, 471–76 (R.I. 1979).

33. E.g., *Ewing v. California*, 538 U.S. 11, 25 (2003).

34. See ALLEN P. WILKINSON & ARTHUR C. ROBERTS, 41 AM. JUR. 2D *Proof of Facts* § 2 (2022).

35. See LAFAVE, *supra* note 1.

36. *Daniel M'Naghten's Case*, 8 Eng. Rep. 718, 719 (H.L. 1843).

37. See WILKINSON & ROBERTS, *supra* note 34, § 4.

38. See *id.* § 3.

raising the defense is extremely high, making *M’Naghten* the strictest test for insanity.<sup>39</sup>

### B. *The MPC Test*

In 1962, the American Law Institute published the Model Penal Code (MPC) and included what would become the second leading test for insanity.<sup>40</sup> Rejecting the narrow scope and high threshold of *M’Naghten*, the MPC offered a softer approach: “A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct *or to conform his conduct to the requirements of law.*”<sup>41</sup> The MPC test, in addition to considering cognitive capacity, takes the defendant’s volitional capacity into account.<sup>42</sup>

A defendant who understands the criminality of their conduct—but lacks the volitional capacity to conform their conduct to the law—may still qualify as criminally insane in a jurisdiction that follows the MPC.<sup>43</sup> Moreover, while *M’Naghten* requires near complete cognitive impairment, the MPC only requires the lack of “substantial capacity,” further lowering the threshold to NGRI.<sup>44</sup>

The advent of the MPC test saw a number of states opting to move away from *M’Naghten*’s all-or-nothing approach in favor of tests that included some variation of the MPC’s volitional component.<sup>45</sup> Given its initial popularity, it seemed at the time that the MPC test represented a positive trend in the law that would inevitably spread across the country.<sup>46</sup> However, the tides turned in 1982 when John Hinckley, Jr. was acquitted of the attempted assassination of President Ronald Reagan and took the proverbial wind out of the MPC’s sails.<sup>47</sup>

Hinckley’s acquittal catapulted the insanity defense to the forefront of legal debate, as outraged members of the public called upon lawmakers to ensure that future “John Hinckleys” would never again escape the reach of

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39. *See id.* § 4.

40. *Id.* § 7.

41. MODEL PENAL CODE § 4.01 (AM. L. INST. 2021) (emphasis added).

42. WILKINSON & ROBERTS, *supra* note 34, § 7.

43. *See id.*

44. *See id.*

45. *See State v. Johnson*, 399 A.2d 469, 475 (R.I. 1979) (noting that twenty-six states had adopted some variation of the MPC test).

46. *See, e.g., id.* at 475–76 (explaining that the MPC test had received “widespread and evergrowing acceptance” and “represent[ed] a significant, positive improvement”).

47. “When the dust cleared [following Hinckley’s acquittal], the sun of the Model Penal Code test had set.” Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CALIF. L. REV. 943, 960 (1999).

justice.<sup>48</sup> In the years that followed, many states, as well as the federal government, returned to the pre-*Hinckley* status quo of the *M’Naghten* test.<sup>49</sup> Some, including South Carolina, opted to incorporate the novel verdict of GBMI in addition to NGRI.<sup>50</sup> Others abolished insanity as an affirmative defense altogether.<sup>51</sup>

### C. *Guilty but Mentally Ill*

While the GBMI verdict has existed in some states since as early as 1975,<sup>52</sup> its popularity exploded in the wake of *Hinckley*, and its persistence today is owed in large part to its prevalence as a solution to the *Hinckley* problem.<sup>53</sup> The *Hinckley* problem—determining what to do with defendants who are unquestionably mentally ill, but whose mental illness does not rise to such a level that society is willing to absolve them of criminal culpability—is far older than *Hinckley* itself.<sup>54</sup>

In addition to *M’Naghten*, courts had articulated other tests for insanity, the central ideas of which were incorporated into both the MPC test as well as many states’ GBMI statutes. The “Irresistible Impulse” Test recognized a volitional component to legal insanity by suggesting that a defendant is NGRI if they “abstractly know[] that a given act is wrong,” but due to “an *insane impulse* . . . [are] irresistibly driven to commit it . . . .”<sup>55</sup> The “Product” Test went further, providing that a defendant is NGRI if their action “was the product of mental disease or mental defect.”<sup>56</sup> Ultimately, these tests proved unworkable, and were largely subsumed by the advent of the MPC, which many viewed as effectively reconciling the high threshold of *M’Naghten* with the volitional capacity concept recognized in the “Irresistible Impulse” and “Product” Tests.<sup>57</sup>

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48. See Slobogin, *supra* note 3, at 494–96.

49. See *id.*; LAFAVE, *supra* note 1, at § 7.5(b).

50. Slobogin, *supra* note 3, at 496 n.10.

51. *Id.* at 494.

52. “In 1975, Michigan became the first state to adopt the verdict of Guilty but Mentally Ill (GBMI).” Andrew J. Black, *People v. Lloyd: Michigan’s Guilty But Mentally Ill Verdict Created with Intention to Help is Not Really a Benefit at All*, 79 U. DET. MERCY L. REV. 75, 76 (2001).

53. See Slobogin, *supra* note 3, at 494–95.

54. See Black, *supra* note 52, at 77–82.

55. *Parsons v. State*, 2 So. 854, 863 (Ala. 1887).

56. *Durham v. United States*, 214 F.2d 862, 875 (D.C. Cir. 1954).

57. See, e.g., *State v. White*, 456 P.2d 797, 803–04 (Idaho 1969) (adopting the MPC test and abandoning the *M’Naghten* and “Product” Tests because of their narrow scope and failure to recognize a volitional component); *Hill v. State*, 251 N.E.2d 429, 438 (Ind. 1969) (adopting the MPC definition of insanity because it incorporates both volitional and cognitive components); *Graham v. State*, 547 S.W.2d 531, 541 (Tenn. 1977) (rejecting *M’Naghten* in favor of the MPC due to *M’Naghten*’s failure to incorporate a volitional component).



Today, the test for GBMI (in states that recognize it) varies jurisdictionally, depending largely on whether a given state applies the *M’Naghten* or MPC test for insanity.<sup>58</sup> However, common to all GBMI statutes is the central premise that, when a defendant’s guilt turns on mental illness (or lack thereof), the three traditional verdicts—guilty, not guilty, and NGRI—are insufficient to address the broad range of cases to which they are applied. Thus, GBMI provides jurors with a fourth verdict option, wherein the defendant is not insane, but due to mental illness, is something less than guilty. As previously stated, the practical import of GBMI is the subject of extensive debate, and its application varies considerably from state to state. Still, in theory, the idea of providing a fourth verdict seems to comport with the reality that mental illness is not as simple as the binary classifications of “sane” and “insane.”

### 1. *GBMI in M’Naghten Jurisdictions*

In *M’Naghten* states, where the defendant’s volitional capacity is disregarded as it pertains to legal insanity,<sup>59</sup> the implications of GBMI are understandably more substantial. The test for GBMI in such jurisdictions typically *does* include a volitional component.<sup>60</sup> Thus, if the jury determines that the defendant had knowledge of right and wrong, but lacked the ability to act accordingly, the defendant is deemed GBMI.<sup>61</sup> This is significant considering that, absent a GBMI option, such a defendant would be declared purely guilty in a traditional *M’Naghten* jurisdiction.

### 2. *GBMI in MPC Jurisdictions*

Conversely, in MPC jurisdictions, volitional capacity is assessed as it pertains to both NGRI and GBMI verdicts.<sup>62</sup> In such jurisdictions, the GBMI standard often employs similar language as the NGRI standard, raising questions as to the legitimacy of the distinction.<sup>63</sup>

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58. Compare S.C. CODE ANN. § 17-24-20(a) (2013), and 18 PA. STAT. AND CONS. STAT. ANN. § 314(a) (West 2022), with KY. REV. STAT. ANN. § 504.060(5), (6) (West 2022), and IND. CODE ANN. § 35-36-1-1 (West 2022).

59. See e.g., S.C. CODE ANN. § 17-24-10(a) (2014); ALASKA STAT. ANN. § 12.47.010 (West 2022).

60. See, e.g., S.C. CODE ANN. § 17-24-20(a) (2013); ALASKA STAT. ANN. § 12.47.030 (West 2022).

61. See statutes cited *supra* note 60.

62. See, e.g., KY. REV. STAT. ANN. § 504.060(5), (6) (West 2022) (defining “insanity” and “mental illness”).

63. For example, Kentucky defines “insanity” as the “lack of substantial capacity either to appreciate the criminality of one’s conduct or to conform one’s conduct to the requirements

D. *The Mens Rea Test: Abolishing the Insanity Defense*

The difficulty in attempting to establish workable categories that are (1) sufficiently broad to account for the various forms in which mental illness might manifest but are (2) sufficiently specific to avoid lumping all mentally ill persons into the same category has led some jurisdictions to abolish the insanity defense altogether.<sup>64</sup>

In a 2020 decision, the Supreme Court of the United States reaffirmed the constitutionality of states abolishing the insanity defense.<sup>65</sup> Importantly, in the few jurisdictions that have done so, defendants are not precluded from offering evidence of their mental illness at trial.<sup>66</sup> Instead, rather than raising an affirmative defense of NGRI, the defendant may offer evidence of their mental incapacity insofar as such evidence is probative of the defendant's inability to form the requisite *mens rea* for the crime charged.<sup>67</sup> For example, if Suzanna Simpson were tried in Utah, she could offer expert testimony tending to prove that, due to her disorder, she was so far divorced from reality that she was incapable of forming the type of intent required by Utah's homicide statute.<sup>68</sup> In *Mens Rea* jurisdictions, evidence of mental illness may constitute grounds for mitigation, either of the level of offense charged, or the associated punishment.<sup>69</sup>

E. *The Present State of the Law*

As it stands, twenty-nine states, and the federal government, employ some version of the *M'Naghten* test.<sup>70</sup> Fifteen states employ some variation of the volitional prong embodied by the MPC test.<sup>71</sup> Five states have abolished insanity as an affirmative defense, allowing evidence of mental illness only as

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of law[.]” KY. REV. STAT. ANN. §504.060(5). “Mental illness” is defined, in part, as a condition that “substantially impaired capacity to use self-control, judgment, or discretion in the conduct of one’s affairs . . . .” *Id.* § 504.060(6). *See also* MICH. COMP. LAWS ANN. § 330.1400(g) (West 2023) (defining “mental illness”), § 768.21(a) (explaining Michigan’s legal insanity defense), and § 768.36 (explaining Michigan’s requirements for a GBMI verdict).

64. *See e.g.*, UTAH CODE ANN. § 76-2-305 (West 2022); KAN. STAT. ANN. § 22-3219 (West 2022).

65. *Kahler v. Kansas*, 140 S.Ct. 1021, 1037 (2020).

66. *See, e.g.*, KAN. STAT. ANN. § 22-3219 (West 2022).

67. *See, e.g.*, UTAH CODE ANN. § 76-2-305 (West 2022); KAN. STAT. ANN. § 21-5209 (West 2022).

68. *See* UTAH CODE ANN. § 76-2-305(1)(a) (West 2022).

69. *See e.g., id.* § 76-2-305(1)(b).

70. JOSHUA DRESSLER & STEPHEN P. GARVEY, *CRIMINAL LAW: CASES AND MATERIALS* 645 (8th ed. 2019).

71. *Id.* at 645–46.

it bears upon an individual's *mens rea*.<sup>72</sup> Finally, twelve states, including South Carolina, include some version of a GBMI verdict.<sup>73</sup>

### 1. *The Law in South Carolina*

The Supreme Court of South Carolina expressly adopted the *M'Naghten* test for insanity as early as 1886.<sup>74</sup> However, as is the case in many jurisdictions, the present statutory scheme has its roots in post-*Hinckley* anxiety.<sup>75</sup> South Carolina enacted its GBMI statute in 1984, two years after *Hinckley*'s acquittal, in order "(1) to reduce the number of defendants being completely relieved of criminal responsibility and (2) to insure [sic] mentally ill inmates receive treatment for their benefit as well as society's benefit while incarcerated."<sup>76</sup> Thus, today, South Carolina is in line with the majority of jurisdictions in that it maintains the purely cognitive *M'Naghten* approach to insanity.<sup>77</sup> Yet, South Carolina is unique in that it also provides a fourth verdict option of GBMI, which *does* include a volitional component.<sup>78</sup>

## III. ARGUMENT

South Carolina's current approach toward mentally ill offenders leaves a lot to be desired. The solely cognitive *M'Naghten* test comports neither with logic nor with the modern understanding of mental illness as a medical condition. Further, the four-verdict model and GBMI criteria place jurors in a uniquely difficult position and exacerbate the problems posed by having lay jurors engage with complicated medical inquiries. Finally, until South Carolina courts adopt an interdisciplinary strategy for assessing mental illness, advances in science will fail to precipitate meaningful legal reform.

### A. *The Current NGRI-GBMI Model is Theoretically Meaningless and Does Not Comport with Modern Understandings of Mental Illness*

If there is to be any meaningful change in South Carolina's approach to mentally ill offenders, the starting point must be the criteria by which a

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72. *Id.* at 646.

73. Slobogin, *supra* note 3.

74. *See* *State v. Bundy*, 24 S.C. 439, 445 (1886); *see generally* Harvey Wingo, *Squaring M'Naghten with Precedent—An Historical Note*, 26 S.C. L. REV. 81 (1974) (providing a useful background of the early history of South Carolina's insanity defense).

75. John H. Blume & Sheri Lynn Johnson, *Killing the Non-Willing: Atkins, the Voluntarily Incapacitated, and the Death Penalty*, 55 S.C. L. REV. 93, 101 (2003).

76. *State v. Hornsby*, 326 S.C. 121, 126, 484 S.E.2d 869, 872 (1997).

77. *See* S.C. CODE ANN. § 17-24-10(a) (2014).

78. *See* S.C. CODE ANN. § 17-24-20(a) (2013).

defendant's culpability is assessed. Consider a hypothetical jurisdiction where there is no GBMI option, and jurors must decide between guilty, not guilty, or NGRI. Regardless of the test for NGRI in that jurisdiction—philosophically—what is the jury really being asked to decide? Divorced from traditional legal phraseology, the question might be framed as follows: Is the defendant afflicted with a mental illness that is so severe that it would be unjust to hold them responsible for their actions? The inquiry seems straightforward enough, but what about the gray area?

The problem is that there will always be defendants who are unquestionably mentally ill but perhaps not so mentally ill that society is prepared to absolve them of guilt. Of course, there is a fundamental question antecedent to that problem: At what point should a defendant's mental illness absolve them of responsibility for their conduct? South Carolina's GBMI option attempts to solve the problem without answering the underlying question. Paradoxically, by including the GBMI verdict, South Carolina recognizes the inherent difficulty in categorizing defendants that fall into the aforementioned gray area, but its solution is to arbitrarily define the gray area and then codify it as a verdict option.

*1. South Carolina's NGRI-GBMI Distinction Is Logically and Morally Debatable*

As previously discussed, the conversation surrounding mental illness and its relationship to criminality can be boiled down to two primary concepts: mental capacity and volitional capacity.<sup>79</sup> The degree to which each concept ought to be considered as it pertains to a defendant's culpability is the subject of considerable debate in both the medical<sup>80</sup> and legal<sup>81</sup> fields. Despite this lack of consensus, South Carolina is apparently comfortable drawing a hard line at mental culpability.

By using the *M'Naghten* test for insanity,<sup>82</sup> and an MPC-like test for GBMI,<sup>83</sup> South Carolina codifies the following moral conclusion: A

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79. See *Insanity Defense*, CORNELL L. SCH. LEGAL INFO. INST., [https://www.law.cornell.edu/wex/insanity\\_defense](https://www.law.cornell.edu/wex/insanity_defense) [<https://perma.cc/E6Z7-JGYX>].

80. See, e.g., Michael S. Moore, *The Neuroscience of Volitional Excuse*, in PHILOSOPHICAL FOUNDATIONS OF LAW AND NEUROSCIENCE 179 (Dennis Patterson & Michael S. Pardo eds., 2016); Linda Gröning et al., *Remodelling Criminal Insanity: Exploring Philosophical, Legal, and Medical Premises of the Medical Model Used in Norwegian Law*, 81 INT'L J.L. & PSYCHIATRY, Art. 101776 (2022).

81. See, e.g., Michael Corrado, *The Case for a Purely Volitional Insanity Defense*, 42 TEX. TECH. L. REV. 481 (2009); Judith A. Morse & Gregory K. Thoreson, *Criminal Law—United States v. Lyons: Abolishing the Volitional Prong of the Insanity Defense*, 60 NOTRE DAME L. REV. 177 (1984).

82. See S.C. CODE ANN. § 17-24-10(a) (2014).

83. See S.C. CODE ANN. § 17-24-20(a) (2013).

defendant with the mental capacity to distinguish between right and wrong is always responsible for their actions, whether or not they had any capacity to control their conduct.<sup>84</sup> Such a conclusion is, at best, debatable, and at worst, untenable.

Consider a hypothetical where South Carolina's standards for each category were reversed. The new NGRI rule would be something like: "A defendant is NGRI if, due to mental illness, they understood the difference between right and wrong, but lacked the volitional capacity to act accordingly." The new GBMI rule would read "A defendant is GBMI if they had the capacity to control their conduct, but due to their mental illness, lacked the ability to understand right from wrong." The new rule is just as reasonable as the old. Such a hypothetical illustrates the arbitrary nature of the current standard and the folly in treating cognitive capacity and volitional capacity as if they are not each useless without the other.<sup>85</sup>

Pick your favorite expletive. Imagine a child, who has yet to learn that the word is an expletive, and inappropriately yells it out in a public setting. Now, imagine the same conduct by an adult who suffers from Coprolalia, a rare symptom of Tourette Syndrome that causes the involuntary outburst of obscene words and socially inappropriate remarks.<sup>86</sup> The hypothetical child lacked the cognitive capacity to understand what they were saying was "wrong," but would presumably have had the volitional capacity not to say it had they known it was wrong. The adult suffering from Coprolalia had the cognitive capacity to understand what they were saying was "wrong," but lacked the volitional capacity not to say it. Is the adult with Coprolalia deserving of punishment, but the child not? South Carolina says "yes."

## 2. *The NGRI-GBMI Distinction Does Not Reflect the Modern Understanding of Mental Illness as a Medical Condition*

Assigning culpability purely on the basis of volitional capacity does not comport with our modern understanding of mental illness as an *illness*, that is, as a *medical condition*.<sup>87</sup> With that understanding, the baseline assumptions about defendants who ought to qualify for NGRI are (1) that they suffer from a medical condition and (2) that their medical condition influences their mind

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84. See S.C. CODE ANN. § 17-24-10(a) (2014); S.C. CODE ANN. § 17-24-20(a) (2013).

85. See Nina Koivula, *A Neuroscientific Perspective on Cognitive and Volitional Impairment in Criminal Irresponsibility Assessments: A Case for a Capacity-Based Approach*, 5 NEUROLAW: MARBLE RSCH. PAPERS 105, 128–29 (2014).

86. *Understanding Coprophenomena: Misunderstood Symptoms*, TOURETTE ASS'N OF AM., <https://tourette.org/resource/understanding-coprolalia/> [https://perma.cc/79GA-CTTW].

87. *What is Mental Illness?*, AM. PSYCHIATRY ASS'N, <https://www.psychiatry.org/patients-families/what-is-mental-illness> [https://perma.cc/WF6T-55XG].

to such a degree that their criminal conduct cannot reasonably be described as “their fault.” Thus, the current rule in South Carolina is that a defendant whose medical condition sufficiently impacts their cognitive capacity can be found NGRI, but a defendant whose medical condition completely eliminates their volitional capacity is somehow culpable—unless their cognitive capacity is also sufficiently impacted.

The issues surrounding mentally ill offenders are unique in that they represent an intersection of the medical and legal fields.<sup>88</sup> Accordingly, many argue that those in the legal field ought to give due deference to medical experts who have a superior grasp on the specific nature of different mental illnesses.<sup>89</sup> At the time *M’Naghten* was decided, psychology did not even exist as a field of experimental study.<sup>90</sup> In the forty-one years since Hinckley was acquitted, developments in technology and research have contributed to a deeper understanding of the symptoms and causes of various mental illnesses.<sup>91</sup> Unfortunately, modern advances in medical understanding have not necessarily been reflected in the legal field where the debate remains relatively stagnant.<sup>92</sup>

Take, for example, the recent discussion surrounding Chronic Traumatic Encephalopathy (CTE).<sup>93</sup> CTE is a neurodegenerative syndrome caused by blunt force impact to the head and is associated with deterioration of behavioral health functioning, including impulse control.<sup>94</sup> Some researchers have gone so far as to suggest a potential direct correlation with aggressive behavior.<sup>95</sup> While psychologists’ understanding of CTE is still developing,<sup>96</sup>

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88. See generally Daniel Stanley Guenther, *The Intersection of Psychology and Law: Exploring Social Issues and Social Problems Relating to the Insanity Defense*, 10 UCLA UNDERGRADUATE L.J. (2011).

89. See, e.g., Beatrice R. Maidman, *The Legal Insanity Defense: Transforming the Legal Theory into a Medical Standard*, 96 B.U. L. REV. 1831, 1855 (2016).

90. See *History of Psychology: Timeline*, ANNENBERG LEARNER, <https://www.learner.org/series/discovering-psychology/explorations/history-of-psychology-contemporary-foundations/> [https://perma.cc/D2CR-88ZE].

91. See generally Peter Falkai et al., *Forty Years of Structural Brain Imaging in Mental Disorders: Is it Clinically Useful or Not?*, 20 DIALOGUES IN CLINICAL NEUROSCIENCE 179 (2018); *DSM History*, AM. PSYCHIATRY ASS’N, <https://psychiatry.org/psychiatrists/practice/dsm/about-dsm/history-of-the-dsm#section>, [https://perma.cc/244N-7H3W].

92. See Koivula, *supra* note 85, at 105.

93. See, e.g., Alexandra L. Aaronson et al., *A Review of the Role of Chronic Traumatic Encephalopathy in Criminal Court*, 49 J. AM. ACAD. PSYCHIATRY & L. 1 (2020), <https://jaapl.org/content/jaapl/early/2020/11/24/JAAPL.200054-20.full.pdf> [https://perma.cc/6ALX-KWKS].

94. See *id.* at 1–2.

95. See *id.*

96. See generally Daniel Antonius et al., *Behavioral Health Symptoms Associated with Chronic Traumatic Encephalopathy: A Critical Review of the Literature and Recommendations for Treatment and Research*, 26 J. NEUROPSYCHIATRY & CLINICAL NEUROSCIENCES 315 (2014).

the fact that it *is* developing illustrates the critical role that medical science can and should play in the discussion surrounding criminal culpability.

As research progresses, so will scientists' ability to accurately describe and predict the potential manifestations of different mental illnesses. How many afflicted defendants were tried and erroneously convicted before Dr. Alzheimer<sup>97</sup> first described that "peculiar disease" in 1906? It is impossible to say. However, what seems obvious to say is that, if cognitive and volitional capacity are the benchmarks of culpability, and if medical science is increasingly able to describe the mechanisms by which specific mental illnesses impact cognitive and volitional capacity, then that progress in medical science should ideally be reflected in case outcomes.

Importantly, not only is scientists' understanding of mental illness improving, so too is their ability to diagnose it.<sup>98</sup> Today, doctors can use technology, such as magnetic resonance imaging (MRI), to visually observe indicia of various mental conditions.<sup>99</sup> MRI's potential as a tool for diagnosing conditions like CTE, schizophrenia, and different forms of neurodegenerative dementia is promising.<sup>100</sup>

Imagine a future where a doctor, by physically observing certain phenomena in an image of a person's brain, will be able to say with confidence that (1) the person likely suffers from x-disease, (2) x-disease likely has x-impact on the person's cognitive capacity, and (3) x-disease likely has x-impact on the person's volitional capacity. Then, what will we ask the jury to decide? Keep this inquiry in mind, as this Note will explore it further in Section III.B's discussion of the role of the jury below.

### 3. *The MPC Offers a Superior Test for Insanity and Eliminates the Need for a GBMI Verdict Option*

Recall the problem that GBMI seeks to address—what to do with gray area offenders. And bear in mind the underlying question: At what point does one's mental illness render one non-culpable? As I have already posited,

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97. *What is Alzheimer's Disease?*, ALZHEIMER'S ASS'N, <https://www.alz.org/alzheimers-dementia/what-is-alzheimers>, [https://perma.cc/9RJ2-XVJB].

98. See, e.g., Xiaoyan Zhan & Rongjun Yu, *A Window into the Brain: Advances in Psychiatric fMRI*, 2015 BIOMED RSCH. INT'L, Art. 542467 (2014).

99. See *id.*

100. See generally Julian D. Dallmeier et al., *Emerging Advances of In Vivo Detection of Chronic Traumatic Encephalopathy and Traumatic Brain Injury*, 92 BRITISH J. RADIOLOGY (2019); Jihoon Oh et al., *Identifying Schizophrenia Using Structural MRI with a Deep Learning Algorithm*, 11 FRONTIERS PSYCHIATRY (2020), <https://www.frontiersin.org/articles/10.3389/fpsy.2020.00016/full>, [https://perma.cc/5RSN-GE3Q]; Mina Park & Won-Jin Moon, *Structural MR Imaging in the Diagnosis of Alzheimer's Disease and Other Neurodegenerative Dementia: Current Imaging Approach and Future Perspectives*, 17 KOR. J. RADIOLOGY 827 (2016).

South Carolina's current model seeks to solve the problem, but it ignores the question. The MPC test, on the other hand, is a superior solution in that it does not presume the answer to the question but, nonetheless, provides logical criteria for approaching the gray area problem.

To begin, the MPC test does not elevate cognitive capacity over volitional capacity as the threshold to insanity.<sup>101</sup> Because neither cognitive nor volitional capacity is meaningful without some degree of the other,<sup>102</sup> the MPC test properly recognizes that deficits in either can be a legitimate basis for reducing culpability. Unlike South Carolina's *M'Naghten* regime, the MPC affords due significance to the fact that different mental illnesses impact different faculties differently.<sup>103</sup>

In this way, the MPC test also has superior potential for giving appropriate deference to advances in the medical field. If the threshold for insanity incorporates both volitional and cognitive components, and the ability of the medical field to understand and describe those components improves, the court's ability to consistently categorize the mentally ill as culpable or not culpable will improve correspondingly. In South Carolina, such improvements will only correspond to the ease with which courts determine which arbitrary and pre-defined category the defendant fits into.

Further, South Carolina's GBMI solution to the gray-area problem misunderstands the nature of the problem and would be unnecessary under an MPC regime. Culpability is a legal question<sup>104</sup> and does not exist on a spectrum in the same way that mental illness exists on a spectrum. True, courts consider certain factors as making a defendant more or less culpable, but the degree to which one is culpable, and the standards of culpability, are ultimately the products of social policy and judicial interpretation.<sup>105</sup>

For example, courts have created the "heat of passion" doctrine as a way to describe what might ordinarily be characterized as murder.<sup>106</sup> Such is reflective of the social understanding that the same action might, in different

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101. See WILKINSON & ROBERTS, *supra* note 34, § 7.

102. See generally Chris Frith, *The Psychology of Volition*, 229 EXPERIMENTAL BRAIN RSCH. 289 (2013) (exploring the psychology of volition, demonstrating its interconnectedness to the way one experiences and perceives the world).

103. See generally Thomas Goschke, *Dysfunctions of Decision-Making and Cognitive Control as Transdiagnostic Mechanisms of Mental Disorders: Advances, Gaps, and Needs in Current Research*, 23 INT. J. METHODS PSYCHIATRIC RSCH. 41 (2013) (explaining that impaired decision-making and impaired volitional control are "characteristics of a wide range of mental disorders," and that studying the biological mechanisms by which such disorders operate could be useful in understanding them).

104. See generally Alexander Sarch, *Should Criminal Law Mirror Moral Blameworthiness or Criminal Culpability? A Reply to Husak*, 41 L. & PHIL. 305, 305–09 (2022) (discussing the nature of criminal culpability as distinguished from moral culpability).

105. See *id.* at 309–10.

106. See 40 AM. JUR. 2D *Homicide* § 45 (2022).



circumstances, warrant different levels of culpability.<sup>107</sup> Thus, the cold-blooded murderer and the heat-of-passion killer are both criminally responsible for their conduct but are deserving of different punishments.<sup>108</sup> These are the kinds of value judgments that society and the courts are well suited to make.

However, the degree to which an individual is mentally ill is *not* a product of social policy, but of a medical reality, and its contours should be defined and interpreted by scientists, not judges. Thus, perhaps one thing that *mens rea* jurisdictions (those that have abolished the insanity defense) get right is that the spectrum of culpability can and should be fixed, defined according to the nature of the criminal action and the surrounding circumstances. Conversely, the mental illness spectrum, which exists independently and outside of the culpability spectrum, is impossible to fix. Any one person's volitional and cognitive capacities are the product of natural, physical realities that scientists understand to varying degrees.<sup>109</sup>

South Carolina's approach is to create a more nuanced spectrum of culpability by creating more categories. The better approach is to develop a singular standard for culpability, the application of which will become increasingly accurate as our understanding of the mental illness spectrum becomes more nuanced.

*B. South Carolina's Current Model Distorts the Proper Role of the Jury and, Consequently, Case Outcomes*

Assuming *arguendo* the legitimacy of South Carolina's NGRI and GBMI criteria, the four-verdict model poses additional problems. For one, a jury would not be unreasonable in assuming that those verdicts—guilty, guilty but mentally ill, not guilty by reason of insanity, or not guilty—represent a continuum of culpability and, therefore, punishment. Yet, they do not.<sup>110</sup> Whatever curative instruction the court may give, the potential for that assumption to impact jurors' decisions, consciously or subconsciously, is ever-present.

Furthermore, again disregarding the propriety of the NGRI-GBMI distinction, South Carolina's current model tasks lay jurors with making complicated medical determinations that they simply are not qualified to make. Recall that in *Simpson*, the jury was free to (and apparently chose to) disregard the expert opinions of several medical professionals, including those

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107. *See id.*

108. *See id.*

109. *See* Goschke, *supra* note 103.

110. *See* MENTAL HEALTH SERVICES POLICY, *supra* note 25; *State v. Downs*, 361 S.C. 141, 146, 604 S.E.2d 377, 380 (2004) (citing S.C. CODE ANN. § 17-24-70 (2003)).

called by the prosecution.<sup>111</sup> Thus, Suzanna Simpson is in prison today due to *the jury's* conclusion that her schizoaffective disorder bipolar type did not impact her cognitive or volitional capacities to a sufficient degree to warrant any sort of mitigation.<sup>112</sup> How can a juror, who may have learned of a disease for the first time at trial, be qualified to conclude whether, and to what degree, that disease influenced a defendant's thinking? I would argue they could not.

1. *The Four-verdict Model, Coupled with the Doctrine of Juror Ignorance, Falsely Suggests a Continuum of Culpability and, Therefore, Dispositions*

South Carolina courts, in accordance with the predominant American jurisprudence, have long held that the “consequences of a conviction do not aid the jury in their function which is to determine whether the defendant committed the offense.”<sup>113</sup> Juror ignorance is a benchmark of the legal system in this country and serves a critical function in ensuring that the role of the jury remains limited to its proper scope: finding facts.<sup>114</sup> As this Note will explain, juror ignorance, specifically in the context of mentally ill offenders under South Carolina's model, carries a significant risk of distorting case outcomes. However, the solution is not to abandon the doctrine but to tweak the model.

Eliminating juror ignorance “invites [the jury] to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion.”<sup>115</sup> A juror might be tempted to alter their verdict in any number of scenarios: where they sympathize with the defendant; where they believe the punishment is too harsh for the crime; where they believe the defendant's conduct should not be illegal; or where they believe the punishment is not harsh enough. The list could go on, but suffice to say, abandoning juror ignorance would turn South Carolina's legal system on its head and transform the role of the jury beyond recognition. Eliminating juror ignorance inevitably opens the door for individual jurors to substitute their personal convictions for established legislative and judicial sentencing determinations.<sup>116</sup> Judicial consistency would be eviscerated as a consequence.

Thus, while juror ignorance is indispensable, it is important to understand why it may be counterproductive when coupled with the current four-verdict

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111. *See State v. Simpson*, 425 S.C. 522, 531–32, 823 S.E.2d 229, 234–35 (Ct. App. 2019).

112. *See id.* at 535, 823 S.E.2d at 236.

113. *State v. Rimert*, 315 S.C. 527, 530, 446 S.E.2d 400, 401 (1994).

114. *See, e.g., Shannon v. United States*, 512 U.S. 573, 579 (1994).

115. *Id.*

116. *See id.*

model in South Carolina. The policy of juror ignorance is to prevent sentencing considerations from improperly skewing the jury's verdict one way or another.<sup>117</sup> Yet, it is possible that, taken together, the four verdict options imply to the juror a continuum of culpability (and presumably, punishment) that is equally likely to improperly influence their decisions.

To be sure, the same concerns attend to three-verdict models, but to a lesser degree. In a three-verdict jurisdiction, NGRI presents as an exception to the binary choice of guilty or not guilty. Whereas, when a fourth option (or second exception) is introduced, the verdicts present less as a binary decision with an exception and more as a sliding scale of culpability.

Whether jurors ought to be informed of the punishments associated with their verdicts, specifically in the context of NGRI and GBMI, is no novel issue to South Carolina jurisprudence. In *State v. Poindexter*, the Supreme Court of South Carolina expressly held that the defendant was not entitled to a jury instruction disclosing the relative consequences of a GBMI versus NGRI verdict.<sup>118</sup> The Court reaffirmed the same in *State v. Rimert*, and that precedent has rarely been questioned since.<sup>119</sup>

Interestingly, despite the cross-jurisdictional prevalence of juror ignorance, many states have carved out an exception allowing (and sometimes even requiring) special instructions where the insanity defense is at play.<sup>120</sup> A common justification for the exception is its potential to dispel the misconception that NGRI is simply a loophole that allows guilty defendants to “go free.”<sup>121</sup> Critically, this justification is premised on two correct assumptions: (1) jurors come to trial with personal notions of justice; and (2) for some jurors, those notions *will* influence their decisions.<sup>122</sup>

Such a view is consistent with the way human beings actually behave: “[j]urors do not operate as machines that clinically ‘find facts.’”<sup>123</sup> And, while the jury's role is as the finder of fact, jurors are, in all cases, confronted with the inescapable reality that their verdict will ultimately decide the defendant's

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117. *See id.*

118. 314 S.C. 490, 492, 431 S.E.2d 254, 255 (1993).

119. *State v. Rimert*, 315 S.C. 527, 530, 446 S.E.2d 400, 401 (1994).

120. *See, e.g.,* *Guilford v. State*, 368 S.E.2d 116, 117 (Ga. 1988); *State v. Blake*, 495 P.2d 905, 914 (Kan. 1972); *State v. Vanzant*, 659 S.W.2d 816, 819 (Tenn. Crim. App. 1983).

121. *See* Christopher J. Rauscher, “*I Did Not Want a Mad Dog Released*”—*The Results of Imperfect Ignorance: Lack of Jury Instructions Regarding the Consequences of an Insanity Verdict* in *State v. Okie*, 63 ME. L. REV. 593, 594–95 (2011).

122. *See generally* W. Wash. Dist. Ct., *Unconscious Bias*, YOUTUBE (May 12, 2021), <https://www.youtube.com/watch?v=hdjBbfdRLkA>, [https://perma.cc/BX9N-GFU7] (highlighting problems presented by unconscious bias, and potential means of combatting such bias).

123. Rauscher, *supra* note 121, at 609.

fate.<sup>124</sup> Moreover, the weight of that responsibility can cut both ways depending on a particular juror's moral disposition.

For example, hypothetical Juror #1 holds a more punitive view of criminal justice and more skeptical view toward mental illness. Juror #2 prefers the rehabilitative aspects of criminal justice and takes a more sympathetic view toward mental illness. Juror #1 might be more apt to find a defendant, like Suzanna Simpson, guilty based on the false belief that a lesser verdict (GBMI) would allow her to avoid punishment altogether. Oppositely, Juror #2 might be inclined to find the defendant NGRI based on a misconception that the defendant would not otherwise receive medical treatment.

While it is vital to recognize that jurors' subjective notions of justice will necessarily influence their decision-making, proponents of juror ignorance are wise in understanding that the problem cannot be solved, only mitigated. Rather than instructing jurors as to the consequence of each verdict (essentially giving them *carte blanche* to apply their subjective notions of justice to the case at hand), the better solution is to limit the universe of questions to which jurors are *able* to apply their subjective notions of justice.

By presenting the jury with four options, and refusing to inform the jury as to the consequences of those options, South Carolina unintentionally invites jurors to imagine for themselves just what the consequences might be.<sup>125</sup> Of course, one could attribute the same effect to the doctrine of juror ignorance in a run-of-the-mill guilty or not guilty scenario, but at least in that scenario, the jurors' assumptions are more likely to be somewhat accurate.

For example, imagine Juror #1 (the law-and-order type from the above hypothetical) is deciding whether or not a defendant committed first or second degree murder. While Juror #1 may assume that first degree murder carries a heftier sentence, and while they may improperly allow that assumption to bear on their decision, their assumption would ultimately prove correct. However, even if it were not correct, the impact of that assumption would be the degree to which a defendant, who is deserving of punishment, is punished. To be clear, such an outcome is objectionable, but it illustrates just how much more extreme the impact of such assumptions is in the GBMI and NGRI contexts. There, the result might be that a defendant, who is not at all deserving of punishment, is sentenced to life in prison.

Thus, the doctrine of jury ignorance is vital to fair and consistent case outcomes, but South Carolina's four-verdict model actually exacerbates the problem that jury ignorance aims to solve. Not only do the four separate

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124. See Masha Bach, Note, *The Not Guilty by Reason of Insanity Verdict: Should Juries be Informed of its Consequences?*, 16 WHITTIER L. REV. 645, 676-77 (1995).

125. See Rauscher, *supra* note 121, at 594-95 (explaining that jurisdictions that do allow jury instruction on the consequences of an NGRI verdict do so "in order to dispel the perhaps common misconception that an extremely dangerous defendant may 'go free' if found insane.").

verdicts imply four separate outcomes, which will inevitably influence a juror's decision-making, but the natural implication of the four-verdict model is incorrect. The verdicts lend themselves to a reasonable assumption that guilty is the "worst," followed by GBMI, followed by NGRI, followed by not guilty, and that the associated punishments exist on a similar continuum. Yet, no such continuum exists. Apart from the asterisk by their name, GBMI defendants are, for all intents and purposes, just guilty.<sup>126</sup>

2. *Jurors Are Not Qualified to Make the Distinction They Are Being Asked to Make*

South Carolina's current regime simply asks too much of jurors. Twelve strangers are supposed to conclude whether a defendant's mental illness—which is a medical condition<sup>127</sup>—impacted his or her cognitive or volitional capacities at the time of the crime and, if so, to what degree. That is not factfinding: that is diagnosis.

Again, owing to the necessary intersection of law and medicine in this unique context, the problem is somewhat unavoidable. Even in an MPC jurisdiction, juries must make some finding as to the relationship between a defendant's mental illness and its potential impact on their capacities. However, in those jurisdictions, the inquiry is less specific, and consequently, jurors are more qualified to make it.

As a corollary, the more nuanced the inquiry is into the defendant's mental illness, the less qualified the jury is to make ultimate conclusions. In a three-verdict, MPC test jurisdiction, the problem of jurors' lack of expertise is better mitigated because jurors are deciding whether the defendant is (1) guilty, (2) not guilty, or (3) excepted from the traditional guilty or not guilty binary due to the effects of mental illness on their capacities. In other words, the jury is tasked with distinguishing whether a defendant is "normal" or whether they suffer from a substantial mental illness.

Oppositely, South Carolina's four-verdict, *M'Naghten* test model complicates the jury's job and obfuscates the proper inquiry. There, the jury is no longer distinguishing between "normal" defendants and mentally ill defendants. Rather, it must make a sub-inquiry as between mentally ill defendants and "insane" defendants. Who knows why, and by what biological mechanisms, a mentally ill individual crosses the threshold to insanity? Scientists do not know yet and certainly not jurors.

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126. See *State v. Downs*, 361 S.C. 141, 146, 604 S.E.2d 377, 380 (2004) (citing S.C. CODE ANN. § 17-24-70 (2003)); MENTAL HEALTH SERVICES POLICY, *supra* note 25, § 7.7.2.

127. *What is Mental Illness?*, *supra* note 87.

Still, scientists' ability to describe and identify mental illness continues to improve. Although it is not legally required,<sup>128</sup> in many relevant cases, medical experts will offer testimony and explain their conclusions and observations as to the particular defendant's mental state. What is puzzling is the fact that such testimony, backed by scientific principles and grounded in biology, must be filtered through a team of lay jurors who are free to disregard it at their discretion.

*C. Yielding at the Intersection of Law and Science: The Need for an Interdisciplinary Approach*

Today, scientists cannot point to an image of a defendant's brain and opine with reasonable certainty that the defendant suffers from, for example, CTE and that CTE caused a 90% decrease in the defendant's volitional capacity at the time of the offense. That ability might not exist until a day far in the future, but it is not a completely unreasonable goal.<sup>129</sup> Science will continue marching forward, and the courts do themselves a great disservice if they refuse to incorporate new medical understanding into the law.

While assessing mentally ill offenders requires an intersection of scientific and legal principles, the law has had the right-of-way since the beginning.<sup>130</sup> The concepts of volitional and cognitive capacity, in the sense that courts define them, are legal constructs that were established prior to the advent of modern psychology.<sup>131</sup> As one scholar acknowledges, "the law sorts people into discrete cognitive taxa (e.g. competent vs. not-competent; responsible vs. not-responsible) [but] inter-individual differences in mental functioning are in fact more dimensional than categorical."<sup>132</sup> That dissonance illustrates the fundamental problem: scientists are busy chiseling a square peg, but the law is drawn as a round hole. Thus, a necessary next step is the development of "a [neuro-legal] lingua franca<sup>133</sup> of self-control to facilitate

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128. See *State v. Lewis*, 328 S.C. 273, 278, 494 S.E.2d 115, 117 (1997) ("A defendant may rely on lay testimony to establish insanity.").

129. See, e.g., Dallmeier et al., *supra* note 100.

130. See generally Branden D. Jung, *Criminal Law's Folk Psychological Dilemma: Resolving Neuroscientific and Philosophical Challenges to the Voluntary Act Requirement*, 122 W. VA. L. REV. 561, 565–68 (2019) (explaining that criminal law employs a sort of "folk psychology" that does not comport with modern neuroscientific understanding).

131. See Andrew Donohue et al., *Legal Insanity: Assessment of the Inability to Refrain*, 5 PSYCHIATRY 58, 58–60 (2008) (outlining the origins and history of the concepts of volitional and cognitive capacity, as well as criticism of those concepts by psychologists and psychiatrists).

132. Buckholtz & Faigman, *supra* note 30.

133. Cambridge Dictionary defines "lingua franca" as "a language used for communication between groups of people who speak different languages." *Lingua Franca*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/lingua-franca> [https://perma.cc/Q98R-PYJQ].

objective classification of legal standards according to scientifically meaningful criteria.”<sup>134</sup>

Creating a “neuro-legal lingua franca” is as much a practical strategy as it is a policy ideal, calling for a basic reconsideration of the relationship between the two fields.<sup>135</sup> Dr. Francis Shen, a proponent of “neurolaw,” posits that “law and neuroscience will become one of the most influential jurisprudential schools in the world.”<sup>136</sup> Neurolaw is an emerging discipline exploring the application of neuroscience in the legal sphere.<sup>137</sup> Dr. Shen points to the rapidly increasing presence of neuroscientific concepts in both proposed legislation and legal scholarship.<sup>138</sup> Put simply, “a lot in law hinges on how brains work.”<sup>139</sup>

Still, there is real danger in prematurely allowing novel or underdeveloped scientific theories into the courtroom.<sup>140</sup> Thus, the neurolaw frontier must be approached cautiously and cooperatively—but proactively.<sup>141</sup> There is a promising future for the use of neuroscience as a tool in criminal adjudication, but the extent to which its potential benefit will materialize will turn on whether or not courts pave the way. The remainder of this Section will identify two potential steps that South Carolina can take to allow for more meaningful scientific input, both in the short-term and the future.

### 1. *Creating a Lingua Franca*

The disjunction between the terminology used in the medical and legal fields to describe mental illness may be a crucial starting point if there is to be a productive dialogue between them.<sup>142</sup> In the process of researching, scientists have developed descriptive vocabulary that is specifically tailored to their research goals. Terms like “delayed reward discounting” are useful in

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134. Joshua W. Buckholtz et al., *A Neuro-Legal Lingua Franca: Bridging Law and Neuroscience on the Issue of Self-Control* 27 (Vanderbilt Univ. L. Sch., Pub. L. & L. Theory, Working Paper No. 16-32, 2016).

135. *See generally id.*

136. Petrie-Flom Ctr. for Health L. Pol’y, Biotechnology, & Bioethics at Harv. L. Sch., “*The Neurolaw Revolution*” *A Lecture by Dr. Francis Shen*, at 11:22, YOUTUBE (May 29, 2018), <https://www.youtube.com/watch?v=4XbgprHc18M>, [<https://perma.cc/FD4F-RBFQ>] [hereinafter *A Lecture by Dr. Francis Shen*].

137. *See generally* Petoft, *supra* note 31.

138. *A Lecture by Dr. Francis Shen*, *supra* note 136, at 17:36–19:14.

139. Macarthur Found. Rsch. Network on L. & Neuroscience, *Law & Neuroscience: What, Why, and Where to Begin*, LAWNEURO.ORG (Aug. 2016), <https://www.lawneuro.org/neurolawintro.pdf> [<https://perma.cc/B4UT-YGJS>].

140. *See id.* at 2.

141. *See id.*

142. *See generally* Buckholtz et al., *supra* note 134.

the context of the laboratory but not necessarily in the courtroom.<sup>143</sup> By the same token, the legal phraseology of “right” and “wrong” does not lend itself to the empirical application of the scientific process.<sup>144</sup> However, open and intentional communication between leaders in both fields may allow for the development of a common linguistic scheme and facilitate more accurate interdisciplinary analysis.

Professor Joshua Buckholtz aptly summarizes the potential benefit of the lingua franca strategy: “[I]f the law’s normative preferences can be framed in a common language, scientists’ ability to operationalize legal concepts and produce legally relevant findings will be enhanced.”<sup>145</sup> However, he notes that the chief concern is “whether seemingly related concepts can be captured with a precision that accords both with what the law needs and what science is able to provide.”<sup>146</sup> The concern is two-fold: (1) scientific inferences drawn from group-level assessments may have limited application to individual-level assessment in the legal context;<sup>147</sup> and (2) “despite semantic similarities, scientific constructs often do not track with [the law’s] normative precepts.”<sup>148</sup>

What this means is that, while development of a lingua franca is necessary, its developers must not forget why it is necessary in the first place. Science and the law are two different disciplines with different goals and different processes by which they pursue those goals. Objectors to the marriage of law and science have reasonable apprehensions about the potential for the law to become too rigid in its application or to otherwise be tainted by reliance on underdeveloped theories.<sup>149</sup> Valid as they are, such concerns ought to inform, not discourage, the development of the lingua franca, which has great potential to bolster the consistency of legal outcomes.

A lingua franca in South Carolina would start with re-evaluating the *M’Naghten* test for NGRI and the MPC-like test for GBMI. There must be a collaborative effort between experts in both the legal and scientific fields, with

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143. *See id.* at 4.

144. *See id.* at 3.

145. *Id.* at 4.

146. *Id.* at 6.

147. Referred to as the “G2i” problem, one of the biggest challenges facing the application of scientific principles to individual legal cases is the lack of available data from which reliable individual-level inferences can be drawn. *See generally* MacArthur Found. Rsch. Network on L. & Neuroscience, *G2i Knowledge Brief*, LAWNEURO.ORG (June 2017), [https://www.lawneuro.org/LawNeuro\\_G2i.pdf](https://www.lawneuro.org/LawNeuro_G2i.pdf) [<https://perma.cc/Y6H2-4HXA>] (explaining that managing the G2i divide “requires, foremost, the active involvement of both legal scholars and scientists”).

148. Buckholtz et al., *supra* note 134, at 1.

149. *See generally* Stephen J. Morse, *Avoiding Irrational NeuroLaw Exuberance: A Plea for Neuromodesty*, 62 MERCER L. REV. 837 (2011) (expressing concerns about what the author perceives as unrealistic optimism for the future of neurolaw).



the former considering the input of the latter. Thus, step one is firmly establishing the legal standards by which mentally ill individuals are judged based on the entirety of jurisprudence and scientific knowledge available.<sup>150</sup>

Step two is to “identif[y] sets of experimental paradigms that putatively operationalize and quantify the capacities described by [the legal standard].”<sup>151</sup> In other words, the next step is to look to any scientific tests thought to allow for empirical analysis of whatever capacity or quality is described by the law. Experts in both fields ought to have the opportunity to describe whether or why they feel the test is an appropriate one.<sup>152</sup> If they agree that it is, the more mechanical language of that scientific test can then operate as a sort of sub-test to the ultimate legal inquiry of, for example, cognitive capacity.<sup>153</sup>

Interdisciplinary communication is, therefore, both the goal and the means of developing a lingua franca. At all stages of the process, the law must be vigilant, so as to not compromise its evidentiary principles for the sake of expediency. Still, if done properly, a common linguistic scheme would offer clarity and consistency to criminal adjudication by tethering abstract legal standards to concrete data bearing on a defendant’s mental capacity.

If scientists better understand the needs of the legal system, they will be better able to direct their research efforts toward meeting those needs and ultimately providing actionable information to courts. The more closely courts rely on scientific principles in analyzing a defendant’s mental capacity, the more confidence the defendant can have that they will be judged according to the reality of their situation, rather than a juror’s emotional response or a judge’s fundamental misunderstanding of their mental illness.

As a final note, a lingua franca strategy would undoubtedly take significant time and effort. It is important to start the process now to ensure that, in the future, new scientific understanding can be readily incorporated into the law. When a defendant’s rights hang in the balance, they ought not to miss their chance at justice simply because the law is lagging behind science—especially if that lag is exacerbated by poor communication.

## 2. *A New Judicial Attitude*

At the end of the day, the fate of the law as it relates to mentally ill defendants in South Carolina will be largely shaped by courts. While state leaders should at least begin exploring the types of strategies and restructuring that science will eventually necessitate, the reality is that such fundamental

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150. See Buckholtz et al., *supra* note 134, at 27.

151. *Id.* at 27.

152. See *id.* at 28.

153. See *id.*

change cannot be casually implemented. Until the legislature is prepared to address the issue, the decisions of juries and court officers will set the policy trend.

While the law is a product of social norms, it also informs social norms, which, in turn, inform the law.<sup>154</sup> Accordingly, individual case outcomes, when aggregated, have enormous transformative value.<sup>155</sup> Thus, South Carolina's judges, in particular, have a responsibility to ensure that their rulings demonstrate an appropriate level of respect for expert testimony. That means reversing decisions where expert testimony was not adequately considered or where it was unjustifiably disregarded.

The same is true across jurisdictions. A prime example of this type of judicial responsibility comes from Indiana.<sup>156</sup> In the 2020 case *Payne v. State*, the Supreme Court of Indiana reversed the GBMI arson conviction of defendant Jesse Payne and declared him NGRI.<sup>157</sup> Specifically, the court held: "Absent conflict in expert opinion, Payne's long and well-documented history of mental illness clearly supports a finding of insanity."<sup>158</sup> Despite acknowledging that "the factfinder's determination . . . warrants substantial deference," the court explained that "the inferences drawn by the factfinder from the evidence at trial must be reasonable and logical."<sup>159</sup>

Finally, the court emphasized that deference to the factfinder cannot supplant the appellate court's duty to conduct meaningful review, and the court reversed "[b]ecause the State presented insufficient demeanor evidence with which to rebut the unanimous expert opinion and evidence of Payne's well-documented history of mental illness . . . ."<sup>160</sup> Decisions of the type in *Payne* send a powerful message to lower courts and future jurors that well-founded scientific testimony cannot be wantonly disregarded. It is worth considering how the trial and conviction of Suzanna Simpson might have been impacted were there to be similar precedent in South Carolina.

A recent case from the Fourth Circuit provides a somewhat encouraging outlook.<sup>161</sup> In July of 2022, the court vacated the death sentence of defendant Quincy Allen on the grounds that the sentencing judge ignored uncontested evidence of mental illness.<sup>162</sup> Allen was convicted by the Richland County

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154. See generally Richard A. Posner, *Social Norms and the Law: An Economic Approach*, 87 AM. ECON. REV. 356 (1997) (explaining that social norms are the source of law); Roberto Galbiati et al., *How Laws Affect the Perception of Norms: Empirical Evidence from the Lockdown*, PLOS ONE, Sept. 24, 2021, at 1.

155. See Jack G. Day, *Why Judges Must Make Law*, 26 CASE W. L. REV. 563, 564 (1976).

156. *Payne v. State*, 144 N.E.3d 706 (Ind. 2020).

157. *Id.* at 714.

158. *Id.* at 710.

159. *Id.* (internal quotations omitted).

160. *Id.* at 714.

161. *Allen v. Stephan*, 42 F.4th 223 (4th Cir. 2022).

162. *Id.* at 228–29.

Circuit Court for a 2005 double homicide and was sentenced to death.<sup>163</sup> After exhausting his state court remedies, and after the district court dismissed his petition for review, the Fourth Circuit took up the issue.<sup>164</sup> Chief Judge Roger Gregory wrote: “The sentencer in this case excluded, ignored, or overlooked Allen’s clear and undisputed mitigating evidence, thereby erecting a barrier to giving this evidence meaningful consideration and effect and eviscerating the well-established requirements of due process in deciding who shall live and who shall die.”<sup>165</sup>

The evidence that was “excluded, ignored, or overlooked” included testimony describing the extensive abuse and neglect Allen suffered as a child.<sup>166</sup> Further evidence documented a long history of mental health challenges and related instances of institutionalization.<sup>167</sup> The Fourth Circuit criticized the lower court for concluding that “Allen was NOT conclusively diagnosed to be mentally ill” based on the fact that numerous psychiatrists and psychologists had offered conflicting diagnoses.<sup>168</sup> The court held that, despite the conflicting diagnoses, the judge could not reasonably have concluded based on the evidence that Allen was not mentally ill.<sup>169</sup>

It is doubtful that *Allen* will have any tangible immediate impact at the South Carolina state court level. Still, multiple “*Allens*” might have real potential to establish a positive trend in the law. As always, judges ought to exercise great discretion in overruling the factfinder. However, when the opportunity presents itself, as in *Allen* and *Payne*, South Carolina judges ought to seize upon the opportunity to model, for jurors and jurists alike, appropriate deference to scientific testimony.

#### IV. CONCLUSION

Why exactly did Suzanna Simpson shoot her entire family while they lay in bed? What role did mental illness play in her decision that morning? And, for that matter, was it even a decision? Nobody knows for sure, perhaps not even Simpson.

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163. *Federal Appeals Court Finds South Carolina Judge Ignored Uncontested Evidence of Mental Illness, Reverses Death Sentence*, DEATHPENALTYINFO.ORG (July 28, 2022), <https://deathpenaltyinfo.org/news/federal-appeals-court-reverses-south-carolina-death-sentence-finding-sentencing-judge-ignored-uncontested-evidence-of-defendants-mental-illness> [<https://perma.cc/KF4F-DW4R>].

164. *Allen*, 42 F.4th at 228.

165. *Id.* at 259.

166. *See id.* at 250.

167. *Id.* at 229–43.

168. *Id.* at 250.

169. *Id.* at 250–52.

After all, maybe she shot them purely for the sake of evil, but—on the other hand—maybe she was sick. Maybe Simpson was *so* sick that she truly thought her actions were for the best. And maybe, if she were not sick, she would have given her life to prevent the very harm that she caused. Maybe the truth lies somewhere in between.

In any event, the answers to such questions will not give victims the closure they deserve. It is doubtful that such closure can ever come from the law. Simpson's children are dead. Their father is wheelchair-bound. Simpson will die in prison.

Even if she deserves to die in prison, her children are dead, their father is wheelchair bound, and their friends and families are left somewhere in the wake of that destruction. If she does not deserve to die in prison, the same is true.

Moreover, dismissive platitudes like, "punishing her won't bring them back," will never satisfy the victims' and society's rightful desire for justice. When innocent people suffer unnecessarily, society correctly demands that the responsible party be held accountable. However, where there is no responsible party, society must not let its desire for accountability lead it down a path of injustice.

Individuals who suffer from mental illness are victims in their own right. Some are victims of their own decisions, others of abuse, and others of nature. Medical science continues to improve its ability to describe and predict the biological mechanisms underlying that reality, and that improvement ought to be reflected in case outcomes.

If South Carolina wishes to take advantage of the benefits that science brings to the table, it must fundamentally reconsider its perspective on mental illness and adopt a more interdisciplinary approach. Psychology did not exist when *M'Naghten* was decided, but it did when *Simpson* was decided. She was entitled to the benefits of new scientific knowledge, and defendants like her are entitled to the same.