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Linda C. Fentiman

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"GUILTY BUT MENTALLY ILL": THE REAL VERDICT IS GUILTY†

LINDA C. FENTIMAN*

[W]henver strong emotions are aroused by a dissension of opinion, it is a sign that some basic problem, some instinct-like emotion, more fundamental than the issue formally under discussion, has smuggled itself in to cloud the issue itself and to interfere with the calm and objective examination of fact.¹

Few legal or public policy issues in America today have aroused as intense conflict and emotions as the insanity defense. Although the insanity defense is invoked in far less than one percent of all felony cases, and is successful in only a fraction of the cases in which it is invoked,² the view is widely held that the insanity defense is used to "coddle"

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* Assistant Professor of Law, Suffolk University Law School; B.S. Cornell University 1970, J.D. State University of New York at Buffalo Law School 1975, L.L.M. Harvard University Law School 1983.

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¹ Zilboorg, *Misconceptions of Legal Insanity*, 9 AM. J. ORTHOPSYCHIATRY 540, 544 (1939).

² One of the most striking things about the public outcry over the "abuse" of the insanity defense is the dearth of evidence to support that charge. Nationwide statistics are impossible to obtain, due to very poor record-keeping among the individual states. See Steadman, Monahan, Hartstone, Davis, and Robbins, *Mentally Disordered Offenders: A National Survey of Patients and Facilities*, 6 LAW AND HUMAN BEHAVIOR 31, 37 (1982) [hereinafter cited as *Mentally Disordered Offenders*]; *Limiting the Insanity Defense: Hearings on S. 818, S. 1106, S. 1558, S. 1995, S. 2572, S. 2658, and S. 2669 Before the SubComm. on Criminal Law, Comm. on the Judiciary*, 97th Cong., 2d Sess. 367 (July 14, 1982) (statement of Henry J. Steadman). But data from those states that do maintain records on the use of the insanity defense show that it is rarely invoked, and even more rarely successful. Thus, in New York it is estimated that only 0.17%, or 220, of the 127,068 felony arrests made in 1978 resulted in insanity pleas, and of these, only twenty-five percent, or fifty-five were successful. *Id.* at 3.

In Michigan, in 1977, the insanity plea was raised in 0.11% of all major felony arrests, and was successful in about eight percent of those cases. Criss and Racine, *Impact of Change in Legal Standard for Those Adjudicated Not Guilty By Reason of Insanity 1975-79*, 8 BULL. AM. ACAD. PSYCHIATRY L. 261, 264, 271 (1980) [hereinafter cited as Criss and Racine]. The average number of insanity acquittals in Michigan during the years 1976 to 1982 was fifty-four. Smith and Hall, *Evaluating Michigan's Guilty But Mentally Ill Verdict: An Empirical Study*, 16 J.L. REFORM 77, 107 (1982) (Appendix A, Table A) [hereinafter cited as Smith and Hall].

Similarly, statistics from California show that in 1980 the 259 insanity acquittals represented only 0.6% of all felony dispositions (the rest were convictions) in that year, and were only 0.1% of all

criminals and to permit guilty and violent individuals to escape the criminal sanction.³

This criticism reflects a basic misunderstanding of both the insanity defense and the whole of the Anglo-American criminal law as well. The insanity defense is but one instance of the criminal law's historic insistence that before an individual may be punished for a wrongful act, he must have consciously elected to do that wrong.⁴ This requirement of moral blameworthiness — that one must consciously choose to do evil before punishment is appropriate — permeates the entire criminal law. It is most clearly seen in the requirement of mens rea, a guilty mind, but it is also found in the defenses of mistake of fact, duress, provocation, and self-defense, as well as that of insanity.⁵ The Supreme Court has never addressed the question of whether the insanity defense is constitutionally compelled.⁶ A strong case can be made, however, that it is so compelled, as part of the

felony arrests made in that year. Turner and Ornstein, *Distinguishing the Wicked From the Mentally Ill*, 3 CAL. LAW. 40, 42 (March, 1982) [hereinafter cited as Turner and Ornstein].

And in New Jersey:

in fiscal year 1982 (July 1, 1981 through June 30, 1982), of the more than 32,500 adult cases handled by the New Jersey Office of the Public Defender, insanity pleas were entered in only fifty-two cases [less than one-sixth of one percent of all cases. Further, the insanity plea] was successful in only fifteen cases. That figure represents . . . one-twentieth of one percent of all cases handled in the course of a year . . .

Letter from Joseph H. Rodriguez, Public Advocate for the State of New Jersey to the Editor, 69 A.B.A. J. 560 (1983) [hereinafter cited as Rodriguez Letter].

It is thus apparent that the use, let alone misuse, of the insanity defense does not explain the storm of controversy constantly raging about it.

³ For example, an October 6, 1981 Associated Press-NBC nationwide poll found that eighty-seven percent of the respondents believed that "too many murderers are using the insanity plea to keep from going to prison." Jeffrey and Pasewark, *Altering Opinions about the Insanity Plea*, 11 J. PSYCHIATRY AND L. 29, 40 n.4 (1983). Similar results were obtained in a spring 1982 study of university students and local residents in Laramie, Wyoming. In this study, ninety-four percent of the students and ninety-two percent of the residents agreed with the statement, "[t]he insanity plea is used too much," and eighty-seven percent of the students and eighty-nine percent of the townspeople concurred in the belief that, "many people escape responsibility for crimes by pleading insanity." *Id.* at 33.

Perhaps one of the most outspoken national critics of the insanity defense is Senator Strom Thurmond. Thurmond capitalized on the groundswell of public opinion against the insanity defense following the June, 1982 insanity acquittal of John Hinckley to push for a sharply curtailed insanity defense for federal defendants. In support of this legislative change, Thurmond argued:

The issue of the insanity defense is one that cries out for legislative reform. Unfortunately as the verdict was in the attempted assassination of the President of the United States, it did serve to focus the attention of the Nation and this Congress on the serious short-comings of the insanity test presently applied by the Federal courts. People throughout the country, from every walk of life and of every political persuasion, have called for a change . . . so that the law will no longer allow the criminals of this world to escape responsibility for deliberate, violent vicious acts.

We in the Senate would be shirking our duty to protect law-abiding citizens if we fail to take the time of this Congress to reform the insanity defense . . . and restore public confidence in our criminal justice system.

. . . We must ensure that criminals who deliberately plan and carry out brutal acts of violence with full knowledge of the nature and wrongfulness of their conduct will be morally condemned by the community and held appropriately accountable for their acts.

128 CONG. REC. S. 11,390 (daily ed. Sept. 14, 1982) (statement of Sen. Thurmond).

⁴ See *infra* text accompanying notes 243-55 for a discussion of this issue.

⁵ See *infra* text accompanying notes 27, 244-51 for a discussion of this issue.

⁶ See *infra* text accompanying notes 233-42 for a discussion of this issue.

requirement of moral blameworthiness which is at the heart of our fundamental "concept of ordered liberty,"⁷ inherited from the English common law, and thereby guaranteed by the due process clause of the fourteenth amendment.⁸

Despite its firm foundation in English and American criminal jurisprudence,⁹ the insanity defense has always been a source of great public debate. The latest battle in the controversy was initiated by the June, 1982 verdict of "not guilty by reason of insanity" in favor of John Hinckley, Jr. after his trial for the attempted assassination of President Reagan. As a direct result of the verdict, over sixty bills were introduced in Congress aimed at either restricting or eliminating the insanity defense for federal defendants.¹⁰ In October, 1984, these efforts culminated in the enactment of a drastically curtailed insanity defense as part of the Comprehensive Crime Control Act of 1984.¹¹ The new law makes insanity an affirmative defense for federal defendants, one which the defendant must prove by clear and convincing evidence.¹² In addition, the test for insanity is an extremely narrow one, focusing only on the defendant's cognitive impairment,¹³ and excluding any volitional impairment due to mental disease or defect as a ground for a defense of insanity.¹⁴

Even before the verdict was reached in the Hinckley trial, public concern in recent years that the insanity defense was being used as a loophole by which the guilty were escaping punishment had persuaded two state legislatures, in Montana and Idaho, to eliminate the insanity defense altogether.¹⁵ Moved by the same concern, twelve states —

⁷ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

⁸ *Morrisette v. United States*, 342 U.S. 246, 250 (1952); see *infra* text accompanying notes 253-55.

⁹ See *infra* text accompanying notes 22-48, 233-73.

¹⁰ See American Bar Association, Standing Committee on Association Standards for Criminal Justice and Commission on the Mentally Disabled, Report to the House of Delegates, at 12 (February 1983).

¹¹ Pub. L. No. 98-473, 198 Stat. 1837 (1984) (signed by President Reagan on October 12, 1984).

¹² 18 U.S.C. § 402(a)(20)(b) (1982).

¹³ 18 U.S.C. § 402(a)(20)(a) (1982) provides that:

It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

¹⁴ The new federal definition of insanity is, in effect, a modern and more narrow version of the nineteenth century M'Naghten rule, see *infra* text accompanying notes 39-45. In contrast to the new law for federal defendants, the American Law Institute's Model Penal Code provides that a defendant may assert an insanity defense based on his lack of substantial capacity, due to mental disease or defect, either to "appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." MODEL PENAL CODE § 4.01(1) (1982). See also *infra* note 48.

¹⁵ In both Idaho and Montana, evidence of a defendant's mental disease or defect is not admissible in support of a defense of insanity, but may be offered only to show that the defendant lacked the requisite state of mind for the offense charged. IDAHO CODE § 18-207 (1979); MONT. CODE ANN. § 46-14-101 (1983). In addition, in Montana, evidence of a defendant's mental illness must be considered by the court at sentencing, to determine whether at the time of the offense, "the defendant was able to appreciate the criminality of his acts or conform his conduct to the requirements of law." MONT. CODE ANN. § 46-14-311 (1983). If the defendant lacked such ability, then the defendant is committed to "an appropriate institution for custody, care and treatment" not to exceed the statutory maximum sentence for the offense of which he has been convicted. MONT. CODE ANN. § 46-14-312(2) (1983). Idaho makes similar provision for the consideration of the convicted defendant's mental illness at sentencing. IDAHO CODE § 19-2523 (Supp. 1984).

Alaska, Connecticut, Delaware, Georgia, Illinois, Indiana, Kentucky, Michigan, New Mexico, Pennsylvania, South Dakota, and Utah — enacted statutes providing for an alternative verdict of “guilty but mentally ill” whenever a defendant asserts the insanity defense.¹⁶ In Oregon, the legislature reacted to concerns that insanity acquittees were being released from state mental hospitals prematurely by creating an entirely new governmental agency, the Psychiatric Security Review Board, to take over the functions formerly performed by the courts in supervising the treatment and release of insanity acquittees.¹⁷ In addition, in 1983, the Oregon legislature changed its denomination of the insanity acquittal from “‘not justly responsible . . . as a result of mental disease or defect’” to “‘guilty but insane,’”¹⁸ again reflecting the increasingly widespread public hostility toward the “acquittal” of criminal defendants as a result of their successful assertion of an insanity defense. All told, in the last five years at least twenty-three state legislatures have considered changes in the insanity defense.¹⁹

In view of the tremendous public outcry over the insanity defense reflected in this recent flood of legislative enactments, it is appropriate to reexamine the fundamental moral and constitutional principles forming the historical underpinnings of the insanity defense to determine if they are still applicable in the complexity of today's world. If the principles are applicable, it then becomes necessary to decide whether the alternatives to the insanity defense which have been proposed or enacted are in harmony with these fundamental principles. If not, then a determination of whether these alternatives to the insanity defense should be eliminated is also necessary.

This article will first explore the reasons for the controversy over the insanity defense to provide insights, both historical and contemporary, into the purposes and functions of that defense. A brief examination will be made of judicial decisions in the last twenty years, which have largely, but not completely, eliminated the distinctions drawn historically between the “civilly” and “criminally” mentally ill. The article will then examine the growing numbers of “Guilty But Mentally Ill” (GBMI) laws, with some emphasis upon the Michigan statute²⁰ as the archetypal GBMI law. It will be argued that the GBMI laws are fatally flawed in two fundamental respects. First, they unconstitutionally undercut a criminal defendant's due process right to present an insanity defense, by encouraging juries to reach a compromise GBMI verdict in cases of mentally ill defendants charged with particularly heinous crimes. Second, because they do not guarantee, and usually do

The constitutionality of Montana's statutory scheme has recently been upheld. *State v. Korell*, — Mont. —, 690 P.2d 992 (1984).

¹⁶ ALASKA STAT. § 12.47.040 (1983); CONN. GEN. STAT. § 53a-13 (repealed 1983); DEL. CODE ANN. tit. 11, § 408 (1982); GA. CODE § 17-7-131 (1984); ILL. REV. STAT. ch. 38, § 5.6-2 (1984); IND. CODE § 35-36-2-3 (1982); KY. REV. STAT. § 504.130 (1982); MICH. COMP. LAWS ANN. § 768.36 (West 1982); N.M. STAT. ANN. § 31-9-3 (1978 & 1984 Cum. Supp.); 18 PA. CONS. STAT. ANN. § 314 (Purdon 1983); S.D. CODIFIED LAWS ANN. § 23A-7-2 (1983); UTAH CODE ANN. § 77-13-1 (1983); see also Institute on Mental Disability and the Law, *The “Guilty But Mentally Ill” Verdict: Current State of the Knowledge* (Williamsburg, Virginia: National Center for State Courts, April 1984) (Tentative Draft of Interim Report, “Guilty But Mentally Ill” Project) [hereinafter cited as Interim Institute Report].

¹⁷ OR. REV. STAT. §§ 161.325 to .400 (1981 & Supp. 1983).

¹⁸ Note, *Battle of the Experts Revisited: 1983 Oregon Legislation on the Insanity Defense*, 20 WIL- LAMETTE L. REV. 303, 312-13 (1984) (quoting OR. REV. STAT. § 161.319 (1981) and H.B. 2073, 62d Or. Legislative Assembly (1983)).

¹⁹ *Id.* at 303 (citing *The Insanity Defense: ABA and APA Proposals for Change*, 7 MENTAL DISAB. L. REP. 136, 140 (1983)).

²⁰ MICH. COMP. LAWS ANN. § 768.36 (West 1982).

not provide, psychiatric treatment to defendants found "guilty but mentally ill," these laws deny those defendants their constitutional right to such treatment.²¹ In conclusion, the article will explain why the insanity defense is essential to the integrity of the criminal law, and explore the alternative of conditional release as a way in which the many competing demands on the insanity defense can be reconciled while still passing constitutional muster.

I. THE CONTROVERSY OVER THE INSANITY DEFENSE

A. *History of the Insanity Defense*

To understand the present controversy surrounding the insanity defense and to place the GBMI statutes in their proper perspective, it is necessary to take a brief look at the insanity defense and the special role it has played historically. Although the insanity defense began as a relatively uncomplicated legal device for exercising mercy in the case of a mentally disturbed offender, it soon was expected to bear the weight of a number of conflicting legal, moral, and social policy considerations.²² Even before the development of the English jury trial system, the law recognized "that [if] a man commits a misdeed involuntarily, or unintentionally, the case is different from that of one who offends of his own free will, voluntarily and unintentionally." The result of this distinction in culpability based on mental state was leniency toward the accused, not his complete exemption from liability.²³

Insanity had begun to be recognized as a defense to a criminal charge by the thirteenth century, although the chattels of the insane individual were still forfeited to the king.²⁴ By the fourteenth century, "a person charged with crime and found to be a madman was not acquitted; but a special verdict was given that he was mad, and then the King pardoned him."²⁵ Even at this time, the criminal, civil, and political consequences of

²¹ This right inheres in the recognition that the institutional commitment of the mentally ill without adequate psychiatric treatment is a violation of the due process clause of the fourteenth amendment. *See, e.g., Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966) (the court held that a person involuntarily committed to a mental hospital after being acquitted of an offense by reasoning of insanity had a statutory right under District of Columbia law to meaningful, individually tailored treatment aimed at curing or improving his mental condition); *Wyatt v. Stickney*, 325 F. Supp. 781, 784-85 (M.D. Ala. 1972) (any involuntarily committed mental patient has a constitutional right to receive such treatment as will give him a realistic opportunity to be cured or to improve his mental condition). *See also infra* notes 82-84 and accompanying text. The Supreme Court has held that the eighth amendment protection against cruel and unusual punishment ensures prisoners the right to adequate medical treatment. *Estelle v. Gamble*, 429 U.S. 97 (1976). Lower federal courts have found that the right to adequate medical treatment includes adequate psychiatric treatment. *See, e.g., Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977).

²² The insanity defense has continued to become complicated because of the tremendous advances in psychiatric treatment made possible by the advent of psychotropic medication, and the concomitant changes in the law's view of what is appropriate treatment for the mentally ill resulting from these medical breakthroughs.

²³ N. WALKER, 1 CRIME AND INSANITY IN ENGLAND 16-19 (1968) (citing a 10th century law of Aethelred) [hereinafter cited as N. WALKER].

²⁴ S. GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW 125 (1925), cited in Note, *Insanity — Guilty But Mentally Ill — Diminished Capacity: An Aggregate Approach to Madness*, 12 J. MAR. PRAC. & PROC. 351, 357 (1979) [hereinafter cited as S. GLUECK].

²⁵ *Id.* It has been suggested that the revenue-producing ability of the king's pardon was a not-inconsiderable aspect of its continuing use, and was perhaps a factor which advanced the time

being insane were closely connected. Exemplary of this intimate relationship is the Statute on the King's Prerogative (*De Prærogativa Regis*) enacted between 1255 and 1290, which declared that:

The king has the custody of the lands of natural fools . . . taking their profits without waste, finding them their necessities . . . and after their death must return them to their rightful heirs. He must also see to it that [regarding] anyone who formerly had a memory and understanding [who] is no longer in his right mind . . . [that] their lands and tenements are safely kept without waste or destruction; and that they and their families live and are maintained from the profits; and that what is left for maintaining them is reasonably kept for their use when they have recovered their memories The king shall take nothing to his own use²⁶

Although this statute undoubtedly reflected the influence of the church, which insisted upon the importance of *mens rea*²⁷ as an essential element of a criminal offense,²⁸ it was also an exercise of shrewd political judgment on the part of the king at a time when he sought to expand his power. Since it was necessary if a lord was insane that his land be under the protection of someone, the choice was either that the king would assert a power of guardianship or that the neighboring lords would take over the insane lord's property. The king naturally preferred himself as guardian.²⁹

By 1581 the notion that insanity precluded criminal responsibility was well established.³⁰ In that year William Lambard published his handbook for justices of the peace, *Eirenarcha*, in which he stated:

If a mad man or a naturall foole, or a lunatike in the time of his lunacy, or a childe y apparently hath no knowledge of good nor euil do kil a ma, this is no felonious acte, nor anything forfeited by it . . . for they cannot be said to have any understanding wil.³¹

This test is significant both in its apparent recognition that one could lose and then regain one's sanity, and that the test for sanity was whether one knew the difference between good and evil. This latter distinction foreshadowed the M'Naghten test enunciated in 1843.³²

By the seventeenth century, the insanity defense had become significant both as a corollary to the fundamental principle of *mens rea* and as an important escape valve in the increasingly harsh system of capital punishment. As to the former, Blackstone stated

when the insanity of the defendant would constitute a complete defense to a crime. See Halpern, *The Fiction of Legal Insanity and the Misuse of Psychiatry*, J. LEG. MED. 18, 22 (1980) [hereinafter cited as Halpern].

²⁶ N. WALKER, *supra* note 23, at 25; see also Note, *Lunacy and Idiocy — the Old Law and Its Incubus*, 18 U. CHI. L. REV. 361, 362 (1951) [hereinafter cited as Note, *Lunacy and Idiocy — the Old Law and Its Incubus*].

²⁷ *Mens rea*, of course, is the mental state required for the commission of a crime. It is, in Blackstone's words, the "vicious will" without which "an unwarrantable act . . . is no crime at all." S. KADISH, S. SCHULHOFFER, & M. PAULSON, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 267 (4th ed. 1983) [hereinafter cited as S. KADISH, S. SCHULHOFFER, & M. PAULSON].

²⁸ N. WALKER, *supra* note 23, at 24.

²⁹ Note, *Lunacy and Idiocy — the Old Law and Its Incubus*, *supra* note 26, at 362.

³⁰ J. BIGGS, *THE GUILTY MIND* 83 (1955) [hereinafter cited as J. BIGGS].

³¹ See *id.* at 84 (citing *EIRENARCHA* Cap. 21.218).

³² See *infra* note 41.

the law simply: "[T]o constitute a crime . . . there must be, first, a vicious will; and secondly, an unlawful act consequent upon such vicious will . . . [One of the deficiencies in will which excuses one from criminal responsibility] arises . . . from a defective or vitiated understanding, viz., in an *idiot* or a *lunatic*."³³ As to the latter, the insanity defense was often the only way that the accused could avoid the death penalty.³⁴ It has been suggested that the insanity defense was an especially important check against the draconian system of capital punishment because it was a defense based on "scientific" medical proof.³⁵ In an era in which death was the punishment for over 350 offenses in England, and over 200 crimes in colonial New York, insanity was a much neater way to circumvent the death penalty than were other, more obvious methods of jury nullification.³⁶

Yet by the mid-nineteenth century, the pendulum had swung against the insanity defense. More and more it was viewed, at least by the politically powerful, as an inappropriate device for granting exemption from criminal liability. Thus, in 1843, after Daniel M'Naghten was acquitted on grounds of insanity of the murder of Edward Drummond, secretary to Prime Minister Robert Peel, a huge outcry was raised on the part of Queen Victoria, the Prime Minister, and the House of Lords. They, along with a large segment of the British public, believed that persons who represented a threat to state security were escaping punishment by invoking the insanity defense.³⁷ The language of the public debate sounds remarkably modern and familiar:

[Two editorials] . . . from the *Illustrated London News* . . . [argued] that M'Naghten was only simulating insanity and that soft-headed judges and doctors had let him escape the stern hand of justice. It was suggested that Bedlam, the "Eden of St. George's Fields," was a soft and pleasant place[,] . . . a "retreat of idleness[.]" and that perhaps M'Naghten and other criminals were "profitably insane."³⁸

As a result of this royal and public outcry, the fifteen justices of the common-law courts were summoned by the House of Lords to answer a series of questions as to the justices' view of the nature of the insanity defense and the circumstances justifying its invocation.³⁹ It was the justices' response to the second and third questions of the series⁴⁰ which became known as the M'Naghten rule.⁴¹ Even at the time it was announced, the

³³ 4 W. BLACKSTONE, COMMENTARIES 19, 21 (1962 Beacon Paperback ed.) (emphasis in original) [hereinafter cited as W. BLACKSTONE].

³⁴ Morris, *The Dangerous Criminal*, 41 SO. CAL. L. REV. 514, 518 (1968); Hill, *Responsibility and the Mentally Abnormal Offender*, 14 SOC'Y OF PUB. TCHRS. OF L. J. 81, 87 (1977).

³⁵ Halpern, *supra* note 25, at 21.

³⁶ *Id.* at 20-21.

³⁷ J. BIGGS, *supra* note 30, at 102-03, 107.

³⁸ *Id.* at 102-03.

³⁹ *Id.* at 102-07.

⁴⁰ The second and third questions put to the common law judges were:

"What are the proper questions to be submitted to the jury, where a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?" And . . . "In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?"

Id. at 103-04.

⁴¹ As expressed by these nineteenth century jurists the test for insanity was as follows: [E]very man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and . . . to

M'Naghten rule was met with the criticism that it failed to define adequately or accurately those circumstances in which a defendant ought to be excused from criminal liability.⁴² Nonetheless, it quickly became the law in England and America.⁴³

In the mid-twentieth century, dissatisfaction with the M'Naghten rule grew, stemming in part from a belief that the rule's focus on cognitive impairment as the sole ground for an insanity acquittal was psychiatrically unwarranted and inconsistent with the general purposes of the criminal law.⁴⁴ Some also expressed dissatisfaction with the rule on the ground that it led to professional perjury. These critics alleged that expert psychiatric witnesses who believed that the defendant ought not to be held criminally responsible would force their testimony into the M'Naghten mold to give the jury grounds for rendering an acquittal on grounds of insanity.⁴⁵ Dissatisfaction with the M'Naghten rule led to the adoption in 1954 of the *Durham*⁴⁶ "product" test of insanity⁴⁷ in the District of Columbia, and the American Law Institute - Model Penal Code test for criminal responsibility announced in 1962 as a model for legislative enactment.⁴⁸

establish a defense on the grounds of insanity, it must be clearly proved that, at the time of committing of the act, the party accused was laboring *under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know that he was doing what was wrong.*

X Clark and Finnely 208, 8 Eng. Rep. 718, 722, cited in J. BIGGS, *supra* note 30, at 105 (emphasis added in J. BIGGS).

⁴² The pioneering American psychiatrist Dr. Issac Ray immediately criticized the M'Naghten rule as being inconsistent with the reality of human psychology. J. BIGGS, *supra* note 30, at 109-10, 115-16.

⁴³ Only New Hampshire rejected the M'Naghten rule, through the influence of Justice Charles Doe of the Supreme Judicial Court, who was persuaded by the writings of Dr. Ray that the M'Naghten rule was inappropriate. *Id.* at 111-16; W. LA FAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 286-87 (1972) [hereinafter cited as W. LA FAVE & A. SCOTT].

⁴⁴ *People v. Drew*, 22 Cal. 3d 333, 341-42, 344, 583 P.2d 1318, 1326, 149 Cal. Rptr. 275, 278-81 (1978); W. LA FAVE & A. SCOTT, *supra* note 43, at 280-82.

⁴⁵ See, e.g., *People v. Drew*, 22 Cal. 3d 333, 334, 583 P.2d 1318, 1323, 149 Cal. Rptr. 275, 279 (1978). But see W. LA FAVE & A. SCOTT, *supra* note 43, at 282-83, and sources cited therein.

⁴⁶ *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

⁴⁷ The *Durham* court declared:

[A]n accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.

We use "disease" in the sense of a condition which is considered capable of either improving or deteriorating. We use "defect" in the sense of a condition which is not considered capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease.

Id. at 875. The *Durham* decision was overruled by *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972).

⁴⁸ The American Law Institute (ALI) test for insanity provides that:

1. 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 of his conduct or to conform his conduct to the requirements of law.
2. The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal and otherwise anti-social conduct.

MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962), cited in A. STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION 230 (1975). The second paragraph has been adopted in some, but not all, of the jurisdictions which have adopted the ALI test of insanity.

B. *The Disparity Between the "Civilly" and "Criminally" Mentally Ill*

At about the same time that judges and legal scholars were struggling with an appropriate way to define those circumstances in which the insanity defense was appropriate, a legal backlash began to grow against the excesses of the "therapeutic state."⁴⁹ In three landmark cases, *Baxstrom v. Herold*,⁵⁰ *Specht v. Patterson*,⁵¹ and *Jackson v. Indiana*,⁵² the United States Supreme Court went on record declaring that the different treatment accorded the "civilly" and "criminally" mentally ill violated the due process and equal protection clauses of the fourteenth amendment.

In *Baxstrom v. Herold*, Baxstrom, a New York prisoner, was certified as insane while serving a two-and-a-half to three-year term for assault. Accordingly, he was transferred to the Department of Corrections psychiatric hospital at Dannemora. When his prison sentence was about to expire, he was civilly committed after a court found that he was "mentally ill and in need of hospital and institutional care."⁵³ The court did not decide whether that care should be provided in a hospital operated by the Department of Corrections or the Department of Mental Hygiene, as it lacked statutory authorization to do so. Rather, that decision was made administratively and ex parte by the Department of Mental Hygiene. Thereafter, Baxstrom was returned to Dannemora, this time nominally under the control of the Department of Mental Hygiene. When, five years later, the Supreme Court reviewed his case, it found that Baxstrom had been denied the equal protection of the laws, both because he had been denied the right to a jury trial which was granted all potential civil committees under New York law, and because his commitment was based on an administrative, rather than a judicial, determination of his dangerousness, again contrary to New York's treatment of the "civilly" mentally ill. The Supreme Court ordered that a new judicial hearing be held, at which Baxstrom's present mental state, need for hospitalization, and potential dangerousness would be determined, with the same procedural protections and substantive criteria guaranteed prospective civil committees.

The following year, in *Specht v. Patterson*, the Supreme Court invalidated a Colorado statute that permitted defendants convicted of sexual crimes to be sentenced indeterminate without a hearing or an opportunity to confront the psychiatric evidence against them. Specht had been convicted of the crime of "indecent liberties," which carried a maximum sentence of ten years. On the basis of that crime, he was further convicted, pursuant to the Colorado Sex Offenders Act, of being a sex offender and committed for an indefinite term. The commitment decision was made by a judge, without a hearing and without the opportunity for Specht to confront the authors of the psychiatric reports considered by the judge. The Supreme Court held that this proceeding, with its possibility of much longer incarceration than that for his substantive criminal offense, denied Specht due process of law, and required the reversal of his conviction.

In *Jackson v. Indiana*, the Supreme Court struck down, as violative of both due process and equal protection, the indefinite commitment as incompetent to stand trial of a 27-year-old deaf-mute who had the mental age of a pre-school child. The Court found

⁴⁹ See generally N. KITTRIE, *THE RIGHT TO BE DIFFERENT: DEVIANCE AND ENFORCED THERAPY* (1971), condemning the rise of the therapeutic state, in which indefinite civil commitment of the mentally ill and other social outcasts has been justified on the paternalistic grounds of treatment.

⁵⁰ 383 U.S. 107 (1966).

⁵¹ 386 U.S. 605 (1967).

⁵² 406 U.S. 715 (1972).

⁵³ *Baxstrom*, 383 U.S. at 108.

that it was so unlikely that the defendant, Jackson, might ever attain the competence necessary to stand trial⁵⁴ that his continued commitment as incompetent was effectively a sentence of life imprisonment. According to the Court, Jackson's commitment violated the equal protection clause of the fourteenth amendment, in that, had he not been charged with a crime, the state would have been able to commit and continue to detain him only by meeting the more stringent standards applicable to persons alleged to be mentally ill or mentally defective and in need of treatment or custodial care. The Court also held that the failure of the state to accord Jackson " 'formal commitment proceedings addressed to [his] ability to function in society,' or to society's interest in his restraint . . . , or to the state's ability to aid him in attaining competency through custodial care or compulsory treatment"⁵⁵ denied him the due process of law. The Court ruled that "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."⁵⁶

The trend, embodied in these three cases, toward abolishing the distinction between the "civilly" and "criminally" mentally ill has been cut short by two more recent Supreme Court decisions: *Addington v. Texas*⁵⁷ and *Jones v. United States*.⁵⁸ In *Addington* the Supreme Court declared that for a state to commit the mentally ill civilly, it need only establish the existence of the relevant commitment criteria by "clear and convincing evidence." According to the Court, a requirement of proof beyond a reasonable doubt would impose a burden too great for the states to meet in many cases, thus denying some individuals needed medical treatment.⁵⁹ In *Jones*, the Court declared that a rational basis existed for holding an insanity acquittee in civil confinement long after he would have been released had he been found guilty of the crime charged, relying on the argument of the District of Columbia that since Jones was being confined for purposes of "treatment, not punishment," an indefinite commitment was appropriate.⁶⁰

C. The Function of the Insanity Defense

Today, public concern over the insanity defense has called the continued existence of the defense into question. The perception that the Hinckley verdict was a miscarriage of justice, along with an increased public concern with crime in general, has led to a new chorus of demands that the insanity defense be reformed or eliminated. Something about the insanity defense gnaws at the public, making people uneasy at the thought of releasing individuals deemed not legally responsible because they either did not know what they were doing was wrong or could not stop themselves from doing it. To a large extent, this concern arises because the defense is not simply a means of determining the question of responsibility for crime. Rather, the insanity defense has been called upon to accomplish a number of social purposes which are increasingly in conflict. These other purposes are, on the one hand, the public's desire to punish the mentally ill criminal and to keep him removed from the community for a number of years, out of fear that, if not

⁵⁴ Competence for the purposes of standing trial has been defined generally as the ability of the defendant "to understand the nature of the charges against him and to participate in his defense." See, e.g., *Jackson*, 406 U.S. at 718.

⁵⁵ *Id.* at 738 (quoting *In re Harmon*, 425 F.2d 916, 918 (1st Cir. 1970)).

⁵⁶ *Id.*

⁵⁷ 441 U.S. 418 (1979).

⁵⁸ 463 U.S. 354 (1983).

⁵⁹ *Addington*, 441 U.S. at 432-33.

⁶⁰ *Jones*, 463 U.S. at 368-69.

incarcerated, he will offend again, and on the other, the public's concomitant but conflicting sense of moral obligation to treat, not punish, the sick.

Essentially, the legal instrument of the insanity defense is being used to answer three questions: the moral question of criminal responsibility and blameworthiness, the psychiatric question of the medically appropriate disposition of the mentally ill offender, and the social policy question of the proper means of protecting society from potentially dangerous individuals.⁶¹ The difficulty of accommodating such divergent needs has been noted by the American Bar Association (ABA) Standing Committee on Association Standards for Criminal Justice and the ABA Commission on the Mentally Disabled: "Determinations regarding the defendant's criminal responsibility for the act are, in essence, backward-looking and are based on moral criteria. Dispositional determinations are forward-looking and depend primarily upon predictive judgments about the defendant's future behavior and the possibility of successful treatment."⁶² For one legal device to address all these criteria, and to provide mutually reconcilable answers to each, is a Herculean task.⁶³

Historically, much less was required of the insanity defense. As noted previously, at its inception in English law the insanity defense was primarily an instrument of religious judgment, providing an exemption from criminal responsibility to those who did not know the difference between good and evil or who lacked a vicious will. Although the defense was not without its political advantages to the monarchy, primarily it reflected an ecclesiastical influence: "[T]he insanity defense . . . was from our earliest experiences essentially a guide to the determination of the moral, rather than the medical, fibre of the individual."⁶⁴

Yet at the same time, that moral judgment of "not justly responsible" was accompanied by the declaration of "too dangerous to be allowed on the public streets:"

[The purpose of the insanity defense was] not to absolve of criminal responsibility "sick" persons who would otherwise be subject to criminal sanction. Rather, its real function [was] . . . to authorize the state to hold those "who must be found not to possess the guilty mind *mens rea*," even though the

⁶¹ These questions are not unique to the insanity defense. Anglo-American jurisprudence has also asked these questions concerning the defense of diminished capacity, the defense of voluntary intoxication due to alcohol or other drugs, and the appropriateness of premeditation and deliberation as the mental state distinguishing particularly heinous murders from other, "lesser," murders. See, e.g., MODEL PENAL CODE § 210.3 comment, § 210.6 comment (1982), quoted in S. KADISH, S. SCHULHOFFER, & M. PAULSON, *supra* note 27, at 441, 425; MODEL PENAL CODE § 2.08 comment (Tent. Draft No. 8, 1959), quoted in S. KADISH, S. SCHULHOFFER, & M. PAULSON, *supra* note 27, at 806-08. For a broader discussion of the appropriate relationship between mental illness and criminal responsibility see Kadish, *The Decline of Innocence*, 26 CAMBRIDGE L.J. 273 (1968) and B. WOOTTON, *CRIME AND THE CRIMINAL LAW* (1963).

⁶² The ABA Standing Committee on Association Standards for Criminal Justice and the ABA Commission on the Mentally Disabled, Report to the House of Delegates, at 8 (February, 1983) [hereinafter cited as ABA, Report to the House of Delegates].

⁶³ The insanity defense is a classic example of Professor Ernest Roberts' "tensile strength" theory of the law. According to Roberts, every legal principle can only hold a certain amount of emotional or political freight, and that amount is defined as its tensile strength. When a principle is pushed beyond its tensile strength by expansionist litigators or creative legislators, it will simply fall apart. Lectures by Ernest Roberts on Environmental Law, Harvard Law School (Spring, 1983).

⁶⁴ Gostin, *Justifications for the Insanity Defense in Great Britain and the United States: The Conflicting Rationales of Morality and Compassion*, 9 BULL. AM. ACAD. PSYCHIATRY & L. 100, 101 (1981) [hereinafter cited as Gostin].

criminal law demands that no person be held criminally responsible if doubt is cast on any material element of the offense charged . . . [Thus,] the insanity defense [was] . . . not designed, as [was] . . . the defense of self-defense, to define an exception to criminal liability, but rather to define for sanction an exception from among those who would [otherwise] be free of liability.⁶⁵

Historically, then, it has been possible for defenders of the insanity defense to say that it distinguished the "wicked" from the "sick," without having to worry that the "sick" would ever get well enough to be released into the community. The underlying rationale for the lengthy commitment of individuals found not guilty by reason of insanity was a quasi-estoppel notion which has been aptly denominated "the clean-up doctrine" — "the assumption that a defendant is either responsible enough to deserve punishment or insane enough to deserve commitment."⁶⁶ Twice in the last twenty-five years, the Supreme Court has premised its decisions on this clean-up doctrine, declaring that because an insanity acquittee has been charged with a crime he is different, and less deserving of procedural and substantive protection, than a "civilly" mentally ill person. In *Lynch v. Overholser*,⁶⁷ the Court upheld a District of Columbia statute which required that insanity acquittees be automatically committed upon acquittal, reasoning that, "Congress might have thought . . . that having successfully claimed insanity to avoid punishment, the accused should then bear the burden of proving that he is no longer subject to the same mental abnormality which produced his criminal acts."⁶⁸ The Court also hypothesized, as an alternative basis for the District of Columbia automatic commitment statute, that it was necessary to deter "false pleas" of insanity.⁶⁹

Likewise in *Jones v. United States*,⁷⁰ the Supreme Court overlooked the precedents of *Baxstrom v. Herold*,⁷¹ *Specht v. Patterson*,⁷² and *Jackson v. Indiana*,⁷³ which had repeatedly invalidated the criminal-civil distinction in state treatment of the mentally ill,⁷⁴ to find that insanity acquittees and potential civil committees were different in terms of the procedures which could be used to secure their incarceration and the length of time that such incarceration might last.⁷⁵ Specifically, the Court stressed the police power interest of the state, declaring that a "common sense" inference of continued insanity and present dangerousness could be drawn from the successful invocation of a not guilty by reason of insanity plea. Such an inference, according to the Court, obviated the need for the state to establish by clear and convincing evidence, as in the case of a civil committee, that the

⁶⁵ Goldstein and Katz, *Abolish the "Insanity Defense" — Why Not?*, 72 YALE L.J. 853, 864-65 (1963) (footnotes omitted).

⁶⁶ Note, *Commitment Following An Insanity Acquittal*, 94 HARV. L. REV. 605, 618 (1981).

⁶⁷ 369 U.S. 705 (1962).

⁶⁸ *Id.* at 715. Placing the burden on the insanity acquittee to show his present sanity was often justified on the ground of a presumption of continuing insanity, particularly in states where the defendant had the burden at trial of proving that insanity at the time of the offense. See, e.g., *In re Franklin*, 7 Cal. 3d 126, 140-41, 496 P. 2d 465, 474, 101 Cal. Rptr. 553, 561-62 (1972).

⁶⁹ *Lynch v. Overholser*, 369 U.S. at 715.

⁷⁰ 463 U.S. 354 (1983).

⁷¹ 383 U.S. 107 (1966).

⁷² 386 U.S. 605 (1967).

⁷³ 406 U.S. 715 (1972).

⁷⁴ See *supra* text accompanying notes 50-56.

⁷⁵ *Jones*, 463 U.S. at 361-70.

individual in question was presently mentally ill and dangerous.⁷⁶ At the same time, the Court relied heavily on the state's role as *parens patriae*, finding that because the purpose of commitment of insanity acquittees is treatment and not punishment, an insanity acquittee could constitutionally be "treated" indefinitely, for a term far beyond that which he would have served had he been found guilty as charged.⁷⁷ Thus, under *Jones*, a verdict of "not guilty by reason of insanity" is for many "acquitted" defendants a sentence to a lifetime of incarceration.

In practice, however, the likelihood for many other insanity acquittees is that they will spend a relatively short period in confinement, due to the convergence of two legal and medical trends. In medicine, the development and expanded use since the 1950's of a wide variety of psychotropic drugs,⁷⁸ capable of radically changing a mentally ill person's symptoms and behavior, have completely revolutionized the treatment of the mentally ill, including insanity acquittees. Today, because many persons ultimately found not guilty by reason of insanity receive psychiatric treatment, including psychotropic medication, while awaiting trial,⁷⁹ a large number of persons found not guilty by reason of insanity are declared, upon psychiatric evaluation after trial, to be presently sane.⁸⁰ In Michigan, for example, between 1975 and 1982 forty-three percent of the 396 persons acquitted on grounds of insanity were released after the mandatory sixty-day psychiatric evaluation period because they failed to meet the criteria for involuntary civil commitment.⁸¹

Simultaneously with, and partly as a consequence of, these medical advances, civil rights lawyers have mounted successful constitutional challenges to the treatment of the mentally ill, both those civilly committed and those found not guilty by reason of insanity. Critics of the mental health system have contended, and found state and lower federal court judges who agreed with them, that there is a constitutional right to such psychiatric treatment as "will give each [individual] . . . a realistic opportunity to be cured or to improve his or her mental condition."⁸² Although the Supreme Court has so far declined to find that a constitutional right to treatment exists,⁸³ other courts have begun to build a

⁷⁶ *Id.* at 366.

⁷⁷ *Id.* at 368-69.

⁷⁸ "Psychotropic" is the general term used to describe medication which has an effect on the psyche, altering the feelings, thinking, and behavior of the person to whom they are administered. STEDMEN'S MEDICAL DICTIONARY 1167 (1976); see Baldessarini, *Chemotherapy*, in THE HARVARD GUIDE TO MODERN PSYCHIATRY 387 (A. Nicholi ed. 1978).

⁷⁹ A mentally incompetent defendant may not stand trial. *Pate v. Robinson*, 383 U.S. 375, 378 (1966). Many insanity acquittees receive psychiatric treatment while awaiting trial to restore their competency. Criss and Racine, *supra* note 2, at 262.

⁸⁰ See, e.g., *The Insanity Defense, Hearings on S. 818, S. 1106, S. 1558, S. 2669, S. 2672, S. 2678, S. 2745 and S. 2780 Before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 464 (1982) (testimony of Dr. Robert Sadoff) [hereinafter cited as *Insanity Hearings*].

⁸¹ This data was obtained during several telephone conversations in March, 1983 with Dr. Harley Stock, psychologist at the Michigan Center for Forensic Psychiatry. The data grew out of a research project he was conducting with Dr. Lynn Blunt of the Center for Forensic Psychiatry [hereinafter cited as *Blunt and Stock Study*]. Some of the data from this research project has been reported by Smith and Hall, *supra* note 2. See also Criss and Racine, *supra* note 2, at 262.

⁸² See, e.g., *Ohlinger v. Watson*, 652 F.2d 775, 778 (9th Cir. 1980); *Rouse v. Cameron*, 373 F.2d 451, 455 (D.C. Cir. 1966); *Wyatt v. Stickney*, 325 F. Supp. 781, 784-85 (M.D. Ala. 1972); *In re R.G.W.*, 145 N.J. Super. 167, 178, 366 A.2d 1375, 1381-82 (1976). See also *supra* note 21.

⁸³ In *Donaldson v. O'Connor*, 422 U.S. 563 (1975), the Supreme Court specifically refused to decide the question of whether a person civilly committed as mentally ill had a constitutional right to treatment. Instead, the Court held only that the continued confinement, and thus deprivation of liberty, of a person who is not dangerous and who could survive in society with the help of others was

definition of the right to treatment which encompasses the right to be treated in the least restrictive way necessary to satisfy the state's interest in protecting either the individual's safety, the public's safety, or both.⁸⁴ At the same time, narrower, more definite commitment criteria and higher burdens of proof for both initial and continued commitment of the mentally ill have been found to be constitutionally required.⁸⁵ Most significantly for persons found not guilty by reason of insanity, increasing numbers of courts and state legislatures have found that both due process and equal protection requirements mandate that insanity acquittees be evaluated soon after their acquittal to determine their present sanity, and that, if found presently sane, they must be released.⁸⁶ In addition, courts and legislatures have begun to require that criminal and mental health codes be amended to eliminate the disparity between the procedures and standards used to determine the present sanity of insanity acquittees and persons involuntarily civilly committed.⁸⁷ The extent to which this burgeoning trend may have been dealt a severe setback by the Supreme Court's decision in *United States v. Jones* is as yet unclear.⁸⁸ It is against this backdrop of the historical role of the insanity defense, and the more recent legislative and judicial reforms and medical breakthroughs which have occurred, that new approaches to the disposition and treatment of mentally ill offenders, specifically the GBMI statutes, must be evaluated.

II. THE "GUILTY BUT MENTALLY ILL" STATUTES

A. Introduction.

When, in 1975, the Michigan legislature enacted the first "Guilty But Mentally Ill" (GBMI) statute, it began a nationwide trend which has so far been followed by Alaska, Connecticut, Delaware, Georgia, Illinois, Indiana, Kentucky, New Mexico, Pennsylvania,

a violation of the right to liberty guaranteed by the fourteenth amendment. 422 U.S. at 576. For an intriguing analysis of the Court's decisionmaking process in the *Donaldson* case, see B. WOODWARD AND S. ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* 369-83 (1979). See also Youngberg v. Romeo, 457 U.S. 307 (1982), in which the Supreme Court adopted a balancing approach

between the legitimate interests of the State and the rights of the involuntarily committed to reasonable conditions of safety and freedom from unreasonable restraints . . .

[T]he Constitution only requires that the courts make certain that professional judgment was in fact exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made.

457 U.S. at 321 (quoting *Romeo v. Youngberg*, 644 F.2d 147, 178 (1980) (Seitz, C.J., concurring)).

⁸⁴ *Covington v. Harris*, 419 F.2d 617, 619 (D.C. Cir. 1969); *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966).

⁸⁵ See, e.g., *Addington*, 441 U.S. at 432-33 (clear and convincing evidence required to commit a mentally ill individual civilly); *Suzuki v. Alba*, 483 F. Supp. 1106 (D. Haw. 1977), *aff'd in part, rev'd in part, sub nom. Suzuki v. Yuen*, 617 F.2d 173 (9th Cir. 1980) (In order for the state to commit an individual civilly, there must be a finding that because of his mental illness, there is an imminent and substantial danger of harm to himself or others, evidenced by a recent overt act, attempt or threat.); *In re S.L.*, 94 N.J. 128, 462 A.2d 1252 (1983) (state may not civilly commit the mentally ill solely to provide them with custodial care). See generally, Groethe, *Overt Dangerous Behavior as a Constitutional Requirement for Involuntary Civil Commitment of the Mentally Ill*, 44 U. CHI. L. REV. 562 (1977).

⁸⁶ See, e.g., *Bolton v. Harris*, 395 F.2d 642 (D.C. Cir. 1968); *People v. McQuillan*, 392 Mich. 511, 221 N.W.2d 569 (1974); *State v. Fields*, 77 N.J. 28, 390 A.2d 574 (1978); *State v. Krol*, 68 N.J. 236, 344 A.2d 289 (1975).

⁸⁷ See, e.g., *Bolton v. Harris*, 395 F.2d 642 (D.C. Cir. 1968); *People v. McQuillan*, 392 Mich. 511, 221 N.W.2d 569 (1974); *State v. Fields*, 77 N.J. 28, 390 A.2d 574 (1978); *State v. Krol*, 68 N.J. 236, 344 A.2d 289 (1975).

⁸⁸ See *supra* text accompanying notes 70-77.

South Dakota, and Utah.⁸⁹ Eleven more state legislatures have considered or are presently considering such legislation,⁹⁰ and the United States Attorney General's Task Force on Violent Crime has also recommended the enactment of the GBMI verdict as a supplement to the insanity defense for federal crimes.⁹¹ This section will examine the GBMI statutes of Michigan and other states to analyze the legal and policy implications of the GBMI verdict. The experience of Michigan and the other GBMI states will be discussed as exemplary of a nationwide trend in which courts and state legislatures have shifted away from a solicitous approach toward the rights of prisoners and the mentally ill generally to a focus on the protection of public safety.

The GBMI verdict has a dual purpose. Its primary goal is to limit the number of persons who may be found not guilty by reason of insanity, thereby increasing the numbers found guilty — albeit mentally ill — and who are therefore subject to imprisonment. Additionally, the GBMI statute holds out the promise of psychiatric therapy and treatment, in a prison setting, to defendants whose mental illness contributed to their commission of a crime. The attempt of the GBMI laws to satisfy both the police power goal of protecting the public by keeping dangerous individuals off the streets and the *parens patriae* goal of helping and treating the mentally ill, however, is seriously flawed. The statutes raise the gravest of constitutional questions concerning a criminal defendant's right to present an insanity defense, his rights to equal protection and due process of law when compared both with other criminal defendants and with other mentally ill individuals whom the state seeks to commit, and his right to adequate psychiatric treatment.

It is the thesis of this article that the GBMI statutes are constitutionally invalid, for several reasons. First, they unconstitutionally attempt to undercut the ability of a criminal defendant to present a successful insanity defense. Due to the overlapping and substantially similar definitions of "insanity" and "mental illness" under the GBMI laws,⁹² it is possible, and indeed likely, for a court or jury to use the GBMI alternative to reach an improper compromise verdict. The availability of the GBMI verdict encourages the trier of fact to resolve its reasonable doubts about the defendant's insanity at the time of the offense charged in favor of a finding of "guilty but mentally ill," because of the factfinder's desire both to keep dangerous people off the streets and to provide psychiatric treatment for the mentally ill. The possibility of such a compromise verdict denies the defendant his right to due process of law under the fourteenth amendment.

Second, the psychiatric treatment promised by the GBMI statutes is not, in fact, provided in many instances, and a number of mentally ill offenders are therefore denied their constitutional right to treatment. Even in cases where psychiatric treatment is provided to individuals found "guilty but mentally ill," it is often not of the same quality provided to individuals found not guilty by reason of insanity or individuals who are confined under civil commitment laws, and thus the person found "guilty but mentally ill" who should have been found not guilty by reason of insanity is denied the equal protection of the laws guaranteed by the fourteenth amendment. Equal protection principles are also violated because persons found not guilty by reason of insanity will be incarcer-

⁸⁹ See generally Interim Institute Report, *supra* note 16.

⁹⁰ Interim Institute Report, *supra* note 16, at 8, n.23.

⁹¹ U.S. DEPT. OF JUSTICE, ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, FINAL REPORT 54 (1981).

⁹² See *infra* text accompanying notes 120-32, and 193-217.

ated only as long as their insanity continues, while persons found "guilty but mentally ill" are committed to the state's department of corrections⁹³ for a full prison term, regardless of whether they have recovered their sanity.

B. Background of the GBMI Statutes

To understand the impetus for the Michigan GBMI statute, the progenitor of all the other GBMI statutes, it is necessary to consider the 1974 Michigan Supreme Court decision in *People v. McQuillan*,⁹⁴ and the public outcry following in its wake. In *McQuillan* the court struck down the Michigan law governing the commitment and release of persons acquitted on grounds of insanity, finding that it violated both the due process and equal protection clauses of the fourteenth amendment. In reaching this result, the court relied heavily on four cases which had significantly eroded the differential treatment accorded the "civilly" and "criminally" mentally ill: *Baxstrom v. Herold*,⁹⁵ *Specht v. Patterson*,⁹⁶ *Jackson v. Indiana*,⁹⁷ and *Bolton v. Harris*.⁹⁸

The decisions in *Baxstrom*, *Specht*, and *Jackson* have already been discussed.⁹⁹ In *Bolton*, the Court of Appeals for the District of Columbia relied upon the decisions in *Baxstrom* and *Specht* to find that the same due process and equal protection considerations which had militated against a criminal/civil distinction among the mentally ill in those cases also required the elimination of that distinction in the case of insanity acquittees. To meet the constitutional objections which had been raised to the District of Columbia statute requiring the automatic civil commitment of persons found NGI, the court read into the District of Columbia law a provision for a post-acquittal hearing on an insanity acquittee's present sanity, to be governed by procedures "substantially similar to those in civil commitment proceedings."¹⁰⁰ The court rejected "prior criminal conduct" as a justification for significant differences in the commitment process and criteria,¹⁰¹ and declared that "[an insanity] plea is neither an express nor implied admission of present illness, and acquittal rests only on a reasonable doubt of *past* sanity, *i.e.* at the time of the offense."¹⁰² Accordingly, the court permitted automatic commitment only for "the period required to determine present mental condition."¹⁰³ In addition, the court incorporated into the law on release of insanity acquittees the requirements of civil commitment law: that a mental patient had the right to be examined by an outside psychiatrist and was entitled to a court hearing if any psychiatrist believed that he should be released. The court upheld, however, the law authorizing judicial review of the mental hospital's decision to release an insanity acquittee, even though such review was not provided in the case of civil commit-
tees.¹⁰⁴

⁹³ A defendant found "guilty but mentally ill" may be paroled under the jurisdiction of the Department of Corrections for a portion of his term. MICH. COMP. LAWS ANN. § 768.36(3) (West 1982).

⁹⁴ 392 Mich. 511, 221 N.W.2d 569 (1974).

⁹⁵ 383 U.S. 107 (1966).

⁹⁶ 386 U.S. 605 (1967).

⁹⁷ 406 U.S. 715 (1972).

⁹⁸ 395 F.2d 642 (D.C. Cir. 1968).

⁹⁹ See *supra* text accompanying notes 50-56.

¹⁰⁰ *Bolton*, 395 F.2d at 651.

¹⁰¹ *Id.* at 649.

¹⁰² *Id.* (emphasis in original).

¹⁰³ *Id.* at 651.

¹⁰⁴ Although *Bolton v. Harris* has long been hailed as a major victory for insanity acquittees, at

In *People v. McQuillan* the Michigan Supreme Court followed the reasoning of *Baxstrom, Specht, Jackson, and Bolton*, and declared that the Michigan procedures for the commitment and release of insanity acquittees violated the constitutional requirements of due process and equal protection of the laws. The court reasoned that an acquittal on the grounds of insanity established only that the state had failed to meet its burden of proving the defendant's sanity beyond a reasonable doubt, and that even this inference of lack of sanity at the time of the crime was of limited probative value after an insanity acquittal.¹⁰⁵ Hence the court held that an insanity acquittee could be committed for a period of no more than sixty days for an intensive psychiatric evaluation.¹⁰⁶ Thereafter, the acquittee was entitled to a full-scale hearing on his present sanity, to be governed by the same procedures applicable to the involuntary civil commitment of the mentally ill.¹⁰⁷ If the acquittee was presently sane, he was required to be released. If he was still suffering from mental illness, he was to be treated as a civil committee in regard to the standards and procedures applicable to his release.¹⁰⁸ In addition to announcing standards to be applied prospectively to the commitment and release of persons acquitted on grounds of insanity, the court also held that the 270 insanity acquittees presently confined must be given a hearing within seventy days or released.¹⁰⁹

Within several months of the *McQuillan* decision, some sixty-four insanity acquittees had been discharged from confinement, having been found presently sane.¹¹⁰ Within a short time thereafter, one of the sixty-four had murdered his wife, and another had committed two rapes.¹¹¹

The public outcry was enormous. Less than eleven months after *McQuillan* was decided, the Michigan legislature enacted the nation's first "Guilty But Mentally Ill" statute. Proponents of the GBMI verdict argued that it was necessary "to protect the public from violence inflicted by persons with mental ailments who slipped through the cracks in the criminal justice system," by permitting long-term incarceration of the mentally ill offender.¹¹² Particular concern was voiced about those who, after an insanity

least one commentator remains skeptical. Alexander Brooks has found that "[a] careful reading of the case reveals that judicial review became possible, not mandatory. Although theoretically either the hospital or the patient could initiate release proceedings, in fact the initiative was almost exclusively that of the hospital." A. BROOKS, LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM 393 (1974). Further, Brooks found that as a practical matter, only three percent of the 275 petitions for habeas corpus filed by patients at St. Elizabeth's Hospital in the District of Columbia during 1968 and 1969 were granted. *Id.*

¹⁰⁵ *McQuillan*, 392 Mich. at 527-28, 221 N.W.2d at 578.

¹⁰⁶ *Id.* at 528, 221 N.W.2d at 578. In rendering its decision, the *McQuillan* court failed to mention that the Michigan legislature had reached virtually the same result by statute the month before the decision.

¹⁰⁷ *Id.* at 529-37, 221 N.W.2d at 577-81.

¹⁰⁸ *Id.* at 533-44, 221 N.W.2d at 581-84.

¹⁰⁹ *Id.* at 547, 221 N.W.2d at 586; Petrella, Benedek, Bank, and Packer, *Examining the Application of the Guilty But Mentally Ill Verdict in Michigan*, 36 HOSP. AND COMMUNITY PSYCHIATRY 254, 255 (1985) [hereinafter cited as *Michigan GBMI Verdict*].

¹¹⁰ Comment, *Guilty But Mentally Ill: A Reasonable Compromise for Pennsylvania*, 85 DICK. L. REV. 289, 307 (1980-81).

¹¹¹ Comment, *Guilty But Mentally Ill: An Historical and Constitutional Analysis*, 53 J. URB. L. 471, 482-83 (1976).

¹¹² *People v. Seefeld*, 95 Mich. App. 197, 199, 290 N.W.2d 123, 124 (1980). Michigan legislators were candid in conceding that the goal of the GBMI statute was to keep more mentally ill offenders incarcerated for longer periods of time:

acquittal, were treated with drugs and then released, without any real "cure" of their underlying mental illness.¹¹³ There was widespread fear that such people would stop taking their medication after release, and would thus become "walking time bombs waiting to explode."¹¹⁴ Other advocates of the GBMI scheme stressed that it would provide needed psychiatric treatment for mentally ill offenders, which would serve both the goals of easing their suffering and of curing their anti-social and criminal tendencies.¹¹⁵ Similar concerns were voiced by legislators and the public in other states.¹¹⁶

C. GBMI — The Statutory Scheme

The Michigan GBMI statute, enacted in response to *McQuillan*, thus was designed to meet the dual goals of public protection and psychiatric treatment for mentally ill offenders. To assess accurately whether either of these legislative goals has been achieved by the Michigan GBMI verdict or the statutes modeled on it, it is necessary first to look at the various statutory provisions and then to examine how these statutes have worked in practice.

Proponents of the guilty but mentally ill statute contend[ed] that it would protect society by allowing for incarceration of defendants who might otherwise be found not guilty by reason of insanity and subsequently released. The legislature anticipated that this statute would reduce the number of insanity acquittals, solve the problems of disposition, and simplify jury deliberations. One legislator commented publicly that the guilty but mentally ill statute was specifically designed to circumvent the *McQuillan* decision. The legislative intent was to give the jury an alternative to the verdict of not guilty by reason of insanity and thus guarantee that mentally ill offenders would not be released into the community before a definitive sentence had been served.

Michigan GBMI Verdict, *supra* note 109, at 255.

Similar public concern was the impetus for the enactment of the GBMI statutes in other states. In Illinois, for example, Senator George Sangmeister explained the purpose of the proposed GBMI law to his colleagues as follows:

If you are found guilty but mentally ill . . . you're going to get the same sentence as if you were found guilty. You're not going to go back out on the street, that's the difference. You're going to get committed to the Department of Mental Health and then you're going to come back after you're cured to serve the rest of your sentence. That's the meat and guts of the bill, and that, apparently, is what the people of this state want.

Chicago Tribune (Perspective), September 4, 1983, p. 1.

Similarly, in Indiana, outraged public reaction to the murder of a mother and her three young children and concern that the defendant might successfully assert an insanity defense led to the formation of a group, Protect the Innocent, which worked for the enactment of Indiana's "Guilty But Mentally Ill" law. Note, *Indiana's Guilty But Mentally Ill Statute: Blueprint to Beguile the Jury*, 57 IND. L.J. 639, 639 n.4 (1982) (citing Indianapolis News, Sept. 11, 1980, at 19, col. 1). In fact, the defendant was convicted and executed for the murders. *Id.* See *Judy v. State*, 275 Ind. 145, 148, 416 N.E.2d 95, 96 (1981).

¹¹³ Brown and Wittner, 1978 *Annual Survey of Michigan Law: Criminal Law*, 25 WAYNE L. REV. 335, 356 (1979).

¹¹⁴ *Id.* (quoting Detroit News (Magazine), Oct. 1, 1978, at 47).

¹¹⁵ As the Michigan Supreme Court expressed it:

[T]he Legislature's object in creating this new verdict was to assure supervised mental health treatment and care for those persons convicted under the laws of our state who are found to be suffering from mental illness, in the humane hope of restoring their mental health and possibly thereby deterring any future criminal conduct on their part.

People v. McLeod, 407 Mich. 632, 663-64, 288 N.W.2d 909, 919 (1980).

¹¹⁶ See *supra* note 112.

The statutes may be most easily understood if they are viewed as having two conceptually distinct parts: first, provisions setting forth the procedures for the rendering of a GBMI verdict, and second, provisions elaborating the consequences of such a verdict. The statutes generally declare that the GBMI verdict is an alternative to the finding of "Not Guilty by Reason of Insanity," and delineate those findings which must be made by the trier of fact to render such a GBMI verdict. Many of the statutes set forth specific information the jury is to consider in reaching its conclusion, including, in some states, the differing consequences of an insanity acquittal and a GBMI verdict. Most often, an insanity acquittee is committed to a mental hospital, while a defendant found "guilty but mentally ill" is sent to state prison.

1. What the Verdict Requires

Under most of the states' schemes, "guilty but mentally ill" becomes available as a verdict only when the defendant places his sanity in issue by raising a defense of not guilty by reason of insanity.¹¹⁷ The Michigan statute is typical. In that state, a defendant who has

¹¹⁷ In Michigan, the verdict of "guilty but mentally ill" is available as an option only if the defendant files notice with the trial court of his intent to raise an insanity defense. The GBMI verdict does not come into play if the defendant enters a plea of not guilty or if he pleads guilty. MICH. COMP. LAWS ANN. §§ 768.36(1), (2) (West 1982) provide that:

(1) *If the defendant asserts a defense of insanity* in compliance with section 20a [which requires 30 days notice to the court and prosecutor if the defendant intends to assert the insanity defense in a felony case], the defendant may be found "guilty but mentally ill" if, after trial, the trier of fact finds all of the following beyond a reasonable doubt:

- (a) That the defendant is guilty of an offense,
- (b) That the defendant was mentally ill at the time of the commission of that offense,
- (c) That the defendant was not legally insane at the time of the commission of that offense.

(emphasis added)

(2) If the defendant asserts a defense of insanity in compliance with section 20a and the defendant waives his right to trial, by jury or by judge, the trial judge, with the approval of the prosecuting attorney, may accept a plea of guilty but mentally ill in lieu of a plea of guilty or a plea of nolo contendere. The judge may not accept a plea of guilty but mentally ill until, with the defendant's consent, he has examined the report or reports prepared pursuant to section 20a, has held a hearing on the issue of the defendant's mental illness at which either party may present evidence, and is satisfied that the defendant was mentally ill at the time of the offense to which the plea is entered. The reports shall be made a part of the record of the case.

Alaska, Georgia, Indiana, Kentucky, Pennsylvania, South Dakota and Utah have similar provisions. Georgia law provides that:

In all cases *in which the defense of insanity is interposed*, the jury, or the court if tried by it, shall find whether the defendant is:

- (1) Guilty;
- (2) Not guilty;
- (3) Not guilty by reason of insanity at the time of the crime; or
- (4) Guilty but mentally ill at the time of the crime, but the finding of the guilty but mentally ill shall be made only in felony cases.

GA. CODE ANN. § 17-7-131(b) (Supp. 1985) (emphasis added).

Under Indiana law:

In all cases *in which the defense of insanity is interposed*, the jury (or the court if tried by it) shall find whether the defendant is:

- (1) Guilty;
- (2) Not guilty;
- (3) Not responsible by reason of insanity at the time of the crime; or
- (4) Guilty but mentally ill at the time of the crime.

raised an insanity defense may be found "guilty but mentally ill" if, after a jury or court trial, the trier of fact finds beyond a reasonable doubt.¹¹⁸

IND. CODE § 35-36-2-3 (1985) (emphasis added).

Under Kentucky law:

In cases in which the defendant provides evidence at trial of his mental illness or insanity at the time of the offense, the jury or court may find the defendant:

- (1) Guilty;
- (2) Not guilty;
- (3) Not guilty by reason of insanity at the time of the offense; or
- (4) Guilty but mentally ill at the time of the offense.

KY. REV. STAT. § 504.120 (1985).

Under South Dakota law:

If the defense of insanity or mental illness has been presented during a trial, the court shall provide the jury with a special verdict form of "guilty but mentally ill" for each offense. The court shall instruct the jury that a special verdict of "guilty but mentally ill" may be returned instead of a general verdict. The court shall also instruct that jury that the special verdict requires a finding beyond a reasonable doubt by the jury that the defendant committed the offense and that the defendant was not insane at the time he committed the offense, but that he was mentally ill at the time.

S.D. CODIFIED LAWS ANN. § 23A-25-13 (Supp. 1984).

So too in Alaska, it is only where a defendant files notice that he intends to raise a defense of insanity or a defense that he lacked the *mens rea* required for the commission of the crime (which, if successful, results in a verdict of not guilty by reason of insanity, ALASKA STAT. § 12.47.020a (1984)), that the trier of fact will be given the opportunity to find the defendant "guilty but mentally ill."

ALASKA STAT. § 12.47.040(a) (1984) provides that:

In a prosecution for a crime *when the affirmative defense of insanity is raised* under AS 12.47.010, or when evidence of a mental disease or defect of the defendant is otherwise admissible at trial under AS 12.47.020, the trier of fact shall find, and the verdict shall state, whether the defendant is

- (1) Guilty;
- (2) Not guilty;
- (3) Not guilty by reason of insanity; or
- (4) Guilty but mentally ill.

Id. (emphasis added).

Similarly, in Pennsylvania:

A person who timely offers a defense of insanity in accordance with the Rules of Criminal Procedure may be found "guilty but mentally ill" at trial if the trier of facts finds, beyond a reasonable doubt, that the person is guilty of an offense, was mentally ill at the time of the commission of the offense and was not legally insane at the time of the commission of the offense.

18 PA. CONS. STAT. ANN. § 314(a) (Purdon 1983) (emphasis added).

Utah law provides that:

If a defendant at trial asserts a defense of "not guilty by reason of insanity," the court shall instruct the jury that they may find the defendant guilty, not guilty, not guilty by reason of insanity, guilty and mentally ill, guilty of a lesser offense, or guilty of a lesser offense due to mental illness but not such illness as would warrant full exoneration. Upon a verdict of guilty and mentally ill to the offense charged, or any lesser offense, the court shall hold a hearing as provided in this section, and if the court finds that the defendant is currently mentally ill, it shall sentence the defendant as a mentally ill offender.

UTAH CODE ANN. § 77-35-21.5 (Supp. 1983).

The Delaware and Illinois statutes are silent as to the circumstances when a judgment of "guilty but mentally ill" may be rendered.

¹¹⁸ Georgia, Pennsylvania, and South Dakota also require that the proof that a defendant is "guilty but mentally ill" be beyond a reasonable doubt. GA. CODE ANN. § 17-7-131(c)(2) (Supp. 1985);

- (a) that the defendant is guilty of an offense,
- (b) that the defendant was mentally ill at the time of the commission of that offense, and
- (c) that the defendant was not legally insane at the time of the commission of that offense.¹¹⁹

The key to applying this test lies, of course, in the distinction between "mentally ill" and "insane." Some, but not all, of the GBMI states provide statutory definitions of "mental illness" and "insanity" for the guidance of the trier of fact in determining whether the defendant is not guilty by reason of insanity, "guilty but mentally ill," guilty, or not guilty.¹²⁰ Most of these definitions of "mental illness" and "insanity" are so similar, however, that even a highly sophisticated and thoughtful factfinder would have great difficulty distinguishing between the two.

Michigan, for example, defines "mental illness" as a "substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life."¹²¹ The Michigan definition of insanity

18 PA. CONS. STAT. ANN. § 314(a) (Purdon 1983); S. D. CODIFIED LAWS ANN. § 23A-25-13 (Supp. 1984).

In Alaska and Kentucky, the trier of fact need not be so certain of its GBMI verdict. The Alaska statute provides that:

To return a verdict of Guilty But Mentally Ill under (a)(4) of this section, the jury must find beyond a reasonable doubt that the defendant committed the crime and find by a preponderance of the evidence that when the defendant committed the crime the defendant was guilty but mentally ill as defined in AS 12.47.030.

ALASKA STAT. § 12.47.040(b) (1984).

Under Kentucky law,

[t]he defendant may be found guilty but mentally ill if:

- (a) The prosecution proves beyond a reasonable doubt that the defendant is guilty of an offense; and
- (b) The defendant proves by a preponderance of the evidence that he was mentally ill at the time of the offense.

KY. REV. STAT. § 504.130(1) (1985).

The Delaware, Illinois, Indiana, and Utah statutes are silent on the standard of proof to be used in determining whether a defendant is "guilty but mentally ill." DEL. CODE ANN. tit. 11, § 408 (Supp. 1984); ILL. ANN. STAT. ch. 38, 6-2 (Smith-Hurd 1972 & Supp. 1984); IND. CODE § 35-36-2-3 (1985); UTAH CODE ANN. § 77-13-1 (Supp. 1983).

¹¹⁹ MICH. COMP. LAWS ANN. § 768.36(1) (West 1982); see *supra* note 117.

¹²⁰ Delaware provides only a definition of insanity. DEL. CODE ANN. tit. 11, § 401 (Supp. 1984) provides that:

(a) In any prosecution for an offense, it is an affirmative defense that, at the time of the conduct charged, as a result of mental illness or mental defect, the accused lacked substantial capacity to appreciate the wrongfulness of his conduct. If the defendant prevails in establishing the affirmative defense provided in this section, the trier of facts shall return a verdict of "not guilty by reason of insanity."

¹²¹ MICH. COMP. LAWS ANN. § 330.1400a (West 1980).

The Georgia definition of "mental illness" is very similar. Under GA. CODE ANN. § 17-7-131(a)(2) (Supp. 1985):

"Mentally ill" means having a disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life or having a state of significantly subaverage general intellectual functioning existing concurrently with defects of adaptive behavior which originates in the developmental period. However, the term "mental illness" shall not include a mental state manifested only by repeated unlawful or antisocial conduct.

Georgia defines "insanity" in accordance with the M'Naghten rule. GA. CODE ANN. § 16-3-2 (1984) declares:

both incorporates this definition of mental illness and is, simultaneously, very similar to it. The Michigan statute follows the Model Penal Code definition of insanity, declaring that:

A person is legally insane if, as a result of mental illness . . . or mental retardation . . . that person lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.¹²²

Similarly, under Indiana law, "mentally ill" is defined as "having a psychiatric disorder which substantially disturbs a person's thinking, feeling, or behavior and impairs the person's ability to function . . . [or] having any mental retardation."¹²³ Indiana, like Michigan, defines insanity by the Model Penal Code test.¹²⁴ Kentucky also follows the Model Penal Code test for insanity,¹²⁵ but defines "mental illness" as "substantially impaired capacity to use self-control, judgment or discretion in the conduct of one's affairs and social relations, associated with maladaptive behavior or recognized emotional symptoms where impaired capacity, maladaptive behavior or emotional symptoms can be related to physiological, psychological or social factors."¹²⁶

Perhaps the slimmest of all distinctions between a defendant who should be acquitted on grounds of insanity and a defendant who should be found "guilty but mentally ill" is drawn by the Alaska and Pennsylvania statutes. The Alaska Code provides that:

[I]t is an affirmative defense of insanity that when the defendant engaged in the criminal conduct, the defendant was unable, as a result of a mental disease or defect, to appreciate the nature and quality of that conduct Evidence of a mental disease or defect that is manifested only by repeated criminal or other antisocial conduct is not sufficient to establish the affirmative defense under (a) of this section.¹²⁷

This definition of "insanity," which is a modern formulation of the M'Naghten rule combined with part of the ALI test for insanity, is remarkably similar to the Alaska

A person shall not be found guilty of a crime if, at the time of the act, omission, or negligence constituting the crime, the person did not have mental capacity to distinguish between right and wrong in relation to such act, omission, or negligence.

¹²² MICH. COMP. LAWS ANN. § 768.21a (West 1982). Michigan precludes the assertion of the insanity defense by one who is voluntarily intoxicated due to the ingestion of drugs or alcohol. *Id.*

¹²³ IND. CODE § 35-36-1-1 (1985).

¹²⁴ IND. CODE § 35-41-3-6 (1985) provides that:

- (a) A person is not responsible for having engaged in prohibited conduct if, as a result of mental disease or defect, he was unable to appreciate the wrongfulness of the conduct at the time of the offense.
- (b) As used in this section, "mental disease or defect" means a severely abnormal mental condition that grossly and demonstrably impairs a person's perception, but the term does not include an abnormality manifested only by repeated unlawful or antisocial conduct.

¹²⁵ Kentucky law provides for a defense of insanity as follows:

- (1) 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 of his conduct or to conform his conduct to the requirements of law.
- (2) As used in this chapter, the term "mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

KY. REV. STAT. § 504.020 (1985); *see also* KY. REV. STAT. § 504.060(4) (1985).

¹²⁶ KY. REV. STAT. § 504.060(5) (1985); *see also* KY. REV. STAT. § 202A.014 (1985).

¹²⁷ ALASKA STAT. § 12.47.010 (1984).

statute's definition of "guilty but mentally ill," which is taken directly from the ALI definition of insanity:

- (a) A defendant is guilty but mentally ill if, when the defendant engaged in the criminal conduct, the defendant lacked, as a result of a mental disease or defect, the substantial capacity either to appreciate the wrongfulness of that conduct or to conform that conduct to the requirements of law
- (b) Evidence of a mental disease or defect that is manifested only by repeated criminal or antisocial conduct is not sufficient to establish that the defendant was guilty but mentally ill under (a) of this section.¹²⁸

Pennsylvania also defines insanity in accordance with the M'Naghten rule and "mental illness" using the Model Penal Code definition of insanity. Pennsylvania law thus provides the following definitions:

- (1) "Mentally ill." One who as a result of mental disease or defect, lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.
- (2) "Legal insanity." At the time of the commission of the act, the defendant was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, if he did know it, that he did not know he was doing what was wrong.¹²⁹

These two statutes come close to making a distinction without a difference in terms of the accused's mental state at the time of the offense. To define the requirements for a verdict of "guilty but mentally ill" in precisely the same terms which most other jurisdictions use to define insanity is an open invitation for the jury to render a verdict of "guilty but mentally ill" whenever it believes the defendant did suffer from mental illness at the time of the offense but is concerned about releasing him into the community.

In Illinois, the statutory definition of mental illness is couched in terms that appear to exclude insanity. The Illinois statute defines "mental illness" as:

a substantial disorder of thought, mood, or behavior which afflicted a person at the time of the commission of the offense and which impaired that person's judgment, but not to the extent that he is unable to appreciate the wrongfulness of his behavior or is unable to conform his conduct to the requirements of law.¹³⁰

Insanity, by contrast, is defined in accordance with the Model Penal Code standard. Yet even this more substantive distinction provides only limited guidance to the jury as to how to make the ultimate choice between "mere" mental illness and insanity.¹³¹ As will be discussed in detail subsequently, some critics of the GBMI verdict have argued that

¹²⁸ ALASKA STAT. § 12.47.030 (1984).

¹²⁹ 18 PA. CONS. STAT. ANN. § 314(c) (Purdon 1983).

¹³⁰ ILL. ANN. STAT. ch. 38, § 6-2(d) (Smith-Hurd 1972 & Supp. 1984).

¹³¹ ILL. ANN. STAT. ch. 38, § 6-2 (Smith-Hurd 1972 & Supp. 1984) provides:

- (a) A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or mental defect, he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.
- (b) The terms "mental disease or mental defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

because many of the GBMI statutes' definitions of "insanity" and "mental illness" are virtually identical, at least from the viewpoint of the average layperson, it becomes extremely likely that a jury will reach a compromise verdict of "guilty but mentally ill" in cases in which the defendant actually meets the statutory test of insanity but has committed such a reprehensible act that the jury is reluctant to see him return soon to the community.¹³²

In addition to a court or jury finding of "guilty but mentally ill," a defendant may also be found "guilty but mentally ill" under the statutes if he enters a plea to that effect.¹³³ As a general matter, the court may accept the plea after reading the pre-trial psychiatric reports prepared in response to the defendant's NGI plea, and after holding a hearing on the defendant's mental illness. To accept the plea, however, the court must be "satisfied that the defendant was mentally ill at the time of the offense."¹³⁴ The data on the actual use of "guilty but mentally ill" as a plea are very limited. In Michigan, however, approximately sixty percent of the GBMI verdicts result from plea bargains, while the remaining forty percent are divided equally between court and jury trials.¹³⁵

2. Disposition After a GBMI Verdict

Once a defendant has been found "guilty but mentally ill," the court may sentence him to prison or probation, just as it would with a defendant who has been found guilty under a traditional scheme.¹³⁶ In Michigan and Kentucky, a pre-sentence psychiatric

¹³² See *infra* text accompanying notes 193-232.

¹³³ DEL. CODE ANN. tit. 11, § 408 (Supp. 1984); GA. CODE ANN. § 17-7-131(g) (Supp. 1985); IND. CODE § 35-36-2-5 (1985); KY. REV. STAT. § 504.130(2) (1985); MICH. COMP. LAWS ANN. § 768.36(2) (West 1982) (quoted *supra* note 117); 18 PA. CONS. STAT. ANN. § 314(b) (Purdon 1983); S.D. CODIFIED LAWS ANN. § 23A-7-16 (Supp. 1984); S.D. CODIFIED LAWS ANN. § 23A-7-2 (Supp. 1983); UTAH CODE ANN. § 77-13-1 (Supp. 1983). The Alaska and Illinois statutes are silent about the possibility of a "guilty but mentally ill" plea.

¹³⁴ See the particular statutes cited *supra* note 117.

¹³⁵ Smith and Hall, *supra* note 2, at 108, Appendix A, Table C.

¹³⁶ MICH. COMP. LAWS ANN. § 768.36 (3), (4) (West 1982) provide that:

(3) If a defendant is found guilty but mentally ill or enters a plea to that effect which is accepted by the court, the court shall impose any sentence which could be imposed pursuant to law upon a defendant who is convicted of the same offense. If the defendant is committed to the custody of the department of corrections, he shall undergo further evaluation and be given such treatment as is psychiatrically indicated for his mental illness or retardation. Treatment may be provided by the department of corrections or by the department of mental health after his transfer Sections 1004 and 1006 of Act No. 258 of the Public Acts of 1974 shall apply to the discharge of such a defendant from a facility of the department of mental health to which he has been admitted and shall apply to the return of such a defendant to the department of corrections for the balance of the defendant's sentence. When a treating facility designated by either the department of corrections or the department of mental health discharges such a defendant prior to the expiration of his sentence, that treating facility shall transmit to the parole board a report on the condition of the defendant which contains the clinical facts, the diagnosis, the course of treatment, and the prognosis for the remission of symptoms, the potential for recidivism and for the danger to himself or the public, and recommendations for future treatment. In the event that the parole board pursuant to law or administrative rules should consider him for parole, the board shall consult with the treating facility at which the defendant is being treated or from which he has been discharged and a comparable report on the condition of the defendant shall be filed with the board. If he is placed on parole by the parole board, his treatment shall, upon recommendation of the treating facility, be made a

condition of parole, and failure to continue treatment except by agreement with the designated facility and parole board shall be a basis for the institution of parole violation hearings.

- (4) If a defendant who is found guilty but mentally ill is placed on probation under the jurisdiction of the sentencing court pursuant to law, the trial judge, upon recommendation of the center for forensic psychiatry, shall make treatment a condition of probation. Reports as specified by the trial judge shall be filed with the probation officer and the sentencing court. Failure to continue treatment, except by agreement with the treating agency and the sentencing court, shall be a basis for the institution of probation violation hearings. The period of probation shall not be for less than 5 years and shall not be shortened without receipt and consideration of a forensic psychiatric report by the sentencing court. Treatment shall be provided by an agency of the department of mental health, or with the approval of the sentencing court and at individual expense, by private agencies, private physicians, or other mental health personnel. A psychiatric report shall be filed with the probation officer and the sentencing court every 3 months during the period of probation. If a motion on a petition to discontinue probation is made by the defendant, the probation officer shall request a report as specified from the center for forensic psychiatry or any other facility certified by department of mental health for the performance of forensic psychiatric evaluation.

See also *People v. McLeod*, 407 Mich. 632, 661, 288 N.W.2d 909, 918 (1980) (holding that the apparent requirement of § 768.36 (4) of a five-year minimum probationary period should be read as only "presumptive," with the sentencing court being authorized "to shorten the . . . five-year period . . . if any forensic psychiatric report obtained prior to sentencing or during the period of probation indicates that a shorter period would be appropriate"). Michigan uses the indeterminate system of sentencing. See MICH. COMP. LAWS ANN. §§ 769.9 (2), (3) (West 1982).

The Indiana statute provides:

- (a) Whenever a defendant is found guilty but mentally ill at the time of the crime, or enters a plea to that effect that is accepted by the court, the court shall sentence him in the same manner as a defendant found guilty of the offense.
- (b) If the defendant who is found guilty but mentally ill at the time of the crime is committed to the department of correction, he shall be further evaluated and then treated in such a manner as is psychiatrically indicated for his mental illness. Treatment may be provided by:
- (1) the department of correction; or
- (2) the department of mental health after transfer under IC 11-10-4.
- (c) If a defendant who is found guilty but mentally ill at the time of the crime is placed on probation, the court may, in accordance with IC 35-38-2-2, require that he undergo treatment.

IND. CODE. § 35-36-2-5 (1985).

The Kentucky statute provides:

- (1) The court shall sentence a defendant found guilty but mentally ill at the time of the offense in the same manner as a defendant found guilty. If the defendant is found mentally ill at the time of sentencing, treatment shall be provided the defendant until he is no longer mentally ill or until expiration of his sentence, whichever occurs first.
- (2) Treatment shall be a condition of probation, shock probation, conditional discharge, parole or conditional release so long as the defendant is mentally ill.

KY. REV. STAT. § 504.150 (1985).

Georgia law provides:

- (g)(1) Whenever a defendant is found guilty but mentally ill at the time of a felony or enters a plea to that effect that is accepted by the court, the court shall sentence him in the same manner as a defendant found guilty of the offense. A defendant who is found guilty but mentally ill at the time of the felony shall be evaluated by a psychiatrist or a licensed psychologist from the Department of Human Resources after sentencing and prior to transfer to a Department of Corrections facility. The Board of Human Resources shall develop appropriate rules and regulations for the implementation of such procedures.

- (2) If the defendant who is found guilty but mentally ill at the time of the felony is not in need of immediate hospitalization, as indicated by the evaluation, then the defendant shall be committed to an appropriate penal facility and shall be further evaluated and then treated, *within the limits of state funds appropriated therefor*, in such manner as is psychiatrically indicated for his mental illness.
- (3) If at any time following the defendant's transfer to a penal facility it is determined that a transfer to the Department of Human Resources is psychiatrically indicated for his mental illness, then the defendant shall be transferred to the Department of Human Resources pursuant to procedures set forth in regulations of the Department of Corrections and the Department of Human Resources.
- (4) If it is determined by the evaluation that the defendant found guilty but mentally ill at the time of the felony is in need of immediate hospitalization, then the defendant shall be transferred by the Department of Corrections to a mental health facility designated by the Department of Human Resources in accordance with rules and regulations of such departments.
- (h) If a defendant who is found guilty but mentally ill at the time of a felony is placed on probation under the "State-wide Probation Act," Article 2 of Chapter 8 of Title 42, the court may require that the defendant undergo available outpatient medical or psychiatric treatment or seek similar available voluntary inpatient treatment as a condition of probation. *Persons required to receive such services may be charged fees by the provider of the service.*

GA. CODE ANN. § 17-7-131(g), (h) (Supp. 1985) (emphasis added).

Under the Alaska statute:

- (a) If the trier of fact finds that a defendant is guilty but mentally ill, the court shall sentence the defendant as provided by law and shall enter the verdict of guilty but mentally ill as part of the judgement.
- (b) The Department of Corrections shall provide mental health treatment to a defendant found guilty but mentally ill. The treatment must continue until the defendant no longer suffers from a mental disease or defect that causes the defendant to be dangerous to the public peace or safety. Subject to (c) and (d) of this section, the Department of Corrections shall determine the course of treatment.
- (c) When treatment terminates under (b) of this section the defendant shall be required to serve the remainder of the sentence imposed.
- (d) Notwithstanding any contrary provision of law, a defendant receiving treatment under (b) of this section may not be released on furlough or work release under AS 33.30.150, 33.30.250, or 33.30.260 or on parole.
- (e) Not less than 30 days before the expiration of the sentence of a defendant found guilty but mentally ill, the commissioner of corrections shall file a petition under AS 47.30.700 for a screening investigation to determine the need for further treatment of the defendant if
 - (1) the defendant is still receiving treatment under (b) of this section; and
 - (2) the commissioner has good cause to believe that the defendant is suffering from a mental illness that causes the defendant to be dangerous to the public peace or safety; in this paragraph, "mental illness" has the meaning given in AS 47.30.915.

ALASKA STAT. § 12.47.050 (1984).

Delaware law provides that:

- (b) In a trial under this section a defendant found guilty but mentally ill, or whose plea to that effect is accepted, may have any sentence imposed on him which may lawfully be imposed upon any defendant for the same offense. Such defendant shall be committed into the custody of the Department of Correction, and shall undergo such further evaluation and be given such immediate and temporary treatment as is psychiatrically indicated. The Commissioner shall retain exclusive jurisdiction over such person in all matters relating to security. The Commissioner shall thereupon confine such person in the Delaware State Hospital. Although such person shall remain under the jurisdiction of the Department of Correction, decisions directly related to treatment for his mental illness shall be the joint responsi-

report evaluating the defendant's present mental health is required before sentencing.¹³⁷

bility of the Director of the Division of Alcoholism, Drug Abuse and Mental Health and those persons at the Delaware State Hospital who are directly responsible for such treatment. The Delaware State Hospital, or any other residential treatment facility to which the defendant is committed by the Commissioner, shall have the authority to discharge the defendant from the facility and return the defendant to the physical custody of the Commissioner whenever the facility believes that such a discharge is in the best interests of the defendant. The offender may, by written statement, refuse to take any drugs which are prescribed for treatment of his mental illness; except when such a refusal will endanger the life of the offender, or the lives or property of other persons with whom the offender has contact.

- (c) When the State Hospital or other treating facility designated by the Commissioner discharges an offender prior to the expiration of such person's sentence, the treating facility shall transmit to the Commissioner and to the Parole Board a report on the condition of the offender which contains the clinical facts; the diagnosis; the course of treatment, and prognosis for the remission of symptoms; the potential for the recidivism, and for danger to himself or the public; and recommendations for future treatment. Where an offender under this section is sentenced to the State Hospital or other facility he shall not be eligible for any privileges not permitted in writing by the Commissioner (including escorted or unescorted on-grounds or off-grounds privileges) until the offender has become eligible for parole. Where the court finds that the offender, before completing his sentence, no longer needs nor could benefit from treatment for his mental illness, the offender shall be remanded to the Department of Correction. The offender shall have credited toward his sentence the time served at the State Hospital or other facility.

DEL. CODE ANN. tit. 11, §§ 408(b), (c) (Supp. 1984).

Further, under Delaware law,

- (a) A person who has been adjudged "guilty, but mentally ill" and who during his incarceration is discharged from treatment may be placed on prerelease or parole status under the same terms and laws applicable to any other offender. Psychological or psychiatric counseling and treatment may be required as a condition for such status. Failure to continue treatment, except by agreement of the Department of Correction, shall be a basis for terminating prerelease status or instituting parole violation hearings.
- (b) If the report of the State Hospital or other facility recommends parole, the paroling authority shall within 45 days or at the expiration of the offender's minimum sentence, whichever is later, meet to consider the offender's request for parole. If the report does not recommend parole, but other laws or administrative rules of the Department permit parole, the paroling authority may meet to consider a parole request. When the paroling authority considers the offender for parole, it shall consult with the State Hospital or other facility at which the offender had been treated, or from which the offender has been discharged.

DEL. CODE ANN. tit. 11, § 409 (Supp. 1984).

¹³⁷ *People v. McLeod*, 407 Mich. at 660, 288 N.W.2d at 918; KY. REV. STAT. § 504.140 (1985), which provides that:

If a defendant is found guilty but mentally ill, the court shall appoint at least one (1) psychologist or psychiatrist to examine, treat and report on the defendant's mental condition at the time of sentencing.

Id. No other state requires a post-conviction, pre-sentence report, although South Dakota requires a psychiatric evaluation of the defendant before the defendant is permitted to plead "guilty but mentally ill."

South Dakota law provides:

if a defendant charged with a felony pleads guilty but mentally ill, the court may not accept the plea until the defendant has been examined by a licensed psychiatrist and the court has examined the psychiatric reports. The court shall hold a hearing on the defendant's mental condition and if there is a factual basis on which the court can conclude that the defendant was mentally ill at the time of the offense, the plea shall be accepted.

In many states, if the court determines that probation is appropriate, psychiatric treatment must be made a condition of probation.¹³⁸

If the defendant is sentenced to prison he will be evaluated to determine if psychiatric treatment is appropriate.¹³⁹ There is no guarantee, however, that such psychiatric treatment will be afforded him. The American Psychiatric Association found in its study of the GBMI verdict that "in Michigan . . . felons have received no more treatment than they would have prior to the new law."¹⁴⁰ This result was in fact predicted by one commentator who noted shortly after the enactment of the GBMI statute that "[e]ven before the new verdict, corrections officials were required by statute, upon an individual's commitment to any of their facilities, to conduct psychological testing and to recommend particularized placement if shown necessary."¹⁴¹

Most of the data presently available on actual treatment afforded the GBMI offender

S.D. CODIFIED LAWS ANN. § 23A-7-16 (Supp. 1984).

In Utah, the court is required to conduct a hearing to determine defendant's present mental state, at which it may consider relevant psychiatric testimony. After receiving this testimony, the court determines whether commitment to the state mental hospital is appropriate. UTAH CODE ANN. § 77-35-21.5 (Supp. 1983). Subsection (4) of that section provides that:

The court shall in its sentence order hospitalization at the Utah state hospital or other suitable facility if, upon completion of the hearing and consideration of the record, the court finds by clear and convincing evidence that:

- (a) The defendant has a mental illness as defined by section 64-7-28(1);
- (b) Because of his mental illness the defendant poses an immediate physical danger to others or self, which may include jeopardizing his own or others safety, health, or welfare if placed in a correctional or probation setting, or lacks the ability to provide the basic necessities of life, such as food, clothing and shelter, if placed on probation;
- (c) The defendant lacks the ability to engage in a rational decision-making process regarding the acceptance of mental treatment as demonstrated by evidence of inability to weigh the possible costs and benefits of treatment;
- (d) There is no appropriate treatment alternative to a court order of hospitalization; and
- (e) The Utah state hospital or other suitable facility can provide the defendant with treatment, care, and custody that is adequate and appropriate to the defendant's conditions and needs.

UTAH CODE ANN. § 77-35-21.5 (4) (Supp. 1983).

Most other states, in contrast, leave the determination of the appropriate psychiatric treatment to the discretion of the Department of Corrections. *See supra* notes 133 and 136, and *infra* notes 138-39.

¹³⁸ *See, e.g.*, IND. CODE § 35-36-2-5 (1985); KY. REV. STAT. § 504.150 (1985); MICH. COMP. LAWS ANN. § 768.36 (4) (West 1982). In Georgia, the court is authorized, but not required, to make probation conditional on the defendant's receiving psychiatric treatment. GA. CODE ANN. § 17-7-131(h) (Supp. 1985). If the court determines that such treatment is an appropriate condition of probation, the defendant may be required to pay for it. *Id.*

¹³⁹ Some states appear to mandate psychiatric treatment, by using language such as "treatment shall be provided the defendant until he is no longer mentally ill . . ." ALASKA STAT. § 12.47.050(b) (1984); KY. REV. STAT. § 504.150 (1985). Other states appear to demand less, requiring only such treatment "as is psychiatrically indicated." DEL. CODE ANN. tit. 11, § 408(b) (Supp. 1984); IND. CODE § 35-36-2-5(b) (1985); MICH. COMP. LAWS ANN. § 768.36(3) (West 1982). Georgia holds out the least promise of treatment of any state, explicitly declaring that the "guilty but mentally ill" offender shall be given psychiatric evaluation and treatment "within the limits of state funds appropriated therefor." GA. CODE ANN. § 17-7-131(g)(2) (Supp. 1985).

¹⁴⁰ Insanity Defense Work Group, *American Psychiatric Association Statement on the Insanity Defense*, 140 AM. J. PSYCHIATRY 681, 684 (1983).

¹⁴¹ Schwartz, *Moving Backward Confidently: Michigan's New Laws on Criminal Responsibility*, MICH. STATE B.J. 847, 849 (1975) (citing MICH. COMP. LAWS ANN. § 791.267 (West 1982) and § 791.68 (repealed 1974)).

comes from Michigan, which has had the longest experience with a GBMI statute. There, research by the Michigan Center for Forensic Psychiatry has shown that only fifty percent of those GBMI defendants sentenced to prison are found by the Department of Corrections to be either presently mentally ill or probably mentally ill at the time of the offense.¹⁴² Only these fifty percent are eligible for psychiatric treatment. Those prisoners found "guilty but mentally ill" but not afforded psychiatric treatment often have special restrictions placed on their freedom of movement within the prison by the prison administration, and they may be stigmatized by their fellow prisoners as mentally ill "weirdos,"¹⁴³ making their adjustment to prison life even more difficult. If, on the other hand, it is determined that psychiatric treatment is appropriate, in many states such treatment may be provided by either the department of corrections or the department of mental health.¹⁴⁴ If the GBMI prisoner is treated in prison, the care which he receives is minimal, because of the extremely small numbers of doctors and nurses available to provide treatment, and the huge number of inmates requiring treatment. The testimony of prison psychiatrist Dr. Dennis Jurczak at one GBMI defendant's sentencing hearing is most revealing. Dr. Jurczak was "the only full-time psychiatrist for a prison population of 12,000, although he estimated that at [Michigan's] Jackson Prison alone there are probably five to six hundred inmates out of a population of 5600 who need psychiatric treatment . . ."¹⁴⁵ Dr. Jurczak testified that there was only one nurse for an in-prison hospital ward of 100 psychotic or suicidal patients. Accordingly, most of the "treatment" given these inmates involved "crisis intervention": the administration of psychotropic medication and locking acutely disturbed inmates in a room. The other, less severely mentally ill prisoners were on high dosages of antipsychotic medication, but because of inadequate psychiatric supervision, there was no way to monitor whether the inmates were in fact taking the medication, nor was there any attempt to integrate the drug regimen with other kinds of psychiatric therapy.¹⁴⁶ Dr. Jurczak summarized his assessment of the treatment accorded the mentally ill in Michigan's prisons by saying:

They [the mentally ill] are really at the mercy of the rest of the prison population . . . [For this defendant] it would do . . . more harm than good [to be turned over to the Department of Corrections]. "*We do not have the wherewithal to implement the legislation regarding the treatment of mentally ill in the corrections system.*"¹⁴⁷

Similar reports of very limited treatment of persons found "guilty but mentally ill" have been received from other states. "Although data on point are scanty, preliminary reports from Illinois and Indiana indicate that the treatment promised to recipients of the GBMI verdict is seldom provided."¹⁴⁸ A majority of those found "guilty but mentally ill" in

¹⁴² Blunt and Stock Study, *supra* note 81. And in another "Michigan study, over 75% of the defendants found GBMI received no mental treatment and the majority of the others had only occasional check-ups from a corrections department psychiatrist." Smith and Hall, *supra* note 2, at 105 n.137.

¹⁴³ Blunt and Stock Study, *supra* note 81.

¹⁴⁴ GA. CODE ANN. § 17-7-131(g) (Supp. 1985); IND. CODE § 35-36-2-5(b) (1985); MICH. COMP. LAWS ANN. § 768.36 (3) (West 1982). In Delaware and Utah, GBMI defendants are committed only to the state mental hospital. DEL. CODE ANN. tit. 11, § 408(b) (Supp. 1984); UTAH CODE ANN. § 77-35-21.5(4) (Supp. 1983). In contrast, in Alaska a GBMI defendant may only be treated within the facilities of the Department of Corrections. ALASKA STAT. § 12.47.050 (1984).

¹⁴⁵ *People v. McLeod*, 407 Mich. at 667 n.5, 288 N.W.2d at 921 n.5 (Levin, J., concurring).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* (quoting Dr. Jurczak) (emphasis in original).

¹⁴⁸ National Center for State Courts, Institute on Mental Disability and the Law, Proposal for National Institute of Justice funding for "The 'Guilty But Mentally Ill' Experiment in Eight States:

Illinois are housed with the general prison population, with less than forty percent receiving "treatment" at the sole Department of Corrections hospital. No Illinois GBMI defendant has ever been committed to the Department of Mental Health.¹⁴⁹ Interestingly, a proposed GBMI bill in Kansas was "shelved because of the significant capital costs which the state would incur in providing the mental facilities for this type of criminal defendant."¹⁵⁰

Even when GBMI prisoners are given psychiatric treatment in a state mental hospital,¹⁵¹ their treatment is only incidental to their punishment. Unlike insanity acquittees, who must be released from confinement once it is determined that they have recovered their sanity,¹⁵² GBMI prisoners who regain their sanity are returned to the prison population to serve out the remainder of their prison term.¹⁵³

D. *The Guilty But Mentally Ill Statutes Are Unconstitutional*

Where does this examination of the structure and actual operation of the GBMI statutes lead? In this section, it will be argued that the GBMI statutes are unconstitutional, at least for some persons convicted under them, in two major respects. First, they fail to fulfill their promise of providing needed psychiatric treatment to the mentally ill offender, and thus deny the mentally ill defendants who are found "guilty but mentally ill" their constitutional right to treatment. Second, the laws encourage triers of fact to reach compromise verdicts by failing adequately to distinguish between "mental illness" and "insanity," and, at the same time, holding out the illusory promise of combining treatment with public protection if the defendant is found "guilty but mentally ill." The substantial possibility that such a compromise verdict may be reached effectively deprives a defendant of his constitutional right to present an insanity defense, and denies him both the due process and equal protection of the laws guaranteed by the fourteenth amendment.

I. Denial of the Right to Treatment

In recent years a growing number of state and federal courts have enunciated a constitutional right to mental health treatment. This right emerged in the early 1970's as an important check on the power of the state to commit involuntarily persons deemed mentally ill and dangerous to themselves or others. In the landmark case of *Wyatt v.*

An Empirical and Descriptive Analysis," at 8 (December 1, 1982) [hereinafter *The GBMI Experiment*].

¹⁴⁹ According to an article in the *Chicago Tribune*:

More than half of the prisoners found guilty but mentally ill are scattered throughout the Illinois prison system's general population, said Stephen Hardy, director of the Menard Psychiatric Center. No inmate who has been found guilty but mentally ill has ever been transferred to the Department of Mental Health, he said, and, at present, only 28 of the 72 inmates incarcerated under the law are housed in the psychiatric center at Menard, the only prison psychiatric hospital in the state.

Chicago Tribune (Perspective), September 4, 1983, p. 5. See *supra* note 112.

¹⁵⁰ *The GBMI Experiment*, *supra* note 148, at 8.

¹⁵¹ The laws of the Delaware, Georgia, Indiana, Michigan, and Utah authorize either the initial commitment or transfer to a state mental hospital of a GBMI defendant. DEL. CODE ANN. tit. 11, § 408(b) (Supp. 1984); GA. ANN. CODE § 17-7-131(g) (Supp. 1984); IND. CODE §§ 35-36-2-5(b), 11-10-4-2 (1985); MICH. COMP. LAWS ANN. § 768.36(3) (West 1982); UTAH CODE ANN. § 77-35-21.5(4) (Supp. 1983).

¹⁵² *People v. McQuillan*, 392 Mich. at 538, 221 N.W.2d at 581; ALASKA STAT. § 12.47.090 (1984); GA. CODE ANN. § 17-7-131 (Supp. 1985); IND. CODE § 35-36-2-4 (1985); KY. REV. STAT. §§ 202A.026, 504.030 (1985); UTAH CODE ANN. § 77-14-5 (Supp. 1983).

¹⁵³ ALASKA STAT. § 12.47.050(c) (1984); DEL. CODE ANN. tit. 11, § 5.408(b), (c) (Supp. 1984); Ky.

Stickney,¹⁵⁴ which addressed the treatment rights of the civilly committed mentally retarded and mentally ill, it was held that, "When patients are . . . committed for treatment purposes they unquestionably have a constitutional right to receive such individual treatment as will give each of them a realistic opportunity to be cured or to improve his or her mental condition."¹⁵⁵ In *Rouse v. Cameron*,¹⁵⁶ the court invoked constitutional considerations of equal protection and due process to declare, as a matter of statutory construction, that the District of Columbia statute providing for mandatory commitment of insanity acquittees should be read to include a "statutory 'right to treatment.'" The court ruled that mandatory commitment under the statute was "permissible [only] because of its humane therapeutic goals. Had appellant been found criminally responsible, he could have been confined a year, at most, however dangerous he might have been. He has been confined four years and an end is not in sight."¹⁵⁷ The court also noted that "[s]ince this difference rests only on the need for treatment," the government's failure to provide adequate psychiatric treatment raised possible violations of the due process and equal protection clauses of the fourteenth amendment, and the cruel and unusual punishment clause of the eighth amendment.¹⁵⁸

The Supreme Court, while unwilling to find a general right to treatment of the mentally ill,¹⁵⁹ has declared that prison inmates are entitled to receive treatment for their medical needs. In *Estelle v. Gamble*,¹⁶⁰ the Court found that because "the denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose . . . we conclude that the deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' . . . proscribed by the Eighth Amendment."¹⁶¹ Recent cases have held that this right of prisoners to medical treatment applies equally to prisoners suffering from physical and mental illnesses.¹⁶²

Against these constitutional requirements, the psychiatric treatment accorded GBMI prisoners has proven inadequate, if not altogether illusory. First, not all of the GBMI statutes expressly guarantee treatment.¹⁶³ Although some statutes do use mandatory language, that is, "the defendant *shall* be treated," others provide only that "the defendant . . . shall undergo further evaluation and be given such treatment as is psychiatrically

REV. STAT. § 504.150(1) (1985); MICH. COMP. LAWS ANN. § 768.36(3) (West 1982); UTAH CODE ANN. § 77-35-21.5 (Supp. 1983). See also Smith and Hall, *supra* note 2, at 90.

¹⁵⁴ 325 F. Supp. 781 (M.D. Ala. 1971).

¹⁵⁵ *Id.* at 784.

¹⁵⁶ 373 F.2d 451, 455 (D.C. Cir. 1966).

¹⁵⁷ In *Jones v. United States*, 466 U.S. 354 (1983), the Supreme Court held that an insanity acquittee could be confined indefinitely, until he had met the burden of proving that he was no longer mentally ill or dangerous, even though, if he had been found guilty of the crime charged, his sentence would have long since expired. A contrary result was reached by the California Supreme Court in *In re Moye*, 22 Cal. 3d 457, 584 P.2d 1097, 149 Cal. Rptr. 491 (1978). That court held that "well established constitutional principles of equal protection require that the duration of institutional confinement of such persons cannot exceed the maximum term for the underlying offense," unless the state seeks extended commitment under the civil commitment statute. *Id.* at 460, 584 P.2d at 1099, 149 Cal. Rptr. at 493. Similar results have been obtained by legislative action in Oregon, OR. REV. STAT. § 161.327 (1983); and Connecticut, CONN. GEN. STAT. ANN. § 53a-13 (West 1972 & Supp. 1983).

¹⁵⁸ 373 F.2d at 453.

¹⁵⁹ *O'Connor v. Donaldson*, 422 U.S. 563, 573 (1975).

¹⁶⁰ 429 U.S. 97, 103-04 (1976).

¹⁶¹ *Id.*

¹⁶² *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977); see also *Ohlinger v. Watson*, 652 F.2d 775, 778-79 (9th Cir. 1980).

¹⁶³ For a discussion of this issue, see *supra* text accompanying notes 138-39.

indicated for his mental illness or retardation."¹⁶⁴ Yet when the GBMI statute has been upheld, as it was by the Michigan Supreme Court in *People v. McLeod*,¹⁶⁵ the rationale for sustaining it has been that the legislative purpose in creating this new verdict was to assure supervised mental health treatment and care for persons convicted under the laws of the state found to be suffering from mental illness.¹⁶⁶

Second, an examination of the mental health treatment presently accorded those found "guilty but mentally ill" shows that that legislative purpose has not been fulfilled. As noted earlier, less than forty percent of the Illinois GBMI defendants, and between twenty-five and fifty percent of the Michigan GBMI defendants, receive any psychiatric treatment at all.¹⁶⁷ At the same time, however, their freedom of movement within the prison may be restricted, and they may be stigmatized by the label of "mentally ill" without having received any of the benefits of psychiatric treatment.¹⁶⁸ At least one court has noted that the long-lasting injury to reputation occasioned by being labelled "mentally ill" may be even worse than that caused by a criminal conviction alone.¹⁶⁹ Thus, far from obtaining special help for their mental problems, these GBMI prisoners are actually worse off than if they had simply been found guilty.

But even those prisoners who are determined to be suitable candidates for psychiatric treatment fare poorly. If they are retained for treatment within the prison, the care they receive is manifestly inadequate, as was evidenced by the testimony of Michigan prison psychiatrist Dr. Dennis Jurczak.¹⁷⁰ No doctor, no matter how dedicated, can give adequate psychiatric treatment to a population of five to six hundred people. Inevitably, the psychiatrist must rely heavily on psychotropic medication as a means of limiting and controlling serious psychiatric breakdowns.¹⁷¹ Hence, "[t]oday, drugs are the most common form of behavior modification and restraint in prisons."¹⁷² This is not to say that drugs are not an extremely important tool for the psychiatrist to use in treating the mentally ill. Psychotropic medication has made possible phenomenal advances in psychiatric treatment and has frequently been responsible for the cures or remissions of serious mental illness which would have been unthinkable only thirty years ago. At the same time, it must be recognized that drugs are an adjunct to psychiatric therapy, not a substitute for it.

While those GBMI prisoners transferred to a state mental hospital for treatment fare much better than their confrères who remain in prison, they are still at a disadvantage when compared to persons acquitted on grounds of insanity. Insanity acquittees must be

¹⁶⁴ MICH. COMP. LAWS ANN. § 768.36 (3) (West 1982). Similar language is found in the Illinois statute:

If the court imposes a sentence of imprisonment upon a defendant who has been found guilty but mentally ill, the defendant shall be committed to the Department of Corrections, which shall cause periodic inquiry and examination to be made concerning the nature, extent, continuance, and treatment of the defendant's mental illness. The Department of Corrections shall provide such psychiatric, psychological, or other counseling and treatment for the defendant as it determines necessary.

ILL. ANN. STAT. ch. 38, § 1005-2-6(b) (Smith-Hurd 1982 & Supp. 1985).

¹⁶⁵ 407 Mich. 632, 288 N.W.2d 909 (1980).

¹⁶⁶ *Id.* at 663, 288 N.W.2d at 919 (emphasis added).

¹⁶⁷ See *supra* notes 142 and 149.

¹⁶⁸ Blunt and Stock Study, *supra* note 81.

¹⁶⁹ *Bartley v. Kremens*, 402 F. Supp. 1039, 1046 (E.D. Pa. 1975).

¹⁷⁰ See *supra* note 145 and accompanying text.

¹⁷¹ Jarvik, *Drugs Used in the Treatment of Psychiatric Disorders*, L. GOODMAN & A. GILMAN, THE PHARMACOLOGICAL BASIS OF THERAPEUTICS 133 (1970).

¹⁷² Forer, *The Prisoner and the Psychiatrist*, 31 EMORY L.J. 61, 66-67 (1982) [hereinafter cited as Forer].

released as soon as they are found to be sane, while a GBMI prisoner who is restored to sanity is returned to prison for the remainder of his sentence.

Also unlike insanity acquittees, GBMI prisoners are not eligible for a treatment program which provides for their gradual reintegration into the community. Yet this type of step-by-step release is precisely the kind of program which holds out the greatest hope for the successful maintenance of mental health after discharge. "The therapeutic ideal calls for allowing patients more and more responsibility for their own actions and judgments, with correlative diminishing restrictions and controls, which inevitably means accepting greater or less security risk."¹⁷³ Unfortunately, "therapy and security are largely inconsistent objectives," and in prison security almost always wins.¹⁷⁴

When measured against the constitutional requirement of mental health treatment, then, the treatment afforded GBMI prisoners is largely inadequate. To the extent that any GBMI inmate who is in fact presently mentally ill is denied "such individual treatment as will give him . . . a realistic opportunity to be cured or to improve his . . . mental condition,"¹⁷⁵ he is being denied his constitutional right to treatment and is subjected to cruel and unusual punishment. "It is repugnant . . . to place a seriously mentally infirm or retarded person in a punitive setting or to impose other forms of punishment."¹⁷⁶ Yet many GBMI defendants receive no psychiatric treatment at all, and, in addition, are stigmatized by correctional officials and their fellow prisoners as a result of their GBMI convictions. The testimony of Dr. Jurczak indicates without any doubt that the quality of care received by the mentally ill in Michigan's prisons receiving treatment is so inadequate as to "shock the conscience."¹⁷⁷

Indeed, such treatment raises serious ethical questions about the doctors who are providing this care.¹⁷⁸ Among the Principles of Medical Ethics adopted by the American Medical Association, two are pertinent here:

The principle objective of the medical profession is to render service to humanity with respect for the dignity of man. Physicians should merit the confidence of patients entrusted to their care, rendering to each a full measure of service and devotion.

A physician should not dispose of his services under terms or conditions which tend to interfere with or impair the free and complete exercise of his medical judgment and skill or tend to cause a deterioration of the quality of medical care.¹⁷⁹

Unquestionably the pressures of practicing medicine in the prison environment make it extremely difficult for a prison psychiatrist to meet his ethical obligations. Under the conditions in Michigan's prisons described by Dr. Jurczak, it is impossible for the psychiatrist to "render . . . to each [inmate] a full measure of service and devotion."¹⁸⁰ Instead, because of the security needs of the institution, and the overwhelming weight of

¹⁷³ Weihofen, *Institutional Treatment of Persons Acquitted By Reason of Insanity*, 38 TEX. L. REV. 849, 853 (1960) [hereinafter cited as Weihofen].

¹⁷⁴ *Id.* at 850, 854.

¹⁷⁵ Wyatt v. Stickney, 325 F. Supp. 781, 784 (M.D. Ala. 1971).

¹⁷⁶ Gostin, *supra* note 64, at 107.

¹⁷⁷ Cf. Rochin v. California, 342 U.S. 165, 172 (1952) (use of stomach pumping to obtain contents of suspect's stomach "shocks the conscience" and constitutes an illegal seizure).

¹⁷⁸ Cf. O'Connor v. Donaldson, 422 U.S. 563 (1975).

¹⁷⁹ See generally *Principles of Medical Ethics*, in AMERICAN MEDICAL ASSOCIATION, OPINIONS AND REPORTS OF THE JUDICIAL COUNCIL (1979) [hereinafter cited as *Principles of Medical Ethics*].

¹⁸⁰ *Id.*

the number of seriously mentally ill prisoners, the nature of the psychiatric practice itself is transformed:¹⁸¹

The patient's physical and mental health is subordinated to considerations of custody. Too frequent applications for medical or psychiatric service are interpreted as malingering. Aggressive behavior is punished as an offense, whereas a therapeutic approach might regard such behavior as a hopeful sign.¹⁸²

Thus the free exercise of the doctor's medical judgment¹⁸³ is severely impaired, and the GBMI prisoner receives inadequate psychiatric treatment.

When this level of treatment is compared with the type of treatment which the prisoner would have received had he been found not guilty by reason of insanity, and thus had been eligible for a gradual, phased reintegration into society as his mental health improved, there is a violation of the equal protection clause of the fourteenth amendment¹⁸⁴ Further,

[i]t has never been determined that sentence-serving convicts suffer from different mental illnesses from persons who are civilly committed . . . [S]ince criminal status is irrelevant to the capability to treat, it should be irrelevant to the right to treatment. Mentally ill convicts are entitled to treatment equal to that received by civilly-committed patients. Whether one compares the statistics on average length of confinement or the relative stigma attaching from confinement, the inescapable conclusion is that "segregated" treatment of any class of mental patient in a maximum security facility is inherently unequal, inherently discriminatory, and inherently unjust.¹⁸⁵

Thus, a large number, if not all, of those GBMI prison inmates presently incarcerated without adequate psychiatric treatment have been denied their fundamental constitutional right to treatment and to the equal protection of the laws, when compared both with insanity acquittees and with the "civilly" mentally ill.

Yet so far, the various courts who have been asked to rule on this issue have failed to provide any remedy. Michigan and Indiana courts, for example, have held that the proper remedy for an asserted denial of the treatment on which the GBMI statute was premised is to secure a writ of mandate against the Department of Corrections¹⁸⁶ or to bring a federal civil rights action,¹⁸⁷ not to declare the statute unconstitutional.¹⁸⁸ To date no writs of mandate have issued.¹⁸⁹ In response to their apparent inability to gain relief from Michigan state courts, a number of GBMI inmates have filed a federal class action suit, alleging that they have not received the psychiatric evaluation and treatment guaranteed by the Michigan GBMI statute, in violation of the due process clause of the four-

¹⁸¹ Weihofen, *supra* note 173, at 860-61.

¹⁸² *Id.* at 861.

¹⁸³ See generally *Principles of Medical Ethics*, *supra* note 179.

¹⁸⁴ See *supra* notes 50 and 52 and accompanying text.

¹⁸⁵ Morris, "Criminality" and the Right to Treatment, 36 U. CHI. L. REV. 784, 798 (1969).

¹⁸⁶ See, e.g., *Stader v. State*, 453 N.E.2d 1032, 1036 (Ind. App. 1983); *People v. Toner*, 125 Mich. App. 439, 439-41, 336 N.W.2d 22, 23 (1983); *People v. Willsie*, 96 Mich. App. 350, 354-55, 292 N.W.2d 145, 147 (1980); *People v. Tenbrink*, 93 Mich. App. 326, 331, 287 N.W.2d 223, 225 (1979); *People v. Sorna*, 88 Mich. App. 351, 362, 276 N.W.2d 892, 897 (1979).

¹⁸⁷ *Stader v. State*, 453 N.E.2d 1032, 1036 (Ind. App. 1983).

¹⁸⁸ *Id.*; see also *People v. McLeod*, 407 Mich. at 655, 288 N.W.2d at 915.

¹⁸⁹ Interim Institute Report, *supra* note 16, at 46.

teenth amendment and the eighth amendment's prohibition against cruel and unusual punishment.¹⁹⁰

An Illinois court has expressly ruled that those found "guilty but mentally ill" have no constitutional right to treatment, since unlike insanity acquittees and other civil commitees, persons found "guilty but mentally ill" are not involuntarily committed at all, but are being incarcerated as punishment for the crimes they have committed.¹⁹¹ As was explained by the court: "Persons found guilty but mentally ill . . . are incarcerated for their crimes, not their mental condition."¹⁹²

2. The GBMI Statutes Encourage Unconstitutional Compromise Verdicts

The disparity between the treatment accorded insanity acquittees and the treatment afforded the GBMI prisoners is particularly striking in light of the very fuzzy distinction between the two groups made by the GBMI statutes at the trial stage. As noted earlier, the statutory definitions of "mental illness" and "insanity" are conceptually very close and, to a considerable degree, overlapping. Thus, Michigan law defines "mental illness" as a "substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life."¹⁹³ Following the Model Penal Code test, a person is deemed insane "if, as a result of mental illness . . . or mental retardation . . . that person lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law."¹⁹⁴ But because there is little distinction between illness that significantly impairs judgment — mental illness — and illness that impairs a defendant's capacity to appreciate the wrongfulness of his conduct — insanity¹⁹⁵ — these definitions in effect "confer upon the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed."¹⁹⁶

Even more confusing to the jury are the distinctions between "mental illness" and "insanity" made by Alaska and Pennsylvania law. Under Alaska law, a defendant is "insane" if, at the time of the offense, he was "unable, as a result of a mental disease or defect, to appreciate the nature and quality of that conduct," but the defendant is only "mentally ill" if, at the time of the offense, he lacked "the substantial capacity either to appreciate the wrongfulness of that conduct or to conform that conduct to the requirements of law"¹⁹⁷ The distinction made by Pennsylvania law is similarly oblique. In

¹⁹⁰ *Gorton v. Johnson*, 100 F.R.D. 801, 803 (E.D. Mich. 1984). The court has limited the class action issue to the question of whether the state defendants have:

devised and put into practice a policy, process, and procedure that can adequately give "further evaluation" and "such treatment as is psychiatrically indicated" to persons who have been determined to be "guilty but mentally ill" . . . and if they have not, is this failure a violation of due process and the prohibition against cruel and unusual punishment

Id. (quoting MICH. COMP. LAWS ANN. § 768.36 (West 1982)). As this article went to press, the case was still in the discovery stage.

¹⁹¹ *People v. Marshall*, 114 Ill. App. 3d 217, 223, 448 N.E.2d 969, 980 (1983).

¹⁹² *Id.*

¹⁹³ MICH. COMP. LAWS ANN. § 330.1400a (West 1980).

¹⁹⁴ MICH. COMP. LAWS ANN. § 768.21a (West 1982). Kentucky and Indiana law draw similar distinctions between "insanity" and "mental illness." See *supra* notes 123-26.

¹⁹⁵ *Robitscher and Haynes, In Defense of the Insanity Defense*, 31 EMORY L.J. 9, 17 (1982).

¹⁹⁶ In *People v. Ramsey*, 89 Mich. App. 468, 472, 280 N.W.2d 565, 566 (1979), the defendant's argument to this effect was flatly rejected by the court, which stated that "[a] reading of the statute refutes defendant's argument." *Id.* at 472, 280 N.W.2d at 567.

¹⁹⁷ See *supra* text accompanying notes 127-28.

that jurisdiction a defendant is "insane" if "[a]t the time of the commission of the act, the defendant was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing or, if he did know it, that he did not know he was doing what was wrong." If, however, the defendant, "as a result of mental disease or defect, lack[ed] substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law," then he is only "mentally ill."¹⁹⁸ By defining "insanity" in accordance with the traditional *M'Naghten* test of insanity and "mental illness" in accordance with the Model Penal Code test for insanity,¹⁹⁹ the Alaska and Pennsylvania legislatures have adopted a narrow view of the circumstances in which an insanity defense is appropriate,²⁰⁰ and have demonstrated an evident preference that, when in doubt about the defendant's mental state at the time of the crime, the jury should resolve its doubts in favor of the verdict of "guilty but mentally ill," even though in many other jurisdictions such a defendant would be legally insane.

Many GBMI defendants have attacked on equal protection grounds the rationality of this purported distinction between a state of mental disturbance that renders the defendant "guilty but mentally ill" and mental disturbance sufficient to permit his acquittal on grounds of insanity. These challenges, however, have been repeatedly rejected by the courts.²⁰¹ In *People v. Sorna*,²⁰² for example, a Michigan appellate court declared that the legislature had acted rationally, based on "a need to make experimental classifications 'in a practical and troublesome area,' " in establishing "an intermediate category to deal with situations where a defendant's mental illness does not deprive him of substantial capacity sufficient to satisfy the insanity test but does warrant treatment in addition to incarceration."²⁰³ The court rejected the defendant's argument that the legislative definitions of "insanity" and "mental illness" amounted to a distinction without a difference, declaring, "the fact that these distinctions may not appear clear-cut does not warrant a finding of no rational basis to make them."²⁰⁴ Yet the effect of this "not . . . clear-cut" distinction between one who was insane at the time of an otherwise criminal act and one who was "only" mentally ill must be to make it possible, if not likely, for a court or jury to resolve doubts about the defendant's insanity by picking the "middle ground" of a GBMI verdict. This compromise resolution is particularly likely in a jurisdiction like Michigan which requires that if a jury so requests, it be given an instruction explaining the alternative dispositions of a defendant found not guilty by reason of insanity and a defendant found "guilty but mentally ill."²⁰⁵

¹⁹⁸ See *supra* text accompanying notes 129-31.

¹⁹⁹ See *supra* note 48.

²⁰⁰ See *supra* text accompanying note 44.

²⁰¹ See, e.g., *Taylor v. State*, 440 N.E.2d 1109, 1112-13 (Ind. 1982); *People v. Jackson*, 80 Mich. App. 244, 246, 263 N.W.2d 44, 45 (1977).

²⁰² 88 Mich. App. 351, 276 N.W.2d 892 (1979).

²⁰³ *Id.* at 360, 276 N.W.2d at 896 (citing *McGinnis v. Royster*, 410 U.S. 263, 270 (1973)).

²⁰⁴ *Id.*

²⁰⁵ *People v. Delaughter*, 124 Mich. App. 356, 361, 335 N.W.2d 37, 39 (1983); *People v. Thomas*, 96 Mich. App. 210, 222, 292 N.W.2d 523, 528-29 (Mich. App. 1980). Michigan pattern jury instructions provide two alternative instructions which may be given to the jury concerning the consequences of an insanity acquittal, and one instruction which addresses the consequences of a verdict of "guilty but mentally ill." These instructions are as follows:

[Form No.404. Disposition of [Insane] Defendant]

If you find the defendant committed the act but was not criminally responsible at the time, then he is not guilty by reason of insanity. If you make such a decision, the defendant will be immediately committed to the custody of the Center for Forensic Psychiatry for evaluation of his present mental condition.

[Form No. 405. Disposition of [Insane] Defendant (Alternative)]

Substantial empirical evidence exists to support the likelihood of such juror compromise. In Rita James Simon's work with mock juries considering the insanity defense,²⁰⁶ she found a number of jurors who would have liked the option of finding the defendant "guilty, but in need of medical treatment,"²⁰⁷ as a way of "easing the choice between acquitting the defendant on grounds of insanity and finding him guilty That kind of verdict would permit the jurors to condemn the defendant's behavior and at the same time to grant him a special dispensation," distinguishing him from "the ordinary criminal."²⁰⁸

(1) If you find the defendant committed the act but was not criminally responsible at the time, then he is not guilty by reason of insanity. If you make such a decision, the defendant will be immediately committed to the custody for the Center for Forensic Psychiatry for a period not to exceed sixty days.

(2) During that time, the statute directs that the Center thoroughly examine and evaluate the present mental condition of the defendant in order to reach an opinion as to whether he is mentally ill and requires medical treatment.

(3) Within the sixty-day period, the Center will file a report with the Court, prosecuting attorney and defense counsel. If the report states that the person is not mentally ill or does not require treatment, the defendant shall be discharged [from custody].

(4) If the report finds that the person is mentally ill and does require treatment, the Court may [will] direct the prosecuting attorney to file a petition with the Probate Court for an order of hospitalization or an order of admission to a clinical facility. If the Court so directs, the Center may retain the person pending such hearing.

(5) If, after a hearing before the Probate Court, the defendant is found not to be mentally ill or not to be a person requiring treatment, the defendant shall be discharged [from custody].

(6) However, if the person is ordered hospitalized, admitted to a facility or otherwise to receive treatment, he shall not be discharged or placed on leave without prior consultation with the Center for Forensic Psychiatry. Once hospitalized, the defendant will be hospitalized until his mental condition is such that he no longer is judged to require treatment.

[Form No. 407. Disposition of Defendant Found Guilty but Mentally Ill]

(14) If you find the defendant committed the crime while responsible but mentally ill, then you may return a verdict of guilty but mentally ill. This verdict may be of the crime charged [or any lesser included offense].

(15) In most respects a verdict of guilty but mentally ill is the same as a verdict of guilty. The defendant may be imprisoned for the same period of time as he would if he were found guilty. [Alternatively, he could be placed on probation for a period of time the same as or greater than he would be if found guilty.] The distinction is that the verdict of guilty but mentally ill imposes upon the Department of Corrections an obligation to provide appropriate psychiatric treatment during the period of imprisonment or while the defendant is on probation.

G. GILLESPIE, 2 MICHIGAN CRIMINAL LAW AND PROCEDURE 380-82 (2d ed. 1978 & 1984 Cumulative Supplement).

Alaska goes one step further than Michigan and *requires* that the jury be advised of the alternative dispositions of a defendant found "guilty but mentally ill" and a defendant found "not guilty by reason of insanity." ALASKA STAT. § 12.47.040(c) (1984). Pennsylvania also requires that the jury be instructed on the consequences of an insanity acquittal. *Commonwealth v. Mulgrew*, 475 Pa. 271, 277-78, 380 A.2d 349, 352 (1977).

²⁰⁶ To avoid the constitutional questions which would be raised by invading the sanctity of the jury room, Simon used jurors drawn from actual jury rolls in Chicago, St. Louis, and Minneapolis. The juries heard tapes of an insanity defense trial. The trials varied in the definition of insanity employed, the detail of psychiatric testimony presented, and in whether or not the jury was told the consequences of conviction and acquittal. R. SIMON, *THE JURY AND THE DEFENSE OF INSANITY* 213-14 (1967) [hereinafter cited as R. SIMON].

²⁰⁷ *Id.* at 96.

²⁰⁸ *Id.* at 178.

Simon's work has been borne out in the real world as well. In *United States v. Patrick*,²⁰⁹ the defendant was charged with first degree murder in the stabbing death of his mother. His defense was insanity due to LSD-induced hallucinations. After deliberating for nearly a day, the jury informed the court that it was deadlocked, with ten jurors in favor of a verdict of guilty, and two jurors in favor of a not guilty by reason of insanity verdict. After the court urged the jury to continue its deliberations in hopes of reaching agreement,²¹⁰ the jury asked the court if it could "make a recommendation of psychiatric treatment for the defendant along with a verdict of murder in the second degree."²¹¹ The court stated that it could. Fifteen minutes later the jury rendered such a verdict. In reversing the defendant's conviction, the D.C. Circuit Court of Appeal focused on the critical importance of keeping separate the questions of a defendant's criminal responsibility and the appropriate disposition if he was found responsible. The court stressed that "where the sole issue [in a case] is the question of criminal responsibility, the potential for undermining a jury verdict by allowing a recommendation of psychiatric treatment is obvious." The court emphasized that the judgment made in an insanity case is a moral one — "whether a person was sufficiently able to control his behavior so that he may justly be held responsible for committing an anti-social act." According to the court, a jury inquiry into the consequences of a particular verdict would undermine their ability to make that moral judgment, and thus would be inappropriate.²¹²

Courts have also frequently recognized the difficulty which jurors may have in acquitting a defendant on grounds of insanity when he has committed a particularly heinous act.²¹³ The difficulty that a trier of fact may have in properly assessing whether the defendant was "merely" mentally ill or truly insane at the time of the offense is compounded by the passage of time and the frequent use of psychiatric treatment, including psychotropic drugs, to "stabilize a mentally ill defendant so that he is calm enough to be found competent to stand trial."²¹⁴ Thus, by the time these defendants do stand trial, they often convey at least the appearance of normality, making it more

²⁰⁹ 494 F.2d 1150 (D.C. Cir. 1974).

²¹⁰ *Id.* at 1153. The court instructed the jury in accordance with the now-disfavored "Allen" charge. *Id.* at 1153, n.4.

²¹¹ *Id.* at 1153 (quoting trial court transcript at 531).

²¹² *Id.* at 1154 (footnotes omitted).

²¹³ See, e.g., *United States v. Bennett*, 460 F.2d 872, 881 (D.C. Cir. 1972). Cf. *Beck v. Alabama*, 447 U.S. 625, 627 (1980) (court struck down Alabama's death penalty statute, which prohibited the jury from being instructed on the crime of felony murder as a lesser included offense of robbery-intentional murder, which carried a mandatory penalty of death). In *Beck*, the court commented upon the reality of jury concern with letting dangerous individuals escape all criminal responsibility:

Jurors are not expected to come into the jury box and leave behind all that their human experience has taught them. The increasing crime rate in this country is a source of concern to all Americans. To expect a jury to ignore this reality and to find a defendant innocent and thereby set him free when the evidence established beyond doubt that he is guilty of some violent crime requires of our juries clinical detachment from the reality of human experience"

447 U.S. at 642 (citing *Jacobs v. State*, 361 So. 2d 640, 657-62 (Ala. 1978) (Shores, J., dissenting), cert. denied, 439 U.S. 1122 (1979)).

²¹⁴ Turner and Ornstein, *supra* note 2, at 43. This problem of "synthetic sanity" has recently prompted several state supreme courts to hold that a defendant may not be forcibly medicated in order to be competent to stand trial if to do so would deprive the jury of the opportunity to observe his demeanor as it was at the time of the offense. See, e.g., *Commonwealth v. Louraine*, 390 Mass. 28, 36-37, 453 N.E.2d 437-46 (1983); *State v. Hayes*, 118 N.H. 458, 389 A.2d 1379, 1382 (1978).

difficult for them to persuade a court or jury of their insanity at the time of the offense. "When the defendant is on drugs, the jury never gets to see him as he was at the time of the incident in question, or as he was when the psychiatrist examined him out of court."²¹⁵

The combination of all these factors — the lack of a clearly articulated distinction between mental illness and insanity, the defendant's potentially misleading demeanor at trial, and the conflicting desires of the trier of fact to provide treatment and at the same time keep violent individuals off the streets — can easily lead a court or jury to elect the GBMI verdict even when substantial evidence is presented of the defendant's insanity.²¹⁶ This verdict is attractive because, by convicting the defendant, the jury can condemn his behavior and keep a possibly dangerous individual in custody. The jury may believe, however, that by also finding the defendant mentally ill, their verdict will ensure special treatment and will carry a lesser stigma than a regular "guilty" verdict.²¹⁷

It is axiomatic that there is a fundamental distinction between therapy and punishment:

Therapy is not a response to person who is at fault. Therapy is normally associated with compassion for what one undergoes, not resentment for what one has illegitimately done

[W]ith therapy, unlike punishment, we do not seek to deprive the person of something acknowledged as a good, but seek rather to help and to benefit the individual who is suffering by ministering to his illness in the hope that the person can be cured

[T]he conceptions of "paying a debt" or "having a debt forgiven" or pardoning have no place in a system of therapy.²¹⁸

Under the GBMI verdict, the distinction between therapy and punishment is impermissibly blurred. The fact that the GBMI verdict comes into play only when a defendant invokes the insanity defense, and is not made applicable to defendants who do not assert mental incapacity as a defense to a crime although they may in fact be mentally ill, is evidence of a legislative purpose to punish, rather than treat, individuals who assert a defense of insanity.²¹⁹ The GBMI statute accomplishes the police power goal of keeping dangerous people off the streets, but disguises this purpose in the rhetoric of treatment. The GBMI verdict's "moral sleight-of-hand"²²⁰ improperly confuses treatment with punishment, and makes it possible for judges and juries to opt for a GBMI verdict, rather than a verdict of not guilty by reason of insanity, under the mistaken impression that they will thereby guarantee psychiatric treatment, as well as lengthy incarceration, for the mentally ill offender.

Currently available data on the possibility of this type of jury compromise is equivocal. In Michigan, the number of insanity acquittals has remained relatively constant before and after the enactment of the GBMI verdict. Between 1967 and 1974 an average

²¹⁵ Turner and Ornstein, *supra* note 2, at 43.

²¹⁶ Judge Barrington Parker, who presided over the Hinckley trial, has assailed the "guilty but mentally ill" verdict as "an open invitation to the jury to return a compromise verdict . . ." Lauter, *A Reform of the Insanity Plea Likely*, 5 NAT'L L. J. 5 (April 25, 1983) (quoting Judge Parker).

²¹⁷ Grostic, *The Constitutionality of Michigan's Guilty But Mentally Ill Verdict*, 12 J.L. REFORM 188, 196 (1978).

²¹⁸ H. MORRIS, ON GUILT AND INNOCENCE 38-39 (1976).

²¹⁹ See *supra* text accompanying note 112.

²²⁰ ABA, Report to the House of Delegates, *supra* note 62, at 9.

of forty persons was acquitted on grounds of insanity each year, although there were seventy-eight in 1974, the year before the GBMI verdict was enacted.²²¹ In 1975, the first year in which the GBMI verdict was law, the number of insanity acquittals fell to thirty-three,²²² but since then it has risen to an average of fifty-four per year for the period 1976-1982.²²³ Given that only forty percent of the GBMI verdicts are the result of a trial, and that the number of successful insanity pleas has been fairly constant before and after the passage of the GBMI law, it has been argued that the GBMI verdict has not undercut the ability of criminal defendants to present a successful insanity defense.²²⁴

This argument, however, overlooks two critical factors. First, the legal definition of insanity was itself changed in 1975, from a variation of M'Naghten²²⁵ plus "irresistible impulse"²²⁶ before the GBMI verdict was enacted, to the A.L.I. Model Penal Code definition²²⁷ thereafter.²²⁸ Second, the number of pre-trial referrals for psychiatric evaluation of defendants who wished to assert an insanity defense skyrocketed after 1975,²²⁹ rising from 401 in 1976 to 1,122 in 1980.²³⁰ Both these factors — a more liberal definition of insanity and a much greater number of defendants asserting an insanity defense and receiving a pre-trial psychiatric evaluation — would lead to a prediction of an *increase* in the number of insanity acquittals.²³¹ Thus, the sharp reduction in the number of insanity

²²¹ Criss and Racine, *supra* note 2, at 265.

²²² *Id.*

²²³ Smith and Hall, *supra* note 2, at 93, 107.

²²⁴ *Id.* at 93, 100-01.

²²⁵ See *supra* note 41.

²²⁶ The "irresistible impulse" test embodies the idea that the defendant "lacks sufficient will power to resist the impulse to commit the charged act, by reason of mental unsoundness," and is used as a supplement to the M'Naghten rule in a number of jurisdictions. A. DEUTSCH, *THE MENTALLY ILL IN AMERICA* 397 (2d ed. 1949).

Prior to 1975, the test for insanity in Michigan was stated thus:

"[W]hether or not he [the defendant] exhibited evidences which leave a reasonable doubt in your minds of the soundness of his mind in that transaction. Did he know what he was doing, — whether it was right or wrong? and if he did, then did he know or did he have the power, the will power, to resist the impulse occasioned?"

People v. Durfee, 62 Mich. 487, 494, 29 N.W. 109, 112 (1886), *cited in* *People v. Martin*, 386 Mich. 407, 416, 192 N.W.2d 215, 219 (1971). As explained by the court in *Martin*, "The Michigan test encompassed[d] . . . not only a sudden overpowering, irresistible impulse but any situation or condition in which the power, 'the will power' to resist, is insufficient to restrain commission of the wrongful act." 386 Mich. at 418, 192 N.W.2d at 220.

²²⁷ 386 Mich. at 418, 192 N.W.2d at 220. See *supra* note 48.

²²⁸ See *supra* note 122 and accompanying text.

²²⁹ *Michigan GBMI Verdict*, *supra* note 109, at 256. Such pre-trial evaluations were made mandatory by the legislature in the same year that it enacted the GBMI verdict. *Id.*

²³⁰ *Id.*

²³¹ Although there is no experimental data available comparing the frequency of NGI verdicts under the ALI and M'Naghten plus "irresistible impulse" formulas, there is such data comparing the results when the M'Naghten and *Durham* tests were used. The *Durham* test is, of course, the rule set forth in *Durham v. United States*, 214 F.2d 862, 874-75 (D.C. Cir. 1954), see *supra* notes 46-47. In *THE JURY AND THE DEFENSE OF INSANITY*, Simon found that experimental jurors were twelve percent more likely to vote for acquittal under the *Durham* rule than the M'Naghten test. R. SIMON, *supra* note 206, at 216. In addition, data from the District of Columbia show that in the seven years after *Durham* was decided in 1954, there was "a fifteen-fold increase in the proportion of defendants who were acquitted on grounds of insanity." *Id.* at 204. While there is certainly a difference between the terminology used in *Durham* and the ALI tests, it is generally thought that both are more liberal in their conception of insanity than the M'Naghten rule. The addition of the "irresistible impulse" concept in the old Michigan test would not be likely to have significantly narrowed the difference

acquittals in the year that the GBMI law became effective, and, indeed, the low numbers of insanity acquittals during the two following years,²³² strongly suggests that the GBMI option has in fact undermined the ability of defendants to make out a case of insanity.

What is even more important than this data in the aggregate, however, is the effect in a particular trial of the presence of the GBMI verdict as a choice for the court or jury. For since, as will be demonstrated, the insanity defense is constitutionally required, then *in any case* in which the defendant's ability to present a successful insanity defense is undercut by the meretricious lure of the GBMI verdict, and he is in fact found "guilty but mentally ill" rather than not guilty by reason of insanity, he has been denied his constitutional right to due process of law.

III. THE INSANITY DEFENSE IS CONSTITUTIONALLY REQUIRED

Whether or not the verdict of not guilty by reason of insanity is constitutionally mandated has been discussed infrequently by courts and legal scholars. The Supreme Court has never directly addressed this issue; however, five of the six state courts that have considered the constitutional basis of the insanity defense have found it to be constitutionally compelled.

Those Supreme Court decisions that have discussed the insanity defense have focused on its procedural aspects. In *Davis v. United States*,²³³ the Supreme Court reversed a defendant's murder conviction on the ground that the jury was not instructed that if it had a reasonable doubt as to the defendant's sanity at the time of the offense it must acquit him. In so reversing, the Supreme Court appeared to assume, although it did not expressly state, that the insanity defense was constitutionally required, because "the crime of murder necessarily involves the possession by the accused of such mental capacity [sanity] as will render him criminally responsible for his acts."²³⁴

In *Leland v. Oregon*,²³⁵ however, the Supreme Court characterized the *Davis* decision as merely "the rule to be followed in federal courts," without constitutional underpinnings,²³⁶ and held that a state could constitutionally require a defendant to prove his insanity beyond a reasonable doubt without running afoul of the due process clause of the fourteenth amendment. The *Leland* Court did not address the question whether the insanity defense itself is constitutionally mandated.²³⁷

Most recently, in *Ake v. Oklahoma*,²³⁸ the Court held that the fourteenth amendment's guarantee of fundamental fairness in criminal trials required that psychiatric assistance be provided an indigent defendant asserting an insanity defense. Specifically, the Court held

between the M'Naghten and A.L.I. results, since the Michigan test retained the essential cognitive emphasis of the M'Naghten rule.

²³² Criss and Racine, *supra* note 2, at 265; Smith and Hall, *supra* note 2, at 107, Appendix A, Table A.

²³³ 160 U.S. 469 (1895).

²³⁴ *Id.* at 485.

²³⁵ 343 U.S. 790 (1952).

²³⁶ *Id.* at 797.

²³⁷ *Id.* at 800. In *Rivera v. Delaware*, 429 U.S. 877 (1976), the Supreme Court dismissed, for want of a substantial federal question, an appeal from a defendant convicted of second degree murder who challenged the Delaware law which made insanity an affirmative defense. Justice Brennan, dissenting, argued that because sanity is an essential aspect of the requirement of mens rea, it must be proved by the state beyond a reasonable doubt. 429 U.S. at 878-79 (Brennan, J., dissenting) (citing *In re Winship*, 397 U.S. 358 (1970), and *Mullaney v. Wilbur*, 421 U.S. 684 (1975)).

²³⁸ 105 S. Ct. 1087 (1985).

that such a defendant must be provided, at state expense, with a psychiatrist to examine him and testify at trial concerning his mental state at the time of the offense.²³⁹ The Court held that such expert assistance was constitutionally mandated for two reasons. First, the Court held that the state has no interest in convicting a defendant if in fact he was insane at the time of the crime.²⁴⁰ Second, the Court found that without the benefit of expert psychiatric testimony concerning the defendant's mental state the risk of an inaccurate resolution of sanity issues is extremely high.²⁴¹ Together these two factors led the Court to conclude that, "unlike a private litigant, a State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained."²⁴²

Despite the Supreme Court's failure to address directly the question of whether the insanity defense is constitutionally compelled, a strong argument can be made that it is so compelled, as part of our fundamental "concept of ordered liberty,"²⁴³ and that therefore any statute or rule of criminal procedure undercutting a defendant's right to present an insanity defense is unconstitutional. To appreciate this contention, it is necessary to put the insanity defense in its proper historical and jurisprudential context.

At the heart of the criminal law is the principle that moral blameworthiness is an essential predicate to legal responsibility. The requirement of moral blameworthiness finds expression in the concept of *mens rea*,²⁴⁴ a prohibited mental state, and in the notion of a *voluntary* act,²⁴⁵ the *actus reus*,²⁴⁶ which is also an essential element of every crime. An examination of the structure of the criminal law as a whole reveals that the insanity defense describes but one of the many situations in the criminal law in which a person who does an act prohibited by a penal statute is not held responsible for the commission of that act, because his conduct is either excused or justified. Just as a person acting under mistake of fact is not held liable if that mistaken belief precluded him from forming the requisite mental state required for a particular crime,²⁴⁷ just as a person acting under duress is not held criminally responsible,²⁴⁸ and just as a person who shoots another in self-defense is not liable,²⁴⁹ so too the insanity acquittee is exempted from a criminal penalty for his admittedly unlawful act because he lacked the moral blameworthiness necessary to convict.

Even the defense of provocation, which will, in most jurisdictions, reduce a homicide from murder to manslaughter despite the accused's intent to kill or cause great bodily

²³⁹ *Id.* at 1092.

²⁴⁰ *Id.* at 1094-95.

²⁴¹ *Id.* at 1096.

²⁴² *Id.* at 1095.

²⁴³ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

²⁴⁴ *See supra* note 27.

²⁴⁵ *See, e.g.,* *People v. Newton*, 8 Cal. App. 3d 359, 376, 87 Cal Rptr. 394, 403 (1970); MODEL PENAL CODE § 2.01(1) (1982).

²⁴⁶ The *actus reus* is a voluntary act or omission (under circumstances in which one has a legal duty to act) which is an essential element of every crime. A person is not blameworthy if he does not commit a prohibited act or omission. Under our criminal law one may not be punished for evil thoughts alone. MODEL PENAL CODE § 2.01 (1982); S. KADISH, S. SCHULHOFER, & M. PAULSON, *supra* note 27, at 257-59.

²⁴⁷ *See, e.g.,* *People v. Mayberry*, 15 Cal. 3d 143, 154, 542 P.2d 1337, 125 Cal. Rptr. 745, 752 (1975); MODEL PENAL CODE § 2.04 (1982).

²⁴⁸ *See, e.g.,* MODEL PENAL CODE § 2.09 (1982).

²⁴⁹ *See, e.g.,* *State v. Wanrow*, 88 Wash. 2d 221, 235-36, 559 P.2d 548, 556 (1977); MODEL PENAL CODE § 3.04 (1982).

harm to the victim,²⁵⁰ is based upon the fundamental principle of free will and moral blameworthiness. The provocation of the victim reduces the seriousness of the defendant's crime because it is believed that due to these provoking circumstances, circumstances to some degree outside his control, he is less blameworthy than one who kills without such provocation.²⁵¹ So too in the case of the insanity acquittee, circumstances beyond his control, although they occur within his own mind, make it inappropriate to impose blame for his conduct.

All of the tests for insanity, from M'Naghten to the Model Penal Code,²⁵² are predicated on this fundamental principle of blameworthiness, that a person ought not to be held responsible if his conduct was not the result of his exercise of free will or a conscious choice to do wrong. Each test is an attempt to give a definition of that involuntariness, of a lack of ability to choose, which, it is thought, appropriately excludes from responsibility those who could not elect to do right or wrong, those who did not exercise their free will in embarking upon a criminal course of conduct.

Thus, to say that the insanity defense is an anomaly in the grand scheme of our criminal law is simply wrong. To the contrary, our criminal justice system requires moral blameworthiness for *every* act subject to criminal sanction, save those which have been made strict liability offenses. "The contention that an injury can amount to a crime only when inflicted by intention is . . . as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."²⁵³ This principle, that moral blameworthiness is an essential predicate to a criminal conviction, was established early in English common law,²⁵⁴ and was carried over into the laws of the colonies and the new republic, even without express statutory enunciation.²⁵⁵

It is not surprising, then, that all but one of the six state courts which have considered the constitutional basis of the insanity defense have found it to be constitutionally re-

²⁵⁰ See, e.g., *Maier v. People*, 10 Mich. 212 (1862); *Director of Public Prosecutions v. Camplin*, House of Lords, [1978] 2 All E.R. 168; MODEL PENAL CODE § 210.3 (1982).

²⁵¹ The defense of manslaughter is designed for those "cases of intentional homicide where the situation is as much to blame as the actor." MODEL PENAL CODE § 210.3 comment (1982). Put another way, "the greater the provocation . . . the more ground there is for attributing the intensity of the actor's passions and his lack of self-control . . . to the extraordinary character of the situation in which he was placed rather than to any extraordinary deficiency in his own character." Michael and Wechsler, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 1261, 1281-82 (1937). Both these sources are cited in S. KADISH, S. SCHULHOFER, & M. PAULSEN, *supra* note 27, at 439-41.

²⁵² See *supra* text accompanying notes 41-48.

²⁵³ *Morrisette v. United States*, 342 U.S. 246, 250 (1952); *accord*, *Durham v. United States*, 214 F.2d 862, 876 (D.C. Cir. 1954).

²⁵⁴ See *supra* text accompanying notes 23-33.

²⁵⁵ As the Supreme Court noted in *Morrisette v. United States*:

Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil. As the states codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation. Courts, with little hesitation or division, found an implication of the requirement as to offenses that were taken over from the common law.

342 U.S. at 251-52 (footnotes omitted). Some states have explicitly adopted the common law of England as controlling precedent so long as it does not conflict with existing federal or state statutes or constitutional provisions. See, e.g., UTAH CODE § 68-3-1 (1978).

quired, recognizing it as an aspect of the fundamental fairness guaranteed by the due process clause of the fourteenth amendment or comparable state constitutional provisions. In *State v. Strasberg*,²⁵⁶ for example, the Washington Supreme Court declared that a state law which eliminated insanity as a defense was violative of the defendant's right to due process of law and his right to jury trial, both of which were guaranteed by the Washington constitution. The court rejected the prosecution's therapeutic justification for the elimination of the insanity defense, namely that "because of modern humane methods in caring for . . . those convicted of crime, there is no longer any reason for taking into consideration the element of will on the part of those who commit prohibited acts, when their guilt is being determined for the purpose of . . . restraint and treatment."²⁵⁷ Instead, the court held that the insanity defense was an essential part of the common law of England and America, a necessary concomitant of the criminal law's mens rea requirement and of the defendant's right to trial by jury, and thus could not constitutionally be abrogated by the legislature.²⁵⁸

Likewise, in *Sinclair v. State*,²⁵⁹ the Mississippi Supreme Court struck down a state statute which eliminated insanity as a defense to murder, but provided that evidence of insanity could be offered to support a verdict of "guilty . . . but insane," which would reduce the sentence for murder from death to life imprisonment. The court held that the law violated the Mississippi Constitution's due process clause, which provides: "No person shall be deprived of life, liberty, or property except by due process of law."²⁶⁰ In addition, one concurring justice found the new law to violate the due process and equal protection clauses of the state and federal constitutions,²⁶¹ and the constitutional prohibition against cruel and unusual punishment, on the ground that it was cruel to subject an insane person to life imprisonment.²⁶²

The Louisiana Supreme Court has held that the insanity defense is constitutionally required in two cases. In the early case of *State v. Lange*,²⁶³ the court struck down a state statute which withdrew the question of the determination of insanity from the courts to a lunacy commission composed of the superintendents of Louisiana's state mental hospitals. The court held this statute to violate provisions of the state constitution which gave exclusive jurisdiction of criminal cases to the courts and which guaranteed the right to trial by jury. In a second case almost fifty years later the court found that juveniles had a constitutional right to present an insanity defense.²⁶⁴ According to the court, "the denial

²⁵⁶ 60 Wash. 106, 110 P. 1020 (1910).

²⁵⁷ *Id.* at 123, 110 P. at 1025.

²⁵⁸ *Id.* at 112-15, 110 P. at 1021-23. See also *Morrisette*, 342 U.S. at 250, and *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. 272, 276-77 (1855). In *Murray's Lessee* the Supreme Court held that in determining whether a legislative enactment violates due process of law, courts "must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." 59 U.S. at 277.

²⁵⁹ 161 Miss. 142, 132 So. 581 (1931).

²⁶⁰ *Id.* at 153, 132 So. at 582 (quoting MISS. CONST. OF 1890, § 14).

²⁶¹ *Id.* at 164-71, 132 So. at 586-88 (Ethridge, J., concurring). He found that the equal protection clause had been violated since a defendant who lacked malice aforethought, the mental state required for murder, could be found guilty only of manslaughter, which carried a maximum term of twenty years, while an insane defendant, who lacked all necessary mens rea, could be sentenced to life imprisonment. *Id.* at 167, 132 So. at 587 (Ethridge, J., concurring).

²⁶² *Id.* at 161, 132 So. at 584 (Ethridge, J., concurring).

²⁶³ 168 La. 958, 966, 123 So. 639, 642 (1929).

²⁶⁴ *In re Causey*, 363 So. 2d 472 (La. 1978).

of the right to plead insanity, with no alternative means of exculpation or special treatment for an insane person unable to understand the nature of his act, violates the concept of fundamental fairness implicit in the due process guaranties."²⁶⁵

The Minnesota Supreme Court has also held that the right of a defendant to assert an insanity defense is guaranteed by the due process clauses of both the state and federal constitutions.²⁶⁶ In *State v. Hoffman*, the court found that a criminal defendant has a fundamental right to present an insanity defense, and that this right was not impaired by jury instructions which permitted the jury to consider evidence of the defendant's mental state solely to determine if the M'Naghten test of insanity was satisfied.²⁶⁷

Only in the case of *State v. Korell*²⁶⁸ did a state supreme court uphold a legislative abolition of the insanity defense. In *Korell*, the Montana Supreme Court rejected the defendant's challenge to the Montana legislature's elimination of the "traditional" defense of insanity. In so ruling, the court placed heavy emphasis on the provisions in the relevant statute requiring the consideration of the defendant's mental state at the time of the offense, both at the trial, under the rubric of mens rea,²⁶⁹ and at sentencing, where the court was required to evaluate the defendant's mental state at the time of the crime in accordance with the Model Penal Code test of insanity and commit him to "an appropriate institution for custody, care, and treatment" if he was insane at that time.²⁷⁰

Except for *Korell* then, in every case in which a state court has considered whether the insanity defense is constitutionally compelled, the court has held that the insanity defense is constitutionally required as a necessary concomitant of either the right to due process of law or the right to jury trial. Such a conclusion seems inescapable. The insanity defense has historically been an integral aspect of the criminal law's requirement of moral blameworthiness as a precondition to the imposition of a penal sanction.²⁷¹ The right to assert an insanity defense in a criminal trial must be recognized as a liberty interest "so rooted in the traditions and conscience of our people as to be ranked as fundamental,"²⁷² and therefore, entitled to the protection of the due process clause.²⁷³

²⁶⁵ *Id.* at 474.

²⁶⁶ *State v. Hoffman*, 328 N.W.2d 709 (Minn. 1982).

²⁶⁷ 328 N.W.2d at 715.

²⁶⁸ —, Mont. —, 690 P.2d 992 (1984).

²⁶⁹ *Id.* at —, 690 P.2d at 1000.

²⁷⁰ *Id.* at —, 690 P.2d at 997.

²⁷¹ See *supra* text accompanying notes 23-33.

²⁷² *Griswold v. Connecticut*, 381 U.S. 479, 487 (1965) (Goldberg, J., concurring) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

²⁷³ Justice Goldberg stated in *Griswold* that "the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights." 381 U.S. at 486 (Goldberg, J., concurring). In agreeing with the Court's striking down of a Connecticut statute which prohibited physicians from prescribing contraceptive devices to married women, Justice Goldberg relied heavily on the ninth amendment's express provision that, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." *Id.* at 488 (Goldberg, J., concurring). He noted that the amendment had been added to the Bill of Rights to quiet "fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected." *Id.* at 488-89 (Goldberg, J., concurring). Just as with the case of the right of marital privacy deemed fundamental in *Griswold*, so too is the right of a criminal defendant to present a defense which goes to the question of his moral blameworthiness, his ability to choose to do good or evil, a fundamental liberty right which must be found to be constitutionally based, despite its lack of specific enumeration in the Constitution. See *Duncan v. Louisiana*, 391 U.S. 145, 148-55 (1968) (historical analysis of the role of trial by jury in the Anglo-American criminal law demonstrated its fundamental importance in safeguarding the essential liberty interest of criminal defen-

The GBMI verdict undercuts a defendant's right to present an insanity defense just as surely as did any of the state statutes struck down in *Lange*, *Sinclair*, or *Strasberg*. Established in an attempt to reach people who would otherwise "fall through the cracks of the criminal justice system" by virtue of an insanity acquittal,²⁷⁴ the GBMI statutes provide vague and deliberately confusing definitions of the distinction between being "insane" and "mentally ill," and at the same time make it extremely attractive to the trier of fact to return a GBMI verdict instead of a verdict of not guilty by reason of insanity, by holding out the twin promises of incarceration and treatment. "A judge [or juror] can satisfy the demands of the press and the public to get the criminals off the street and at the same time salve his conscience with the belief that he is helping the offender by . . . sending him to prison for the purpose of treatment or cure."²⁷⁵ But, as shown earlier, the promise of treatment for GBMI prisoners has been unfulfilled, leaving incarceration and the protection of public safety as the only purpose actually served by the GBMI verdict. While protection of the public is a reasonable goal — and indeed was one of the major functions of the insanity defense until ten or fifteen years ago — it is constitutionally impermissible to achieve it by depriving criminal defendants of both a meaningful right to present an insanity defense and the right to treatment. "To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane and therapeutic reasons, and then fail to provide adequate treatment, violates the very fundamentals of due process."²⁷⁶ Thus, the GBMI verdict is unconstitutional, violating a criminal defendant's constitutional right to due process and equal protection of the laws, and denying a convicted offender his right to adequate psychiatric treatment.

IV. CONDITIONAL RELEASE AS AN ALTERNATIVE TO THE GUILTY BUT MENTALLY ILL STATUTES

Much of the recent animosity toward the insanity defense has been expressed in the idea that insanity acquittees are in some way "getting off," escaping liability for the punishment they so richly deserve through the legal loophole of the insanity defense. The impetus for the enactment of the GBMI statutes was a growing public concern that persons found not guilty by reason of insanity were being released prematurely, without an adequate assessment either of their mental competence or, more significantly, of their potential for dangerous criminal actions in the future. The GBMI statutes were passed in an effort to reduce the number of persons found not guilty by reason of insanity and thereby, presumably, to protect the public. But, as pointed out above, the GBMI statutes represent a misguided and constitutionally defective attempt to deal with the relationship between crime and mental illness.

In assessing alternatives to the GBMI statutes, two separate issues must be addressed. The first deals with the function of the insanity defense within the framework of our criminal law. Since, as has been demonstrated, the insanity defense is not an anomaly within the Anglo-American criminal law, but is entirely consistent with the fundamental principles of that jurisprudence, it needs to be maintained to insure the coherence of the

dants); see also *In re Winship*, 397 U.S. 358, 363-64 (1970) (proof beyond a reasonable doubt held to be constitutionally required as an essential part of due process of law, even though it was not enumerated in the Constitution or the Bill of Rights).

²⁷⁴ See *supra* text accompanying notes 106-07.

²⁷⁵ Forer, *supra* note 172, at 66.

²⁷⁶ *Wyatt v. Stickney*, 325 F. Supp. 781, 785 (M.D. Ala. 1972).

criminal law as a whole. At the same time, however, the disposition of insanity acquittees must be considered. A preferred alternative to the GBMI statutes would retain the insanity defense as a means of excusing from criminal responsibility that rare individual who ought not to be blamed for his conduct, while at the same time safeguarding the public from persons who may pose a risk of future dangerousness.

Such an alternative may be the approach, taken by a number of states, of the conditional release of insanity acquittees. In contrast with the GBMI statutes, in which the emphasis is on a change in the verdict which may be rendered at an insanity defense trial, the emphasis in conditional release is on the post-verdict stage: on what happens after a judgment of not guilty by reason of insanity is rendered. The GBMI statutes seek to protect the public by limiting the number of persons who may be found not guilty by reason of insanity. The conditional release approach, on the other hand, seeks to assure the public's protection by providing meaningful psychiatric treatment and effective supervision of insanity acquittees, through a program of graduated, step-by-step relaxation of controls which is designed with both the acquittee's mental health and his apparent dangerousness in mind.

The theory behind conditional release is relatively straightforward. Psychiatrists have long recognized the difficulty in predicting the future dangerousness of an incarcerated individual,²⁷⁷ simply because the environment in which the psychiatrist sees this person is so different than that of the outside world. What may be a successful adjustment to the constraints of institutional life may be maladaptive behavior for the real world. As one court has put it, "[G]ood patients may be bad risks."²⁷⁸

An insanity acquittee may become adjusted to life inside the hospital But [this] adjustment . . . gives no assurance that [he] . . . would refrain from reestablishing [his] . . . undesirable behavior patterns if released. In fact, the more completely a person accepts the regulated environment of the hospital, the more unfitted he may be to deal with the demands of an unregulated free life.²⁷⁹

²⁷⁷ Indeed, today there is nearly universal agreement among both psychiatrists and lawyers that psychiatric predictions of dangerousness are quite inaccurate and unreliable. For example, the American Psychiatric Association's Task Force on Clinical Aspects of the Violent Offender has declared: "[J]udgments [of dangerousness] are fundamentally of very low reliability, much as would be the prediction of 'altruism' or other human behaviors." TASK FORCE REPORT #8, Clinical Aspects of the Violent Offender 23 (1974) [hereinafter cited as TASK FORCE REPORT].

Similarly:

[There] is a large and growing body of research dramatically demonstrating that when a group of prisoners or mental patients who have been predicted to be violent are nonetheless released into the community, the majority, frequently the vast majority, do not commit the violent behavior expected of them *The persistence of this finding is itself remarkable: no study has ever found prediction to be more accurate than inaccurate.*

Monahan, *Prediction Research and the Emergency Commitment of Dangerous Mentally Ill Persons: A Reconsideration*, 135 AM. J. PSYCHIATRY 198, 199 (1978) (emphasis added).

Despite the skepticism with which a growing number of psychiatrists, social scientists, and lawyers view predictions of future dangerousness, some jurists still find such predictions persuasive. See, e.g., *Barefoot v. Estelle*, 463 U.S. 880 (1983) (Supreme Court upheld Texas' use of psychiatric prediction of future dangerousness as a factor to be considered in determining whether the death penalty ought to be imposed), *reh'g denied*, 464 U.S. 874 (1983).

²⁷⁸ *State v. Carter*, 64 N.J. 382, 403, 316 A.2d 449, 461 (1974).

²⁷⁹ *Weihofen, supra* note 173, at 864. *Accord*, K. BURKHART, *WOMEN IN PRISON* 132 (1973).

Conversely, a patient who is aggressive, independent, and questioning of authority may well be better equipped to handle life in normal society.²⁸⁰

Recognizing this predictive problem, courts in a number of states have attempted to reconcile the public's concern about the premature release of insanity acquittees, who are perceived as being more dangerous than other offenders because of their mental illness,²⁸¹ with the acquittees' liberty interest in being free from state custody if they are no longer mentally ill or dangerous.²⁸² In a conditional release program, the court and the treating psychiatrist have an opportunity to observe the acquittee's behavior as he moves from greater to lesser restrictions on his liberty, and can thereby assess more accurately the likelihood that the acquittee will engage in violent actions if he is released without restraint into the community. A good conditional release program provides a

built-in graded system wherein a person could be sent from a maximum security to a moderate security to a civil hospital to a halfway house, have the options of out-patient treatment under mandate, so that the psychiatrists . . . who are treating the person and . . . testifying to the judge who maintains jurisdiction over the case . . . would have the option of evaluating the person in various degrees of security . . .²⁸³

The therapy-centered approach of conditional release makes good financial sense as well. In New Jersey, for example, a good conditional release program will provide the

²⁸⁰ *Id.* Cf. Flynn, *Psychotropic Drugs and Informed Consent*, 30 HOSP. & COMMUNITY PSYCHIATRY 51, 53 (1979).

²⁸¹ The public is more afraid of insanity acquittees than other persons charged with crime because the former are viewed as both "mad" and "bad," and therefore unpredictable in their violence. But the limited data which is available shows that many insanity acquittees are acquitted of non-violent crimes and that the overwhelming majority of mentally ill criminals who have been predicted to be dangerous turn out not to be so.

In New Jersey, for example, "a survey of insanity acquittals during the years 1974-1982 . . . showed that deaths were involved in less than one-third of all cases. Interestingly, the plea was also raised in cases of non-violent offenses such as writing false checks, carrying an unloaded starter's pistol, and drug use." Rodriguez letter, *supra* note 2. See also Pasewark, *Insanity Plea: A Review of the Research Literature*, 9 J. PSYCHIATRY & L. 357, 366 (1981). In Oregon, "only about 5 percent of the . . . insanity acquittees were acquitted of murder, with assault and less serious crime being the bulk of the cases." *Insanity Hearings*, *supra* note 80, at 470 (testimony of Dr. John Monahan).

As to the consequences of releasing the criminally insane, perhaps the most startling results were obtained in Operation Baxstrom, the release of New York prisoners mandated by the Supreme Court's decision in *Baxstrom v. Herold*, 383 U.S. 107 (1966). The decision in *Baxstrom* led to the transfer of 967 inmates of hospitals for the criminally insane to regular civil hospitals. Ultimately, some of these were returned to the community in accordance with existing civil commitment and release procedures. "These patients were considered to be among the most dangerous in the state and were expected to display their dangerousness both in the civil hospitals to which they were transferred and in the community upon their release. The level of dangerous behavior among the patients we followed in the community was 14 percent . . . [O]ur four-year follow-up of these patients revealed that only 26 of the 967 had exhibited sufficiently violent behavior at the civil hospitals to justify their return to hospitals for the criminally insane." Cocozza and Steadman, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, 29 RUTGERS L. REV. 1084, 1090-93 (1976).

²⁸² In *O'Connor v. Donaldson*, 422 U.S. 563 (1975), the Supreme Court declared that there is no constitutional basis for confining even a mentally ill individual involuntarily if he is "dangerous to no one and can live safely in freedom." *Id.* at 575. Similarly, there can be no state interest in confining a non-mentally ill individual based upon a psychiatric prediction of dangerousness. Such involuntary commitment is the equivalent of preventive detention.

²⁸³ *Insanity Hearings*, *supra* note 80, at 462-63 (testimony of Dr. Robert Sadoff).

insanity acquittee with room and board at a half-way house located in the community, daily participation in an out-patient treatment program, and a weekly visit with a psychiatrist. Such a program costs approximately \$20,000 per year, roughly 55% of what it would cost to maintain the acquittee in a state mental hospital, and only \$3,000 more than the average cost of maintaining an inmate in a New Jersey prison, with only minimal psychiatric treatment.²⁸⁴ Similarly, in Oregon, the current maximum cost of maintaining an insanity acquittee in a conditional release program is \$13,282 per year, approximately one-third the amount required to maintain him in the forensic unit of the state mental hospital.²⁸⁵ This too compares favorably with the cost of providing psychiatric care in an Oregon prison, where the current average cost of maintaining an inmate in prison is \$13,412 per year, and the additional cost of providing psychiatric treatment or other therapeutic counseling is \$105 per day, or \$39,022 per year.²⁸⁶ Thus it cannot be convincingly argued, as it might in the case of an economically depressed state like Michigan, that the conditional release of insanity acquittees is fiscally impractical.

Two principal approaches to conditional release presently exist: the administrative and the judicial models. The sole representative of the administrative model is Oregon's Psychiatric Security Review Board (hereinafter PSRB or Board). This Board was established by statute in 1977 in response to concerns of the public and state mental health personnel that insanity acquittees were being prematurely released from state mental hospitals without adequate judicial, or other, supervision.²⁸⁷ The Board is an independent state agency with five members — a psychiatrist, a psychologist, a person with substantial parole and probation expertise and experience, a public member, and an experienced criminal trial lawyer not presently a prosecutor or public defender.²⁸⁸ The Board meets periodically to review the disposition of all insanity acquittees committed to its jurisdiction.

Under Oregon law, after a trial, the judge must determine what crime the acquittee "would have been convicted of had [he] . . . been found responsible."²⁸⁹ If this crime is a felony or a violent misdemeanor, and "the court finds, by a preponderance of the

²⁸⁴ Personal Communication from Patrick D. Reilly, Mental Health Consultant, Department of the Public Advocate, Division of Mental Health Advocacy, State of New Jersey, Trenton, New Jersey (April, 1985).

²⁸⁵ Personal Communication from Thomas O. Stern, Data Coordinator for the Program Office of Mental or Emotional Disturbance, Oregon Mental Health Division, Salem, Oregon (April, 1985).

²⁸⁶ Personal Communication from Marlene Haugland, Executive Assistant to the Director of the Oregon Department of Corrections, Salem, Oregon (April, 1985).

²⁸⁷ There were 268 persons acquitted on grounds of insanity in Oregon during the period 1971 to 1976, compared with 225 insanity acquittals in New York State (which had a population nearly eight times as large as Oregon's) during the same period. Pati, Letter to the Editor, 136 AM. J. PSYCHIATRY 1346, 1346-47 (1979). Because of this large number of insanity acquittees, judges were unable to keep track of all the people whom they had committed to the state hospital, to design effective conditional release programs for them, or to monitor their performance while conditionally released. Some judges were felt to be overly deferential to the views of mental health personnel. As a result of inadequate judicial supervision and hospital overcrowding, "many individuals were released from the hospital after a very short stay." Rogers, 1981 Oregon Legislation Relating to the Insanity Defense and the Psychiatric Security Review Board, 18 WILLAMETTE L.J. 23, 24 (1982). As in Michigan, "several incidents of serious anti-social behavior among the [prematurely] released population . . . pointed to the need for more stringent supervision." Bloom and Bloom, *Disposition of Insanity Defense Cases in Oregon*, 9 BULL. AM. ACAD. PSYCHIATRY L. 93, 95 (1981).

²⁸⁸ OR. REV. STAT. § 161.385 (1), (2) (1983).

²⁸⁹ OR. REV. STAT. § 161.325 (2)(a) (1983).

evidence that the person is affected by mental disease or defect and presents a substantial danger to others requiring commitment to a state mental hospital . . . or conditional release, the court shall order the person placed under the jurisdiction of the Psychiatric Security Review Board for care and treatment . . ."²⁹⁰ for the maximum sentence he could have received had he been found responsible.

Within ninety days of an insanity acquittee's commitment to the state mental hospital and two years of an acquittee's conditional release, the PSRB must review the case and determine whether the disposition is appropriate or whether the acquittee should be conditionally or unconditionally released.²⁹¹ The Board's decision is to be based primarily on the criterion of "the protection of society," not on the insanity acquittee's treatment needs.²⁹² Conditional release is mandated, however, if the PSRB "finds that the person presents a substantial danger to others but that the person can be adequately controlled with supervision and treatment if conditionally released and that necessary supervision and treatment are available . . ."²⁹³ This approach thus apparently codifies the doctrine of the "least restrictive alternative which has long been advocated as a necessary aspect of all civil commitment of the mentally ill."²⁹⁴

The alternative to the administrative model of conditional release is the judicial one, presently authorized by statute in more than half the states.²⁹⁵ One example of a good judicial conditional release program is the New Jersey program. As long ago as the early 1970's, the New Jersey Supreme Court recognized the need for a phased, gradual return of the insanity acquittee to the community, which was carefully monitored by individual trial judges to insure that the interests of both the insanity acquittee and the public were protected. Under the New Jersey scheme, as articulated by its Supreme Court in *State v. Carter*,²⁹⁶ a program of conditional release of insanity acquittees is required to balance the public's interest in protection from dangerous offenders and the insanity acquittee's right to psychiatric treatment. In *Carter*, the court held that persons acquitted on grounds of insanity had a right to conditional release from the mental institution to which they had

²⁹⁰ OR. REV. STAT. § 161.327 (1983).

²⁹¹ OR. REV. STAT. § 161.341 (7) (1983).

²⁹² OR. REV. STAT. § 161.336 (10) (1983).

²⁹³ OR. REV. STAT. § 161.336 (1) (1983).

One Oregon court has found that this provision imposes a heavy burden on the PSRB to find a suitable conditional release placement for an insanity acquittee, and that mere difficulty in finding one is not sufficient to meet this burden. *Cochenour v. Psychiatric Sec. Review Bd.*, 47 Or. App. 1097, 1106-07, 615 P.2d 1155, 1160 (1980).

²⁹⁴ Under this doctrine, a state must show that "a particular legislative course [is] . . . the least drastic method of achieving a desired end . . . [T]he state must demonstrate that the infringement upon human liberties which occurs is *unavoidable* if the purpose of the state is to be achieved." Singer, *Sending Men to Prison: Constitutional Aspects of the Burden of Proof and the Doctrine of the Least Drastic Alternative as Applied to Sentencing Determinations*, 58 CORNELL L. REV. 51, 55-56 (1972) (emphasis in original).

The doctrine has been applied in a number of cases concerning the mentally ill which have declared that the state must provide for its mentally ill a therapeutic environment which is the least restrictive one necessary to achieve the safety of the mentally ill individual and the public. *See, e.g., Lake v. Cameron*, 364 F.2d 657, 660-62 (D.C. Cir. 1966) (court ordered the District of Columbia authorities to show that no alternative means existed, other than confinement in a large public mental hospital, of protecting a senile sixty year old woman who "wandered" in the streets of Washington, D.C.)

²⁹⁵ *See State v. Carter*, 64 N.J. 382, 401 n.10, 316 A.2d 449, 460 n.10 (1974).

²⁹⁶ 64 N.J. 382, 316 A.2d 449 (1974).

been committed even if they were not fully "restored to reason" or "cured" of their underlying mental illness, as long as there was adequate psychiatric supervision and other provisions for the protection of the public. The court premised its decision on the fundamental purpose of committing insanity acquittees to a mental hospital — treatment and rehabilitation, which could only be achieved by a judicially authorized gradual, supervised return to the community.²⁹⁷ To deny "the possibility of conditional release," said the court, would be "tantamount to an elaborate mask for preventive detention" of the mentally ill."²⁹⁸

In *State v. Krol*,²⁹⁹ the New Jersey Supreme Court built upon *Carter*, to hold that for purposes of evaluating insanity acquittees' continued need for psychiatric hospitalization and treatment, they were to be treated just like other "civilly" mentally ill individuals, with the same procedural safeguards and substantive commitment criteria used for this latter group.³⁰⁰ The court reached this result based upon considerations of both due process³⁰¹ and equal protection of the laws.³⁰²

This court-centered approach to determining when, and under what conditions, the release of an insanity acquittee is appropriate, has been endorsed by the American Bar Association's Standing Committee on Association Standards for Criminal Justice. These standards suggest that all decisions regarding "authorized leave," defined to encompass anything "from a brief pass through a projected long-term release on conditions,"³⁰³ should be subject to judicial scrutiny before being implemented, to ensure adequate consideration of the problems of "public safety and community concern" along with the therapeutic desirability or necessity of the authorized leave.³⁰⁴

Whether administratively or judicially supervised, then, conditional release of insanity acquittees provides an alternative to the GBMI statutes which protects both the offender's constitutional rights and the public safety at a reasonable cost. Such an approach also leaves intact the insanity defense, which is crucial to maintaining the requirement of blameworthiness throughout the criminal law as a precondition to conviction.

CONCLUSION

The insanity defense had its genesis in a simple, homogeneous, highly religious and moralistic society. At the time of its inception it was easy to have a rule exempting from

²⁹⁷ The judicial approach also has the advantage of frankly acknowledging that the decision to release is a political and policy one. Medical opinion is an important factor to be weighed in making this decision, but it is only part of the equation. In our society, the job of balancing conflicting individual and social interests has been given to judges, not doctors. See *Insanity Hearings*, *supra* note 80, at 472-73 (testimony of Dr. John Monahan).

²⁹⁸ *Carter*, 64 N.J. at 398, 316 A.2d at 458 (quoting Greenwald, *Disposition of the Insane Defendant After 'Acquittal' — The Long Road From Commitment To Release*, 49 J. CRIM. L. C. & P.S. 583, 586 (1959).

²⁹⁹ 68 N.J. 236, 344 A.2d 289 (1975).

³⁰⁰ In *State v. Fields*, 77 N.J. 282, 390 A.2d 574 (1978), the New Jersey Supreme Court declared that the *Krol* mandate of equality of treatment of the "criminally" and "civilly" mentally ill meant that both groups were required to have automatic periodic judicial review of their commitments, including the terms of their conditional release, to determine if the restrictions on their liberty which had been previously ordered by the court were still necessary. 77 N.J. at 297-99, 390 A.2d at 581-82.

³⁰¹ *Krol*, 68 N.J. at 246-49, 344 A.2d at 295-96.

³⁰² *Id.* at 250-55, 344 A.2d at 297-99.

³⁰³ ABA Standing Committee on Association Standards for Criminal Justice, Provisional Criminal Justice Mental Health Standards V-8 (April, 1982).

³⁰⁴ *Id.*; see also *Humphrey v. Cady*, 405 U.S. 504 (1972).

criminal responsibility those few individuals who lacked a "vicious will,"³⁰⁵ particularly when the result of a finding of insanity was lengthy, if not lifetime, incarceration in an insane asylum rather than death.

In a complex and heterogeneous society, however, the insanity defense is called upon to answer a number of competing questions: the moral question of who may justly be held responsible, the psychiatric question of how best to treat the mentally ill offender, and the social policy question of how best to protect the community from dangerous individuals while at the same time safeguarding those individuals' constitutional rights. Today, the exculpation from criminal liability provided by the insanity defense is deeply troubling to many citizens. They find it inconceivable that a person could on one day suffer from mental illness so severe as to not know what he was doing or to be able to stop himself from doing it, and then, a few months later, due to psychiatric treatment and medication, be pronounced "sane." Their sense of justice is offended, particularly if the defendant was charged with a serious offense. The result, in a time of great concern about crime in general, is tremendous public pressure to minimize or eliminate the use of the insanity defense, pressure to which Congress has recently acceded in enacting a drastically reduced version of the insanity defense for federal criminal offenses.

This article has examined another attempt to reduce the "abuse" of the insanity defense, the "Guilty But Mentally Ill" statutes, and has concluded that these laws are a constitutionally impermissible means of dealing with the dangerous mentally ill offender. The GBMI statutes improperly cloak a punitive attitude toward the mentally ill criminal in the guise of treatment, confusing the very different theoretical underpinnings of a system of punishment and a system of treatment. These laws deny mentally ill persons who are found "guilty but mentally ill" instead of not guilty by reason of insanity their "constitutional right to receive such individual [psychiatric] treatment as will give each of them a realistic opportunity to be cured or to improve . . . his mental condition."³⁰⁶ In practice, the psychiatric treatment accorded GBMI inmates tends to be either minimal or nonexistent. Even GBMI prisoners who receive adequate treatment at a psychiatric hospital are denied the equal protection of the laws when compared to insanity acquittees, since GBMI convicts must serve out the remainder of their prison terms upon restoration to mental health, while insanity acquittees must be released.

The constitutional violation of the denial of the right to treatment is compounded by the inherent tendency of the GBMI statutes to encourage compromise verdicts. Due to the statutes' inadequate distinction between "mental illness" and "insanity," it is possible, and indeed likely, for a trier of fact to resolve any doubts it may have about a defendant's sanity at the time of the offense in favor of a finding of "mere" mental illness. That finding assures the trier of fact that the defendant will be kept off the streets for some time, while it simultaneously holds out the promise of psychiatric treatment for an obviously disturbed individual. The constitutional right to present an insanity defense, inherent in the constitutional rights to due process and equal protection of the laws, is denied in any case in which a defendant is found "guilty but mentally ill" when, without that option, he would have been found not guilty by reason of insanity.

In contrast, the conditional release approach, while not perfect, holds out the promise of making the insanity defense viable today. The conditional release approach continues to accept the fundamental premise of the insanity defense that there are a few

³⁰⁵ W. BLACKSTONE, *supra* note 33, at 19.

³⁰⁶ *Wyatt v. Stickney*, 325 F. Supp. 781, 784 (M.D. Ala. 1972).

individuals who cannot morally be held accountable for their actions. In practice it offers a real chance of meaningful psychiatric therapy and a return to sanity for such mentally ill offenders. At the same time, it strives to protect society from the dangerous mentally ill individual in a manner maximizing the vindication of the latter's constitutional rights. Conditional release thus provides the best answer we have today to the difficult moral, medical, and political questions raised by the insanity defense. Its adoption and implementation across the nation would, in the long run, provide greater public protection than the superficially attractive GBMI approach.

We live in an age in which people are expressing greater fears about their safety and security, and are concerned about a lack of control over their lives. At such a time, it is easy to seize upon the perceived abuses of the insanity defense as both symbol and cause of increased crime and disorder. Yet the insanity defense is no more than "a pimple on the nose of justice,"³⁰⁷ and the "Guilty But Mentally Ill" statutes are no more than an ill-conceived and ill-fitting band-aid.

³⁰⁷ Stone, *The Insanity Defense on Trial*, 33 HARV. L. SCH. BULL. 15, 17 (1982).