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Convicting or Confining--Alternative Directions in Insanity Law Reform: Guilty but Mentally Ill Versus New Rules for Release of Insanity Acquittees

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Summary of Contents

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I. INTRODUCTION

Ye people of England: exult and be glad,
For ye're now at the will of the merciless mad.
Why say ye that but three authorities reign—
Crown, Commons, and Lords! —You omit the insane!
They're a privileg'd class, whom no statute controls,
And their murderous charter exists in their souls.
Do they wish to spill blood—they have only to play
A few pranks—get asylum'd a month and a day
—Then heigh! to escape from the mad-doctor's keys,
And to pistol or stab whomsoever they please.

Thomas Campbell[1]

Consider these cases:

(1) Before television cameras a man emerges from the crowd. He reveals and discharges a revolver injuring a number of persons.[2] Barring some illusionistic media prank, the public that witnesses the broadcast of this event is certain of the guilt of the man who discharged the revolver. Yet months later, the public learns that the man is found not guilty by reason of insanity.[3] The public is bewildered at this apparent incoherent op-

1. Campbell, *Congratulations on a Late Acquittal*, Standard, Mar. 7, 1843, at 1, col. 1, *cited in* R. MORAN, KNOWING RIGHT FROM WRONG: THE INSANITY DEFENSE OF DANIEL MCNAUGHTAN 19-20 (1981).

2. *See* E. Newman, NBC White Paper: Crime & Insanity 16 (Apr. 26, 1983) (transcript of television special report) ("In full view of television cameras, John Hinckley gunned down four people, including the President of the United States. Then Hinckley pleaded not guilty by reason of insanity.")

3. At the trial both sides brought in a parade of paid psychiatrists to testify about Hinckley's mental state. Their testimony confused not only some of the jurors, but also a good part of the American public. "This shrink for hire,"

eration of the criminal law.[4]

(2) A policeman is charged with shooting a black youth without provocation and without any legal justification.[5] At trial the defendant is found not guilty on the ground that, as a result of mental illness, he was either not able to appreciate the criminality of his conduct or not able to conform to the requirements of law.[6] One year after the trial, the state mental health authorities recommend that the court release the policeman because he is not mentally ill or dangerous.[7] Bewildered, the public wonders what kind of protection it has from people who murder if they can avoid prison and obtain release from a mental hospital within a year after having killed.[8]

The insanity defense seems to the public to provide criminals immunity from punishment and to deny law-abiding members of the community protection from criminals. This view is not new. Controversy about the insanity defense always has been greatest following acquittals in notorious cases involving assassination or attempted assassination of public figures or political leaders.[9] In June 1982 a District of Columbia jury found

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somebody called it.

Finally, John Hinckley was found not guilty by reason of insanity. Today he is confined at St. Elizabeth's Hospital in Washington, D.C.

The Hinckley case focused public attention on the insanity defense.

Id.

4. *See* Cohen, *It's a Mad, Mad Verdict,* THE NEW REPUBLIC, July 12, 1982.

> [A]s the jury began to deliberate, few observers expected . . . strict legal logic to prevail. Hinckley would certainly be convicted, the experts thought, if only because the idea that someone can shoot the President and not be punished for it is so abhorrent to both common sense and civil order. And if the initial reactions of ordinary people are any indication, the verdict has deeply outraged the sense of justice of most Americans.

Id. at 13.

5. *See* W. WINSLADE & J. ROSS, THE INSANITY PLEA: THE USES AND ABUSES OF THE INSANITY DEFENSE 134-58 (1983).

6. *Id.* at 142.

7. *See In re* Torsney, 47 N.Y.2d 667, 394 N.E.2d 362, 420 N.Y.S.2d 192 (1979). *Torsney* involved the release, after a year of hospital confinement, of a white New York City police officer, Robert Torsney, who had been acquitted by reason of insanity of the charge of unjustifiably shooting a black juvenile. After a recommendation for release was heard by a trial court, Torsney was ordered released from the hospital on condition that, *inter alia,* he would not carry a gun and that he would continue as an outpatient for five years. This decision was unanimously reversed by the appellate division in *In re* Torsney, 66 A.D.2d 281, 412 N.Y.S.2d 914 (1979). A divided court of appeals reversed the appellate division and reinstated the trial judge's order.

8. *See* N.Y. Times, Feb. 7, 1979, at B3, col. 2.

9. *See* Steadman & Cocozza, *Selective Reporting and the Public's Misconceptions of the Criminally Insane,* 41 PUB. OPINION Q. 523 (1977-1978). The authors suggest that

John Hinckley, charged with attempting to assassinate President Ronald Reagan and with wounding several other persons, not guilty by reason of insanity.[10] Public outrage was reflected in demands for reform of the procedures governing the insanity defense[11] and even for abolition of the defense.[12] The *Hinckley* verdict has also aroused calls for adoption of the "guilty but mentally ill" verdict[13] and demands for new procedures governing the commitment and release of persons acquitted on grounds of insanity.[14]

Recent public criticism of the insanity defense has been much broader than a mere suggestion that there are technical defects with its operation. Some have suggested that the "insanity defense is little more than a ploy used by killers, abetted by crafty defense lawyers and soft-hearted psychiatrists, to escape punishment."[15] Such public sentiment finds support in professional publications[16] as well as in the press.[17] Even before the

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the public's perceptions of the criminally insane and the actual operation of the insanity defense are highly erroneous. *Id.* at 531. The authors conclude, "The public's perceptions appear to be heavily influenced by selective news reports which are limited to a small, atypical segment of cases involving psychiatric testimony for bizarre or mass murders or assassinations." *Id.* at 523.

10. United States v. Hinckley, Crim. No. 81-306, (D.D.C. June 21, 1982). *See generally* United States v. Hinckley, 672 F.2d 115 (D.C. Cir. 1982), *aff'g* 525 F. Supp. 1342 (D.D.C. 1981) and 529 F. Supp. 520 (D.D.C. 1982); *In re* Application of Am. Broadcasting Cos., 537 F. Supp. 1168 (D.D.C. 1982); W. WINSLADE & J. ROSS, *supra* note 5, at 181-97.

11. *See, e.g.*, S. 2672, 97th Cong., 2d Sess. § 16(b) (1982). This section would place the burden on the defendant to prove the insanity defense by a preponderance of the evidence.

12. *See 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. 283 (1982) (testimony of Abraham L. Halpern, M.D.) [hereinafter cited as *Insanity Defense Hearings*]. In his testimony Halpern states: "[I]t is my contention that abolition of the insanity defense benefits the public because it insures that the government retains undisputed control of a defendant who has been convicted of an antisocial act and may still be dangerous to the community." *Id.* at 683.

13. *See, e.g.*, S. 2672, *supra* note 11, § 16(i) (providing for the plea of guilty but mentally ill); *see also* ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME, U.S. DEPT. OF JUSTICE, FINAL REPORT 54 (Aug. 17, 1981) (supporting legislation that would create an additional verdict in federal cases of "guilty but mentally ill") [hereinafter cited as ATTORNEY GENERAL'S REPORT ON VIOLENT CRIME].

14. *See, e.g.*, PROVISIONAL CRIMINAL JUSTICE MENTAL HEALTH STANDARDS (1982) [hereinafter cited as PROVISIONAL STANDARDS]. Provisional Standard 7-5.4 provides for special commitment procedures for insanity acquittees who have been tried for felonies involving acts of violence or acts producing serious bodily harm.

15. *Insanity on Trial*, NEWSWEEK, May 8, 1978, at 108; *see also Outraged Washington Urges: Scrap Insanity Plea*, Chi. Sun-Times, June 23, 1982, at 30, col. 1.

16. *See, e.g.*, diGenova & Toensing, *Bringing Sanity to the Insanity Defense*, 69

Hinckley acquittal, an increasing number of legal commentators criticized the insanity defense and recommended either modifications in the standards for the test, changes in procedures by which it is administered, or its abolishment.[18] Similarly, members of the psychiatric community have maintained that the legal defense and the standards used to establish it have little to do with the information that is within the competence of psychiatrists to provide and that the legal inquiry has little to do with the nature and function of psychiatric medicine, which is to provide treatment.[19]

At the same time, an established body of opinion views the insanity defense as a central feature of a criminal justice system that aims to punish responsible persons for their conduct.[20] Both the American Psychiatric Association[21] and the American Bar

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A.B.A. J. 466 (1983); Halpern, *The Insanity Defense: A Juridical Anachronism*, 7:8 PSYCHIATRIC ANNALS 41 (Aug. 1977).

17. *See, e.g., Behind Growing Outrage over Insanity Pleas*, U.S. NEWS & WORLD REP., May 7, 1979, at 41; *The Insanity Defense: Under Fire*, U.S. NEWS & WORLD REP., Apr. 20, 1981, at 11; *The Insanity Plea on Trial*, NEWSWEEK, May 24, 1982, at 56; Lyon, *The Law on Insanity—Time for Its Own Trial?*, Chi. Tribune, Oct. 24, 1976, at 1, col. 2; Mabley, *Crime, Insanity: Revolving Door*, Chi. Tribune, Oct. 24, 1976, at 4, col. 1.

18. *See, e.g.*, Cohen, *In Defense of the Insane: A Proposal to Abolish the Defense of Insanity*, 2 CRIM. JUST. Q. 127 (1974); Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?*, 72 YALE L.J. 853 (1963); Spring, *The End of Insanity*, 19 WASHBURN L.J. 23 (1979); Weiner, *Not Guilty by Reason of Insanity: A Sane Approach*, 56 CHI. KENT L. REV. 1057 (1980); Note, *Modern Insanity Tests—Alternatives*, 15 WASHBURN L.J. 88 (1976).

19. *See, e.g.*, T. SZASZ, PSYCHIATRIC JUSTICE (1965); De Vito, *Some New Alternatives to the Insanity Defense*, 1 AM. J. FORENSIC MED. 38 (1980); Fingarette, *Disabilities of Mind and Criminal Responsibility—A Unitary Doctrine* 76 COLUM. L. REV. 236 (1976); Halpern, *The Fiction of Legal Insanity and the Misuse of Psychiatry*, 2 J. LEGAL MED. 18 (1980); Szasz, *The Insanity Plea and the Insanity Verdict*, 40 TEMP. L.Q. 271 (1967).

20. *See, e.g.*, Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A. J. 194 (1983). Professor Bonnie argues:

> The moral core of the defense must be retained, in my opinion, because some defendants afflicted by severe mental disorder who are out of touch with reality and are unable to appreciate the wrongfulness of their acts cannot justly be blamed and do not therefore deserve to be punished. The insanity defense, in short, is essential to the moral integrity of the criminal law.

Id. at 194. *See generally* D. HERMANN, THE INSANITY DEFENSE: PHILOSOPHICAL, HISTORICAL AND LEGAL PERSPECTIVES (1983).

21. The Board of Trustees of the American Psychiatric Association noted:

> The American Psychiatric Association, speaking as citizens as well as psychiatrists, believes that the insanity defense should be retained in some form. The insanity defense rests upon one of the fundamental premises of the criminal law, that punishment for wrongful deeds should be predicated upon moral culpability. However, within the framework of English and American law, defendants who lack the ability (the capacity) to rationally control their behavior do not possess free will. They cannot be said to have "chosen to do wrong."

Association[22] have urged the retention of the insanity defense while recommending changes in the procedures by which it is administered, particularly the procedure for admitting psychiatric testimony to establish the defense.[23]

Three basic areas of reform of the insanity defense are considered here. First, this Article examines the various insanity standards used to establish the defense, the criticisms directed at the current standards, and the proposals for changes in the procedural and substantive rules for establishing the defense.[24] In particular, the Article considers proposals relating to the burden of proof[25] as well as suggestions that the defense be limited to the required *mens rea* or mental state element of the criminal offense.[26]

Second, this Article examines the "Guilty but Mentally Ill" (GBMI) legislation, the statutory measure aimed at narrowing the applicability of the insanity defense that has received the greatest acceptance in state legislatures.[27] This type of statute recently has been enacted in several states[28] and has received support from some state courts,[29] federal legislators,[30] and law

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> Therefore, they should not be punished or handled similarly to all other criminal defendants. Retention of the insanity defense is essential to the moral integrity of the criminal law.

AMERICAN PSYCHIATRIC ASSOCIATION STATEMENT ON THE INSANITY DEFENSE 8 (Dec. 1982) [hereinafter cited as STATEMENT ON THE INSANITY DEFENSE].

22. PROVISIONAL STANDARDS, *supra* note 14, Provisional Standard 7-4.1.

23. *See* STATEMENT ON THE INSANITY DEFENSE, *supra* note 21, at 14; *see also* PROVISIONAL STANDARDS, *supra* note 14, Provisional Standards 7-1.4, 7-1.5, 7-4.4.

24. *See infra* text accompanying notes 35-210.

25. *See infra* text accompanying notes 132-78.

26. *See infra* text accompanying notes 179-210.

27. *See infra* text accompanying notes 226-430.

28. *See, e.g.*, GA. CODE ANN. § 27-1503 (1983); ILL. ANN. STAT. ch. 38, § 6-2 (Smith-Hurd 1982); IND. CODE ANN. § 35-36-2-3 (Burns Supp. 1982); KY. REV. STAT. § 504.120 (1982); MICH. COMP. LAWS § 768.36 (1982) (MICH. STAT. ANN. § 28.1059 (CALLAGHAN 1978)); N.M. STAT. ANN. § 31-9-3 (Supp. 1982).

29. *See, e.g.*, People v. McLeod, 407 Mich. 632, 288 N.W.2d 909 (1980). The Michigan Supreme Court commented:

> It is apparent that the 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 [the] 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.

Id. at 663-64, 288 N.W.2d at 919.

The Michigan Court of Appeals has noted that "the Legislature sought to protect the public from harm and violence by creation of the new verdict of guilty but mentally ill." People v. Seefeld, 95 Mich. App. 197, 199, 290 N.W.2d 123, 125 (1980). Before the Kentucky Legislature adopted the GBMI verdict, the Kentucky Supreme Court com-

enforcement officials.[31] The Article explains why the GBMI verdict does not accomplish its avowed aims of providing psychiatric treatment for mentally disabled offenders and protecting the public from dangerous mentally ill criminals by keeping them behind bars. This critical examination of the GBMI alternative analyzes the terms of the statutes establishing GBMI and the operational aspects of the verdict, including its deficiencies and drawbacks.

Third, this Article examines various commitment and release procedures for persons found not guilty by reason of insanity (NGRI).[32] It is at this stage that the balance can be struck between the constitutional rights of insanity acquittees and the public's legitimate interest in being protected from the premature release of potentially dangerous persons. Reforms of the conditions of commitment and release of insanity acquittees provide the best opportunity for preserving the integrity of the insanity defense. At the same time, such reforms address the legitimate fears of the public regarding the premature release of dangerous offenders and provide for effective treatment of the mentally disordered offender while protecting the acquittees' constitutional rights and legitimate interest in personal liberty.

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mented favorably on the verdict:

> Some of our sister states have endeavored to meet the problem [of the insanity defense] by authorizing a verdict of "guilty but mentally ill" (short of legal "insanity") under which the sentence is not affected but the defendant while serving it may be confined as long as may be necessary in a mental institution. We commend that approach to our own General Assembly.

Gall v. Commonwealth, 607 S.W.2d 97, 113 (Ky. 1980), *cert. denied,* 450 U.S. 989 (1981).

In addition, two justices of the Tennessee Supreme Court have commented approvingly on the Michigan "guilty but mentally ill" verdict:

> We are impressed with the attempted Michigan approach to this [insanity defense] problem. . . .
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> . . . .
>
> This procedure goes a long way in the direction of solving the dilemma [of how to deal with the traditional insanity defense]. Instead of Tennessee's all-or-nothing approach under which the insane may be confined in the penitentiary or "turned loose on the streets," Michigan juries have a means . . . to assure the protection of society and simultaneously to provide treatment."

State v. Stacy, 601 S.W.2d 696, 706 (Tenn. 1980) (Henry, J., joined by Fones, J., dissenting).

30. *See, e.g., Insanity Defense Hearings, supra* note 12, at 18 (statement of Sen. Dan Quayle).

31. *See, e.g.,* ATTORNEY GENERAL'S REPORT ON VIOLENT CRIME, *supra* note 13, at 54. In Recommendation 39 the Task Force proposed that "the Attorney General support or propose legislation that would create an additional verdict in federal criminal cases of 'guilty but mentally ill' modeled after the recently passed Illinois statute." *Id.*

32. *See infra* text accompanying notes 431-627.

The Article analyzes an Oregon statutory scheme that exemplifies one means by which the desired balance may be accomplished.[33]

The last section of this Article presents a statutory proposal drawing on the Oregon experience, but with additional provisions designed to meet the civil liberty claims of both committed insanity acquittees and other dangerous mentally ill persons by providing for court supervision of commitment and release procedures for these persons.[34] Such a statute presents a viable alternative to the GBMI legislation because it accomplishes the goals of dealing humanely with the mental problems of some affected offenders and of guaranteeing the public's safety by insuring that release will be closely scrutinized by a professional board with the opportunity for court review.

II. The Insanity Defense

That the legal defense of insanity is required by a just and fair system of criminal justice is not a novel idea. In a comment on the apparent immorality of ascribing criminal responsibility to the mentally incompetent, one jurist wrote: "Our collective conscience does not allow punishment where it cannot impose blame."[35] Various legal tests have been devised over the last two hundred years to ascertain a defendant's exculpatory mental condition.[36] The issue raised by the insanity defense always has been whether the defendant's mental condition at the time of the offense so incapacitates him that he should not be held responsible, but instead should be excused for his criminal conduct.[37] The first part of this section briefly examines the major tests for insanity and criticisms lodged against them. The second part of the section discusses proposals for procedural reform of the insanity defense designed to restrict the ability to establish

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33. Or. Rev. Stat. § 161.385 (1981).

34. *See infra* Part IV and appendix.

35. Holloway v. United States, 148 F.2d 665, 666-67 (D.C. Cir. 1945), *cert. denied*, 334 U.S. 852 (1947).

36. As early as 1790, Frith's Case, 22 How. St. Tr. 307, 318 (1790), the jury was instructed that if the defendant's mental condition at the time of trial was so disordered so as to result in his being incapable of a rational defense, he could not be adjudged liable to punishment.

37. For detailed histories and analyses of the insanity defense, see D. Hermann, *supra* note 20; J. Biggs, The Guilty Mind 37-117 (1955); S. Glueck, Mental Disorder and the Criminal Law 123-60 (1925); Lewinstein, *The Historical Development of Insanity as a Defense in Criminal Actions* (pts. 1 & 2), 14 J. Forensic Sci. 275, 469 (1969).

the defense by placing the burden of proof of insanity on the defendant. It also analyzes and critiques suggestions that the insanity defense be narrowed or abolished outright by restricting evidence of mental illness to disproof of the mental state element of an offense.

A. Insanity Tests

The issue whether mental incapacity to commit a crime constitutes a defense to criminal behavior has been recognized by the English common law since approximately the twelfth century.[38] Towards the end of the reign of Henry III the concept of using insanity to excuse criminal behavior appeared in the form of royal pardons granted to those who were deemed insane.[39] From that time and until the nineteenth century, legal commentators[40] and case law[41] contributed various criteria for establish-

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38. *See* Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 1004-07 (1932).

39. 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 480 (2d ed. 1952).

40. Bracton, writing in the thirteenth century, asserted the following:

> [W]e must consider with what mind (*animo*) or with what intent (*voluntate*) a thing is done, in fact or in judgment, in order that it may be determined accordingly what action should follow and what punishment. For take away the will and every act will be indifferent, because your state of mind gives meaning to your act, and a crime is not committed unless the intent to injure (*Mocendi voluntas*) intervene, nor is a theft committed except with the intent to steal.

H. BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 101b, *quoted in* Sayre, *supra* note 38, at 985.

Littleton, in the fifteenth century, declared that a man "which is of non sane memory, that is to say, in Latin, qui non est compos mentis," could not raise this fact as a defense, but it could be used by the individual's heirs. H. WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 53 (1954). In the seventeenth century Coke stated that "[n]o felony or murder can be committed without . . . a felonious intent and purpose . . . ." Beverley's Case, 76 Eng. Rep. 1118, 1121 (K.B. 1603). Towards the end of the seventeenth century, Lord Matthew Hale articulated the following test for total insanity: "The best measure that I can think of is this; such a person as labouring under melancholy distempers hath yet ordinarily as greater understanding as ordinarily a child of fourteen years hath, is such a person as may be guilty of treason or felony." 1 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 30 (1st Am. ed. 1787). Hale contended that only total insanity excused criminal liability. Partial insanity committed to "particular discourse, subjects, or applications" was not considered enough to constitute exculpation, because those so afflicted were not "wholly destitute of reason" and thus would be accountable for their criminal conduct. *Id.* at 30.

Late in the eighteenth century, Hawkins articulated the test that was to announce the standard used in the *M'Naghten* case. He stated that "those who are under a natural disability of distinguishing between good and evil, as infants under the age of discretion, idiots and lunaticks, are not punishable by any criminal prosecution whatever." 1 W. HAWKINS, PLEAS OF THE CROWN 1 (1824).

41. *See, e.g.*, Rex v. Arnold, 16 How. St. Tr. 695 (1724). In ruling whether the defendant was mentally afflicted when he shot a man, Judge Tracy stated:

ing criminal responsibility, all of which ultimately led in 1843 to the *M'Naghten* test.[42]

1. *The* M'Naghten *test*

Probably the most significant case in the history of the insanity defense arose in England out of an attempt to assassinate

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> [T]hat is the question, whether this man hath the use of his reason and sense? If he . . . could not distinguish between good and evil, and did not know what he did . . . he could not be guilty of any offence against any law whatsoever . . . . On the other side . . . it is not every kind of frantic humour or something unaccountable in a man's actions, that points him out to be such a madman as is to be exempted from punishment: it must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast, such a one is never the object of punishment; therefore I must leave it to your consideration, whether the condition this man was in, as it is represented to you on one side, or the other, doth shew a man, who knew what he was doing, and was able to distinguish whether he was doing good or evil, and understood what he did . . . .

Id. at 765.

The boundaries of the insanity defense widened in the Hadfield's Case, 27 How. St. Tr. 1281 (K.B. 1800). Hadfield had been discharged from the army on grounds of insanity after suffering severe head injuries in battle. Subsequently, he attempted to assassinate King George III with the intent of being apprehended and thus of dying as a martyr. Lord Erskine, using Hale's definitions of insanity, *see* M. HALE, *supra* note 40, argued for the notion of partial insanity, observing that in other cases "reason is not driven from her seat, but distraction sits down upon it with her, holds her, trembling, upon it, and frightens her from her propriety." Hadfield's Case, 27 How. St. Tr. at 1313. In these situations, even if delusions do not completely overtake the subject's mind, they are strong enough to create

> *the cases which frequently mock the wisdom of the wisest in judicial trials;* because such persons often reason with a subtlety which puts in the shade the ordinary conceptions of mankind: their conclusions are just, and frequently profound; but the *premises from which they reason,* WHEN WITHIN THE RANGE OF THE MALADY, are uniformly false . . . . Delusion, therefore, where there is no frenzy or raving madness, is the true character of insanity.

Id. at 1313-14. Hadfield was acquitted with the understanding that he would be committed; *see also* 1 F. WHARTON & M. STILLE, MEDICAL JURISPRUDENCE 527-30 (5th ed. 1905).

The insanity defense was further clarified and broadened in the case of Regina v. Oxford, 173 Eng. Rep. 941 (N.P. 1840). Oxford was tried for the attempted assassination of Queen Victoria. Lord Chief Justice Denman advanced a charge which in part consisted of an "irresistible impulse" test and in part a "product" test. Denman charged the jury, "If some controlling disease was, in truth, the acting power within him which he could not resist," the defendant should not be held responsible.

> The question is, whether the prisoner was labouring under that species of insanity which satisfies you that he was quite unaware of the nature, character, and consequences of the act he was committing, or, in other words, whether he was under the influence of a diseased mind, and was really unconscious at the time he was committing the act, that it was a crime.

Id. at 950. *See generally* 1 F. WHARTON & M. STILLE, *supra,* at 536.

42. M'Naghten's Case, 8 Eng. Rep. 718 (H.L. 1843).

the English Prime Minister.[43] In 1843 Daniel M'Naghten, a young Scottish woodturner, shot and killed Edward Drummond, Prime Minister Robert Peel's secretary, with a bullet intended for Peel.[44] At trial, M'Naghten's defense attorney, Alexander Cockburn, in describing M'Naghten's delusional state quoted the American psychiatric expert, Dr. Isaac Ray.[45] Cockburn explained that his client had been "the victim of a fierce and fearful delusion" that the Tories and Sir Robert Peel were his enemies.[46] This is the first reported instance in a legal proceeding of the defense using medical psychiatric expertise to ascertain the mental culpability of the defendant.[47] The nine medical witnesses who testified at the trial maintained that M'Naghten was insane.[48] At the close of the medical testimony, Judge Tindal charged the jury:

> The question to be determined is, whether at the time the act in question was committed, the prisoner had or had not the use of his understanding, so as to know that he was doing a wrong or wicked act. If the jurors should be of opinion that the prisoner was not sensible, at the time he committed it, that he was violating the laws both of God and man, then he would be entitled to a verdict in his favour: but if, on the contrary, they were of opinion that when he committed the act he was in a sound state of mind, then their verdict must be against him.[49]

Tindal then set out the right-wrong test to the jury in the following terms:

> If on balancing the evidence . . . you [the jury] think the prisoner capable of distinguishing between right and wrong, then he was a responsible agent and liable to all the penalties the law imposes . . . . If not so, . . . then you will probably not take [it] upon yourselves to find the prisoner guilty.[50]

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43. *See generally* R. MORAN, *supra* note 1; D. WEST & A. WALK, DANIEL MCNAUGHTON: HIS TRIAL AND THE AFTERMATH (1977).

44. R. MORAN, *supra* note 1, at 1.

45. *Id.* at 93. The court quoted extensively from I. RAY, MEDICAL JURISPRUDENCE OF INSANITY (1838), a treatise on forensic psychiatry. *See generally* Diamond, *Isaac Ray and the Trial of Daniel M'Naghten*, 112 AM. J. OF PSYCHIATRY 651 (1956).

46. REPORT OF STATE TRIALS: 1839-1843, at 875 (J. Wallis ed. 1892), *quoted in* R. MORAN, *supra* note 1, at 1.

47. R. MORAN, *supra* note 1, at 103.

48. *Id.* at 18.

49. M'Naghten's Case, 8 Eng. Rep. at 719-20.

50. REPORT OF STATE TRIALS: 1839-1843, *supra* note 46, at 925, *quoted in* R. MORAN, *supra* note 1, at 19.

Then, in what might be the first instance of informing the jury regarding the consequences of a verdict of not guilty by reason of insanity, Tindal continued his instructions with an assurance to the jury that treatment would be provided in case of an acquittal: "If you find the prisoner not guilty, on the ground of insanity . . . proper care will be taken of him."[51] In less than two minutes of deliberation the jury declared, "We find the prisoner not guilty, on the ground of insanity."[52]

The *M'Naghten* verdict profoundly disturbed Queen Victoria, who expressed her dismay in a letter to Prime Minister Peel:

> We have seen the trials of Oxford and MacNaughtan conducted by the ablest lawyers of the day . . . and they allow and advise the Jury to pronounce the verdict of Not Guilty on account of Insanity—whilst everybody is morally convinced that both malefactors were perfectly conscious and aware of what they did! . . . Could not the Legislature lay down the rule that the Lord Chancellor does in his paper, . . . and why could not the Judges be bound to interpret the law in this and no other sense in their charges to the Juries?[53]

This reaction is quite similar to the furor caused by the *Hinckley* verdict and the calls for legislative reform lodged in its wake.[54]

Following the Queen's demand, the House of Lords took up the debate and called upon the Supreme Court of Judicature to hear opinions regarding the insanity law.[55] Five questions were drafted for judicial deliberation.[56] Chief Justice Tindal, at the

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51. *Id.*

52. *Id.*

53. 1 BENSON, THE LETTERS OF QUEEN VICTORIA, 1837-1861 at 587 (1907).

54. *See* 127 CONG. REC. E5365-66 (daily ed. Nov. 17, 1981) (statement of Hon. John M. Ashbrook, citing Gallo, *The Insanity Defense,* CRIM. JUST. REP., Oct. 1981). Congressman Ashbrook's extended remarks noted:

> The Hinckley affair, as well as a number of other notorious criminal cases, has focused national attention on the extent to which psychiatry has undermined justice in the United States by justifying criminality. As a result, a growing number of lawmakers, jurists and even psychiatrists themselves are suggesting sweeping changes in insanity pleadings at both the state and federal levels.

Id. at E5365.

55. R. MORAN, *supra* note 1, at 22.

56. The following questions were asked of the common-law judges:

> 1st. What is the law respecting alleged crimes committed by persons afflicted with insane delusion, in respect of one or more particular subjects or persons: as, for instance, where at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or

request of his colleagues, delivered the judges' answers. These answers became what is now known as the *M'Naghten* insanity test:

> [Answer to question (1): If a person commits a criminal act] with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable . . . if he knew at the time . . . that he was acting contrary to the law . . . .
>
> . . . [Answer to questions (2) and (3): T]he jurors ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.[57]

The latter answer, which provides a two-part test for ascertaining the mental incapacity of a criminal defendant, rejected the purely psychiatric test proposed by Dr. Isaac Ray, which centered on the establishment of an incapacitating delusional state.[58] The *M'Naghten* test focused instead on cognitive incapacity about the nature of one's conduct and on a good-and-evil

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revenging some supposed grievance or injury, or of producing some supposed public benefit?

2nd. What are the proper questions to be submitted to the jury, when 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 defense?

3d. 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?

4th. If a person under an insane delusion as to existing facts, commits an offence in consequence thereof, is he thereby excused?

5th. Can a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act, that he was acting contrary to law, or whether he was labouring under any and what delusion at the time?

M'Naghten's Case, 8 Eng. Rep. at 720.

57. *Id.* at 722.

58. I. RAY, *supra* note 45.

test[59] derived from the quasi-scientific notions of phrenology or monomania.[60] Despite the lack of a medical or psychiatric foundation for this test, the *M'Naghten* rules immediately were adopted and used in the United States without any major modifications for almost a century.[61] During that time the test was the object of vehement criticism from both the legal and psychiatric communities.[62] The criticism took two major forms: (1) that the test, with its emphasis on cognitive impairment and moral ignorance, was outdated with respect to contemporary psychiatric developments;[63] and (2) that the "know" and "wrong" language was ambiguous, obscure, unintelligible, and too narrow.[64]

According to both legal and psychiatric critics, the human being's psyche is an integrated entity of cognition and affect; therefore, one single aspect of personality—namely cognition—cannot solely be determinative of behavior.[65] Critics also

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59. *See supra* note 41 and accompanying text.

60. It has been suggested that the *M'Naghten* rules were based on outmoded views of the human psyche rather than on modern psychological theory. *See* United States v. Freeman, 357 F.2d 606 (2d Cir. 1966). In *Freeman* the court maintained that "rather than relying on Dr. Ray's monumental work which had apparently impressed him at M'Naghten's trial, Tindal, with the Queen's breath upon him, reaffirmed the old restricted right-wrong test despite its 16th Century roots and the fact that it, in effect, echoed such uninformed concepts as phrenology and monomania." *Id.* at 617.

61. Until the 1950's, the *M'Naghten* rules were the primary test of criminal insanity in most jurisdictions, although in several states they were modified by the addition of the "irresistible impulse" test. One jurisdiction, New Hampshire, adopted a "product" test. *See* Annot., 45 A.L.R.2d 1447, 1452 n.6 (1956) (giving a comprehensive list of cases using the *M'Naghten* test); *see also* H. WEIHOFEN, INSANITY AS A DEFENSE IN CRIMINAL LAW 32-33 (1933); Platt & Diamond, *The Origins of the "Right and Wrong" Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey*, 54 CALIF. L. REV. 1227, 1256-57 (1966).

62. *See generally* F. ALEXANDER & H. STAUB, THE CRIMINAL, THE JUDGE, AND THE PUBLIC: A PSYCHOLOGICAL ANALYSIS 70 (1931); B. CARDOZO, *What Medicine Can Do for Law*, in LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 70, 101-09 (1931); K. MENNINGER, THE HUMAN MIND 450 (3d ed. 1964). Justice Cardozo commented, "Everyone concedes that the present definition of insanity has little relation to the truths of mental life." B. CARDOZO, *supra*, at 106.

63. *See, e.g.*, W. WHITE, TWENTIETH CENTURY PSYCHIATRY 493-95 (1936) (White, an American Freudian, wrote: "The right and wrong test . . . represent[s] antiquated and outworn medical and ethical concepts . . . ."); *see also* Gaylin, *Psychiatry and the Law: Partners in Crime*, 8 COLUM. U. FORUM 23 (1965).

64. "The Opinion of the Judges is so confusing on this point [the meaning of the word 'wrong'] that, although the question has been much discussed, it seems impossible to determine in which sense the word 'wrong' was there used." H. WEIHOFEN, *supra* note 61, at 40; *see also* A. GOLDSTEIN, THE INSANITY DEFENSE 49-53 (1967).

65. One legal commentator maintained:

[A] person's moral judgment ("knowledge of right and wrong") is not reified as

maintain that the narrow scope of the expert testimony required by the *M'Naghten* test deprives the jury of a complete picture of the psychological profile of the defendant.[66]

Criticism of the language of the *M'Naghten* rules has taken the form of an attack on the narrowness of the word "know" and the vagueness and ambiguity of the term "wrong."[67] Some courts have interpreted the concept of knowledge to be equivalent to the idea of cognitive awareness, i.e., if the defendant is not cognitively aware of the criminality of his act, then he is not responsible.[68] Other courts have attempted to give a broader meaning to the term "know" by construing it to mean a "realization or appreciation of the wrongness of seriously harming a

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> an outside, icy spectator of a moving self. On the contrary, the corollary is that such valuing is permeated with the color and warmth of emotion. Indeed, in the integrative view of personality, all normal conduct, especially that relevant to penal law, involves a unified operation of the various functions of personality, e.g., a normal person who saw someone committing a serious battery on a child would understand and condemn the immorality of that and at the same time feel the surge of emotion and be disposed to take appropriate action. It is that kind of moral knowledge which many judicial interpretations of the M'Naghten Rules require.

J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 478-79 (2d ed. 1960). The *M'Naghten* test has been criticized in judicial opinions for not taking into consideration established psychiatric principles.

> The science of psychiatry now recognizes that a man is an integrated personality and that reason, which is only one element in that personality, is not the sole determinant of his conduct. The right-wrong test, which considers knowledge or reason alone, is therefore an inadequate guide to mental responsibility for criminal behavior.

Durham v. United States, 214 F.2d 862, 871 (D.C. Cir. 1954), *overruled in* United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972).

66. One psychiatric critic remarked:

> The language of the law is no longer usable by the present day psychiatrist as he is required to do on the witness stand for the expression of his thoughts. According to the law, if one's mental condition does not produce a certain set of results, he is legally responsible for his acts no matter how mentally ill he may be from a medical viewpoint.

W. WHITE, *supra* note 63, at 493; *see also* S. GLUECK, *supra* note 37, at 169-70; A. GOLDSTEIN, *supra* note 64, at 53-58. Judicial opinions also reflect this criticism of the narrow approach under the *M'Naghten* rules. Judge Kaufman maintained that "[t]he true vice of *M'Naghten* is not . . . that psychiatrists will feel constricted in artificially structuring their testimony but rather that the ultimate deciders—the judge or the jury—will be deprived of information vital to their final judgment." United States v. Freeman, 357 F.2d at 620.

67. *See generally* A. GOLDSTEIN, *supra* note 64, at 49-53; W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 276-78 (1972); Lewinstein, *supra* note 37, at 287-89.

68. *See, e.g.*, Martin v. State, 223 Ga. 649, 157 S.E.2d 458 (1967); Criswell v. State, 84 Nev. 459, 443 P.2d 552 (1968), *cert. denied*, 400 U.S. 946 (1970).

human being,"[69] with the result that insanity comes to mean "a diseased and deranged condition of mind which renders a person incapable of knowing or *understanding* the nature and quality" or wrongfulness of his act.[70] It should be noted that Judge Tindal in his instruction at trial used the formulation of "had or had not the use of his understanding."[71] The confusion created by the word "wrong" also stems from two separate interpretative approaches. Some courts have chosen to ascribe a meaning of moral wrong to this portion of the test,[72] while others interpret the concept to stand for "legally wrong."[73]

While a great deal of criticism has been directed at the validity, relevance, and ease of application of the *M'Naghten* rules as originally formulated and narrowly construed, a recently developing body of commentary calls for a return to a broadened version of the *M'Naghten* test.[74] Those commentators favoring the revitalization of the *M'Naghten* rules recommend that the rules be construed to provide an excuse where mental disease or defect impairs the defendant's understanding or ability to ap-

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69. People v. Wolff, 61 Cal. 2d 795, 800, 394 P.2d 959, 962, 40 Cal. Rptr. 271, 274 (1964) (quoting J. HALL, *supra* note 65, at 520).

70. *Id.* at 801, 394 P.2d at 962, 40 Cal. Rptr. at 274 (quoting CALJIC No. 801 Rev.). California since has adopted the ALI rule. *See infra* notes 104-05 and accompanying text; *see also* People v. Drew, 22 Cal. 3d 333, 583 P.2d 1318, 149 Cal. Rptr. 275 (1978).

Professor Goldstein attempted to rebut the contention that the word "know" unduly narrows the defense:

> The assertion that "know" is narrowly defined has been made so often and so insistently that it comes as a surprise to find that very few appellate courts have imposed the restrictive interpretation. Indeed most of the courts which have addressed themselves to the question have favored a rather broad construction.

A. GOLDSTEIN, *supra* note 64, at 49.

71. M'Naghten's Case, 8 Eng. Rep. at 719.

72. *See, e.g.*, State v. Corley, 108 Ariz. 240, 495 P.2d 470 (1972); People v. Schmidt, 216 N.Y. 324, 110 N.E. 945 (1915); People v. Irwin, 166 Misc. 751, 4 N.Y.S.2d 548 (Ct. Gen. Sess. 1938). *See generally* W. LAFAVE & A. SCOTT, *supra* note 67, at 278.

73. *See, e.g.*, State v. Hamann, 285 N.W.2d 180, 183 (Iowa 1979) (maintaining that the word "wrong" means "legally wrong" because "it is futile to pretend that our society maintains a consensus on moral questions beyond what it writes into laws"); *see also* People v. Perez, 9 Cal. 3d 651, 510 P.2d 1026, 108 Cal. Rptr. 474 (1973); People v. Schmidt, 216 N.Y. at 340, 110 N.E. at 949 (commenting that knowledge of the illegality of an act gives rise to the inference that the act is also morally impermissible).

74. *See, e.g.*, Bonnie, *supra* note 20; Livermore & Meehl, *The Virtues of M'Naghten*, 51 MINN. L. REV. 789 (1967); *see also* SENATE COMM. ON THE JUDICIARY, REPORT ON THE COMPREHENSIVE CRIME CONTROL ACT OF 1983, S. REP. No. 225, 98th Cong., 1st Sess. 225 (1983) (proposing that the volitional part of the cognitive-volitional test of the ALI-Model Penal Code be eliminated). *See generally* D. HERMANN, *supra* note 20, at 143-51.

preciate the nature of his conduct or its wrongfulness in such a manner that it is unreasonable to hold the person culpable for failure to conform his conduct to the requirements of law.[75]

2. *The irresistible impulse test*

As noted above, one of the major criticisms against the *M'Naghten* test is that it concentrates on the cognitive faculties of the defendant and ignores the affective and volitional components of behavior.[76] In order to remedy this weakness, some courts adopted an irresistible impulse test.[77] Under this test criminal conduct resulting from the defendant's mental inability to control his behavior is excused.[78] The problem with the irre-

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75. *See, e.g., Insanity Defense Hearings, supra* note 12, at 267 (statement of Richard J. Bonnie). Professor Bonnie contends:

> The sole test of legal insanity should be whether the defendant, as a result of mental disease, lacked "substantial capacity to appreciate the wrongfulness of his conduct." This language . . . uses clinically meaningful terms to ask the same question posed by the House of Lords in M'Naghten 150 years ago. . . . I am convinced that this test is fully compatible with the ethical premises of the penal law, and that results reached by judges and juries in particular cases ordinarily would be congruent with the community's moral sense.

Id. at 278; *see also* D. HERMANN, *supra* note 20, at 143-44 (suggesting that the test for the insanity defense should focus on impaired "understanding"); Livermore & Meehl, *supra* note 74.

76. The necessity for such a test was indicated shortly after the enunciation of the *M'Naghten* rules in these terms: "[T]his should be the test of irresponsibility—not whether the individual be conscious of right and wrong—not whether he had knowledge of the consequences of his act—but whether he can properly control his action!" J. HALL, *supra* note 65, at 487 (quoting S. KNAGGS, RESPONSIBILITY IN CRIMINAL LUNACY 69 (1854)); *see also* H. WEIHOFEN, *supra* note 61, at 45-52.

77. Parsons v. State, 81 Ala. 577, 2 So. 854 (1886), provided the first unequivocal recognition of the irresistible impulse test.

78. Professor Goldstein explained the irresistible impulse test in these terms: "The rule, broadly stated, tells jurors to acquit by reason of insanity if they find the defendant had a mental disease which kept him from controlling his conduct. They are to do so even if they conclude he knew what he was doing and that it was wrong." A. GOLDSTEIN, *supra* note 64, at 67. The decision in Parsons v. State, 81 Ala. 577, 2 So. 854 (1886) presented comprehensive judicial guidelines for the applicability of the irresistible impulse defense with a series of questions:

> 1. Was the defendant at the time of the commission of the alleged crime, as a matter of fact, afflicted with a *disease of the mind,* so as to be either idiotic, or otherwise insane?
>
> 2. If such be the case, did he know right from wrong as applied to the particular act in question? If he did not have such knowledge, he is not legally responsible.
>
> 3. If he did have such knowledge, he may nevertheless not be legally responsible if the two following conditions concur:
>
> (1.) If, by reason of the duress of such mental disease, he had so far lost the power to choose between the right and wrong, and to avoid doing the act in

sistible impulse test is evident from the very name of the test; there seems to be no workable way to distinguish an impulse that simply is not resisted from one that is irresistible.[79] This issue is not merely evidentiary. It also carries important implications for a theory of human responsibility. First, should a person be relieved of responsibility for a lack of self control when his understanding is not impaired?[80] Second, if we accept the concept of the integrated human personality, which serves as the basis of the attack on the *M'Naghten* rules, can we meaningfully consider a lack of control without considering the effect of the mental disorder on the whole personality?[81] Although the irresistible impulse test has been applied in some jurisdictions,[82] it has been rejected overwhelmingly by the English courts and most American courts.[83]

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question, as that his free agency was at the time destroyed.

(2.) and if, at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it solely.

Id. at 596-97, 2 So. at 866-67; *see also* Warren v. State, 243 Ind. 508, 188 N.E.2d 108 (1963); State v. Holt, 22 Utah 2d 109, 449 P.2d 119 (1969). *Contra* State v. Goza, 317 S.W.2d 609 (Mo. 1958).

79. The irresistible impulse test has met with criticisms based on grounds ranging from the principled to the pragmatic including: (1) The viewpoint that no such mental disability truly exists; (2) even if it does exist, it may not be readily provable to constitute a defense to criminal conduct; (3) the test is so narrow and misleading that some who should be acquitted will not be; and (4) conversely, the test may excuse some who should be convicted. *See, e.g.*, Wade v. United States, 426 F.2d 64 (9th Cir. 1970); United States v. Freeman, 357 F.2d 64 (2d Cir. 1966); Sollars v. State, 73 Nev. 248, 316 P.2d 917 (1957); *see also* S. GLUECK, *supra* note 37 at 233-40; H. WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 95 (1954); Hall, *Psychiatry and Criminal Responsibility*, 65 YALE L.J. 761, 775-78 (1956).

80. *See* ROYAL COMMISSION ON CAPITAL PUNISHMENT, 1949-1953 REPORT 113 (London: Her Majesty's Stationery Office, 1953) [hereinafter cited as ROYAL COMMISSION]; *see also* D. HERMANN, *supra* note 20, at 145.

81. Professor Glueck stated his criticism of the irresistible impulse test in these terms:

> [Its] employment as such *neglects the fundamental notion of the unity of the mind and interrelationship of mental processes* and the fact that a disturbance in the cognitive, volitional, or emotional sphere, as the case may be, can hardly occur without its affecting the personality as a whole and the end conduct flowing from the personality.

S. GLUECK, CRIME AND CORRECTION: SELECTED PAPERS 150 (1952).

82. Approximately eighteen states and, after Davis v. United States, 165 U.S. 373, 378 (1897), a majority of federal courts used the irresistible impulse defense until they replaced it with the ALI-Model Penal Code test. A. GOLDSTEIN, *supra* note 64, at 67.

83. Because of the criticisms outlined above, many courts have rejected it unequivocally. *See, e.g.*, United States v. Freeman, 357 F.2d 606, 620 (2d Cir. 1966), State v. Johnson, 121 R.I. 254, 263, 399 A.2d 469, 474 (1979); Regina v. Burton, 176 Eng. Rep. 354, 357 (1863).

3. *The* Durham *test*

For more than a century the *M'Naghten* rules represented the only test for ascertaining a defendant's lack of criminal responsibility based on mental impairment, with the exception of the few jurisdictions that supplemented it with the irresistible impulse test. The irresistible impulse test, while ultimately criticized by psychiatric commentators, originally was adopted, by those jurisdictions which used it, as a means to facilitate the introduction of a broad range of psychiatric evidence.

Perhaps the most noteworthy effort to root an insanity test in psychiatric expertise was the "product test" that originated in the New Hampshire Supreme Court decision in *State v. Pike.*[84] The *Pike* court held that the insanity defense should be understood as requiring the fact finder to determine whether the defendant's impaired mental condition constituted the cause of his criminal conduct.[85] This decision reflected the influence of Dr. Ray's proposal that a defendant suffering from a mental disorder should not be held responsible for his criminal conduct if that conduct was a direct result of the mental disorder.[86] Although the New Hampshire court's rule with its psychiatric underpinnings was amplified in subsequent decisions,[87] it did not

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84. 49 N.H. 399 (1870), *overruled on other grounds,* Hardy v. Merrill, 56 N.H. 227 (1875) (allowing nonexperts to testify on the issue of insanity); H. WEIHOFEN, *supra* note 79, at 79-84.

85. The *Pike* court allowed a jury instruction which declared that the defendant was not guilty of murder if the killing "was the offspring of mental disease in the defendant." 49 N.H. at 402.

86. H. WEIHOFEN, THE URGE TO PUNISH 3 (1956). New Hampshire Judge Charles Doe, directly influenced by his correspondence with Isaac Ray, maintained in his dissent in Boardman v. Woodman, 47 N.H. 120, 146-47 (1865), *overruled on other grounds,* Hardy v. Merrill, 56 N.H. 227 (1875) (allowing nonexperts to testify on issues of insanity), that the question whether a delusional state was a symptom or a test of responsibility was a matter to be decided by the jury. Three years later in *Pike,* Judge Doe writing for the majority enunciated the test in these terms:

> The whole difficulty is, that courts have undertaken to declare that to be law which is a matter of fact. The principles of the law were maintained at the trial of the present case, when, experts having testified as usual that neither knowledge nor delusion is the test, the court instructed the jury that all tests of mental disease are purely matters of fact, and that if the homicide was the offspring or product of mental disease in the defendant, he was not guilty by reason of insanity.

49 N.H. at 442.

See generally Sobelloff, *From McNaghten to Durham and Beyond,* in CRIME AND INSANITY 140 (Nice ed. 1958); Reik, *The Doe-Ray Correspondence: A Pioneer Collaboration in the Jurisprudence of Mental Disease,* 63 YALE L.J. 183, 192 (1953).

87. *See* State v. Jones, 50 N.H. 369 (1871). In this case, Judge Ladd amplified the

find acceptance in other jurisdictions[88] until 1954, when it was adopted by the United States Court of Appeals for the District of Columbia in *Durham v. United States.*[89] The court specifically rejected the M'Naghten and irresistible impulse tests as obsolete.[90] The *Durham* rule as enunciated by Judge Bazelon stated:

> The rule we now hold . . . is not unlike that followed by the New Hampshire court since 1870. It is simply that the accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.
>
> . . . .
>
> The legal and moral traditions of the western world require that those who, of their own free will and with evil intent (sometimes called *mens rea*), commit acts which violate the law, shall be criminally responsible for those acts. Our traditions also require that where such acts stem from and are the product of a mental disease or defect as those terms are used herein, moral blame shall not attach, and hence there will not be criminal responsibility.[91]

The *Durham* court's decision was influenced by the findings of the Royal Commission on Capital Punishment, which recommended the abolition of the *M'Naghten* test and the adoption of a test that would permit "the jury to determine whether the accused was suffering from disease of the mind (or mental deficiency) to such a degree that he ought not to be held responsible."[92] The *Durham* court found a "justly held responsible test" to provide too broad a basis for the operation of jury discretion; however, it concluded that this notion of "justly held responsi-

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language of *State v. Pike* in these terms: "[t]he real ultimate question to be determined seems to be, whether, at the time of the act, he had the mental capacity to entertain a criminal intent—whether, in point of fact, he did entertain such intent." *Id.* at 382. He further stated: "The defendant was to be acquitted unless the jury were satisfied beyond a reasonable doubt that the killing was not produced by mental disease." *Id.* at 400. Judge Ladd maintained that the following was a proper jury instruction: "If the defendant killed his wife in a manner that would be criminal and unlawful if the defendant were sane, the verdict should be 'not guilty by reason of insanity,' if the killing was the offspring product of mental disease in the defendant . . . ." *Id.* at 398.

88. *See, e.g.*, State v. Pallhymer, 114 Ariz. 390, 392, 561 P.2d 311, 313 (1977); People v. Jennings, 66 Cal. App. 3d 743, 745, 136 Cal. Rptr. 249, 250 (1977); State v. Pagels, 92 Mo. 300, 317, 4 S.W. 931, 937 (1887); State v. Bundy, 24 S.C. 439, 445 (1885).

89. 214 F.2d 862 (D.C. Cir. 1954), *overruled,* United States v. Brawner, 471 F.2d 969, 981 (D.C. Cir. 1972).

90. *Id.* at 874-76.

91. *Id.*

92. ROYAL COMMISSION, *supra* note 80, at 116.

ble" could best be realized within the "product test," which would provide for the broadest range of expert psychiatric evidence.[93]

Although the *Durham* rule was adopted in only a few jurisdictions,[94] it became the object of a great deal of controversy and discussion.[95] The main difficulty with the "product test" lay in the requirement of establishing a causal connection between the mental illness and the criminal conduct.[96] Under the "product test" a defendant must show that his conduct would not have occurred except for his "mental disease or defect."[97] The

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93. 214 F.2d at 876.

94. *See, e.g.*, ME. REV. STAT. ANN. tit. 15 § 102 (1963) (repealed 1976). New Hampshire's rule was enunciated in State v. Pike, 49 N.H. 399 (1869), *overruled on other grounds*, Hardy v. Merrill, 56 N.H. 227 (1875) (allowing nonexperts to testify on the issue of insanity). The District of Columbia's rule was stated in Durham v. United States, 214 F.2d 862, 874-75 (D.C. Cir. 1954); *see also* Columbus v. Zanders, 25 Ohio Misc. 144, 150, 266 N.E.2d 602, 606 (Franklin County Mun. Ct. 1970).

95. *See, e.g.*, Bazelon, *The Concept of Responsibility*, 53 GEO. L.J. 5 (1964); McGee, *Defense Problems Under the Durham Rule*, 5 CATH. LAW. 35 (1959); Reid, *The Companion of the New Hampshire Doctrine of Criminal Insanity*, 15 VAND. L. REV. 721 (1962); Wechsler, *The Criteria of Criminal Responsibility*, 22 U. CHI. L. REV. 367 (1955).

96. *See* N. MORRIS, MADNESS AND THE CRIMINAL LAW 56, 62-64; *see also* Hermann, Book Review, 51 GEO. WASH. L. REV. 329, 338-41 (1983). *See generally* D. HERMANN, *supra* note 20, at 43-45.

97. Durham v. United States, 214 F.2d 862, 875 (D.C. Cir. 1954). The District of Columbia Court of Appeals further confronted the dilemma of the product test in Wright v. United States, 250 F.2d 4 (D.C. Cir. 1957), in which it stated: "The terms 'disease' and 'defect' are not so self-explanatory and our definition of them in *Durham* is not so definitive as to make elucidation always superflous." *Id.* at 11. The court further commented on the causal relationship between the mental disability and the crime:

> [T]he short phrases "product of" and "causal connection" are not intended to be precise, as though they were chemical formulae. They mean that the facts concerning the disease and the facts concerning the act are such as to justify reasonably the conclusion that "But for this disease the act would not have been committed."

Id. at 13 (quoting Carter v. United States, 252 F.2d 608, 617 (D.C. Cir. 1956)).

In Carter v. United States, 252 F.2d 608 (D.C. Cir. 1956), the court attempted to elucidate the product test in these terms:

> [T]he simple fact that a person has a mental disease or defect is not enough to relieve him of responsibility for a crime. There must be a relationship between the disease and the criminal act . . . such . . . that the act would not have been committed if the person had not been suffering from the disease.

Id. at 615-16 (footnotes omitted); *see also* H. WEIHOFEN, *supra* note 86, criticizing the *Durham* test in these terms:

> The term product implies a "causal connection" as the court in the *Durham* case indicated. . . . At the most elementary level, we have the basic question, does the rule mean that the disorder must have been the cause of the act, or merely one cause . . .? An even greater difficulty is involved when we try to trace causation from mental disorder to criminal conduct. As Dr. Phillip Q. Roche has said, "Mental illness does not cause one to commit a crime nor does

District of Columbia court defined mental disease as a condition that can improve or deteriorate and mental defect as a condition which is congenital or caused by injury or disease. A second basis for dissatisfaction with the *Durham* rule was rooted in increasing disaffection with the nature of the psychiatric evidence received by the courts in the District of Columbia: the test was too heavily dependent upon psychiatric expertise and led to experts testifying on the ultimate issue of responsibility; therefore, the jury's decision-making responsibilities were being usurped by psychiatrists.[98]

Gradually the District of Columbia court began to admit that there were fundamental difficulties in applying the "product test" relating to both the causal inquiry and the delegation to psychiatric authorities of responsibility for determining what would constitute a mental disease or defect.[99] In 1962, in *McDonald v. United States*,[100] the court tried to clarify and am-

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mental illness produce a crime. Behavior and mental illness are inseparable—one and the same thing."

Id. at 90-92.

98. *See, e.g.*, United States v. Freeman, 357 F.2d 606 (2d Cir. 1966). Judge Kaufman stated, "It seems clear that a test which permits all to stand or fall upon labels or classifications employed by testifying psychiatrists hardly affords the court the opportunity to perform its function of rendering an independent legal and social judgment." *Id.* at 622. In Washington v. United States, 390 F.2d 444 (D.C. Cir. 1967) the court acknowledged that the unchecked influence that the experts exert over the jury constitutes one of the *Durham* test's biggest shortcomings. *Id.* at 446. It prohibited psychiatric testimony regarding the "product" concept because it refers more to a conclusion than to a clinical or medical condition. *Id.* at 455-56. The court continued to allow medical testimony regarding the concept of "mental disease or defect" but suggested an instruction to experts admonishing them to refrain from rendering moral judgments and to restrict their testimony solely to medical opinion. *Id.* at 457-58; *accord* State v. Harkness, 160 N.W.2d 324, 332 (Iowa 1968); State v. Lucas, 30 N.J. 37, 71, 152 A.2d 50, 68 (1959). *But see* P. ROCHE, THE CRIMINAL MIND (1958). Dr. Roche stated:

> [The *Durham*] decision removes from the public centered aspect of criminal justice an impediment to the fuller exploitation of technical information for the use of those who make moral decisions. Furthermore, the decision achieves a greater insulation of those who supply the technical information from those who make the decisions. The expert is less imposed upon to transpose scientific observation into value judgments, less restricted to an intellectual exercise focused exclusively on a single aspect of the subjective element of a crime.

Id. at 250-51. *See generally* Halleck, *A Critique of Current Psychiatric Roles in the Legal Process*, 1966 WIS. L. REV. 379, 388-89; Wertham, *Psychoauthoritarianism and the Law*, 22 U. CHI. L. REV. 336 (1955).

99. *See, e.g.*, Frigillana v. United States, 307 F.2d 665, (D.C. Cir. 1962). The court noted that the scope of the medical testimony had been narrowed to the concepts of "disease" and "product." *Id.* at 670. The court also acknowledged that the ALI test was a better method of ascertaining insanity. *Id.* at 670 n.8.

100. 312 F.2d 847 (D.C. Cir. 1962). *See generally* Acheson, *McDonald v. United*

plify the definitions of mental disease and defect, holding that these terms include "any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls."[101] Also the court sought to enlarge the scope of the jury's considerations of expert testimony by declaring that "it [is] very clear that neither the court nor jury is bound by *ad hoc* definitions or conclusions as to what experts state is a disease or defect."[102] Finally in 1972, in *United States v. Brawner,*[103] the court reversed its 1954 decision, concluding that it was not possible to place proper limits on psychiatric testimony within a framework that required a determination of whether a mental disorder had caused the criminal conduct. In place of the "product test," the court adopted the American Law Institute Model Penal Code test for insanity.

4. The ALI-Model Penal Code test

In order to avoid the major criticisms and shortcomings of the *M'Naghten,* irresistible impulse, and *Durham* tests, the American Law Institute (ALI) considered new standards for ascertaining criminal responsibility.[104] The test adopted in the ALI-Model Penal Code provides that a defendant is not criminally responsible for his conduct if at the time he committed the

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States: The Durham Rule Redefined, 51 GEO. L.J. 580 (1963).

101. McDonald v. United States, 312 F.2d 847, 851 (D.C. Cir. 1962).

102. *Id.* at 851.

103. 471 F.2d 969, 973 (D.C. Cir. 1972).

104. *See* MODEL PENAL CODE § 4.01, at 27-28 (Tent. Draft No. 4, 1955). The approved formulation states:

> (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 [wrongfulness] 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 or otherwise anti-social conduct.

Id.

The two alternative formulations read:

> (a) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect his capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law is so substantially impaired that he cannot justly be held responsible.
>
> (b) 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 to appreciate the criminality of his conduct or is in such state that the prospect of conviction and punishment cannot constitute a significant restraining influence upon him.

Id.

criminal act he lacked substantial capacity either to appreciate the wrongfulness of his behavior or to conform his actions to the law because of mental disease or defect.[105]

The ALI test is rooted in the *M'Naghten* standard with its focus on impairment of knowledge and the irresistible impulse test with its focus on impairment of ability to choose. One of the main differences between the *M'Naghten* and the Model Penal Code standards is the inclusion of the word "substantial" in the Model Penal Code to qualify the extent of the mental impairment.[106] The drafters contended that a major strain of case law applying the right-wrong test had required a showing of total impairment for exculpation from criminal responsibility. They felt that the proper inquiry should be whether there was a sufficient impairment to require that a person be held not responsible.[107] Further, the Code dealt with the controverted cognitive language of *M'Naghten*[108] by substituting broader language of mental impairment, which captures both the cognitive and affective aspects of impaired mental understanding. The ALI test uses the word "appreciate" instead of the word "know" since "the mere intellectual awareness that conduct is wrongful when divorced from an appreciation or understanding of the moral or legal import of behavior, can have little significance."[109] The word "wrong" was replaced first with the word "criminality" and eventually with "wrongfulness."[110] Thus, the drafters adopted the position that the insanity defense deals with an impaired moral sense rather than an impaired sense of legal wrong. This position is based on the feeling that the insanity issue is concerned with responsibility relating to "guilty mind."[111] The term

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105. MODEL PENAL CODE § 4.01 ¶ (1) (Proposed Official Draft, 1962); for ¶ (2) see *supra* note 104. *See generally* Diamond, *From M'Naghten to Currens, and Beyond*, 50 CALIF. L. REV. 189 (1962); Kuh, *A Prosecutor Considers the Model Penal Code*, 63 COLUM. L. REV. 608 (1963).

106. Sobelloff, *supra* note 86, at 147-48.

107. *See* MODEL PENAL CODE, *supra* note 104, at 158-59; *see also* Wechsler, *The Criteria of Criminal Responsibility*, 22 U. CHI. L. REV. 367, 372 (1955).

108. *See supra* notes 67-71 and accompanying text.

109. United States v. Freeman, 357 F.2d 606, 623 (2d Cir. 1966); *see also* People v. Drew, 22 Cal. 3d 333, 346, 583 P.2d 1318, 1325, 149 Cal. Rptr. 275, 282 (1978).

110. MODEL PENAL CODE § 4.01 (Proposed Official Draft, 1962).

111. In Bethea v. United States, 365 A.2d 64 (D.C. 1976), *cert. denied*, 433 U.S. 911 (1977), the court observed that the use of the word "wrongfulness" in the test resulted in a definition of "insane" as "those who may be fully aware of the law's requirements, but because of a delusion resulting from a mental disease or defect believe their conduct to be morally justified." *Id.* at 80. *See generally* Weihofen, *Capacity to Appreciate "Wrongfulness" or "Criminality" Under the ALI-Model Penal Code Test of Mental Re-*

"control" was adopted to meet the purposes of the "irresistible impulse" test while avoiding the criticism of that test, which was viewed as requiring a sudden impulse, excluding the possibility of lack of responsibility following a period of brooding.[112] Such a period was thought to provide an equally compelling basis for a finding of lack of responsibility.

Supporters of the ALI test have contended that their formulation addresses both the cognitive and volitional aspects of the defendant's mental picture[113] and properly acknowledges that partial impairment may preclude criminal responsibility.[114] Another suggested advantage over previous tests is that because of the ALI test's plain language, the jury is better able to understand the clinical explanations of psychiatric experts but is not presented with a conclusory opinion that goes to the ultimate question of responsibility.[115] Therefore, the jury or fact finder is

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sponsibility, 58 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 27 (1967). Weihofen advocated use of the term "wrongfulness." He said, "If we hold a person mentally responsible for his criminal act unless he is so disordered as to be unable to appreciate its criminality, we shall have to condemn as responsible and fit for punishment some of the most wildly disordered persons ever seen . . . ." *Id.* at 27.

112. *See* MODEL PENAL CODE, *supra* note 104, at 157.

113. *See, e.g.,* United States v. Freeman, 357 F.2d 606, 622 (2d Cir. 1966) (ALI treats the mind as an entity); Commonwealth v. McHoul, 352 Mass. 544, 549-50 n.5, 226 N.E.2d 556, 559 n.5 (1967) (unified view of mind is the advantage of the ALI test). In United States v. Currens, 290 F.2d 751 (3d Cir. 1961) the Third Circuit adopted a modified version of the ALI test after rejecting the cognitive test. This modified version was formulated as follows:

> The jury must be satisfied that at the time of committing the prohibited act the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated. *Id.* at 774 (footnote omitted).

Judge Biggs, writing for the court, stated that cognitive impairment by itself was insufficient because the insanity defense has always implied some volitional component in the context of the criminal conduct. *Id.; see also* Wion v. United States, 325 F.2d 420, 427 (10th Cir. 1963), *cert. denied,* 377 U.S. 946 (1964). *But see* United States v. Brawner, 471 F.2d 969, 992 (D.C. Cir. 1972) (retaining the cognitive test with the option of allowing the defendant to request deletion of the ALI test's cognitive phrase when no evidence of cognitive impairment was present.

114. *See, e.g.,* United States v. Shapiro, 383 F.2d 680, 685 (7th Cir. 1967); United States v. Freeman, 357 F.2d 606, 622 (2d Cir. 1966); State v. White, 93 Idaho 153, 159, 456 P.2d 797, 803 (1969); Hill v. State, 252 Ind. 601, 607, 251 N.E.2d 429, 433 (1969).

115. *See, e.g.,* Commonwealth v. McHoul, 352 Mass. 544, 554, 226 N.E.2d 556, 562 (1967). The Massachusetts Supreme Court commented that in presenting expert testimony under the other insanity tests, lawyers and psychiatrists often argued at length over the meanings of key words, thus confusing the jury. Under the ALI test, psychiatrists can testify regarding the defendant's " 'capacity . . . to appreciate . . . or to conform.' " *Id.* at 554, 226 N.E.2d at 562; *see also* United States v. Brawner, 471 F.2d 969, 983 (D.C. Cir. 1972) (familiar language of the ALI test allows communication); United States v. Frazier, 458 F.2d 911 (8th Cir. 1972) (ALI test allows for better means of com-

not forced to accept the opinions of experts as outcome determinative, but can reason to its own conclusions about the criminal responsibility of the defendant based on whether he was insane at the time the crime was committed.[116]

Nonetheless, the ALI test has met with substantial criticism.[117] Some critics have observed that the concept of "substantial impairment" is vague and, therefore, leads to unprincipled jury decisions.[118] Some commentators have expressed the opinion that this test allows too many defendants to be excused from criminal responsibility.[119] Perhaps the most significant criticism of the ALI test is that it continues the faults of the *M'Naghten* rules and the irresistible impulse test by providing separate knowledge and control tests; in doing so, this test seems to rest on a bifurcated rather than an integrated view of the human personality.[120]

5. *The justly responsible test*

The American Law Institute also offered a minority formulation for a test of insanity, designed to strengthen the jury's function as the sole decisionmaker in ascertaining criminal responsibility.[121] The language of the minority position is similar to that of the majority with one exception: the defendant is not to be found criminally responsible if his mental impairment is so

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munication by medical experts); Wade v. United States, 426 F.2d 64, 71 (9th Cir. 1970) (ALI phrases are consistent with psychiatric testimony); United States v. Smith, 404 F.2d 720 (6th Cir. 1968) (juries can more readily comprehend the ALI test); United States v. Chandler, 393 F.2d 920 (4th Cir. 1968) (language of ALI test is understandable by psychiatrists).

116. *See, e.g.*, United States v. Brawner, 471 F.2d 969, 983, 994, 1006 (D.C. Cir. 1972) (contending that the jury may draw its own conclusions from psychiatric testimony rendered by experts who have been instructed to use layman's language); *see also* Bethea v. United States, 365 A.2d 64, 76-77 (D.C.), *cert. denied*, 433 U.S. 911 (1976) (ALI test allows the jury to consider the expert testimony without adopting scientific conclusions).

117. *See generally* D. HERMANN, *supra* note 20, at 86-88.

118. United States v. Brawner, 471 F.2d 969, 1034 (D.C. Cir. 1972); Wade v. United States, 426 F.2d 64, 77-78 (9th Cir. 1970) (Trask, J., dissenting); *see also* W. LAFAVE & A. SCOTT, *supra* note 67, § 39, at 294; Livermore & Meehl, *supra* note 74, at 826-33.

119. *See* Wade v. United States, 426 F.2d 64, 75 (9th Cir. 1970) (Trask, J., dissenting); State v. White, 60 Wash. 2d 551, 592, 374 P.2d 942, 966 (1962), *cert. denied*, 375 U.S. 883 (1963). *See generally* Brady, *Abolish the Insanity Defense?—No!*, 8 HOUS. L. REV. 629 (1971); Monahan, *Abolish the Insanity Defense?—Not Yet*, 26 RUTGERS L. REV. 719 (1973).

120. *See* Hall, *Psychiatry and Criminal Responsibility*, 65 YALE L.J. 775-77 (1956).

121. MODEL PENAL CODE § 4.01, alternative (a) to paragraph (1) of § 4.01 (Tent. Draft No. 4, 1955).

substantial that he cannot be held justly responsible.[122] The theory behind this alternative is that the "justly responsible" standard encourages the jury to apply its own sense of justice according to accepted community standards for determining whether the defendant ought to be found responsible for a crime, rather than to depend exclusively upon the medical testimony of experts.[123]

The "justly responsible" test was adopted as the standard for the insanity defense in Rhode Island in 1979 in *State v. Johnson.*[124] The Rhode Island Supreme Court felt that this test "focused upon the legal and moral aspects of responsibility" since it required the jury to "evaluate the defendant's blameworthiness in light of prevailing community standards."[125] Moreover, the court asserted that this test makes clear that the nature of the impairment at issue is one of legal rather than medical significance.[126]

The "justly responsible" test has met with criticism from both the courts[127] and legal commentators.[128] The principal criticism lodged against it is that this test relies mainly on the concept of justice for which there cannot be a principled definition; therefore, the jurors are permitted to use unreviewable personal criteria for assessing blame.[129]

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122. *Id.* This formulation was first articulated in 1953 by the British Royal Commission on Capital Punishment when it proposed that a person should not be held responsible for his unlawful act if "at the time of the act the accused was suffering from disease of the mind (or mental deficiency) to such a degree that he ought not to be held responsible." ROYAL COMMISSION, *supra* note 80, at 116.

123. *See* United States v. Brawner, 471 F.2d 969, 1030-31 (D.C. Cir. 1972) (Bazelon, C.J., concurring and dissenting) (asserting that the jury would be likely to give too much weight to the psychiatrists' diagnoses and proposing that references to mental disease should be abandoned to allow the jury to rely primarily on community standards when ascertaining criminal responsibility); *see also* Wechsler, *supra* note 107, at 372 (the jury's "sense of justice" constitutes the proper criterion of insanity).

124. 121 R.I. 254, 399 A.2d 469 (1967).

125. *Id.* at 267-68, 399 A.2d at 476-77.

126. *Id.* at 268, 399 A.2d at 477.

127. *See* United States v. Brawner, 471 F.2d 969, 988 (D.C. Cir. 1972); Wade v. United States, 426 F.2d 64, 70 (9th Cir. 1970).

128. A. GOLDSTEIN, *supra* note 64, at 81-82. Professor Goldstein observed that "the overly general standard may place too great a burden upon the jury. If the law provides no standard, members of the jury are placed in the difficult position of having to find a man responsible for no other reason other than their personal feeling about him."

129. *See* D. HERMANN, *supra* note 20, at 57-58.

B. Proposals to Narrow the Insanity Defense

None of the various insanity tests has met with a great deal of approval. Over the years, one of the major criticisms of these tests has been that they allow too many defendants to be excused from criminal responsibility.[130] Therefore, the public has been challenged to exercise its sense of fairness and justice in creating alternative solutions that adequately balance the penal objectives of punishing the guilty and protecting the public against the concept that a mentally ill individual should not be held responsible for his criminal behavior.

Two principal approaches have recently been urged as means of placing desired limits on the insanity defense. These two approaches involve (1) a procedural change in the administration of the defense—shifting the burden to the defendant to prove his insanity, and (2) a substantive change in the scope of the defense—restricting evidence of mental impairment to the issue of the state of mind or *mens rea* required for the particular offense.[131]

1. Burden of proof

It is a well-established principle of criminal law in all state and federal jurisdictions[132] that people are presumed sane and accountable for their actions.[133] In order for a defendant to place his sanity at issue with an insanity plea, he must meet his bur-

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130. *Limiting the Insanity Defense, 1982: Hearings on S. 818, S. 1106, S. 1558, S. 1995, S. 2572, S. 2658, and S. 2669 Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 34-36 (1982) (statement of the Hon. Orrin Hatch) [hereinafter cited as *Limiting the Insanity Defense, Hearings*].

131. *See generally* Smith, *Limiting the Insanity Defense: A Rational Approach to Irrational Crimes*, 47 MO. L. REV. 605 (1982); Eule, *The Presumption of Sanity: Bursting the Bubble*, 25 UCLA L. REV. 637 (1978); Feinberg, *Toward a New Approach to Proving Culpability: Mens Rea and the Proposed Federal Criminal Code*, 18 AM. CRIM. L. REV. 123 (1980); Note, *Constitutional Limitations on Allocating the Burden of Proof of Insanity to the Defendant in Murder Cases*, 56 B.U.L. REV. 499 (1976); Note, *The Insanity Defense in Criminal Trials—Burden of Proof*, 10 SUFFOLK U.L. REV. 1037 (1976).

132. *See* H. WEIHOFEN, *supra* note 65, at 214.

133. When questioned by the House of Lords in the aftermath of the *M'Naghten* decision, Lord Chief Justice Tindal responded: "[E]very man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes . . . ." M'Naghten's Case, 8 Eng. Rep. 718, 722 (H.L. 1843). *See generally* W. LAFAVE & A. SCOTT, *supra* note 67, § 40, at 312; Comment, *Unburdening the Criminal Defendant:* Mullaney v. Wilbur *and the Reasonable Doubt Standard*, 11 HARV. C.R.-C.L. L. REV. 390, 412 (1976); Annot., 17 A.L.R.3d 146 (1968).

den of going forward with evidence showing mental impairment.[134] From this point on, the various jurisdictions are divided about whether the prosecution or the defense has the ultimate burden of persuasion on the insanity of the defendant.[135] One group of jurisdictions takes the position that insanity is related to the required elements of an offense and, therefore, places the burden on the prosecution to prove beyond a reasonable doubt that the defendant was sane at the time he committed the crime.[136] The other group of jurisdictions interprets the insanity defense as an affirmative defense,[137] requiring the defendant to prove his insanity[138] or to rebut the presumption of sanity either

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134. In the federal system the defendant has to introduce "some" evidence of insanity. *See, e.g.*, Brown v. United States, 351 F.2d 473, 474 (5th Cir. 1965) (quoting Davis v. United States, 160 U.S. 469 (1895)); Keys v. United States, 346 F.2d 824 (D.C. Cir.), *cert. denied*, 382 U.S. 869 (1965); Hawkins v. United States, 310 F.2d 849 (D.C. Cir. 1962). State standards vary ranging from "some" to "any" evidence of insanity. *See, e.g.*, State v. Penry, 189 Kan. 243, 368 P.2d 60 (1962) ("some" evidence); People v. Garbutt, 17 Mich. 9 (1868) ("any" evidence would suffice to put insanity in issue); Thompson v. State, 159 Neb. 685, 68 N.W.2d 267 (1955) ("any" evidence); Snider v. State, 56 Neb. 309, 76 N.W. 574 (1898) ("any" evidence tending to show insanity is sufficient to dissipate presumption of sanity). *See generally* W. LAFAVE & A. SCOTT, *supra* note 67, § 40, at 312-13.

135. The "burden of proof" encompasses two separate and distinguishable phases of presenting evidence during the trial:

> 1) the initial burden of going forward with the evidence . . . and 2) the burden of persuasion . . . [o]n the issue of lack of responsibility because of insanity[. T]he initial burden of going forward is everywhere placed upon the defendant . . . . The burden of persuasion . . . involves the situation in which factual matter is before the jury for decision; the burden is that of convincing the jury to accept the version of those facts alleged by the party bearing the burden.

W. LAFAVE & A. SCOTT, *supra* note 67, § 40, at 312.

136. All federal courts place the burden on the prosecution to prove the defendant's sanity beyond a reasonable doubt. *See, e.g.*, Lynch v. Overholser, 369 U.S. 705 (1962); Davis v. United States, 160 U.S. 469, 484-85 (1895); Davis v. United States, 364 F.2d 572 (10th Cir. 1966); Hartford v. United States, 362 F.2d 63 (9th Cir.), *cert. denied*, 385 U.S. 883 (1966); Rollerson v. United States, 343 F.2d 269, 271 (D.C. Cir. 1964). A majority of states also follow this approach. *See, e.g.*, State v. Martin, 102 Ariz. 142, 426 P.2d 639 (1967); Castro v. People, 140 Colo. 493, 346 P.2d 1020 (1959); State v. Thomas, 219 N.W.2d 3 (Iowa 1974); State v. Penry, 189 Kan. 243, 368 P.2d 60 (1962); Commonwealth v. Demmit, 456 Pa. 475, 321 A.2d 627 (1974); Covey v. State, 504 S.W.2d 387 (Tenn. Crim. App. 1973) (quoting Jordan v. State, 124 Tenn. 81, 135 S.W. 327 (1911)).

137. *See, e.g.*, Grace v. Hopper, 566 F.2d 507, 510 (5th Cir.), *cert. denied*, 439 U.S. 844 (1978). Under Georgia law sanity was not an element of the offense of murder; instead insanity was an affirmative defense. The Fifth Circuit in *Grace* upheld the constitutionality of the Georgia rule that the accused must prove insanity by a preponderance of the evidence.

138. *See, e.g.*, United States v. Greene, 489 F.2d 1145, 1152, 1156 (D.C. Cir. 1973) (applying District of Columbia law), *cert. denied*, 419 U.S. 977 (1974); State v. Collins, 297 A.2d 620, 637 (Me. 1972); Hatten v. State, 83 Nev. 531, 534, 435 P.2d 495, 497 (1967).

by a preponderance of the evidence[139] or to the satisfaction of the jury.[140] The United States Supreme Court recently confirmed that "[a] defendant could be required to prove his insanity by a higher standard than a preponderance of the evidence."[141]

Since the 1895 United States Supreme Court decision in *Davis v. United States,*[142] federal courts have required the prosecution to prove the defendant's insanity beyond a reasonable doubt. The underlying rationale of the *Davis* decision was that the prosecution must prove every element of the crime beyond a reasonable doubt, including *mens rea,* and that the insanity defense is directly related to *mens rea.* The *Davis* Court held:

> [Defendant's] guilt cannot be said to have been proved beyond a reasonable doubt—his will and his acts cannot be held to have joined in perpetrating the murder charged—if the jury, upon all the evidence, have a reasonable doubt whether he was legally capable of committing the crime. . . . As the crime of murder involves sufficient capacity to distinguish between right and wrong, the legal interpretation of every verdict of guilty as charged is that the jury believed from all the evidence beyond a reasonable doubt that the accused was guilty, and was therefore responsible, criminally, for his acts. How then upon principle or consistently with humanity can a verdict of guilty be properly returned, if the jury entertain a reasonable doubt as to the existence of a fact which is essential to guilt, namely, the capacity in law of the accused to commit that crime?[143]

More than half a century later, the Supreme Court in *Le-*

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139. *See, e.g.,* State v. Mabry, 596 F.2d 332, 333 (8th Cir.), *cert. denied,* 444 U.S. 946 (1979) (applying Arkansas law); People v. Drew, 22 Cal. 3d 333, 348-49, 583 P.2d 1318, 1326, 149 Cal. Rptr. 275, 283 (1978); People v. Martin, 114 Cal. App. 3d 739, 748, 170 Cal. Rptr. 840, 844 (1981); Boswell v. State, 243 Ga. 732, 256 S.E.2d 470, 471 (1979); State v. Marmillion, 339 So. 2d 788, 796 (La. 1976); Hurd v. State, 513 S.W.2d 936, 944 (Tex. 1974); State v. Grimm, 156 W. Va. 615, 627, 195 S.E.2d 637, 644-45 (1973), *overruled on other grounds,* State v. Nuckolls, 273 S.E.2d 87, 91 (W. Va. 1980).

140. *See, e.g.,* Riggins v. State, 226 Ga. 381, 174 S.E.2d 908 (1970) (instructions that defendant's insanity must be established "to the reasonable satisfaction of the jury" correctly charged the law applicable and could not have confused the jury); Lively v. State, 178 Ga. 693, 173 S.E. 836 (1934); State v. Humbles, 26 Iowa 462, 102 N.W. 409 (1905); Edwards v. Commonwealth, 554 S.W.2d 380 (Ky.), *cert. denied,* 434 U.S. 999 (1977).

141. Jones v. United States, 51 U.S.L.W. 5041, at 5045 n.17 (U.S. June 28, 1983) (citing Leland v. Oregon, 343 U.S. 790, 799 (1952), upholding a statute that required the defendant to establish the defense of insanity by proof beyond a reasonable doubt).

142. 160 U.S. 469 (1895).

143. *Id.* at 488.

land v. Oregon,[144] decided to limit the application of the analysis developed in *Davis,*[145] and upheld a statute imposing the burden of proving insanity beyond a reasonable doubt on the defendant.[146] Justice Clark, writing for the majority, said that the *Davis* decision was not a ruling having constitutional dimensions, but rather was a supervisory rule for federal prosecutions.[147] The Court decided that the Oregon statute was not unconstitutional because requiring the defendant to prove his insanity was not inconsistent with the prosecution's burden of proving the requisite elements of the offense. Thus, while the state was required to prove beyond a reasonable doubt that the homicide was a deliberate and premeditated killing,[148] it was not required to prove the defendant's sanity to the extent that it was not related to the required *mens rea.*[149] The Court further held that due process did not require that the prosecution prove the defendant's sanity in all criminal proceedings.[150] Justice Frankfurter, joined by Justice Black, dissented on the ground that culpability and sanity were interrelated, and that culpability was one of the essential elements of murder; therefore, a defendant could not be convicted of murder unless the prosecution proved beyond a reasonable doubt that the defendant was sane.[151]

The rationale of *Leland v. Oregon* was brought into question by the 1970 decision of *In re Winship.*[152] The Supreme Court held in this case that the due process clause of the Constitution mandated that the prosecution prove beyond a reasonable doubt every element of the offense charged.[153] The *Winship* de-

144. 343 U.S. 790 (1952).

145. Justice Harlan, writing for a unanimous court, addressed the issue whether this decision would permit "crimes of the most atrocious character" to go unpunished and thereby endanger the public safety. Justice Harlan observed that "the possibility of such results must always attend any system devised to ascertain and punish crime, and ought not to induce the courts to depart from principles fundamental in criminal law, and the recognition and enforcement of which are demanded by every consideration of humanity and justice." Davis v. United States, 160 U.S. 469, 493 (1895).

146. 343 U.S. at 796-97.

147. *Id.* at 797.

148. *Id.* at 794-95.

149. *Id.* at 797-98.

150. *Id.* at 798-99.

151. *Id.* at 803-04.

152. 397 U.S. 358 (1970); *see, e.g.,* Note, *Constitutional Limitations on Allocating the Burden of Proof of Insanity to the Defendant in Murder Cases,* 56 B.U.L. REV. 499, 500 (1976). The author of this Note suggested: "After *Winship* and *Wilbur,* the continued vitality of *Leland* is open to question."

153. 397 U.S. at 364.

cision was followed in 1975 by *Mullaney v. Wilbur*,[154] in which the Court examined the constitutionality of the placement of burden of proof of specified defenses under the Maine homicide statute. The Maine law provided that absent justification or excuse, all intentional or criminally reckless homicides were felonious homicides.[155] The statute defined two types of killings. Murder was an unlawful killing with malice aforethought,[156] while manslaughter was an unlawful killing in the heat of passion without malice aforethought.[157] The presence or absence of malice was the critical distinguishing factor between the two categories of felonious homicide. The Supreme Court construed the related provisions of the Maine law as creating a presumption of malice. In order to avoid conviction for murder, the defendant had to prove by a preponderance of evidence that the crime had been committed in the heat of passion and on sudden provocation.[158] The Court held that this statutory scheme as construed violated the due process clause as interpreted in *Winship*. The prosecution could not, based on a presumption, be relieved of its burden of establishing beyond a reasonable doubt the element of malice, which was essential to the crime of murder under the Maine statute.[159]

Despite the apparent implications of the *Mullaney* decision for the placement of burden of proof of insanity on the defendant (contra to *Leland* and in accord with *Davis*), Justice Rehnquist, in a concurring opinion, declared his belief in the continued viability of *Leland*.[160] Justice Rehnquist reasoned that insanity, unlike malice, was the subject of jury deliberations only after the jury has found on all the elements of the offense, including *mens rea*, beyond a reasonable doubt.[161] Even though Justice Rehnquist did concede that "evidence relevant to insanity as defined by state law" also may be relevant to whether

154. 421 U.S. 684 (1975). *See generally* Note, *The Burden of Proof and the Insanity Defense After* Mullaney v. Wilbur, 28 ME. L. REV. 435 (1976).

155. ME. REV. STAT. ANN. tit. 17, §§ 2551, 2651 (1964) (repealed 1975).

156. *Id.* Section 2651 provided: "Whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life."

157. *Id.* Section 2551 stated: "Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought . . . shall be punished by a fine . . . or by imprisonment."

158. 421 U.S. at 686-87.

159. *Id.* at 702.

160. *Id.* at 705-06 (Rehnquist, J., concurring).

161. *Id.* at 705.

the required *mens rea* was present, he went on to affirm that "the existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime."[162] Justice Rehnquist's position suggests (1) that while mental disorder might preclude *mens rea,* for example "intent" or "knowledge," it does not necessarily do so, and (2) that the insanity defense is related to the issue of culpability independent of *mens rea,* such as when the defendant did not understand the wrongfulness of his action.[163] Justice Rehnquist's position apparently was confirmed by the Supreme Court's action in *Rivera v. Delaware.*[164] There, the Court dismissed for lack of a substantial federal question a constitutional challenge to a Delaware statute defining insanity as an affirmative defense with the burden of proof of insanity on the defendant.[165] The Supreme Court of Delaware had cited the Rehnquist concurrence in *Mullaney* as the basis for its holding that the statute placing the burden of proof of insanity on the defendant was constitutional.[166]

Following the United States Supreme Court's dismissal of the appeal in *Rivera,* confusion as to the propriety of placing the burden of proof of insanity on the defendant became widespread throughout federal and state courts.[167] Consequently, the Supreme Court in 1977 in *Patterson v. New York*[168] attempted to clarify the contexts in which it would be appropriate to place the burden of proof of a defense such as the insanity defense on a defendant. In *Patterson* the Court found constitutional a New

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162. *Id.* at 705-06.

163. *See,* D. HERMANN, *supra* note 20, at 126-27.

164. 429 U.S. 877 (1976).

165. DEL. CODE ANN. tit. 11, § 401 (1979) (amended 1982).

166. Rivera v. State, 351 A.2d 561, 562-63 (Del.), *appeal dismissed sub. nom.* Rivera v. Delaware, 429 U.S. 877 (1976).

167. Some courts adopted Justice Rehnquist's position regarding the continued viability of *Leland. See, e.g.,* Guynes v. State, 92 Nev. 693, 694-95, 558 P.2d 626, 627 (1976) (per curiam); State v. Pendry, 227 S.E.2d 210, 220-21 (W. Va. 1976). Other courts adopted the "element of the crime" test. *See, e.g.,* Commonwealth v. Kostka, 370 Mass. 516, 350 N.E.2d 444 (1976). The Supreme Judicial Court of Massachusetts held that a defendant's mental disease or defect bears no " 'necessary relationship to the existence or nonexistence of the required mental elements of the crime [charged].' " *Id.* at 532 n.15, 350 N.E.2d at 455 n.15 (quoting Mullaney v. Wilbur, 421 U.S. 684, 706 (1975)). Two other courts ruled that *Mullaney* did not necessarily override *Leland* and therefore upheld statutes requiring the defendant to establish his insanity by a preponderance of the evidence. Buzynski v. Oliver, 538 F.2d 6 (1st Cir.), *cert. denied,* 429 U.S. 984 (1976); Bethea v. United States, 365 A.2d 64 (D.C. 1976), *cert. denied,* 433 U.S. 911 (1977).

168. 432 U.S. 197 (1977).

York statute that required the defendant to prove by a preponderance of the evidence the affirmative defense of extreme emotional disturbance in order to reduce the offense of murder to manslaughter.[169] Even though the Court did not specifically overrule *Mullaney,* it limited significantly the effect of that opinion. The Supreme Court accepted the reasoning of the Court of Appeals of New York,[170] which distinguished *Mullaney* by applying an analysis based on a strict "element of the crime" test and looked to the statute for the specification of the requisite elements of the offense. The New York court reasoned that malice was an element of murder under the Maine statutory scheme in *Mullaney,* and that the United States Supreme Court's decisions required such an element to be proved by the prosecution.[171] The New York statute, by contrast, was construed as requiring only two elements: intent and act. Thus, malice was not an element of murder in New York. Moreover, the statutory affirmative defense of extreme emotional disturbance did not relate to either of the required elements; thus the burden of proving extreme emotional disturbance could be placed on the defendant.[172] Citing the opinion in *Leland v. Ore-*

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169. N.Y. PENAL LAW § 125.25 (McKinney 1975) provided:

A person is guilty of murder in the second degree when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution under this subdivision, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was reasonable explanation or excuse . . . .

Section 125.20 provided:

A person is guilty of manslaughter in the first degree when:

. . . .

2. With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in paragraph (a) of subdivision one of section 125.25. The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision . . . .

170. People v. Patterson, 39 N.Y.2d 288, 347 N.E.2d 898, 383 N.Y.S.2d 573 (1976).

171. *Id.* at 301-02, 347 N.E.2d at 907, 383 N.Y.S.2d at 581-82.

172. In its analysis of *Mullaney,* the Court noted:

Mullaney's holding, it is argued, is that the State may not permit the blameworthiness of an act . . . to depend on the presence or absence of an identified fact . . . beyond a reasonable doubt. In our view, the *Mullaney* holding should not be so broadly read . . . .

Mullaney surely held that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof

gon as authority, the United States Supreme Court concluded that "[t]he Due Process Clause . . . does not put New York to the choice of abandoning [its affirmative] defenses or undertaking to disprove their existence;" so long as the state proves all the requisite elements of an offense, it may impose penal sanctions.[173]

With the *Patterson* opinion, the Court seems to have clearly established that the state may impose on the defendant the burden of proving an affirmative defense.[174] The Court's standard for determining the constitutionality of placing the burden of proof for any defense is formulated as an "element of the crime" test; if the defense does not relate to a specific element of a particular statutory offense, the burden of proof may be placed on the defendant.[175] The Court's interpretive scheme under this "element of the crime" test requires a narrow construction of the literal wording of the statute defining the offense without presuming any additional elements. When *mens rea* elements are defined narrowly in terms of acting intentionally or knowingly, the insanity defense, which excuses criminal conduct on the basis that the defendant is not culpable, is properly viewed as an affirmative defense because it does not necessarily preclude the requisite intent or knowledge. Once the insanity defense is denominated an affirmative defense, the defendant may be compelled to bear the burden of proving his insanity. This was the basis of the holding in *Leland,* which was confirmed by *Patterson,*[176] and this approach has received general acceptance by state courts.[177] Many of those urging reform of the insanity

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to the defendant by presuming that ingredient upon proof of the other elements of the offense. 432 U.S. at 214-15.

173. *Id.* at 207-08.

174. For various analyses of the *Patterson* case, see generally Allen, *The Restoration of* In re Winship: *A Comment on Burdens of Persuasion in Criminal Cases after* Patterson v. New York, 76 MICH. L. REV. 30 (1977); Eule, *supra* note 131, at 681-82; Note, *Due Process and the Insanity Defense: The Supreme Court's Retreat from* Winship *and* Mullaney, 54 IND. L.J. 95 (1978).

175. 432 U.S. at 206-08.

176. The Court observed:

> In convicting Patterson under its murder statute, New York did no more than *Leland* and *Rivera* permitted it to do without violating the Due Process Clause. Under those cases, once the facts constituting a crime are established beyond a reasonable doubt, based on all the evidence including the evidence of the defendant's mental state, the State may refuse to sustain the affirmative defense of insanity unless demonstrated by a preponderance of the evidence.

Id. at 206.

177. Since *Patterson,* a number of decisions have upheld the constitutionality of

defense view a statutory shift of the burden of proof from the prosecution to the defense as the key to resolving much of the confusion and abuse that is felt to attend the defense as administered in approximately half of the states and in all federal courts.[178]

2. Mens rea

Early dissatisfaction with the insanity defense resulted in outright efforts to abolish it. These efforts, however, met resistance on grounds that the defense was constitutionally required. One effort at outright abolition can be observed in a turn-of-the-century report of a committee of the New York State Bar Association:

> Has not the time come in our system of penology to relegate to the realm of the obsolete the assumption that an insane man cannot commit crime? . . . [O]ught we not to abolish the

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state statutes that place the burden of proving insanity on the defendant. *See, e.g.*, People v. Martin, 114 Cal. App. 3d 739, 748, 170 Cal. Rptr. 840, 844 (1981) (statute placing the burden of proof in a criminal prosecution on the defendant held constitutional); People v. Lee, 92 Cal. App. 3d 707, 716, 155 Cal. Rptr. 128, 132 (1979) (statute which placed burden of proof on defendant to prove himself insane held constitutional); Price v. State, 412 N.E.2d 783, 785 (Ind. 1980) (statute placing the burden of proof of insanity on a defendant held permissible under the United States Constitution); *accord* Johnson v. State, 426 N.E.2d 1312, 1313 (Ind. 1981); Basham v. State, 422 N.E.2d 1206, 1209 (Ind. 1981); State v. Gerald, 304 N.C. 511, 519-20, 284 S.E.2d 312, 317-18 (1981); State v. Capalbo, 433 A.2d 242 (R.I. 1981).

178. The drawback of "placing the burden on the prosecution to prove criminal guilt beyond a reasonable doubt is an increased risk that the guilty will go free." *Insanity Defense Hearings, supra* note 12, at 21 (statement of Senator Dan Quayle).

> One proponent of imposing the burden of persuasion on the defendant stated:
> [I]nsanity should be treated as an affirmative defense and the burden of proof placed upon the defendant to prove it. This would have significant impact. When experts disagree as to the sanity of the defendant, it confuses the jurors. Because of the burden of proof, that confusion now results in "not guilty by reason of insanity."

Id. at 111 (statement of William L. Cahalan).

This proponent also suggested that shifting the burden to the defendant will eliminate that confusion and will remove an obstacle which stands "in the way of the proper verdict of guilty, which has been proven in all its elements beyond a reasonable doubt to a moral certainty." *Id.; see also* S. 2658, 97th Cong., 2d Sess. (1982), which provides:

> (a) It shall be an affirmative defense to a prosecution under any Federal statute that the defendant, as a result of a mental disease, did not know the nature and quality of his actions or did not know the wrongfulness of his actions at the time he committed the acts otherwise constituting the offense.

S. 2672, 97th Cong., 2d Sess. (1982) provides: "(b) BURDEN OF PROOF—The burden of proof is on the defendant to establish the defense of insanity by a preponderance of the evidence."

> defense of insanity and leave as the one issue to the petit jury—Did the accused do the forbidden act? If he did not he is innocent; if he did he is guilty; and with the state of his mind at that time the jury has nothing to do.[179]

The committee specifically recommended the following statutory change in the state's Penal Code:

> Insanity or other mental deficiency shall no longer be a defense against a charge of crime; nor shall it prevent a trial of the accused unless his mental condition is such as to satisfy the court upon its own inquiry that he's unable by reason thereof to make proper preparations for his defense.[180]

Several states did in fact follow the suggestion of the New York Bar Association. For example, the state of Washington enacted the following legislation: "It shall be no defense to a person charged with the commission of crime, that at the time of its commission, he was unable by reason of his insanity, idiocy or imbecility to comprehend the nature and quality of the act committed, or to understand that it was wrong . . . ."[181] This statute was attacked under the Washington State Constitution in *State v. Strasburg*.[182] The Washington Supreme Court analyzed the insanity issue in terms of its relation both to the defendant's culpability and to the requisite *mens rea* for the offense charged. Reasoning from common-law decisions and doctrinal analysis developed in legal treatises,[183] the court concluded:

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179. Rood, *Statutory Abolition of the Defense of Insanity in Criminal Cases*, 9 MICH. L. REV. 126, 126 (1911).

180. *Id.*

181. WASH. REM. & BAL. CODE § 2259 (1909); 1909 WASH. LAWS ch. 249, § 7.

182. 60 Wash. 106, 110 P. 1020 (1910). For a critical analysis of *State v. Strasburg*, see Rood, *supra* note 179.

183. The Washington court cited favorably Blackstone's Commentaries which states: "The . . . case of a deficiency in will, which excuses from the guilt of crimes, arises also from a defective or vitiated understanding . . . in an idiot or lunatic . . . . In criminal cases . . . idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities." 4 W. BLACKSTONE, COMMENTARIES *24. In addition, the court cited as authority for its decision Massachusetts' Chief Justice Shaw's comments in Commonwealth v. Rogers, 48 Mass. 500 (7 Met. 1844), in which he stated:

> In order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience, or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts.

60 Wash. at 114, 110 P. at 1022 (quoting 48 Mass. at 501 (7 Met.)).

> It seems too plain for argument that one accused of crime had the right, prior to and at the time of the adoption of our Constitution, to show as a fact in his defense, that he was insane when he committed the act charged against him, the same as he had the right to prove any other fact tending to show that he was not responsible for the act . . . . The question of the insanity of the accused at the time of committing the act charged . . . is and always has been a question of fact for the jury to determine . . . . Such beyond all question was the right of all persons accused of crime at the time of and prior to the adoption of our Constitution.[184]

The Washington court concluded that the insanity defense was a principal means available to the defendant to negate the requisite mental state of the offense charged. The court reasoned that abolishing this avenue for exculpation had "the effect of depriving the [defendant] of liberty without due process of law, especially in that it deprives him of the right of trial by jury; and [was] therefore unconstitutional."[185]

While the *Strasburg* court acknowledged the legislature's competence to specify the requisite *mens rea* for an offense, it maintained that once the state had done so, it could not deny a defendant the opportunity to prove that his insanity precluded the required mental state. The *Strasburg* court held that the insanity defense could not be abolished because:

> Whatever the power may be in the legislature to eliminate the element of intent from criminal liability, we are of the opinion that such power cannot be exercised to the extent of preventing one accused of crime from invoking the defense of his insanity at the time of committing the act charged, and offering evidence thereof before the jury.[186]

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184. 60 Wash. at 115-16, 110 P. at 1022-23.

185. *Id.* at 123-24, 110 P. at 1025. The court based its decision upon this premise:

> The right of trial by jury must mean that the accused has the right to have the jury pass upon every substantive fact going to the question of his guilt or innocence . . . . [S]anity of the accused at the time of committing the act charged against him has always been regarded as much a substantive fact, going to make up his guilt, as the fact of his physical commission of the act. It seems to us the law could as well exclude proof of any other substantive fact going to show his guilt or innocence . . . . To take from the accused the opportunity to offer evidence tending to prove . . . [his sanity] is in our opinion as much a violation of his constitutional right of trial by jury as to take from him the right to offer evidence before the jury tending to show that he did not physically commit the act . . . .

Id. at 118-19, 110 P. at 1023-24.

186. *Id.* at 121, 110 P. at 1024.

Another effort to statutorily abolish the insanity defense was undertaken by the state of Mississippi. The Mississippi enactment eliminated insanity as a defense, but provided that evidence of insanity could be admitted in mitigation and could be taken into account in sentencing.[187] In *Sinclair v. State*[188] the constitutionality of the Mississippi statute was challenged on two grounds: (1) that it violated the state constitutional provisions against cruel and unusual punishment; and (2) that it violated the due process clauses of the federal and state constitutions, particularly the guarantee of a fair and impartial trial by jury.[189]

The *Sinclair* court, like the *Strasburg* court, examined the legal precedent and commentaries concerning the insanity defense and reasoned that insanity could provide a complete defense by precluding either culpability or the intent necessary for conviction:

> One of the essential ingredients of crime is intent. Intent involves an exercise of the reasoning powers in which the result

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187. 1928 MISS. LAWS ch. 75, §§ 1, 2 provided:

Sec. 1 [F]rom and after the passage of this act, the insanity of the defendant at the time of the commission of the crime shall not be a defense against indictments for murder and the courts shall so instruct the jury in trials for murder, but evidence tending to prove the insanity of the defendant at the time of the commission of the offense may be offered by the defendant in mitigation of the crime. In the event the jury shall find the defendant guilty as charged in the indictment, but insane at the time of the commission of the crime, they shall so state in their verdict, and shall fix the penalty at imprisonment in the state penitentiary for life. . . .

Sec. 2 If the jury finds the defendant guilty, but insane at the time of the commission of the crime; or find the defendant guilty as charged, but disagree as to his sanity, and the trial judge fixes the penalty at imprisonment in the state penitentiary for life, the trial judge may, in his discretion, certify to the governor that in his opinion the mental condition of the prisoner is such that he should not be confined in the penitentiary, in which event the governor shall cause an investigation to be made by one or both of the superintendents of the state institution for the care of the insane and by any other means he may deem proper, and if satisfied that the mental condition of the defendant is such that he should not be confined in the penitentiary he shall order the transfer of such prisoner to one of said institutions for the care of the insane, and in like manner the governor may on information derived from the superintendent of said state institution for the care of the insane where a person convicted under this act is confined, or from other sources, investigate the matter and order the transfer of such person to the state penitentiary. The governor may, at any time under like conditions, order any person held under authority of this act transferred from the penitentiary to the State Insane Asylum.

188. 161 Miss. 142, 132 So. 581 (1931).

189. *Id.* at 156-57, 132 So. at 583.

> of the criminal act is foreseen and clearly understood. Another essential element of crime is animus. Animus involves an exercise of reasoning powers, in which the result of the criminal act is recognized as being contrary to the rules of law and justice. If a person is mentally unsound, one or both of these elements may be, and usually are, wanting.[190]

Having concluded that insanity might preclude either culpability or the requisite intent, the Mississippi court ruled that the statute, which it construed as abolishing the insanity defense, unconstitutionally violated due process and the prohibitions against cruel and unusual punishment found in both the state and federal constitutions.[191]

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190. *Id.* at 160, 132 So. 584 (quoting SMOOT ON INSANITY at 372).

191. Judge Ethridge stated:

> It would be . . . cruel and . . . unusual to impose life imprisonment or death upon any person who did not have intelligence enough to know that the act was wrong or to know the consequences that would likely result from the act. . . .
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> . . . .
>
> It seems to me that there could be no greater cruelty than trying, convicting, and punishing a person wholly unable to understand the nature and consequence of his act, and that such punishment is certainly both cruel and unusual in the constitutional sense.

Id. at 161-64, 132 So. at 584-85.

Judge Ethridge expressed his views on the statute's constitutionality as follows:

> I am also of the opinion that it violates the due process clause of both state and federal Constitutions . . . .
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> . . . .
>
> [T]he statute does not undertake to create and define a crime. It apparently leaves the definition of murder as embraced in other sections of the Code, and then attempts to enact by legislative fiat that insanity cannot destroy the mind so that it cannot form an intent, or "deliberate intent," to use the precise words of the statute. In other words, it is equal to saying that malicious intent is obtained by legislative declaration merely; this, . . . cannot be done . . . .
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> . . . .
>
> The test of the constitutionality of an act is, not what is actually done in a particular case . . . but is what may be done under the law. The statute is the measure by which we test its constitutionality. It clearly authorizes punishment which, in the ordinary course of affairs, may be discriminatory and unequal as against a sane person. It is certainly not a reasonable classification to single out the insane helpless and impose burdens upon them which are not placed upon people with intelligence . . . .

Id. at 164, 166, 168, 132 So. at 586-87.

The abolition of the insanity defense also was held to be unconstitutional in Louisiana. The Louisiana statute provided that the judge determine the defendant's sanity based on the recommendation of an expert advisory commission. If the defendant was found to be presently sane and sane at the time of the commission of the crime, he could not bring forth the insanity defense at trial. 1928 LA. ACTS 17 (Ex. Sess.). In State v.

While the United States Supreme Court has never ruled on whether the insanity defense is constitutionally mandated,[192] the general view of commentators is that a prohibition on the introduction of evidence of mental disorder would violate due process to the extent that it prevents a defendant from introducing evidence to disprove the existence of a requisite element of a crime.[193] This concern with constitutional objections to abolition of the insanity defense largely explains the form of recent statutory enactments[194] and proposals[195] aimed at restricting the defense to the presentation of evidence of mental impairment related to the particular *mens rea* requirement of a crime.[196]

Limiting evidence of mental disorder to proving lack of the requisite *mens rea* was first proposed in 1971, in the report of

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Lange, 168 La. 958, 964-67, 123 So. 639, 641-42 (1929), the Supreme Court of Louisiana held the above statute to be violative of the state constitutional mandate that provided the state courts exclusive jurisdiction over criminal cases, and the right to trial by jury.

192. *See* Frendak v. United States, 408 A.2d 364, 378 n.24 (D.C. 1979).

193. *See* NAT'L COMM'N ON REFORM OF FED. CRIM. LAWS, *Consultant's Report on Criminal Responsibility—Mental Illness: Section* 503, 1 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 252-54 (1970).

194. MONT. CODE ANN. § 46-14-102 (1981) provides in part: "Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense."

IDAHO CODE § 118-207 (Supp. 1982) states that "mental condition shall not be a defense to any charge of criminal conduct." It does, however, add: "Nothing herein is intended to prevent the admission of expert evidence on the issues of mens rea or any state of mind which is an element of the offense, subject to the rules of evidence." *Id.*

195. *See, e.g.*, S. 818, 97th Cong., 1st Sess. (1981). This bill provides: "(a) It shall be a defense to prosecution under any Federal statute, that the defendant, as a result of mental disease or defect lacked the state of mind required as an element of the offense charged. Mental disease or defect does not otherwise constitute a defense."
See also S. 1558, 97th Cong., 1st Sess. (1981); S. 2669, 97th Cong., 2d Sess. (1982); S. 2672, 97th Cong., 2d Sess. (1982); S. 2678, 97th Cong., 2d Sess. (1982); S. 2745, 97th Cong., 2d Sess. (1982).

196. In discussing S. 2572, 97th Cong., 2d Sess. (1982), which was incorporated into the proposed Violent Crime and Drug Enforcement Act of 1982, Rudolph W. Giuliani, Associate Attorney General, stated:

> The . . . approach . . . incorporated in S. 2572, permits a jury to return a verdict of guilty, not guilty, or not guilty only by reason of insanity. This last verdict may be returned only if the defendant, as a result of mental disease or defect, lacked the state of mind required as an element of the offense. Mental disease or defect would not otherwise constitute a defense. . . .
>
> . . . .
>
> This would abolish the insanity defense to the maximum extent permitted under the Constitution and would make mental illness a factor to be considered at the time of sentencing.

Insanity Defense Hearings, supra note 12, at 33.

the National Commission on Federal Criminal Laws,[197] as an alternative to the Model Penal Code test. It was suggested again in 1975 as the preferred approach to providing a defense based on mental disease or defect in a Senate bill for reform of the criminal code.[198] This proposal generated substantial critical commentary.[199]

The first objection is that the *mens rea* alternative does not simply restrict the insanity defense, but effectively abolishes it.[200] The *mens rea* approach denies the defendant the opportunity to present a defense based on lack of culpability. Generally a defendant is not held responsible for his criminal acts if he can show that because of mental disorder he lacked understanding of the significance or the wrongfulness of his conduct. This result follows from the fact that a defendant could act intentionally but at the same time be in such a delusional state that he does not understand the significance or the wrongfulness of his action.[201] Denying a defendant the opportunity to disprove cul-

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197. NAT'L COMM'N ON REFORM OF FED. CRIM. LAWS, FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF THE FEDERAL CRIMINAL LAWS § 503 (1971).

198. *See, e.g.*, S. 1, 93d Cong., 1st Sess. (1973); S. 1400, 93d Cong., 1st Sess. (1973).

199. *See generally* Feinberg, *Toward a New Approach to Proving Culpability: Mens Rea and the Proposed Federal Criminal Code*, 18 AM. CRIM. L. REV. 123 (1980); Platt, *The Proposal to Abolish the Federal Insanity Defense: A Critique*, 10 CAL. W.L. REV. 449 (1974); Wales, *An Analysis of the Proposal to "Abolish" the Insanity Defense in S. 1: Squeezing a Lemon*, 124 U. PA. L. REV. 687 (1976).

200. In his testimony before the Senate Judiciary Committee, Attorney General William French Smith stated:

> S. 2572 would effectively eliminate the insanity defense except in those rare cases in which the defendant lacked the state of mind required as an element of the offense . . . .
>
> . . . .
>
> Under this formulation, the mental disease or defect would be no defense if the defendant knew he was shooting at a human being to kill him—*even if the defendant acted out of an irrational or insane belief.*
>
> This would abolish the insanity defense to the maximum extent permitted under the Constitution.

Insanity Defense Hearings, supra note 12, at 23-30 (emphasis added).

201. The classical example is the "lemon squeezing" spouse killer. If a husband strangled his wife believing that he was squeezing a lemon, under the *mens rea* proposals he would be found not guilty by reason of insanity. But if he strangled his wife as a result of delusion that he believed she was turning into a lemon, he would be found guilty of a criminal offense because he did have the intent to inflict injury upon her or acted in reckless disregard of such injury. *See* Wales, *supra* note 199, at 690. In general, many mentally deluded and even the severely disturbed offenders plan their crimes and execute them accordingly. The crucial question is how much the defendant's mental impairment contributed to his lack of accurate awareness of his situation, which, in turn, led to his criminal behavior. Under the *mens rea* statutory approach, most defendants would be found guilty because they would have the requisite intent or knowledge of his

pability, which has been an underlying requisite of criminal liability, may be a denial of due process; the *Sinclair* court, which viewed the insanity defense as involving both the issue of requisite *mens rea* and the issue of culpability, held that precluding a defendant from offering evidence of mental disorder to prove the lack of either element constituted a denial of due process.[202]

A second ground of constitutional attack on the proposal to limit evidence of mental disorder to *mens rea* is based on the constitutional prohibition against cruel and unusual punishment.[203] To the extent that the insanity defense involves presenting evidence of lack of responsibility or culpability because the person lacked understanding or control, it relates to the status of the defendant—to punish the insane defendant would not be to punish him for what he did, since he is not responsible; rather it would be to punish him because he was insane. Punishing the defendant for his status as an insane person would arguably violate the prohibition on cruel and unusual punishment.[204]

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action necessary to satisfy the definitional elements of a crime.

202. 161 Miss. at 166-67, 132 So. at 586.

203. In Robinson v. California, 370 U.S. 660, 666-67 (1962), the Supreme Court held unconstitutional a California statute providing for the punishment of any person "addicted to the use of narcotics" because it violated the prohibition against cruel and unusual punishment. The Court stated that the "status" of a narcotics addict or an ill person cannot provide the basis for criminal conviction. In dicta the Court commented:

> It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill. . . . [I]n the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

Id. at 666.

The Court seemed to narrow the *Robinson* holding in Powell v. Texas, 392 U.S. 514, 517-31 (1968), in which a statute which established that appearing drunk in public places was an offense was upheld as constitutional. The Court refused to find that chronic alcoholics suffered from a compulsion to drink and were therefore insane. The Court reasoned:

> Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms. . . . If a person in the "condition" of being a chronic alcoholic cannot be criminally punished as a constitutional matter for being drunk in public, it would seem to follow that a person who contends that, in terms of one test, "his unlawful act was the product of mental disease or mental defect" . . . would state an issue of constitutional dimension with regard to his criminal responsibility had he been tried under some different and perhaps lesser standard, *e.g.*, the right-wrong test of *M'Naghten's Case.*

Id. at 536.

204. *See* 370 U.S. 660 at 667-68 (Douglas, J., concurring).

Criticism of the proposal to limit the insanity defense to disproof of *mens rea* also involves practical objections. Certain proponents such as Attorney General William French Smith have expressed belief that the *mens rea* proposal "would . . . eliminate entirely the presentation at trial of confusing psychiatric testimony."[205] However, this view fails to recognize that psychiatric testimony will still be admissible on issues of act and intent as well as on issues of fitness to stand trial.[206] Thus, while "confusing psychiatric testimony" may be reduced, it will not be wholly eliminated. Furthermore, some commentators have speculated that the judiciary might adopt a diminished capacity alternative to provide for defenses based on lack of culpability if the insanity defense is abolished or restricted to the issue of *mens rea*.[207] Under a diminished capacity approach, evidence could be admitted to establish that the defendant's ability to form the requisite intent was reduced by his impaired mental condition.[208] Alternatively, it could be shown that the defendant's culpability was reduced or precluded because his moral understanding was impaired as a result of mental disorder.[209] The diminished capacity approach might appear attractive to a court faced with an obviously seriously disturbed defendant who

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205. *Insanity Defense Hearings, supra* note 12, at 30.

206. *Limiting the Insanity Defense, Hearings, supra* note 130, at 269-74 (statement of Seymour Halleck).

207. *See* Wales, *supra* note 199, at 705, 707; *see also* Arenella, *Reflections on Current Proposals to Abolish or Reform the Insanity Defense*, 8 AM. J.L. & MED. 271, 276-77 (1982).

208. *See, e.g.*, People v. Webb, 143 Cal. App. 2d 402, 411-12, 300 P.2d 130, 136-37 (1956) (subjective abnormality may constitute a defense to the extent that it disproves an essential mental state of mind).

209. *See, e.g.*, People v. Wolff, 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964) (evidence of mental disorder was admissible to prove lack of culpability). In *Wolff*, the defendant, a fifteen year-old boy, was convicted of murdering his mother with an axe after planning to kill her. Psychiatric evidence showed that the youth was disturbed and that his capacity for rational behavior was substantially impaired. The California Supreme Court revised the first degree murder conviction. It held that even though the defendant was legally sane under the state's test for insanity, the culpability test for first-degree murder demanded further consideration. In testing the culpability of a defendant, the court held that it must also focus on the "somewhat limited extent to which this defendant could maturely and meaningfully reflect upon the gravity of his contemplated act." *Id.* at 821, 394 P.2d at 975, 40 Cal. Rptr. at 287. The Supreme Court concluded this test was not satisfied by the psychiatric testimony presented in the case.

In 1981, the California Legislature amended California Penal Code § 189 to abolish the diminished capacity defense by including the following sentence: "To prove the killing was 'deliberate and premeditated,' it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act." CAL. PENAL CODE § 189 (West Supp. 1983).

nevertheless did know that he was killing someone, or that he was committing some aggressive act, but lacked a full sense of the significance of what he was doing because of his mental disorder.[210] A diminished capacity analysis would allow the jury to hear expert psychiatric testimony quite similar to that presented in insanity defense cases. Therefore, the jury would continue to be faced with the task of interpreting and evaluating psychiatric opinions with reference to the ultimate issue whether the defendant held the requisite criminal intent to commit the crime and possessed the requisite degree of culpability to be convicted and punished for some particular act.

III. GUILTY BUT MENTALLY ILL

In addition to proposals to shift the burden of proof of insanity to the defendant and proposals to limit the defense to proving lack of *mens rea*, proposals have been made for adoption of a new plea or verdict: "Guilty but Mentally Ill" (GBMI). This section examines the development and meaning of the GBMI plea and verdict and considers the problems and criticisms that have become apparent in jurisdictions that already have adopted GBMI legislation. Specific attention will be directed at constitutional objections to the legislation and at the practical results of making the verdict available to the jury.

A. Guilty but Insane

The GBMI verdict bears a semantic resemblance to the "guilty but insane" verdict, which first made its appearance in the Trial of Lunatics Act of 1883.[211] The "guilty but insane" for-

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210. *See* Comment, *Admissibility of Subjective Abnormality to Disprove Criminal Mental States*, 12 STAN. L. REV. 226 (1959); *see also Limiting the Insanity Defense, Hearings, supra* note 130, at 270 (statement of Seymour Halleck). Mr. Halleck made the following observation:

> [C]urrently intent is defined as awareness of conduct and its consequences and the circumstances under which it takes place. There was a time when intent meant motivation, or it meant evil, and I do not think it is impossible that the courts might eventually come to a broadened view of intent.
>
> Certainly, I think ambitious defense attorneys will work very diligently to broaden that definition of mens rea if the insanity defense is not there. These kinds of things happened in California, as you know, with the diminished capacity defense, which by the way no longer exists in California. But I think that scenario is not unlikely.

Id.

211. Trial of Lunatics Act, 1883, 46 & 47 Vict., ch. 38. This Act provided that if the jury found that the defendant committed the offense charged, but was insane and irre-

mulation was developed as a result of Queen Victoria's expression of displeasure with the verdict not guilty by reason of insanity (NGRI), which had been provided by the Criminal Lunatics Act of 1800.[212] Queen Victoria's opposition to the NGRI verdict was exacerbated not only by the acquittal of Daniel M'Naghten but also by the acquittal of a man who attempted to assassinate the Queen herself.[213] The Queen's desire to have the verdict modified led to the enactment of the Trial of Lunatics Act of 1883, which changed the nomenclature of the NGRI verdict to "guilty but insane."[214] Despite the change in nomenclature, the English courts gave the newly formulated verdict the same effect as the NGRI verdict: it operated as an acquittal of the underlying criminal charge.[215]

In contrast, some American legislatures have attempted to give the "guilty but insane" verdict a different interpretation and effect than that given to the NGRI verdict. The "guilty but insane" verdict in fact has been adopted as an effort to abolish the insanity defense. As noted above, these statutory schemes have been ruled unconstitutional.[216] Nevertheless, the "guilty but insane" verdict has made a resurgence during the recent congressional debates on the insanity defense.[217] Under the current proposed versions, this verdict would be rendered when a defendant's "actions constitute all necessary elements of the offense charged other than the requisite state of mind, and he lacked the requisite state of mind as a result of mental disease

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sponsible at the time of the commission, then the verdict was to be "guilty but insane." H. WEIHOFEN, *supra* note 61, at 263.

212. An Act for the Safe Custody of Insane Persons Charged With Offences, 1800, 39 & 40 Geo. 3, ch. 94. This act had replaced the simple "not guilty" verdict available to an insane defendant with the "not guilty by reason of insanity" verdict, and further provided for the automatic commitment of insanity acquittees.

213. *See* Robey, *Guilty But Mentally Ill*, 6 BULL. AM. ACAD. PSYCHOLOGY & LAW 374, 377 (1978).

214. *See supra* note 211.

215. *See* Felstead v. Rex, 1914 A.C. 534. In *Felstead* the defendant was accused of "wounding his wife with intent to do grievous bodily harm." The jury returned the verdict of "guilty but insane." Felstead appealed the conviction. The court of criminal appeals held that it had no jurisdiction to hear such an appeal, because the verdict was in effect an acquittal. *Id.* at 535. This "guilty but insane" verdict continued until the British Revised Judicature Act of 1952. The "not guilty by reason of insanity" verdict was reinstated in 1964. Criminal Procedure (Insanity) Act, 1964, ch. 84.

216. *See, e.g.*, Sinclair v. State, 161 Miss. 142, 132 So. 581 (1931); *see also supra* text accompanying notes 181-91.

217. *See, e.g.*, S. 1106, 97th Cong., 1st Sess. (1981); H.R. 4898 (Violent Crime Control Act of 1982-Title IV), 97th Cong., 2d Sess. (1982).

or defect."[218] Such a verdict, along with the suggested meaning, is likely to encounter constitutional attacks like those directed at earlier enactments. According to a Justice Department witness appearing before a Senate Committee conducting hearings on the insanity defense:

> [T]his approach raises serious constitutional concerns. The due process clause requires that the government prove every element of the offense, including the requisite mental state, beyond a reasonable doubt. This approach, however, could permit a jury to convict a defendant even though he lacks the statutorily required state of mind.[219]

Recently, the Court of Appeals of Maryland in *Langworthy v. State*[220] ruled that the verdict of guilty but insane was appealable and therefore not an acquittal. According to the Maryland court's interpretation of this verdict, a defendant found guilty but insane is guilty of the offense charged because, even though he pleaded the insanity defense, he has been found to have had the requisite *mens rea* to commit the crime, and therefore the dispositional proceedings are to be consistent with such a finding.[221] The Maryland court reasoned:

> If the verdict on the general plea is guilty and the special verdict on the additional plea is that the accused was insane at the time of the commission of the offense, he has failed in what he sought under his general plea, but attained what he sought by his additional plea, in that he shall not be held responsible for his criminal conduct.
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> . . . .
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> . . . [T]he clear legislative intent regarding the successful

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218. S. 1106, 97th Cong., 1st Sess. § 2(e) (1981).

219. *Insanity Defense Hearings, supra* note 12, at 32 (statement of Rudolph W. Giuliani).

220. 284 Md. 588, 399 A.2d 578 (1979), *cert. denied*, 450 U.S. 960 (1981). For a complete discussion of this case, see Note, *A Defendant Found Guilty but Insane May Appeal His Conviction*—Langworthy v. State, 39 MD. L. REV. 538 (1980).

221. In a footnote the Maryland court commented:

> We do not subscribe to the theory . . . that a finding that a defendant was insane at the time of the commission of the crime means that "there is no crime." [The] reasoning [for this] was that the finding of insanity establishes a lack of the *mens rea*. We do not think that this is so in light of the conditions prescribed for a finding of insanity, namely "as a result of mental disorder, [a defendant] lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." Neither of these tests is necessarily at variance with a general intent to commit a crime.

284 Md. at 599 n.12, 399 A.2d at 584 n.12 (citations omitted).

> interposition of a plea of insanity is not that an accused is to be found not guilty of the criminal act it was proved he committed, but that he shall not be punished therefore. Rather than be punished, he may go free or . . . be provided treatment for his mental disorder.[222]

Maryland's judicially created "guilty but insane" verdict is a special guilty verdict that replaces the NGRI verdict.[223] The special verdict applies in cases in which the jury finds that the accused had the requisite intent to commit the crime but lacked substantial capacity to appreciate the criminality of his conduct or to conform to the requirements of law.[224] The defendant who is guilty but insane is found guilty but not culpable as a result of his insanity. He is not subject to penal sanction but is to be committed for an indefinite period to a mental health facility for treatment.[225]

B. Michigan's Guilty but Mentally Ill Statute (GBMI)

In an attempt to reduce the availability of the insanity defense while averting the constitutional problems associated with its outright abolition, the Michigan legislature in 1975 passed a statute providing for the GBMI plea and verdict.[226] This statute was enacted in reaction to the Michigan Supreme Court decision in *People v. McQuillan,*[227] prohibiting automatic commitment of persons acquitted on grounds of insanity. The *McQuillan* court

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222. *Id.* at 594, 598, 399 A.2d at 581-82, 584.

223. The Maryland court stated:

> We believe the reference to "not guilty by reason of insanity" is a holdover from common law concepts and prior statutory provisions regarding insanity and the commission of crimes. In light of the . . . provisions of [the statute providing for the interposition of the plea of insanity] we do not consider [the statutory provisions for commitment of defendants found insane] as authorizing or calling for a verdict of "not guilty by reason of insanity."

284 Md. at 599 n.12, 399 A.2d at 584 n.12.

224. *See* Note, *supra* note 220, at 553-54.

225. 284 Md. at 594, 598, 399 A.2d at 581-82, 584.

226. MICH. COMP. LAWS § 768.36 (1982) provides:

> (1) If a defendant asserts a defense of insanity . . . 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.

227. 392 Mich. 511, 221 N.W.2d 569 (1974).

had held:

> [A] defendant is entitled to a sanity hearing when found not guilty by reason of insanity after completion of observation and examination. . . . [U]nless those found not guilty by reason of insanity are given sanity hearings to ascertain their present mental condition, then their due process and equal protection rights have been violated.[228]

The *McQuillan* decision led to a reevaluation of the mental condition of persons held in Michigan mental hospitals who had been committed following insanity acquittals. Sixty-four of them were released as presently sane.[229] Within a year after release, two of the persons, Robert Manlen[230] and John McGee,[231] again committed criminal acts. The public clamor following newspaper reports of these crimes and a study conducted by the Center for Forensic Studies outlining the abuses of the NGRI plea[232] prompted Michigan's legislature to conduct a review of insanity defense procedures and subsequently to enact the GBMI statute.

According to the Michigan courts that have construed the GBMI legislation, the purpose and justification of the statute is not only to provide protection for the public but also to ensure needed mental health treatment for those convicted of a criminal offense. As one court observed:

> The Legislature's intent in establishing a fourth verdict which might be returned by a jury presented with an insanity defense

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228. *Id.* at 536, 221 N.W.2d at 580; *see also* Specht v. Patterson, 386 U.S. 605 (1967); Baxstrom v. Herold, 383 U.S. 107 (1966); Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968). *But see* Jones v. United States, 51 U.S.L.W. 5041, (U.S. June 29, 1983), in which the Court recognized the constitutionality of automatic commitment, at least in a jurisdiction where the defendant has the burden of proving insanity by preponderance of the evidence, and where there is provision for timely judicial review of the commitment.

229. Mitchell, *New Mental Health Code System in Turmoil,* Detroit Free Press, Mar. 24, 1975 § A, at 2, col. 1.

230. *Id.* Robert D. Manlen raped two Detroit women.

231. Dieboldt & Mitchell, *Killer, Freed as Sane, Held in Wife's Slaying,* Detroit Free Press, Apr. 15, 1975, § A, at 1, cols. 3-4. John Bernard McGee murdered his wife.

232. In September 1974 the Center for Forensic Psychiatry conducted a study of nearly 350 insanity acquittees who were patients in state mental facilities. The study indicated that only about twenty percent of them "were legitimately found to be both mentally ill and, by reason thereof, exculpable." Fifty percent of the patients studied "were viewed as having some level of neurosis or psychosis," but no "causal relationship" was noted between their mental condition and their criminal conduct and, consequently, their mental impairment should not have exculpated them. The remaining 30% of patients had only character disorders and therefore did not display any forms of mental illness. Robey, *supra* note 213, at 375.

> although not without question or controversy, appears to have been twofold: (1) *to ensure that criminally responsible but mentally ill defendants obtain professional treatment* in "the humane hope of restoring their mental health" while incarcerated or on probation, and, correlatively, (2) *to assure the public* that a criminally responsible and mentally ill defendant will not be returned to the streets to unleash further violence without having received necessary psychiatric care after sentencing.[233]

The GBMI statute was clearly part of a comprehensive attempt by the Michigan legislature to deal with the complex issue of criminal responsibility and insanity.[234] In contrast with Maryland's judicially developed "guilty but insane" verdict, the GBMI verdict is viewed not as a replacement for the NGRI verdict but as an alternative to deal with those defendants "who cannot be classified as insane but who are clearly suffering from some mental illness or defect at the time of the offense."[235] Under Maryland's *Langsworthy* decision, a defendant may both be guilty, in the sense of having the requisite *mens rea,* and be insane, in the sense of lacking capacity to appreciate the criminality of his conduct or to conform to the law.[236] However, under the Michigan scheme, a defendant cannot be found GBMI if he is legally insane because insanity is preserved as a separate defense.[237]

The dispositional consequences of the Michigan GBMI verdict also differ from those of the Maryland "guilty but insane"

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233. People v. Booth, 414 Mich. 343, 353-54, 324 N.W.2d 741, 745 (1982) (footnote omitted) (emphasis added); *see also* People v. McLeod, 407 Mich. 632, 663, 288 N.W.2d 909, 919 (1980). The Supreme Court of Michigan stated that

> the [Michigan] Legislature's object in creating its new verdict was to assure supervised mental health treatment and care for those persons convicted under the laws of [the] 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.

Id. at 663-64, 288 N.W.2d at 919.

234. The act is described as "[a]n act to modernize, add to, revise, consolidate, and codify the statutes relating to mental health." 1975 Mich. Pub. Acts 179, 180; *see also* People v. Seefeld, 95 Mich. App. 197, 199, 290 N.W.2d 123, 124-25 (1980).

In *Seefeld* the Michigan appellate court stated: "The guilty but mentally ill verdict was . . . created as part of the package of bills enacted by the Legislature in 1975 in an effort to protect the public from violence inflicted by persons with mental ailments who slipped through the cracks in the criminal justice system." *Id.* at 124.

235. Comment, *Insanity-Guilty But Mentally Ill-Diminished Capacity: An Aggregate Approach to Madness,* 12 J. MAR. J. PRAC. & PROC. 351, 355 (1979).

236. *See supra* text accompanying note 224.

237. MICH. COMP. LAWS §§ 768.20a, .29a (1982).

verdict. In Maryland, because the defendant who is found guilty but insane is not held culpable, he is subject to mental treatment but not penal sanction.[238] In Michigan a defendant found GBMI is held criminally responsible and, therefore, will be sentenced for a definite prison term, with the possibility of psychiatric treatment in a state mental institution.[239]

The Michigan GBMI statute includes a procedural schedule that, if followed, may lead to either the assertion of a plea of GBMI or a verdict of GBMI.[240] No less than thirty days before the trial date the defendant must file a written statement declaring his intention to assert the insanity defense.[241] Upon receipt of this notice, the court must direct the Center for Forensic Psychiatry to examine the defendant's mental condition.[242] The Center and an independent psychiatrist secured by the defendant are required to submit reports concerning the defendant's condition to the defense attorney and the prosecutor.[243] These reports are to contain the clinical findings of the examining psychiatrists, the facts leading to their diagnoses, and "the opinion of the center or the independent examiner on the issue of the defendant's insanity at the time the alleged offense was committed and whether the defendant was mentally ill . . . at the time the alleged offense was committed."[244]

If the defendant asserts the insanity defense and waives his right to a jury trial, he may plead GBMI in place of pleading "guilty" or "nolo contendere."[245] However, the court may not accept such a plea until a hearing has been held regarding the defendant's mental condition and the court is satisfied that the defendant was mentally ill at the time the crime charged was committed.[246] Significantly, in order to trigger the possibility of a GBMI verdict, the defendant must either plead GBMI or put his sanity in issue by pleading the defense of insanity. When the defendant pleads insanity, the trier of fact may return one of four possible verdicts: guilty, not guilty, NGRI, or GBMI.[247]

238. *See supra* note 225 and accompanying text.
239. MICH. COMP. LAWS § 768.36(3) (1982).
240. *Id.* at § 768.20a.
241. *Id.* at § 768.20a(1).
242. *Id.* at § 768.20a(2).
243. *Id.* at § 768.20a(6).
244. *Id.*
245. *Id.* at § 768.36(2).
246. *Id.*
247. *Id.* at § 768.29a.

Under Michigan law, which follows the American Law Institute-Model Penal Code Standard,[248] the verdict of NGRI is to be rendered when the jury finds that the defendant, "as a result of mental illness, . . . lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law."[249] A GBMI verdict is to be returned when the trier of fact finds beyond a reasonable doubt (1) that the defendant is guilty of an offense, (2) that the defendant was mentally ill at the time he committed the offense, and (3) that the defendant was not legally insane at the time he committed the offense.[250]

The second required finding makes clear that a GBMI verdict is predicated on a finding of mental illness, as defined in the Michigan Mental Health Code.[251] According to this definition, " 'mental illness' means a substantial disorder of thought or mood which significantly impairs judgement, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life."[252] It seems inevitable, however, that jurors will be confused by this conceptual definition designed for mental health professionals to use in mental commitment evaluation, especially when it must be applied in comparison with the definition for insanity. The probability of confusion resulting from overlapping definitions and lack of conceptual clarity between the standards to be used for GBMI and NGRI provides the basis for some of the strongest criticism of the Michigan statutory scheme.[253]

A defendant found NGRI in Michigan is to be committed to the Center for Forensic Psychiatry for a period not to exceed sixty days for assessment of his present mental condition to determine whether he is "a person requiring treatment."[254] Under the statute, "a person requiring treatment" is a person who is civilly committable because, as a result of mental illness, he is dangerous or unable to provide for himself.[255] An order for civil

248. MODEL PENAL CODE § 4.01(1) (Proposed Official Draft 1962); *see supra* text accompanying notes 104-29.

249. MICH. COMP. LAWS § 768.21a(1) (1982).

250. *Id.* at § 768.36(1).

251. *Id.* at § 330.1400a.

252. *Id.*

253. *See infra* text accompanying notes 367-85.

254. MICH. COMP. LAWS § 330.2050(1) (1982).

255. *Id.* at § 330.1401. The statute describes persons who should be committed for treatment as follows:

commitment or release from custody requires a court hearing.[256]

A GBMI verdict triggers quite different dispositional directives. The court is to impose upon the defendant any sentence consistent with the offense for which he was found guilty.[257] Based upon an evaluation of his mental condition, the prisoner is to be provided psychiatric treatment either in the correctional facility or in a facility of the Department of Mental Health.[258] After discharge from a mental institution, the defendant must be returned to the custody of the Department of Correction to finish his sentence.[259] The mental health facility must submit a report to the parole board regarding the clinical and diagnostic medical condition of the defendant, his potential for recidivism and for dangerousness to self and others. If the defendant is granted parole, the continuation of prescribed treatment can be made a condition of his parole.[260]

The Michigan GBMI statute has met with both support[261] and strong criticism[262] from legal commentators, the courts, and

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(a) A person who is mentally ill, and who as a result of that mental illness can reasonably be expected . . . to seriously physically injure himself or another person, and who has . . . made significant threats that are substantially supportive of the expectation.

(b) A person who is mentally ill, and who as a result of that mental illness is unable to attend to those of his basic physical needs such as food, clothing, or shelter . . . .

(c) A person who is mentally ill, whose judgement is so impaired that he is unable to understand his need for treatment and whose continued behavior as the result of his mental illness can . . . be expected, on the basis of competent medical opinion, to result in serious physical harm to himself or others.

256. *Id.* at § 330.2050(3).

257. *Id.* at § 768.36(3).

258. *Id.*

259. *Id.*

260. *Id.*

261. *See, e.g.*, Comment, *Guilty but Mentally Ill: An Historical and Constitutional Analysis*, 53 J. URB. L. 471, 496 (1976) (concluding that "[t]he potential exists to make guilty but mentally ill an effective alternative for the disposition of criminal cases"); *see* Robey, *supra* note 213, at 380; *see also supra* notes 29-31 and accompanying text.

262. *See, e.g.*, Sherman, *Guilty But Mentally Ill: A Retreat from the Insanity Defense*, 7 AM. J.L. MED. 237 (1981). Sherman commented:

The guilty but mentally ill statutory alternative to the insanity defense illustrates a dogmatic approach to the problems of mentally ill criminals . . . . The guilty but mentally ill legislation represents an abrupt departure from the presumption underlying the insanity defense; that an individual suffering from serious mental illness lacks free will and therefore should not be held accountable for his crimes. In place of this presumption the statute proposes to punish mentally ill offenders with prison sentences and isolate them in prison psychiatric wards regardless of mental responsibility.

Id. at 260; *see also infra* text accompanying notes 273-320; Robitscher & Haynes, *In*

legislators. It has been viewed by some as a well-intentioned attempt to (1) recognize psychiatric theories that mental illness is a matter of degree, with no marked lines between sanity and insanity; and (2) provide needed treatment for those whose mental illness is not severe enough to lead to acquittal, and subsequent commitment, by guaranteeing mental treatment for criminal convicts.[263] Realistically, however, such a statutory scheme may result in the conviction of persons who actually merit acquittal on grounds of insanity, because most juries cannot be expected to deal in a principled fashion with issues as complex and nebulous as an individual's degree of mental disorder. At the same time, this statutory verdict may actually fail to provide any greater likelihood of mental treatment for those who are convicted and imprisoned.[264] A better alternative may be to deal with problems of needed mental treatment in post conviction disposition, apart from the criminal trial, and simply to allow juries to decide clear-cut cases of severe mental impairment by a verdict of NGRI. Those persons who are guilty, and not insane, but who suffer from mental disorder can and should be provided treatment as required by the corrections code.

C. *Problems Associated with the Guilty but Mentally Ill Verdict*

Major objections to the GBMI legislation can be categorized as follows: (1) it presents constitutional problems;[265] (2) it causes confusion of the jury leading to compromise;[266] (3) it does not

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Defense of the Insanity Defense, 31 EMORY L.J. 9, 18 (1982).

263. *See* Livermore, Malmquist & Meehl, *On the Justifications for Civil Commitment*, 117 U. PA. L. REV. 75, 80 (1968) ("One need only glance at the diagnostic manual of the American Psychiatric Association to learn what an elastic concept mental illness is . . . . Obviously, the definition of mental illness is left largely to the user and is dependent upon the norms of adjustment that he employs."); *see also* Williams, *The Act and the Criminal Law, The Mental Health Act*, 1959, 23 MOD. L. REV. 410 (1960). "[I]t is now accepted that there is a borderland between sanity and insanity where the one shades off into the other, which is inhabited by some seriously disturbed personalities." *Id.* at 415. In W. WHITE, INSANITY AND THE CRIMINAL LAW 89 (1923) the author commented:

> To conceive that an individual is either absolutely responsible or absolutely irresponsible is to fly in the face of perfectly patent facts that are in everybody's individual experience and is only comparable to such beliefs of the Middle Ages that a person is possessed of a devil . . . and therefore is . . . not a free moral agent."

264. *See infra* notes 400-02 and accompanying text.

265. *See infra* text accompanying notes 268-320.

266. *See infra* text accompanying notes 321-97.

accomplish a different result from the guilty verdict.[267]

1. *Constitutional considerations*

The enactment of the Michigan GBMI statute provoked commentary suggesting that the legislation was constitutionally infirm.[268] Although the statute encountered immediate challenge in state courts,[269] the Supreme Court of Michigan seems to have rejected all plausible constitutional objections in its 1980 opinion in *People v. McLeod.*[270] While the statute has withstood constitutional attack in Michigan, it is nevertheless useful to consider the constitutional problems that have been associated with the GBMI verdict. Certain of the subsequent state enactments differ from the statute adopted in Michigan in ways that may have constitutional significance.[271] It may also be possible to give narrow interpretation to certain Michigan constitutional rulings dealing with the statute.[272] The principal bases for constitutional attack on the GBMI statute have been that (1) it violates equal protection, (2) it denies due process, and (3) it violates the prohibition against cruel and unusual punishment.[273]

The equal protection challenge against the statute has taken three principal forms. The first argument is based upon the assertion that defendants who are mentally ill at the time of an

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267. *See infra* text accompanying notes 398-422.

268. *See, e.g.*, Sherman, *supra* note 262, at 260, in which the author stated that "[t]he statute poses an unmistakable threat to the constitutionally protected rights of mentally ill prisoners who are sentenced and released as if they were not mentally ill." *See* Note, *The Constitutionality of Michigan's Guilty but Mentally Ill Verdict*, 12 U. MICH. J.L. REFORM 188, 195 (1978).

269. *See infra* notes 274-82 and accompanying text.

270. 407 Mich. 632, 288 N.W.2d 909 (1980).

271. *Compare* Illinois and Michigan statutes (providing for examination and treatment after a "GBMI" verdict) *with* N.M. STAT. ANN. § 31-9-4 (Cum. Supp. 1982) (providing specific requirements for appropriate psychiatric treatment).

> The court may impose any sentence upon a defendant which could be imposed pursuant to law upon a defendant who has been convicted of the same offense without a finding of mental illness; provided that if a defendant is sentenced to the custody of the corrections department, the department shall examine the nature, extent, continuance and treatment of the defendant's mental illness and shall provide psychiatric, psychological and other counseling and treatment for the defendant as it deems necessary.

272. *See, e.g.*, People v. Sharif, 87 Mich. App. 196, 274 N.W.2d 17 (1978) (GBMI statute was found not to violate the "title object" clause of the Michigan Constitution).

273. *See, e.g.*, People v. McLeod, 407 Mich. 632, 288 N.W.2d 909 (1980) (statute was found not in violation of due process or the prohibition against cruel and unusual punishment); *see also* People v. Sorna, 88 Mich. App. 351, 276 N.W.2d 892 (1979) (statute did not violate equal protection).

offense and who plead insanity are indistinguishable from defendants who are mentally ill at the time of an offense but who do not plead insanity. Since such defendants are similarly situated, it is discriminatory to subject mentally ill defendants who plead insanity to the GBMI verdict, while not subjecting similar defendants who do not plead insanity to the special verdict.

This equal protection argument was presented in *People v. Darwall*.[274] The defendant contended that applying the GBMI verdict to a defendant who pleaded NGRI was unfair and discriminatory because the verdict could not be invoked against other defendants facing the same charge but who did not plead NGRI.[275] The Michigan court rejected this argument on two grounds: (1) "[t]he statute treats the same all criminal defendants charged with murder and in a similar situation"; and (2) the legislature was not required to provide an all inclusive classification for those who are guilty and mentally ill in order to provide a verdict which would apply to a certain group that is guilty and mentally ill.[276] The court suggested that the statute was constitutional because it provided for a classification reasonably related to a valid state interest. The court observed:

> The state's interest in protecting society from insane defendants who exhibit dangerous tendencies and in securing proper treatment for such persons suffering from mental illness certainly bear[s] a reasonable relation to this statute's provision for two special verdict types indicating the jury's findings as to insanity and mental illness. The law passes muster if its classification is reasonably related to the legislative purpose.[277]

The Michigan courts have rejected this first equal protection challenge on the ground that a state is not required to pro-

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274. 82 Mich. App. 652, 267 N.W.2d 472 (1978).

275. *Id.* at 661, 267 N.W.2d at 476; *see also* People v. Jackson, 80 Mich. App. 244, 263 N.W.2d 44 (1977). In response to the defendant's contention that a person who is mentally ill at the time he commits a crime but who does not plead insanity cannot be found GBMI under the statute, the court stated that:

> The Legislature does not have to make every single category absolutely air tight [sic] and all inclusive in order to keep the classification reasonable and non-arbitrary.
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> . . . .
>
> The fact that one must plead insanity before one can be found "guilty but mentally ill" does not invalidate the statute. The Legislature had a right to make such a classification that was not all inclusive.

Id. at 245-46, 263 N.W.2d at 45.

276. 82 Mich. App. at 661, 267 N.W.2d at 476.

277. *Id.*

vide an all inclusive classification for defendants who are guilty and mentally ill but not insane. The significant factor, according to the *Darwall* court, is that the GBMI classification bears a reasonable relationship to the legislative purpose of the statute, which is to provide protection for the public and treatment for a group of criminal defendants. The court in *Darwall* held only that the Michigan statute did not unconstitutionally discriminate against defendants who plead insanity by subjecting them to the GBMI verdict. The question remains whether, because of the effective limitation on the application of the GBMI statute to the class of guilty but mentally ill persons, the state unconstitutionally discriminates in providing treatment for mentally ill offenders by classifying those who plead insanity as GBMI while classifying those who do not plead insanity simply as "guilty."

The second equal protection argument has been constructed on the ground that a GBMI defendant sentenced to a prison term is in the same position as a defendant simply found guilty of the same offense and who may or may not be mentally ill. The argument is made that subjecting the GBMI defendant to treatment on the basis of a mental examination without the judicial or administrative hearing required to transfer a prisoner from a correctional facility to a hospital for involuntary psychiatric treatment violates equal protection.

In *People v. Sharif*,[278] the Michigan Court of Appeals rejected this argument on the ground that "the primary purpose of the hearing [for other prisoners found guilty and sentenced to a correctional facility] is to determine whether treatment can best be provided by a mental health facility. [citations omitted] It is thus reasonable for the legislature to provide a hearing only for those whom corrections officials contemplate transferring."[279] Thus the constitutionality of denying procedural protections to the GBMI offender before he is subjected to involuntary mental treatment depends in this case, as in *Darwall*, upon the reasonableness of the classificatory distinction between the guilty and GBMI offender. However, the *Darwall* opinion itself recognized that the GBMI classification was not all inclusive. One may well ask whether the fact that a defendant pleads insanity at his trial is a proper basis for denying him a hearing on the issue of involuntary mental health treatment when he is unsuccessful in his

278. 87 Mich. App. 196, 274 N.W.2d 17 (1978).
279. *Id.* at 200-01, 274 N.W.2d at 20 (citations omitted).

plea and instead is found GBMI. The objection to such a denial is made all the stronger by the fact that in Michigan if the defendant is successful in his NGRI plea, he can not be subjected to involuntary commitment following acquittal without a hearing.

The third equal protection challenge is based on the assertion that defendants found mentally ill at the time of the offense are in the same position as those found legally insane at the time of the crime because the statutory scheme provides no clear definitional criteria for differentiating between NGRI and GBMI. Therefore, it is argued, those found GBMI ought to be treated substantially in the same manner as those found NGRI.

The Michigan Court of Appeals considered this argument in *People v. Sorna*,[280] where the defendant claimed that it was "irrational to consider a defendant found 'mentally ill' criminally responsible for his acts while excusing one person adjudged 'legally insane' from a similar responsibility"[281] and that such a classification violated equal protection. The court rejected this contention, holding:

> The Legislature . . . has established 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. The fact that these distinctions may not appear clear-cut does not warrant a finding of no rational basis to make them.[282]

The court based its decision on a finding that the conceptual and definitional distinctions between the categories of GBMI and NGRI were sufficiently clear. The question remains whether these conceptual and definitional differences can be given operational significance so that in fact different categories of persons are or can be distinguished on the basis of culpability, which provides a legitimate basis for different dispositional outcomes.

The equal protection challenge was definitively rejected by the Supreme Court of Michigan in *People v. McLeod*.[283] The Michigan court found that those persons adjudged GBMI did not constitute a suspect class.[284] Moreover, the court held that

280. 88 Mich. App. 351, 276 N.W.2d 892 (1979).
281. *Id.* at 360, 276 N.W.2d at 896.
282. *Id.*
283. 407 Mich. 632, 288 N.W.2d 909 (1980).
284. *Id.* at 663, 288 N.W.2d at 919.

since persons found GBMI have necessarily been found guilty beyond a reasonable doubt, they have "no right to the exercise of unfettered liberty,"[285] and therefore have no basis for claiming deprivation of any fundamental right. Since neither a suspect class nor a fundamental right was involved, special scrutiny of the classification was held not necessary. Therefore, the court ruled that the GBMI classification needed only to bear a rational relationship to legitimate state purposes to be upheld as constitutional.[286] The *McLeod* court went on to find such a reasonable relationship between the classification and the state's interest in "providing supervised mental health treatment and care to guilty but mentally ill defendants."[287]

Although the Michigan courts have rejected all equal protection challenges to the GBMI statute, basic questions remain even within the parameters of the analysis developed in *McLeod.* For example, is there a fundamental right to plead the insanity defense in a jurisdiction which recognizes such a defense? If so, does providing the jury with the GBMI alternative infringe that right by making the possibility of a GBMI verdict a condition of its exercise? It may be argued that to subject a defendant to the risk of a GBMI verdict as a condition to pleading NGRI violates due process and involves an arbitrary classification. Furthermore, if imposing this alternative verdict arbitrarily subjects a person to the risk of the GBMI verdict, or alternatively, if there is no reasonable basis in practice for separating those found GBMI and those found guilty who are in fact mentally ill, there may be equal protection objections to subjecting a GBMI offender to involuntary treatment without a hearing when such protection is extended to other "guilty" but "mentally ill" offenders. Nevertheless, any equal protection challenge to the GBMI statute can be expected to meet the contentions that the creation of the GBMI class of defendants does have a rational basis in the state's legislative purpose of providing protection for the public and in guaranteeing needed treatment for an identifiable group of offenders, and that such a classification need not include all mentally ill offenders in order to survive equal protection scrutiny.

The second significant basis for constitutional challenge to

285. *Id.* at 662, 288 N.W.2d at 919.

286. *Id.* at 663, 288 N.W.2d at 919, (citing San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 40 (1973)).

287. 407 Mich. at 664, 288 N.W.2d at 919.

GBMI statutes has been denial of due process. The principal form of due process challenge is derived from the *McQuillan* opinion.[288] According to *McQuillan* and the judicial authority upon which it draws,[289] due process requires that persons found NGRI be provided with a hearing to determine their *present* mental condition, before being subjected to involuntary mental treatment.[290] Since defendants found GBMI might also be subject to involuntary psychiatric treatment, the argument is that they too should receive a hearing to determine present mental illness and need for treatment. The defendant in *McLeod* advanced this argument in challenging the constitutionality of the provisions of the GBMI statute that require submission to continuing mental treatment as a condition for probation.[291] The Supreme Court of Michigan rejected this contention on the basis that mentally ill offenders were in a wholly different position than persons NGRI.[292] The *McLeod* court reasoned that an NGRI verdict established only "that there was a reasonable doubt as to defendant's sanity at the time of the crime."[293] Because subsequent commitment in a mental health facility constituted a significant restriction on an insanity acquittee's right to liberty, due process required a hearing on the acquittee's present mental condition and need for treatment for commitment.[294]

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288. 392 Mich. 511, 221 N.W.2d 569 (1979) *cited in* People v. McLeod, 407 Mich. at 658-59, 288 N.W.2d at 915; *see also supra* notes 227-28 and accompanying text.

289. *See, e.g.*, Baxstrom v. Herold, 383 U.S. 107 (1966); Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968).

290. In *McQuillan* the court stated:

> [W]e hold that due process requires a sanity hearing for those found not guilty by reason of insanity . . . . A defendant who was insane for the purpose of responsibility at the time of the offense may not be insane for the purpose of civil commitment at the time of the verdict.

392 Mich. at 533, 221 N.W.2d at 579; *see also*, Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968). The Court of Appeals for the District of Columbia stated:

> The [insanity] plea is neither an express nor implied admission of present illness, and acquittal rests only on a reasonable doubt of *past* sanity, [emphasis in original] *i.e.*, at the time of the offense.
>
> . . . .
>
> After acquittal by reason of insanity there is also need for a new finding of fact: The trial determined only that there was a reasonable doubt as to defendant's sanity in the past, present commitment is predicated on a finding of *present* insanity [emphasis added].

Id. at 649-50.

291. 407 Mich. at 656-57, 288 N.W.2d at 916.

292. *Id.* at 659, 288 N.W.2d at 917.

293. *Id.*

294. *Id.*

However, the *McLeod* court reasoned that this analysis did not apply in the case of GBMI defendants because they "have been found beyond a reasonable doubt to have been (1) guilty of an offense; (2) mentally ill at the time of the commission of the offense; and (3) not legally insane at the time of the offense."[295] Consequently, the court concluded that these defendants do not have a right to unfettered liberty and hence have no valid due process objection to being subjected to mental health treatment without receiving a separate sanity hearing.[296] The court also held that in the case of GBMI prisoners, due process is satisfied if, prior to sentencing, the court obtains a report regarding the defendant's present mental state:

> We find that defendant's interest in the legislatively created sentencing alternative of probation will be protected adequately if the sentencing court is required to obtain a report on defendant's present mental health prior to sentencing and provides a procedure for review to allow shortening or discontinuing the period of probation if the reasons for the five-year period no longer obtain. Such procedures strike a constitutional balance between defendant's interest in a period of probation of less than five years and society's interest in assuring that mentally ill criminals are provided supervised treatment for a period of time sufficient to determine that their mental health is restored.[297]

The *McLeod* court's analysis fails to recognize that due process concerns are not limited to the restrictions on liberty imposed by commitment, but that they also arise from the nature and consequences of involuntary treatment. GBMI defendants may have valid objections to both the stigma attaching to involuntary commitment and, more importantly, to the likelihood of special treatment, including restraints and drug therapy.[298]

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295. *Id.*

296. *Id.*

297. *Id.* at 660, 288 N.W.2d at 918.

298. The dangers of stigmatization from being adjudicated mentally ill, and the compulsory treatment attendant to involuntary hospitalization have been recognized as more "intrusive" than mere incarceration. *See* Jones v. United States, 51 U.S.L.W. 5041, 5049 (U.S. June 29, 1983) (Brennan, J., dissenting). Justice Brennan observed:

> It is true that we recognized that individuals have an interest in not being . . . labeled mentally ill. Avoiding stigma, however, is only one of the reasons for recognizing a liberty interest in avoiding involuntary commitment. We have repeatedly acknowledged that persons who have already been labeled as mentally ill nonetheless retain an interest in avoiding involuntary commitment. Other aspects of involuntary commitment affect them in far more immediate

Given these concerns, due process seems to require a judicial determination of the existence of present mental illness and need for treatment as much for the GBMI offender as it does for the insanity acquittee or for any person subjected to involuntary mental treatment.[299]

A third basis for constitutional challenge to the GBMI statute is that it violates the eighth amendment provision proscribing cruel and unusual punishment.[300] Although this issue has not

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ways.

> In many respects, confinement in a mental institution is even more intrusive than incarceration in a prison. Inmates of mental institutions, like prisoners, are deprived of unrestricted association with friends, family, and community; they must contend with locks, guards, and detailed regulation of their daily activities. In addition, a person who has been hospitalized involuntarily may to a significant extent lose the right enjoyed by others to withhold consent to medical treatment. *See* Youngberg v. Romeo, 102 S. Ct. 2452 (1982) (involuntary committee's due process right to freedom from unreasonable restraint limited to a guarantee that professional medical judgment be exercised). The treatments to which he may be subjected include physical restraints such as straightjacketing, as well as electroshock therapy, aversive conditioning, and even in some cases psychosurgery. Administration of psychotropic medication to control behavior is common. *See* American Psychiatric Assn., Statement on the Insanity Defense 15 (1982) ("Greater emphasis is now placed upon psychopharmacological management of the hospitalized person."). Although this Court has never approved the practice, it is possible that an inmate will be given medication for reasons that have more to do with the needs of the institution than with individualized therapy. We should not presume that he lacks a compelling interest in having the decisions to commit him and to keep him institutionalized made carefully, and in a manner that preserves the maximum degree of *personal* autonomy.

Id. at 5049-50 (some citations and footnotes omitted).

299. A due process challenge to involuntary treatment of prisoners detained in correctional facilities was sustained in Vitek v. Jones, 445 U.S. 480 (1980). The Supreme Court ruled unconstitutional a Nebraska statute authorizing a prison director to unilaterally transfer a prisoner deemed by a psychiatrist or psychologist to be in need of psychiatric treatment not available in the correctional facility. The Court held that the statutory procedure infringed on the liberty of the prisoners by failing to provide for a hearing to determine the "conditions that warranted the transfer" and by subjecting the prisoner to the "distinctive stigma" of psychiatric treatment and to "behavior modification" therapy as a result of the transfer. *Id.* at 492. For an analysis of this case, see Note, Vitek v. Jones: *Transfer of Prisoners to Mental Institutions,* 8 AM. J.L. & MED. 175 (1982). Although GBMI defendants have already been found mentally ill at the time of the offense, this finding does not address the issue of present mental illness and need for treatment. A medical examination after sentencing alone does not provide a substitute for a judicial hearing and determination of present mental illness as is required in the case of insanity acquittees. Because GBMI defendants and insanity acquittees are indistinguishable as to the issue of present mental illness and present need of treatment, both should be afforded a mental examination and a judicial finding as to present illness and need for treatment.

300. *See generally* Comment, *Cruel and Unusual Punishments,* 3 CATH. U. AM. L. REV. 117 (1953); Comment, *The Eighth Amendment Right to Treatment for Involunta-*

been fully litigated in Michigan as yet, the *McLeod* court did deal with an eighth amendment claim in summary fashion.[301] The trial judge, after determining that McLeod was mentally ill at the time of the offense charged, had refused to enter a GBMI verdict on the ground that "the conditions within the Department of Corrections . . . posed an immediate threat of irreparable harm to defendant,"[302] and that as a result of these conditions the defendant was not likely to receive adequate psychiatric treatment if committed to the Department of Corrections.[303] Based on the determination that adequate treatment facilities and personnel were not available, the trial judge ruled that the GBMI statute was "legally inert" and could not "be given judicial implementation [because] compliance with its provisions as to treatment is impossible."[304] The trial court, sua sponte, set aside the GBMI verdict, declaring it a "nullity."[305]

The court of appeals reversed this ruling on the basis that the trial court findings were premature.[306] Affirming the decision of the court of appeals, the Supreme Court of Michigan held:

> [T]he sentencing court was an inappropriate forum to determine that the sentencing provisions of [the GBMI statute] could not and would not be implemented . . . . [T]he trial court's factual finding that the conditions at the Department of Corrections facilities posed a threat of immediate and irreparable injury to the defendant was made on an inadequate factual record. . . . [B]ecause no full evidentiary record was properly developed below, it has not been established that defendant will not be afforded the treatment to which he has a statutory right nor that the actual operation of [the GBMI statute] violates the Eighth Amendment's ban on cruel and unusual punishment.[307]

A right to adequate psychiatric treatment for those under penal sentence has been recognized by some courts. For exam-

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rily Committed Mental Patients, 61 IOWA L. REV. 1057 (1976); Comment, *Sentencing: Proportionality Analysis Under the Eighth Amendment*, 20 WASHBURN L.J. 186 (1980).

301. People v. McLeod, 407 Mich. at 51-55, 288 N.W.2d at 914-15.

302. *Id.* at 648-49, 288 N.W.2d at 912-13.

303. *Id.* at 648, 288 N.W.2d at 912.

304. *Id.* at 649, 288 N.W.2d at 913.

305. *Id.* at 650, 288 N.W.2d at 913.

306. People v. McLeod, 77 Mich. App. 327, 258 N.W.2d 214 (1977), *aff'd*, 407 Mich. 632, 288 N.W.2d 909 (1980).

307. 407 Mich. at 655, 288 N.W.2d at 915 (some statutes and footnotes omitted).

ple, in *Newman v. State*[308] an Alabama district court found that the state was willfully and intentionally violating a prisoner's right to be free from cruel and unusual punishment by not providing sufficient medical facilities and staff and by limiting the prisoner's access to psychiatric personnel and medication.[309] While the factual record in *McLeod* may not have been sufficient to support a holding that the GBMI verdict as implemented in Michigan violated the prohibition on cruel and unusual punishment, the eighth amendment challenge to application of the GBMI statute remains viable. The argument needs only to be presented with a full and adequate factual showing that persons have been incarcerated under the GBMI verdict without being provided adequate psychiatric care.[310]

The type of eighth amendment challenge raised in *McLeod* is not based on the GBMI statute in and of itself since the legislation explicitly provides that adequate psychiatric care is to be available to the mentally ill offender.[311] Instead the challenge is based on the lack of treatment that results when overcrowding and lack of professional personnel make implementation of the treatment provisions of the statute impossible. Such a showing

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308. 349 F. Supp. 278 (M.D. Ala. 1972), *aff'd*, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975).

309. *Id.* at 284-86; *see* Estelle v. Gamble, 429 U.S. 97 (1976). The Supreme Court stated that "deliberate indifference to serious medical needs" of prisoners by prison officials would violate the eighth amendment. *Id.* at 106. Justice Stevens, in dissent, declared: "[W]hether the conditions in Andersonville were the product of design, negligence, or mere poverty, they were cruel and inhuman" and he concluded that governmental indifference to a prisoner's medical needs violates the eighth and fourteenth amendments. *Id.* at 116-17.

310. *See, e.g.*, People v. Feagley, 14 Cal. 3d 338, 535 P.2d 373, 121 Cal. Rptr. 509 (1975); State *ex rel.* R.G.W., 145 N.J. Super. 167, 366 A.2d 1375 (Passaic County Ct. 1976); *see also* Comment, *Insanity—Guilty but Mentally Ill—Diminished Capacity: An Aggregate Approach to Madness*, 12 J. MAR. J. PRAC. & PROC. 351, 372-73 (1979). *See generally* Robinson v. California, 370 U.S. 660 (1962). The eighth amendment's ban against cruel and unusual punishment, applicable to the states through the due process clause of the fourteenth amendment, protects inmates from unconstitutional conditions of treatment imposed by prison authorities.

311. *See, e.g.*, IND. CODE ANN. § 35-36-2-5 (Burns Supp. 1982) which provides in pertinent part:

> (a) Whenever a defendant is found guilty but mentally ill at the time of the crime . . . the court shall sentence him in the same manner as a defendant found guilty of the offense.
>
> (b) If a defendant who is found guilty but mentally ill . . . 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.

See also ILL. ANN. STAT. ch. 38, § 1005-2-6 (Smith-Hurd 1982); KY. REV. STAT. § 504.150 (Supp. 1982); N.M. STAT. ANN. § 31-9-4 (Supp. 1982).

likely can be made in view of the well established fact that adequate psychiatric treatment is not commonly available to mentally ill offenders.[312] The basis for an eighth amendment challenge is even stronger in the case of a person found guilty but mentally ill than in the case of a person incarcerated under a guilty verdict since the courts have explicitly recognized that the purpose of the GBMI verdict, and consequently the incarceration which follows it, is to provide protection for the public and *treatment for the offender.* To incarcerate an offender under a GBMI statute in order to provide needed treatment and then to fail to provide such treatment would seem to present a clear case of cruel and unusual punishment.

Another basis for an eighth amendment challenge to the implementation of the GBMI statute draws on the rationale developed in *Sinclair v. State.*[313] The *Sinclair* court stated: "[T]here could be no greater cruelty than trying, convicting, and punishing a person wholly unable to understand the nature and consequence of his act. . . . [S]uch punishment is certainly both cruel and unusual in the constitutional sense."[314]

On its face, the GBMI statute does not provide a verdict applicable to the person wholly deprived of mental capacity to appreciate the criminality of his act. In fact, by the terms of the statute, its objective is quite to the contrary.[315] However, a plausible case can be made that in implementing the statute, a jury will be more inclined to adopt a GBMI verdict than an NGRI verdict because the certain period of confinement accompanying the former verdict offers a greater guarantee of public safety without giving up the promise of needed treatment for the mentally ill offender.[316] Thus, the result of presenting the jury with these alternative verdicts may be to subject severely disturbed defendants to a prison term if they are found GBMI. If the mental illness of such a person could be shown to in fact have substantially impaired his understanding, a sentence imposed pursuant to the GBMI statute would qualify as cruel and unusual punishment under the *Sinclair* rationale.

A third challenge based on the cruel and unusual punish-

312. *See generally* Roth, *Correctional Psychiatry,* MODERN LEGAL MEDICINE, PSYCHIATRY, AND FORENSIC SCIENCE 677 (1980).

313. 161 Miss. 142, 132 So. 581 (1931) (per curiam).

314. *Id.* at 164, 132 So. at 585 (Ethridge, J., concurring).

315. MICH. COMP. LAWS § 786.36 (1982).

316. *See infra* notes 327-66 and accompanying text.

ment theory is that the statute as construed may permit the state to impose psychiatric treatment and a mental institution environment on persons who are not mentally ill.[317] This danger arises from the fact that the statute as implemented permits involuntary mental treatment of the person found GBMI on the basis of a medical evaluation alone, without an adversarial hearing to determine present mental illness and need for treatment.[318] Of course, this challenge to the GBMI statute could be met simply by amending it or construing it to require a hearing before sentencing or before imposing treatment to determine whether the defendant is presently mentally ill and in need of treatment. This solution, however, makes clear that the GBMI verdict is no more than a guilty verdict since all persons sentenced to a corrections facility are to be provided needed medical treatment, including health treatment.

Perhaps the most persuasive challenge to GBMI legislation is that it may operate within the context of jury deliberations to effectively deprive a number of defendants who would otherwise be found NGRI of a real opportunity to obtain such a verdict. Arguably, this result "would run afoul of due process in that it would deprive defendants of the *traditional* right to negate proof of criminal intent" and to establish lack of culpability by proof of a defense of insanity.[319] The GBMI verdict may effectively restrict the availability of the insanity defense because the jury, when presented with this alternative that offers greater public protection, may be led to compromise or to prefer the GBMI verdict over the NGRI verdict.[320] Problems associated

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317. Concern with the imposition of unneeded mental treatment on a person convicted of a criminal offense was expressed in United States *ex rel.* Schuster v. Herold, 410 F.2d 1071 (2d Cir.), *cert. denied,* 396 U.S. 847 (1969). The court stated:

> [W]e are faced with the . . . terrifying possibility that the transferred prisoner may not be mentally ill at all. Yet he will be confined with men who are not only mad but dangerously so. . . . [H]e will be exposed to physical, emotional, and general mental agony. Confined with those who are insane, told repeatedly that he too is insane and indeed treated as insane, it does not take much for a man to question his own sanity and in the end to succumb to some mental aberration.

Id. at 1078.

318. Sherman, *supra* note 262, at 257.

319. State v. Stacy, 601 S.W.2d 696, 704 (Tenn. 1980) (Henry, J., dissenting) (emphasis added); *see also* State *ex rel.* Causey, 363 So. 2d 472, 474 (La. 1978) ("the denial of the right to plead insanity, with no alternative means of exculpation . . . for an insane person unable to understand the nature of his act, violates the concept of fundamental fairness implicit in the due process guaranties").

320. *See infra* notes 380-88 and accompanying text.

with the jury's perception of the GBMI alternative are the topic of the next section.

2. *Jury problems*

In criminal cases, the sixth amendment to the Constitution guarantees a defendant's right to a jury trial.[321] Under the sixth amendment, the jury's function is to decide the facts, based on its examination of the evidence and an evaluation of the testimony presented during the trial, and to render a verdict of guilty or not guilty by applying the law, as presented in the judge's instructions.[322] A major problem for criminal defendants and for jurors is the fact that laypersons who serve on juries often are unable to understand the instruction on the law given by the judge. Misunderstanding arises from the syntax of the instructions, from the manner of presentation, and from the general unfamiliarity of laypersons with legal terminology.[323] The jury's difficulty in complying with instructions has been demonstrated in the case of the insanity defense, where these general problems may be exacerbated by the addition of the GBMI verdict.

Several empirical studies have been conducted to assess jurors' attitudes toward and comprehension of the insanity defense.[324] One study indicates that jurors may be prejudiced against the insanity plea, especially in cases where the defendant has been charged with a serious crime and therefore appears dangerous.[325] This prejudice may prevent adherence to the in-

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321. U.S. CONST. amend. VI.

322. *See generally* H. KALVEN & H. ZEISEL, THE AMERICAN JURY ch. 1 (1966).

323. *See, e.g.*, Elwork, Sales & Alfini, *Juridic Decisions: In Ignorance of the Law or in Light of It?* 1 LAW AND HUMAN BEHAVIOR 163 (1977); Charrow & Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979); Strawn & Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478 (1976). *See generally* A. ELWORK, B. SALES & J. ALFINI, MAKING JURY INSTRUCTIONS UNDERSTANDABLE (1982).

324. *See, e.g.*, R. SIMON, THE JURY AND THE DEFENSE OF INSANITY (1967); Morris, Bozzetti, Rusk & Read, *Wither Thou Goest? An Inquiry Into Jurors' Perceptions of the Consequences of a Successful Insanity Defense*, 14 SAN DIEGO L. REV. 1058 (1977).

325. *See* Bronson, *On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen*, 42 U. COLO. L. REV. 1, 7 n.32 (1970); *see also* United States v. Bennett, 460 F.2d 872, 881 (D.C. Cir. 1972) (acknowledgement of the jurors' reluctance to acquit defendants charged with serious crimes). In one instance when the evidence clearly indicated a history of mental illness, and the facts and circumstances surrounding the crime were bizarre enough to have been caused by serious mental impairment, a jury rejected the insanity defense. Parman v. United States, 399 F.2d 559 (D.C. Cir.), *cert. denied*, 393 U.S. 858 (1968). *But see Hinck-*

structions given on the insanity defense. The jury's prejudicial or skeptical attitude toward the insanity defense may be even more pronounced today in view of the public's increased disenchantment with psychiatry in general and with the NGRI verdict in particular.[326] Jurors faced with the GBMI alternative may be tempted to adopt it as a compromise verdict based on the assumption that dangerous offenders would be neutralized by incarceration, while still receiving required psychiatric treatment.[327] It has been shown that jurors, besides being unfavorably disposed towards the insanity defense, also "manifest start[l]ingly low comprehension of the charge materials with which they are presented."[328] This low level of comprehension may be colored by the subtle prejudices of the instructing

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ley Writings Basis for Verdict: Jury Foreman Says, Chi. Sun-Times, June 23, 1982, at 1, col. 1. L. Coffey, the jury foreman at the Hinckley trial, stated that the evidence presented at trial convinced the jurors to render the "not guilty by reason of insanity verdict." One interesting note is that the jurors "did not even remember the instruction to the jury from the judge that specifically said that if found insane, Hinckley would be confined to a mental institution."

326. *See* Arafat & McCahery, *The Insanity Defense and the Juror,* 22 DRAKE L. REV. 538 (1973); *see also* Lauter, *Why Insanity Defense is Breaking Down: New Studies Show Public Misperception of the Plea,* NAT'L. L.J., May 3, 1982, at 1, col. 1.

327. *See* Grostic, *The Constitutionality of Michigan's Guilty But Mentally Ill Verdict,* 12 U. MICH. J.L. REF. 188, 196-98 (1978). *But see* Simon, *supra* note 324, at 92-93, in which researchers concluded that jurors considering the insanity defense were not affected by knowledge of dispositional consequences. Simon concluded that

> [t]he presence or absence of commitment information had no noticeable effect on the individuals' or the juries' verdicts. The absence of information did not increase, to any significant extent, the likelihood that a jury would find the defendant guilty; nor did the presence of information enhance the likelihood that the jury would acquit the defendant on grounds of insanity. We can only conclude . . . that information as to disposition of the defendant is *not* a crucial consideration in the jury's decision.

He also noted:

> Some jurors . . . seemed to be searching for a compromise between the two verdict alternatives provided by the law—guilty or not guilty by reason of insanity. They were unwilling to find the defendant *not* guilty by reason of insanity because they were too impressed both with the heinousness of the crime and with the rational, calculated manner in which . . . the defendant carried it out. On the other hand . . . they were uneasy about having the defendant treated as an ordinary criminal. *An ideal solution, and one which they seemed to be searching for, would have allowed them to find the defendant guilty, but in need of medical treatment.* The defendant would then be committed to an institution that was neither prison nor hospital but which had the facilities of both.

Id. at 172 (emphasis added).

328. Arens, Granfield & Susman, *Jurors, Jury Charges and Insanity,* 14 CATH. U.L. REV. 1, 25 (1965).

judge[329] as well as by the jurors' general suspicions of psychiatry and particular concerns with the insanity plea.[330]

The current controversy over instructing the jury on the dispositional consequences of the insanity defense further complicates the issue of jury compliance with instructions.[331] This controversy is exacerbated when the GBMI verdict is introduced into a jurisdiction with the traditional verdicts of guilty, not guilty, and NGRI. There are opposing positions on the question of whether the jury should be informed of the effect of a verdict: one approach favors informing the jury of the fate of the defendants found NGRI,[332] and the other contends that it is not the province of the jury to concern itself with the consequences of the verdict and that such an instruction might lead to needless and even prejudicial deliberations.[333] The leading case favoring the giving of instructions on the effects of an insanity verdict is *Lyles v. United States*.[334] In *Lyles* the Court of Appeals for the District of Columbia held that the jury has a right to know the meaning of the NGRI verdict.[335] Although the court acknowledged the compelling force of the general doctrine that juries should not be informed of the consequences of a verdict, it allowed an exception to this rule in cases involving an insanity

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329. *See* Arens & Susman, *Judges, Jury Charges and Insanity*, 12 How. L.J. 1 (1966). The authors concluded: "The study revealed pervasive judicial hostility toward the insanity defense when that defense was not founded on flagrant psychotic symptomatology." *Id.* at 2. They noted that judges "unconsciously express public feelings because they . . . are part of society. Their charges [to the jury] reflect the community's attitudes and biases because they are 'close' to the community . . . ." *Id.* at 34 n.43.

330. *See* Arafat & McCahery, *supra* note 326, at 549.

> As the data of this research indicates, those jurors who have favorable attitudes toward psychiatry would have a greater tendency to act in an impartial manner when considering an insanity plea . . . .
>
> Conversely, those jurors who have unfavorable attitudes toward psychiatry appear to have a more basic approach to the relationship between crime and punishment.

331. For a discussion of arguments on both sides of the controversy, see Schwartz, *Should Juries be Informed of the Consequences of the Insanity Verdict?*, 8 J. Psych. L. 167 (1980).

332. *See, e.g.*, Roberts v. State, 335 So. 2d 285 (Fla. 1976); State v. Amorin, 58 Hawaii 623, 574 P.2d 895 (1978); Commonwealth v. Mulgrew, 475 Pa. 271, 380 A.2d 349 (1977). *See generally* Annot., 11 A.L.R. 3d 737 (1967).

333. *See, e.g.*, Curry v. State, 271 Ark. 913, 611 S.W.2d 745 (1981); Payne v. Commonwealth, 623 S.W.2d 867 (Ky. 1981), *cert. denied*, 456 U.S. 909 (1982); State v. Buckman, 630 P.2d 743 (Mont. 1981).

334. 254 F.2d 725 (D.C. Cir. 1957), *cert. denied*, 356 U.S. 961 (1958), *cert. denied*, 362 U.S. 943 (1960), *cert. denied*, 368 U.S. 992 (1962).

335. *Id.* at 728.

defense.[336] The court reasoned that, as compared to "guilty" or "not guilty" verdicts, an NGRI verdict has no commonly understood meaning.[337] Therefore, when the defense of insanity is properly raised, the trial judge should instruct the jury as to the legal meaning of an NGRI verdict.[338]

A number of jurisdictions have followed the *Lyles* rationale in adopting the view that juries should be instructed regarding the possible consequences of an insanity acquittal.[339] In *Roberts v. State*[340] the Supreme Court of Florida, citing *Lyles*, declared:

> Freed from confusion and wonderment as to the possible practical effect of a verdict of not guilty by reason of insanity, jurors will be able to weigh the evidence relating to the factual existence of legal insanity in an atmosphere untroubled by the distracting thought that such a verdict would allow a dangerous psychopath to roam at large.[341]

Several other jurisdictions have required an instruction on the dispositional consequences of an insanity verdict whenever the defendant or the jury requests it.[342] The reasoning of the Supreme Court of Michigan in *People v. Cole*[343] is representative of the approach used by these jurisdictions. In reaching its decision to require such an instruction, the Michigan court weighed two conflicting factors: (1) the possible injustice to a person who should be hospitalized, but because the jury does not understand the consequences of the insanity verdict, is imprisoned; and (2) a "possible" invitation to the jury to consider extraneous matters.[344] The court concluded that the first factor weighed more heavily and, therefore, allowed the instruction at the request of the accused or the jury.[345]

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336. *Id.*

337. *Id.*

338. *Id.* at 729.

339. *See* State v. Nuckolls, 273 S.E.2d 87, 90 (W. Va. 1980) (defense counsel entitled to argue the consequences of finding a defendant not guilty by reason of insanity); *see also supra* note 332 and accompanying text.

340. 335 So. 2d 285 (Fla. 1976).

341. *Id.* at 289.

342. *See, e.g.*, Schade v. State, 512 P.2d 907 (Alaska 1973); People v. Thomson, 197 Colo. 232, 591 P.2d 1031 (1979); Commonwealth v. Mutina, 366 Mass. 810, 323 N.E.2d 294 (1975); People v. Cole, 382 Mich. 695, 172 N.W.2d 354 (1969); State v. Hammonds, 290 N.C. 1, 224 S.E.2d 595 (1976).

343. 382 Mich. 695, 172 N.W.2d 354 (1969).

344. *Id.* at 720, 172 N.W.2d at 366.

345. The *Cole* court was consistent with *Lyles* in holding that when the defense of insanity is presented, upon timely request by the defendant or by the jury, the court

While an increasing number of jurisdictions are requiring or permitting the jury to be informed of dispositional consequences of NGRI verdicts, a majority still follows the traditional doctrine of judge-jury separation and treats the post-verdict disposition of one acquitted by reason of insanity as irrelevant to the jury function.[346] As a result, these jurisdictions have refused to permit any argument or instruction to the jury explaining that the defendant will be committed to an institution if he is found not guilty by reason of insanity.[347] One of the leading cases holding it proper to refuse defense counsel's request for an insanity verdict instruction is *State v. Garrett*.[348] In *Garrett* the court felt that the requested instruction "would divert the jury from the real merits of the insanity issue by the introduction of this extraneous consideration, which actually is nothing less than an invitation for the jury to find the defendant mentally irresponsible *because* he would then be confined anyway."[349]

One commentator, after reviewing the arguments on each side of the controversy about instructing the jury on consequences of an NGRI verdict, concluded that the giving of such an instruction ought to be discretionary with the trial judge.[350] This recommendation recognizes that the effects of such an instruction may be prejudicial, but also recognizes the danger that ignorance of dispositional consequences may affect the jury's verdict. This commentator asserts that the trial judge is in the best position to weigh these dangers and to determine whether the instruction ought to be given in any particular case.[351]

Before the adoption of a statute requiring instructions on dispositional consequences,[352] the Michigan courts examined the

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shall instruct the jury as to the consequences of a verdict of not guilty by reason of insanity. *Id.*

346. *See, e.g.*, State v. Buckman, 630 P.2d 743 (Mont. 1981). The Supreme Court of Montana held that "the function of the jury . . . is to determine the facts relevant to guilt or innocence . . . . [T]he jury's purpose and duty go no further and should not be involved with the consequences of the verdict they are charged to render." *Id.* at 748 (citations omitted); *see also supra* note 333 and accompanying text.

347. *See, e.g.*, Pope v. United States, 298 F.2d 507 (5th Cir. 1962), *cert. denied*, 381 U.S. 941 (1965); State v. Park 159 Me. 328, 193 A.2d 1 (1963).

348. 391 S.W.2d 235 (Mo. 1965).

349. *Id.* at 242.

350. *See* Schwartz, *supra* note 331, at 176-78.

351. *Id.* at 178.

352. Michigan has a statutory provision dealing with jury instructions:

> At the conclusion of the trial, where warranted by the evidence, the charge to the jury shall contain instructions that it shall consider separately the issues of the presence or absence of . . . legal insanity and shall also contain instruc-

propriety of giving such an instruction in cases where GBMI is one of the possible verdicts. In *People v. Tenbrick*[353] the Michigan court of appeals, citing *Lyles*[354] and *Cole*,[355] held that there was "no reversible error in the sua sponte instructions of the trial court relative to possible dispositions of the defendant if he were found 'not guilty by reason of insanity' or 'guilty but mentally ill.' "[356] The court based its conclusion on the premise that giving the disposition instruction in the case of an NGRI verdict was authorized, if not mandatory, and that since the introduction of the GBMI verdict did not change the law regarding the disposition of defendants found NGRI, the instruction continued to be applicable where an NGRI verdict is under consideration. Consequently, an instruction on the GBMI verdict was necessary to provide full information to the jury on dispositional consequences.[357]

In *People v. Thomas*[358] the defendant complained of the giving of the dispositional instruction at the prosecution's request and over defendant's objection.[359] In analyzing the appropriateness of such an instruction over defendant's objection, the court commented upon the merits of a "truth and accuracy test as a measure of the correctness of a trial judge's instruction regarding the effect of a not guilty by reason of insanity verdict or a guilty but mentally ill verdict."[360] The court stated that it might be as wrong "to mislead a jury into believing that there is no public safety factor in either of those verdicts because a defendant will not be released until it is certain that he will not commit further violent crime," as to allow it to believe that "a defendant will automatically be released from a mental hospital within a very short time after either of these verdicts."[361] The rationale supporting the "truth and accuracy test" is based upon the assumption that in an adversary system the prosecutor and

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tions as to the verdicts of guilty, guilty but mentally ill, not guilty by reason of insanity, and not guilty with regard to the offense or offenses charged and, as required by law, any lesser included offense.

MICH. COMP. LAWS § 768.29(a) (1982).

353. 93 Mich. App. 326, 287 N.W.2d 223 (1979).

354. *See supra* notes 334-38 and accompanying text.

355. *See supra* notes 343-45 and accompanying text.

356. 93 Mich. App. at 331, 287 N.W.2d at 225.

357. *Id.* at 330, 287 N.W.2d at 224-25.

358. 96 Mich. App. 210, 292 N.W.2d 523 (1980).

359. *Id.* at 222, 292 N.W.2d at 527.

360. *Id.* at 223, 292 N.W.2d at 528.

361. *Id.*

the defense attorney will each try to persuade the jury of their "differing versions of what happens after a not guilty by reason of insanity verdict or a guilty but mentally ill verdict" and that the best way to combat these efforts is to allow the court to tell the jury what the law provides.[362] The *Thomas* court reasoned:

> Leaving the question of whether or not to give this jury instruction to the whim of the defendant imparts a kind of judicial gamesmanship to the trial. Confidence in the jury should override the fear that somehow knowledge of what happens to a defendant in the case of a not guilty by reason of insanity or a guilty but mentally ill verdict will result in an unjust verdict.[363]

The danger of giving instructions on the dispositional consequences of both the NGRI and GBMI verdicts lies in informing the jury precisely of a middle ground between the "guilty" and NGRI verdicts, which, according to empirical studies, juries seek as they strive to reach a compromise verdict.[364] Providing instructions on the consequences of both the NGRI and GBMI verdicts may have effects more insidious than those generated by the giving of the NGRI instruction alone.[365] Faced with the choice of acquitting a mentally disturbed offender or finding him GBMI, jurors reasonably can be expected to choose the GBMI verdict, whether appropriate or not, since it not only provides for needed treatment for the mentally ill offender, as does the NGRI verdict, but also assures a period of confinement, which is not guaranteed by an NGRI verdict.[366]

Another potential jury-related problem is that jurors may not be able to grasp the subtle distinctions between the statutory definitions of insanity and mental illness as employed in the

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362. *Id.*

363. *Id.* at 223, 292 N.W.2d at 528-29.

364. *See* R. SIMON, *supra* note 324, at 172; *see also supra* note 327 and accompanying text.

365. *See* Weihofen, *Procedure for Determining Defendant's Mental Condition Under the American Law Institute's Model Penal Code*, 29 TEMP. L.Q. 235, 247 (1956).

366. One legislator, in describing what he considered to be the advantages of the GBMI verdict, stated:

> [J]uries have now been given an option which is a more 'middle of the road,' balanced approach to the difficult choice of incarcerating an individual in need of medical attention or releasing a confused and possibly dangerous individual into society . . . . A jury, or judge, when confronted with a clear case of guilty action and a difficult question of sanity, can protect society even at the same time providing medical treatment for the mentally ill.

Insanity Defense Hearings, *supra* note 12, at 23 (statement of Sen. Dan Quayle).

GBMI statute.[367] It may be unrealistic to expect a layperson to understand the qualitative differences between the mental condition of a person "lacking substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law"[368] (the test for NGRI), and the mental condition of a person having "a substantial disorder of thought, mood or behavior which afflicted [him] at the time of the commission of the offense and which impaired [his] 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 the law"[369] (the test for GBMI). Both of these definitions call upon the jury to make an informed decision regarding the cognitive and affective states of a defendant who might be charged with a serious and even heinous crime. The jury does not receive much guidance in making its decision from the statutory definition of mental illness. That definition is phrased in terms of a mental condition just short of insanity and is written as the negative of insanity. Thus, it fails to provide the jury with positive criteria for making a factual determination without reference to the insanity defense itself. One Michigan court conceded that "trained professionals may better understand the distinction between a not guilty by reason of insanity verdict and a guilty but mentally ill verdict," but this court went on to conclude that the statute, nevertheless, did provide "sufficient guidance in this respect."[370]

One obvious drawback of the dual definitions of mental impairment is continued reliance upon expert testimony. Provision of these alternative verdicts may even increase the need for psychiatric expertise in the courtroom. Much of the impetus for adoption of the GBMI verdict stems from dissatisfaction with

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367. *See, e.g.*, KY. REV. STAT. § 504.060 (Supp. 1982) which provides in part:

(4) "Insanity" means that, as a result of mental condition, lack of substantial capacity either to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law;

(5) "Mental illness" means 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 can be related to physiological, psychological, or social factors.

See also GA. CODE ANN. §§ 16-3-2, 17-7-131 (Supp. 1982); IND. CODE ANN. §§ 35-41-6, 31-36-1-1 (Burns 1979 & Supp. 1982); N.M. STAT. ANN. § 31-9-3 (Supp. 1982); Comment, *supra* note 235, at 375-76.

368. *See* ILL. REV. STAT. ch. 38, § 6-2(a) (1981).

369. *See* ILL. REV. STAT. ch. 38, § 6-2(d) (Supp. 1982).

370. People v. Thomas, 96 Mich. App. 210, 221, 292 N.W.2d 532, 537 (1980).

psychiatric evidence received under an insanity plea, and from complaints that the insanity defense has permitted psychiatric experts to subvert the criminal justice system.[371] However, the definitional problems connected with the GBMI verdict may create the need for increased psychiatric testimony in the court room. The possibility of greater reliance on psychiatric experts threatens even greater invasion of the province of the jury on the ultimate question of criminal responsibility.[372]

Aside from the increased reliance on psychiatric testimony, even more significant problems are likely to flow from the definitions of mental illness and insanity. In *Taylor v. State*,[373] the Supreme Court of Indiana rejected a challenge to the constitutionality of the Indiana GBMI statute based on a claim that the overlapping definitions of insanity and mental illness were so vague as to describe the same mental condition, thus denying the defendant notice of the charge against him and bestowing unlimited discretion on the trier of fact in applying the terms of the statute.[374] Although the court acknowledged that "the conditions described by the legislature involve similar behavioral characteristics," it rejected the defendant's contention that the definitions were so broad and vague that they described the same mental condition.[375] Focusing on the *mens rea* requirement as it relates to the concepts of insanity and mental illness, the court reasoned that the mere existence of a mental disease or defect did not "*ipso facto* render a defendant legally insane."[376] Defendants classified as mentally ill but not insane may not be

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371. Rudolph Giulini, Associate Attorney General, explicitly recognized the danger of the GBMI alternative verdict producing increased jury confusion, when he testified to a senate committee:

> [The guilty but mentally ill] approach . . . does not, however, eliminate confusing psychiatric testimony concerning a wide range of issues not directly related to the mental element, such as delusions of a divine calling. This may serve to confuse the jury. Therefore, this approach would still lead to a battle of expert witnesses on issues as wide and possibly even more varied than under present procedures.

Insanity Defense Hearings, supra note 12, at 33.

372. There is a distinct possibility that the adoption of GBMI along with NGRI will create a need for expert testimony on differences in nature and effect of particular mental illnesses. The concurrent adoption of both pleas may create a situation similar to that which occurred in the District of Columbia under the "product" test for insanity adopted in *Durham*. *See supra* notes 89-98 and accompanying text.

373. 440 N.E.2d 1109 (Ind. 1982).

374. *Id.* at 1111.

375. *Id.*

376. *Id.*

so mentally impaired as to negate the *mens rea* required for the criminal offense. On the other hand, defendants suffering from insanity as defined in the Indiana statute lack moral culpability that would otherwise justify criminal punishment. Therefore, the court concluded that the distinction between the statutory definitions of insanity and mental illness was "unequivocally drawn" where the inquiry focused on culpable intent.[377]

The Indiana court's analysis itself suggests the difficulty with the distinction upon which it relies. First the court observed that although a mentally ill defendant's "thoughts, feelings and behavior were affected or his functions impaired, this does not automatically negate the *mens rea* necessary to the offense."[378] Then the court went on to observe that a defendant proves his insanity by establishing his lack of moral culpability.[379] Thus the Indiana court implicitly recognized that the issue under the insanity defense is not the presence of the requisite *mens rea,* but a determination of the lack of moral culpability. It seems difficult to deny that the term mental illness has the same meaning in the two verdicts and that the real issue is the degree of mental impairment. Whether jurors can be instructed on and can differentiate between degrees of mental illness, in terms of their effect on moral culpability in any particular case, is open to question. The danger is that juries, unable to differentiate between the effects of mental illness necessary for each of the alternative verdicts, may find the requisite criminal mental state in defendants who otherwise would have been found NGRI. Juries may be expected to conclude that if a defendant is mentally ill, he should be treated; and if he has caused a criminal harm, he should be incarcerated. The GBMI verdict permits both of these objectives to be met. The Michigan courts that have considered whether a mentally ill person can have the criminal intent necessary for conviction have held that "[m]ental illness and malice aforethought [requisite *mens rea*] are not mutually exclusive mental conditions."[380] Therefore, if a jury finds a defendant to be GBMI, the jury necessarily must have found that the defendant had the requisite *mens rea* to

377. *Id.* at 1112.

378. *Id.*

379. *Id.*

380. People v. Ramsey, 89 Mich. App. 468, 280 N.W.2d 565-66 (1979); *accord* People v. Broadnax, 111 Mich. App. 46, 314 N.W.2d 522 (1981); People v. Thomas, 96 Mich. App. 210, 292 N.W.2d 523 (1980).

commit the offense charged. This was the ruling in *People v. Broadnax*,[381] where the defendant contended that "the jury's finding of mental illness is irreconcilable with a finding of premeditation and deliberation."[382] The court rejected this contention, holding that there was no necessary contradiction in a finding of mental illness and the *mens rea* requisite for guilt. The court reasoned:

> [It would not be] logically or legally impossible that a person who suffers from a substantial disorder of mood which significantly impairs his or her ability to cope . . . might also be able to think beforehand about a killing and to evaluate the major facets of a choice or problem. That the opposite might also be true merely raises a question of fact for the jury.[383]

The problem with this approach is that the finding of mental illness must relate both to the existence of the requisite mental state and to the capacity required for culpability. The complexity of making such fine factual determinations of the effect of mental illness presents conceptual and decisional challenges that may be beyond the jury's competence. The GBMI verdict may provide an all too attractive compromise. Thus, the jury's duty to determine criminal responsibility is likely to be frustrated if faced with a showing of mental illness since the jurors simply might choose GBMI as a compromise verdict.

The complexity of the jury's function in this area has been summarized by one court in these terms:

> With respect to responsibility the jury has two functions. In the first place it measures the extent to which the defendant's mental and emotional processes and behavior controls were impaired at the time of the unlawful act. The answer to that question is elusive, but no more so than many other facts that a jury must find beyond a reasonable doubt in a criminal trial. The determination must be based on the evidence presented, and *any doubts must be resolved in favor of finding greater rather than lesser impairment.*[384]

This observation was made with reference to a statutory scheme involving only the opposing verdicts of guilty and NGRI. Under

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381. 111 Mich. App. 46, 314 N.W.2d at 525.

382. *Id.* at 52, 314 N.W.2d at 525.

383. *Id.* at 53, 314 N.W.2d at 525.

384. United States v. Eichberg, 439 F.2d 620, 624-25 (D.C. Cir. 1971) (emphasis added) (footnotes omitted).

such a scheme it is relatively simple for the jury to follow the prescription of resolving doubts in favor of the defendant. The complexity added to the jury's process of deliberation by the GBMI verdict is caused, in part, by the shift from a binary process of decisionmaking to one which involves a third possibility, a middle ground with the obvious temptation to compromise.[385]

This discussion of the potential problems faced by a jury grappling with the GBMI verdict illustrates the difficulty of rendering a principled or objective decision, especially in cases where the defendant is accused of a particularly heinous or brutal crime.[386] The American Psychiatric Association cited this difficulty in opposition to the GBMI verdict. In its *Statement on the Insanity Defense,* the Association observed that the GBMI option could easily lead to a situation where "[p]ersons who might otherwise have qualified for an insanity verdict may instead be siphoned into a category of guilty but mentally ill."[387] The implication of this result is that if a basis for a constitutional right to the insanity defense can be established,[388] then, by depriving certain defendants of an effective opportunity to present that defense, the GBMI statute itself may be unconstitutional.

Supporters of the GBMI statute have claimed that empirical evidence regarding jury behavior does not bear out the inferential analysis developed above.[389] One recent study conducted at the Michigan Center for Forensic Psychiatry indicates that in comparing the periods preceding and following the GBMI legislation, there was no significant difference in the number of persons asserting the insanity defense or in the number of NGRI

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385. *See* Taylor v. State, 440 N.E.2d 1109 (Ind. 1982). In *Taylor* the Supreme Court of Indiana recognized:

> Our legislature has now provided jurors with an alternative verdict, an intermediate ground, which embodies the circumstances long recognized in law—the defendant who suffers from a mental illness or deficiency yet remains capable of appreciating right from wrong and conforming his conduct to the requirements of law.

Id. at 1112.

386. Two jurors after the Hinckley trial stated that "they would have preferred finding Hinckley 'guilty but insane' " if that verdict had been available to them. *Two Jurors Speak Up: Felt Hinckley Was Guilty,* Chi. Sun-Times, June 23, 1982, at 6, col. 1.

387. STATEMENT ON THE INSANITY DEFENSE, *supra* note 21, at 9.

388. *See supra* notes 192-204 and accompanying text.

389. *See, e.g.,* Robey, *supra* note 213, at 380; Comment, *Guilty but Mentally Ill: A Reasonable Compromise for Pennsylvania,* 85 DICK. L. REV. 289, 312 (1981); Comment, *supra* note 261, at 493.

acquittals.[390] Between 1967 and 1974, 279 persons were found NGRI, or about 40 acquittals per year, while between 1975 and 1979, 223 individuals were found NGRI, or about 45 per year.[391] However, it should be noted that this study did not deal with the number of persons who pleaded the insanity defense but were found GBMI. An earlier effort to meet the objection that the GBMI verdict might lead to jury compromise was made in a report by the Director of the Center for Forensic Psychiatry. The report claimed that compromise may have occurred in only two out of fifty-seven cases of people found GBMI.[392] However, the size of the population and the methodology of this study make its conclusion inconclusive if not unpersuasive.

A recent empirical study conducted in Michigan to determine the impact of the GBMI statute suggests some explanation for the apparent constancy in the number of defendants found NGRI subsequent to the enactment of the GBMI statute.[393] The study reports that sixty percent of the GBMI convictions are the result of plea bargaining and twenty percent result from a trial verdict.[394] Because only twenty percent of all GBMI convictions result from jury trials, and because no account is given of the reasons for which a substantial number of persons plead guilty but mentally ill, it seems apparent that the jury bias concerning these alternative verdicts cannot be accurately determined by merely comparing the total number of defendants found GBMI with the total number of persons found NGRI, or by simply comparing the total number of successful NGRI defendants with the total number of NGRI pleas.

In testimony before the Senate Committee on the Judiciary, one Michigan prosecutor stated that during the first five years of the GBMI verdict's existence, 262 defendants were found NGRI and 137 were found GBMI.[395] Based on this statistic, the prosecutor concluded that jurors were capable of making a distinction

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390. *See* Criss & Racine, *Impact of Change in Legal Standard for Those Adjudicated Not Guilty by Reason of Insanity 1975-1979*, 8 BULL. AM. ACAD. PSYCHIATRY & L. 261, 265 (1980).

391. *Id.*

392. *See* Robey, *supra* note 213, at 380.

393. Project, *Evaluating Michigan's Guilty But Mentally Ill Verdict: An Empirical Study*, 16 U. MICH. J.L. REFORM 77 (1982).

394. *Id.* at 102.

395. *Insanity Defense Hearings*, *supra* note 12, at 102 (statement of William L. Cahalan).

between the two verdicts.[396] Nevertheless, the limited data available and the lack of any systematic evaluation of the Michigan cases compel the conclusion that the issue is far from being settled. Studies of larger populations as well as studies of particular proceedings need to be conducted to determine the validity of the theoretical speculations about jury compromise and confusion in light of actual trial experience or by psychological and sociological experimentation.[397]

3. *Disposition following a GBMI verdict*

The avowed purpose of the GBMI verdict is to provide "help to those who have committed a criminal offense while suffering from mental illness even when that mental illness cannot be said to have totally relieved the defendant from all criminal responsibility."[398] The main difference between a guilty verdict and the GBMI verdict is said to be the provision of treatment following a GBMI verdict.[399] Nevertheless, an examination of the sentencing statutes and corrections codes of the states which have adopted GBMI statutes makes clear that this special verdict is not necessary to ensure that the convicted defendant receive psychiatric treatment.[400] In Michigan, as in other states,

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396. *Id.*

397. *See generally* R. SIMON, THE JURY AND THE DEFENSE OF INSANITY (1967); Morris, Bozzetti, Rusk & Read, *Whither Thou Goest? An Inquiry Into Jurors' Perceptions of the Consequences of a Successful Insanity Defense*, 14 SAN DIEGO L. REV. 1058 (1977).

398. People v. Philpot, 98 Mich. App. 257, 296 N.W.2d 229, 230 (1980).

399. *See, e.g.*, MICH. COMP. LAWS ANN. §§ 791.267, 330.2001a (West 1982); *see also* ILL. ANN. STAT. ch. 38, § 1003-8-2(a) (Smith-Hurd 1982) which provides:

> A social evaluation shall be made of a committed person's medical, psychological, educational and vocational condition and history, the circumstances of his offense . . . . The committed person shall be assigned to an institution or facility . . . in accordance with the social evaluation. Recommendations shall be made for medical, dental, psychiatric, psychological and social service treatment.

Illinois also provides by statute for follow-up examination of inmates:

> The Department [of Corrections] shall cause inquiry and examination at periodic intervals to ascertain whether any person committed to it may be subject to involuntary admission . . . . The Department may provide special psychiatric or psychological or other counseling or treatment to such persons . . . or the Director of the Department of Corrections may transfer such persons to the Department of Mental Health and Developmental Disabilities for observation, diagnosis and treatment . . . .

ILL. ANN. STAT. ch. 38, § 1003-8-5(a) (Smith-Hurd 1982).

400. *See, e.g.*, MICH. COMP. LAWS ANN. § 791.267 (West 1982); *see also* ILL. ANN. STAT. ch. 38, § 1003-8-2(a),-5(a) (Smith-Hurd 1982). These statutes provide for examina-

treatment was available to persons incarcerated before the enactment of the GBMI legislation; therefore, this law does nothing more than reiterate and formalize a state's commitment to provide psychiatric care for prison inmates.[401] Several Michigan decisions about a defendant's right to treatment under the GBMI statute and the concommitant obligation of the state to provide mental treatment reinforce this conclusion.[402]

In *People v. McLeod*[403] the Michigan Supreme Court reviewed a trial court holding that the GBMI statute violated state and federal constitutional guarantees by "mandating a minimum five-year term of probation for [GBMI defendants] . . . without regard to the existence or extent of their mental illness or the time needed for treatment while other persons convicted of the same probationable crimes face no such minimum term of probation."[404] The defendant had been found guilty of arson but mentally ill in a bench trial. At the end of the trial, the court on its own motion conducted hearings to determine the type of treatment that may be available under the GBMI verdict.[405] Based on the testimony of psychiatric experts, the court concluded that the Department of Corrections could not provide adequate treatment.[406] Therefore, the trial court held that the statute was "legally inert" and that because the provisions of the statute concerning treatment could not be complied with, the court was deprived of authority either to enter a GBMI judgment or to sentence the defendant.[407] The court of appeals reversed, declaring that the trial court's finding of unconstitutionality was premature because it was based on speculation that neither the Department of Corrections nor the Department

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tion of prisoners to furnish needed mental treatment pursuant to the respective corrections or penal codes.

401. *See* People v. Booth, 414 Mich. 343, 324 N.W.2d 741 (1982). The court stated:

> The guilty but mentally ill statute is broadly addressed to the creation of an *altogether different verdict,* one which encompasses findings of both criminal responsibility and mental illness . . . . "[G]uilty but mentally ill" can be viewed as a generic phrase denoting the result which may be obtained under the statute—an adjudication of criminal responsibility as well as mental illness at the time of the crime.

Id. at 355, 324 N.W.2d at 746 (emphasis added).

402. *See, e.g.,* People v. Booth, 414 Mich. 343, 324 N.W.2d 741 (1982); People v. McLeod, 407 Mich. 632, 288 N.W.2d 909 (1980).

403. 407 Mich. 632, 288 N.W.2d 909 (1980).

404. *Id.* at 649, 288 N.W.2d at 913.

405. *Id.* at 648, 288 N.W.2d at 912.

406. *Id.* at 648-49, 288 N.W.2d at 912-13.

407. *Id.* at 649, 288 N.W.2d at 913.

of Mental Health would be able to comply with the statutory mandate.[408] The Supreme Court of Michigan upheld the appellate court's decision, holding that the trial court had based its finding on an inadequate factual record.[409]

Perhaps as significant as the actual holding in *McLeod* is the dictum in which the court observed that "even if a proper determination could have been made by the trial court that Mr. McLeod would not receive the required treatment, it does not follow that the statute is, *for that reason,* unconstitutional."[410] This suggests that the stated purpose of the statute is irrelevant to its constitutionality. Without any guarantee of treatment, the GBMI statute is rendered "a nullity" when read alongside the penal code provision for a guilty verdict and the corrections code provision for mental treatment of convicted offenders.

A recent case reiterated the potential conflict between the promise of treatment made by the GBMI statute and the provision of treatment available within state facilities. In *People v. Booth*[411] the Supreme Court of Michigan, reversing two appellate court decisions, reinstated the defendants' convictions based on GBMI pleas. The court decided that a defendant suffering from amnesia could avail himself of this legislatively created plea because he belonged to the class of persons intended to be included within the GBMI designation.[412] The court reasoned that amnesic defendants, "[l]ike any other defendant who, although criminally responsible, has been found to have suffered from mental illness at the time of the offense," would benefit from psychiatric treatment during their incarceration.[413] To deny them the opportunity to plead GBMI would undercut the legislative purpose of assisting mentally ill defendants to regain their mental health. The court emphasized that *"the guilty but mentally ill statute should apply to those whom it was intended to assist."*[414] However, the court later retreated from this strong endorsement of the treatment provision when it rejected the defendant's contention that because psychiatric treatment had not been forthcoming, the GBMI pleas were based upon "an

408. *Id.* at 650, 288 N.W.2d at 913.
409. *Id.* at 655, 288 N.W.2d at 915.
410. *Id.*
411. 414 Mich. 343, 324 N.W.2d 741 (1982).
412. *Id.* at 354, 324 N.W.2d at 745.
413. *Id.*
414. *Id.* at 354, 324 N.W.2d at 746 (emphasis added).

illusory bargain and therefore were involuntary."[415] The court restated its *McLeod* position:

> A naked allegation of non-treatment or inadequate treatment after sentencing will not serve to invalidate an otherwise valid plea of guilty but mentally ill, although non-treatment may possibly provide a basis for an action by defendants against those departments which have not fulfilled the statutory mandate of treatment as psychiatrically indicated.[416]

It is apparent that the GBMI statute, at least as implemented in Michigan, does not accomplish its stated objective of providing needed treatment; the Michigan courts do not perceive providing treatment as a mandatory *raison d'etre* for the statute and therefore view it as unnecessary for the viability of the legislation.

The recent Michigan study discussed earlier in this Article[417] indicates that persons found GBMI are not more likely to receive mental health treatment than persons simply found guilty.[418] The authors of this study assert that defendants found GBMI would have been found guilty had the GBMI verdict not been available to the trier of fact.[419] Since some defendants pleaded GBMI as a result of plea bargaining,[420] the authors speculate that these offenders may have been counseled to choose the GBMI verdict in order to obtain mental health treatment.[421] However, this may pose the greatest danger of the statute: it deludes defendants into believing that the GBMI verdict "is in some way 'better' than a guilty verdict."[422]

4. *Critique of GBMI legislation*

The GBMI alternative has been adopted in eight states[423] and has been proposed in several bills pending before Con-

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415. *Id.* at 364, 324 N.W.2d at 750.
416. Id.
417. Project, *supra* note 393.
418. *Id.* at 104-05.
419. *Id.* at 101-02.
420. *Id.* at 102.
421. *Id.* at 103.
422. *Id.* at 105.
423. *See* ALASKA STAT. § 12-47-040 (Supp. 1982); GA. CODE ANN. § 17-7-131 (Supp. 1982); ILL. ANN. STAT. ch. 38, § 115-3(c) (Smith-Hurd Supp. 1982); IND. CODE ANN. § 35-35-2-1 (Burns Supp. 1981); KY. REV. STAT. § 504.120 (Supp. 1982); MICH. COMP. LAWS ANN. § 768.36 (West 1982); N.M. STAT. ANN. § 31-9-3 (Supp. 1982).

gress.[424] Legislators who support the verdict view it as "a much needed 'middle ground' for future 'Hinckley' juries—to give them an option—something between turning an offender loose because he has a 'mental problem' and sending the same offender to prison with absolutely no psychiatric help for his problem."[425] The rationale for the GBMI verdict stems from a legislative concern that the insanity defense is too easily proved, while the abolition of automatic commitment of insanity acquittees in some states has made civil commitment of persons found NGRI more difficult.[426]

Ironically, GBMI legislation is criticized specifically on the same grounds its supporters have found to be the very advantages of the legislation. Because it is a middle ground option, juries inappropriately will settle for it as a compromise verdict. As one commentator argued:

> Even if a jury is given the option of finding a defendant NGRI, it is hard to believe that they will pick that verdict over "guilty but mentally ill." Juries notoriously will "split the difference" and tend to avoid extreme verdicts for those in the middle ranges. GBMI could easily be a compromise when jurors are struggling with the difficult question of an NGRI acquittal versus conviction.[427]

By rendering a compromise verdict, juries effectively will deprive some defendants of their right to a defense based on lack of *mens rea* or insanity. A misconception that the GBMI verdict will ensure psychiatric treatment for mentally ill defendants may tempt jurors even more to render a compromise verdict. The result is that some defendants who did not appreciate the criminality of their acts, and therefore would have qualified for an NGRI verdict, will be sent to jail. Moreover, because adequate treatment is unlikely,[428] the mental condition of these de-

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424. *See, e.g.*, S. 2672, 97th Cong., 2d Sess. (1982); S. 2754, 97th Cong., 2d Sess. (1982).

425. *Insanity Defense Hearings, supra* note 12, at 89-90 (statement of Senator Thad Cochran).

426. *Id.* at 111 (statement of William L. Cahalan).

427. *Id.* at 67 (statement of Randolph A. Read).

428. *Id.* at 256 (statement of Richard J. Bonnie); *see also* People v. McLeod, 407 Mich. 632, 288 N.W.2d 909 (1980). In *McLeod* the trial court, after eliciting testimony from correctional and mental health authorities, concluded: "The conditions within the Department of Corrections, as described by the psychiatrist from that department, *posed an immediate threat of irreparable harm to defendant.*" *Id.* at 648-49, 288 N.W.2d at 912-13 (emphasis added).

fendants may deteriorate to the extent that at the completion of their prison term they are even more dangerous or violent than when they were first incarcerated.[429] This analysis leads one commentator to conclude that

> a separate verdict of "guilty but mentally ill" . . . is an ill-conceived way of identifying prisoners who are amenable to psychiatric treatment. It surely makes no sense for commitment procedures to be triggered by a jury verdict based on evidence concerning the defendant's past mental condition rather than his present mental condition and potential problems. Moreover, decisions concerning the proper placement of incarcerated offenders should be made by correctional authorities and mental health authorities, not by juries or trial judges.[430]

Ultimately the GBMI verdict is nothing more than a guilty verdict; therefore, its only real consequence is to limit the availability of the insanity defense. If the objective of legal reform is to limit the availability of the insanity defense, society would be served better by a more precise definition of standards for assessing criminal responsibility—a broadened *M'Naghten* test or a standard of impaired understanding. And if the objective of legal reform is to reduce the consequences of the insanity defense, society would be better served by the development of commitment and release standards specifically addressed to the class of persons who are mentally ill and dangerous to others.

IV. Commitment and Release Procedures

The major motivation for the public outcry for reform of the insanity defense is fear of the possible disastrous consequences following premature release of mentally ill and dangerous offenders. However, the majority of people found NGRI are not immediately released into society after acquittal, but are committed to mental health facilities in accordance with various statutory schemes.[431] Modifications of the insanity defense will be most productive if they address these provisions for commitment and release of insanity acquittees.

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429. *See, e.g.*, S. Halleck, Psychiatry and the Dilemmas of Crime 282-300 (1967).

430. *Insanity Defense Hearings, supra* note 12, at 256-57 (statement of Richard J. Bonnie).

431. *See generally* A. Goldstein, *supra* note 64, at 145; Greenwald, *Disposition of the Insane Defendant after "Acquittal"—The Long Road from Commitment to Release*, 59 J. Crim. L. Criminology & Police Sci. 583 (1968); Note, *Commitment Following an Insanity Acquittal*, 94 Harv. L. Rev. 605 (1981).

A. Dispositional Guidelines Suggested by the American Psychiatric Association

The American Psychiatric Association has suggested the following dispositional guidelines for persons found NGRI:

> 1. Special legislation should be designed for those persons charged with violent offenses who have been found "not guilty by reason of insanity."
> 2. Confinement and release decisions should be made by a board including psychiatrists and other professionals representing the criminal justice system similar to a parole board.
> 3. Release of such persons should be conditional upon submission to a treatment supervision plan which is supported by necessary resources.
> 4. The board having jurisdiction over released insanity acquittees should have clear authority to reconfine where necessary for community safety.
> 5. When psychiatric treatment within a hospital setting has been provided to the maximum extent possible, but confinement is still necessary to insure community safety, the insanity acquittee should be transferred to the most appropriate restraining facility.[432]

The Association apparently views insanity acquittees, particularly those who have been charged with violent crimes, as a special class distinct from other subjects of mental commitment, including those committed on the grounds of dangerousness. This designation of insanity acquittees as a special class is based on their having committed a crime. The Association views insanity acquittees and the insanity defense itself as quasicriminal. Specifically, the Association recommends that it is unnecessary to periodically review and recertify insanity acquittees as dangerous in order to subject them to continued hospitalization.[433] The principal reason given by the Association is that psychopharmacological drugs now extensively used in mental hospitals can only reduce overt signs of illness; they do not guarantee recovery and nondangerousness. Rather, the Association recommends a regular use of conditional release with supervision and required out patient treatment as conditions for deinstitutionalization of insanity acquittees. The Association stresses that release should be accompanied by a plan of super-

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432. STATEMENT ON THE INSANITY DEFENSE, *supra* note 21, at 17.
433. *Id.* at 15.

vision likely to guarantee public safety. However, when the subject remains dangerous but no longer subject to treatment, the Association recommends transfer to a non-treatment facility providing necessary confinement. As a special feature the Association's guidelines provide for a special board, composed of psychiatrists and other experts in evaluating potential for violent behavior, to control release, rather than fixing discretion solely in medical health authorities. This board would retain control over the acquittee for the period to which he could have been sentenced if he had not been acquitted on the basis of insanity.[434]

Perhaps the most significant question arising from these guidelines is why insanity acquittees should be differentiated from civil committees who have been involuntarily hospitalized on the basis of dangerousness. Insanity acquittees are not all charged with crimes entailing violence. Even those charged with violent crimes are not necessarily different from persons committed under a mental health code. Many civil committees have performed similar acts but have not been criminally prosecuted, either as a result of prosecutorial discretion or because of unfitness to stand trial. If the concern is with community safety, no principled grounds exist for distinguishing insanity acquittees charged with violent offenses from civil committees hospitalized because they perpetrated violent acts dangerous to others.

There is reason to question why insanity acquittees should not have a right to the same periodic review of their present mental condition and dangerousness that other patients committed on grounds of dangerousness receive. An even greater problem with the Association's guidelines is the recommendation that when treatment can no longer be provided, the subject should be placed in a custodial facility and held solely upon a prediction of dangerousness. This would constitute preventive detention, raising clear grounds for due process objection. If persons civilly committed because of mental illness and dangerousness cannot be confined involuntarily when they no longer have a mental illness that can be treated, the mere assertion that an insanity acquittal has a quasi-criminal quality provides no greater basis for confining an insanity acquittee who is no longer mentally ill. The United States Supreme Court suggested in *Jones v. United States* that due process would be violated by

434. *Id.* at 15-17.

continued commitment of an insanity acquittee on a finding of dangerousness without a showing of continuing mental illness.[435] Recently, increased concern for achieving a balance between the public's safety and the acquittee's constitutional rights has caused several states to reexamine and revise statutes dealing with commitment and release of insanity acquittees.[436] The next section of this article briefly reviews the range of legislation dealing with disposition of persons found NGRI[437] and examines in detail an exemplary Oregon scheme that operates with a Psychiatric Review Security Board.

B. Current Statutory Schemes for Disposition of Insanity Acquittees

Present laws dealing with commitment procedures range from initiation of civil commitment procedures at the end of the trial[438] to mandatory involuntary commitment with no right to a

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435. The Court reasoned:

> The Due Process Clause requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed. The purpose of commitment following an insanity acquittal, like that of civil commitment, is to treat the individual's mental illness and protect him and society from his potential dangerousness. The committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous. . . .
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> . . . .
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> . . . As he was not convicted, he may not be punished. His confinement rests on his continuing illness and dangerousness.

51 U.S.L.W. 5041, 5045 (U.S. June 8, 1983) (citations and footnotes omitted).

436. *See, e.g.*, German & Singer, *Punishing the Not Guilty: Hospitalization of Persons Acquitted by Reason of Insanity*, 29 RUTGERS L. REV. 1011 (1976); Matthews & Coyne, *"Arbeit Macht Frei:" Vocational Rehabilitation and the Release of Virginia's Criminally Insane*, 16 U. RICH. L. REV. 543 (1982); Rogers, *1981 Oregon Legislation Relation to the Insanity Defense and the Psychiatric Security Review Board*, 18 WILLAMETTE L. REV. 23 (1982); Comment, *Reforming Insanity Defense Procedures in New York: Balancing Societal Protection Against Individual Liberty*, 45 ALB. L. REV. 679 (1981); Note, *Commitment and Release of Persons Found Not Guilty by Reason of Insanity: A Georgia Perspective*, 15 GA. L. REV. 1065 (1981).

437. This legislation has been examined extensively elsewhere. *See, e.g.*, Kirschner, *Constitutional Standards for Release of the Civilly Committed and Not Guilty by Reason of Insanity: A Strict Scrutiny Analysis*, 20 ARIZ. L. REV. 233 (1978); Note, *supra* note 431.

438. *See, e.g.*, OKLA. STAT. ANN. tit. 22, § 1161 (West Supp. 1981) (district attorney must file a petition for civil commitment if there are reasonable grounds to believe that the defendant is presently mentally ill and dangerous); PA. STAT. ANN. tit. 50, § 7406 (Purdon Supp. 1981) (attorney for commonwealth may file petition for involuntary civil commitment); S.D. CODIFIED LAWS ANN. § 23A-26-12 (1979) (court may order a civil commitment hearing if it deems discharge dangerous).

release hearing for one year.[439] Most statutes provide either for (1) a hearing following acquittal to determine whether the acquittee should be committed because of present mental illness and dangerousness[440] or (2) automatic temporary commitment to a mental hospital for examination, followed by a commitment hearing.[441] Several states require involuntary hospitalization for six months or more before a release hearing to be held at the defendant's request.[442] However, some of these states allow ear-

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439. *See, e.g.*, DEL. CODE ANN. tit. 11, § 403(a)-(b) (1979 & Supp. 1982) (upon motion of Attorney General).

440. In these hearings the burden of proof is on the defendant to show that he is not mentally ill and dangerous. In civil commitment proceedings, the burden is on the state to prove the need for commitment by "clear and convincing evidence." Addington v. Texas, 441 U.S. 418, 431-33 (1979). Some states provide for mandatory hearings to determine the defendant's mental state at the time of acquittal. *See* IOWA CODE ANN. § 813.2 (West 1979); OHIO REV. CODE ANN. § 2945.40 (Page 1982); UTAH CODE ANN. § 77-14-5(1) (1982). Other states provide only for discretionary post-acquittal hearings. *See* ALA. CODE § 15-16-41 (1982). Still other states require some type of determination that the defendant is presently mentally ill or dangerous before he may be committed, but do not provide for a separate post-acquittal hearing. *E.g.*, CAL. PENAL CODE § 1026 (Deering 1983) (defendant is to be committed or placed on out-patient status unless it appears to the court that his sanity has been recovered); FLA. STAT. ANN. § 916.15 (West Supp. 1982) (court has discretion to commit defendant if it determines that the defendant is mentally ill and dangerous); MISS. CODE ANN. § 99-13-7 (1973) (defendant is to be committed if the jury which returned verdict of acquittal determines that the defendant has not been restored to his reason or is dangerous); WASH. REV. CODE ANN. § 10.77.110 (1980) (defendant is to be committed if it is found that the defendant is dangerous and in need of control).

441. *See* D.C. CODE ANN. § 24-301(d) (1981) (automatic commitment, with a hearing after 50 days); MASS. ANN. LAWS ch. 23, § 16 (West Supp. 1983) (court may order defendant hospitalized for observation and examination for 40 days, after which a civil commitment hearing may be held); NEB. REV. STAT. §§ 29-3701,-3702 (Supp. 1981) (the court may commit a defendant for up to 90 days if there is probable cause to believe he is dangerous by reason of mental illness; an evidentiary hearing must be held before the examination period ends, and if the court finds there is clear and convincing evidence that the defendant is dangerous or will be dangerous, he must be committed for treatment); N.Y. CRIM. PROC. LAW § 330.20 (McKinney Supp. 1982) (defendant is automatically confined in secure facility for up to 30 days, after which a hearing must be held in which the district attorney has the burden of establishing "to the satisfaction of the court that the defendant has a dangerous mental disorder or is mentally ill").

442. *See* COLO. REV. STAT. § 16-8-115(1) (Supp. 1982) (defendant is entitled to a hearing as a matter of right after 180 days detention); DEL. CODE ANN. tit. 11, § 403(b) (Supp. 1982) (defendant is entitled to have his detention reconsidered after one year, although he may move the court for release at any time); KAN. STAT. ANN. § 22-3428(a) (1981) (defendant is entitled to a hearing after one year); 1981 NEV. STAT. § 1655-1656 (amending NEV. REV. STAT. § 175.521 (1979)) (hearing after six months in which counsel can examine physicians on their report). The former Georgia post-acquittal commitment statute was held unconstitutional in Benham v. Edwards, 678 F.2d 511 (5th Cir. 1982). The former Wisconsin statute was declared unconstitutional in State *ex rel.* Kovach v. Schubert, 64 Wis. 2d 612, 219 N.W.2d 341 (1974), *appeal dismissed*, 419 U.S. 1117, *cert. denied*, 419 U.S. 1130 (1975). In *Schubert* the Wisconsin court held that in future pro-

lier release if the superintendent of the mental institution recommends to the trial court that the defendant is no longer dangerous.[443]

Commentators[444] and courts[445] have criticized statutory schemes providing for automatic commitment as violating constitutional rights of NGRI acquittees. Two principal grounds for constitutional attack have been argued. First, it has been said that automatic commitment violates due process by confining the insanity acquittee to an institution without a hearing to determine present mental illness and dangerousness. Second, it has been asserted that the differences between procedures, and often burdens of proof, applied to insanity acquittees and those applied to persons civilly committed on grounds of mental illness and dangerousness violate equal protection.[446] Although the constitutionality of automatic commitment statutes has been challenged several times, most of these challenges ultimately have been rejected by the courts.[447] Generally, courts have held that automatic commitment represents a legitimate and reasonable balancing of the interests of the insanity acquittee against the need for community protection. In *People v. Chavez*,[448] a case involving such a constitutional challenge, the Supreme Court of Colorado described factors it considered appropriate for determining the constitutionality of an automatic commitment statute:

> In the context of a commitment to a mental institution three factors have been isolated as pertinent to a due process analysis: (1) the weight of the governmental interest in the automatic commitment process; (2) the severity of the deprivation suffered by the individual as a result of the governmental action; and (3) the functional appropriateness of the disputed

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ceedings, a defendant acquitted on the grounds of insanity may be committed only if the jury which acquitted him finds that he is presently mentally ill and dangerous.

Other states provide for automatic commitment upon acquittal, but grant the defendant a right to a release hearing at any time. *See* ME. REV. STAT. ANN. tit. 15, § 103 (1980); MO. ANN. STAT. § 552.040 (Vernon Supp. 1983).

443. *See, e.g.*, KAN. STAT. ANN. § 22-3428 (1981).

444. *See* German & Singer, *supra* note 436, at 1012-13.

445. *See, e.g.*, Benham v. Edwards, 678 F.2d 511 (5th Cir. 1982).

446. *See* German & Singer, *supra* note 437, at 1012.

447. *See, e.g.*, People v. Chavez, 629 P.2d 1040 (Colo. 1981); *In re* Lewis, 403 A.2d 1115 (Del. 1979); Clark v. State, 245 Ga. 629, 266 S.E.2d 466 (1980); *In re* Jones, 228 Kan. 90, 612 P.2d 1211 (1980); State v. Kee, 510 S.W.2d 477 (Mo. 1974); *see* Annot., 50 A.L.R.3d 144 (1973).

448. 629 P.2d 1040 (Colo. 1981).

> procedures for minimizing the risk of an erroneous decision in resolving the competing claims of the parties.[449]

Balancing these factors, the *Chavez* court concluded that the automatic commitment statute should be upheld. The court found it reasonable to presume that the insanity acquittee's mental incapacity continues until it is shown that sanity has been restored. Thus, an NGRI verdict furnished a legitimate basis for the immediate commitment of the defendant for observation and examination to determine his mental condition and level of dangerousness to self or others. Further, the court stated that even if a defendant were entitled to a hearing on the issue of mental illness and dangerousness, the hearing need not precede commitment.[450]

Generally, automatic commitment statutes have been held not to violate due process because they represent "a judicious weighing of the public's right to be protected from possibly dangerous mentally ill persons against the individual defendant's right to be protected against unjustified commitment."[451] The bases for this position are (1) that the insanity acquittee has committed a criminal act and is therefore dangerous,[452] and (2) that an NGRI verdict gives rise to a presumption of continued insanity.[453]

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449. *Id.* at 1046.

450. *Id.* at 1048; *see also* Chase v. Kearns, 278 A.2d 132, 134 (Me. 1971).

451. People v. McQuillan, 392 Mich. 511, 528, 221 N.W.2d 569, 576 (1974); *see also* People v. Chavez, 629 P.2d 1040, 1049 (Colo. 1981); *In re* Lewis, 403 A.2d 1115, 1118-19 (Del. 1979); *In re* Jones, 228 Kan. 90, 104, 612 P.2d 1211, 1224 (1980); Chase v. Kearns, 278 A.2d 132, 134 (Me. 1971).

452. *See, e.g., In re* Lewis, 403 A.2d 1115, 1118-19 (Del. 1979); Mills v. State, 256 A.2d 752, 757 (Del. 1969); Chase v. Kearns, 278 A.2d 132 (Me. 1971). In *Chase,* the court stated:

> Once a defendant has been found "not guilty by reason of mental disease or mental defect," special factors and policy considerations rationally justify immediate commitment inasmuch as such a defendant might or could be incapable of controlling his behavior, might or could be . . . in need of study, observation and treatment . . . .

278 A.2d at 135.

The view that an insanity acquittee is potentially more dangerous than an individual facing civil commitment often is disputed by commentators, particularly when the crime charged was a non-violent crime. *See* German & Singer, *supra* note 436, at 1023-24 ("[e]ven if it were established that [insanity acquittees] as a class were more dangerous, this fact alone would not justify confinement of any particular individual in the class without a specific finding of dangerousness").

453. *See, e.g.,* People v. Chavez, 629 P.2d 1040, 1047-48 (Colo. 1981); *In re* Lewis, 403 A.2d 1115, 1117 (Del. 1979); Mills v. State, 256 A.2d 752, 755-57 (Del. 1969); Clark v. State, 245 Ga. 629, 631, 266 S.E.2d 466, 469-70 (1980); *see also In re* Jones, 228 Kan. 90,

The automatic commitment statutes also have withstood equal protection attack.[454] The rationale for using different procedures to involuntarily hospitalize insanity acquittees than to involuntarily hospitalize civil committees is rooted in the assertion that insanity acquittees, because of their past criminal behavior, constitute a special class of persons whose special treatment bears a rational relationship to legitimate state purposes.[455] A few courts have justified automatic commitment on the ground that it will discourage false insanity pleas.[456]

Nevertheless, some courts have held that automatic commitment statutes violate the insanity acquittee's rights to due process and equal protection when the commitment is for a period longer than necessary to evaluate the defendant's mental condition before a civil commitment hearing.[457] In the leading case in this area, *Bolton v. Harris*,[458] the District of Columbia Court of Appeals held that a District statute[459] providing for automatic commitment and confinement for an indefinite period violated equal protection. District of Columbia law required the

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110, 612 P.2d 1211 (1980). The court citing KAN. STAT. ANN. § 22-3428(1) (1981) stated that "a finding of not guilty because of insanity shall be prima facie evidence that the acquitted person is presently dangerous to the person's self or others or property of others."

The presumption of insanity often is attacked as being unrealistic (since the acquittee was found to have been competent to stand trial), inflexible (since the presumption applies without regard to the type of insanity which existed at the time of the offense), and unfair (since the acquittee has no opportunity to rebut the presumption before commitment). *See* A. GOLDSTEIN, *supra* note 64, at 144; W. LAFAVE & A. SCOTT, *supra* note 67, at 319; German & Singer, *supra* note 436, at 1018-19, 1022.

454. *See, e.g.*, People v. Chavez, 629 P.2d 1040, 1052-54 (Colo. 1981); *In re* Lewis, 403 A.2d 1115, 1117-19 (Del. 1979); Mills v. State, 256 A.2d 752, 756 (Del. 1969); *In re* Jones, 228 Kan. 90, 109-12, 612 P.2d 1211, 1228-30 (1980).

455. *See* People v. Chavez, 629 P.2d 1040, 1053 (Colo. 1981). The U.S. Supreme Court held that in the absence of a suspect classification, such as race or nationality, or an infringement on fundamental rights, a challenged classification will not violate equal protection if it bears "some rational relationship to legitimate state purposes." San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 40 (1973). *See also* Baxstrom v. Herold, 383 U.S. 107, 111 (1966).

456. *In re* Rosenfield, 157 F. Supp. 18, 21 (D.D.C. 1957), *remanded*, 262 F.2d 34 (D.C. Cir. 1958); *see* German & Singer, *supra* note 436, at 1020-21.

457. *See, e.g.*, Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968); Benham v. Edwards, 501 F. Supp. 1050 (N.D. Ga. 1980); People v. McQuillan, 392 Mich. 511, 221 N.W.2d 569 (1974); State v. Krol, 68 N.J. 236, 344 A.2d 289 (1975).

458. 395 F.2d 642 (D.C. Cir. 1968).

459. D.C. CODE ANN. § 24-301(d) (1967) provides in part: "If any person tried . . . for an offense . . . is acquitted solely on the ground that he was insane at the time of its commission, the court shall order such person to be confined to a hospital for the mentally ill."

government to prove beyond a reasonable doubt that the defendant was sane at the time of the offense. To acquit on grounds of insanity, a jury only needed to find a reasonable doubt about the defendant's sanity. The court held that because the burden was on the prosecution to prove the defendant's sanity beyond a reasonable doubt, an acquittal did not necessarily imply that the defendant was insane or mentally ill; it merely established that there was a reasonable doubt that the defendant was sane at the time the offense was committed.[460] Therefore, no basis for a presumption of continued insanity or dangerousness arose out of the insanity acquittal. Accordingly, the court concluded that the 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."[461] Moreover, the court reasoned that a finding that the defendant was insane at the time of the crime did not necessarily mean that he was mentally ill at the time of acquittal.[462] Finding no rational basis for any difference in commitment procedures between insanity acquittees and civil committees, the court held that insanity acquittees were entitled to judicial proceedings substantially similar to those used in civil commitment cases to determine present mental illness and dangerousness.[463]

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460. 395 F.2d at 649.

461. *Id.* The District of Columbia currently places the burden of proof on the defendant to prove his insanity by a preponderance of the evidence. *See generally* Note, *Commitment of Persons Acquitted by Reason of Insanity: The Example of the District of Columbia*, 74 COLUM. L. REV. 733 (1974).

462. 395 F.2d at 647.

463. *Id.* at 651. The court in *Bolton* relied on several Supreme Court decisions which, although not dealing with the issue of commitment of insanity acquittees, addressed the issue of commitment without a prior hearing. The principal case relied on was Baxstrom v. Herold, 383 U.S. 107 (1966). In *Baxstrom* the Supreme Court ruled that the commitment of a convicted prisoner, at the end of his sentence to a mental hospital for an indefinite period of time, violated his right to equal protection of the laws because the criminal law under which he was committed did not provide prisoners the same procedural safeguards that were present for civil commitments. *Id.* at 114-15. The Court held that where commitment to a mental hospital is concerned, differentiating convicted prisoners from persons subject to civil commitment on the basis of criminal status does not rest on a rational basis. On the issue of presence or absence of mental illness, convicted prisoners facing commitment are no different from persons facing civil commitment. *See id.* at 111, 115.

The court in *Bolton* also relied upon Specht v. Patterson, 386 U.S. 605 (1967), to hold that automatic commitment of insanity acquittees violates due process. In *Specht* the Supreme Court ruled that a person convicted of "indecent liberties" under a Colorado statute authorizing a maximum sentence of 10 years could not constitutionally be given an indeterminate sentence under the *Colorado Sex Offenders Act* without a prior

The *Bolton* court conceded that equal protection did allow different treatment between the two classes of mentally ill persons to the extent that there were relevant differences between the groups. Therefore, the court suggested that automatic commitment for a temporary period to determine the defendant's present mental condition would be constitutional.[464] The court felt "[t]he jury's finding of a reasonable doubt as to defendant's sanity at the time of the offense provides sufficient warrant for further examination."[465] Further, by upholding the District of Columbia's provisions for release of insanity acquittees, which differed from those for civilly committed persons, the court implicitly held that it was permissible to have stricter standards for release of persons found NGRI than for those civilly committed under the mental health code.[466]

Since *Bolton* a number of courts have held automatic commitment statutes unconstitutional, on both equal protection[467] and due process grounds.[468] For example, in *Benham v. Edwards*[469] the United States Court of Appeals for the Fifth Circuit invalidated the Georgia automatic commitment statute. Finding "no rational basis for applying the presumption [of con-

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hearing to determine if he constituted a threat of bodily harm to the public, since such a finding was required for indefinite sentencing under the Act. The Court rejected the contention that the defendant had been provided all the rights of due process at his first trial, because a new finding of fact—dangerousness—was required for the *Colorado Sex Offender Act* to apply. *Id.* at 608; *see also* 395 F.2d at 650.

464. 395 F.2d at 651.

465. *Id.*

466. *Id.* at 652.

467. In People v. McQuillan, 392 Mich. 511, 221 N.W.2d 569 (1974), the court, in ruling that automatic commitment for treatment violated equal protection, stated:

> Equal protection demands that differences in treatment of classes be based on a rational basis. The lack of a hearing cannot be justified by the contention that the defendant because of his acquittal by reason of insanity is so potentially dangerous at that time that he must be committed without further hearing . . . . Where the state has provided a full range of judicial protection to determine the competency of all civilly committed, it may not deny those rights to a person found not guilty by reason of insanity.

Id. at 535-36, 221 N.W.2d at 580; *see also* Wilson v. State, 259 Ind. 375, 385-86, 287 N.E.2d 875, 881 (1972); State v. Krol, 68 N.J. 236, 250-55, 344 A.2d 289, 297-99 (1975); State *ex rel.* Kovach v. Schubert, 64 Wis. 2d 612, 616-22, 219 N.W.2d 341, 343-46 (1974), *appeal dismissed,* 419 U.S. 1117, *cert. denied,* 419 U.S. 1130 (1975).

468. *See* Benham v. Edwards, 678 F.2d 511 (5th Cir. 1982); *see also* People v. McQuillan, 392 Mich. 511, 530-33, 221 N.W.2d 569, 577-79 (1974); State v. Krol, 68 N.J. 236, 248-49, 344 A.2d 289, 296 (1975); State *ex rel.* Kovach v. Schubert, 64 Wis. 2d 612, 623, 219 N.W.2d 341, 347 (1974), *appeal dismissed,* 419 U.S. 1117, *cert. denied,* 419 U.S. 1130 (1975).

469. 678 F.2d 511 (5th Cir. 1982).

tinued mental illness or continued dangerousness] against insanity acquittees and not against [civil] committees," the court held that the statute violated the equal protection clause.[470] The Georgia statute was found to violate equal protection by placing the burden on insanity acquittees to prove lack of mental illness in commitment proceedings, while the state bore the burden of proving insanity in other civil commitment proceedings. The court found no "rational basis for the intuitive assumption—that insanity acquittees generally are more dangerous than [civil] committees generally—sufficient to justify discriminating against insanity acquittees with respect to the burden of proof."[471]

Similarly, in *State v. Krol*[472] the New Jersey Supreme Court held, on both due process and equal protection grounds, that the distinction between the standards for involuntary commitment of insanity acquittees and those for involuntary commitment of others lacked even a rational basis. The court reasoned that "where personal liberty is involved . . . each individual's fate must be adjudged on the facts of his own case, not on the general characteristics of a 'class' to which he may be assigned."[473] Therefore, the court held that the same standard for commitment, requiring present mental illness and present dangerousness to self or others, was applicable to insanity acquittees and all other involuntary patients.[474] In short, the *Krol* court decided that an insanity acquittee was entitled to virtually the same due process hearing as any other patient prior to involuntary commitment.

In 1970 Congress responded to the *Bolton* decision by amending the D.C. Code provisions providing for automatic commitment in two significant ways.[475] First, it provided auto-

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470. *Id.* at 517.

471. *Id.* at 528.

472. 68 N.J. 236, 344 A.2d 289 (1975).

473. *Id.* at 255, 344 A.2d at 299.

474. *Id.* at 257-58, 344 A.2d at 300-01.

475. Act of July 29, 1970, Pub. L. No. 91-358, title I, §§ 155(a), 159(e), title II, § 207, 84 Stat. 570 (1970) (codified at D.C. CODE ANN. § 24-301(d) (1981)); *see also* Jones v. United States, 396 A.2d 183 (D.C. 1978); *vacated,* 411 A.2d 624 (D.C. 1980), *aff'd on reh'g en banc,* 432 A.2d 364 (D.C. 1981), in which the District of Columbia Court of Appeals observed:

> In 1970, however, Congress responded to the *Bolton* decision by amending § 24-301 of the D.C. Code. Dissatisfied with the anticipated consequences of *Bolton,* Congress attempted to accomodate the acquitee's [sic] constitutional rights and provide rehabilitative opportunities while protecting the public

matic commitment only for the defendant who affirmatively pleads[476] and proves his insanity by a preponderance of the evidence.[477] Second, it required a judicial release hearing within fifty days of confinement,[478] at which time the defendant may establish his lack of present mental illness or dangerousness.[479] Reviewing courts in the District of Columbia have held that this hearing eliminates the possibility of indeterminate commitment without judicial review and provides due process rights equivalent to those available under civil commitment.[480]

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against anticipated danger. By the terms of the amended, and currently applicable, § 24-301, an insanity acquitee [sic] once again faces automatic commitment . . . .

396 A.2d at 185 (citations omitted).

476. One year before *Bolton*, the District of Columbia Court of Appeals had held in Cameron v. Mullen, 387 F.2d 193 (D.C. Cir. 1967), that an insanity acquittee could not be automatically committed when the insanity acquittal was not a result of the defendant's voluntary plea. D.C. CODE ANN. § 24-301(d)(1) (1981) presently provides:

> If *any person* tried upon an indictment or information for an offense *raises* the defense of insanity and is acquitted solely on the ground that he was insane at the time of its commission, he shall be committed to a hospital for the mentally ill until such time as he is eligible for release pursuant to this subsection or subsection (e) of this section.

H.R. Rep. No. 907, 91st Cong., 1st Sess. 74 (1970) interpreted this provision to mean that automatic commitment is permissible only if the defendant himself raises the insanity defense.

477. D.C. CODE ANN. § 24-301(j) (1981) provides in part: "No person accused of an offense shall be acquitted on the ground that he was insane at the time of its commission unless his insanity, regardless of who raises the issue, is affirmatively established by a preponderance of the evidence."

478. *Id.* at § 24-301(d)(2).

> (A) A person confined pursuant to paragraph (1) . . . shall have a hearing, unless waived, within 50 days of his confinement to determine whether he is entitled to release from custody. . . .
>
> (B) . . . Within 10 days from the date the hearing was begun, the court shall determine the issues and make findings of fact and conclusions of law with respect thereto. The person confined shall have the burden of proof. If the court finds by a preponderance of the evidence that the person confined is entitled to his release from custody, either conditional or unconditional, the court shall enter such order as may appear appropriate.

479. *See* Jones v. United States, 432 A.2d 364 (D.C. 1981). The District of Columbia Court of Appeals recognized the standard for release to be lack of mental illness and dangerousness. The court observed:

> § 24-301(d) refers only to an acquittee's entitlement to release. But it is reasonable to assume that the same standard governs § 301(d) release hearings by reference to § 24-301(e), which states that entitlement to release, upon hospital certification, depends on a showing that the acquittee is no longer mentally ill and dangerous.

Id. at 372 n.16.

480. *E.g.*, Jones v. United States, 396 A.2d 183, 186. In Jones v. United States, 432 A.2d at 372, the District of Columbia Court of Appeals construed the "release hearing"

The United States Supreme Court recently recognized the constitutionality of the District of Columbia's modified scheme for automatic commitment in *Jones v. United States*.[481] A majority of the Court adopted the view that an NGRI verdict establishes that a crime was committed because of mental illness. The Court found that once insanity is established it may be presumed to continue and that the commission of the criminal act is sufficient to establish dangerousness, which is presumed to continue until proven otherwise.[482] Even though the underlying offense in *Jones* was an attempt to steal a jacket from a department store, a nonviolent crime against property, the Court endorsed the view that violence is not a necessary aspect of dangerousness or a requisite for commitment.[483]

The majority did recognize that the strength of the inference of present mental illness and present dangerousness might depend on the facts of the particular case, but reasoned that the release hearing provided under the D.C. Code was sufficient to meet due process demands:

> The precise evidentiary force of the insanity acquittal, of course, may vary from case to case, but the Due Process Clause does not require Congress to make classifications that fit every individual with the same degree of relevance. Because a hearing is provided within 50 days of the commitment, there is assurance that every acquittee has prompt opportunity to obtain release if he has recovered.[484]

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under § 24-301(d) as sufficiently similar to the civil commitment hearing under § 24-545(b) to meet the *Bolton* objection to automatic commitment of an insanity acquittee. The court noted their similarities:

> First, the substantive standard of commitment is identical under both statutes. The twofold proof requirement of mental illness and dangerousness varies only in the manner in which it is established. Second, both § 24-301(d)(2) and § 21-545(b) provide for mandatory judicial hearings, with notice and assistance of counsel (court-appointed if necessary). These common characteristics constitute the essential due process rights associated with involuntary commitment.

432 A.2d at 372 (footnotes omitted).

481. 51 U.S.L.W. 5041 (U.S. June 29, 1983).

482. *Id.* at 5044.

483. *Id.* The Court endorsed the view stated by Judge Burger in Overholser v. O'Beirne, 302 F.2d 852, 861 (1962): "[T]o describe the theft of watches and jewelry as 'non-dangerous' is to confuse danger with violence. Larceny is usually less violent than murder or assault, but in terms of public policy the purpose of the statute is the same as to both." The Court further observed: "It also may be noted that crimes of theft frequently may result in violence from the efforts of the criminal to escape or the victim to protect property or the police to apprehend the fleeing criminal." 51 U.S.L.W. at 5044 n.14.

484. 51 U.S.L.W. at 5044 (citations omitted).

The petitioner in *Jones* argued that the government lacked a legitimate reason for automatic commitment because it could introduce insanity acquittals as evidence in subsequent civil proceedings. The Court rejected this argument, finding the government's interest in avoiding a de novo commitment hearing after each insanity acquittal strong enough to justify automatic commitment. Among other things, the Court found that a de novo commitment hearing would require the Government to bear the burden of proof by clear and convincing evidence and likely would require relitigation of much of the criminal trial instead of focusing on whether the acquittee has recovered. In conclusion, the Court stated that "a finding of not guilty by reason of insanity is a sufficient foundation for commitment of an insanity acquittee."[485]

Only one of the two dissenting opinions in *Jones* dealt with the issue of automatic commitment. Justice Brennan's dissent noted that no previous opinion of the Court explicitly addressed the constitutionality of automatic commitment.[486] Justice Brennan contended that an insanity acquittal is insufficient to support automatic commitment for an indefinite period. He argued that the presumptions of present dangerousness and continuing mental illness found implicit in the insanity acquittal by the majority were insufficient grounds for involuntary hospitalization, and that the Government still had the burden of proving those elements by clear and convincing evidence.[487] Justice Brennan noted that "a 'not guilty by reason of insanity' verdict is backward looking, focusing on one moment in the past, while commitment requires a judgment as to the present and future."[488] Further, he suggested that the endorsement of automatic commitment given by the majority was unduly broad because "[i]n some jurisdictions . . . an acquittal by reason of insanity may mean only that a jury found a reasonable doubt as to a defendant's sanity and as to the causal relationship between his mental condition and his crime."[489]

Justice Brennan was particularly critical of basing a prediction of dangerousness on a single past criminal act.[490] He pre-

485. *Id.*
486. *Id.* at 5046 (Brennan, J., dissenting) (joined by Marshall, J., and Blackmun, J.).
487. *Id.*
488. *Id.* at 5047.
489. *Id.* at 5047-48.
490. Justice Brennan suggests:

ferred an approach recognizing the propriety of temporary commitment for examination, as provided by *Bolton,* and recognizing that the insanity acquittal may be introduced as evidence in any subsequent commitment hearing.[491] The essential point made by Justice Brennan is that a de novo commitment hearing is required after an insanity acquittal because "the issues of present mental illness and dangerousness are sufficiently different from the issues raised by an insanity defense so that even if the latter were taken as settled there would still be a need for findings of fact on new issues."[492]

In evaluating the significance of the *Jones* opinion, it is important to observe that the D.C. Code places the burden on the defendant to prove his insanity by a preponderance of the evidence and provides for an automatic release hearing within fifty days of confinement. It is also important to note that the appellate court opinion affirmed by the Supreme Court construed the D.C. Code provisions as consistent with *Bolton v. Harris.*[493] Nevertheless, the majority opinion in *Jones* suggests that when an insanity acquittee has proved his insanity by a preponderance of the evidence, the state is justified in automatically committing him on the presumption that he is presently mentally ill and dangerous. To this extent the decision provides constitutional authority for automatic commitment procedures that allow the acquittee to obtain a timely judicial determination of commitment status.

Courts currently take two approaches to the issue of the appropriate standard of proof in committing persons found NGRI. The first approach, approved by the Supreme Court in *Jones,* recognizes a lower standard of proof for committing insanity acquittees than for committing others, based on the potential for

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> [A] State may consider non-violent misdemeanors "dangerous," but there is room for doubt whether a single attempt to shoplift and a string of brutal murders are equally accurate and equally permanent predictors of dangerousness. As for mental illness, certainly some conditions that satisfy the "mental disease" element of the insanity defense do not persist for an extended period—thus the traditional inclusion of "temporary insanity" within the insanity defense.

Id. at 5048.

491. *Id.* at 5049.

492. *Id.* at 5049 n.17.

493. Jones v. United States 432 F.2d 364, 371-72 (D.C. Cir. 1981) ("The judicial hearing required by *Bolton* was codified in § 301(d)'s 50-day release hearing provision, notwithstanding the changed nature of the insanity defense [shifting the burden of proof from the government to the defendant].").

dangerous acts demonstrated by insanity acquittees' prior criminal behavior.[494] The Second Circuit Court of Appeals used this rationale in *Warren v. Harvey*.[495] The court held that the insanity acquittee's having committed a criminal act justified the less rigorous standard of proof, implicitly holding that persons found NGRI are more dangerous than civil committees.[496] In *Jones* the Supreme Court emphasized that the differences in burden of proof and procedures for commitment under the D.C. Code were justified because the insanity acquittee was a member of a special class.[497] An insanity acquittee could be involuntarily committed upon a jury's finding by a preponderance of the evidence that he was insane at the time of the crime,[498] while civil commitment required a finding of present mental illness by clear and convincing evidence.[499] The Court rejected the claim that the same burden of proof was required for commitment of both classes because the risk of erroneous commitment differed between the two classes. The Court noted that the reason for the "clear and convincing" standard in civil commitment proceedings was the "concern that members of the public could be confined on the basis of 'some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable.' "[500] Because automatic commitment followed only if the acquittee himself advanced insanity as a defense and proved that his criminal act was a product of his mental illness, the risk of erroneous commitment was greatly diminished. Furthermore, the Court reasoned that proof of an acquittee's criminal act eliminated "the risk that he is being committed for mere

494. Jones v. United States, 51 U.S.L.W. 5041 (U.S. June 29, 1983). *See generally* Comment, *Commitment Following an Insanity Acquittal*, 94 HARV. L. REV. 605, 625 (1981) ("Someday courts and commentators will have to account for the tension within the insanity defense itself—the disparity between our spoken belief that madmen should not be punished and our silent reservations about letting them escape chastisement.").

495. 632 F.2d 925 (2d Cir. 1980).

496. *Id.* at 932.

497. 51 U.S.L.W. at 5045-46. The Court viewed its holding as based on "the widely and reasonably held view that insanity acquittees constitute a special class that should be treated differently from other candidates for commitment."

498. *Id.* at 5042. The Court's findings regarding the basis for Jones's commitment rested on its reading of the D.C. Code: "In the District of Columbia a criminal defendant may be acquitted by reason of insanity if his insanity is 'affirmatively established by a preponderance of the evidence.' D.C. Code § 24-301(j) (1981). If he successfully invokes the insanity defense, he is committed to a mental hospital. § 24-301(d)(1)." *Id.*

499. 51 U.S.L.W. at 5045 (citing Addington v. Texas, 441 U.S. 418, 426-27 (1979)).

500. *Id.*

'idiosyncratic behavior' [since a] criminal act by definition is not 'within a range of conduct that is generally acceptable.' "[501] Because the concerns that underlie the heavier burden for civil commitment were "diminished or absent," the Court held that the preponderance of the evidence standard for committing insanity acquittees did not violate due process.[502]

Significantly, the *Jones* decision provides authority for automatic commitment of insanity acquittees only in jurisdictions that place the burden of proof of insanity on the defendant.[503] In jurisdictions that place the burden of proof of sanity on the prosecution, a jury acquittal would necessarily imply only a reasonable doubt concerning the acquittee's sanity and, therefore, would not meet the evidentiary standard set out by *Jones* as a basis for automatic commitment.[504] In these jurisdictions a different rule for the burden of proof may be required.

The second approach to the standard of proof issue is to require the same level of proof for commitment of insanity acquittees as for commitment of others. This approach recognizes no basis for different evidentiary burdens of proof for commitment of insanity acquittees and commitment of other persons, since commitment in either case requires a showing of present mental illness and present dangerousness and involves identical concerns of public safety and individual treatment and liberty. The Fifth Circuit took this approach in *Benham v. Edwards,* holding on both due process and equal protection grounds that the State must bear the burden of proving present mental illness and present dangerousness for both insanity acquittees and civil committees by clear and convincing evidence.[505] Whether this approach is constitutionally required in all jurisdictions that

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501. *Id.*

502. *Id.*

503. The *Jones* Court stated the explicit holding on automatic commitment as follows:

> We hold that when a criminal defendant establishes by a preponderance of the evidence that he is not guilty of a crime by reason of insanity, the Constitution permits the Government, on the basis of the insanity judgment, to confine him to a mental institution until such time as he has regained his sanity or is no longer a danger to himself or society.

Id.

504. *See id.* at 5047-48 (Brennan, J., dissenting) ("In some jurisdictions, most notably in federal criminal trials, an acquittal by reason of insanity may mean only that a jury found a reasonable doubt as to a defendant's sanity and as to the causal relationship between his mental condition and his crime.").

505. Benham v. Edwards, 678 F.2d 511, 528 (5th Cir. 1982).

place the burden of proving sanity in a criminal trial on the prosecution is uncertain. Because the Supreme Court decision in *Jones* did not provide a rule to govern procedures and standards of proof for commitment of insanity acquittees in all jurisdictions, these issues will continue to raise concerns for drafters and legislators.

An equally important issue, on which the Supreme Court has not ruled, is whether release procedures may differ between insanity acquittees and civil committees. Various viewpoints have been stated in commentary and case law on the appropriateness of applying different release procedures to insanity acquittees than to civil committees.[506] The legal controversy has focused on pragmatic considerations of the public's interest in being reasonably secure from mentally ill persons released prematurely and principled objections to unreasonable and prolonged detention of insanity acquittees in mental hospitals. One study indicates that in New York, an insanity acquittee is "institutionalized for a significantly shorter period of time than had he been convicted on his arrest charge."[507] A Michigan study arrived at much the same conclusion when it found that 55.6 per cent of persons found not guilty by reason of insanity were discharged following a sixty day diagnostic commitment.[508]

The critical concern that colors every release decision is whether an acquittee's future dangerousness can be predicted.[509] Members of the psychiatric community are divided about their ability to predict dangerous behavior. One study concluded that "under pre-trial examination conditions psychiatrists show no abilities to predict accurately future violent behavior beyond that expected by chance.[510] On the other hand, in an earlier

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506. *See, e.g.*, Kirschner, *supra* note 437, at 233; Spring, *The Insanity Issue in a Public Needs Perspective*, 4 DET. C.L. REV. 603 (1979); Note, *Stopping the Revolving Door: Adopting a Rational System for the Insanity Defense*, 8 HOFSTRA L. REV. 973 (1980).

507. *See* Pasewark, Pantee & Steadman, *Detention and Rearrest Rates of Persons Found Not Guilty by Reason of Insanity and Convicted Felons*, 139 AM. J. PSYCHOLOGY 892, 896 (1982).

508. Criss & Racine, *supra* note 390, at 269.

509. *See, e.g.*, C. FREDERICK (ed.), DANGEROUS BEHAVIOR: A PROBLEM IN LAW AND MENTAL HEALTH (1978); J. MONAHAN, THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR (1981); Kozol, *Dangerousness in Society and Law*, 13 U. TOLEDO L. REV. 241 (1982); Kozol, Boucher & Garofalo, *The Diagnosis and Treatment of Dangerousness*, 18 CRIME & DELINQ. 371 (1972); Steadman & Cocozza, *Psychiatry, Dangerousness and the Repetitively Violent Offender*, 69 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 226 (1978).

510. Steadman & Cocozza, *supra* note 509, at 231.

Massachusetts study, conducted at the Center for the Diagnosis and Treatment of Dangerous Persons, researchers concluded that "dangerousness in criminal offenders can be reliably diagnosed and effectively treated with a recidivism rate of 6.1 percent."[511] Both these extreme views miss the real issue: What degree of negative or positive error in prediction is socially tolerable given our concerns with individual liberty and public safety?

The circumstances leading to enactment of the New York Insanity Defense Act[512] in 1980 illuminated the current controversy about striking the proper balance between the public interest in safety and the committed acquittee's constitutional interest in liberty. Before 1980 the New York statute governing disposition of insanity acquittees required that any person acquitted by reason of insanity be automatically committed to the custody of the Commissioner of the New York Department of Mental Hygiene.[513] The Commissioner was required to confine the insanity acquittee in an appropriate mental health facility until the Commissioner determined that he could be released without danger to himself or others.[514] Upon determining that the patient could be released safely, the Commissioner filed a petition for discharge with the committing court, which then would determine whether the patient should be released.[515] When the court decided that the acquittee should not be discharged, a civil hearing could be requested by the hospital or the acquittee to determine whether release was warranted.[516]

By contrast, civil committees in New York enjoyed many more procedural and substantive safeguards. According to the New York Mental Hygiene Law civil commitment required proof of a person's need for immediate psychiatric hospital treatment because of a mental illness likely to result in serious bodily harm to himself or others, or an inability to provide for his own needs.[517] A civil committee was to be released when he was no longer dangerous because of mental illness. Release could be

511. Kozol, Boucher & Garofalo, *supra* note 509, at 371.

512. Act of June 26, 1980, ch. 548, 1980 N.Y. Laws 1616.

513. N.Y. CRIM. PROC. LAW § 330.20(1) (McKinney 1971) (current version at N.Y. CRIM. PROC. LAW § 330.20(2)-(9) (McKinney Supp. 1982)).

514. *Id.* § 330.20(2).

515. *Id.* § 330.20(2)-(3).

516. *Id.* § 330.20(2)-(5).

517. N.Y. MENTAL HYG. LAW § 9.37(a) (McKinney 1981).

provided either administratively or judicially.[518]

New York did not extend to insanity acquittees any of the statutory procedural and substantive rights included in the commitment or release provisions for civil committees. Since the state did not provide the insanity acquittee with a jury trial on the issue of original commitment or with even a determination of present mental illness as a necessary precondition of involuntary commitment, it was possible for an insanity acquittee to be held indefinitely without a hearing regarding his mental condition. State law also provided different standards for commitment and release of the two classes of involuntarily hospitalized mental patients. The civil standard required release of a patient who was no longer dangerous by virtue of his mental illness. This release could be ordered by mental health authorities or by a court following a petition by the patient.[519] Because continued hospitalization required a showing of present mental illness and present dangerousness, the patient had to be released once his mental illness was under control, even though he might have dangerous propensities originating from some other source. In contrast, the statute governing release of insanity acquittees did not require a direct connection between the patient's dangerousness and his mental illness for continued commitment. An insanity acquittee could be confined indefinitely, even in the absence of mental impairment, based only on a finding of dangerousness.[520]

This disparity between the detention and release standards for insanity acquittees and those for civil committees was upheld as constitutional by the New York courts.[521] The courts that examined this dual statutory scheme reasoned that insanity acquittees already had endangered the public by committing criminal acts while suffering from a mental disorder, while civil patients, although potentially just as dangerous, had not necessarily manifested their dangerousness through criminal conduct.[522] Relying on the state's police power to safeguard the pub-

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518. *Id.* § 29.15(a), (d); *see also* O'Connor v. Donaldson, 422 U.S. 563 (1975) (mentally ill patients cannot be held without treatment if not dangerous to themselves or others).

519. N.Y. MENTAL HYG. LAW § 29.15 (McKinney 1978).

520. *See* N.Y. CRIM. PROC. LAW § 330.20 (McKinney 1971) (amended 1980).

521. *See, e.g., In re* Lee, 46 A.D.2d 999, 362 N.Y.S.2d 635 (1974).

522. *See, e.g.*, People *ex rel.* Henig v. Commissioner of Mental Hygiene, 43 N.Y.2d 334, 372 N.E.2d 304, 401 N.Y.S.2d 462 (1977); Lublin v. Central Islip Psychiatric Center, 43 N.Y.2d 341, 372 N.E.2d 307, 401 N.Y.S.2d 466 (1977); People v. Lally, 19 N.Y.2d 27,

lic, the courts held that the differences in treatment were reasonably related to the state's interest in providing protection from the two different classes of patients.

However, the constitutionality of the New York statutory scheme came increasingly into question following two United States Supreme Court decisions dealing with the application of the equal protection clause to mentally disabled offenders.[523] The first of these decisions, *Baxstrom v. Herold*,[524] involved a prisoner who had been found insane while in prison. The State of New York sought to commit him at the end of his sentence without providing a de novo jury review of his mental condition, a right granted other persons civilly committed. The state maintained that the prisoner was dangerous, as evidenced by his criminal conviction, and that he could therefore be committed outside of the standards and procedures used for civil commitment.[525] Rejecting the state's argument, the Supreme Court held that the prisoner could not be denied jury review of his present mental condition before being involuntarily hospitalized when all civil patients received the right to jury review before involuntary commitment.[526] The Court also found that the prisoner's dangerousness was not relevant in determining whether he was mentally ill, although it might be relevant in determining whether to involuntarily commit the prisoner once his mental illness was established.[527] Finding no rational basis to substantiate a difference in procedures and standards between a commitment following a prison term and other civil commitments, the Court held that the same procedural and substantive standards must be used in committing persons at or nearing the end of a prison term as would be used in committing any civil patient.

Significantly, the Supreme Court not only acknowledged that dangerousness could be considered in determining when a mentally ill person should be confined, but also suggested that dangerousness could serve as a rational basis for special *procedural treatment* of mentally ill persons. The implication of the Court's reasoning is that all mentally ill persons committed on

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224 N.E.2d 87, 277 N.Y.S.2d 654 (1966).

523. Jackson v. Indiana, 406 U.S. 715 (1972); Baxstrom v. Herold, 383 U.S. 107 (1966).

524. 383 U.S. 107 (1966).

525. *Id.* at 114.

526. *Id.* at 110.

527. *Id.* at 110-11.

the basis of dangerousness, whether insanity acquittees or civil committees, might be treated differently than nondangerous civil committees.[528] Nevertheless, the *Baxstrom* Court determined that dangerousness alone was irrelevant in providing opportunities for hospitalized persons to prove their lack of mental illness. This holding necessarily extended to continued confinement on the basis of dangerousness alone and to restrictions on periodic review of the patient's mental state. Thus, the *Baxstrom* opinion indicated that differences in treatment relating to the substantive issue of whether a person is mentally ill cannot be justified on the basis of dangerousness alone. The decision left open the question whether a state can justifiably prescribe different procedures for dangerous mentally ill persons, including both insanity acquittees and civil committees, than for nondangerous mentally ill persons.

The Supreme Court further considered the distinction between nondangerous and dangerous mentally ill persons in *Jackson v. Indiana.*[529] The *Jackson* case involved a deaf mute who had been involuntarily hospitalized for an indefinite period after being found incompetent to stand trial. Since his condition was not subject to improvement, he was in fact being held indefinitely. The Court, relying on *Baxstrom,* held that the mere filing of criminal charges could not justify involuntary commitment with less procedural and substantive protection than available in civil commitment proceedings.[530] In dictum the *Jackson* Court noted approvingly that the *Baxstrom* principle requiring identical commitment standards for all mentally ill persons had been extended to insanity acquittees in both federal and state court opinions.[531] Arguably, the Court's dictum in *Jackson* extended the *Baxstrom* principle to require identical substantive treatment of civil patients and insanity acquittees in all matters related to involuntary commitment.

The *Baxstrom* and *Jackson* decisions prompted the New York courts to construe the state's mental health code to require that the same substantive commitment and release standards applying to involuntarily committed civil patients be applied to

528. *Id.* at 111-12.

529. 406 U.S. 715 (1972).

530. *Id.* at 724.

531. *Id.* at 724 (citing Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968); Cameron v. Mullen, 387 F.2d 193 (D.C. Cir. 1967); People v. Lally, 19 N.Y.2d 27, 224 N.E.2d 87, 277 N.Y.S.2d 654 (1966)).

insanity acquittees.[532] However, this trend in New York case law led to public concern about perceived laxity in the release procedures for insanity acquittees.[533] Public criticism centered on the fact that as more procedural rights were granted to the insanity acquittee, his release status was more frequently reviewed. More frequent reviews led to increases in the number of releases allowed and in the speed with which they were obtained. Commentators and the public viewed these earlier releases as premature, reflecting a general public distrust in the ability of psychiatrists and courts to determine present mental condition, and more particularly mental cure.[534]

In New York public dissatisfaction with release of insanity acquittees became intense following *In re Torsney*.[535] This case concerned the court-authorized release of Robert Torsney, a former New York policeman who had shot and killed a black teenager without apparent motive. Torsney successfully pleaded insanity and was acquitted of second degree murder.[536] The *Torsney* court, in a plurality decision, went beyond the requirement of procedural equality in the *commitment* of civil patients and insanity acquittees. Relying on the United States Supreme Court opinions in *Baxstrom* and *Jackson*, the New York court additionally required that the same substantive standard be used in determining *release* of an insanity acquittee as was used in deciding whether to release civil committees.[537] The court thus prohibited the state from refusing to release an insanity acquittee on the grounds of dangerousness alone. Applying the civil release standard, the court held that a person acquitted of a crime by reason of insanity must be released from the custody of the state unless he is determined to be presently dangerous because of present mental illness.[538]

Public response to the *Torsney* decision in New York was

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532. *See, e.g., In re* Torsney, 47 N.Y.2d 667, 394 N.E.2d 262, 420 N.Y.S.2d 192 (1979); People v. Lally, 19 N.Y.2d 27, 224 N.E.2d 87, 277 N.Y.S.2d 654 (1966).

533. *See* N.Y. Times, Mar. 31, 1980, at 81, col. 1.

534. *Id. See generally* N.Y. DEP'T OF MENTAL HYGIENE, A REPORT TO GOVERNOR HUGH L. CAREY ON THE INSANITY DEFENSE IN NEW YORK (Feb. 17, 1978).

535. 47 N.Y.2d 667, 394 N.E.2d 262, 420 N.Y.S.2d 192 (1979).

536. *Id.*

537. In *Torsney* the court noted that "equal protection mandates that a person be afforded the same procedural rights governing his release from custody as any other involuntarily committed person. Similarly . . . appellants' petition for release must be measured by the same substantive standards governing involuntary civil commitment of any other individual." *Id.* at 676, 394 N.E.2d at 267, 420 N.Y.S.2d at 197.

538. *Id.*

similar to the response to the *McQuillan* decision in Michigan.[539] The case led to growing public dissatisfaction and ultimately to legislative proposals culminating in passage of the Insanity Defense Reform Act of 1980.[540] This Act attempts to balance acquittees' constitutional rights and interest in liberty with a measure of certainty that dangerous mentally ill offenders will not be prematurely released. For the most part, the procedural and substantive rights provided for civil commitment have been incorporated into the Act and made applicable to insanity acquittees.[541] This meets the requirements of the equal protection clause for involuntary hospitalization of all persons so confined on account of present mental illness. However, at the same time the Act provides greater control over the release of insanity acquittees by requiring increased participation of the courts and the district attorney in the release of persons committed following an insanity acquittal.[542] In effect there are greater restrictions on the release of insanity acquittees. Insanity acquittees are treated as a special class of involuntarily committed persons, potentially more dangerous than other involuntarily committed persons, with more restrictive standards for release than apply to other committees. The difference in standards for release is based on the need for greater scrutiny of release decisions involving insanity acquittees to provide for public protection.[543]

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539. *See supra* notes 227-31 and accompanying text.

540. *See* N.Y. CRIM. PROC. LAW § 330.20 (McKinney 1982).

541. *Id.* § 330.20(17).

542. The district attorney must be notified of all hearings on the transfer, furlough, or release of insanity acquittees, so he may have an opportunity to represent the state in those hearings. *Id.* § 330.20(10)-(12). The Reform Act provides that at the release proceedings, the state has the burden to prove: (1) the insanity acquittee has a dangerous mental disorder precluding his transfer to a non-secure facility, or (2) that the insanity acquittee remains mentally ill so as to preclude his release from the Department of Mental Hygiene. *Id.* § 330.20(12). This placement of the burden of proof is consistent with the holding in Addington v. Texas, 441 U.S. 418 (1979), that the state must bear the burden of proof in retaining civil patients. One New York court has determined that *Addington* is applicable to insanity acquittees. *In re* Estes, 75 A.D.2d 451, 453, 429 N.Y.S.2d 514, 515 (1980).

543. The involvement of the district attorney in the transfer and release proceedings suggests that the release of the insanity acquittee will be governed by a more stringent standard than that applied to civil patients. The presence of the district attorney at acquittee hearings tends to provide additional support in favor of society's interest in receiving protection from dangerous patients. By contrast in civil cases, the Department of Mental Hygiene tends to weight the interests of the patient in treatment more heavily than those of society. The different interests stressed in civil and criminal release hearings thus create a strong potential for disparity between the standards applied to the two classes of mental patients.

While the attribute of dangerousness may provide a basis for applying different release procedures to committed persons, a significant question arises whether there is a basis for differentiating insanity acquittees from other persons committed on the grounds of dangerousness, since both may have engaged in equally dangerous conduct. Moreover, in some cases the fact that a person is committed civilly rather than as a result of an insanity acquittal may mean no more than that the prosecutor, in his discretion, decided against bringing a criminal action, or that the person charged with a criminal offense was simply found unfit to stand trial. In these situations, there is no foundation for the belief that a civilly committed person poses any less threat of future dangerous behavior than a person prosecuted for the same underlying conduct but acquitted as insane.

Other jurisdictions have attempted, either through statute[544] or judicial action,[545] to establish an equitable balance between the constitutional rights and personal liberty interests of insanity acquittees and society's interest in being protected from dangerous mentally impaired offenders. Several courts that have recently considered the issue have held that because of their previous criminal behavior, insanity acquittees are indeed a special class of mentally ill patients; therefore, their release from confinement warrants closer scrutiny.[546] For example, in *United States v. Ecker*[547] the United States Court of Appeals for the District of Columbia Circuit upheld the District's statute dealing with release of insanity acquittees against an equal protection attack. The court first found that active judicial review of conditional release of insanity acquittees was appropriate to determine that "the patient will not in the reasonable future endanger himself or others."[548] The court held that the likelihood of danger in the future provided an adequate basis for the continued detention and confinement of an insanity acquittee who had committed a violent criminal act, unless the trial court could affirmatively determine that it was more probable than not that

544. *See, e.g.*, ILL. REV. STAT. ch. 38, § 1005-2-4(d)-(m) (1983).

545. *See, e.g.*, Powell v. Florida, 579 F.2d 324 (5th Cir. 1978); United States v. Ecker, 543 F.2d 178 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977).

546. *See, e.g.*, Powell v. Florida, 579 F.2d 324 (5th Cir. 1978); United States v. Ecker, 543 F.2d 178 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977); People v. Valdez, 79 Ill. 2d 74, 402 N.E.2d 187 (1980).

547. 543 F.2d 178 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977).

548. *Id.* at 187.

he would not be violently dangerous in the future.[549]

The *Ecker* court also considered the claim that the statute violated the defendant's equal protection rights by treating insanity acquittees differently from civil committees for release from confinement. The court concluded that the defendant's earlier violent criminal conduct provided a reasonable justification for the statutory differences in release procedures between insanity acquittees and civil committees.[550] The court based its decision on the legislative intent underlying the special release procedures for insanity acquittees—protection of the public against a threat from an identifiable class of dangerous mentally ill persons.[551] Again, as with New York legislation providing for special release provisions, the question arises whether there is any principled basis for distinguishing insanity acquittees and other persons committed on the grounds of dangerousness.

In *Powell v. Florida*[552] the Fifth Circuit Court of Appeals agreed with the *Ecker* court that the former criminal behavior of insanity acquittees, while not warranting different procedures or standards for original involuntary commitment, did justify release procedures different from those provided for civil committees. The Florida system at issue in *Powell* allowed civil committees to be released solely on the recommendation of the hospital administrator but required court approval for release of insanity acquittees. The court decided on due process grounds that the insanity acquittee could not be committed without a hearing concerning his present sanity and dangerousness.[553] Nevertheless, the court found that the state could treat insanity acquittees differently than persons committed under the civil statute, so long as the differences related to a legitimate state interest.[554] Finding that the acquittee's dangerousness to society had been established by antisocial behavior, the court reasoned that the need to protect society from future dangerous behavior justified judicial supervision of release to determine whether the acquittee remains dangerous after the initial treatment.[555]

Similarly, in *People v. Valdez*[556] the Illinois Supreme Court

549. *Id.* at 188.
550. *Id.* at 199.
551. *Id.* at 197.
552. 579 F.2d 324 (5th Cir. 1978).
553. *Id.* at 330.
554. *Id.* at 332.
555. *Id.* at 333.
556. 79 Ill. 2d 74, 402 N.E.2d 187 (1980).

upheld the constitutionality of a statute[557] providing for judicial review of the Department of Mental Health's decision to release an insanity acquittee. The defendant, an insanity acquittee, contended that this statute deprived him of equal protection of the law, since release of civil committees did not require court review. The defendant also argued that the statute created an unreasonable classification by providing for judicial review only during the maximum period of time for which an insanity acquittee could have been sentenced had he been convicted.[558] The Illinois court examined the holdings of *Baxstrom* and *Jackson,* and found, without further comment, that "they did not involve the precise issues presented here."[559] However, the court did find persuasive the opinions in *Ecker* and *Powell.*[560] Finding that the dangerousness demonstrated by the acts underlying the criminal charge justified differences in release procedures between insanity acquittees and civil committees, the court held that public safety justified the additional safeguard provided in the statutory provisions for judicial review.[561] Further, the court held that requiring judicial review only for the period of the maximum sentence that could have been imposed had the defendant been found guilty did not violate the equal protection clause. The court reasoned that relating the period of judicial control to the potential criminal sentence provided a period of judicial supervision that was related to the seriousness of the acts of the insanity acquittee, and hence reflected the dangerousness of the subject's conduct.[562]

The United States Supreme Court faced a narrow issue concerning release of insanity acquittees in *Jones v. United States.*[563] The question before the Court was whether a person committed to a mental hospital following an insanity acquittal must be released or recommitted under the civil commitment code after being hospitalized for a period of time equivalent to the period for which he could have been sentenced had he been convicted. The Court held that the length of the prison sentence an insanity acquittee might have received places no limit on the

557. ILL. REV. STAT. ch. 38, § 1005-2-4(d) (1982).
558. 79 Ill. 2d at 82, 402 N.E.2d at 191.
559. *Id.*
560. *See supra* text accompanying notes 547-55.
561. 79 Ill. 2d at 82, 402 N.E.2d at 191-92.
562. *Id.* at 83-84, 402 N.E.2d at 192.
563. 51 U.S.L.W. 5041 (U.S. June 29, 1983).

period for which the insanity acquittee can be hospitalized, and that there is no right to a de novo civil commitment at the end of the period to which the acquittee might have been sentenced. The Court reasoned that due process requires that the nature and duration of commitment bear a reasonable relation to the purpose of the commitment. In the Court's view, commitment following an insanity acquittal served the same purpose as civil commitment—to treat the individual's mental illness and protect him and society from his potential dangerousness. Therefore, the Court concluded that the insanity acquittee was entitled to release when he recovered his sanity and was no longer dangerous.[564]

The Court ruled that the length of the sentence which could have been received was irrelevant to the possible length of commitment for two reasons. First, the possible length of sentence reflected "society's view of the proper response to commission of a particular criminal offense, based on a variety of considerations such as retribution, deterrence, and rehabilitation," while the length of commitment rested on the period of "continuing illness and dangerousness."[565] Second, the Court found "no necessary correlation between severity of the offense and the length of time necessary for recovery."[566] Therefore, the length of the acquittee's hypothetical criminal sentence was irrelevant to the purpose of his commitment.

The Court was clearly correct to the extent that it considered the issue as narrowly put before it—whether a person under noncriminal confinement could be hospitalized for longer than the period for which he could serve in prison if he had been convicted. The issue that remains open is whether the release provisions applicable to civil committees must be made available to insanity acquittees at the end of the period for which they could have been imprisoned had they been convicted. If the release procedures applicable to civil committees become available to insanity acquittees, then in many jurisdictions insanity acquittees would become eligible for hospital release without court approval, and would also be eligible for periodic review to determine whether continued hospitalization is justified.[567]

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564. *Id.* at 5045-46 (citing O'Connor v. Donaldson, 422 U.S. 563, 575-76 (1975)).

565. *Id.* at 5045.

566. *Id.*

567. *See, e.g.*, Public Act 80-1414, §§ 3-813, -902, ILL. REV. STAT. ch. 91½, §§ 3-813, -902 (1982).

The Supreme Court recognized in *Jones* that the District of Columbia's procedures for releasing insanity acquittees were different from the procedures for releasing civil committees even though the standards for release were the same.[568] However, the Court explicitly stated that it was not ruling on the constitutionality of the difference in release procedures.[569]

While other courts have grappled with the complexity of issues involved in the release of insanity acquittees,[570] the question is far from settled. The central issue is whether the conduct of the insanity acquittee underlying the criminal charge provides a basis for predicting dangerousness so that insanity acquittees can be classified as a special group of dangerous mentally ill persons. This determination would seem to require that one distinguish between violent and nonviolent offenses. It also raises the question whether any real difference exists between insanity acquittees and dangerous, as opposed to nondangerous, civil committees. The basic constitutional concern is whether more restrictive release procedures can be designed to provide for greater assurance of public safety without violating requirements of due process and equal protection. The states of Maryland[571] and Oregon[572] have enacted statutes seeking to provide such re-

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568. 51 U.S.L.W. at 5044 n.11. The standard for release of both classes was lack of present dangerousness or mental illness. However, a patient committed civilly was entitled to unconditional release on certification of his recovery by the hospital chief of service, whereas release of a committed acquittee on certification of recovery required court approval. *Id.*

569. *Id.* The Court observed: "Neither of these provisions is before the Court, as petitioner has challenged neither the adequacy nor the disparity in treatment of insanity acquittees and other committed persons." *Id.*

570. *See, e.g.*, State v. Davee, 558 S.W.2d 335, 338 (Mo. Ct. App. 1977) where the court held:

> The fact that [the defendant] was not accountable for his conduct because he suffered from a mental condition does not prevent him from being a danger to society. He is placed in a special class of persons whose danger to society has been established by existing facts. . . . The purpose of criminal commitment is to assure that conduct which has harmed one or more persons [will] not again be permitted to constitute a threat of danger. One who has undergone a criminal commitment cannot be released from that commitment unless a court finds that he "does not have and in the reasonable future is not likely to have a mental disease or defect rendering him dangerous to the safety of himself or others . . . ."

See also In re Noel, 226 Kan. 536, 601 P.2d 1152 (1979); *In re* Fleming, 431 A.2d 616 (Me. 1981); Daniels v. Superintendent, Clifton T. Perkins State Hosp., 34 Md. App. 173, 366 A.2d 1064 (1976).

571. MD. HEALTH-GEN. CODE ANN. §§ 12-113 to -116 (1982).

572. OR. REV. STAT. § 161.385 (1981).

lease procedures. These statutes have met with approval from legal commentators[573] and, so far, have withstood constitutional attack.[574] The Oregon statute in particular may prove a model for the development of procedures to govern the releases of insanity acquittees. This statute will be analyzed and discussed in the next section of this Article.

C. Oregon Legislation

In 1977 the Oregon legislature passed a general statute providing for a special agency to oversee the releases of insanity acquittees. This agency was called the Psychiatric Security Review Board.[575] By 1981 the Oregon legislature found that this experimental approach to release insanity acquittees was a success and adopted legislation titled Chapter 711 to perpetuate this special agency's control of release of insanity acquittees.[576] The provisions of Chapter 711 merit extended examination and comment.

The 1977 Oregon legislature was confronted with charges of a breakdown in the interaction of the mental health and criminal justice systems as they related to the management and supervision of insanity acquittees.[577] These charges led to the formation of the Governor's Task Force on Corrections and a Mental Health Division task force, which were charged with the responsibility of studying Oregon insanity defense proceedings and recommending reforms.[578] These groups proposed the formation of the Psychiatric Security Review Board (the "Board").[579]

The statute establishing the Board provided that it should be composed of five members: a lawyer, a psychiatrist, a psychologist, a person familiar with parole and probation, and a lay citizen.[580] In order to assure the Board's independence from

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573. *See, e.g.*, Wiener, *Not Guilty By Reason of Insanity: A Sane Approach*, 56 CHI. KENT L. REV. 1056 (1980).

574. *See* Ashley v. Psychiatric Sec. Review Bd., 53 Or. App. 333, 632 P.2d 15 (1981).

575. OR. REV. STAT. § 161.385 (1979); *see generally* Bloom & Bloom, *Disposition of Insanity Defense Cases in Oregon*, 9 BULL. AM. ACAD. PSYCHIATRY & L. 93 (1981); Rogers, *supra* note 436.

576. Act of Aug. 19, 1981, ch. 711, 1981 Or. Laws 930.

577. *See* Rogers, *supra* note 436, at 24; *see also* Colbach, *Insanity Defense is Indefensible*, WILLAMETTE WEEK, Nov. 3, 1975 at 9.

578. Rogers, *supra* note 436, at 25.

579. GOVERNOR'S TASK FORCE ON CORRECTIONS, A COMMUNITY CORRECTIONS SYSTEM FOR OREGON 62 (Sept. 1976) (revised Oct. 1976).

580. OR. REV. STAT. § 161.385(2) (1981).

both mental health authorities and the judiciary, no member was to be a judge or a psychiatrist or psychologist involved with either the state Mental Health Division or any community mental health program.[581] In 1978 the Board assumed supervisory responsibility for all insanity acquittees who previously had been under the jurisdiction of the courts.[582] The new legislation provided that the insanity acquittee was to be placed under the Board's control following court commitment, and the Board was authorized to obtain an evaluation of the acquittee's mental condition and to receive a recommendation for a course of treatment. To insure a proper course of treatment, the Board was given the authority to require local mental health facilities to provide psychiatric treatment facilities for persons under its jurisdiction.[583] Further, the Oregon legislature appropriated sufficient funds to finance such evaluation and treatment.[584]

Under the statute, the Board is required to conduct periodic hearings to determine the need for continued commitment and treatment of insanity acquittees and to determine when conditional release should be ordered.[585] The Board is authorized to receive testimony from hospital doctors, other experts and lay witnesses regarding the patient's progress. Each of the Board's hearings is followed by a closed session at which the Board decides on action concerning the acquittee's course of treatment or conditional release.[586] Following a review of the performance of the Board in 1981, this system was adopted permanently with certain modifications in the original legislation.[587]

The 1981 legislation removed from the purview of the Board persons who, because of mental diseases or defect, were found not responsible for misdemeanors committed during a "criminal episode in the course of which the person did not cause physical injury or risk of physical injury to another."[588] The legislature determined that these defendants' behavior did not warrant

581. *Id.* § 161.385(2)(a)-(b).

582. *Id.* § 161.327.

583. *Id.* § 161.336(1).

584. 1979 Or. Laws ch. 212.

585. OR. REV. STAT. § 161.346 (1981).

586. *Id.*

587. *See* GOVERNOR'S TASK FORCE ON MENTAL HEALTH, SUNSET REVIEW OF THE PSYCHIATRIC SECURITY REVIEW BOARD (Dec. 1980) (submitted to the Governor and the 61st Legislative Assembly) [hereinafter cited as GOVERNOR'S TASK FORCE ON MENTAL HEALTH].

588. OR. REV. STAT. § 161.328(1) (1981).

Board supervision since the state mental hospital wards and community release programs under the Board's direction were designed for the treatment of the most dangerous of mentally ill acquittees.[589] Less dangerous misdemeanants are processed through the civil commitment system, which supervises less secure facilities. By this change, the Oregon legislature clearly established that the insanity acquittee's dangerousness, understood in terms of likelihood of violent conduct or serious harmful acts, was the primary basis for providing special dispositional procedures. This change in the law meets the criticism that the mere finding of criminal conduct preceding the insanity acquittal does not provide sufficient grounds for dangerousness to justify the classification of insanity acquittees for special treatment. Thus, the special procedures apply only to insanity acquittees who have engaged in violent or seriously harmful conduct.

Chapter 711 also reduced the standard of proof for insanity acquittees in commitment hearings from "clear and convincing" to a "preponderance of the evidence."[590] The standard for committing persons under the civil statutes remains "clear and convincing evidence."[591] This difference in the standards of proof required for involuntary commitment has raised important constitutional issues.

In *Ashley v. Psychiatric Security Review Board*[592] the Oregon Court of Appeals upheld the constitutionality of the "preponderance of the evidence" burden in criminal commitments before the Board. The plaintiff had attacked this burden on the basis of the United States Supreme Court decision in *Addington v. Texas*,[593] which held that due process required the state to prove the patient's need for treatment by clear and convincing evidence in civil commitment proceedings. The plaintiff argued that her continued commitment under the jurisdiction of the Board, based on the statutory "preponderance of the evidence"

589. *See* Rogers, *supra* note 436, at 30 n.41 (citing *Minutes of Hearings on H.B. 2410 Before the Or. House Comm. on the Judiciary, Subcomm. 3*, 61st Or. Legislative Assembly, Exhibit U (May 15, 1981), (May 15, 1981 memorandum letter from J.H. Treleaven, M.D., Assistant Director, Human Resources, Administrator for Mental Health, to the Honorable Joyce Cohen, Chairperson, House Comm. on the Judiciary)).

590. OR. REV. STAT. § 161.328(2) (1981).

591. *Id.* § 426.307.

592. 53 Or. App. 333, 632 P.2d 15 (1981).

593. 441 U.S. 418 (1979).

standard violated both due process and equal protection.[594] The court of appeals rejected the plaintiff's argument, holding that "there are material distinctions between the two types of proceedings which justify not imposing the same standard of proof."[595] The court's decision seems to rest on the significance of the criminal court finding that the accused engaged in criminal conduct as a prerequisite of the NGRI verdict.

The *Ashley* decision is supported by the Supreme Court opinion in *Jones v. United States,* recognizing the constitutionality of committing insanity acquittees by a preponderance of the evidence standard, rather than by the civil commitment burden of clear and convincing evidence.[596] Nevertheless, the better approach would be to give great evidentiary weight to the finding of the criminal trial court in the subsequent commitment hearing, rather than to apply different burdens of proof on issues of present mental illness and dangerousness as the bases for involuntary commitment.

One interesting modification made by the 1981 statute is the elimination of the Board's jurisdiction over insanity acquittees found to be mentally ill but dangerous only to themselves. These defendants are to be discharged outright, without any special processing under the civil commitment system.[597] This again reflects a legislative determination that it is the particular threat to public safety presented by certain insanity acquittees that justifies special commitment and release procedures.

Another interesting feature of the 1981 enactment is the provision for notifying victims, upon their request, of subsequent Board hearings concerning insanity acquittees or of any conditional release, discharge, or escape.[598] This provision underscores once more that the purpose of these special procedures is to provide the general public maximum protection from dangerous offenders by insuring that all relevant evidence about the underlying past dangerous conduct is presented to the Board.

As originally enacted the 1977 statute did not provide specifically for the state's attorney to appear at hearings to re-

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594. 53 Or. App. at 336, 632 P.2d at 17. OR. REV. STAT. § 161.346(10) (1981) provides: "The burden of proof on all issues at hearings of the board shall be by a preponderance of the evidence."

595. 53 Or. App. at 338, 632 P.2d at 18.

596. Jones v. United States, 51 U.S.L.W. 5041, 5045 (U.S. June 29, 1983).

597. OR. REV. STAT. § 161.329 (1981).

598. *Id.* § 161.325(2)(b).

present the state before the Board. Since patients were required to be represented by counsel, this situation created an imbalance, casting the Board in the untenable position of serving as both prosecutor and judge. The 1981 legislation remedied this deficiency by providing that the state is to be represented in these hearings by either the attorney general or the district attorney of the county from which the defendant was committed.[599]

The Oregon statute was modified further by changing the timing of the hearings. The original statute required the Board to conduct its first hearing on possible conditional release or discharge within twenty days of the trial court's commitment order.[600] Since this time period was too short in most instances to develop a conditional release plan, acquittees were held an additional six months until they could apply for a second hearing.[601] A new provision requires that the initial hearing take place within ninety days of the original commitment.[602] This change may provide greater protection for the insanity acquittee from unnecessary involuntary hospitalization by allowing hospitals more time to develop workable conditional release plans before the initial Board hearings. Whether ninety days will be sufficient to accomplish this goal can only be determined by subsequent study of the operation of this provision.

The 1981 legislation also changes the conditional release process itself. The Review Board is now required to hold hearings for conditional release of an acquittee within sixty days of receiving an application for conditional release accompanied by a verified release plan.[603] If the application is not received in a timely manner, the Review Board may request that the Mental Health Division prepare a predischarge or preconditional release plan for presentation to the Board.[604] To prevent undue burdening of the Mental Health Division, the Division may subcontract the provision of conditional release treatment programs to public agencies and private corporations.[605] This may expand the

599. *Id.* § 161.346(12).

600. *Id.* § 161.336(1) (1977).

601. *See* GOVERNOR'S TASK FORCE ON MENTAL HEALTH, *supra* note 587, at 34.

602. OR. REV. STAT. § 161.341(7)(a) (1981).

603. *Id.* § 161.341(2). A verified conditional release plan requires formal agreement between the Review Board and the person(s) or institution(s) designated to provide treatment for the conditional release patient. *Id.* § 161.336(1).

604. *Id.* § 161.390(2).

605. *Id.* § 161.390(3).

treatment options for acquittees, which increases the likelihood that they will receive adequate mental health care.

The conditional release decision is probably the most critical decision the Board must render. The statute requires that the Board consider "the best interest of justice, the protection of society, and the welfare of the acquittee" in making the decision.[606] While these factors are stated in a vague and general way, they do reflect the central concerns presented by the commitment and release of insanity acquittees—the interest in liberty of the acquittees and the need for protection of the public. Not only does a balance need to be struck in principle, but also the specific facts of each case require special consideration to determine the degree of danger posed by the individual under review and the extent to which the specific protective measures proposed meet that potential danger.

In general, the conditional release provisions draw on the probation-parole model, empowering the Board to implement individualized dispositional decisions. Provisions for conditional discharge are ultimately a function of the balance between the preventive detention aspects of handling persons found NGRI and the restorative purpose of the prescribed psychiatric treatment. Thus conditional release is provided even though a person presents a substantial danger to himself or others if he can be controlled adequately with supervision and treatment.[607] Discharge from the hospital or treating authority and conditional release are determined by assessing the acquittee's dangerousness and whether his mental illness continues. Ultimately the purpose of the statute is to provide treatment that will reduce the likelihood of dangerous behavior. Certain evaluative questions must be answered by further empirical study to determine the Board's effectiveness: (1) whether the administrative procedures employed by the Review Board in dealing with acquittees under its jurisdictions are fair; and (2) whether the standards utilized by the Board to determine discharge, conditional release or recommitment are effective in predicting whether or not the insanity acquittee will engage in future dangerous conduct.[608]

One possible consequence of the Oregon statute is that a patient who continues to be dangerous but for whom no appropri-

606. *Id.* § 161.336(1).
607. *Id.*
608. *See* Bloom & Bloom, *supra* note 575, at 96.

ate treatment is available may be indefinitely confined. Although that problem has not as yet been specifically addressed by the Oregon courts in the context of the new statute, the decision in *Newton v. Brooks*[609] contains the likely judicial response to a challenge based on indefinite confinement. In that case, an Oregon appeals court concluded: "So long as mental disorder continues, whatever form it may take, or whatever name the doctor may give it, if it is probable that the disorder would make the person's liberty dangerous to the public, the legislative policy within constitutional bounds ought to be carried out."[610] Thus, the diagnosis of continued mental illness accompanied by a convincing prediction of dangerousness seems to be recognized in Oregon as sufficient basis for continued involuntary hospitalization even though no effective treatment is being administered.

So far there has not been extensive litigation in Oregon requiring judicial review of Board activities. In *Cardwell v. Psychiatric Security Review Board*[611] the Oregon Court of Appeals reviewed a Board decision to modify a person's conditional release order and to readmit him to a mental hospital. The Board's inquiry into the status of the subject was triggered by an anonymous phone call informing the police that the subject had threatened suicide. The Board decided, based on the testimony of the treating physician and the subject himself, that Cardwell was dangerous to himself and others, that he could not adequately fulfill the terms of conditional release, and that he needed closer supervision and control.[612] The Board found that continued conditional release "would not be in the best interests of justice, the protection of society, as well as the welfare of John Cardwell."[613]

Cardwell appealed the Board's decision to recommit him on the ground that the evidence was insufficient to show that he presented a substantial danger. The court found that the

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609. 246 Or. 484, 426 P.2d 446 (1967).

610. *Id.* at 490, 426 P.2d at 449.

There is no necessary inconsistency between the Oregon court's position and the United States Supreme Court opinion in O'Connor v. Donaldson, 422 U.S. 563 (1975) (holding that involuntary commitment of nondangerous persons gave rise to a requirement of adequate treatment), since the Court did not discuss the question whether dangerous mentally ill persons have a right to treatment as a condition of involuntary commitment. *Id.* at 573.

611. 38 Or. App. 565, 590 P.2d 787 (1979).

612. *Id.* at 570-71, 590 P.2d at 789-90.

613. *Id.* at 571, 590 P.2d at 790.

Board's decision was based on a record inadequate to support a finding of dangerousness and, as such, the decision was "conclusory."[614] The state maintained that the Board properly employed criteria similar to those that would have supported a parole revocation; that is, the Board's decision concluding that Cardwell was "unfit for conditional release" followed a finding that he had not conformed to the terms of his conditional release.[615] Nevertheless, the court, after examining the legislative intent behind the Psychiatric Security Review Board statute, rejected the state's analogy to the parole statute and held that "the legislature did not intend 'unfitness for conditional release' to be an independent criterion for commitment in the absence of dangerousness."[616]

The *Cardwell* holding is important not only for clarifying the conditions under which conditional release may be revoked, but also for delineating the extent of appropriate judicial review of the Board's decisions. The opinion indicates that the courts will not simply defer to Board judgments, but will independently review both the Board's construction of the statute and its particular decisions in order to safeguard the acquittee's constitutional and statutory rights. The courts will independently balance the patient's interest in liberty against the concern for public safety to assure compliance with the legislative intent that is the foundation of the statute.

The *Cardwell* decision, with its imperative for specificity in Board decisions based on criteria of dangerousness, led to the enactment in 1979 of an amendment to the statutory provisions governing conditional release. The statute now requires (1) that the Board render its decision based on specific findings rather than mere conclusions, and (2) that the Board's decisions be based on "material, relevant and reliable" evidence.[617] Nevertheless, the amended statute did not preclude subsequent challenges to the appropriateness and sufficiency of evidence received and used by the Board as the basis for decisions on conditional release. Two joined cases indicative of the continuing problems involved in the proper interpretation of expert evidence presented at the hearings are *Dunn v. Psychiatric Secur-*

614. *Id.* at 572, 590 P.2d at 790.
615. *id.* at 573, 590 P.2d at 790-91.
616. *Id.* at 573, 590 P.2d at 791.
617. OR. REV. STAT. § 161.346 (1981).

ity Review Board[618] and *Jones v. Psychiatric Security Review Board.*[619] In these cases, psychiatrists testifying before the Board blatantly disagreed about whether certain personality disorders constituted "mental diseases or defects." The Board, after carefully documenting the discrepancies, ordered continued confinement.[620] The Oregon Court of Appeals affirmed both decisions without opinion and thus failed to provide any elucidation or guidance for applying the terms "mental disease or defect" in Board decisions.

The *Dunn* and *Jones* cases illustrate a continuing need for greater specificity in the procedures and substantive standards required to give effect to the statute. The Oregon legislature has so far failed to develop these specific standards itself. It has also declined to delegate authority to the Board to draft certain administrative definitional and operational standards, despite the recommendation of a Governor's Task Force that the Board be empowered to do so.[621] Therefore, it is still up to either the legislature or the courts to assist the Board by providing evidentiary rules for evaluating and interpreting expert testimony. These guidelines are needed to prevent the Board's hearings from becoming instances of ad hoc procedural decisions and battles of psychiatric experts without means for resolving conflicts in testimony and evidence.

Another shortcoming of this legislation is reflected in *Rolfe v. Psychiatric Security Review Board,*[622] in which the proper role of Board members was at issue. The Board's order had included memoranda from two of its expert members explaining their recommendation for continued Board supervision of the plaintiff. On appeal, the court determined that portions of these memoranda constituted an impermissible introduction of new evidence not in the hearing record. While recognizing that by statute the Board is composed of members with acknowledged expertise, the majority of the court nevertheless precluded the Board from relying on its "special knowledge as a substitute for evidence presented at a hearing."[623] A strong dissent in the case

618. 52 Or. App. 1, 628 P.2d 798 (1981) (aff'd mem.).

619. *Id.*

620. Rogers, *supra* note 436, at 46.

621. GOVERNOR'S TASK FORCE ON MENTAL HEALTH, *supra* note 587, at 47.

622. 53 Or. App. 941, 633 P.2d 846, *petition for review denied,* 292 Or. 334, 644 P.2d 1127 (1981).

623. *Id.* at 951-52, 633 P.2d at 852.

maintained that the majority view would effectively subvert the role or utility of the expert members of the Board or that it would force them into undesirable subterfuges to develop a record that would sustain the Board's decisions.[624] The dissenting judges suggested that if they were expert members of the Board they would resign because the majority opinion would greatly curtail their effectiveness in performing their statutory duties.[625] The *Rolfe* case makes clear that the statutes need to specifically define the role of the expert members on boards controlling patient release. It also seems evident that experts need some latitude to draw on their knowledge and experience; otherwise, there would be no purpose in requiring that certain members of the Board be experts.[626]

Although the Oregon statutory scheme does not eliminate all concerns associated with the administration of the insanity defense and the disposition of insanity acquittees, it does provide a useful model for those who are interested in responding to the legitimate concerns about community safety expressed by critics of the defense and by the general public. As one commentator has stated: "Preliminary results from the first four years suggest that Oregon may serve as a model for retaining an insanity defense while more effectively protecting the public."[627]

V. Proposed Model Statute[628]

The recent attention given to the insanity defense has generated a diversity of opinions, critiques, and recommendations for legislation directed at the disposition of persons found NGRI. The solutions to the problems of dealing with insanity acquittees must be designed to create a satisfactory balance between the public's security interests and the insanity acquittee's constitutional rights. The Oregon statutory scheme establishing a Psychiatric Security Review Board provides the best model to date for resolving the very basic conflict of concerns that underlies the disposition of insanity acquittees. The Oregon statutes maintain the insanity defense while providing for fair and effective treatment and supervision of persons found NGRI. Never-

624. *Id.* at 952-53, 633 P.2d at 853.
625. *Id.* at 953, 633 P.2d at 853-54.
626. *See* Rogers, *supra* note 436, at 47.
627. *Id.* at 48.
628. *See infra* Appendix p. 627.

theless, certain modifications would improve the operation of the Oregon scheme and would also avoid probable grounds for constitutional attack. This section develops a model statutory scheme that preserves and builds upon the best features of the Oregon statute while eliminating various grounds for objection.

The proposed statute mandates the creation of a Psychiatric Supervisory Board (PSB) charged with the supervision and management of *all dangerous mentally ill persons.* This provision eliminates the possible equal protection challenge that arises when persons civilly committed on grounds of dangerousness are treated differently than insanity acquittees. The statute applies the same procedures to dangerous civil committees that apply to insanity acquittees charged with violent crimes. There are good reasons for including persons committed on grounds of dangerousness—many of them will have engaged in dangerous conduct that would constitute a crime and will not have been prosecuted simply because they were unfit to stand trial or because of prosecutorial discretion. It may be desirable to consider revising mental health codes to require commission of a violent or dangerous act as a basis for commitment on grounds of dangerousness. Regular civil commitment procedures would apply to those persons committed on grounds other than dangerousness and insanity acquittees charged with nonviolent offenses.

Under the proposed statute, the PSB is composed of six persons: one psychiatrist experienced in treating violent or dangerous mentally affected criminals; one licensed psychologist experienced in the criminal justice system; one lawyer experienced in criminal trial practice; one member experienced in the parole and probation system; two members of the lay public; and one social worker with experience in community re-entry programs. The members of the PSB are independent of any state treatment facilities or the judicial system. The range of expertise on the PSB should provide the maximum opportunity for predicting dangerousness. In addition, the lay members should contribute to the PSB's effective consideration of the public's concern with safety and should provide a firm basis for community acceptance of PSB decisions.

The PSB obtains jurisdiction over persons in one of two ways: (1) upon an insanity acquittal where the underlying offense was a violent crime, and (2) upon a civil hearing for involuntary commitment when the person to be committed has been diagnosed as potentially dangerous to others. Following transfer

to the PSB's jurisdiction, and after an initial observation period of ninety days, an insanity acquittee receives a hearing to assess his present mental condition. At the hearing the PSB decides on the further disposition of the acquittee based on the following criteria: (1) the degree or extent of acute mental illness; (2) the extent of the acquittee's present or potential inclination for dangerous or violent behavior; (3) the extent to which the illness can be controlled with psychotropic drugs in a way that eliminates the potential for dangerous or violent behavior, and the likelihood that the subject will adhere to a program of drug treatment; (4) the amount of treatment that can effectively be provided at an outpatient facility; and (5) the degree of supervision the patient would need to be effectively treated and controlled in a conditional release program. Involuntary civil committees receive a similar hearing within ninety days of the PSB's taking original jurisdiction of their cases. The same criteria that apply to insanity acquittees also govern the disposition of civil committees.

The PSB receives testimony from the treating physicians, psychologists and social workers involved in evaluating a patient. In dealing with insanity acquittees, the PSB receives testimony from the state's attorney or district attorney representing the state, and any other person with an interest in the disposition of the patient, including the acquittee's victim or the victim's family. The victim or the victim's family receive notice of all hearings on the disposition of the insanity acquittee so that all relevant facts surrounding the underlying charge may be brought to the PSB's attention. When the PSB deals with civil committees, family members and persons who were the objects of the committee's violent or dangerous acts may testify.

The model statute provides that the party seeking to maintain more restrictive control of the patient must bear the burden of proof on all matters presented to the PSB. The standard in all cases is proof by clear and convincing evidence. Establishing this uniform burden of proof eliminates any basis for challenging involuntary hospitalization of insanity acquittees by less proof than required by due process in any civil commitment. Under the statute, a finding of past dangerousness, based upon the criminal conduct underlying the original charge against the insanity acquittee, may carry significant evidentiary weight, but it does not justify a lower burden of proof on the issue of present dangerousness.

If the PSB decides that the patient should be committed, it will request the Department of Mental Health either to provide the necessary mental health services and institutional support or to subcontract with an appropriate mental health facility to provide the needed in-hospital treatment. The hospital to which the subject is committed must provide the PSB with a proposed course of treatment, which the PSB will examine and either approve or amend to meet the patient's needs as determined by the PSB. The hospital must also provide the PSB with periodic reports on the progress of the patient.

Each person subject to the PSB's jurisdiction receives periodic hearings, in accordance with the statutory schedule, to establish his current mental condition, need for treatment, and continuing dangerousness. At these hearings the state must prove by clear and convincing evidence that the patient should continue to be confined. The provision for a uniform burden of proof on the issue of release, as well as on the issue of initial commitment, reflects the fact that the basic issues are factual and that concern with community safety and potential dangerous behavior is the same for all persons hospitalized because of their past dangerous acts.

When the PSB decides, after a hearing into present mental condition, that a patient is an appropriate candidate for conditional release, it is empowered to request a proposal for community reentry and outpatient treatment from mental health authorities. After receiving this proposal the PSB may order the conditional release of the subject. However, the PSB is required to monitor the patient's progress in the community. If at any time it appears that the person is not successfully meeting the demands of life in the community, the PSB may recommit him. The patient receives a hearing upon recommitment, in which the procedural steps required in all other dispositional hearings apply.

When the PSB determines to recommend unrestricted release of an insanity acquittee, it must notify the court that originally rendered the NGRI judgment of the recommendation. This court will then review the evidence upon which the PSB's recommendation is based, and may concur in the PSB's decision or may decline to release the insanity acquittee and order the PSB to retain jurisdiction and provide additional treatment or provide a program of conditional release. When the PSB recommends unrestricted release of persons civilly committed, the

court that issued the involuntary commitment order receives the same opportunity for review.

A statute following this general outline will at least in part answer the concerns of all parties interested in the disposition of dangerous mentally ill persons whether they are denominated insanity acquittees or civil committees. It meets these concerns in a fair and principled manner. Nevertheless, the success of such a statutory scheme depends upon adequate staffing and funding by the state to provide the support and resources needed for such a specialized program.

VI. Conclusion

Practically since its inception, the insanity defense has been surrounded by controversy. Although it has been strongly supported in principle by many legal commentators and medical authorities, it has met with disapproval from others, particularly concerning its implementation. Support for the insanity defense is predicated on the notion of morality and justice that one who does not know or understand what he is doing and cannot be expected to conform to law ought not to be held responsible. The criticism of the actual operation of the defense stems from a fear of mentally disturbed persons who, while not deserving punishment, present the threat of dangerous or violent behavior and who need to be confined and treated.

The controversial nature of the insanity defense has led to numerous proposals and enactments aimed at reforming, limiting, or abolishing the defense. Some of the proposed changes in the law are primarily procedural, such as the suggestion that the defendant bear the burden of proving the defense of insanity. Other suggested changes are substantive in nature, such as those which would restrict evidence of mental illness to disproving the mental state specified for an offense. Many of those making this proposal recognize that it would in effect abolish the insanity defense. One recent proposal for legal reform, which has garnered broad support, is the creation of an alternative verdict of GBMI. Realistically this verdict is nothing more than a special version of a guilty verdict, with an apparent promise of psychiatric treatment for mentally ill offenders. Since persons imprisoned often have a right to treatment under sentencing statutes, and since courts reviewing the GBMI statues have held that a provision for treatment is not a constitutional requisite for the GBMI verdict or plea, the only certain result of this alternative

is to effectively curtail the availability of the insanity defense by providing the jury an attractive compromise verdict.

An alternative approach to legal reform that has greater merit is a statutory proposal providing special dispositional control of insanity acquittees. Without changing the insanity defense itself, this approach meets the concern for public safety while providing needed treatment and maintaining the constitutional rights of the acquittee. This proposed statute is directed at developing an authority well suited to evaluate the patient's mental condition and to assess his potential for danger. Most reform of the insanity defense system ought to take place at the dispositional stage. The GBMI legislation lacks a principled foundation and does not effectively meet the real concerns of the public. An alternative system devised to provide close supervision of acquittees and to control and monitor their release back into society provides the best hope for effectively balancing the public's concern with safety and the acquittee's concern with treatment and liberty.

APPENDIX

Model Statute Providing for the Commitment and Discharge of Persons Mentally Ill and Dangerous to Others

Preamble

The purpose of this Act is to establish procedures and criteria for the commitment and discharge of dangerous mentally ill persons. These procedures seek to balance the public's need for safety from the threat presented by the premature release of dangerous mentally ill persons and the individual's interest in receiving appropriate psychiatric treatment with due regard to his constitutional rights and his interest in personal liberty. All mentally ill persons who are deemed to be dangerous following a finding of not guilty by reason of insanity in a criminal proceeding and all persons who are deemed mentally ill and dangerous following a mental examination and involuntary civil commitment proceeding come within the ambit of this Act.

SEC. 1

Definitions

1.1) *Mental Illness* - Substantial disorder of thought, mood or behavior which impairs a person's judgment and ability to function in a manner consistent with his own well being and safety or with the well being and safety of others.
1.2) *Insanity Acquittee* - A person who is found not guilty by reason of insanity in a criminal trial.
1.3) *Involuntary Civil Committee* - A person determined to be in need of confinement in a mental health facility because he is mentally ill and dangerous to others.
1.4) *Dangerous* - A condition in which a person is likely to inflict serious physical harm on others if not hospitalized, i.e. the person presents a substantial risk of physical harm to other persons as manifested by evidence of acts of homicidal or other violent behavior that place others in reasonable fear of suffering serious physical harm.
1.5) *Person* - Includes both insanity acquittees and civil committees found to be mentally ill and dangerous and placed under the jurisdiction of the Psychiatric Supervisory Board.
1.6) *Conditional Release* - A period of supervision under the jurisdiction of the Psychiatric Supervisory Board during which a

person is released to the community in accordance with the terms or requirements imposed by the Board and with the provision that the person's behavior and course of psychiatric treatment are monitored by the Board.

SEC. 2

PSYCHIATRIC SUPERVISORY BOARD

2.1) With the advice and consent of the state legislature, the governor shall appoint a Psychiatric Supervisory Board [hereinafter referred to as the PSB] to consist of seven members.
2.2) The membership of the PSB shall be composed of

(a) A psychiatrist experienced in the criminal justice system and specifically in the treatment of dangerous or violent mentally disordered persons and not otherwise employed by the Mental Health Department or any community mental health program;
(b) A licensed psychologist experienced in the criminal justice system and not otherwise employed by the Mental Health Department or a community mental health program;
(c) A penologist with expertise in the parole and probation system;
(d) A lawyer with expertise in the criminal justice system;
(e) A social worker experienced in community treatment programs;
(f) Two members of the lay public.

2.3) Each member of the PSB shall serve for a term of six years, subject to removal by the governor for good cause.
2.4) The state legislature shall establish an annual budget for the PSB to include a compensation schedule for the PSB's members and staff and funds to support the PSB's operation.
2.5) The PSB shall select one of its members as chairperson to serve a term of one year with such duties and powers as the PSB may provide.
2.6) A majority of the voting members of the PSB shall constitute a quorum for the purpose of conducting hearings and performing the various duties of the PSB.
2.7) A vote of the majority of the voting members at a meeting of the PSB at which a quorum is present shall constitute an act of the PSB.
2.8) a) A person over whom the PSB exercises its jurisdiction is entitled to judicial review of final orders of the PSB that may

adversely affect or aggrieve him. On judicial review of PSB decisions the person shall be represented by counsel. If the person is indigent, counsel shall be appointed by the reviewing court and the costs of counsel and other legal fees shall be borne by the county in which the order placing the person under the jurisdiction of the PSB originated.

b) Any final order is subject to review by the court of appeals of this state upon petition to that court filed within ninety days of the order sought to be reviewed. When the court of appeals reviews any final order, it may also review the proceedings underlying the order.

SEC. 3

PSB AUTHORITY AND ADMINISTRATIVE POLICIES

3.1) The PSB is authorized to promulgate and implement administrative policies and procedures consistent with the statutory mandate of the PSB.

3.2) The Department of Mental Health shall formulate procedures consistent with the PSB's supervisory authority for the assignment and management of persons assigned by the PSB to state mental health facilities or to community mental health programs or to other facilities in which persons under the Board's jurisdiction are placed.

3.3) The PSB is authorized to review and approve the criteria established by the Department of Mental Health for the evaluation and treatment of insanity acquittees and dangerous civil committees committed to a state mental health facility or a community mental health program or any other facility in which persons under the PSB's jurisdiction are placed.

3.4) The PSB is authorized to subpoena witnesses to appear and to testify in any hearing conducted by the PSB.

3.5) The PSB is authorized to issue *subpoenas duces tecum* for the production of documents and other physical evidence needed to develop a full evidentiary record in any hearing before the PSB.

3.6) Upon a party's failure to comply with subpoena orders issued pursuant to subsections 3.4 or 3.5 of this section or upon a person's refusal to testify regarding pertinent matters, not inconsistent with applicable law, the PSB is authorized to request the judge of the county court in the county in which the PSB is sitting to issue a contempt citation against said party.

3.7) Any individual opinion of a PSB member based on evidence obtained at a hearing and on the individual expertise and experience of the PSB member, and which is considered by the whole PSB as a basis for a final order of the PSB, shall be in writing and made a part of the record of the PSB's proceedings. This requirement does not apply to opinions expressed during the PSB's deliberation but not made an express basis for a final order of the PSB.

SEC. 4

JURISDICTION

4.1) When a defendant is acquitted of a criminal charge by reason of insanity, the court entering the judgment shall order an examination of the insanity acquittee as provided in subsection 4.2 of this section. After receiving the results of this examination, the court shall conduct a dispositional hearing to determine whether the insanity acquittee should be placed under the jurisdiction of the PSB consistent with the criteria promulgated in subsection 4.3 of this section or be discharged pursuant to subsection 4.5 of this section.
4.2) Before issuing a dispositional order pursuant to subsection 4.3 or 4.5 of this section, the court shall order the insanity acquittee placed in a state mental health facility for evaluation and observation for a period not to exceed ninety days.
4.3) After receiving the mental evaluation of an insanity acquittee examined pursuant to subsection 4.2 of this section, the court shall conduct a dispositional hearing as provided in subsection 4.1 of this section. If the court determines at the close of the hearing that the insanity acquittee would have been found guilty of committing an offense involving physical injury or risk of physical injury to another but for the defense of insanity, and further determines that it has been established by clear and convincing evidence that the insanity acquittee continues to be affected by mental illness and continues to be dangerous, the court shall order the person placed under the jurisdiction of the PSB for supervision, care, and treatment.
4.4) For purposes of this section, an insanity acquittee in a state of remission is considered to have a continuing mental illness requiring PSB supervision when it is found with reasonable medical certainty that this condition occasionally may become acute, and when acute, render the person dangerous to others.

4.5) After receiving the mental evaluation of an insanity acquittee examined pursuant to subsection 4.2 of this section, and upon a finding that the insanity acquittee is no longer affected by mental disease or defect, or if so affected, no longer presents a substantial danger to others and is not in need of care, supervision or treatment, the court shall order the insanity acquittee discharged from custody.

4.6) Upon a court order of involuntary civil commitment, the committing court shall conduct a hearing to determine whether the civil committee should be remanded to the jurisdiction of the PSB consistent with the criteria enunciated in subsection 4.7 of this section or be placed under the supervision of the Department of Mental Health pursuant to subsection 4.9 of this section.

4.7) If at the close of the hearing conducted pursuant to subsection 4.6 of this section, the court determines that it has been established by clear and convincing evidence that the person is mentally ill and further determines that, as a result of mental illness, he is dangerous, the court shall order the person placed under the jurisdiction of the PSB for supervision, care, and treatment.

4.8) For purposes of this section, an involuntary civil committee in a state of remission is considered to have a continuing mental illness requiring PSB supervision when it is found with reasonable medical certainty that this condition occasionally may become acute, and when acute, render the person dangerous to others.

4.9) Upon a court order of involuntary civil commitment, if the committing court finds that the committee is in need of care or treatment even though his mental condition does not render him dangerous to others, the court shall order the committee placed under the supervision of the Department of Mental Health.

4.10) An order of a court under this section is final and appealable. On appeal the person shall be entitled to counsel as provided in subsection 2.8 of section 2.

4.11) When a person is placed under the jurisdiction of the PSB consistent with the requirements of subsections 4.3 or 4.7 of this section, the court making such placement shall notify the person of the right to appeal and the right to a hearing before the PSB in accordance with subsection 5.3 of section 5.

SEC. 5

BOARD DISPOSITIONAL ORDERS

5.1) Upon an order placing a person under the jurisdiction of the PSB consistent with the requirements of subsections 4.3 or 4.7 of section 4, the PSB shall order the person placed in a state mental health facility for a period not to exceed ninety days for evaluation, observation, and the development of a treatment program.

5.2) The PSB may appoint a psychiatrist or a licensed psychologist to examine the person and to submit a report to the PSB. Reports filed with the PSB shall include, but need not be limited to, an opinion as to the mental condition of the person and whether the person could be adequately controlled with treatment as a condition of release.

5.3) Within ninety days after acquiring jurisdiction over the person, the PSB shall conduct hearings regarding the disposition of the person consistent with subsections 5.5, 5.7, and 5.8 of this section.

5.4) Notice in writing shall be given of any hearing, dispositional order, or discharge provided for in this Act. The notice shall be given within a reasonable time prior to such hearing and within thirty days following such dispositional order to the following persons:

(a) the person subject to the PSB's jurisdiction;
(b) the attorney representing the person;
(c) the appropriate legal representative of the state;
(d) the person's victim or the victim's family.

The notice shall include the time, place, and location of the hearing; the nature of the hearing and the issues to be considered at the hearing with the relevant statutory provisions and rules involved; a statement of the authority and jurisdiction under which the hearing is to be held; and a statement of the person's rights under subsection 5.11 of this section.

5.5) The burden of proof on all issues at the hearings before the PSB shall be by clear and convincing evidence.

5.6) If, at a hearing pursuant to subsection 5.3 of this section, the PSB finds that the person is no longer affected by mental illness, or if so affected, no longer presents a substantial danger to others, it shall recommend to the court that placed the person under the PSB's jurisdiction that the person be discharged from commitment.

5.7) The court that placed the person under the jurisdiction of the PSB shall review all discharge recommendations issued pursuant to subsection 5.5 of this section. If the court denies discharge, the person shall continue under the jurisdiction of the PSB and a hearing will be conducted to determine whether the person should be placed in a mental health facility or on conditional release consistent with subsection 5.7 of this section. The status of the person is to be reviewed by the PSB within six months after the court denial of any discharge recommendation.
5.8) If, at a hearing pursuant to subsection 5.3 of this section, the PSB finds that the person continues to be affected by mental illness and continues to be dangerous to others, but can be adequately controlled under a program of conditional release, with continued treatment and medical supervision as a condition of release, the PSB shall order the person released as provided in subsection 6.1 of section 6.
5.9) If, at a hearing pursuant to subsection 5.3 of this section, the PSB finds that the person continues to be affected by mental illness and continues to be dangerous and cannot be adequately controlled by a program of conditional release, the PSB shall order the person committed or retained in a state mental health facility designated by the Department of Mental Health for custody, care and treatment.
5.10) The PSB may make a determination concerning discharge or conditional release based upon the written reports submitted pursuant to this section. If the PSB requires further information from the examining psychiatrist or licensed psychologist who submitted the report, the PSB shall summon these persons to testify pursuant to subsection 3.4 of section 3. In making dispositional decisions, the PSB shall consider all material and relevant evidence available to it concerning the issues before the PSB. Evidence may include, but is not limited to, the record of the criminal trial or civil commitment proceeding; the person's psychiatric and criminal history; information supplied by counsel representing the person, by counsel representing the state, or by any other interested party, including the person's victim, the victim's family, and the person himself.
5.11) At any dispositional PSB hearing, the person about whom the hearing is being held shall have the right

(a) to appear at all proceedings held pursuant to this section, except PSB deliberations;
(b) to cross-examine all witnesses appearing to testify at the

hearing;
(c) to subpoena witnesses and documents as provided in subsections 3.4 and 3.5 of section 3;
(d) to be represented by counsel, to consult with counsel during any hearing and, if indigent, to have counsel provided without cost;
(e) to examine all information, documents and reports which the PSB may consider. The information, documents and reports shall be disclosed to the person in a timely manner so that he may examine the material before the hearing.

5.12) A record shall be kept of all hearings before the PSB, including PSB deliberations.

SEC. 6

CONDITIONAL RELEASE

6.1) If the PSB determines pursuant to subsection 5.7 of section 5 that even though the person presents a substantial danger to others, he can be adequately controlled with supervision and treatment if conditionally released, and that necessary supervision and treatment are available in the community, the PSB may order the person conditionally released, consistent with the safety of the public and the best interests of the person. The PSB may appoint any state, county or local agency which the PSB finds capable of providing necessary supervision of the person upon release, to take custody of the person subject to the direction of the PSB in its order of conditional release. Before making any appointment, the PSB shall notify the agency to which conditional release is to be made, in order to provide the agency an opportunity to design the necessary supervisory plan or to report to the PSB any necessary modification of its contemplated conditional release order. After taking custody of a person subject to a conditional release order entered pursuant to this section, the responsible agency shall assume supervision of the person under the direction of the PSB.
6.2) If, any time after commitment of a person to a state mental hospital designated by the PSB under subsection 5.8 of section 5, the superintendent of the hospital believes that the person can be adequately controlled with medication, supervision and treatment if conditionally released, even though he continues to be affected by mental illness and without treatment would continue to be dangerous to others, the hospital superintendent shall apply to the PSB for an order of conditional release. This

application shall be accompanied by a report setting forth the facts supporting the opinion of the superintendent. The application also shall be accompanied by a verified conditional release plan. The PSB shall conduct a hearing on the application within sixty days of its receipt. Not less than thirty days before this hearing, copies of the submitted application and recommended conditional discharge plan shall be given to the attorney representing the state in the release proceedings.

6.3) Any person who has been committed to a state hospital designated by the Department of Mental Health for custody, care, and treatment pursuant to subsection 5.8 of section 5, or anyone else authorized to act on the person's behalf may apply to the PSB for a conditional release order on the ground that the person can be adequately controlled and given proper care and treatment if placed on conditional release, even though he continues to be affected by a mental illness and without treatment would continue to be dangerous to others.

6.4) When application is made under subsection 6.3 of this section, the PSB shall require a report from the superintendent of the facility maintaining custody of the person who is the subject of the application. This report shall be prepared and transmitted according to the standards established in subsection 6.2 of this section. Applications for conditional release under subsection 6.3 of this section shall not be filed more often than once every six months commencing from the date of the initial PSB hearing.

6.5) (a) As a condition of release, the PSB may require the person to report to any state or local mental health facility for evaluation and to cooperate with and accept the recommended medical, psychiatric, or psychological treatment.

(b) Any facility to which the person has been referred for evaluation as a condition of release, upon performing the evaluation shall submit a written report of its findings to the PSB. If the facility finds that treatment of the person is appropriate, it shall include its recommendations for treatment in the report to the PSB.

(c) Whenever treatment is provided by any facility, the facility shall furnish reports to the PSB on a regular basis concerning the progress of the person.

(d) Copies of the reports submitted to the PSB pursuant to this section shall be furnished to the person and the legal counsel of the person.

6.6) (a) Any person conditionally released under this section may apply to the PSB for discharge from or modification of the order of conditional release on the ground that the person is no longer affected by mental illness or, if so affected, is no longer dangerous to others and no longer requires supervision, medication, care, or treatment. Notice of the hearing on an application for discharge from or modification of an order of conditional release shall be given to any interested party, including the parties listed in subsection 5.4. The applicant, at the hearing pursuant to this subsection, must prove by a preponderance of the evidence his fitness for discharge from or modification of the order of conditional release. Applications by a person for discharge from or modification of conditional release shall not be filed more often than once every six months commencing from the time of the original order for conditional release.

(b) Upon application by any agency responsible for supervision or treatment pursuant to an order of conditional release, the PSB shall conduct a hearing to determine if the conditions of release shall be continued, modified, or terminated. The application shall be accompanied by a report setting forth the facts supporting the application.

6.7) The community mental health program director, or the director of the facility providing treatment to a person on conditional release, or any law enforcement officer may take custody of a person on conditional release or request that the person be taken into custody if there is reasonable cause to believe that he presents a danger to others and is in need of immediate care, custody, or treatment. Any person taken into custody pursuant to this subsection shall be transported immediately to a state mental hospital designated by the Department of Mental Health.

6.8) If at any time while the person is under the jurisdiction of the PSB it appears to the PSB that the person has violated the terms of the conditional release or that the mental health of the individual has deteriorated significantly, the PSB may order the person returned to a state hospital designated by the Department of Mental Health for evaluation or treatment. A written order of the PSB is sufficient warrant for any law enforcement officer to take custody of the person and transport him accordingly. A sheriff, municipal police officer, constable, parole or probation officer, prison official or other peace officer shall execute the order.

6.9) Within ten days of a revocation of a conditional release under subsections 6.7 or 6.8 of this section, the PSB shall conduct a hearing to determine the further disposition of the person. Appropriate notice shall be given. The PSB may continue the person on conditional release or, if it finds by clear and convincing evidence that the person is affected by mental illness and is dangerous to others and cannot be adequately controlled under the terms of conditional release, the PSB may order the person committed to a state mental hospital designated by the Department of Mental Health. The state must prove by clear and convincing evidence the unfitness of the person for continued conditional release.

SEC. 7

DISCHARGE

7.1) When the PSB finds at any hearing that a person placed under its jurisdiction pursuant to subsections 4.3 or 4.7 of section 4 is no longer affected by mental illness or, if so affected, no longer is dangerous to others so that he no longer requires regular medical care, medication, supervision, or treatment, the PSB shall recommend to the court that placed the person under the PSB's jurisdiction that the person be discharged as provided in subsection 7.5 of this section.

7.2) If at any time after commitment of a person to a state mental health facility designated by the Department of Mental Health pursuant to subsection 5.8 of section 5 the superintendent of the facility believes that the person is no longer affected by mental illness or, if so affected, no longer is dangerous to others and no longer requires regular medical care, medication, supervision, or treatment, the superintendent of the facility shall apply to the PSB for an order of discharge. This application shall be accompanied by a report setting forth the facts supporting the opinion of the superintendent. The PSB shall hold a hearing on the application within sixty days of its receipt. Not less than thirty days before the hearing, copies of the application and report of the superintendent of the facility shall be sent to the parties listed in subsection 5.6.

7.3) Any person committed to a state hospital designated by the Department of Mental Health pursuant to subsection 5.8 of section 5 for continued care and treatment or any person authorized to act on the behalf of such person may apply to the PSB

for an order of discharge on the ground that the person has recovered from mental illness or, if not recovered, no longer presents a substantial danger to others and no longer requires regular medical care, medication, supervision, or treatment.

7.4) When application is made under subsection 7.3 of this section, the PSB shall require a report from the superintendent of the facility to which the person has been committed. This report shall be prepared and transmitted as provided in subsection 7.2 of this section. Application for discharge under subsection 7.3 of this section shall not be filed more often than once every six months commencing with the initial PSB hearing.

7.5) All orders discharging persons placed under the jurisdiction of the PSB pursuant to subsections 4.3 and 4.7 of section 4 shall be reviewed by the court making the original placement. If the court disapproves the discharge order, the person shall continue under the jurisdiction of the PSB, which shall conduct a hearing to determine whether the person should be placed in a mental health facility or be conditionally released pursuant to subsections 5.7 and 5.8 of section 5 and subsection 6.1 of section 6. The status of the person shall be reviewed by the PSB within six months of the court's denial of the discharge order.

7.6) Any person who has been placed under the jurisdiction of the PSB and who has been subject to involuntary hospitalization, or to conditional release, or to a combination of involuntary hospitalization and conditional release, for a period of five years shall receive a hearing before the PSB within thirty days of the expiration of the five-year period. At this hearing the PSB shall review the person's status and determine whether the person should be recommended for discharge from the jurisdiction of the PSB.