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The Guilty But Mentally Ill Verdict: An Idea Whose Time Should Not Have Come

Christopher Slobogin*

The occasionally controversial consequences of the insanity defense, epitomized by John Hinckley's acquittal,¹ have recently spawned a rash of legislative attempts to prevent similar outcomes in future cases. Three states have abolished the insanity defense entirely, permitting evidence of mental abnormality only when relevant to the state of mind required for the offense.² Several other states have opted for less dramatic steps: tinkering with the insanity test;³ shifting the burden of proof to the defendant;⁴ or

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1. United States v. Hinckley, Crim. No. 81-306 (D.D.C. June 21, 1982).

2. IDAHO CODE § 18-207 (Supp. 1984); MONT. CODE ANN. § 46-14-201 (1983) ("Evidence of mental disease or defect is not admissible in a trial on the merits unless the defendant . . . files a written notice of his purpose to rely on a mental disease or defect to prove that he did not have a particular state of mind which is an essential element of the offense charged."); UTAH CODE ANN. § 76-2-305(1) (Supp. 1983) (mental illness is not a defense unless mental state is a required element of the crime).

For a critique of this approach toward mental abnormality, see Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A. J. 194, 195-96 (1983).

3. See, e.g., CAL. PENAL CODE § 25(b) (West 1982) (changing insanity test from the Model Penal Code formulation to a version of the *M'Naghten* test).

4. See, e.g., ARIZ. REV. STAT. ANN. § 13-502(B) (Supp. 1984-1985) (burden on defendant by clear and convincing evidence); IND. CODE § 35-41-4-1(b) (1981) (burden on

both.⁵ By far the most popular "solution" to the "insanity defense problem," however, is what has become known as the guilty but mentally ill verdict.

Although there are as many variations of the guilty but mentally ill verdict as there are statutes endorsing it, all such legislation is designed to provide the factfinder with an additional option to the three traditional verdicts of guilty, not guilty, and not guilty by reason of insanity. Under the typical formulation,⁶ if the jury finds a defendant who asserts the insanity defense guilty⁷ and not insane, it may alternatively find him guilty but mentally ill at the time of the offense. If the defendant is found guilty but mentally ill the court may impose any sentence appropriate for the offense, but the defendant is eligible for treatment in prison or a mental hospital while incarcerated. Proponents of guilty but mentally ill legislation hope to reduce insanity acquittals and provide greater protection to the public by offering judges and juries a compromise verdict that purportedly ensures both prolonged incarceration and treatment for the mentally ill offender.⁸

defendant by a preponderance of the evidence); 18 PA. CONS. STAT. § 315(a) (1983) (burden on defendant by a preponderance of the evidence).

5. ALASKA STAT. § 12.47.010, .040 (Supp. 1984) (burden on defendant to show by a preponderance of the evidence that, because of a mental disease or defect, he did not appreciate the nature and quality of his act). Alaska had placed the burden on the prosecution to disprove insanity beyond a reasonable doubt. *Id.* § 12.45.083(b) (repealed 1982).

6. The text describes the Michigan statute, MICH. COMP. LAWS § 768.36 (1982), which has been the model for other states. See also McGraw, Farthing-Capowich & Keilitz, *The "Guilty But Mentally Ill" Plea and Verdict: Current State of Knowledge*, 30 VILL. L. REV. 117, 128-41 (1984) (table describing the various guilty but mentally ill statutes). That article, and in particular the tables it contains, is an extremely useful source on legal aspects of the guilty but mentally ill verdict.

7. As a prerequisite to finding guilt, the jury must find that the actus reus and mens rea requirements for the crime were met.

8. See, e.g., Smith, *Limiting the Insanity Defense: A Rational Approach to Irrational Crimes*, 47 MO. L. REV. 605, 614 (1982) (The verdict "presents a middleground that may be seized by a jury as a point of compromise or as a means of providing recognition of responsibility while assuring some form of consideration of the defendant's mental state at the sentencing stage of the proceedings."); Note, *Insanity — Guilty But Mentally Ill — Diminished Capacity: An Aggregate Approach to Madness*, 12 J. MAR. J. PRAC. & PROC. 351, 369 (1979) (under guilty but mentally ill legislation, "rather than having the door revolve from a mental facility into the street, it revolves from one secured facility to another, thereby assuring the public protection"); Comment, *Guilty But Mentally Ill: A Reasonable Compromise for Pennsylvania*, 85 DICK. L. REV. 289, 309 (1981) ("The GBMI [guilty but mentally ill] verdict represents a true compromise between those who advocate liberalizing the insanity defense and those who would abolish it altogether."); Taylor, *Too Much Justice*, HARPER'S, Sept. 1982, at 65 (The "alternative verdict of 'guilty but mentally ill' . . . should be adopted more widely to deal with the John Hinckleys of this world, the partly crazies, who deserve neither to be absolved of responsibility nor to be treated just like ordinary criminals.").

In introducing Illinois' guilty but mentally ill proposal, Governor Thompson stated: "Most importantly, [the verdict] is designed 'to protect the public from violence inflicted by persons with mental ailments who slipped through the cracks in the crimi-

The guilty but mentally ill verdict has received increasing attention. Several states had already passed or were seriously considering legislation establishing a guilty but mentally ill verdict before John Hinckley's 1982 acquittal vaulted the idea into national prominence.⁹ Today at least twelve states have adopted some version of the verdict¹⁰ and perhaps twenty others have considered or are considering similar statutes.¹¹

Yet despite the popularity of the guilty but mentally ill scheme, the American Bar Association's Criminal Justice Mental Health Standards,¹² the American Psychiatric Association Statement on the Insanity Defense,¹³ and the National Mental Health Association's Commission on the Insanity Defense¹⁴ all have recom-

nal justice system.'" Thompson, A Message to the Eighty-Second General Assembly, State of Illinois, Technicalities in the Criminal Justice Process: Closing the Loopholes Through Which the Guilty Escape 8 (Apr. 23, 1981) (quoting *People v. Seefeld*, 95 Mich. App. 197, 199, 290 N.W.2d 123, 124 (1980)).

9. Michigan, Indiana, and Illinois had passed legislation providing for a guilty but mentally ill verdict at the time of Hinckley's acquittal: Michigan in 1975; Indiana in 1980; and Illinois in 1981. See 1975 Mich. Pub. Acts 180 (codified at MICH. COMP. LAWS § 768.36 (1982)); 1982 Ind. Acts 204 (codified at IND. CODE § 35-36-2-3 (Supp. 1982)); 1981 Ill. Laws 82-553 (codified at ILL. REV. STAT. ch. 38, § 115-2(b) (1981)). Alaska, Delaware, Georgia, Kentucky, and New Mexico all passed such legislation in 1982. See 1982 Alaska Sess. Laws ch. 143, § 22 (codified at ALASKA STAT. § 12.47.040 (Supp. 1984)); 63 Del. Laws 328 (1982) (codified at DEL. CODE ANN. tit. 11, § 408 (Supp. 1984)); 1982 Ga. Laws 22 (codified at GA. CODE ANN. § 17-7-131 (Michie 1985)); 1981 Ky. Acts 113 (codified at KY. REV. STAT. § 504.120 (Supp. 1982)); 1982 N.M. Laws 55 (codified at N.M. STAT. ANN. § 31-9-3 (Supp. 1983)). Connecticut enacted and repealed its statute in the same year. 1983 Conn. Acts 486 (codified at CONN. GEN. STAT. § 53-a-13 (Supp. 1983) (repealed 1983)).

10. In addition to those states listed in note 9, *supra*, Pennsylvania, South Carolina, South Dakota, and Utah have adopted the guilty but mentally ill verdict. See 1982 Pa. Laws 286 (codified at 18 PA. CONS. STAT. § 314 (1983)); 1984 S.C. Acts 396 (codified at S.C. CODE ANN. § 17-24-20 (Law. Co-op. 1985)); 1983 S.D. Sess. Laws 174 (codified at S.D. CODIFIED LAWS ANN. § 23a-7-2 (Supp. 1983)); 1980 Utah Laws 49 (codified at UTAH CODE ANN. § 77-13-1 (Supp. 1983)).

11. In 1982 roughly two dozen states in addition to those listed in note 9, *supra*, were considering the insanity plea. N.Y. Times, June 24, 1982, at D21, col. 1.

12. The ABA *Criminal Justice Mental Health Standards* provide: "Statutes which supplant or supplement the verdict of not guilty by reason of mental nonresponsibility [insanity] with a verdict of guilty but mentally ill should not be enacted." ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-6.10(b) [hereinafter cited as MENTAL HEALTH STANDARDS, 7-x.y]. The ABA House of Delegates formally adopted the *Mental Health Standards* as chapter seven of the ABA STANDARDS FOR CRIMINAL JUSTICE (2d ed. 1980) on August 7, 1984. Nevertheless, when considering each chapter of the *ABA Standards for Criminal Justice*, the House of Delegates votes only upon the black letter standards. Therefore, the commentary accompanying the *Mental Health Standards* does not represent ABA policy; its purpose is to assist practitioners by explaining the *Mental Health Standards*, underlying legal and mental health rationales. All citations to the commentary are to the August 1984 edition of the *Mental Health Standards* submitted to the House of Delegates. Some minor changes should be expected in the final commentary, which will appear in the *ABA Standards for Criminal Justice*, because the Standing Committee on Association Standards for Criminal Justice is presently updating the commentary.

13. American Psychiatric Association Statement on the Insanity Defense 9-10 (Dec. 1982) [hereinafter cited as APA Statement].

14. NATIONAL MENTAL HEALTH ASSOCIATION, MYTHS & REALITIES: A REPORT OF THE NATIONAL COMMISSION ON THE INSANITY DEFENSE 32-34 (Mar. 1983) (copy on file at the *George Washington Law Review*). On the other hand, of the six state psychological associations that have reported a position on the insanity defense, three favor the guilty but mentally ill verdict. Melton, *Organized Psychology and Legal Poli-*

mended against its adoption. This Article attempts to justify the ABA's recommendation. Part I summarizes the concerns that gave rise to the guilty but mentally ill verdict and suggests that those concerns are exaggerated. It concludes that the insanity defense has not been significantly abused, nor has it led, in most cases, to inappropriate release following acquittal. Acknowledging, nonetheless, some need both to reduce the potential for mistaken outcomes and to provide greater protection to the public, Part II investigates the guilty but mentally ill verdict on its own terms, by examining the available data addressing its implementation. Although equivocal, the results of this research strongly suggest that the new verdict fails to achieve its stated goals. Part III argues that, regardless of its practical success, the guilty but mentally ill verdict should not be adopted because it introduces a foreign and meaningless element into the criminal justice system. Finally, Part IV demonstrates that the verdict is unnecessary, even assuming that the current system requires reform and that the guilty but mentally ill verdict effectively accomplishes its goals in a manner compatible with the theoretical foundation of the criminal law. Redefining the insanity defense, carefully structuring the commitment process for insanity acquittees, and ensuring treatment for those found guilty or not guilty by reason of insanity would more directly and effectively address the concerns underlying the current attraction toward the guilty but mentally ill verdict.

I. The Current System: Is It Dramatically Flawed?

Dissatisfaction with the insanity defense has provided the impetus for the guilty but mentally ill verdict.¹⁵ In almost every state that adopted the verdict prior to January 1, 1985, vociferous public reaction to one or two incidents — either a controversial insanity acquittal or the commission of a violent act by someone recently released from a hospital for the insane — apparently triggered the legislation. In Michigan, the first state to pass guilty but mentally ill legislation, a murder and a rape committed by two insanity acquittees within two years of their discharge as “safe and sane” sparked the statute's passage.¹⁶ Similarly, public outcry over vio-

cymaking: Involvement in the Post-Hinckley Debate, in PROFESSIONAL PSYCHOLOGY: RESEARCH AND PRACTICE 2 (1983).

15. See *supra* note 8.

16. Comment, *Guilty But Mentally Ill: An Historical and Constitutional Analysis*, 53 U. DET. J. URB. L. 471, 472 (1976). The Michigan Supreme Court's decision in *People v. McQuillan*, 392 Mich. 511, 221 N.W.2d 569 (1974) was perhaps the penultimate catalyst of Michigan's guilty but mentally ill legislation. *McQuillan* required that the state release within 60 days any insanity acquittee confined at the time of the decision who did not meet the criteria for civil commitment. Within a year, 79% of

lent crimes committed by former insanity acquittees spurred the enactment of the guilty but mentally ill alternative in both Illinois¹⁷ and Georgia.¹⁸ In Indiana, several notorious cases involving assertion of the insanity defense focused public and legislative attention on the guilty but mentally ill verdict as a way to prevent defendants from evading conviction.¹⁹ Finally, John Hinckley's acquittal galvanized support for guilty but mentally ill legislation in several states.²⁰

Although the moral nature of the insanity inquiry makes any conclusion about the "correctness" of a given insanity verdict problematic,²¹ some individuals probably are wrongly found not guilty by reason of insanity. And it is indisputable that some insanity acquittees commit violent crimes once released. But recent data suggest that "inappropriate" insanity acquittals and dis-

the state's 270 acquittees had been released, including the individuals mentioned in the text. Blunt & Stock, *Guilty But Mentally Ill: The Michigan Experience*, Presentation at American Association of Psychiatry & Law, Portland, Oregon 5 (Oct. 28, 1983) (copy on file at the *George Washington Law Review*). One state legislator declared that Michigan's guilty but mentally ill law was designed "to circumvent the *McQuillan* decision." *Mental Health: Guilty But Mentally Ill: Hearings on H.B. 4363*, 78th Leg. (1975) (statement of Rep. Rosenbaum).

17. Comment, *Punishment Versus Treatment of the Guilty But Mentally Ill*, 74 J. CRIM. L. & CRIMINOLOGY 428, 435 (1983).

18. According to Dr. Ilhan Ermulu, a precipitating factor behind Georgia's guilty but mentally ill legislation was a multiple murder committed by an insanity acquittee shortly after his release. NATIONAL CENTER FOR STATE COURTS, THE "GUILTY BUT MENTALLY ILL" PLEA AND VERDICT: AN EMPIRICAL STUDY: FINAL REPORT SUBMITTED TO THE NATIONAL INSTITUTE OF JUSTICE, U.S. DEPARTMENT OF JUSTICE 2-3 (working draft Nov. 15, 1984) (copy on file at the *George Washington Law Review*). This report comprises three sections: a final report; descriptive data; and a telephone survey. References hereinafter will cite the appropriate section.). This report is an invaluable source of data on the guilty but mentally ill verdict.

19. Apparently the controversy engendered by the insanity plea in *Judy v. State*, 416 N.E.2d 95 (Ind. 1981), directly provoked the passage of Indiana's guilty but mentally ill statute. See Note, *Indiana's Guilty But Mentally Ill Statute: Blueprint to Beguile the Jury*, 57 IND. L.J. 639, 639 (1982). Ironically, the defendant, charged with the murder of a woman and her three small children, was ultimately convicted and executed. *Id.* at 639 n.4. *State v. Kiritsis*, 269 Ind. 550, 381 N.E.2d 1245 (1978), which resulted in the insanity acquittal of a defendant who kidnapped a business executive and held him at gunpoint before television cameras, may also have played a role. Note, *supra*, at 639 n.2, 640 n.6.

20. According to a survey conducted by the National Center for State Courts, Delaware, Pennsylvania, South Dakota, and Utah adopted the guilty but mentally ill verdict partly because of outrage over the Hinckley verdict. NATIONAL CENTER FOR STATE COURTS (Final Report), *supra* note 18, at 2; NATIONAL CENTER FOR STATE COURTS, STATE PROFILE (SOUTH DAKOTA) 2 (1984); NATIONAL CENTER FOR STATE COURTS, STATE PROFILE (UTAH) 3 (1984) (copy on file at the *George Washington Law Review*).

21. See generally A. GOLDSTEIN, *THE INSANITY DEFENSE* 1-22 (1967). Professor Goldstein's 1967 conclusions remain valid today:

The insanity defense is caught up in some of the most controversial ideological currents of our time. The direction it takes depends, essentially, upon the place in social control one assigns to the criminal law as it competes with other methods of regulation by the state, to each of the themes underlying the criminal law, to the confidence one has that the mentally ill offender can be identified and treated, and the importance one attaches to the idea of blame. However difficult it has been in the past to find one's way among considerations of this sort, events are conspiring to make the problem even more complex.

Id. at 20.

charges are both infrequent and, for the most part, unavoidable. Moreover, although the incidents that trigger public and legislative support for guilty but mentally ill legislation are deplorable, they are not so common or egregious as to warrant creation of an entirely novel verdict or, for that matter, any other major restructuring of the system.

Even in states with expansive versions of the insanity test and no guilty but mentally ill verdict, significantly less than one percent of all felony cases result in insanity acquittals. For instance, in 1980, when California used the American Law Institute's relatively unrestrictive insanity formulation, the state experienced only 259 insanity acquittals, representing .6% of all felony arrests for that year.²² In 1979, two years before Illinois enacted its guilty but mentally ill statute, only an estimated fifty defendants — .23% of all felony arrests — were acquitted under that state's version of the ALI's insanity test.²³ Nationwide statistics indicate that in 1978, when only one state had passed guilty but mentally ill legislation, the 1,625 defendants found not guilty by reason of insanity accounted for only 8.1% of the 19,171 admissions to mental hospitals in the United States,²⁴ an average of less than thirty-three acquittals for each state.²⁵

Other research suggests that most of these acquittals were "appropriate." In many states, over sixty percent of all insanity acquittals result from plea bargaining or a quasi-plea-bargain arrangement, rather than a full-fledged trial.²⁶ In these cases, the prosecution stipulates that the defendant should be hospitalized, rather than convicted and imprisoned. Thus, only a small number of defendants have an opportunity to somehow "hoodwink" a trial

22. Turner & Ornstein, *Distinguishing the Wicked from the Mentally Ill*, 3 CAL. LAW. 40, 42 (Mar. 1983).

23. Memorandum from Donald M. McIntyre, Associate Executive Director of the American Bar Foundation, to Richard Lynch, Executive Director, ABA Standing Committee on Criminal Justice Standard 3 (Aug. 3, 1982) [hereinafter cited as McIntyre Memorandum].

24. Steadman & Braff, *Defendants Not Guilty By Reason of Insanity*, in MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE 109, 110 (H. Steadman & J. Monahan eds. 1983).

25. In 1978, there were approximately 2,284,495 felony arrests in the United States. FBI UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 185 (1979).

26. From 1981 to 1983, 85 (61%) of Georgia's 138 insanity acquittals were by insanity plea. NATIONAL CENTER FOR STATE COURTS (Descriptive Data), *supra* note 18, at 7. In Oregon, between 1978 and 1980, 79% percent of all insanity acquittals resulted from pretrial agreements between prosecution and defense; 18% resulted from bench trials, and only three percent resulted from jury trials. Rogers & Bloom, *Characteristics of Persons Committed to Oregon's Psychiatric Security Review Board*, 10 BULL. AM. ACAD. PSYCHIATRY & L. 155, 158 (1982). In Michigan, 90% of the defendants found not guilty by reason of insanity received non-jury trials, often through a quasi-plea-bargaining process. Smith & Hall, *Evaluating Michigan's Guilty But Mentally Ill Verdict: An Empirical Study*, 16 U. MICH. J.L. REF. 77, 94 (1982).

jury or judge in the first place. And of those pleas which are contested, the insanity defense tends to prevail in less than half the cases,²⁷ suggesting that the good sense of the judge or jury ferrets out most spurious insanity claims.

Perhaps more importantly, defendants acquitted by reason of insanity rarely obtain quick release, and when they are released it is usually appropriate, given the limited ability to predict future behavior.²⁸ Virtually all states automatically confine insanity acquittees for an initial evaluation period of up to ninety days,²⁹ and they may continue to detain the acquittees until they are no longer mentally ill or dangerous.³⁰ In most states, the statutory criteria for release are very restrictive.³¹ As a result, persons acquitted by reason of insanity in these states spend, on average, almost as much time in confinement as do individuals convicted of

27. The overall success rate is approximately 25%. See, e.g., Steadman & Braff, *supra* note 24, at 118 (between 1969 and 1976, Hawaii acquitted approximately 19% of those who pleaded insanity); Steadman, Monahan, Hartstone, Davis & Robbins, *Mentally Disordered Offenders: A National Survey of Patients and Facilities*, 6 L. & HUM. BEHAV. 31, 36 (1982) (Erie County, New York, acquitted roughly 25% of those who pleaded insanity); NATIONAL MENTAL HEALTH ASSOCIATION, *supra* note 14, at 15 (acquittal rate for New Jersey in 1982 was approximately 30%).

The success rate at trial is probably higher, however. If, in a group of 200, 50 are acquitted by reason of insanity, as many as 20 (40%) and as few as 5 (10%) will be acquitted at a trial, with the number acquitted at trial in the average jurisdiction probably falling closer to the latter figure. See *supra* note 26. Of the 150 who are convicted, approximately 15 will be found guilty through the trial process. See also Newman, *Reshape the Deal*, 9 TRIAL 11, 11 (May/June 1973) (ninety percent of all felony convictions are obtained through plea bargaining). As a result, the success rate for insanity pleas which go to trial is probably a little less than 50% in most jurisdictions.

28. See generally Slobogin, *Dangerousness and Expertise*, 133 U. PA. L. REV. 97, 110-19 (1984) (describing studies assessing the validity of clinical predictions of dangerousness).

29. See, e.g., COLO. REV. STAT. § 16-8-105(4) (1978); D.C. CODE ANN. § 24-301(d)(1) (1973) (upon motion of Attorney General); GA. CODE ANN. § 17-7-131 (Michie 1985); KAN. STAT. ANN. § 22-3428(2) (Supp. 1981); ME. REV. STAT. ANN. tit. 15, § 103 (1981); MO. ANN. STAT. § 552.040 (I) (Vernon Supp. 1985); N.Y. CRIM. PROC. LAW § 330.20(4) (McKinney 1983); V.I. CODE ANN. tit. 5, § 3637(a) (1967); WIS. STAT. ANN. § 971.17(1) (West 1985).

30. Morris, *Acquittal by Reason of Insanity: Developments in the Law*, in MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE 70-72 (H. Steadman & J. Monahan eds. 1983).

31. As of 1976, 18 states explicitly applied more restrictive release criteria to insanity acquittees than to civilly committed patients. See German & Singer, *Punishing the Not Guilty: Hospitalization of Persons Acquitted by Reason of Insanity*, 29 RUTGERS L. REV. 1011, 1080-81 (Tables) (1976). In other states the release criteria for criminal commitment resemble those for civil commitment, but their manner of implementation is significantly more restrictive. See Morris, *supra* note 30, at 72-75 (describing additional procedures and burdens of criminal commitment); see also German & Singer, *supra*, at 1059-74 (detailing differences in the authority making the discharge decision, in burdens of proof, in periodic review provisions, and in conditional release practices); Note, *Commitment Following an Insanity Acquittal*, 94 HARV. L. REV. 605, 606 (1981) (separate procedures for civil and criminal commitment exist in many states, indicating that those states view insanity acquittees differently from candidates for civil commitment). Civil commitment is the process by which the state involuntarily hospitalizes mentally ill individuals who have not been charged with crime but who are considered dangerous to themselves or others. See, e.g., *Lesard v. Schmidt*, 349 F. Supp. 1078, 1084-89 (E.D. Wis. 1972), *vacated and remanded for a more specific order*, 414 U.S. 473 (1974), *order on remand*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded on other grounds*, 421 U.S. 957 (1975).

similar crimes.³²

In a few states, recent judicial decisions and statutes have relaxed the release criteria for insanity acquittees,³³ finding no rational basis for distinguishing between insanity acquittees and persons subjected to civil commitment.³⁴ But even in these jurisdictions, a significant proportion of insanity acquittees remain confined for prolonged periods of time.³⁵ As Professors Katz and

32. One study conducted in New York found no appreciable difference in duration of confinement between matched acquittees and felons when the acquittees were hospitalized in a Department of Corrections facility. Pantle, Pasewark & Steadman, *Comparing institutionalization periods and subsequent arrests of insanity acquittees and convicted felons*, 8 J. PSYCHIATRY & L. 305, 309-12 (1980) [hereinafter cited as Pantle, Pasewark & Steadman, *Subsequent Arrests*]. Another found that acquittees were released 10 months earlier than felons after jurisdiction over the acquittees was transferred to the Department of Mental Health. Pasewark, Pantle & Steadman, *Detention and Rearrest Rates of Persons Found Not Guilty by Reason of Insanity and Convicted Felons*, 139 AM. J. PSYCHIATRY 892, 893-94 (1982) [hereinafter cited as Pasewark, Pantle & Steadman, *Rearrest Rates*]. In Connecticut, which limits hospitalization of acquittees to the maximum prison term prescribed for the offense, a study indicated that acquittees were released an average of 19 months earlier than the felons with whom they were paired. Phillips & Pasewark, *Insanity Plea in Connecticut*, 8 BULL. AM. ACAD. PSYCHIATRY & L. 335, 340 (1980).

In contrast, an Arizona study found no significant difference in length of confinement for felons and acquittees between 1955 and 1978. Kahn & Raifman, *Hospitalization v. Imprisonment and the Insanity Plea*, 8 CRIM. JUST. & BEHAV. 483, 488 (1981). As the authors admit, however, the time period of the study encompassed changes in the philosophy, treatment methods, and practices of mental hospitals and probably of penal institutions. *Id.* at 489.

Finally, a Washington, D.C., study found that acquittee confinement (1,950 days) far exceeded inmate confinement (1,050 days), although no attempt to match the two groups was made. Dobbs & Henneberry, Special Report on the Commitment (St. Elizabeth Hospital, Washington, D.C., June 1983) (reported in Steadman, *Empirical Research on the Insanity Defense*, 477 ANNALS 58, 64 (1985) [hereinafter cited as *Empirical Research*]).

None of these studies considered the pretrial confinement of insanity acquittees; yet most spend many months hospitalized as incompetent to stand trial before they are found not guilty by reason of insanity. In at least one state, this period of confinement averages 38.4 months. McIntyre Memorandum, *supra* note 23, at 7.

33. See, e.g., *Benham v. Edwards*, 501 F. Supp. 1050, 1056-59 (N.D. Ga. 1980); *Wilson v. State*, 259 Ind. 375, 383, 287 N.E.2d 875, 880 (1972); *People v. McQuillan*, 392 Mich. 511, 546-47, 221 N.W.2d 569, 586 (1974); *State v. Krol*, 87 N.J. 236, 249, 344 A.2d 289, 296 (1975).

34. See MENTAL HEALTH STANDARDS, *supra* note 12, 7-7.4, commentary at 413-18 (adopting the view that insanity acquittees should be subjected to general commitment procedures unless the acquittees differ from the characteristic civil committee). But see *infra* text accompanying notes 140-45.

35. A study of the five-year period after the Michigan Supreme Court decided *People v. McQuillan*, 392 Mich. 511, 221 N.W.2d 569 (1974), which equated the standards for criminal and civil commitment, showed that of the 220 defendants found not guilty by reason of insanity, 121 were released as noncommitable. Almost half of the remaining 99 acquittees were released within the next five years, after an average confinement of 9.48 months. However, 55 (25%) of those acquitted by reason of insanity were confined over five years. Criss & Racine, *Impact of Change in Legal Standard for Those Adjudicated Not Guilty by Reason of Insanity, 1975-1979*, 8 BULL. AM.

Goldstein contend,³⁶ the insanity defense is as much a method for restraining those perceived to be dangerously mentally ill as it is a means for determining criminal responsibility.

Admittedly, a sizeable proportion of released acquittees (from six to twenty percent depending upon the study)³⁷ are rearrested for crimes against persons. However, in absolute terms, this is not a large group. For example, assuming release of the 1,625 insanity acquittees admitted to mental hospitals in 1978,³⁸ a twenty percent

ACAD. PSYCHIATRY & L. 261, 266-67 (1981). The difference in mean length of stay before and after *McQuillan* was approximately seven months. *Id.* at 267.

In New Jersey, liberalization of criminal commitment standards caused a decidedly greater change in confinement times for acquittees. In *State v. Krol*, 87 N.J. 236, 249, 344 A.2d 289, 296 (1975), the New Jersey Supreme Court equated criminal and civil commitment in most important respects. Post-*Krol* acquittees in Essex County were confined, on average, for 6.4 months — approximately a 20-month decrease in confinement time relative to pre-*Krol* acquittees. Singer, *Insanity Acquittal in the Seventies: Observations and Empirical Analysis of One Jurisdiction*, 2 MENTAL DISABILITY L. REP. 406, 407 (1978). However, Singer admitted that, given the nature of their offenses, “many of the [46] defendants [studied] would not have received custodial sentences if convicted.” *Id.* Thus, conviction would not have accorded the public any greater protection in those instances. Most importantly, six persons (all acquitted of murder) were not released during the time period of the study; all were members of the 28 person post-*Krol* group. *Id.* at 408 n.11. If the eventual length of confinement of those six acquittees conformed to the 33.4 month confinement of previous murder acquittees in New Jersey, the post-*Krol* group’s average confinement would easily have more than doubled, making the difference in confinement times of pre- and post-*Krol* groups similar to that found in Michigan between pre- and post-*McQuillan* groups.

36. Professors Goldstein and Katz state:

Though unpleasant to acknowledge, the insanity defense is an expression of uneasiness, conscious or unconscious, either about the adequacy of such material elements of an offense as “*mens rea*” and “voluntariness,” as bases for singling out those who ought to be held criminally responsible, or it is an expression of concern about the adequacy of civil commitment procedures to single out from among the “not guilty by reasons of insanity” those who are mentally ill and in need of restraint.

Goldstein & Katz, *Abolish the “Insanity Defense” — Why Not?* 72 YALE L.J. 853, 868 (1963).

37. Two New York studies, a Connecticut study, and a Missouri study address this issue. In the first New York study, at most, 19% of the released acquittees were arrested for crimes against persons within one to ten years after release. Pasewark, Pantle & Steadman, *The Insanity Plea in New York State, 1965-1976*, 51 N.Y. ST. B.J. 186, 221-22 (1979). This figure may be inflated because the data in the study permit computation only of the ratio between the number of post-discharge arrests for crimes against persons (17) and the number of discharged acquittees (107); because many of the discharged acquittees were arrested more than once (although not necessarily for crimes against persons), *id.* at 221, the number arrested for violent crimes may be considerably fewer than 17. In the second New York study, 15% of the released acquittees were rearrested for crimes against persons over a three to five year period. Pasewark, Pantle & Steadman, *Rearrest Rates*, supra note 32, at 895. In the Connecticut study, 20% of the released acquittees were rearrested during a seven to nine year period. Phillips & Pasewark, supra note 32, at 341. Finally, the Missouri study found, over a three year period, a four percent rearrest rate for assaultive crime (2 out of 44). Morrow & Peterson, *Follow-up of Discharged Offenders — “Not Guilty by Reason of Insanity” and “Criminal Sexual Psychopaths,”* 57 J. CRIM. L., CRIMINOLOGY & POLICE SCIENCE 31, 33 (1966).

38. It must be noted, however, that these arrest rates probably underestimate recidivism to a significant extent, given the number of unreported and unsolved crimes. See Slobogin, supra note 28, at 116-17. This distortion is not taken into account in the text because the 20% figure used there is treated as an annual figure, whereas the rates reported in the above studies represent the percentage of the sample arrested over multiple-year periods ranging from three to ten years. It is assumed that inter-

rate of recidivism would yield perhaps 325 rearrests for violent crimes annually, or an average of 6.5 per state per year.

Moreover, those discharges that result in further crime are largely unavoidable in an enlightened society. Given the well-known difficulty of accurately predicting long-term dangerousness — such predictions are correct less than fifty percent of the time³⁹ — one is tempted to recommend prolonged confinement of *all* acquittees. But outweighing any resulting increase in public safety is the indisputable fact that this scheme would inappropriately deprive large numbers of individuals of their liberty. Even assuming an unrealistic fifty percent base rate for violence over the *lifetime* of the released acquittee population, automatic long-term confinement would lead to the needless and unjustifiable incarceration of one out of two acquittees. In light of this concern, the discharge decisions made by hospitals and courts should not be too harshly criticized.

Data indicating similar recidivism rates for discharged acquittees and released felons reinforce this conclusion. Three studies have compared the recidivism rate of discharged insanity acquittees with that of released felons charged with similar offenses. Two of the studies indicate that, as groups, acquittees have slightly lower recidivism rates than do felons.⁴⁰ The third study shows the recidivism rates between the two groups to be about even.⁴¹ Thus, the release of acquittees through discharge decisions is proportionately no more threatening to the public than is the release of felons on parole or at the termination of their sentences. In absolute terms, of course, the release of acquittees is considerably less inimical to public safety.

Put another way, although recidivism by released acquittees poses significant concerns, discharge decisions involving acquittees are no more irresponsible than are similar decisions made by sentencing judges or parole boards. Further, unless we are willing to authorize lifelong confinement, a certain amount of recidivism is

preting the data in this way “cancels out” the inadequacy of relying on arrest rates to compute recidivism, although this assumption cannot be proven. See *supra* text accompanying note 24.

39. See generally Monahan, *The Prediction of Violent Behavior: Toward a Second Generation of Theory and Policy*, 141 AM. J. PSYCHIATRY 10, 11 (1984) (modifying his earlier assessment by concluding that the ceiling on the accuracy of clinical predictions of violent behavior may be closer to 50%); see also J. MONAHAN, *THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR* 47-49 (1982) (concluding that over a several year period, “psychiatrists and psychologists are accurate in no more than one out of three predictions of violent behavior . . . [for] institutionalized populations that had . . . committed violence in the past . . . [and] were diagnosed as mentally ill”) (emphasis in original).

40. Pantle, Pasewark & Steadman, *Subsequent Arrests*, *supra* note 32, at 312-13; Pasewark, Pantle & Steadman, *Rearrest Rates*, *supra* note 32, at 895.

41. Phillips & Pasewark, *supra* note 32, at 340-42.

inevitable, whether the individuals concerned are felons or acquittees.

The research showing similar recidivism rates between matched acquittees and felons also confirms the more general finding that there is only a very weak correlation between severe mental illness and violent behavior; the most accurate predictor of violence is not diagnosis but the number and nature of prior violent acts.⁴² This conclusion directly refutes the public's apparent perception that the typical released insanity acquittee is "abnormally" dangerous.⁴³ dangerousness does not necessarily have anything to do with "insanity" per se.

To the extent that public and legislative sentiment favoring the guilty but mentally ill verdict is based on the belief that defendants frequently abuse the insanity defense, it is unfounded. To the extent that such sentiment stems from the impression that insanity acquittees are extraordinarily violent individuals, let loose upon acquittal or at the whim of incompetent hospital staff, it blinks at reality. Unfortunately, one or two well-publicized incidents can inaccurately, but effectively, stereotype all insanity acquittees,⁴⁴ and unnecessarily precipitate the passage of guilty but

42. For the best description of the literature on predicting violent behavior by mentally ill offenders, see Monahan & Steadman, *Crime and Mental Disorder: An Epidemiological Approach*, in CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 145 (1983). The authors conclude:

The overarching impression that remains after reviewing the vast array of existing epidemiological data on crime and mental disorder is that, when one makes the appropriate controls for demographic and anamnestic factors (e.g. prior patterns of institutionalization), rates of true and treated criminal behavior vary independently of rates of true and treated mental disorder.

Id. at 181. See also Coccozza, Melick & Steadman, *Trends in Violent Crime Among Ex-Mental Patients*, 16 CRIMINOLOGY 317 (1978).

One study, based on self-reports of violence, suggests that while ex-offenders are considerably more dangerous than either the general population or the mentally ill, the mentally ill are no more dangerous than a random sample taken from the general population. Steadman & Felson, *Self-Reports of Violence*, 22 CRIMINOLOGY 321, 336 (1984).

43. A study conducted in New York asked 413 randomly selected citizens to name offenders they believed to be "criminally insane." Of those offenders named by more than one interviewee, none had been found either insane or incompetent to stand trial. In fact, all had been convicted of murder, kidnapping, or bombings. Steadman & Coccozza, *Selective Reporting and the Public's Misconceptions of the Criminally Insane*, 41 PUB. OPINION Q. 523, 525-29 (1977-1978). The public seems quick to attach the term "insanity" to dangerous and notorious individuals, whether or not they actually plead the defense or are acquitted by reason of insanity.

44. Professors Saks and Kidd have described the pervasiveness of the "availability" as a heuristic, which posits that "people are likely to judge the probability or frequency of an event based on the ease with which they can recall instances or occurrences of the event." Saks & Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 LAW & SOC'Y REV. 123, 137 (1980-1981).

As the text suggests, availability seems to have influenced the insanity debate and the genesis of the guilty but mentally ill verdict. A study conducted in Wyoming provides concrete evidence of this conclusion. Between 1971 and 1972, 47% of all felony cases in that state involved an insanity plea; the plea was successful in only one of the 102 instances it was used. Yet, on average, college students in Wyoming estimated that 37% of all criminal cases in the state involved an insanity plea and that 44% of these were successful. Wyoming legislators gave estimates of 20 and 44%, respec-

mentally ill legislation.

Those who would drastically reform the current system must show more to establish the need for a major overhaul. Admittedly, the insanity defense and provisions relating to the disposition of insanity acquittees may require some fine-tuning. But the creation of an entirely new verdict is an overreaction to what in reality are minor, although intractable, problems associated with determining criminal responsibility and the likelihood of future violence.

II. The Impact of the Guilty But Mentally Ill Verdict

Even if flaws in the administration of the insanity defense are minor, guilty but mentally ill legislation is not necessarily superfluous. Proponents of the legislation can still argue that the guilty but mentally ill verdict provides an effective method of addressing the problems that do afflict the current system. According to its proponents, the verdict will reduce, if not eliminate, inappropriate insanity acquittals, and prevent, or at least postpone, the further commission of violent acts by mentally ill individuals.⁴⁵ Additionally, the verdict purportedly offers two other advantages over the current system: by providing for hospitalization of those found guilty but mentally ill, it assures more effective treatment for mentally ill offenders,⁴⁶ and by discouraging the insanity plea, it minimizes the time-consuming expert battles that plague litigation of the insanity issue.⁴⁷ If the verdict can accomplish these objectives without creating new problems, then perhaps it should be adopted despite the absence of any grave deficiencies in the current system.

One might also support the verdict for its symbolic value as well. Even if the public's negative attitude toward the insanity defense stems from an exaggerated perception of the defense's deficiencies, one cannot deny that the perception exists. Thus, the guilty but mentally ill verdict, if it works, might do much to remove antipathy toward the insanity defense.

The burden here is to demonstrate that the verdict does not effectively achieve any of the practical objectives advanced by its proponents, and that even if it did, the verdict's associated costs seriously detract from any symbolic benefit it may offer. Meeting this burden will in large part require examining the available

tively. Pasewark, Seidenzahl & Pantle, *Opinions About the Insanity Plea*, 8 J. FORENSIC PSYCHOLOGY 63, 66 (1981).

45. See *supra* note 8.

46. See *infra* text accompanying notes 80-81.

47. See *infra* note 100.

research on the verdict's impact, but to some extent will also involve exposing the inadequacy of the verdict on commonsense grounds.

A. *The Effect of the Guilty But Mentally Ill Verdict on Insanity Acquittals*

Proponents of guilty but mentally ill legislation seek to reduce the number of insanity acquittals by providing the jury with a compromise verdict which will encourage conviction in borderline cases.⁴⁸ But the available data suggest that the guilty but mentally ill option has failed in its intended effect; the verdict has had little or no impact on the insanity acquittal rate. Moreover, there is reason to believe that any decrease in the acquittal rate which occurs under guilty but mentally ill legislation results as much from the improper conviction of those who should have been found insane as from the prevention of improper insanity acquittals.

Data concerning insanity acquittals are available from four jurisdictions that use the guilty but mentally ill verdict: Michigan, Illinois, Alaska, and Georgia.⁴⁹ While these data must be evaluated cautiously, they strongly suggest that the effect of the guilty but mentally ill verdict on the acquittal rate is minimal.⁵⁰

Michigan has been the most widely studied jurisdiction because its legislation has been in effect longer than any other state's and its centralized forensic system facilitates collection of the relevant data. In the four and one half years prior to the 1975 passage of Michigan's guilty but mentally ill verdict, 237 persons were found not guilty by reason of insanity, an average of roughly fifty acquittals per year.⁵¹ For the seven years following the verdict's passage, the state reported roughly fifty-five insanity acquittals each year.⁵² Expressed as a percentage of total arrests, the annual ac-

48. Several commentators have suggested that jurors actually want such a compromise verdict. In the most widely cited study of jury reaction to the insanity defense, for instance, Professor Simon found:

Many of the jurors [studied] felt constrained by the verdict limitations placed upon them by the court. They would like to have a way of easing the choice between acquitting the defendant on grounds of insanity and finding him guilty. The former designation goes further than they want to go in distinguishing the defendant from the ordinary criminal, and the latter allows for no distinction. In many instances, the jury would have liked to declare the defendant guilty, but insane. That kind of verdict would permit the jurors to condemn the defendant's behavior . . . [and fulfill] their desire to commit the defendant to an institution that both punished and treated.

R. SIMON, *THE JURY AND THE DEFENSE OF INSANITY* 178 (1967).

49. 1982 Alaska Sess. Laws ch. 43, § 22 (codified at ALASKA STAT. § 12.47.040 (1984)); 1984 Ga. Laws 22 (codified at GA. CODE ANN. § 17-7-131 (Michie 1985)); 1981 Ill. Laws 82-553 (codified at ILL. REV. STAT. ch. 38, § 115-2(b) (1981)); 1975 Mich. Pub. Acts 180 (codified at MICH. COMP. LAWS § 763.36 (1982)).

50. Also of interest is an informal study conducted by Steadman of six states with guilty but mentally ill legislation, finding a "negligible change in the volume of insanity acquittals, after the introduction of the guilty but mentally ill plea." Steadman, *Empirical Research*, *supra* note 32, at 68.

51. Smith & Hall, *supra* note 26, at 107 (Table A).

52. Blunt & Stock, *supra* note 16, at 13 (Table 2).

quittal rate has *increased* slightly since passage of Michigan's guilty but mentally ill statute.⁵³ Superficially, this outcome suggests that the guilty but mentally ill verdict has failed miserably in its attempt to reduce insanity acquittals.

Unfortunately, conclusions about the verdict's impact on insanity acquittals may be confounded by three events, any one of which could have produced the observed increase in the number of insanity acquittals in Michigan after 1975. First, the Michigan Supreme Court's 1974 decision in *People v. McQuillan*⁵⁴ loosened the release standards for criminal commitment by equating them with the criteria for civil commitment. Then, two statutory provisions, passed as part of the same package that contained the guilty but mentally ill verdict, liberalized the definition of insanity⁵⁵ and authorized, at state expense, a psychiatric evaluation of any indigent defendant asserting an insanity defense.⁵⁶ All of these legal changes may have encouraged insanity pleas, which rose precipitously after 1975.⁵⁷ The increase in insanity pleas may in turn have increased the number of insanity acquittals.

It is quite possible, however, that the guilty but mentally ill legislation has itself caused the increase in acquittals by increasing the number of insanity pleas. Under Michigan's legislation, a defendant must plead insanity to be considered for the guilty but mentally ill verdict. Thus, defendants seeking a verdict of guilty but mentally ill — perhaps believing that they are more likely either to receive treatment or to avoid the stigma of outright conviction⁵⁸ — may instead be found insane.

Data from Illinois, a state which also requires an insanity plea as a predicate to a verdict of guilty but mentally ill, reinforce this interpretation of Michigan's experience. According to the National Center for State Courts, the number of acquittals in Illinois also increased after passage of the guilty but mentally ill statute, from 124 acquittals during the thirty-three months before enactment to 154 during a comparable period after the statute's effective date.⁵⁹ Yet unlike Michigan, no confounding legal variables existed in Illinois.

53. Smith & Hall, *supra* note 26, at 93.

54. 392 Mich. 511, 221 N.W.2d 569 (1974).

55. MICH. COMP. LAWS § 768.21(a) (1982) (effective 1975). The insanity formulation changed from a combination of the *M'Naghten* test and the "irresistible impulse" test to the American Law Institute's Model Penal Code formulation. See *infra* text accompanying notes 116-22.

56. MICH. COMP. LAWS § 768.20(a)(2) (1982) (effective 1975).

57. According to Doctors Blunt and Stock, the number of insanity pleas entered increased steadily between 1976 and 1980, decreasing only slightly in 1981 and 1982. Blunt & Stock, *supra* note 16, at 13 (Table 2).

58. See *infra* notes 96-97 and accompanying text.

59. NATIONAL CENTER FOR STATE COURTS (Final Report), *supra* note 18, at 37.

In contrast, data from two other jurisdictions using the guilty but mentally ill verdict appear to indicate that the verdict has reduced the frequency of insanity acquittals. Most dramatically, Alaska reports only one insanity acquittal since the passage of its guilty but mentally ill legislation in 1982.⁶⁰ Yet the same legislation that created the verdict also changed Alaska's test for insanity to the most restrictive in the country, and shifted the burden of proving insanity to the defendant.⁶¹ Furthermore, even before 1982, Alaska courts found very few individuals — only five or six per year — not guilty by reason of insanity.⁶²

Only in Georgia, the final state with relevant data, is there direct evidence of a reduction in insanity acquittals. Georgia's annual number of acquittals dropped from fifty-six to forty-two between 1981 and 1983.⁶³ The sole intervening legal change affecting mentally ill offenders was Georgia's guilty but mentally ill legislation, which went into effect on November 1, 1982.⁶⁴ Even here, however, the data appear ambiguous: because there were only forty insanity acquittals in 1982, the 1981 acquittal rate seems abnormally high.⁶⁵ Without data on pre-1980 acquittal rates, it is impossible to draw a definitive conclusion about Georgia's guilty but mentally ill law.

Granting, nonetheless, that the verdict may marginally reduce insanity acquittals in at least some states, it is unclear whether the verdict prevents only inappropriate acquittals, or instead leads juries to convict defendants who should be found insane under the prevailing standard. Again, absent an objective measure of "insanity," this question is difficult, if not impossible, to answer. It will not do to argue that, given the moral nature of the insanity inquiry, the factfinder is always right. Indeed, the danger of the guilty but mentally ill option lies in the possibility that it will tempt the judge or jury to allow extraneous factors, such as sympathy for the victim or concern over the brutal nature of the offense, to enter into their deliberations. In the typical insanity trial, the underlying sense that the defendant requires treatment

60. Telephone conversation between James Scoles, Alternative Care Coordinator, State of Alaska Department of Health and Social Services, and author (Dec. 10, 1984).

61. The new Alaska insanity statute provides that defendants are not guilty by reason of insanity when they are "unable, as a result of mental disease or defect, to appreciate the nature and quality of that conduct." ALASKA STAT. § 12.47.010 (Supp. 1984). This test eliminates an inquiry found even in the restrictive *M'Naghten* test, which focuses additionally on whether the accused knows that his or her act was wrong. See *infra* text accompanying note 121. The new statute also makes insanity an "affirmative defense." ALASKA STAT. § 12.47.010 (Supp. 1984).

62. Telephone conversation with James Scoles, *supra* note 60. Because Alaska reported no verdicts of guilty but mentally ill prior to 1984, *id.*, the change in the insanity defense, not the advent of the guilty but mentally ill verdict, most likely caused the lack of acquittals in 1982 and 1983. See also *infra* text accompanying notes 114-15 (disputing claim that changes in the insanity formulation have little or no effect on the factfinder's deliberations).

63. NATIONAL CENTER FOR STATE COURTS (Final Report), *supra* note 18, at 7.

64. GA. CODE ANN. § 17-7-131 (Michie 1985).

65. NATIONAL CENTER FOR STATE COURTS (Final Report), *supra* note 18, at 7.

may neutralize the jury's outrage at the offense committed,⁶⁶ thereby forcing the jury to think through the responsibility issue. In contrast, the wording of the guilty but mentally ill verdict may lead jurors and judges to assume that a "guilty" verdict will assure treatment for the defendant. Thus, the defendant's criminal responsibility may become less of a concern. This is particularly unfortunate because, as discussed below,⁶⁷ those found guilty but mentally ill are not guaranteed treatment.

The possibility of improper convictions due to the guilty but mentally ill verdict is heightened by the difficulty of clearly instructing jurors about the difference between the definition of "insanity" and the meaning of "mental illness" in the context of the guilty but mentally ill verdict. Michigan, for instance, uses the American Law Institute's formulation of the insanity test: 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 wrongfulness of his conduct or to conform his conduct to the requirements of the law."⁶⁸ In comparison, Michigan's guilty but mentally ill statute defines mental illness as "a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life."⁶⁹ Jurors who see little difference between these competing terminologies may choose the guilty but mentally ill verdict solely because it supposedly results in treatment or longer confinement. A person with a valid insanity defense may therefore be convicted.⁷⁰

66. See *supra* text accompanying note 48.

67. See *infra* notes 85-95 and accompanying text.

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

69. *Id.* § 330.1400a.

70. The suggestion that confused jurors may misapply the guilty but mentally ill test is not pure speculation. In *People v. Murphy*, 416 Mich. 453, 331 N.W.2d 152 (1982), the Michigan Supreme Court struck down a verdict of guilty but mentally ill and directed an insanity acquittal, noting that even the prosecution's expert agreed that the defendant was out of touch with reality and unable to control his behavior or appreciate the wrongfulness of his acts at the time of the offense. 416 Mich. at 462-63, 331 N.W.2d at 156. See also *Michigan v. Fultz*, 111 Mich. App. 587, 588, 314 N.W.2d 702, 703 (1981) (overturning a verdict of guilty but mentally ill in a bench trial because the only forensic report in evidence found the defendant insane).

Although its artificial nature diminishes its relevance to the debate on the guilty but mentally ill verdict, a study by Professors Roberts and Golding is also of interest here. Professors Roberts and Golding asked University of Illinois students to give their "verdict" in 16 different vignettes varied according to the degree of mental disorder, the bizarreness of the crime, and the planned nature of the crime. Ninety-five percent of the students found the psychotic defendant who committed an unplanned act insane when the guilty but mentally ill verdict was not an option, but only 18% of the students found the same individual insane when the verdict was available. Roberts, Golding & Fincham, *Decision-Making and the Insanity Defense: Implicit Theories of Responsibility* 58 (1984) (copy on file at the *George Washington Law Review*).

Finally, although the insufficient sample sizes bar definitive conclusions, the exper-

Unfortunately no definition of mental illness is likely to avoid this result and still meaningfully distinguish between non-insane, "disturbed" offenders and "normal" ones.⁷¹

The guilty but mentally ill verdict will not result in de facto abolition of the insanity defense, as some have predicted.⁷² The available research suggests that most defendants found guilty but mentally ill would have been found simply guilty in the absence of the novel verdict.⁷³ But precisely because any reduction in insanity acquittals which does occur may very well be accomplished at the expense of improperly convicting the truly insane, the worth of guilty but mentally ill legislation is suspect at best.

B. *The Verdict's Protection of the Public*

Adoption of the guilty but mentally ill option has been triggered as much by the specter of a "lunatic" on the loose as by the feeling that juries are erroneously finding guilty individuals insane.

rience in Georgia is worth describing. After Georgia passed its guilty but mentally ill statute the number of judicial insanity determinations decreased only slightly from 13 in 1981 to 12 in 1983, while insanity acquittals by juries decreased 66%, from six to two. NATIONAL CENTER FOR STATE COURTS (Final Report), *supra* note 18, at 7. Thus, in the one state where the guilty but mentally ill verdict apparently has affected acquittals, the reduced acquittal rate may have been achieved at some loss to the integrity of the system.

71. For example, Pennsylvania uses the *M'Naghten* test for insanity, 18 PA. CONS. STAT. § 314(d) (1983), but, like many guilty but mentally ill jurisdictions, uses a version of the ALI's test to define mental illness for purposes of the guilty but mentally ill verdict. *Id.* § 314(c)(1). A proposed jury instruction for the state distinguishes between insanity and mental illness as follows:

Legal insanity requires that the defendant be *incapable* either of knowing what he is doing or of judging its wrongfulness. Mental illness requires only that the defendant lack *substantial capacity* either to appreciate the wrongfulness of what he is doing or to *obey the law*. Loosely speaking, mental illness is the broader term.

Murphy, *Legally Insane or Guilty But Mentally Ill: A Suggested Jury Instruction*, 88 DICK. L. REV. 344, 349 (1984) (emphasis in original). If, as is probable, expert witnesses stress that the clinical definition of the word "know" includes emotional appreciation as well as cognitive awareness, jurors easily could find the difference between mental illness and insanity barely discernible. All things thus being equal, jurors may rather convict a person who commits a violent crime than find him not guilty by reason of insanity.

72. The American Psychiatric Association calls the guilty but mentally ill alternative "the abolitionist position in disguise," were it the only option besides guilt or innocence. APA Statement, *supra* note 13, at 9. Professor Slovenko likewise has suggested that the guilty but mentally ill verdict "may very well be successful" at "doing away" with the insanity defense. Slovenko, *Commentaries on Psychiatry and Law: "Guilty But Mentally Ill"*, 10 J. PSYCHIATRY & L. 541, 549 (1982).

73. Some researchers have attempted to test directly this proposition. In a study conducted in Michigan, Professors Smith and Hall compared the guilty but mentally ill group with the not guilty by reason of insanity and guilty groups to assess potential affinities among them. Smith & Hall, *supra* note 26, at 95-100. They tentatively concluded that "at least a majority of the [guilty but mentally ill] defendants would have been found guilty in the absence of the [guilty but mentally ill] statute." *Id.* at 100.

The National Center for State Courts surveyed officials in those states that have adopted the guilty but mentally ill verdict and found a majority (78%) of the 74 respondents believed that most offenders would have been found guilty, as opposed to insane, if the guilty but mentally ill alternative had not been available. NATIONAL CENTER FOR STATE COURTS (Telephone Survey), *supra* note 18, at 31; see also *infra* note 115.

Guilty but mentally ill legislation is supposed to minimize premature release of dangerous individuals by subjecting mentally ill offenders to sentences linked to their crimes rather than to institutional confinement predicated on continued mental illness and dangerousness.⁷⁴

The principal reason the guilty but mentally ill verdict fails at this goal should be apparent. Because the verdict displaces so few insanity acquittals in the first place,⁷⁵ it cannot add appreciably to the public's protection; only a few offenders will be imprisoned rather than hospitalized in "insane asylums" because of the verdict. Furthermore, the verdict cannot guarantee that the insanity acquittals it does prevent will involve for the most part recidivistic offenders.⁷⁶

Even if the guilty but mentally ill verdict were to imprison a significantly greater number of dangerous, mentally ill individuals than does the current system, it assures neither longer periods of confinement nor reduced recidivism. Indeed, as noted earlier, the average period of confinement is similar for insanity acquittees and felons tried for the same crime,⁷⁷ and the recidivism rates for these two groups are nearly identical.⁷⁸ Moreover, the perception that imprisonment results in prolonged incarceration is itself illusory: offenders convicted of serious crimes spend, on average, less than four years in prison for a first offense.⁷⁹

74. The latter standard is the one typically required for continued commitment of insanity acquittees. See *infra* notes 133-39 and accompanying text.

75. See *supra* text accompanying notes 49-65.

76. The factfinder is not — and should not be — asked to address dangerousness when deciding which verdict to return. See *infra* text accompanying notes 105-15. Admittedly, judges and juries may, in practice, find it difficult to avoid considering this factor; even so, they certainly cannot predict future violence more effectively than the professionals Professor Monahan found to be wrong in over fifty percent of their predictions. See *supra* note 39.

77. See *supra* note 32 and accompanying text. In states that equate criminal commitment standards and procedures with those used in civil commitment, see *supra* note 33 and accompanying text, the confinement of insanity acquittees may be appreciably shortened. To the extent this is so, the guilty but mentally ill verdict results in longer confinement for those mentally ill offenders who otherwise would have been found insane. See *supra* note 35. But see *infra* note 79.

78. See *supra* text accompanying notes 40-44.

79. In an 11-state survey of offenders released between 1979 and 1983, those convicted of serious crimes (murder, non-negligent manslaughter, robbery or aggravated assault) served an average of only 38 months and a median of as few as 33 months. Koppel, *Time Served in Prison*, Special Report, Bureau of Justice Statistics, U.S. Dep't of Justice 3 (Tables 1 & 2) (1984).

Those found guilty but mentally ill are likely to serve similar sentences. In all but one of the guilty but mentally ill jurisdictions that have general parole provisions, guilty but mentally ill offenders are entitled to parole under the same circumstances as offenders receiving guilty verdicts. See McGraw, Farthing-Capowich & Keilitz, *supra* note 6, at 136-41 (Table 3). To provide otherwise, as Alaska apparently does, ALASKA STAT. § 12.47.050(d) (1984), probably violates the equal protection clause. The only conceivable justification for differential treatment of the guilty but mentally

Because the guilty but mentally ill verdict will neither significantly decrease the number of insanity acquittees released nor significantly add to the confinement imposed on mentally ill offenders, it is unlikely to influence the public's perception of the criminal justice system or make the public feel less threatened.

C. *The Effect of the Verdict on Treatment of Mentally Ill Offenders*

Supporters tout the guilty but mentally ill verdict not only as a means of paring insanity acquittals and protecting the public, but also as a mechanism for providing psychiatric treatment to needy offenders. For instance, the sponsor of Illinois's guilty but mentally ill bill emphasized that a defendant found guilty but mentally ill "can be . . . sentenced exactly as a healthy defendant charged with the same crime except that his sentence must include psychiatric and psychological treatment or counselling."⁸⁰ The Attorney General's Task Force on Violent Crime recommended the verdict in part because it would "enable a jury to be confident that a defendant who is incarcerated as a result of its verdict will receive treatment for that illness while confined."⁸¹

Such statements mislead for two reasons. First, they suggest that guilty but mentally ill legislation is necessary to assure treatment for mentally ill offenders. Yet virtually all jurisdictions, including those that have adopted guilty but mentally ill statutes, already provide for treatment of mentally ill prisoners.⁸² For example, before Illinois passed its guilty but mentally ill statute in 1981, existing law authorized the transfer of prisoners requiring psychiatric treatment to special treatment facilities within the Department of Corrections or to mental hospitals.⁸³ Similarly, well before the passage of Indiana's guilty but mentally ill statute, Indiana law mandated the Department of Corrections to "provide for the care and treatment of every committed offender who is determined to be mentally ill by a psychiatrist employed or retained by the department."⁸⁴ Thus, to the extent that support of guilty but

ill and the guilty in this context is the mental illness of the former group. Yet the Supreme Court has firmly held that the state may not confine an individual on the basis of mental illness alone. *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975).

80. Senate Floor Debate, Senate Bill 867, at 127 (May 27, 1981) (3d reading) (quoted in Comment, *Punishment Versus Treatment of the Guilty But Mentally Ill*, 74 J. CRIM. L. & CRIMINOLOGY 428, 436 (1983)).

81. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME: FINAL REPORT 54 (1981).

82. Forty-six states and the District of Columbia have enacted special procedures for transferring mentally ill prisoners to hospital facilities. Four states — Arizona, Montana, New Mexico, and Pennsylvania — appear to rely on civil commitment law for this purpose. See Favole, *Mental Disability in the American Criminal Process: A Four Issue Survey*, in *MENTALLY DISORDERED OFFENDERS*, *supra* note 24, at 281-95.

83. Unified Code of Correction § 3-8-5, ILL. REV. STAT. ch. 38, § 1003-8-5 (1982 & Supp. 1984). In 1981, the legislature amended the statute to require the department "at periodic intervals to ascertain whether any person committed to it" needs psychiatric treatment. *Id.* (Supp. 1984).

84. IND. CODE § 11-10-4-2 (1981).

mentally ill legislation is bottomed on the perception that statutory authority is needed to provide treatment to prisoners, it is misguided.

Statements lauding the treatment goals of guilty but mentally ill legislation also mislead by suggesting that offenders found guilty but mentally ill will be more likely to receive necessary care than other convicted offenders. Admittedly, the language of some guilty but mentally ill legislation supports this interpretation. For instance, Michigan's statute requires the Department of Corrections to ensure that "the [guilty but mentally ill] defendant . . . be given such treatment as is psychiatrically indicated . . ." ⁸⁵ Michigan courts have held that this provision gives guilty but mentally ill offenders a statutory right to treatment. ⁸⁶ But most guilty but mentally ill statutes and state courts provide less definite access to treatment.

For example, the guilty but mentally ill statutes of Illinois, New Mexico, South Dakota, and Utah vest discretion in the correctional or mental health facility having custody of the offender to provide such treatment for the defendant *as it determines necessary*. ⁸⁷ The Illinois Court of Appeals has held explicitly that the Illinois provision does not provide a right to treatment for guilty but mentally ill offenders beyond the constitutional right to minimally adequate medical care available to all prisoners. ⁸⁸ The Pennsylvania and Georgia statutes provide for treatment of guilty but mentally ill offenders only to the extent state funds permit. ⁸⁹ Even in Michigan, the "right to treatment" for guilty but mentally ill offenders has been more abstract than real; Michigan courts have been extremely cautious about enforcing the right they have created. ⁹⁰

85. MICH. COMP. LAWS § 768.36 (1982). Other states employ similar language. *See, e.g.*, ALASKA STAT. § 12.47.05(b) (1984); DEL. CODE ANN. tit. 11, § 408(b) (Supp. 1984); IND. CODE § 35-36-2-5(b) (1981); KY. REV. STAT. § 504.150 (1984). *But see* NATIONAL CENTER FOR STATE COURTS (Final Report), *supra* note 18, at 23 (reading an element of discretion into the phrase "as psychiatrically indicated"); *infra* note 87.

86. *See, e.g.*, *People v. McLeod*, 407 Mich. 632, 639, 288 N.W.2d 909, 914 (1980).

87. Unified Code of Corrections § 5-2-6, ILL. REV. STAT. ch. 38, § 1005-2-6 (1981); N.M. STAT. ANN. § 31.9.4 (1984); S.D. CODIFIED LAWS ANN. § 23A-27-38 (Supp. 1984); UTAH CODE ANN. § 77-35-21.5(4) (Supp. 1983).

88. *People v. Marshall*, 114 Ill. App. 3d 217, 233, 448 N.E.2d 969, 980 (1983); *see also* *People v. Smith*, 124 Ill. App. 3d 805, 811, 465 N.E.2d 101, 106 (1984) (failing to assure treatment to guilty but mentally ill does not render statute unconstitutional).

89. 42 PA. CONS. STAT. § 9727(b) (Supp. 1984-1985); GA. CODE ANN. § 17-7-131(g) (Michie 1985).

90. The Michigan courts have actually enforced the so-called statutory "right to treatment" on only one occasion. *People v. Mack*, 104 Mich. App. 560, 562, 305 N.W.2d 264, 265-66, (1981). In that case, the sentencing judge had ordered specific treatment; this order presumably required enforcement even if the defendant had been found simply guilty. *See* R.O. DAWSON, SENTENCING 114 n.44 (1969). In other decisions, Michigan courts have rejected specific right-to-treatment claims. *See, e.g.*, *People v.*

This legislative and judicial reticence is probably rooted in the concern, made explicit in the Pennsylvania and Georgia enactments, that providing effective treatment for all guilty but mentally ill offenders might severely test the state's resources. An equal protection dilemma, which may have influenced the Illinois court's decision,⁹¹ also lurks in the background: on what basis can the state justify according a right to treatment to guilty but mentally ill offenders while denying treatment to prisoners who are similarly ill?⁹²

These fiscal and legal constraints should tend to minimize differences in the treatment of guilty and guilty but mentally ill offenders. The only available data concerning care of prisoners in guilty but mentally ill jurisdictions support this hypothesis. In a National Center for State Courts survey of lawyers, administrators, and mental health professionals from eleven states using the verdict, forty-two of seventy-eight respondents believed guilty but mentally ill offenders were more likely to receive post-conviction care. However, thirty-six of these respondents were lawyers and judges who had no direct contact with treatment programs.⁹³ In a telling contrast, most administrators familiar with the services provided for guilty but mentally ill offenders indicated that these individuals are no more likely to obtain mental health care than are mentally ill offenders in the general prison population.⁹⁴ If this is true, the guilty but mentally ill verdict does not offer any benefits beyond those available to mentally ill offenders under current dispositional arrangements.⁹⁵

The troubling aspect of the Center's survey is its finding that most judges and lawyers — and, therefore, presumably most jurors — believe otherwise. Obviously a perception that those found guilty but mentally ill are accorded "special" post-conviction treatment, even if true, should not affect the decision on guilt or insanity. But to the extent that treatment considerations influ-

McLeod, 407 Mich. 632, 649, 288 N.W.2d 909, 913 (1980) (the Department of Corrections must be given "a reasonable opportunity to comply with the statutory mandate" before it is found to violate the guilty but mentally ill legislation); *People v. Sharif*, 87 Mich. App. 196, 200-01, 274 N.W.2d 17, 19-20 (1978) (failure to give treatment not actually promised by the trial judge does not require automatic invalidation of a guilty but mentally ill plea).

91. *People v. Marshall*, 114 Ill. App. 3d 217, 233, 448 N.E. 2d 969, 980 (1983).

92. Providing treatment to guilty but mentally ill offenders while denying it to similarly ill prisoners who are not so labeled would be particularly offensive if the latter's illness occurred after conviction, when the guilty but mentally ill plea is no longer available.

93. NATIONAL CENTER FOR STATE COURTS (Telephone Survey), *supra* note 18, at 48.

94. NATIONAL CENTER FOR STATE COURTS (Final Report), *supra* note 18, at 37.

95. In many states, guilty but mentally ill offenders receive post-conviction evaluation more often than do other offenders; therefore, their treatment needs are more likely to be identified. *See, e.g.*, GA. CODE ANN. § 17-7-131(g) (Michie 1985); 42 PA. CONS. STAT. § 9727(b) (Supp. 1984-1985). But all offenders should receive a thorough post-conviction evaluation. Obviously the guilty but mentally ill verdict is not the most efficient way to accomplish the goal. *See infra* text accompanying notes 144-50.

ence the factfinder — and research findings suggest they do⁹⁶ — the belief that the guilty but mentally ill verdict offers superior treatment opportunities may lead to improper conviction of the insane. It may also lead to misguided strategic decisions by attorneys.⁹⁷

Thus, it is not only misleading but dangerous to characterize the guilty but mentally ill verdict either as a humane advance in the treatment of mentally ill offenders or as a more effective way to identify offenders in need of treatment. Undoubtedly, evaluation and treatment of prisoners can be improved; however, the guilty but mentally ill verdict is not the appropriate device for achieving these goals, especially in light of the effect its illusory promise of special treatment may have on the factfinder.

D. The Verdict's Effect on Expert Testimony

The psychiatric testimony elicited by the insanity defense has been characterized as time-consuming, confusing, and “far-fetched.”⁹⁸ To the public, this is perhaps the most galling aspect of the defense; many who find fault with the outcome in *Hinckley*

96. See *supra* note 48. The promise of treatment offered by the verdict clearly influenced the guilty but mentally ill findings by the students involved in the Roberts and Golding study, described *supra* note 70. The authors found that eighty-six percent of the students thought that “the GBMI [guilty but mentally ill] sentencing alternative was moral, just and an adequate means of providing for the treatment needs of mentally ill offenders.” Roberts, Golding & Finchman, *supra* note 70, at 62 (emphasis added).

97. Most guilty but mentally ill verdicts result from plea bargains rather than jury trials. In Georgia, for instance, 134 (eighty-six percent) of the 157 guilty but mentally ill verdicts between passage of the statute in 1982 and the end of 1984 were by plea. In Illinois roughly 65% of the guilty but mentally ill verdicts in the four years following passage of guilty but mentally ill legislation were by plea. NATIONAL CENTER FOR STATE COURTS (Final Report), *supra* note 18, at 7, 14. This willingness to plead guilty but mentally ill may be sparked by an intuitive belief that the verdict is less stigmatizing than a straight guilty verdict. But, if the the National Center for State Courts survey is representative, the popularity of the verdict probably stems from the defense attorney’s erroneous belief that defendants are more likely to receive treatment by pleading guilty but mentally ill. To prevent such misconceptions, the Kentucky Public Advocate’s Office has established an educational program designed in part to educate attorneys about the availability of treatment under the guilty but mentally ill verdict. Apparently the Office fears that defense attorneys will plead their clients guilty but mentally ill to crimes or agree to sentences to which they would not have assented had they known treatment would not necessarily be provided. NATIONAL CENTER FOR STATE COURTS (Telephone Survey), *supra* note 18, at 37.

98. See, e.g., L. COLEMAN, *THE REIGN OF ERROR 36-64* (1984); W. WINSLADE, *THE INSANITY PLEA: THE USES AND ABUSES OF THE INSANITY DEFENSE 3* (1983). Partly as a result of these concerns, some commentators suggest that psychiatric testimony be prohibited or severely limited in insanity adjudications. See, e.g., Morse, *Crazy Behavior, Morals and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527, 602-14 (1978).

are particularly critical of the prolonged battle of the experts waged during the trial.⁹⁹

Some proponents of the guilty but mentally ill verdict claim the verdict will minimize participation of mental health professionals in criminal cases by discouraging assertion of the insanity defense.¹⁰⁰ But this claim flies in the face of logic. In most states, the guilty but mentally ill verdict is not available unless the defendant asserts an insanity defense;¹⁰¹ thus, in these states, the verdict is likely to *increase* the number of insanity pleas.¹⁰² Research confirms that after states pass guilty but mentally ill legislation, the combined number of insanity acquittals and guilty but mentally ill verdicts far exceeds the number of previous insanity acquittals. For instance, Georgia, which passed its statute in 1982, had fifty-six acquittals in 1981, but forty-two acquittals and eighty-eight guilty but mentally ill verdicts in 1983. More relevant to the "battle of the experts" issue, the fifty-six insanity acquittals in 1981 involved only nineteen trials, whereas the 130 insanity acquittals and guilty but mentally ill verdicts in 1983 involved a combined total of twenty-four trials.¹⁰³ Thus, it is difficult to imagine how the guilty but mentally ill verdict would reduce expert involvement at any stage of the criminal process.

A National Center for State Courts survey further supports this conclusion. The Center surveyed the effect of the guilty but mentally ill verdict on expert participation, and found that thirty-seven of forty-six respondents believed the verdict to have had no effect on the nature and frequency of expert participation. Five respondents felt it had increased (or would increase) the involvement of mental health professionals in the criminal justice system.¹⁰⁴

Available information thus indicates that the guilty but mentally ill verdict will significantly diminish neither the number of trials involving battles of the experts, nor the role of mental health professionals generally. Certainly, nothing indicates that

99. See, e.g., L. COLEMAN, *supra* note 98, at 36, 43; Will, *Insanity . . . And Success*, Wash. Post, June 23, 1982, at A27, col. 1 ("The [Hinckley] trial allowed — indeed, required — a jury to pick between numerous flatly incompatible theories spun by credentialed 'experts,' theories purporting to divine Hinckley's mental state on one day 15 months [before the trial].").

100. In a survey of 46 legal and mental health professionals, four believed the guilty but mentally ill verdict would reduce the participation of mental health professionals in the criminal justice system. NATIONAL CENTER FOR STATE COURTS (Telephone Survey), *supra* note 18, at 39, 40.

101. KY. REV. STAT. § 504-130(2) (Supp. 1982); MICH. COMP. LAWS §§ 768.20(a)(1), 768.36(2) (1982).

102. See, e.g., *supra* note 56 and accompanying text (discussing Michigan).

103. Fourteen trials resulted in insanity acquittals and 10 in guilty but mentally ill verdicts. NATIONAL CENTER FOR STATE COURTS (Descriptive Data), *supra* note 18, at 7 (Table). Michigan reported 222 guilty but mentally ill verdicts and 381 insanity verdicts in the seven years after passage of the guilty but mentally ill act, as opposed to 270 insanity verdicts before passage of the act. Blunt & Stock, *supra* note 16, at 5, 13 (Table 2).

104. NATIONAL CENTER FOR STATE COURTS (Telephone Survey), *supra* note 18, at 39.

the verdict has successfully kept psychiatrists and psychologists out of the courtroom or the pre-trial evaluation process.

The guilty but mentally verdict does not seem to be achieving its intended goals. It has not substantially reduced insanity acquittals nor enhanced public safety. It has not appreciably improved treatment for mentally ill offenders and has failed to affect expert involvement in criminal adjudications. Consequently, any improvement in the public's perception of the insanity defense, or the criminal justice system in general, is unlikely.

At the same time, guilty but mentally ill legislation has injected a misleading and confusing element into criminal adjudications which could lead to inappropriate resolution of cases involving the insanity defense. This aspect of the verdict, although perhaps not particularly troublesome to the public, is a cost which must be weighed against the verdict's minimal practical and symbolic benefits.

III. A Verdict in Name Only

The guilty but mentally ill verdict not only fails on the pragmatic front. It is flawed conceptually as well. Even if the verdict successfully achieved its goals of reducing inappropriate insanity acquittals and effectuating better treatment of mentally ill offenders, its adoption should be resisted on the theoretical ground that it introduces an alien and irrelevant concept into the criminal trial process.

The purpose of a criminal trial is to determine whether the defendant has committed a crime as defined by the legislature. The prosecution must prove the *actus reus* and *mens rea* for the crime charged beyond a reasonable doubt¹⁰⁵ and must also, in effect, convince the factfinder, by at least a preponderance of the evidence, that there is no justification or excuse for the defendant's acts.¹⁰⁶

Mental illness may be relevant to each of these determinations. It could diminish the defendant's ability to exert conscious control over his actions,¹⁰⁷ negate *mens rea*,¹⁰⁸ cause a mistaken belief that

105. *In re Winship*, 397 U.S. 358, 364 (1969) (requiring proof beyond a reasonable doubt of every fact necessary to constitute a crime).

106. Although some jurisdictions require the defendant to bear the burden of persuasion for "affirmative defenses" such as insanity, entrapment, or self-defense, they allow the defendant to meet this burden by a preponderance of the evidence. W. LAFAYE & A. SCOTT, *CRIMINAL LAW* 56-51 (1972); see, e.g., *People v. Monk*, 56 Cal. 2d 288, 297, 363 P.2d 865, 869, 14 Cal. Rptr. 633, 637 (1961) (requiring proof of insanity defense by a preponderance of the evidence). In effect, then, unless the prosecution can produce evidence sufficient to convict of "equal" or greater persuasiveness than the defendant's contrary evidence, the prosecution cannot secure a conviction.

107. See, e.g., *People v. Grant*, 71 Ill. 2d 551, 554, 377 N.E.2d 4, 8 (1978).

108. At least 10 states have adopted provisions similar to *Model Penal Code*

a criminal act was justified¹⁰⁹ or, through the insanity defense, provide an excuse for the criminal act.¹¹⁰

But the jury's finding of mental illness needed to render a verdict of guilty but mentally ill is not pertinent to any of these considerations. It results neither in acquittal nor reduction in the grade of offense. Nor is sentence length affected by the verdict, because the verdict is not a finding of diminished responsibility; thus, the judge may impose any sentence authorized by law for the crime involved.¹¹¹ In fact, sentences imposed on guilty but mentally ill offenders do not appear to differ from the sentences imposed on other offenders.¹¹²

A guilty but mentally ill finding does not even mitigate culpability in the attenuated sense of improving post-conviction treatment status. In deliberating upon the applicability of the verdict, the factfinder's evaluation is limited to the defendant's mental illness *at the time of the offense*.¹¹³ Although jurors may allow concern about treatability to influence their decision, guilty but mentally ill legislation appropriately recognizes that the dispositive treatment determination be made by experts after conviction, not by lay factfinders at trial.¹¹⁴ To provide otherwise would force a decision on judges and juries they are ill-equipped to make.¹¹⁵

§ 4.02(1), which provides: "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." MODEL PENAL CODE § 4.02(1) (Proposed Official Draft 1962); *see also* MENTAL HEALTH STANDARDS, *supra* note 12, 7-6.2 & commentary (permitting introduction of defendant's mental condition at time of offense as evidence of mental state).

109. *See, e.g.*, *United States v. Bright*, 517 F.2d 584, 586 (2d Cir. 1975); *People v. Wetmore*, 22 Cal. 3d 318, 326-27, 583 P.2d 1308, 1314, 149 Cal. Rptr. 265, 271 (1978) (superseded by CAL. PENAL CODE § 28(a) (Deering Supp. 1985)).

110. *See infra* text accompanying notes 116-22 (summarizing the various insanity tests).

111. *See, e.g.*, GA. CODE ANN. § 17-7-131(g) (Michie 1985); IND. CODE § 35-36-2-5(a) (1981); S.D. CODIFIED LAWS ANN. § 23A-27-38 (Supp. 1984).

112. For instance, those found guilty but mentally ill in Georgia received an average sentence of 11.76 years, compared to an average sentence of just over nine years for all Georgia offenders. NATIONAL CENTER FOR STATE COURTS (Descriptive Data), *supra* note 18, at 27. The greater sentences for guilty but mentally ill offenders may in part result from the types of crimes for which they are convicted.

113. *See, e.g.*, ALASKA STAT. § 12.47.040(b) (1984); KY. REV. STAT. § 504.130(1)(b) (1984); 18 PA. CONS. STAT. § 314(a) (1983).

114. *See, e.g.*, GA. CODE ANN. § 17-7-131(g) (Michie 1985); IND. CODE § 35-36-2-5(b) (1981); 42 PA. CONS. STAT. § 9727(b) (Supp. 1985).

115. In fact, a significant proportion (ranging between 25 and 75%) of those found guilty but mentally ill do not need treatment. The director of Michigan's Forensic Psychiatry Center has stated that 75% of those found guilty but mentally ill are sent to prison and receive "no treatment." Statement of Bill Meyer, Director, Forensic Psychiatry Center, State of Michigan, at State Mental Health Directors Third Annual Conference (Sept. 29, 1982) (copy on file at the *George Washington Law Review*). However, another Michigan study concluded that 72% of those found guilty but mentally ill were in need of treatment: this percentage of offenders was recommended for one or more mental health services, such as psychotherapy, individual or group counseling, sex-offender programs, substance-abuse assistance, and psychotropic medication. NATIONAL CENTER FOR STATE COURTS (Final Report), *supra* note 18, at 36. Similarly, Georgia recommended some form of mental health services for 64% percent of those found guilty but mentally ill. *Id.*

Varying definitions of "treatment" probably account for the differences among

Accordingly, the guilty but mentally ill verdict is not a proper "verdict" at all. Indeed, the "mentally ill" component of the verdict serves no identifiable purpose; even if the verdict does reduce insanity acquittals and comfort the factfinder, it does not do so within the theoretical framework of the criminal law. Instead, it embroils the trier of fact in a conceptually meaningless inquiry, and for this reason alone, the guilty but mentally ill scheme is unacceptable.

IV. *A Coherent Approach to the "Insanity Defense Problem"*

Rather than adopt a theoretically unsound verdict that produces uncertain effects, those hoping to rectify the problems associated with the insanity defense should attack those problems directly. If the goal is to reduce improper acquittals by reason of insanity, attention should be focused on the proper scope of the insanity defense. If it is to prevent premature release of insane persons, the criteria for committing and releasing these individuals should be re-examined. If the concern is proper treatment of the mentally ill offender, sentencing and prison transfer provisions should be re-evaluated. And if it is believed that expert testimony is too confusing or unscientific, appropriate limitations on such testimony should be formulated. The recommendations found in the *American Bar Association Criminal Justice Mental Health Standards* attempt to achieve each of these goals.

these studies. Mr. Meyer seemingly refers to the number of guilty but mentally ill offenders requiring extensive mental health intervention, as opposed to the type of "treatment program" accorded almost every offender at one time or another. As Mr. Meyer has stated elsewhere: "[T]he folks who are pleading 'guilty but mentally ill' . . . tend to be sex offenders, there tends to be very good evidence against them, and not a very good possibility of them being found 'not guilty by reason of insanity' because there is no evidence of mental illness." NATIONAL MENTAL HEALTH ASSOCIATION, *supra* note 14, at 33.

Although definitional quibbles obscure the number of guilty-but-mentally-ill offenders who require "treatment," it is clear that most guilty-but-mentally-ill offenders do not receive *hospital* treatment. Of the 43 defendants found guilty but mentally ill in Indiana over a 21 month period, only two were transferred to mental hospitals; moreover, the two guilty-but-mentally-ill transferees represented only six percent of all offenders transferred. Memorandum by Juliette Spence, Governor's Fellow, Indiana Department of Mental Health 3 (Sept. 24, 1984) (copy on file at the *George Washington Law Review*). Similarly, of the 45 defendants found guilty but mentally ill in Illinois over a 13 month period, all have been incarcerated in the Department of Corrections. Statement of Terry Brelje, Coordinator for the Forensic Psychiatry Program at Chester Mental Health Center, Illinois, at Mental Health Forensic Directors Third Annual Conference (Sept. 29, 1982) (copy on file at the *George Washington Law Review*).

A. Recasting the Insanity Defense

The *Durham* rule¹¹⁶ is probably the most expansive insanity formulation, permitting a finding of nonresponsibility if the criminal act was the product of the defendant's mental disease or defect. Today only New Hampshire adheres to the product test.¹¹⁷ Almost half the states follow the American Law Institute's test,¹¹⁸ which excuses any act resulting from a mental disease or defect that substantially impaired the actor's capacity to appreciate the wrongfulness of the act or conform his behavior at the time of the act to the requirements of the law.¹¹⁹ Most of the remaining states¹²⁰ use the *M'Naghten* test,¹²¹ which provides an insanity defense when a mental disease or defect caused the actor not to know the nature and quality or wrongfulness of the criminal act. A few states combine the "irresistible impulse" test with the *M'Naghten* test.¹²²

The American Bar Association has rejected all of these insanity tests, reasoning that the *Durham* rule, the ALI's test, and the irresistible impulse test are all unnecessarily broad and that the *M'Naghten* test is too restrictive. Instead, the *Mental Health Standards* adopt the following formulation:

(a) A person is not responsible for criminal conduct if, at the time of such conduct, and as a result of mental disease or defect, that person was unable to appreciate the wrongfulness of such conduct. (b) When used as a legal term in this standard "mental disease or defect" refers to: (i) impairments of mind, whether enduring or transitory; or, (ii) mental retardation, either of which substantially affected the mental or emotional processes of the defendant at the time of the alleged offense.¹²³

Although this test does not revert to the *M'Naghten* rule, it lim-

116. *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954), provided the modern formulation of the product test or *Durham* rule. (*Durham* itself was overruled by *United States v. Brawner*, 471 F.2d 969, 973 (D.C. Cir. 1972)). However, the New Hampshire Supreme Court's decision in *State v. Pike*, 49 N.H. 399, 402 (1870), originated the product test.

117. N.H. REV. STAT. ANN. § 628:2 (1974 & Supp. 1983); see also Favole, *supra* note 79, at 264 (discussing various courts' applications of the product test).

118. Favole, *supra* note 82, at 259.

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

120. Favole, *supra* note 82, at 259-69.

121. *Daniel M'Naghten's Case*, 8 Eng. Rep. 718, 719 (H.L. 1843). For a general discussion of the *M'Naghten* test, see W. LAFAVE & A. SCOTT, *CRIMINAL LAW* 274-83 (1972).

122. See Favole, *supra* note 82, at 259-69. The irresistible impulse test protects the defendant from liability even if he knew he was committing a wrong, provided he possessed a mental disease that prevented him from controlling his conduct. See *id.* at 260-61, 264, 268.

123. MENTAL HEALTH STANDARDS, *supra* note 12, 7-6.1. The American Psychiatric Association also has proposed the elimination of a volitional prong from the insanity test. APA statement, *supra* note 13, at 12. One state uses an insanity test similar to the one recommended in the *Mental Health Standards*. N.D. CENT. CODE § 12-04-03 (1981); see I. KEILITZ & J. FULTON, *THE INSANITY DEFENSE AND ITS ALTERNATIVES: A GUIDE FOR POLICYMAKERS* 16-17 (1984). Additionally, as of October 12, 1984, the federal courts, which had uniformly endorsed the ALI's test, see Favole, *supra* note 82, at 266-68, must follow a version of the "appreciation" formula. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 4241(d), 98 Stat. 1976, 2065-66.

its the availability of the insanity defense to defendants suffering from substantial cognitive or affective impairment at the time of the offense. The drafters of the ABA's formulation assumed that any "moral mistakes" in the administration of the insanity defense are most likely to result from the use of a volitional or "control" test in conjunction with vague or broad interpretations of "mental disease." The separate volitional test poses the greatest risk because it is virtually impossible to distinguish an irresistible impulse from an impulse that merely was not resisted; consequently, virtually all mentally ill persons may plausibly make the former claim.¹²⁴ In contrast, the ABA's test limits the responsibility inquiry to the more manageable issue of determining the extent to which a person's awareness, perceptions, and understanding of the criminal event were impaired. Under this test, if mentally ill or retarded individuals who found it difficult to choose law-abiding conduct are exculpated, it will be because the severity of their illness or retardation also impaired their ability to appreciate the wrongfulness of their conduct.¹²⁵

The ABA's standard thus differs from most other insanity tests. But will it also change the results of the insanity inquiry? Professors Goldstein and Simon have claimed that the precise language of the insanity test has little or no effect on the outcome.¹²⁶ But data from California suggest that restricting the scope of the defense can affect insanity acquittals. In 1983, the year after California switched from the ALI's test to an insanity formulation similar to the ABA's, insanity acquittals dropped almost fifty percent despite an increase in felony arrests for that year.¹²⁷ Furthermore, neither Professor Goldstein nor Professor Simon recognize

124. See Bonnie, *supra* note 2, at 196-97.

125. Michael Moore proposes a different conceptual approach that produces the same result. He suggests the factfinder may find insanity when the accused "is so irrational as to be nonresponsible." M. MOORE, LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP 245 (1984). By shifting the focus of the insanity inquiry to the rationality of one's reasons for acting, Moore's formulation makes the degree to which one is "compelled" irrelevant. See Slobogin, *A Rational Approach to Responsibility*, 83 MICH. L. REV. 820, 830 (1985).

126. GOLDSTEIN, *supra* note 21, at 213-14; SIMON, *supra* note 48, at 215. However, Professor Simon found that jurors were 12% more likely to find a defendant insane under the *Durham* rule than under the *M'Naghten* test, a statistically significant difference. *Id.*

127. *Interim Hearing on the Insanity Defense and Provisions Governing Release of the Criminally Insane, Before the Senate Comm. on Judiciary*, 98th Cong., 1st Sess. 4 (1983) (testimony of Michael O'Connor). By year, insanity acquittals in California totalled: 1977, 170; 1978, 187; 1979, 270; 1980, 247; 1981, 269; 1982, 218; 1983, 134 (projected). *Id.* (Table I).

Also of note is the significant increase in acquittals between 1978 and 1979. In 1978, the California Supreme Court abandoned the *M'Naghten* test and adopted the ALI's formulation. *People v. Drew*, 22 Cal. 3d 333, 349, 583 P.2d 1318, 1326, 149 Cal. Rptr. 275, 283 (1978) (in June 1982, California voters renounced the *Drew* decision in Propo-

that varying the language of the insanity test also may affect the acquittal rate by influencing decisions made before the jury retires. Indeed, the specific terminology of a particular test might color a constellation of decisions: the expert's decision to testify and to formulate specific testimony; the lawyer's strategic decision to assert the defense, to conduct direct and cross-examination, and to formulate arguments to present to the jury; and the judge's decision concerning the sufficiency of the evidence. Thus, from the time a defendant contemplates an insanity defense to the moment the jury reaches its verdict, the specific language of the insanity test may have a substantial, cumulative effect on the defendant's case. The difference in impact would likely be particularly pronounced if the choice of language evidenced a purely cognitive standard rather than a volitional one.

By focusing on those aspects of mental dysfunction most clearly relevant to the insanity inquiry and most likely to accurately be discerned, the *Mental Health Standards'* approach to the insanity defense should substantially rectify any tendency on the part of judges and juries to misinterpret the proper scope of the insanity defense. The guilty but mentally ill verdict, in contrast, does not even address these issues, much less resolve them. Instead, the verdict distracts the factfinder from the task of determining criminal responsibility.

Proponents of the guilty but mentally ill verdict might still insist, however, that the verdict aids juries agonizing over the resolution of difficult cases. Professor Simon's data suggest that, even with a tightened definition of insanity, jurors may feel uncomfortable choosing between insanity on the one hand and guilt on the other.¹²⁸ But that is the choice they must make. Jurors should not be offered a compromise option merely to make their decision less painful.

Moreover, a legitimate way to ease the decisionmaker's burden does exist: as the *Mental Health Standards* recommend, the court can instruct the jury about the consequences of an insanity verdict.¹²⁹ Research indicates that, at best, jurors have inconsistent

sition 8, replacing the ALI's test with the *M'Naghten* test, codified at CAL. PENAL CODE § 25(b) (Deering Supp. 1985)).

Of course, changes in the language of the insanity test may not be the sole reason for the variations in California's acquittal rates. For example, in 1978, the same year that *Drew* was decided, the California Supreme Court held that insanity acquittees may be confined beyond the maximum term of their sentences only if the state establishes that they remain a danger to themselves or others. *In re Moye*, 22 Cal. 3d 457, 467, 584 P.2d 1097, 1103-04, 149 Cal. Rptr. 491, 497-98 (1978) (these criteria are codified at CAL. PENAL CODE § 1026.5(b)(1) (Deering Supp. 1985)). *Moye* may have made insanity pleas more attractive. Similarly, the outcry over the *Hinckley* verdict and the publicity accompanying the vote on Proposition 8, both of which occurred in 1982, may have changed the attitude of the public, and therefore of juries and judges, toward the insanity defense.

128. See *supra* note 48. Professor Simon derived her conclusion from responses made by jurors who had experienced simulations using *M'Naghten* and *Durham* instructions. SIMON, *supra* note 48, at 161-70.

129. MENTAL HEALTH STANDARDS, *supra* note 12, 7-6.8. The standard provides:

perceptions about the fate of insanity acquittees.¹³⁰ Informing jurors of the precautions governing the release of an acquittee¹³¹ alleviates their concern for public safety,¹³² and helps them focus on the morally appropriate inquiry of criminal responsibility. Knowledge of dispositional consequences, combined with a restructured insanity defense, should assure reasoned decisions on the insanity issue.

B. *The Appropriate Disposition of Insanity Acquittes*

Because insanity acquittees have been acquitted, they cannot be punished; the state may confine them only on incapacitative and rehabilitative grounds.¹³³ Requiring acquittees to serve specific

"The court should instruct the jury as to the dispositional consequences of a verdict of not guilty by reason of mental nonresponsibility [insanity]." *Id.*

130. A relevant study found that the overwhelming majority of jurors realize that dangerous persons are not released upon acquittal by reason of insanity. SIMON, *supra* note 48, at 38. However, Professor Simon's methodology has been criticized and Professor Simon herself has expressed ambivalence about her conclusions. See Schwartz, *Should Juries Be Informed of the Consequences of the Insanity Verdict?* 1980 J. PSYCHIATRY & L. 167, 173-74. Another study found some correspondence between guilty verdicts and fear that an insanity acquittal would lead to release; however, overall jurors had consistent perceptions about the disposition of acquittees. 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, 1067, 1068 (1977). Given the absence of solid empirical data, the ABA's task force opted for giving the instruction. The commentary to Standard 7-6.8 states: "Jurors surely know, without being told, what happens to most convicted offenders, as well as defendants who are acquitted outright; the proposed instruction seeks to provide the same level of knowledge with respect to the fate of persons acquitted by reason of [insanity]." MENTAL HEALTH STANDARDS, *supra* note 12, commentary at 374.

131. See *infra* text accompanying notes 140-45.

132. In a jurisdiction adopting *Mental Health Standards* 7-7.2 to .5 and 7-7.7 to .8, an appropriate jury instruction might read:

If the defendant is found "not guilty by reason of insanity", the defendant will be committed for evaluation for approximately 30 days, after which this court will hold a hearing to consider evidence about the defendant's mental condition. If, as a result of this hearing, the court finds that the defendant is mentally ill or mentally retarded and that he poses a substantial threat of bodily harm to others, or that he does not meet these criteria solely because he is undergoing treatment which is not likely to continue unless he is committed to a secure facility, then the defendant will be confined in a secure facility for a term not to exceed the maximum term of confinement he would have received had you found him guilty of the offense charged. He may be released before this term is expired if a court finds either that he is no longer disordered or that he no longer poses a threat of bodily harm to others and that he does not require continued confinement in order to assure that he will remain in this improved condition.

MENTAL HEALTH STANDARDS, *supra* note 12, 7-6.8 commentary at 375.

133. See generally German & Singer, *supra* note 31 (finding no basis for any differentiation between insanity acquittees and civil committees); Morris, *supra* note 30. See also Jones v. United States, 463 U.S. 354, 366 (1983) (concluding that 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").

terms would be illogical, if not unconstitutional.¹³⁴ Although release of insanity acquittees must therefore be predicated on problematic predictions of dangerousness and treatability, public safety still may be considered when devising schemes for criminal commitment.

Several states, on equal protection grounds, have equated the criteria for release of insanity acquittees with those used in civil commitment.¹³⁵ Thus, in these states, the prosecution must prove by clear and convincing evidence that the insanity acquittee is mentally ill and dangerous, as required in the civil commitment context under *Addington v. Texas*.¹³⁶ In *Jones v. United States*,¹³⁷ however, the Supreme Court suggested that the Constitution does not require this approach to criminal commitment. In the course of sanctioning automatic commitment for evaluation following an insanity acquittal, the Court held that mental illness may be presumed from the fact of acquittal and that dangerousness may be presumed from the acquittee's commission of a criminal act. Although this reasoning is questionable,¹³⁸ courts now appear to have solid constitutional authority for imposing relatively more restrictive release criteria on insanity acquittees, including shifting the burden of proof to the defendant.¹³⁹

As with the scope of the insanity defense itself, the *Mental Health Standards* take a compromise position on the disposition issue. Under the *Mental Health Standards*, any acquittee found to have committed an act causing or threatening serious bodily harm automatically may be confined for evaluation for up to thirty days, or longer, if good cause is shown.¹⁴⁰ After this evaluation, the court may, subject to periodic review, commit the acquittee for a term not to exceed the maximum sentence associated with the offense charged.¹⁴¹ In order to commit the defendant after the eval-

134. In *Jones v. United States*, 463 U.S. 354 (1983), the Court refused to base an acquittee's hospital stay on the length of the sentence he would have received if convicted. *Id.* at 368-69.

135. See *supra* note 33 and accompanying text. The courts generally reason that because insanity acquittees are "acquitted" of the crime charged, they are similarly situated to civil committees, and are entitled to the same procedural and substantive safeguards.

136. 441 U.S. 418, 443 (1979).

137. 463 U.S. 354 (1983).

138. For instance, the mental illness that caused insanity at the time of the offense quite possibly will be in remission due to treatment or natural causes by the time of trial. Similarly, although prior violent acts are probably the best predictors of future acts, Monahan, *supra* note 39, at 71, such acts do not justify a presumption of dangerousness, but rather should merely provide data relevant to the dangerousness prediction. Moreover, as in *Jones*, the act that led to criminal charges may not be "dangerous." See Note, *supra* note 31, at 608-12.

139. See, e.g., *United States v. Brown*, 478 F.2d 606, 611 (D.C. Cir. 1973); *In re Franklin*, 7 Cal. 3d 126, 141, 496 P.2d 465, 474, 101 Cal. Rptr. 553, 562 (1972); *State v. Taylor*, 158 Mont. 323, 331-32, 491 P.2d 877, 882 (1971), *cert. denied*, 406 U.S. 978 (1972).

140. MENTAL HEALTH STANDARDS, *supra* note 12, 7-7.2. For acts not involving serious bodily harm, the commentary to standard 7-7.3 suggests that, to the extent incapacitation is necessary, civil commitment procedures are adequate. *Id.* 7-7.3 commentary at 406.

141. *Id.* 7-7.7 to .8.

uation period and to continue the commitment upon later review, the court must find that the acquittee is mentally ill or mentally retarded and poses a substantial threat of serious bodily harm to others, or that the acquittee does not meet these criteria solely because he is undergoing treatment or rehabilitation that is likely to end unless commitment continues. The state must prove mental illness or retardation and threat of harm by clear and convincing evidence; the acquittee must disprove the need for continued confinement by a preponderance of the evidence.¹⁴²

In most respects, therefore, the *Mental Health Standards* equate criminal commitment with civil commitment. However, the addition of the third criterion, requiring the acquittee to prove that successful treatment will continue upon release, forestalls premature discharge of acquittees potentially unwilling to continue medication outside the hospital. Moreover, unlike typical civil commitment statutes,¹⁴³ the *Mental Health Standards* do not delegate the discharge decision to hospital staff, but rather require judicial involvement.¹⁴⁴ The *Mental Health Standards* also provide for *conditional* release of insanity acquittees, revocable by the hospital superintendent or court whenever either believes the acquittee has violated a condition of treatment or any other condition of leave.¹⁴⁵ The occasional release of "false positives" cannot be avoided. But the *Mental Health Standards* admirably balance society's right to be protected with the nondangerous insanity acquittee's right to be free of confinement.

C. *Caring for the Mentally Ill Offender*

The *Mental Health Standards* provide a comprehensive approach to improving both the quality of post-conviction treatment, and the procedures for obtaining it. They require the state to provide expert assistance at sentencing to help identify the treatment needs of indigent defendants.¹⁴⁶ They also allow the offender and the prosecution to initiate proceedings before or during the sentencing hearing to determine whether the offender is severely mentally disabled.¹⁴⁷ Once sentenced, the mentally ill or mentally retarded offender is guaranteed a right to treatment, either in

142. *Id.* 7-7.4. At the commitment and review hearings the acquittee is entitled to counsel, and to confront witnesses. The state bears the costs if the acquittee cannot afford them. Trial rules of evidence apply. *Id.* 7-7.5.

143. As of 1976, only 19 states required a hearing before the committing court in order for an insanity acquittee to obtain release. German & Singer, *supra* note 31, at 1076-79.

144. MENTAL HEALTH STANDARDS, *supra* note 12, 7-7.4.

145. *Id.* 7-7.11.

146. *Id.* 7-9.4.

147. *Id.* 7-9.8.

prison, or if an adversarial hearing confirms a severe disability, in a mental health or mental retardation facility.¹⁴⁸ Committed offenders are entitled to periodic review and transfer back to a correctional facility once they are no longer considered seriously mentally ill or mentally retarded.¹⁴⁹ The *Mental Health Standards* also provide procedures for allowing a prisoner to seek hospital services voluntarily.¹⁵⁰

The ABA's approach makes unnecessary the creation of a new verdict to secure treatment for mentally ill offenders. If a state is serious about providing treatment for these individuals, regardless of their legal label, the approach recommended in the *Mental Health Standards* is far superior to the discriminatory route taken by guilty but mentally ill legislation.

D. *Expert Testimony*

Much of the blame for verdicts like the one reached in *Hinckley* falls on the mental health experts who testify at trial. Yet, as Professor Bonnie has pointed out, this blame is misplaced:

The bench and bar are ultimately responsible for improving the administration of justice. If judges and juries are confused or misled by expert testimony, this usually means there has been poor lawyering. If experts give conclusory testimony, encompassing so-called ultimate issues—and fail to explain the bases for their opinions—the fault lies with the bench and bar, not with the experts. If forensic evaluators do not have access to the same information and reach different opinions for this reason, the fault lies with the legal system, not with the experts.¹⁵¹

The only way in which the guilty but mentally ill verdict even approaches addressing the problems identified by Professor Bonnie is by attempting to reduce the number of trials in which the insanity defense is raised, thereby hoping to reduce as well the frequency with which battles of the experts occur. If the verdict works at all in this area, it works circuitously.¹⁵²

The *Mental Health Standards*, on the other hand, grapple directly with the issue of expert testimony. They seek to educate and train lawyers, judges, and mental health professionals about the mental health professional's role in the criminal process.¹⁵³ They establish criteria for qualifying mental health professionals as experts.¹⁵⁴ They prohibit experts from testifying on the ulti-

148. *Id.* 7-9.7; 7-9.11; 7-10.8.

149. *Id.* 7-9.14; 7-10.6.

150. *Id.* 7-10.3; 7-10.4.

151. Bonnie, *Morality, Equality, and Expertise: Renegotiating the Relationship Between Psychiatry and the Criminal Law*, 12 BULL. AM. ACAD. PSYCHIATRY & L. 5, 5-6 (1984).

152. See *supra* notes 100-04 and accompanying text.

153. MENTAL HEALTH STANDARDS, *supra* note 12, 7-1.3.

154. *Id.* 7-3.10 (requiring the court to consider a witness's professional education, training, experience, and forensic knowledge before qualifying a witness as an expert); 7-3.11 (specifying types of knowledge required for a witness to be qualified as an expert); 7-3.12 (establishing minimum professional education and clinical training re-

mate legal issue¹⁵⁵ and require them to reveal the theoretical and factual bases for those opinions that may *legitimately* be offered to the factfinder.¹⁵⁶ With due regard for the defendant's fifth and sixth amendment rights, they allow prompt access to the defendant by prosecution as well as defense experts,¹⁵⁷ and mandate full exchange of other information pertaining to the defendant's mental state at the time of the offense.¹⁵⁸

If states conscientiously implemented these provisions, insanity trials would provide for the orderly transfer of information and would seldom confuse the factfinder. The potential for battles of the experts will always exist in adversarial systems of adjudication. But the negative aspects of this process can be minimized, and its positive attributes accentuated, by promoting the policies defined in the *Mental Health Standards*.

Conclusion

The guilty but mentally ill verdict is an ill-conceived and ineffective overreaction to the problems associated with the insanity defense. The verdict's popularity stems not from considered analysis of its actual impact or of the available alternatives, but rather from its *appearance* of "doing something" about public safety, treatment of mentally ill offenders, and expert testimony. This Article has attempted to assess both the worth of the verdict and the value of the available alternatives, in particular those proposed by the American Bar Association. The conclusion is inescapable that the guilty but mentally ill verdict is an idea whose time should not have come.

quirements for experts); 7-3.13 (establishing qualification requirements for witnesses proffered as experts on scientific and clinical research).

155. *Id.* 7-3.9; 7-6.6. Standard 7-3.9 states in part: "[T]he expert witness should not express, or be permitted to express, an opinion on any question requiring a conclusion of law or a moral or social value judgment properly reserved to the court or the jury." *Id.* 7-3.9.

156. *Id.* 7-3.14.

157. *Id.* 7-3.4 (allowing prosecution experts access to the defendant within forty-eight hours of the defense's evaluation, provided the results of the prosecution's evaluation are sealed until the defendant gives notice of a defense).

158. *Id.* 7-3.6(c) (permitting presence of defense attorney during prosecution evaluation, provided examiner agrees); 7-3.6(d) (providing for recording of court-ordered evaluations); 7-3.8 (permitting prompt discovery of information regarding the defendant's mental state and requiring the prosecution and defense to exchange information once the defendant gives notice of a defense); 7-3.2 (prohibiting the prosecution from using any evaluation results unless they relate to the mental-condition issue raised by the defendant); *see also id.* 7-6.3; (requiring a defendant to notify prosecution within pretrial filing period of intention to rely on mental nonresponsibility defense); 7-6.4 (providing for court-ordered evaluation of defendant upon prosecutor's motion); 7-6.5 (requiring prosecution to disclose all information bearing on defendant's mental condition).