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PUNISHMENT VERSUS TREATMENT OF THE GUILTY BUT MENTALLY ILL

I. INTRODUCTION

When Michigan originally enacted it in 1976, the guilty but mentally ill verdict presented a unique approach to the problematic relationship between mental illness and crime.¹ In essence, Michigan

¹ MICH. COMP. LAWS § 768.36 (1976). The Michigan statute provides:

(1) If the defendant asserts a defense of insanity in compliance with section 20a, the defendant may be found "guilty but mentally ill" if, after trial, the trier of fact finds all of the following beyond a reasonable doubt:

(a) That the defendant is guilty of an offense.

(b) That the defendant was mentally ill at the time of the commission of that offense.

(c) That the defendant was not legally insane at the time of the commission of that offense.

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

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

directed jurors to find defendants guilty but mentally ill if they believe those defendants to have been mentally ill, but not insane, at the time of the offense.² In addition to offering juries a middle ground between insanity acquittals and guilty verdicts, the new verdict appeared to promise treatment for those convicted under its terms.³

During the seven years since Michigan enacted its statute, seven more states have followed suit.⁴ In almost all important respects, the statutes are identical; there is, however, one significant difference. Six states, including Michigan, require that imprisonment pursuant to a guilty but mentally ill conviction be accompanied by such treatment as is "psychiatrically indicated."⁵ Illinois and New Mexico alone direct their Departments of Corrections to provide only such treatment as they "deem necessary."⁶ The Michigan Supreme Court has interpreted the

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

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

² *Id.*

³ *Id.*

⁴ ALASKA STAT. §§ 12.47.030, 12.47.050 (Supp. 1982); DEL. CODE ANN. tit. 11, § 408 (1982); GA. CODE ANN. § 27-1503 (1982); ILL. REV. STAT. ch. 38, §§ 115-3(c), 1005-2-6 (1981); IND. CODE § 35-36-2-5 (1982); KY. REV. STAT. ANN. §§ 504.120, 504.130 (Supp. 1982); N.M. STAT. ANN. §§ 31-9-3, 31-9-4 (Supp. 1982).

⁵ See statutes for Alaska, Delaware, Georgia, Indiana, and Kentucky cited *supra* note 4.

⁶ N.M. STAT. ANN. §§ 31-9-3, 31-9-4; see ILL. REV. STAT. ch. 38, §§ 115-3(c), 1005-2-6 (Department of Corrections must provide only such treatment as it "determines" necessary). The Illinois statute provides:

(c) When the defendant has asserted a defense of insanity, the court may find the defendant guilty but mentally ill if, after hearing all of the evidence, the court finds beyond a reasonable doubt that the defendant:

- (1) is guilty of the offense charged; and
- (2) was mentally ill at the time of the commission of the offense; and
- (3) was not legally insane at the time of the commission of the offense.

ILL. REV. STAT. ch. 38, § 115-3.

It further provides for the sentencing and treatment of the guilty but mentally ill:

(a) After a plea or verdict of guilty but mentally ill . . . the court shall order a presentence investigation and report . . . and shall set a date for a sentencing hearing.

former standard to give its guilty but mentally ill inmates an "unequivocal statutory right to treatment."⁷ In Illinois and New Mexico, however, the scope of the right to treatment has yet to be determined.⁸ Lacking an "unequivocal statutory right," guilty but mentally ill inmates in these two states may be forced to rely on unsettled constitutional rights to treatment generated by the eighth and fourteenth amendments.⁹

This Comment seeks to establish the parameters of the right to

The court may impose any sentence upon the defendant which could be imposed pursuant to law upon a defendant who had been convicted of the same offense without a finding of mental illness.

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

(c) The Department of Corrections may transfer the defendant's custody to the Department of Mental Health and Developmental Disabilities in accordance with the provisions of Section 3-8-5 of this Act.

(d)(1) The Department of Mental Health and Developmental Disabilities shall return to the Department of Corrections any person committed to it pursuant to this Section whose sentence has not expired and whom the Department of Mental Health and Developmental Disabilities deems no longer requires hospitalization for mental treatment, mental retardation, or addiction.

(2) The Department of Corrections shall notify the Director of Mental Health and Developmental Disabilities of the expiration of the sentence of any person transferred to the Department of Mental Health and Developmental Disabilities under this Section. If the Department of Mental Health and Developmental Disabilities determines that any such person requires further hospitalization, it shall file an appropriate petition for involuntary commitment pursuant to the Mental Health and Developmental Disabilities Code.

(e)(1) All persons found guilty but mentally ill, whether by plea or by verdict, who are placed on probation or sentenced to a term of periodic imprisonment or a period of conditional discharge shall be required to submit to a course of mental treatment prescribed by the sentencing court.

(2) The course of treatment prescribed by the court shall reasonably assure the defendant's satisfactory progress in treatment or habilitation and for the safety of the defendant and others. The court shall consider terms, conditions and supervision which may include, but need not be limited to, notification and discharge of the person to the custody of his family, community adjustment programs, periodic checks with legal authorities and outpatient care and utilization of local mental health, or developmental disabilities facilities.

(3) Failure to continue treatment, except by agreement with the treating person or agency and the court, shall be a basis for the institution of probation revocation proceedings.

(4) The period of probation shall be in accordance with Section 5-6-2 of this Act and shall not be shortened without receipt and consideration of such psychiatric or psychological report or reports as the court may require.

Id. at § 1005-2-6.

⁷ *People v. McLeod*, 407 Mich. 632, 637, 388 N.W.2d 909, 913 (1980).

⁸ Although Illinois' statute was passed in 1981 and has been used to convict approximately sixty defendants, the Illinois courts have not yet addressed this issue. The New Mexico statute is still too recently passed to have generated significant litigation.

⁹ For further discussion, see *infra* section V.

treatment due a person found guilty but mentally ill in Illinois.¹⁰ Although state and federal courts have dealt extensively with the constitutional rights of prisoners to various kinds of treatment,¹¹ the incarceration of those found guilty but mentally ill presents substantially different concerns and a much stronger right to treatment.

States adopting the guilty but mentally ill verdict have been responding largely to the perceived inadequacies of the insanity defense.¹² After discussing the relationship between the insanity defense and the guilty but mentally ill verdict, this Comment will describe the operation of Illinois' verdict and then compare the Illinois law with its Michigan predecessor.¹³ The final sections will address how the courts may and should analyze treatment rights for those found guilty but mentally ill.

II. THE INSANITY DEFENSE

Underlying the insanity defense is the assumption that those who commit criminal acts while insane should not be held criminally responsible for their behavior. To the extent that mental impairment is, in some sense, "responsible" for an individual's proscribed behavior, treatment, and not punishment, is acknowledged to be society's appropriate response.¹⁴ Judge Bazelon summarized the rationale for the defense: "Our collective conscience does not allow punishment where it cannot impose blame."¹⁵ In contrast, society punishes actions that are not traceable to mental illness or another acceptable defense.

Unfortunately, modern medicine is currently incapable of precisely identifying the psychological causes of human behavior. One commen-

¹⁰ Textual discussion is limited to comparing the Illinois and Michigan statutes because they furnished the models for the other six states. Michigan's unequivocal statutory right to treatment should provide the basis for similar rights in Alaska, Delaware, Georgia, Indiana and Kentucky. The absence of a statutory right to treatment in Illinois and New Mexico should give rise to the same constitutional right to treatment. *See infra* section V.

¹¹ *See infra* text accompanying notes 96-128.

¹² *See infra* notes 21-26 and accompanying text.

¹³ This Comment will not focus on the other statutes because of their similarity to the Michigan and Illinois counterparts and because of the absence of significant litigation in this area. GA. CODE ANN. § 27-1503 (1982); IND. CODE § 35-36-2-3 (1982); *see supra* note 10.

¹⁴ MODEL PENAL CODE § 4.01, comment (Tent. Draft No. 4, 1955) ("the problem is to discriminate between the cases where a punitive-correctional disposition is appropriate and those in which a medical-custodial disposition is the only kind that the law should allow"). Goldstein states that the insanity defense

becomes the occasional device through which an offender is found to be inappropriate for the social purposes served by the criminal law. He is too much unlike the man in the street to permit his example to be useful for purposes of deterrence. He is too far removed from normality to make us angry with him. But because he is sick rather than evil, society is cast as specially responsible for him and obligated to make him better.

A. GOLDSTEIN, *THE INSANITY DEFENSE* 15 (1967).

¹⁵ *Durham v. United States*, 214 F.2d 862, 876 (D.C. Cir. 1954).

tator has therefore summarized the controversy over the insanity defense as "lack of a societal consensus on the definition of mental illness and its relationship to criminal behavior."¹⁶ Until advances in medical science allow us to trace an antisocial act directly to the actor's mental illness rather than to his moral deficiency, there will continue to be confusion and disagreement about whether treatment or punishment is appropriate. In the meantime, "[t]he key to the insanity defense is probably to be found in the extent to which it must serve as a bridge . . . between medical science and . . . complex social objectives."¹⁷

Under virtually every insanity standard,¹⁸ the insanity defense presents substantial problems. Both the implementation of the defense and the premises underlying it have been severely criticized,¹⁹ and attempts to eliminate the defense altogether seem to have been quelled only by the probability that such action would be held unconstitutional.²⁰ Nevertheless, critics of the defense continue to seek ways to mitigate some of its perceived consequences. Although many of these arguments and proposals are outside the purview of this Comment, some of the defense's limitations bear upon the motivation behind and the goals of the guilty but mentally ill verdict.

¹⁶ Comment, *Guilty But Mentally Ill: A Reasonable Compromise for Pennsylvania*, 85 DICK. L. REV. 289, 291 (1981).

¹⁷ A. GOLDSTEIN, *supra* note 14, at 90.

¹⁸ The American Law Institute's Model Penal Code "expressed a rule which has become the dominant force in the law pertaining to the defense of insanity." *United States v. Brawner*, 471 F.2d 969, 979 (D.C. Cir. 1972). The ALI test provides that "[a] person is not responsible for criminal conduct if at the time of such conduct as result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law." MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962). The ALI test has been adopted by at least five states, 21 AM. JUR. 2d CRIMINAL LAW § 63, and it is the rule in all but one of the federal circuits. *Brawner*, 471 F.2d at 979.

¹⁹ The problems with the insanity defense are best illustrated by the recurring movements to abolish the defense. See Goldstein & Katz, *Abolish the Insanity Defense—Why Not?*, 72 YALE L.J. 853 (1963); Morris, *Psychiatry and the Dangerous Criminal*, 41 S. CAL. L. REV. 514, 516 (1968) ("[t]he defense of insanity is moribund and should in the decades ahead be interred"); Comment, *supra* note 16, at 302 ("Abolition of the insanity defense would at once eliminate the confusion, tension and illogical distinctions inherent in the law of insanity as it now exists.").

²⁰ See *State v. Strasberg*, 60 Wash. 106, 110 P. 1020 (1921); see also *Johnson v. Louisiana*, 406 U.S. 356, 372 n.9 (1972) (Powell, J., concurring) (insanity defense is basic to the American system); Weiner, *'Guilty But Mentally Ill: New Plea in Criminal Cases Fools Public*, Chicago Sun-Times, Aug. 5, 1981, at 52 [hereinafter cited as Weiner, *'Guilty But Mentally Ill'*]; 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). For arguments advocating abolition of insanity defense, see H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968); B. WOOTTON, CRIME AND THE CRIMINAL LAW (1963) [hereinafter cited as B. WOOTTEN, CRIME]; B. WOOTTON, SOCIAL SCIENCE AND SOCIAL PATHOLOGY (1978) [hereinafter cited as B. WOOTTON, SOCIAL SCIENCE]; Morris, *supra* note 19, at 514.

The guilty but mentally ill verdict was largely a response to the alleged inadequacy of the procedures for committing and, ultimately, releasing defendants found not guilty by reason of insanity.²¹ Forceful arguments have been made that society should be protected from one who commits forbidden acts,²² whether or not he or she is "responsible" for those acts. But because such a defendant has not been convicted of a crime, society must justify the insanity acquittee's confinement on other grounds.²³ To confine one who is not criminally responsible, the state must show that person to be presently insane and dangerous to him- or herself or to others.²⁴ Since this determination is made subsequent to the criminal prosecution, many states automatically commit those acquitted by reason of insanity for temporary observation periods pending a hearing on present sanity and dangerousness.²⁵ Civil commitment of indefinite duration follows a finding of present insanity and dangerousness.²⁶

In theory, the length of commitment depends on continuing findings of insanity and dangerousness; when hospital staff can no longer support such findings, the insanity acquittee must be released. In fact, significant incentives militate against prompt release of these individuals, long after release is warranted under the law. Hospital staff may err on the side of caution, understandably reluctant to risk the possibility

²¹ Thompson, *supra* note 20, at 7-11; *Thompson hopes to reform law on mentally ill criminals*, Chicago Tribune, Aug. 23, 1983, § 1, at 16; Weiner, 'Guilty But Mentally Ill,' *supra* note 20, at 52; Editorial, *Why Not Guilty Though Insane?*, Chicago Tribune, Dec. 20, 1977, § 3, at 2, col. 1.

²² See H.L.A. HART, *supra* note 20, at n.51; T. SZASZ, LAW, LIBERTY AND PSYCHIATRY 138-46 (1963); B. WOOTTON, CRIME, *supra* note 20, at 52 ("an action does not become innocuous merely because whoever performed it meant no harm").

²³ *Vitek v. Jones*, 445 U.S. 480 (1980) (even prisoners are entitled to a hearing meeting due process standards before they are transferred to a mental hospital); *Specht v. Patterson*, 386 U.S. 605 (1967); *Baxstrom v. Herold*, 383 U.S. 107 (1966) (past dangerousness proven by commission of prohibited act is not in itself a conclusive indication that the defendant qualifies for commitment); *Lynch v. Overholser*, 369 U.S. 705, 715 (1962) (insanity acquittal does not justify continued confinement without additional evidence concerning present mental condition); *Bolton v. Harris*, 395 F.2d 642 (D.C. Cir. 1968); *Allen v. Radack*, 426 F. Supp. 1052 (D.S.D. 1977); *State v. Clemons*, 100 Ariz. 79, 515 P.2d 324 (1973); *Wilson v. State*, 259 Ind. 375, 386, 287 N.E.2d 875, 881 (1972) (insanity acquittee who is committed is subject to the same standards for release as any civilly committed individual); *People v. McQuillan*, 392 Mich. 511, 221 N.W.2d 569 (1974) (automatic commitment of insanity acquittees violates due process and equal protection); *People v. Lally*, 19 N.Y.2d 27, 224 N.E.2d 87, 277 N.Y.S.2d 654 (1966); see also MENTAL DISABILITY L. REP., *Special Report, Legal Issues in State Mental Health Care: Proposals for Change*, 654, 655 (Mar.-Apr. 1978) (automatic commitment for substantial periods without notice, assistance of counsel, and a judicial hearing conflicts with a growing body of precedent holding that such procedures are constitutionally required).

²⁴ See *People v. McQuillan*, 392 Mich. 511, 536, 221 N.W.2d 569, 580 (1974); *Wilson v. State*, 259 Ind. 375, 386, 287 N.E.2d 875, 881 (1972); MENTAL DISABILITY L. REP., *supra* note 23, at 655.

²⁵ See MENTAL DISABILITY L. REP., *supra* note 23, at 654.

²⁶ *Id.*

that one who previously committed an anti-social act, whatever the cause, will do so again.²⁷ Furthermore, limited resources may prevent timely recognition of a patient's improved condition.²⁸ Consequently, an insanity acquittee's civil commitment often results in actual incarceration for a period far longer than that which would be served for the offense charged.²⁹

Proponents of the guilty but mentally ill verdict perceive the problem of release quite differently. They claim that mental health facilities routinely release insanity acquittees too early and fail to consider adequately the risk to the community that those released may prove to be dangerous.³⁰ Supporters cite instances of repeated, violent criminal be-

²⁷ Professor Goldstein found that "[a] surprisingly large number [of jurisdictions] treat persons acquitted as insane as members of an 'exceptional class,' requiring stricter standards for release than the general run of mental patients." A. GOLDSTEIN, *supra* note 14, at 153-54. Indeterminate commitment may thus become permanent detention. Thornberry and Jacoby, in *THE CRIMINALLY INSANE*, similarly found that "[t]o avoid . . . negative political consequences, the prediction that a patient will not be dangerous after release is rarely made. Instead, the clinicians at maximum security hospitals routinely overpredict the rate of dangerousness among their patients. . . . 'The result of this practice is that as many as 20 harmless people are incarcerated for every one who will commit a violent act.'" T. THORNBERRY & J. JACOBY, *THE CRIMINALLY INSANE* 32 (1979) (quoting Steadman & Cocozza, "We Can't Predict Who Is Dangerous," *Psychology Today* 32-35 (Jan. 1975)); see also *American Weekly* 4 (June 18, 1961) ("The notion that a verdict of not guilty by reason of insanity means an easy way out is far from the truth. Indeed the odds favor such a person spending a longer period of confinement in the hospital than if the sentence was being served in jail."); Kahn & Raifman, *Hospitalization Versus Imprisonment and the Insanity Plea*, 8 *CRIM. JUST. & BEHAV.* 483, 488 (1981).

²⁸ See *supra* note 27.

²⁹ A. STONE, *MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION* (1975) (Stone posits that incarceration pursuant to a successful insanity plea can be longer than the imprisonment of one found guilty). The New York Times reported that a man accused of shoplifting, for which he could have received a maximum jail term of one year, was acquitted by reason of insanity. More than seven years later, he was still confined to a mental institution. *New York Times*, Oct. 3, 1982, at 23, col. 6. *But see* Kahn & Raifman, *supra* note 27, at 488 (the authors conclude that no significant difference exists between the amount of time served by those found guilty and imprisoned and those hospitalized pursuant to an insanity plea).

³⁰ *Reagan Advisor Edwin Meese Enunciates Administration's Crime Control Goals*, 12 *CRIM. JUST. NEWSLETTER* 4 (1981) (Meese advocates elimination of the insanity defense and thus "riding the streets of some of the most dangerous people that are out there, that are committing a disproportionate number of crimes."); Sullivan, *Dangerous Mental Patients Must Not be Freed*, *Chicago Sun-Times*, Feb. 16, 1981, at 32, col. 1; Taylor, *Issue and Debate: The Plea of Insanity and Its Use in Criminal Cases*, *New York Times*, July 27, 1981, at 9 (critics of the defense claim that rather than being confined for long periods, people are getting out of mental institutions after fairly short periods, sometimes to go on to commit further crimes); Locin, *Thompson Hopes to Reform Law on Mentally Ill Criminals*, *Chicago Tribune*, Aug. 23, 1981 §1, at 16 (law enforcement authorities have decried the insanity defense because the perpetrators of often violent crimes are sometimes released from mental institutions after only short periods of treatment); Fritsch, *Plan Off-Grounds Passes for Killer*, *Chicago Tribune*, July 8, 1979, at 42; Editorial, *Why Not Guilty Though Insane?*, *Chicago Tribune*, Dec. 20, 1977, § 3, at 2, col. 1 (insanity defense is inadequate because "[d]angerous individuals have returned to the streets too easily and too soon").

havior following release of those acquitted by reason of insanity.³¹

In fact, instances of repeated violent criminal behavior among members of this class are relatively rare. Two studies have examined the crime rates among criminally committed individuals released into the community pursuant to court orders requiring new hearings as to their sanity and dangerousness.³² Although institutional health care staff anticipated high rates of recidivism and violence, the studies found that these were vast overpredictions; in fact, few of the subjects exhibited dangerous behavior.³³ The more recent study concluded that "[a]n image of the[se] patients that is based on the premise that the majority . . . are and will be dangerous is erroneous."³⁴ Even those who advocate abolition of the insanity defense acknowledge that release of insanity acquittees does not affect the crime rate.³⁵ Nevertheless, those occasions when insanity acquittees again violate the criminal law trigger an extreme public reaction against the insanity defense.³⁶

III. THE ILLINOIS STATUTE: HISTORY AND OPERATION

Between 1976 and 1977, public outrage over post-release criminal behavior by two insanity acquittees spurred the creation of Illinois' guilty but mentally ill alternative.³⁷ Without citing statistics, Governor Thompson blamed the insanity laws for failure to prevent mentally ill offenders from repeating violent crimes.³⁸ He presented the new verdict as a constitutional means of dealing with mentally ill offenders: "The fact that we are constitutionally precluded from abolishing the insanity defense does not mean that we cannot provide for alternative classifications to deal with offenders who are not legally insane but suffer from a mental illness."³⁹ Thus, while acknowledging the protected status of the

³¹ See *supra* note 30.

³² H. STEADMAN & J. COCOZZA, *CAREERS OF THE CRIMINALLY INSANE* (1974); T. THORNBERRY & J. JACOBY, *supra* note 27.

³³ H. STEADMAN & J. COCOZZA, *supra* note 32, at 158; T. THORNBERRY & J. JACOBY, *supra* note 27, at 201, 202.

³⁴ T. THORNBERRY & J. JACOBY, *supra* note 27, at 202; see also Weiner, 'Guilty But Mentally Ill,' *supra* note 20, at 52; Gliciek, *Getting Away With Murder*, *New York Times*, Aug. 21, 1978, at 21-22 (the number of crimes committed by people previously acquitted by reason of insanity is small).

³⁵ Taylor, *The Plea of Insanity and Its Use in Criminal Cases*, *New York Times*, July 27, 1981, at 9 (quoting Norval Morris).

³⁶ See *supra* note 30.

³⁷ See Weiner, 'Guilty But Mentally Ill,' *supra* note 20, at 52; Thompson, *supra* note 20, at 7. For the text of the Illinois statute, see *supra* note 6.

³⁸ Thompson, *supra* note 20, at 7 ("Our existing insanity laws do not protect citizens from convicted felons with a history of violence and mental illness. It is for this reason that the insanity defense has been called '[t]he chronic scandal of American criminal law.'") (quoting M. FLEMING, *OF CRIMES AND RIGHTS* 202 (1978)).

³⁹ Thompson, *supra* note 20, at 8.

insanity defense, the Illinois legislature has sought to prevent some of the consequences of its application, in particular the perceived problem of premature release.

That premature release was a significant catalyst is clear from the purposes proffered in support of the Act. Predominant among these was protecting society from violent crime. As Governor Thompson concluded, "Most importantly, [the Act] is designed 'to protect the public from violence inflicted by persons with mental ailments who slipped through the cracks in the criminal justice system.'"⁴⁰

Governor Thompson also emphasized the importance of the statute's mandatory treatment function. He asserted that, in addition to incarceration for the crime charged, "[t]he Department of Corrections must provide appropriate psychiatric, psychological, or other treatment to restore the offender to full capacity, and make periodic examinations of the nature, extent and continuance of the offender's condition."⁴¹

The Governor's treatment theme was echoed by other proponents of the bill. During the final debate in the Illinois Senate, the bill's major sponsor described a defendant's disposition under the statute as follows: "A guilty but mentally ill defendant 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.*"⁴² At the close of this debate, Senate Bill 867, providing for the verdict of guilty but mentally ill, was passed by a vote of fifty-five to zero.⁴³

The rationale for the new classification thus rests on the dual aims of protecting society from violent crime⁴⁴ and treating offenders for the mental illnesses which affect their behavior.⁴⁵ In spite of the rhetorical

⁴⁰ *Id.* (quoting *People v. Seefeld*, 95 Mich. App. 197, 199, 290 N.W.2d 123, 124 (1980)).

⁴¹ *Id.* at 9.

⁴² Senate Floor Debate, Senate Bill 867, at 127 (May 27, 1981) (3rd reading). A few pages later in the transcript, the senator reiterated that treatment was mandated under the Bill.

⁴³ *Id.* at 135.

⁴⁴ See *supra* notes 22-23 and accompanying text.

⁴⁵ See Thompson, *supra* note 20; Senate Floor Debate, Senate Bill 867, at 127, 131 (May 27, 1981) (3rd reading). Commentators have focused on probable scenarios in which juries use the guilty but mentally ill verdict to balance society's interest in institutionalizing offenders against the interests of mentally ill defendants. See Corrigan & Grano, *Criminal Law, 1976 Annual Survey of Michigan Law*, 23 WAYNE L. REV. 473, 479 (1979); Comment, *supra* note 15, at 309; Comment, *Insanity—Guilty But Mentally Ill—Diminished Capacity: An Aggregate Approach to Madness*, 12 J. MAR. J. PRAC. & PROC. 357, 381 (1979) [hereinafter Comment, *Insanity*]. Some commentators fear that this balancing process may obfuscate the distinction between legal insanity and mental illness. In their desire to balance, juries may be led to "avoid the difficult responsibilities of an insanity acquittal by finding the defendant guilty but mentally ill. In short, juries may misuse the verdict by ignoring substantial evidence that the essential element of mens rea has not been proved." Comment, *Guilty But Mentally Ill: An Historical and Constitutional Analysis*, 53 U. DET. J. URB. L. 471, 492-93 (1976). But as one commentator

commitment to treatment,⁴⁶ however, the operational provisions of the Illinois statute reveal that the actual commitment is rather thin.

Under the statute's terms a defendant may be found guilty but mentally ill if he or she so pleads, or if he or she pleads not guilty by reason of insanity and the finder of fact determines beyond a reasonable doubt that the defendant committed the acts charged and that the defendant "was not legally insane at the time of the commission of those acts but that he was mentally ill at such time."⁴⁷

Illinois defines as insane one who, "as a result of mental disease or defect . . . lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law."⁴⁸ In contrast, mental illness is defined as a

substantial disorder of thought, mood or behavior which afflicted a person at the time of the commission of the offense and which impaired that person's judgment, but not to the extent that he is unable to appreciate the wrongfulness of his behavior or is unable to conform his conduct to the requirements of law.⁴⁹

Upon conviction, the presiding judge is authorized to "impose any sentence upon the defendant which could be imposed pursuant to law upon a defendant who had been convicted of the same offense without a finding of mental illness."⁵⁰ If a prison sentence is imposed, the court then transfers jurisdiction to the Department of Corrections.

Once the Department of Corrections receives custody of the defendant, the statute provides that the Department "shall cause periodic inquiry and examination to be made concerning the nature, extent, continuance and treatment of the defendant's mental illness. The Department of Corrections shall provide such special psychiatric, psychological, or other counselling and treatment for the defendant *as it determines necessary*."⁵¹ In addition, the Department of Corrections may institute proceedings to transfer the defendant to the custody of the Department of Mental Health and Developmental Disabilities [hereinafter DMHDD].⁵² The law, however, requires that "the [DMHDD] shall return to the Department of Corrections any person committed to it pursuant to this section whose sentence has not expired and whom the

noted, this fear may be unwarranted and premature: "The possibility of future abuse cannot justify a finding that the statute is unconstitutional at present." *Id.* at 493.

⁴⁶ See Thompson, *supra* note 20; Floor Debate, Senate Bill 867 (May 27, 1981) (3rd reading).

⁴⁷ ILL. REV. STAT. ch. 38, § 115-3(c) (1981). For text of statute, see *supra* note 6.

⁴⁸ *Id.* ch. 38, § 6-2(a); MICH. STAT. ANN. § 28.1044(1).

⁴⁹ ILL. REV. STAT. 38, § 6-2(d).

⁵⁰ *Id.* ch. 38, § 1005-2-6(a).

⁵¹ *Id.* ch. 38, § 1005-2-6(b)(emphasis added).

⁵² *Id.* ch. 38, § 1005-2-6(c).

[DMHDD] deems no longer requires hospitalization."⁵³

The statute addresses the problem of premature release in the provision allowing for criminal sentencing, and by the requirement that those released from hospitalization must be returned to the Department of Corrections for the balance of their terms.⁵⁴ In theory, every insanity acquittee is released immediately upon becoming "sane or safe." One found guilty but mentally ill, however, must finish the entire prison term, either in prison or in a hospital, despite a finding of mental fitness or lack of dangerousness.⁵⁵ If one assumes that a criminal sentence will always exceed any term of civil commitment,⁵⁶ the proponents' purpose of protecting society from the insane and dangerous is fulfilled.

The treatment purpose espoused by the drafters, in contrast, receives little support from the operational provisions of the statute. By requiring the Department of Corrections to provide only such treatment "as it determines necessary,"⁵⁷ the language of the statute quite clearly contemplates that a defendant found guilty but mentally ill may receive little or no treatment. As this language suggests, the Act apparently vests the Department of Corrections with complete discretion over the type and duration of treatment for incarcerated individuals.

By placing the treatment decision wholly in the discretion of the Department of Corrections, the statute increases the likelihood that mentally ill offenders will receive little, if any, treatment. Given the limited mental health facilities currently available in prisons⁵⁸ and the fact that no additional appropriation for this purpose accompanied the bill,⁵⁹ it seems likely that the Department of Corrections will find treatment to be "necessary" only in particularly severe cases.⁶⁰ Consequently,

⁵³ *Id.* ch. 38, § 1005-2-6(d).

⁵⁴ *Id.* ch. 38, §§ 1005-2-6(a), 1005-2-d(1).

⁵⁵ *Id.* ch. 38, § 1005-2-d(2).

⁵⁶ At least one recent study indicates, however, that there is no significant difference between the lengths of confinement of hospitalized and imprisoned individuals. *See* Kahn & Raifman, *supra* note 27.

⁵⁷ ILL. REV. STAT. ch. 38, § 1005-2-6(b)(1981).

⁵⁸ According to the director of the Institute for Psychiatry and the Law, the sixty Illinois defendants found to be guilty but mentally ill have been sent to the Menard Correctional Facility, where the evaluation or treatment they receive does not differ from that received by other Menard inmates. Interview with Barbara Weiner, Director of the Institute of Psychiatry and the Law (Apr. 4, 1983).

⁵⁹ Chicago Tribune, Oct. 13, 1981, § 1, at 22 (letter to editor from R. Wettstein) ("the act does not appropriate additional funding for the needed treatment"); Weiner, *'Guilty But Mentally Ill,' supra* note 20, at 52. Ms. Weiner confirmed that no funding accompanied the bill and that there have been no additional funds allocated in the three years since the bill's passage. Interview with Barbara Weiner, Director of the Institute of Psychiatry and the Law (Apr. 4, 1983).

⁶⁰ *See* M. McCormick, Litigating the Constitutionality of GBMI: The Michigan Experience 183 (1980)(unpublished manuscript).

the Department of Corrections may deem necessary only that treatment which is available to all inmates, or it may limit treatment to that which is necessary for containment purposes.⁶¹ Either of these possible interpretations of the statutory language would eviscerate the statute's treatment function.

The significance of the Illinois statute's treatment language becomes clear upon comparison with the parallel provision in Michigan's guilty but mentally ill statute. As the following section will show, the Michigan counterpart generates a substantial statutory right to treatment which has been recognized by the Michigan courts. It stands in marked contrast to the potentially illusory protection provided by the Illinois legislature.

IV. THE MICHIGAN EXPERIENCE

The Illinois legislators were not drafting on a clean slate. When Governor Thompson proposed the guilty but mentally ill verdict, he was plainly influenced by the Michigan model and suggested that in enacting the verdict, "[w]e should follow Michigan's lead."⁶²

In almost all respects, the two statutes are identical.⁶³ There is, however, one dramatic difference. Like the Illinois statute, a guilty but mentally ill verdict in Michigan authorizes the judge to impose any sentence which would be appropriate for one found guilty of the offense. But if the defendant is sentenced to a term of imprisonment, Michigan requires the Department of Corrections to ensure that "the defendant . . . shall undergo further evaluation and be given *such treatment as is psychiatrically indicated*."⁶⁴ As we have seen, the parallel provision in Illi-

⁶¹ *Id.* McCormick suggests that the distinction between the Illinois and Michigan statutes would be particularly significant "if the Department of Corrections interprets necessary treatment as that treatment needed for containment purposes, rather than treatment for the well-being of the individual defendant." *Id.*; see also *supra* note 58.

⁶² Thompson, *supra* note 20, at 7, 8.

⁶³ Both statutes require the jury or judge to find beyond a reasonable doubt that the defendant committed the acts charged and that he was mentally ill but not legally insane at the time of the offense. ILL. REV. STAT. ch. 38, § 115-3(c)(3) (1981); MICH. STAT. ANN. § 28.1059(1) (1978). The statutes similarly define as insane an individual who "as a result of mental illness . . . lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." ILL. REV. STAT. ch. 38, § 1005-1-11 (1981); MICH. STAT. ANN. § 28.1044(1) (1978).

Although Michigan's guilty but mentally ill statute does not contain a definition, mental illness is defined in the Public Health Title 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." MICH. STAT. ANN. § 14.800 (400a) (1978). This definition would presumably be imported into Michigan's guilty but mentally ill statute. Illinois and Michigan thus have virtually identical standards for determining whether a defendant is guilty but mentally ill.

⁶⁴ MICH. COMP. LAWS § 768.36 (1976) (emphasis added).

nois vests in the Department of Corrections discretion to "provide such . . . treatment for the defendant as it determines necessary."⁶⁵ Illinois' subjective standard diminishes the protection promised by the verdict's proponents by increasing the probability that defendants with acknowledged mental impairment will receive no treatment, or minimal treatment, throughout their incarceration.⁶⁶

In contrast, the Michigan statute on its face sets up an external, objective standard for determination of the treatment due to a guilty but mentally ill inmate. The Michigan courts faced with construing the statute have accordingly recognized a statutory right to treatment for guilty but mentally ill inmates.

In *People v. McLeod*,⁶⁷ the Michigan Supreme Court upheld the constitutionality of the guilty but mentally ill verdict and confirmed the existence of a statutory right to treatment. Following McLeod's conviction, the trial judge held the statute unenforceable because she found that the treatment psychiatrically indicated for the defendant would not be available within the existing facilities and procedures of the Department of Corrections and the Department of Mental Health.⁶⁸ She therefore found that the statute was "legally inert and cannot be given judicial implementation for the reason that compliance with its provisions as to treatment is impossible and the court is thereby deprived of its authority to enter a judgment of guilty but mentally ill or to sentence defendant thereunder."⁶⁹

The Michigan Court of Appeals reversed the trial court, holding that until the departments statutorily charged with responsibility for providing treatment were given "a reasonable opportunity to comply with the statutory mandate," no court could conclude that the statutory mandate would be "impossible" to fulfill.⁷⁰ The Michigan Supreme Court upheld the court of appeals' reversal of the trial court's judgment:

The reasons asserted by the trial judge . . . are premature in that they all relate to speculation that the Department of Corrections or the Department of Mental Health will not pay heed to the statute. While future events may prove the trial judge was correct in her surmise, to conclude that compliance with the statute is 'impossible' is inaccurate.⁷¹

Although the trial court's holding was reversed, the existence of a

⁶⁵ ILL. REV. STAT. ch. 38, § 1005-2-6(b) (1981).

⁶⁶ See *supra* text accompanying notes 37-61.

⁶⁷ 407 Mich. 632, 288 N.W.2d 909 (1980), *aff'g*, 77 Mich. App. 327, 258 N.W.2d 214 (1977).

⁶⁸ *Id.* at 648-49, 288 N.W.2d at 909.

⁶⁹ *Id.* at 649, 288 N.W.2d at 913.

⁷⁰ *Id.*

⁷¹ 407 Mich. at 652, 288 N.W.2d at 914 (quoting *McLeod*, 77 Mich. App. at 330, 258 N.W.2d at 216).

statutorily created right to treatment was unquestioned by the highest court.⁷² The Michigan Supreme Court explicitly found that "this new statute grants the defendant, and other persons who are sentenced pursuant to this new verdict, an unequivocal statutory right to 'such treatment as is psychiatrically indicated for his mental illness'"⁷³

McLeod appears to have had a positive effect on treatment facilities in the Michigan correctional system. The trial court's conclusion in *McLeod* rested in large part upon evidence given by the prison physician, Dr. Dennis Jurczak,⁷⁴ who had testified that the mental health facilities available to prisoners at the time *McLeod* was to be incarcerated were so inadequate as to make it unlikely at best that the defendant would ever receive the treatment he required.⁷⁵ The Michigan Supreme Court's conclusion that the "statutory mandate for evaluation and treatment" had not yet been violated impliedly threatened that duly convicted and imprisoned defendants would have to be released if such findings were ultimately made. Subsequently, the Michigan correctional system underwent a significant improvement in its mental health facilities. In a letter written subsequent to his testimony at trial, Dr. Jurczak informed an assistant county prosecutor that the treatment facilities currently available at certain Michigan institutions are reasonable and adequate for the needs of the inmate population.⁷⁶

Although the *McLeod* decision may not have been solely responsible for these changes, it supplied some pressure to effect much-needed im-

⁷² *Id.*; see Grostick, *The Constitutionality of Michigan's Guilty But Mentally Ill Verdict*, 12 U. MICH. J.L. REF. 188, 190 (1978) (the guilty but mentally ill verdict "may help insure that convicted defendants who need treatment for mental illness will receive it"); Comment, *supra* note 45, at 489 ("The mental illness determination is a matter of disposition: whether or not the guilty party needs treatment."); Comment, *Guilty But Mentally Ill: A Retreat from the Insanity Defense*, 7 AM. J. L. & MED. 237, 254 (1981) ("Once a defendant is convicted under a guilty but mentally ill statute he must be provided with an opportunity to receive psychiatric treatment in a prison hospital."); Comment, *supra* note 15, at 309 ("The guilty but mentally ill verdict enables the jury to openly convict the defendant . . . while ensuring that he receives mental health treatment."); Comment, *Insanity*, *supra* note 45, at 354 n.17 (Michigan's guilty but mentally ill verdict "creates a statutory right to treatment"); Senator Frank Padavan, 11th District, New York State Senate, Memorandum in Support of New York's Proposed G.B.M.I. Legislation (1979) (unpublished report) (cited in Comment, *supra*, at 254-55 n.137) ("This legislation was created so that a defendant with a diminished mental capacity . . . not [sic] use the mental hygiene system as a short circuit to freedom, but rather will be sentenced in accordance with the law and then afforded psychiatric treatment.")

⁷³ 407 Mich. at 652, 288 N.W.2d at 914.

⁷⁴ *People v. McLeod*, No. 76-01672, 6 (Recorders Court Opinion, Detroit, Mich., Sept. 21, 1976), *rev'd*, 77 Mich. App. 327, 258 N.W.2d 214 (1977), *aff'd*, 407 Mich. 632, 288 N.W.2d 909 (1980). The trial court judge quoted Dr. Jurczak's testimony: "We do not have the wherewithal to implement the legislation regarding the treatment of the mentally ill in the correction system." *Id.*

⁷⁵ *Id.* at 5-6.

⁷⁶ Brown & Wittner, *Annual Survey of Michigan Law—Criminal Law*, 25 WAYNE L. REV. 335, 361 n.159 (1979).

provements. Nevertheless, the inadequacy of prison mental health treatment remains a generic flaw. As Dr. Jurczak confirmed in his most recent statement, "[W]e are still a long way from being ideal."⁷⁷

The dimensions of a right to treatment under the statute in the event of official indifference or proven institutional inadequacy remain unclear. *McLeod* leaves this matter unresolved, holding only that there could be no predetermination that treatment would be inadequate.⁷⁸

Subsequent cases did attempt to describe more precisely the dimensions of the statutory right recognized in *McLeod*. In *People v. Sharif*,⁷⁹ the Michigan Court of Appeals considered whether failure to provide treatment justified recission of a defendant's guilty but mentally ill plea. Sharif had plea bargained from a first degree charge of criminal sexual conduct down to a guilty but mentally ill plea for second degree sexual conduct.⁸⁰ He contended that the trial judge had promised that a guilty but mentally ill verdict would unconditionally entitle him to treatment and, when treatment was not forthcoming, claimed the right to change his plea. The court of appeals determined, however, that no promise of treatment had actually been made, and that failure to give treatment which had never been promised did not constitute a violation of the statutory mandate.⁸¹ On these findings, the court of appeals ruled that the plea was binding.

This result is not necessarily inconsistent with *McLeod*'s "unequivocal statutory right" to treatment. The court of appeals in *McLeod* correctly concluded that treatment is not mandated by the statute in every case, but only in those cases where treatment is "psychiatrically indicated."⁸² A trial judge at the plea stage may not be qualified to determine whether treatment is so indicated; the statutory right would thus be activated at a later stage, upon imprisonment.⁸³ In any case, the

⁷⁷ *Id.*

⁷⁸ *McLeod*, 407 Mich. at 652-53, 288 N.W.2d at 914. Other cases have suggested that inadequate treatment may be remedied through a mandamus action. *People v. Sorna*, 88 Mich. App. 351, 276 N.W.2d 892 (1979); *People v. Tenbrink*, 93 Mich. App. 326, 287 N.W.2d 223 (1979); see also Corrigan & Grano, *supra* note 45, at 478; cf. *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1967).

⁷⁹ 87 Mich. App. 196, 274 N.W.2d 17 (1978).

⁸⁰ *Id.* at 198, 274 N.W.2d at 18.

⁸¹ *Id.* at 198, 274 N.W.2d at 19.

⁸² *McLeod*, 407 Mich. at 652, 288 N.W.2d at 922.

⁸³ The system as it now exists requires a judge to make a finding concerning mental illness for the purpose of establishing criminal liability, yet it forbids the same judge to determine whether treatment is required for defendants found guilty but mentally ill. It is interesting to note that judges are not always so constrained; for example, they frequently require treatment as a condition of probation. See R.O. DAWSON, SENTENCING 114-15 (1969). Although this appears to be an implausible distinction, it has long been acknowledged that legal and medical determinations of mental illness require different expertise and involve different standards. On this theory, the treatment decision is a medical, not legal, decision, and is properly

holding in *Sharif* does not alter the statutory requirement that such treatment as is psychiatrically indicated is due to every defendant imprisoned pursuant to its provisions.

The Michigan Court of Appeals also rebuffed an equal protection challenge to the statute's constitutionality in *People v. Sorna*.⁸⁴ The statute distinguishes between insanity and mental illness for the purpose of determining criminal responsibility. Nevertheless, the court justified the guilty but mentally ill classification as a valid intermediate category to deal with situations where a defendant's mental illness "does not deprive him of substantial capacity sufficient to satisfy the insanity test but does warrant treatment in addition to incarceration." The fact that these distinctions are not clear-cut does not warrant a finding of no rational basis to make them.⁸⁵ The court thus found the statute to be valid under the equal protection clause in part because it mandated treatment for the continuing mental illness of those found guilty but mentally ill.

To date, only one case has sought directly to enforce the statute's treatment function. In *People v. Mack*,⁸⁶ the defendant pled guilty but mentally ill to a charge of manslaughter. The trial court accepted her plea, sentenced her to eight to fifteen years in prison and specifically directed the Department of Corrections to provide her with intensive counseling and alcohol therapy. The defendant appealed her conviction on the grounds that she was not receiving the treatment mandated by the trial judge. The court of appeals ordered the trial court to hold a new hearing to determine whether the defendant was receiving proper care and to order the Department of Corrections to fully implement the treatment program.⁸⁷

No state or federal court, however, has determined the dimensions of Michigan's statutory right to treatment for a guilty but mentally ill inmate whose sentencing judge does not order specific treatment; this inmate may not be in the same position as Mack. Michigan's right to treatment must therefore not be dependent on explicit instructions from the sentencing judge if those convicted under its terms are not to be in precisely the same position as those simply found guilty.

Similar objectives underlie the guilty but mentally ill verdicts in Michigan and Illinois. Both statutes ostensibly seek to protect the com-

the concern of doctors, not judges. As one commentator put it, "[f]or legal purposes, insanity focuses on mens rea. Psychiatry, however, has developed independently of the law. Its categories and definitions of various mental diseases do not easily conform to legal necessities." Comment, *Insanity*, *supra* note 45, at 487 n.60.

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

⁸⁵ *Id.* at 360, 276 N.W.2d at 896 (emphasis added).

⁸⁶ 104 Mich. App. 560, 305 N.W.2d 264 (1981).

⁸⁷ *Id.* at 562, 305 N.W.2d at 266.

munity from repeated violent behavior and to treat defendants convicted under their terms. In the seven years since its passage, the Michigan statute has clearly helped to remove some previously violent offenders from the community.⁸⁸ There is, however, some question whether the goal of treating mentally ill offenders has been adequately served. Until recently, the Michigan courts had done nothing concrete to further this objective. Thus, the treatment function frequently has been described as illusory,⁸⁹ and this major justification for the statute remains unfulfilled. The 1981 case of *People v. Mack*,⁹⁰ however, suggests that the Michigan courts stand willing to enforce the statutory right to treatment and may signal movement toward full implementation of the treatment model.

If implementation of the treatment function under the Michigan statute has been inadequate, the Illinois statute presents even greater obstacles to accomplishment of this objective.⁹¹ The Illinois legislature vested unlimited discretion in the Department of Corrections to determine when treatment is necessary.⁹² Legislators, however, have presumably relied on representations by the proponents that those found guilty but mentally ill would receive treatment.⁹³ Juries are likely to make the same presumption⁹⁴ and defendants clearly believe they will receive treatment.⁹⁵ Nevertheless, even though no statutory right to treatment may exist, constitutional principles mandate a right to treatment for defendants found guilty but mentally ill.

V. CONSTITUTIONAL RIGHTS TO TREATMENT

A. RIGHT TO TREATMENT UNDER THE EIGHTH AMENDMENT

The Constitution offers some protection for prison inmates. In the

⁸⁸ Perhaps this proposition should be disputed. One commentator asserts that the guilty but mentally ill verdict has had no effect on the number of insanity acquittals in Michigan. See Weiner, *'Guilty But Mentally Ill,' supra* note 20, at 52.

⁸⁹ *People v. McLeod*, No. 76-01672, 8 (Recorders Court Opinion, Detroit, Mich., Sept. 21, 1976), *rev'd*, 77 Mich. App. 327, 258 N.W.2d 214 (1977), *aff'd*, 407 Mich. 632, 288 N.W.2d 909 (1980); Grostick, *supra* note 72, at 196 (the consequences of the guilty but mentally ill and guilty verdicts are nearly identical).

⁹⁰ 104 Mich. App. 560, 305 N.W.2d 264 (1981).

⁹¹ See *supra* section III.

⁹² ILL. REV. STAT. ch. 38, § 1005-2-6(b). For further discussion, see *supra* section III.

⁹³ See *supra* notes 41-46 and accompanying text.

⁹⁴ The guilty but mentally ill verdict "enables the jury to *openly* convict the defendant (incarceration results) while ensuring that he receives mental health treatment. . . . Thus, the purpose . . . —to provide mental health treatment to those who have violated ethical or social norms—is well served by adoption of the [guilty but mentally ill verdict]." Comment, *supra* note 15, at 309 (emphasis in original) (footnotes omitted).

⁹⁵ See *People v. Sharif*, 87 Mich. App. 196, 200, 274 N.W.2d 17, 19 (1978) ("Defendant indicated when he pled guilty but mentally ill that he did so because he wanted treatment.").

area of health care, the Supreme Court has held that the eighth amendment's proscription of "cruel and unusual punishment" generates a right to medical treatment for prisoners.⁹⁶ The range of this protection, however, is severely limited.

The current standard, promulgated in *Estelle v. Gamble*,⁹⁷ permits court intervention only when an inmate alleges "deliberate indifference to serious medical needs" or an "unnecessary and wanton infliction of pain."⁹⁸ Prior to implementing this standard, federal courts had consistently held that only a showing that prison officials had abused their discretion would justify judicial inquiry into the adequacy of prison medical care.⁹⁹

Despite the apparent malleability of both standards, the courts have taken a more protective stance under *Estelle*.¹⁰⁰ The courts' role, however, still remains limited. Thus, failure to provide an inmate with drugs prescribed for his diagnosed heart ailment justified intervention,¹⁰¹ but failure to accommodate an inmate who believed he needed psychiatric care did not.¹⁰² As these cases demonstrate, it is extremely

⁹⁶ *Estelle v. Gamble*, 429 U.S. 97 (1976); *Johnson v. Avery*, 393 U.S. 483 (1969). The theory underlying this extension of the eighth amendment is derived from the common law view that "it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself." *Estelle*, 429 U.S. at 104 (citing *Spicer v. Williamson*, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926)).

⁹⁷ 429 U.S. 97 (1976).

⁹⁸ *Id.* at 104-05; *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

⁹⁹ The Tenth Circuit, as recently as 1969, stated the prevalent standard:

[T]he basic responsibility for the control and management of penal institutions, including the discipline, treatment, and care of those confined, lies with the responsible administrative agency and is not subject to judicial review unless exercised in such a manner as to constitute clear abuse or caprice upon the part of prison officials.

Betha v. Crouse, 417 F.2d 504, 505-06 (10th Cir. 1969). This "hands-off" approach to prison management was frequently applied when inmates sought redress for injuries allegedly caused by inadequate or improper medical treatment. See Klein, *Prisoners' Rights to Physical and Mental Health Care: A Modern Expansion of the Eighth Amendment's Cruel and Unusual Punishment Clause*, 7 FORDHAM URB. L.J. 1, 7 (1978); Comment, *Confronting the Conditions of Confinement: An Expanded Role for Courts in Prison Reform*, 12 HARV. C.R.-C.L. L. REV. 366 (1977); Comment, *Constitutional Law—The Eighth Amendment and Prison Reform*, 51 N.C.L. REV. 1539 (1973).

¹⁰⁰ See articles cited *supra* note 99. In the federal courts, actions under section 1983 of the Civil Rights Act comprise the bulk of the successful prison reform cases. See Klein, *supra* note 99, at 10. The Civil Rights Act of 1871, § 1, 42 U.S.C. § 1983 (1970) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Federal jurisdiction derives from 28 U.S.C. §§ 1343(3), 2201 (1970).

¹⁰¹ *Campbell v. Beto*, 460 F.2d 765 (5th Cir. 1972).

¹⁰² *Flint v. Wainwright*, 433 F.2d 961 (5th Cir. 1970).

difficult to establish an individual eighth amendment claim for lack of mental health treatment.

Although mental and physical care are technically measured under the same standard,¹⁰³ the courts have been far less willing to recognize eighth amendment violations in the mental health area, probably out of concern that the symptoms of mental illness are easily feigned. On the other hand, the classic case of unconstitutional prison conditions, *Newman v. Alabama*,¹⁰⁴ cited the inadequacy of psychiatric care as a major factor in determining that these prison facilities violated the inmates' eighth amendment rights.¹⁰⁵ It is not possible to establish such massive inadequacy in every case. As this section will demonstrate, the eighth amendment standard accords inadequate protection to the treatment interests of guilty but mentally ill defendants.

In the first major case concerning prisoners' right to treatment, the Supreme Court both established the eighth amendment standard and placed an important qualification upon it. In addition to requiring a demonstration of "deliberate indifference to" medical needs or "wanton infliction of pain," the Court held that no constitutional right was implicated by an inadvertent failure to provide adequate treatment.¹⁰⁶ Presumably, if it appears that prison officials have made a good faith effort to deal with the prisoner's serious medical problems, the constitutional mandate has been fulfilled.¹⁰⁷ Thus, there is no constitutional violation when the alleged failure to treat involves, as it did in *Estelle*, a question of disputed medical judgment.¹⁰⁸ The fact that a prisoner believes he or she should be receiving a different type of treatment does not render the treatment given constitutionally inadequate.¹⁰⁹

On the other hand, the complete failure to evaluate and treat a serious illness has been held to violate inmates' eighth amendment rights.¹¹⁰ Similarly, treatment which is prescribed or administered with

¹⁰³ See *Bowring v. Godwin*, 551 F.2d 44 (4th Cir. 1977); see also Note, *Prisoners' Rights—Bowring v. Godwin: The Limited Right of State Prisoners to Psychological and Psychiatric Treatment*, 56 N.C.L. REV. 612, 614 (1978) ("Though this standard for invoking the right to psychological and or psychiatric treatment may seem excessively restrictive, it is for the most part consistent with the standards that have developed in the general area of medical care for prisoners.").

¹⁰⁴ 349 F. Supp. 278, 284 (M.D. Ala. 1972), *aff'd*, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975).

¹⁰⁵ *Id.*

¹⁰⁶ *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

¹⁰⁷ Note, *supra* note 103, at 615.

¹⁰⁸ *Estelle*, 429 U.S. at 104.

¹⁰⁹ *Id.* One commentator remarked that the *Estelle* standard was "little more than a reaffirmation of the current amorphous standard adopted by several circuits proscribing 'deliberate indifference' to inmates' medical needs." Neisser, *Is There a Doctor in the Joint? The Search for Constitutional Standards for Prison Health Care*, 63 VA. L. REV. 921, 922 (1977).

¹¹⁰ *Id.*; see *Inmates of Allegheny County Jail v. Pierce*, 612 F.2d 754, 762 (3d Cir. 1979); see

a "callous disregard"¹¹¹ for the patient's welfare can be tantamount to "intentional deprivation" of needed care¹¹² if it is extraordinary, shocking or barbaric.¹¹³ Thus far, only one circuit has required less than an absence of "callous disregard" or "intentional deprivation" to state a

also Tolbert v. Eyman, 434 F.2d 625 (9th Cir. 1970); Coleman v. Johnston, 247 F.2d 273 (7th Cir. 1957) (total denial of urgently needed medical care implicates eighth amendment); Newman v. Alabama, 349 F. Supp. 278 (M.D. Ala. 1972), *aff'd*, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); Black v. Ciccone, 324 F. Supp. 129 (W.D. Mo. 1970); Ramsey v. Ciccone, 310 F. Supp. 600 (W.D. Mo. 1970); Redding v. Pate, 220 F. Supp. 124 (N.D. Ill. 1963).

¹¹¹ Laamon v. Helgemoe, 437 F. Supp. 269, 315 (D.N.H. 1977).

¹¹² Pinon v. Wisconsin, 368 F. Supp. 608, 610 (E.D. Wis. 1973) (quoting Davis v. Schmidt, 57 F.R.D. 37, 41 (W.D. Wis. 1972)); Ramsey v. Ciccone, 310 F. Supp. 600 (W.D. Mo. 1970). Description of a few cases will help to demonstrate the difficulty of meeting the eighth amendment standard.

Complete failure to attend to a prisoner's bullet wounds, which failure resulted ultimately in amputation of his leg, was deemed sufficient to state a cause of action under the Civil Rights Act in Coleman v. Johnston, 247 F.2d 273 (7th Cir. 1957). Allegations of improper or inadequate medical treatment were held insufficient to justify relief in habeas corpus unless they were (1) continuing, (2) unsupported by any recognized competent school of medical opinion, and (3) amounted to a denial of needed medical treatment. *Ramsey*, 310 F. Supp. at 604. Under this standard, propounded six years before *Estelle*, petitioner's claim was denied because his condition had been treated in an arguably competent fashion. *Id.* Similar facts precluded relief for the petitioner in Mayfield v. Craven, 433 F.2d 873 (9th Cir. 1970). Although needed surgery had been delayed, possibly causing permanent damage, there could be no finding of cruel and unusual punishment where prison officials eventually went outside the prison to supply treatment by a specialist.

In its first application by the Supreme Court, the callous disregard-deliberate indifference standard was held not to have been met by the prisoner's claim that treatment for his back injury was inadequate. *Estelle v. Gamble*, 429 U.S. 97 (1976). The prisoner had received treatment from medical personnel seventeen times over the course of a three-month period following his injury. The alleged failure to use additional diagnostic techniques or different forms of treatment was deemed to be merely a matter of medical judgment; the Court would not find callous disregard in the face of some efforts to treat, whether successful or not. *Id.* at 107. At least one commentator sees the *Estelle* standard of "deliberate indifference" as requiring an independent showing of bad faith on the part of prison officials. Klein, *supra* note 99, at 16.

Improper treatment, negligent treatment and failure to allow a prisoner to choose his own doctor have also been held not to constitute eighth amendment violations. McCracken v. Jones, 562 F.2d 22, 24 (10th Cir. 1977), *cert. denied*, 435 U.S. 917 (1978) (difference of opinion between prisoner and medical staff insufficient to state a cause of action); Wester v. Jones, 554 F.2d 1285, 1286 (4th Cir. 1977) (doctor's negligence does not constitute deliberate indifference); Mason v. Ciccone, 531 F.2d 867, 872 (8th Cir. 1976) (denial of request to see a particular doctor is not cruel and unusual punishment); Massey v. Hutto, 545 F.2d 45, 46 (9th Cir. 1976) (mere disagreement over proper medical treatment does not constitute cruel and unusual punishment); Tolbert, 434 F.2d at 626 (malpractice allegation does not suffice for constitutional claim). As one commentator put it, "[o]nly such intentional deprivations as would be shocking to the conscience are unconstitutional. Under this standard, a prisoner is entitled to some, but not the best or even effective, treatment. For all practical purposes, even the most rudimentary medical care facilities will meet the constitutional minimums." Note, *supra* note 103, at 619 (footnotes omitted).

¹¹³ See Mayfield v. Craven, 433 F.2d 873 (9th Cir. 1970), *aff'g* 299 F. Supp. 1111 (E.D. Cal. 1969).

cause of action under the eighth amendment; the Fourth Circuit, in *Blanks v. Cunningham*,¹¹⁴ held that all prisoners have a right to reasonable care and treatment.

As discussed above,¹¹⁵ the prisoner's eighth amendment right to treatment extends to mental as well as physical care.¹¹⁶ In spite of some misgivings about its effectiveness,¹¹⁷ there has been growing acceptance of psychiatric and psychological disciplines; this acceptance has helped to establish the legitimacy of prisoners' claims for mental health treatment.¹¹⁸ Moreover, several institutional personnel consider psychiatric illness to be the single most important problem in modern prisons.¹¹⁹

In 1977, the Fourth Circuit, in the landmark case *Bowring v. Godwin*,¹²⁰ extended the *Estelle* "deliberate indifference" standard and established that the eighth amendment right to mental health treatment is identical to that for other aspects of medical care. The court concluded that it could see no underlying distinction between the right to medical care for physical ills and its psychological and psychiatric counterpart.¹²¹

Under the *Bowring* court's eighth amendment standard, a prisoner is entitled to some psychological or psychiatric treatment

if a physician or other health care provider, exercising ordinary skill and care at the time of observation, concludes with reasonable medical certainty (1) that the prisoner's symptoms evidence serious disease or injury; (2) that such disease is curable or may be alleviated; and (3) that the potential for harm to the prisoner by reason of delay or the denial of care

¹¹⁴ 409 F.2d 221 (4th Cir. 1969); see also *Bowring v. Godwin*, 551 F.2d 44 (4th Cir. 1977); *Russell v. Sheffer*, 528 F.2d 318 (4th Cir. 1975). At the district court level, see *Laaman v. Helgemoe*, 437 F. Supp. 269, 311 (D.N.H. 1977).

¹¹⁵ See *supra* notes 103-04 and accompanying text.

¹¹⁶ *Inmates of Allegheny County Jail v. Pierce*, 612 F.2d 754, 763 (3d Cir. 1979); *Bowring v. Godwin*, 551 F.2d 44 (4th Cir. 1977).

¹¹⁷ See *supra* notes 15-18 and accompanying text.

¹¹⁸ *Inmates of Allegheny County Jail v. Pierce*, 612 F.2d 754 (3d Cir. 1979); *Bowring v. Godwin*, 551 F.2d 44 (4th Cir. 1977); *Laaman v. Helgemoe*, 437 F. Supp. 269 (D.N.H. 1977); see also ABA, *Criminal Justice Section Project on Standards Relating to the Legal Status of Prisoners*, § 5.1 (Tent. Draft), in 14 AM. CRIM. L. REV. 377, 466 (1977) ("Prisoners should be entitled to proper medical services, including, but not limited to, dental, physical, psychological, psychiatric, physical therapy, and other accepted medical care.").

¹¹⁹ See, e.g., *Newman v. Alabama*, 349 F. Supp. 278 (M.D. Ala. 1972) (mental illness and retardation are the prevalent medical problems in the Alabama prison system). See Petrick, *Rate of Psychiatric Morbidity in a Metropolitan City Jail Population*, and Gibbs, *Psychological and Behavioral Pathology in Jails: A Review of the Literature* (Sept. 1978) (papers prepared for the Special National Workshop on Mental Health Services in Local Jails, Baltimore, Md.), cited in Adler, *From Hospital to Jail: New Challenges to the Law Enforcement Process*, 17 CRIM. L. BULL. 319, 332 (1981).

¹²⁰ 551 F.2d 44 (4th Cir. 1977).

¹²¹ *Id.* at 47.

would be substantial.¹²²

In addition, the prisoner's serious medical needs must allegedly have been treated with "callous indifference" to state an eighth amendment cause of action.¹²³ The *Bowring* court acknowledged that although the judiciary is "ill-equipped to prescribe the techniques of treatment, this does not alter the fact that in many cases, treatment is obviously called for and is available in some form. In such cases, the state cannot arbitrarily refuse to provide relief."¹²⁴

Thus, it appears that guilty but mentally ill convicts will not likely be in a better position than ordinary inmates to make eighth amendment claims for treatment. *Estelle* and its progeny require the inmate to show "intentional deprivation" of a "serious" medical need; upon a showing that the prison has made any effort to deal with the illness, the court will reject the inmate's claim.¹²⁵ Since Illinois requires guilty but mentally ill inmates to receive "periodic inquiry and examination to be made concerning the nature, extent, continuance and treatment of the defendant's mental illness,"¹²⁶ cursory attention to this provision by the Department of Corrections will probably prevent any eighth amendment challenge. Right to treatment claims have generally failed when prison officials have made some attempt to treat.¹²⁷ By requiring evaluation and only that treatment which the Department of Corrections deems necessary,¹²⁸ the Department's performance under the guilty but mentally ill statute, however minimal, will probably meet the threshold requirements of the eighth amendment. The Illinois legislature has thus effectively insulated the Department of Corrections from eighth amendment right to treatment claims in all but the most flagrant cases of intentional or negligent mistreatment.

B. RIGHT TO TREATMENT UNDER THE FOURTEENTH AMENDMENT

Guilty but mentally ill convicts may have a stronger right to treatment under the fourteenth amendment. A long line of cases has held that the fourteenth amendment mandates treatment of civilly commit-

¹²² *Id.*; see also *Hampton v. Holmesburg Prison Officials*, 546 F.2d 1077, 1081 (3d Cir. 1976); *Laaman*, 437 F. Supp. at 311.

¹²³ *Bowring*, 551 F.2d at 47.

¹²⁴ *Id.* at 48 n.3.

¹²⁵ See *supra* text accompanying notes 105-11.

¹²⁶ ILL. REV. STAT. ch. 38 § 1005-2-6(b). Of the sixty defendants found guilty but mentally ill in Illinois, none are receiving special evaluation or treatment. Interview with Barbara Weiner, Director of the Institute of Psychiatry and the Law (Apr. 4, 1983); see *supra* note 58.

¹²⁷ See *Estelle v. Gamble*, 429 U.S. 97 (1976); *Bowring*, 557 F.2d at 47-48; *Mayfield v. Craven*, 433 F.2d 873 (9th Cir. 1970); *Coleman v. Johnston*, 247 F.2d 273 (7th Cir. 1957); *Ramsey v. Ciccone*, 310 F. Supp. 600 (W.D. Mo. 1970); see also *infra* note 128.

¹²⁸ ILL. REV. STAT. ch. 38, § 1005-2-6(b).

ted mental patients, sexual psychopaths and juvenile offenders,¹²⁹ although the Supreme Court has not expressly confirmed their reasoning. In *Donaldson v. O'Connor*,¹³⁰ the Fifth Circuit held that civil commitment of persons found mentally ill and dangerous involves a "massive curtailment of liberty," which triggers strict due process analysis.¹³¹ The court concluded that civil commitment satisfies due process only if treatment accompanies confinement.¹³² It identified two important state interests underlying civil commitment: protection of society and rehabilitation of the mentally ill. The court concluded that the state may legitimately confine an individual pursuant to its *parens patriae* and police powers if it provides treatment. "To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process."¹³³ A majority of the circuits have relied upon or extended the *Donaldson* holding.¹³⁴

Donaldson involved the rights of involuntarily committed individuals, but its rationale has been extended to protect the voluntarily committed¹³⁵ and mentally retarded,¹³⁶ as well as the criminally committed

¹²⁹ *Romeo v. Youngberg*, 644 F.2d 147 (3d Cir. 1980), *cert. granted*, 452 U.S. 939 (1981), *vacated*, 102 S. Ct. 2452 (1982); *Scott v. Plante*, 532 F.2d 939 (3d Cir. 1976); *Costello v. Wainwright*, 525 F.2d 1239 (5th Cir. 1976); *Burnham v. Dep't of Public Health*, 503 F.2d 1319 (5th Cir. 1974), *cert. denied sub nom.* Dep't of Human Resources of Georgia v. Burnham, 422 U.S. 1057 (1975); *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974), *affg* 355 F. Supp. 451 (N.D. Ind. 1972), *cert. denied*, 417 U.S. 976 (1974); *Philipp v. Carey*, 517 F. Supp. 513 (N.D.N.Y. 1981); *Ohlinger v. Watson*, 28 Crim. L. Rep. (BNA) 2321 (No. 78-3037, 9th Cir. 1980); *Eckerhart v. Hensley*, 475 F. Supp. 908 (W.D. Mo. 1979); *Rone v. Fireman*, 473 F. Supp. 92 (N.D. Ohio 1979); *Davis v. Watkins*, 384 F. Supp. 1196 (W.D. Ohio 1974); *Welsch v. Likins*, 373 F. Supp. 487 (D. Minn. 1974).

¹³⁰ 493 F.2d 507 (5th Cir. 1974), *aff'd on other grounds*, 422 U.S. 563 (1975).

¹³¹ *Id.* at 520 (quoting *Humphrey v. Cady*, 405 U.S. 504, 509 (1972) (civil confinement involves "massive curtailment of liberty")); *see also* *Addington v. Texas*, 441 U.S. 418 (1979) (massive curtailment of liberty implicates due process).

¹³² *Donaldson*, 493 F.2d at 520.

¹³³ *Id.* at 521 (quoting *Wyatt v. Stickney*, 325 F. Supp. 781, 785 (M.D. Ala. 1971), *aff'd sub nom.* *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974)).

Ultimately the United States Supreme Court limited the Fifth Circuit's interpretation, holding only that the state may not constitutionally confine any noncriminal who is neither dangerous nor mentally ill. *O'Connor v. Donaldson*, 422 U.S. 563, 573 (1975). This ruling reserved the issue of treatment for the civilly committed for subsequent consideration.

When the Supreme Court accepted the certiorari petition in *Romeo v. Youngberg*, 451 U.S. 982 (1981), it appeared that the Court would address precisely this issue. The Court's ultimate decision, however, provided no additional guidance to the lower federal courts on the fourteenth amendment right to treatment. *Youngberg v. Romeo*, 102 S. Ct. 2452 (1982). In fact, the Court did not face the right to treatment issue, having found that it had been "dropped" from the case on appeal. *Id.* at 2459 n.23. For the time being at least, federal courts are thus left to interpret for themselves the meaning of the fourteenth amendment's right to treatment.

¹³⁴ See cases cited *supra* note 129.

¹³⁵ *Philipp v. Carey*, 517 F. Supp. 513 (N.D.N.Y. 1981).

(insanity acquittees and defendants incompetent to stand trial),¹³⁷ juvenile offenders¹³⁸ and sexual psychopaths.¹³⁹ This extension of a fourteenth amendment right to treatment to contexts other than pure civil commitment provides the foundation for a fourteenth amendment right to treatment for the guilty but mentally ill.

The rationale underlying the Fifth Circuit's holding in *Donaldson* was easily transferred from the context of involuntary to that of voluntary commitment. In *Phillipp v. Carey*,¹⁴⁰ the court reasoned that there was no constitutionally significant difference between the rights of the voluntarily and involuntarily committed. In both contexts, a major asserted purpose was to rehabilitate the mentally ill; and in both categories some individuals were indefinitely confined for no criminal offenses.¹⁴¹ These similarities led the court to conclude that the voluntarily committed could not be confined absent treatment.¹⁴²

A more complex problem faced the courts when they extended the fourteenth amendment right to treatment to juvenile offenders, sexual psychopaths and the criminally insane. These circumstances, unlike civil commitments, involve individuals who have violated the law, but

¹³⁶ *Romeo*, 644 F.2d 147, 158; *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *Flakes v. Percy*, 511 F. Supp. 1325 (W.D. Wis. 1981); *Gary W. v. Louisiana*, 437 F. Supp. 1209, 1219 (E.D. La. 1976).

¹³⁷ *Ohlinger v. Watson*, 28 CRIM. L. REP. (BNA) 2321 (No. 78-3037, 9th Cir. 1980); *Scott v. Plante*, 532 F.2d 939 (3d Cir. 1976); *Davis v. Watkins*, 384 F. Supp. 1196 (W.D. Ohio 1974).

¹³⁸ *Morales v. Turman*, 383 F. Supp. 53 (E. D. Tex. 1974), *aff'd on other grounds*, 536 F.2d 993 (5th Cir.), *cert. denied*, 430 U.S. 988 (1977); *Nelson v. Heyne*, 491 F.2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974); *Martarella v. Kelley*, 349 F. Supp. 575 (S.D.N.Y. 1972); *Inmates of Boy's Training School v. Affleck*, 346 F. Supp. 1354 (D.R.I. 1972).

¹³⁹ *Humphrey v. Cady*, 405 U.S. 504 (1972); *Millard v. Cameron*, 373 F.2d 468 (D.C. Cir. 1966); *Stachulak v. Coughlin*, 364 F. Supp. 686 (N.D. Ill. 1973).

¹⁴⁰ 517 F. Supp. 513 (N.D.N.Y. 1981).

¹⁴¹ *Id.* at 518. The court recognized that although voluntarily committed individuals were not confined by virtue of any power of the state, they were likely to be *de facto* restrained from leaving by pressure of the institution, family and friends. *Id.*

¹⁴² *Id.* at 519. The court's holding was in the form of a denial of defendant's motion to dismiss for failure to state a claim; it did not make any findings concerning the actual merits of this case. *Id.* The court did not consider that those who were voluntarily committed had voluntarily foregone the due process protections for which the *quid pro quo* of treatment was to substitute in the context of involuntary commitment. The voluntarily committed arguably may not be entitled to the same degree of protection as those committed against their will. On the other hand, in both cases, the state has undertaken treatment. The *Goldberg* line of cases has held that due process can be triggered when government terminates a benefit which it has undertaken to provide. *Goldberg v. Kelly*, 397 U.S. 254 (1970); *see Goss v. Lopez*, 419 U.S. 565 (1975) (suspension of high school student must be preceded by due process hearing); *Bell v. Burson*, 402 U.S. 535 (1971) (suspension of driver's license requires prior due process hearing). Even if voluntary commitment triggers due process inquiry, the question remains whether the same degree of process is due, exacting the same *quid pro quo* of treatment as that required in involuntary commitments. The *Phillipp* court implicitly answered this question in the affirmative.

upon whom society has chosen not to impose criminal liability. The rationale of the pure civil commitment cases relied heavily upon the absence of criminal conduct on the part of these plaintiffs. As the court in *Wyatt v. Stickney* reasoned: “[t]he purpose of involuntary hospitalization for treatment purposes is *treatment* and not mere custodial care or punishment. This is the only justification, from a constitutional standpoint, that allows civil commitments to mental institutions. . . .”¹⁴³ Similarly, the court in *Donaldson* justified the right to treatment on the grounds that “governments must afford a *quid pro quo* when they confine citizens in circumstances where the conventional limitations of the criminal process are inapplicable.”¹⁴⁴ Nevertheless, the fourteenth amendment analysis used in *Donaldson* and *Wyatt* has not been restricted to purely civil confinements.

By extending the right to treatment outside the strictly civil context, the courts have deemphasized the distinction between criminals and non-criminals, relying instead upon the stated objectives of the confinement.¹⁴⁵ When the goals of confinement include treatment or rehabilitation as a major objective, a right to treatment has been found to exist under the fourteenth amendment even if the objectives also include punishment or prophylactic isolation from society.¹⁴⁶

This extension may reflect an acknowledgement that the civil commitment standard undermines the distinction between civilly committed and criminally confined individuals. That standard requires a committing judge to have found that the individual is mentally ill and that he is likely to be dangerous to himself or others.¹⁴⁷ Clearly, considerations outside of humane and altruistic desires to rehabilitate enter into this determination. Because the judge is required to find the subject potentially dangerous to himself or others, one can infer that the purposes of commitment include confinement for the protection of society as well as rehabilitation. Thus, the distinction among the purposes of confinement does not present as compelling a basis for distinguishing rights to treatment as the earlier cases suggest.

One area in which the courts have eliminated the distinction alto-

¹⁴³ 325 F. Supp. 781, 784 (M.D. Ala. 1971) (emphasis in original), *aff'd in part*, *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

¹⁴⁴ *Donaldson*, 493 F.2d at 524. The court identified as the three central limitations missing from civil commitment (1) that detention must be in retribution for a specified offense; (2) that it be limited to a fixed term; and (3) that it be preceded by a process imbued with fundamental procedural safeguards. *Donaldson's quid pro quo* analysis has not been accepted by all the circuits.

¹⁴⁵ *Id.* at 522.

¹⁴⁶ See cases cited *supra* notes 138-42.

¹⁴⁷ See *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Rouse v. Cameron*, 373 F.2d 451, 458 (D.C. Cir. 1966); ILL. REV. STAT. ch. 38, § 119 (1981).

gether for right to treatment purposes is that of sexual psychopaths. In *Ohlinger v. Watson*¹⁴⁸ two sexual offenders challenged their indefinite confinement without treatment on both eighth amendment and fourteenth amendment grounds. Notwithstanding its agreement with the lower court that petitioners had not met their strict eighth amendment burden,¹⁴⁹ the Ninth Circuit held that due process principles command "adequate and effective treatment" for prisoners convicted as sexual psychopaths.¹⁵⁰

The *Ohlinger* court closely considered the indeterminacy of the defendants' prison terms; underlying this factor, however, was a judgment concerning the purpose of the confinement. The court reasoned that confinement, whose purpose is essentially punitive, must be analyzed under the eighth amendment standard of *Estelle* and *Bowring* because "[i]ncarceration under those circumstances is primarily for punitive purposes."¹⁵¹ The state's interest, however, in creating this special status is "to provide for the rehabilitation of a sex offender who has disclosed a tendency to be a menace to society."¹⁵² Thus, when the state justifies confinement on rehabilitative as well as punitive grounds, the fourteenth amendment holds the state to a high standard of treatment.¹⁵³

Like the *Ohlinger* defendants, guilty but mentally ill defendants are not being sentenced "merely because they committed criminal offenses, but also because they possess . . . 'a mental disturbance, delinquency or condition predisposing' them to the commission of . . . offenses."¹⁵⁴ Furthermore, although they are not subject to indefinite imprisonment, the stigma of their criminal convictions is compounded when they are labelled "mentally ill."¹⁵⁵ In light of this added stigma and in recognition of the likelihood that mental illness actually contributed to their criminal behavior, guilty but mentally ill defendants should be guaranteed treatment which meets fourteenth amendment standards.

A similar line of reasoning justifies the right to treatment of juvenile offenders. In *Nelson v. Heyne*,¹⁵⁶ the Seventh Circuit affirmed that a juvenile correctional facility must provide rehabilitative treatment. The

¹⁴⁸ 28 CRIM. L. REP. (BNA) 2321 (No. 78-3037, 9th Cir. 1980).

¹⁴⁹ See *supra* notes 96-126 and accompanying text.

¹⁵⁰ 28 CRIM. L. REP. (BNA) at 2321.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ See *Vitek v. Jones*, 445 U.S. 480 (1980) (Supreme Court recognized the additional stigma of a prisoner's transfer to a mental hospital).

¹⁵⁶ 491 F.2d 352 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974); see also *McRedmond v. Wilson*, 533 F.2d 757, 762 (2d Cir. 1976); *Johnson v. Solomon*, 484 F. Supp. 278, 298-99 (D. Md. 1979); *Morgan v. Sproat*, 432 F. Supp. 1130, 1140-41 (S.D. Miss. 1977); *Lucas v. Wasser*, 425 F. Supp. 955, 960-61 (S.D.N.Y. 1976); *Pena v. New York State Div. for Youth*, 419 F. Supp.

court construed the fourteenth amendment more broadly than did the courts in *Ohlinger* or *Donaldson*. *Ohlinger* and *O'Connor v. Donaldson* both focused on the indeterminate term of confinement;¹⁵⁷ *Donaldson* also stressed that the non-criminal context of civil commitment justified a right to treatment.¹⁵⁸ Although neither of these factors is present in the incarceration of juvenile offenders, the court in *Nelson* nevertheless found that

“[a] new concept of substantive due process is evolving in the therapeutic realm. This concept is founded upon a recognition of the concurrency between the state’s exercise of sanctioning powers and its assumption of the duties of social responsibility. Its implication is that effective treatment must be the *quid pro quo* for society’s right to exercise its *parens patriae* controls. Whether specifically recognized by statutory enactment or implicitly derived from the constitutional requirements of due process, the right to treatment exists.”¹⁵⁹

Under this theory, effective treatment is required whenever treatment or rehabilitation is a major goal of confinement. The *Nelson* view is also supported by the reasoning of *Rone v. Fireman*, which held that “whenever the provision of care and treatment is *part of the purpose for confinement*, such must be accorded consistent with due process.”¹⁶⁰ Thus, the evolving fourteenth amendment standard announced in these cases¹⁶¹ requires that whenever governments confine individuals for the express

203, 206 (S.D.N.Y. 1976); *Morales v. Turman*, 383 F. Supp. 105, 119 (E.D. Tex. 1974); *Collins v. Bensinger*, 374 F. Supp. 273, 275 (N.D. Ill. 1974).

¹⁵⁷ *O'Connor v. Donaldson*, 422 U.S. 563, 568 (1975); *Ohlinger*, 28 CRIM. L. REP. (BNA) at 2321.

¹⁵⁸ *O'Connor*, 422 U.S. at 568 (“A finding of mental illness alone cannot justify a state’s locking a person up . . . and keeping him in simple custodial confinement. . . . [A] state cannot constitutionally confine without more a nondangerous individual. . . .”).

¹⁵⁹ 491 F.2d at 359 (quoting *Martarella v. Kelley*, 349 F. Supp. 575, 600 (S.D.N.Y. 1972)).

¹⁶⁰ 473 F. Supp. 92, 119 (N.D. Ohio 1979) (emphasis added). The “purpose” test may be criticized on the grounds that logic will not permit it to be confined to mentally ill offenders and juveniles; after all, is not rehabilitation one of the stated goals of criminal imprisonment generally? Why should not the right to rehabilitation be just as compelling for all corrections populations? Although this “floodgates” argument is somewhat compelling, it overlooks two distinguishing factors. First, the expectation of treatment is much greater when the premise of the confinement is explicitly treatment, as in the civil commitment, juvenile offender and guilty but mentally ill contexts. Second, the likelihood of “treatability” is much greater in these contexts as well. Thus, wholesale treatment and rehabilitation are not necessarily called for by the reasoning of these cases.

It is therefore possible to distinguish ordinary imprisonment from treatment-oriented confinement and to conform to the Supreme Court’s rejection of right to rehabilitation claims by inmates. *Marshall v. United States*, 414 U.S. 417, 421 (1974); *see also Pugh v. Locke*, 406 F. Supp. 318, 330 (M.D. Ala. 1976) (“Courts have thus far declined to elevate a positive rehabilitation program to the level of a constitutional right.”). To the extent that rehabilitation remains one of the goals of “corrections,” however, perhaps the distinction should be reexamined and the goals of criminal punishment publicly adapted to society’s unwillingness to actively rehabilitate offenders.

¹⁶¹ *See also* cases cited *supra* note 156.

purpose of treating them, they must receive constitutionally adequate treatment.

Although it has been held that the function of ordinary criminal incarceration is fulfilled even when a prison has no rehabilitative facilities,¹⁶² a defendant convicted under the guilty but mentally ill statute is in a different position than one who was simply found guilty.¹⁶³ One of the explicit purposes of the verdict is to effect treatment.¹⁶⁴ The proponents of the legislation stated that the verdict is intended "to assure that those who are responsible for their crimes are punished *as well as treated*."¹⁶⁵ In this respect, guilty but mentally ill defendants are similar to sexual psychopaths who are also recognized offenders afflicted with mental illness.¹⁶⁶

There are, admittedly, other functions served by incarceration of the guilty but mentally ill; however, there are also other functions served by confinement of sexual psychopaths, juvenile offenders, and, to a lesser extent, the non-criminal mentally ill. Confinement of members of these latter categories is further justified by multiple purposes, including protection of society and deterrence.¹⁶⁷ Like members of these latter categories, the guilty but mentally ill are entitled to constitutionally adequate treatment.¹⁶⁸

In determining the strength of a fourteenth amendment right to

¹⁶² Holt v. Sarver, 309 F. Supp. 362, 379 (E.D. Ark. 1970); Wilson v. Kelley, 294 F. Supp. 1005, 1012-13 (N.D. Ga. 1968); see Klein, *supra* note 99, at 22.

¹⁶³ This distinction is somewhat problematic because it dismisses the rehabilitation function for the bulk of those serving time. For the purpose of the guilty but mentally ill, however, this discussion is just intended to suggest that the defendants have a particularly strong claim to treatment. Such a preference can be challenged on grounds expressed in Newman v. Alabama, 349 F. Supp. 278 (M.D. Ala. 1972). There the court noted that in the Alabama prison system, it is estimated that 10% of the inmates were psychotic and another 60% are disturbed enough to require treatment. Nevertheless, treatment preference for those found guilty but mentally ill would be consistent with a policy of placing resources where they are most desperately needed. It would also better comport with the requirements of the fourteenth amendment.

¹⁶⁴ See *supra* notes 41-46 and accompanying text.

¹⁶⁵ Thompson, *supra* note 20, at 4 (emphasis added).

¹⁶⁶ See, e.g., Millard v. Cameron, 373 F.2d 468 (D.C. Cir. 1966).

¹⁶⁷ See *supra* notes 140-146 and accompanying text.

¹⁶⁸ The cases further dictate the character of treatment to be given. The object of treatment should be to give every committed person "a realistic opportunity to be cured or to improve his or her mental condition." Welsch v. Likins, 373 F. Supp. 487, 499 (D. Minn. 1974) (quoting Wyatt v. Stickney, 325 F. Supp. 781, 784 (M.D. Ala. 1971), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974)). The courts have looked particularly for three conditions in determining whether this goal has been met—a humane psychological and physical environment, qualified staff in sufficient numbers and, most important, individualized treatment plans. Wyatt v. Stickney, 334 F. Supp. 1341, 1343 (M.D. Ala. 1971) (on remand). If the indicia of adequate treatment are not present, the hospital is, for legal purposes, "transform[ed] . . . into a penitentiary where one could be held indefinitely for no convicted offense . . ." raising due process and equal protection issues. Ragsdale v. Overholser, 281 F.2d 943,

treatment, courts have primarily examined the statutory purpose for confinement.¹⁶⁹ A right to individualized treatment consisting of a " 'bona fide effort' to cure or improve the patient"¹⁷⁰ has been read into certain kinds of confinement, and failure to provide such treatment has been held to state a cause of action.¹⁷¹ The express treatment goal of the guilty but mentally ill statute favors a strong treatment right for those convicted pursuant to its terms.

VI. CONCLUSION

Of the eight states creating the guilty but mentally ill verdict, only two failed to provide for an unequivocal statutory right to treatment.¹⁷² Instead, Illinois and New Mexico conferred broad discretion on their Departments of Corrections to provide only that treatment they deem necessary.¹⁷³

In the absence of an express or implied statutory right, guilty but mentally ill inmates in Illinois and New Mexico must rely on the Constitution to vindicate their rights to treatment. Under established eighth amendment standards, however, they will be unlikely to secure significant treatment. Current interpretation of the fourteenth amendment, on the other hand, lends itself to a much stronger right to treatment. To date, no such claim has been litigated in the state or federal courts. As the proposal to establish the verdict on the federal level gains national prominence,¹⁷⁴ however, these disposition and treatment issues will likely lead the debate.

VICKI L. PLAUT

950 (D.C. Cir. 1966); *see also* Covington v. Harris, 419 F.2d 617, 625 (D.C. Cir. 1969); Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966).

¹⁶⁹ See cases cited *supra* note 129.

¹⁷⁰ Covington v. Harris, 419 F.2d 617, 625 (D.C. Cir. 1969) (treatment for criminally insane); Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala. 1971), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

¹⁷¹ Rouse v. Cameron, 373 F.2d 452 (D.C. Cir. 1966).

¹⁷² ILL. REV. STAT. ch. 38, § 1005-2-6 (1981); N.M. STAT. ANN. §§ 31-9-3, 31-9-4 (Supp. 1982).

¹⁷³ *Id.*

¹⁷⁴ U.S. DEP'T OF JUST., ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME: FINAL REPORT, 540 (1981). Recommendation 39 reads: "The Attorney General should support or propose legislation that would create an additional verdict in federal criminal cases of 'guilty but mentally ill' modeled after the recently passed Illinois statute" *Id.* The Commentary states that the verdict

would enable federal juries to recognize that some defendants are mentally ill but that their mental illness is not related to the crime they committed or their culpability for it.

It would also 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.

Id. (emphasis added).