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GUILTY BUT MENTALLY ILL VERDICTS AND THE DEATH PENALTY: AN EIGHTH AMENDMENT ANALYSIS

ANNE S. EMANUEL†

Since 1975, twelve states have enacted statutes adopting the plea and verdict of "guilty but mentally ill." The statutes authorize the same sentences for defendants found guilty but mentally ill and defendants found simply guilty. Because the death penalty is legal in ten of these states, several courts have sentenced guilty but mentally ill defendants to death. In this Article, Professor Emanuel argues that imposing the death penalty on defendants found guilty but mentally ill violates the proportionality requirement of the eighth amendment.

Professor Emanuel explains that the death penalty is qualitatively different from other "maximum" punishments and is constitutionally permissible only when the defendant is fully responsible for the crime. She asserts that a verdict of guilty but mentally ill must be understood to indicate a jury finding that the defendant is not fully responsible for the crime; therefore, the death penalty is constitutionally disproportionate.

I. INTRODUCTION

The plea and verdict of not guilty by reason of insanity and the death penalty are two of the most controversial elements in our criminal justice system. Normally the two do not interface, for it goes without saying that a defendant found not guilty of an offense may not be sentenced at all, much less sentenced to death. Increasingly, however, an interface of sorts occurs. In a number of states, when a defendant enters a plea of not guilty by reason of insanity, the jury is charged that it may return one of four verdicts: guilty, not guilty, not guilty by reason of insanity, or guilty but mentally ill.

The plea and verdict of guilty but mentally ill were first introduced in Michigan in 1975.¹ Since then, eleven additional states have adopted them by statute.² Of the twelve states with a guilty but mentally ill plea and verdict, only

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1. Act of Aug. 6, 1975, No. 180, § 36, 1975 Mich. Pub. Acts 387 (codified at MICH. COMP. LAWS § 768.36 (1982)); McGraw, Farthing-Capowich & Keilitz, *The "Guilty But Mentally Ill" Plea and Verdict: Current State of the Knowledge*, 30 VILL. L. REV. 117, 120 (1985).

2. McGraw, Farthing-Capowich & Keilitz, *supra* note 1, at 120; see Act of July 3, 1982, ch. 143, 1982 Alaska Sess. Laws 1 (codified at ALASKA STAT. § 12.47.030 (Supp. 1984)); Act of July 2, 1982, ch. 328, § 2, 63 Del. Laws 714 (1982) (codified at DEL. CODE ANN. tit. 11, § 408 (1987)); Act of Apr. 16, 1982, 1982 Ga. Laws 1476 (codified at GA. CODE ANN. § 17-7-131 (Supp. 1988)); Act of

Alaska and Michigan do not also have the death penalty.³ The statutes uniformly provide that a defendant found guilty but mentally ill may be sentenced for his crime as otherwise provided by law.⁴ Relying in part on that provision, in at least four cases the prosecution has succeeded in having the death penalty imposed on defendants found guilty but mentally ill.⁵

By enacting statutes that provide for guilty but mentally ill pleas and verdicts, legislatures provide a mechanism by which the trier of fact in a criminal case may return a verdict that indicates that the defendant bore diminished responsibility for his crime. Where recognized, the defense of diminished responsibility historically has allowed culpable defendants to offer evidence of mental illness, not to disprove any element of the crime, but simply to mitigate punishment.⁶ In the American criminal justice system, however, the range of permissible punishments is for the most part left to legislative judgment; that is, the legislature is free to authorize any penalty for a guilty but mentally ill defendant that does not offend the Constitution.⁷

Sept. 17, 1981, No. 82-553, 1981 Ill. Laws 2782 (codified at ILL. ANN. STAT. ch. 38 (Smith-Hurd Supp. 1989)); Act of May 5, 1981, No. 298, §§ 4-5, 1981 Ind. Acts 2314 (codified at IND. CODE ANN. §§ 35-35 to -36 (Burns 1983)); Act of July 15, 1988, ch. 283, § 8, 1988 Ky. Acts 834 (codified at KY. REV. STAT. ANN. § 504 (Michie/Bobbs-Merrill Supp. 1988)); Act of Mar. 8, 1982, ch. 55, 1982 N.M. Laws 418 (codified at N.M. STAT. ANN. § 31-9-3 (1984)); Act of Dec. 15, 1982, No. 286, 1982 Pa. Laws 1262 (codified at 18 PA. CONS. STAT. ANN. § 314 (Purdon 1983)); Act of May 16, 1984, No. 396, 1984 S.C. Acts 1785 (codified at S.C. CODE ANN. § 17-24-20 (Law. Coop. 1988)); Act of Mar. 19, 1983, ch. 174, 1983 S.D. Laws 368 (codified at S.D. CODIFIED LAWS ANN. § 23A-7-2 (Supp. 1983)); Act of Jan. 31, 1980, ch. 15, 1980 Utah Laws 110 (codified at UTAH CODE ANN. § 77-13-1 (Supp. 1989)).

3. See McGraw, Farthing-Capowich & Keilitz, *supra* note 1, at 154-55 n.122.

4. *Id.*; see, e.g., ILL. REV. STAT. ch. 38, ¶ 1005-2-6(a) (1981) ("The court may impose any sentence upon the defendant which could be imposed pursuant to law upon a defendant who has been convicted of the same offense without a finding of mental illness.").

5. *People v. Crews*, 122 Ill. 2d 266, 522 N.E.2d 1167 (1988) (defendant found guilty of murder, kidnapping, and rape but mentally ill), *cert. denied*, 109 S. Ct. 3260 (1989); *Harris v. State*, 499 N.E.2d 723 (Ind. 1986) (defendant found guilty of murder but mentally ill), *cert. denied*, 482 U.S. 909 (1987). A Delaware jury found Reginald Sanders guilty but mentally ill and recommended a sentence of death in 1986. The Delaware Supreme Court has not yet ruled on Sanders' appeal, and the trial proceedings are not reported. See "*Mentally Ill*" and *Bound to Die*, N.Y. Times, Oct. 12, 1986, § 1, at 50, col. 1. In May 1989 a South Carolina judge accepted a plea of guilty but mentally ill from a 20-year-old man who had killed two third-grade students and wounded seven students and two teachers during a shooting spree at an elementary school. The judge then sentenced the defendant, James Wilson, to death. *Found Mentally Ill, Killer of Schoolgirls Gets Death Sentence*, Atlanta J. & Const., May 10, 1989, at A-3. In a subsequent editorial, the *Atlanta Journal and Constitution* called the sentence "utterly astonishing" and commented:

While Wilson's crime was inarguably ghastly, his disordered mental state makes his ram-page more a hideous tragedy than an unmitigated outrage. What purpose would his execution serve? Would it deter other psychotics from similar behavior? The very notion is ridiculous. . . . At best, Wilson's execution would be no more than a hopeless gesture of protest against a crime that defies understanding. At worst, it would be an act of unspeakable meanness. James Wilson could not control his own worst impulses. Sometimes our judicial system has the same problem.

It's Wrong to Kill the Mentally Ill, Atlanta J. & Const., May 14, 1989, at D-6.

6. For a discussion of the history and philosophy of the theory of diminished responsibility, see *infra* notes 109-20 and accompanying text.

7. The constitutional provision most commonly used to invalidate criminal penalties provided by statute is, of course, the cruel and unusual punishment clause of the eighth amendment. Other provisions, however, may be controlling. See, e.g., *Stanford v. Kentucky*, 109 S. Ct. 2969, 2979 (1989) (plurality opinion) (noting that the equal protection clause of the fourteenth amendment could be used to invalidate criminal penalties with no rational basis).

Although the cruel and unusual punishment clause of the eighth amendment is not offended by the death penalty per se,⁸ it does not allow execution of a defendant when the penalty of death is disproportionate to the crime.⁹ The thesis of this Article is that a guilty but mentally ill verdict establishes that the defendant, because of mental illness, bears diminished responsibility for his crime, and that such a verdict renders society's most severe sanction, the death penalty, disproportionate as a matter of law.

II. THE GUILTY BUT MENTALLY ILL PLEA AND VERDICT

A. A Historical Overview

First adopted in Michigan in 1975, the guilty but mentally ill plea and verdict are of relatively recent origin.¹⁰ A year earlier, in *People v. McQuillan*,¹¹ the Michigan Supreme Court had ruled that defendants found not guilty by reason of insanity and committed to institutions for the criminally insane were entitled to hearings on their present sanity to the same extent as patients who were civilly committed.¹² Those found currently sane were entitled to release.¹³ Pursuant to *McQuillan* and following hearings in which they were determined to be presently sane, some sixty-four inmates not guilty by reason of insanity were released; two committed violent crimes almost immediately.¹⁴ The ensuing public outcry triggered a legislative response directed at curtailing (and perhaps at indirectly abrogating) the insanity defense.¹⁵

In order to understand Michigan's solution, one must consider the problem

8. See *Gregg v. Georgia*, 428 U.S. 153, 168-87 (1976) (plurality opinion).

9. See *Coker v. Georgia*, 433 U.S. 584, 598 (1977) (plurality opinion) (death penalty excessive punishment for rape); see also *infra* notes 136-45 and accompanying text (discussion of proportionality).

10. Act of Aug. 6, 1975, No. 180, § 36, 1975 Mich. Pub. Acts 387 (codified at MICH. COMP. LAWS § 768.36 (1982)).

11. 392 Mich. 511, 221 N.W.2d 569 (1974).

12. *Id.* at 536, 221 N.W.2d at 580.

13. *Id.* at 538, 221 N.W.2d at 581.

14. John McGee kicked his wife to death within a month of his release; Ronald Manlen committed two rapes. Mickenberg, *A Pleasant Surprise: The Guilty But Mentally Ill Verdict Has Both Succeeded In Its Own Right and Successfully Preserved the Traditional Role of the Insanity Defense*, 55 U. CIN. L. REV. 943, 973 (1987).

15. *Id.* at 973-74. That most proponents of the guilty but mentally ill verdict consider it a means of decreasing the likelihood of a not guilty by reason of insanity verdict is virtually universally accepted. One study concluded:

The primary purposes of the [guilty but mentally ill] legislation were to curtail the assertion of the insanity defense, to reduce the incidence of insanity acquittals, and thereby to protect society by imprisoning mentally disturbed, dangerous defendants who might otherwise be found [not guilty by reason of insanity] and released shortly thereafter. Related to the legislative purpose to close the perceived loophole whereby allegedly criminally responsible defendants escape punishment for their misconduct, was the intent to offer juries a compromise verdict that would ensure that such defendants would not be released before a minimum prison term had been served and mental health treatment has proved effective. Some commentators argued that the real intent of [guilty but mentally ill] laws is punishment cloaked in the guise of mental health treatment.

INSTITUTE ON MENTAL DISABILITY, NATIONAL CENTER FOR STATE COURTS, *THE GUILTY BUT MENTALLY ILL VERDICT: AN EMPIRICAL STUDY*, EXECUTIVE SUMMARY E-4 (rev. ed. 1985) [hereinafter *EMPIRICAL STUDY*].

the legislature confronted. One might posit that the problem was the existence of the plea of not guilty by reason of insanity, but the insanity plea reflects a well-accepted approach to criminal law in our society. In part, our claim to be a civilized society rests on the fact that we do not, as a rule, punish people for acts for which they bear no moral responsibility.¹⁶

The *Model Penal Code* promulgated by the American Law Institute illuminates this principle. In setting forth the predicates for criminal liability, the *Model Penal Code* first establishes that our society does not punish people for acts that are not "voluntary."¹⁷ The *Model Penal Code* then lists examples of involuntary acts: reflexes or convulsions; a bodily movement during unconsciousness or sleep; conduct during hypnosis or resulting from hypnotic suggestion; and conduct that is not a product of the effort or determination of the actor, either conscious or habitual.¹⁸ If an act is not voluntary, the actor is not responsible for it. If the actor is not responsible for his act, it makes little sense to punish him for it.¹⁹

The concept of voluntariness is, however, extremely limited. An act that is willed is voluntary. But it does not follow that a person bears moral responsibility—or should suffer criminal consequences—for every voluntary act. Consider the five-year-old who angrily pushes another child down a flight of steps, causing a fall that results in death. The act is voluntary; were it the act of a rational adult, it might well be murder. Yet surely no one would hold a five-year-old criminally liable.²⁰

Similarly, few who accept that a defendant was insane, and thus not morally responsible or blameworthy for an act that would otherwise be criminal, would hold that defendant criminally responsible.²¹ Yet the debate over the

16. As Justice Jackson wrote:

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.

Morrisette v. United States, 342 U.S. 246, 250-51 (1952) (footnote omitted).

17. MODEL PENAL CODE § 2.01(1) (1985). "A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable." *Id.* For a discussion of the philosophical complexity that underlies this proposition, see Saunders, *Voluntary Acts and the Criminal Law: Justifying Culpability Based on the Existence of Volition*, 49 U. PITT. L. REV. 443 (1988).

18. MODEL PENAL CODE § 2.01(2) (1985).

19. See *id.* § 4.01 comment n.12.

20. For a discussion of the infancy defense, see Mickenberg, *supra* note 14, at 955 ("The reason society holds minors free from criminal liability is not because they are too young to form a criminal intent, but because they are presumed to be too young to make a conscious, moral choice between doing good and doing evil.")

21. *Id.* at 965 ("Polls indicate that even the general public believes that defendants who are really unable to choose between right and wrong should not be held criminally liable for their acts."); see Vuoso, *Background, Responsibility, and Excuse*, 96 YALE L.J. 1661, 1663 (1987) ("Whatever one's position on whether moral and legal responsibility are logically related, it is a plain

continued viability of the insanity defense continues.²² Opponents of the insanity defense for the most part do not disagree with the principle that society should not hold people criminally accountable for conduct for which they are not responsible. Rather, they view the insanity defense as a flawed effort to deal with that problem.²³

Upon a closer analysis, then, it becomes apparent that the "problem" Michigan faced was not simply the existence of the defense of not guilty by reason of insanity. Rather, it was the fact that the possible verdicts—guilty, innocent, or not guilty by reason of insanity—left a gap. Confronted by a defendant whose mental illness, at a minimum, significantly contributed to his offense, and who therefore was not entirely responsible, a jury would be forced to choose between a guilty verdict, which ignored the mental illness, and a not guilty by reason of insanity verdict, which offered complete exoneration.²⁴

The Michigan solution was to offer another choice—the plea and verdict of guilty but mentally ill. Defendants found guilty but mentally ill are held criminally responsible and sentenced for their acts. They also are guaranteed (at least theoretically) necessary mental health treatment during incarceration.²⁵ The guarantee of mental health treatment may be illusory;²⁶ the sentence is not.

The Michigan guilty but mentally ill statute stood alone for some six years until Indiana followed suit in 1981.²⁷ Like Michigan, Indiana responded to public outcry. In Indiana the outcry began when a defendant accused of a particularly heinous crime entered an insanity plea. The possibility that a man who had drowned three children under age six and raped and murdered their mother might be acquitted by reason of insanity so inflamed public opinion that the furor subsided only slightly when the jury rejected the insanity plea, found the

fact that in practice our criminal law is such that people are generally held criminally responsible only when they would also be held morally responsible.").

22. See N. MORRIS, *MADNESS AND THE CRIMINAL LAW* (1982); Dutile & Singer, *What Now for the Insanity Defense?*, 58 NOTRE DAME L. REV. 1104 (1983); Mackay, *Post-Hinckley Insanity in the U.S.A.*, 1988 CRIM. L. REV. 88; Tyrell, *Insanity: A Crazy Defense*, 35 MED. TRIAL TECH. Q. 48 (1988).

23. See MODEL PENAL CODE § 4.01 comment (1985); W. LAFAYE & A. SCOTT, *CRIMINAL LAW* 308-09 (2d ed. 1986); MORRIS, *supra* note 22, at 59; Mickenberg, *supra* note 14, at 965-66; Vuoso, *supra* note 21, at 1682.

24. Two points must be noted here. Mental illness can be presented as a diminished responsibility defense, which reduces but does not eliminate culpability. Nonetheless, when an insanity defense is presented, at some point the jury is confronted with a choice between guilt and innocence. Also, to say that a not guilty by reason of insanity verdict results in complete exoneration is, of course, not to say that the defendant is given his freedom immediately. If the mental illness persists and continues to render the defendant dangerous to himself or others, the defendant probably will be committed automatically. Comment, *Evaluating Michigan's Guilty But Mentally Ill Verdict: An Empirical Study*, 16 U. MICH. J.L. REF. 77, 82 (1982).

25. *Id.* at 79.

26. *Id.* at 79 n.10; see, e.g., *People v. Carter*, 135 Ill. App. 3d 403, 413, 481 N.E.2d 1012, 1020 (1985) ("Although there is no guarantee that defendant will be treated as the trial court suggested, the fact that defendant was found guilty but mentally ill does guarantee defendant the benefit of being characterized as in need of treatment as the legislature intended."); see also McGraw, Farthing-Capowich & Keilitz, *supra* note 1, at 187 ("Despite the widespread belief that a [guilty but mentally ill] finding guarantees an offender mental health treatment, a review of the relevant statutes indicates that the finding does not ensure treatment beyond that available to other offenders.").

27. Act of May 5, 1981, No. 298, §§ 4-5, 1981 Ind. Acts 2314, 2366-2372 (codified at IND. CODE ANN. §§ 35-35 to -36 (Burns 1983)).

defendant guilty, and sentenced him to death.²⁸ The Indiana legislature quickly passed a guilty but mentally ill statute.²⁹

In 1982, John W. Hinckley, whose attempted assassination of President Reagan left the President, Press Secretary James Brady, a Secret Service agent, and a metropolitan police officer wounded, successfully asserted an insanity defense and was acquitted.³⁰ The *Hinckley* case renewed interest in the guilty but mentally ill plea and verdict. By 1984, notwithstanding widespread opposition from the American Bar Association³¹ and others,³² ten additional states had adopted guilty but mentally ill statutes.³³

B. Legal Definitions of Insanity and Mental Illness

The traditional legal definition of insanity is embodied in the *M'Naghten* Rule:³⁴ a defendant is legally insane only if, as a result of a defect of reason from a disease of the mind, at the time of the act he did not know either the nature and quality of the act or that the act was wrong.³⁵ Some states supplement the *M'Naghten* Rule with the "irresistible impulse" test,³⁶ which focuses on the defendant's ability to control her act. If the defendant commits an act that otherwise would be a crime at a time when, because of mental illness, she

28. See Note, *Indiana's Guilty But Mentally Ill Statute: Blueprint to Beguile the Jury*, 57 IND. L.J. 639, 639 & n.4 (1982). The case that caused the furor was *Judy v. State*, 275 Ind. 145, 416 N.E.2d 95 (1981). Steven Judy was convicted of raping and murdering a young mother and of drowning her three children, who were five, four, and two years old. *Id.* at 151, 416 N.E.2d at 98.

29. Note, *supra* note 28, at 639.

30. See *United States v. Hinckley*, 525 F. Supp. 1342 (D.D.C.), *op. clarified, reconsideration denied*, 529 F. Supp. 520 (D.D.C.), *aff'd*, 672 F.2d 115 (D.C. Cir. 1982); Taylor, *Jury Finds Hinckley Not Guilty, Accepting His Defense of Insanity*, N.Y. Times, June 22, 1982, § 1, at 1, col. 5.

31. ABA STANDARDS FOR CRIMINAL JUSTICE, MENTAL HEALTH STANDARDS 7-6.10(b) (1984) [hereinafter MENTAL HEALTH STANDARDS].

32. See Britton & Bennett, *Adopt Guilty But Mentally Ill? — No!*, 15 U. TOL. L. REV. 203 (1983); Klofas & Weisheit, *Pleading Guilty But Mentally Ill: Adversarial Justice and Mental Health*, 9 INT'L J.L. & PSYCHIATRY 491 (1986); Slobogin, *The Guilty But Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*, 53 GEO. WASH. L. REV. 494 (1985); Note, *Guilty But Mentally Ill: A Critical Analysis*, 14 RUTGERS L.J. 453 (1983).

33. See Act of July 3, 1982, ch. 143, 1982 Alaska Sess. Laws 1 (codified at ALASKA STAT. § 12.47.030 (Supp. 1984)); Act of July 2, 1982, ch. 328, § 2, 63 Del. Laws 714 (1982) (codified at DEL. CODE ANN. tit. 11, § 408 (1987)); Act of Apr. 16, 1982, 1982 Ga. Laws 1476 (codified at GA. CODE ANN. § 17-7-131 (Supp. 1988)); Act of Sept. 17, 1981, No. 82-553, 1981 Ill. Laws 2782 (codified at ILL. ANN. STAT. ch. 38 (Smith-Hurd Supp. 1989)); Act of July 15, 1988, ch. 283, § 8, 1988 Ky. Acts 834 (codified at KY. REV. STAT. ANN. § 504 (Michie/Bobbs-Merrill Supp. 1988)); Act of Mar. 8, 1982, ch. 55, 1982 N.M. Laws 418 (codified at N.M. STAT. ANN. § 31-9-3 (1984)); Act of Dec. 15, 1982, No. 286, 1982 Pa. Laws 1262 (codified at 18 PA. CONS. STAT. ANN. § 314 (Purdon 1983)); Act of May 16, 1984, No. 396, 1984 S.C. Acts 1785 (codified at S.C. CODE ANN. § 17-24-20 (Law. Coop. 1988)); Act of Mar. 19, 1983, ch. 174, 1983 S.D. Laws 368 (codified at S.D. CODIFIED LAWS ANN. § 23A-7-2 (Supp. 1983)); Act of Jan. 31, 1980, ch. 15, 1980 Utah Laws 110 (codified at UTAH CODE ANN. § 77-13-1 (Supp. 1989)); see also *State v. Robinson*, 399 N.W.2d 324, 328 n.3 (S.D. 1987) (commenting that South Dakota's guilty but mentally ill statute was adopted shortly after the *Hinckley* verdict).

34. The rule had its origin in *M'Naghten's Case*, 8 Eng. Rep. 718 (H.L. 1843). For a history of the *M'Naghten* Rule, see English, *The Light Between Twilight and Dusk: Federal Criminal Law and the Volitional Insanity Defense*, 40 HASTINGS L.J. 1 (1988).

35. W. LAFAVE & A. SCOTT, *supra* note 23, at 311.

36. *E.g.*, *Caldwell v. State*, 257 Ga. 10, 354 S.E.2d 124 (1987); *People v. Wright*, 648 P.2d 665 (Colo. 1982); see Keilitz, *Researching and Reforming the Insanity Defense*, 39 RUTGERS L. REV. 289, 294 (1987).

has suddenly suffered a brief loss of control, she is not held criminally responsible for her act.³⁷

From 1954 until 1972 the United States Court of Appeals for the District of Columbia Circuit followed a test enunciated by Judge Bazelon in *Durham v. United States*:³⁸ "[A]n accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."³⁹ The *Durham* rule was never widely accepted and was abandoned by the District of Columbia Circuit in 1972 in favor of the *Model Penal Code* test.⁴⁰

The *Model Penal Code* test, which has been widely adopted by the states,⁴¹ provides: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law."⁴² This broadens the *M'Naghten* Rule in three important ways. First, the *Model Penal Code* changes the term "know" to "appreciate"; second, it requires only a substantial, not a total, lack of capacity to appreciate; and third, it adds a "volitional prong" by exonerating the defendant who lacks the substantial capacity to control his conduct. By relaxing the strictures of the *M'Naghten* Rule, the *Model Penal Code* test broadened the class of defendants who could avail themselves of an insanity plea. By 1984 almost all of the federal courts of appeals had adopted the *Model Penal Code* test.⁴³ In 1984, however, Congress enacted a statutory insanity test as part of the Comprehensive Crime Control Act.⁴⁴ Under this act a defendant may be found not guilty by reason of insanity when "as a result of a severe mental disease or defect, [he] was unable to appreciate the nature and quality or the wrongfulness of his act"⁴⁵ at the time of the offense. The federal statutory test represents, for the most part, a return to the *M'Naghten* Rule.⁴⁶

An understanding of the various legal definitions of insanity helps in characterizing the definitions of mental illness in guilty but mentally ill statutes. No state uses the *M'Naghten* Rule to define mental illness for purposes of a guilty but mentally ill plea and verdict.⁴⁷ Alaska and Pennsylvania use the *M'Naghten* test to define insanity for purposes of a not guilty by reason of insanity plea or

37. Keilitz, *supra* note 36, at 294 n.26.

38. 214 F.2d 862 (D.C. Cir. 1954), *overruled by* United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972) (en banc).

39. *Id.* at 874-75. A similar rule was articulated almost a century earlier by the New Hampshire Supreme Court. See *State v. Pike*, 49 N.H. 399, 443 (1869).

40. United States v. Brawner, 471 F.2d 969, 973 (D.C. Cir. 1972) (en banc).

41. Keilitz, *supra* note 36, at 296 n.37.

42. MODEL PENAL CODE § 4.01 (1985).

43. W. LAFAYE & A. SCOTT, *supra* note 23, at 330.

44. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 402(a), 98 Stat. 1976, 2057 (codified at 18 U.S.C. § 17(a) (Supp. V 1987)).

45. *Id.* The new federal test is similar to the test proposed by the American Bar Association. See MENTAL HEALTH STANDARDS, *supra* note 31, at 7-6.1(a).

46. It also represents a reaction to the not guilty by reason of insanity verdict in the *Hinckley* case. English, *supra* note 34, at 4-5.

47. *Quaere* whether doing so would be constitutionally permissible. See *id.* at 19.

verdict,⁴⁸ and use the *Model Penal Code* test for insanity to define mental illness when a guilty but mentally ill plea or verdict is at issue.⁴⁹ South Carolina, which also uses the *M'Naghten* test to define insanity,⁵⁰ uses only the volitional prong of the *Model Penal Code* test to define mental illness.⁵¹ Delaware uses the cognitive prong of the *Model Penal Code* test to define sanity⁵² and the volitional prong to define mental illness.⁵³

The remaining eight states use a variety of formulations.⁵⁴ The Michigan statute, for example, defines mental illness as "a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life."⁵⁵ In Kentucky, mental illness means "substantially impaired capacity to use self-control, judgment or discretion in the conduct of one's affairs and social relations, associated with maladaptive behavior or recognized emotional symptoms where impaired capacity, maladaptive behavior or emotional symptoms can be related to physiological, psychological or social factors."⁵⁶ Finally, in Utah, mental illness is defined simply as "a mental disease or defect."⁵⁷

C. *Guilty but Mentally Ill Verdicts and Jury Nullification*

This overview of the statutes reveals that the definition of mental illness for purposes of a guilty but mentally ill plea and verdict varies substantially from state to state. The plethora of definitions of mental illness allows juries in some states to find guilty but mentally ill a defendant who would be not guilty by reason of insanity in other jurisdictions.⁵⁸ It also may exacerbate any tendency of juries to return a guilty but mentally ill verdict even though the defendant is actually insane.⁵⁹

48. ALASKA STAT. § 12.47.010 (1984); 18 PA. CONS. STAT. ANN. § 315(b) (Purdon 1983).

49. ALASKA STAT. § 12.47.030 (1984); 18 PA. CONS. STAT. ANN. § 314(c)(2) (Purdon 1983).

50. S.C. CODE ANN. § 17-24-10(A) (Law. Co-op. Supp. 1988).

51. *Id.* § 17-24-20(A).

52. DEL. CODE ANN. tit. 11, § 401(a) (1981).

53. *Id.* tit. 11, § 401(b). In Delaware, Pennsylvania, and South Carolina, a defendant may be found guilty but mentally ill and sentenced to death, although under the *Model Penal Code* definition of insanity, the same defendant would be not guilty by reason of insanity and acquitted. *Quaere* whether a death penalty based on such a verdict could stand, even absent the argument advanced in this Article.

54. See *infra* notes 55-57 and accompanying text.

55. MICH. COMP. LAWS. § 330.1400a (1982). The Georgia and Indiana statutes to a great extent track the Michigan statute. GA. CODE ANN. § 17-7-131(a)(2) (Supp. 1988); IND. CODE ANN. § 35-36-1-1 (Burns 1985). South Dakota also tracks the Michigan statute to a great extent, but adds a qualification: "Mental illness does not include abnormalities manifested only by repeated criminal or otherwise antisocial conduct." S.D. CODIFIED LAWS ANN. § 22-1-2(24) (1988). Both New Mexico and Illinois expressly state that mental illness does not relieve the defendant of criminal responsibility. N.M. STAT. ANN. § 31-9-3(A) (1984); ILL. REV. STAT. ch. 38, para. 6-2 (Supp. 1988).

56. KY. REV. STAT. ANN. § 504.060(6) (Michie/Bobbs-Merrill Supp. 1988).

57. UTAH CODE ANN. § 76-2-305(4) (Supp. 1989). In Utah mental illness, including insanity, is a defense in that the defendant may offer it to disprove the existence of the mens rea element of the crime. There is no longer a separate affirmative defense of not guilty by reason of insanity. See *Utah Legislative Survey—1983*, 1984 UTAH L. REV. 115, 151-56.

58. See *supra* notes 47-54 and accompanying text.

59. See *infra* note 68.

A proper charge, of course, will instruct the jury that it may not return a verdict of guilty but mentally ill if it finds that the defendant is insane.⁶⁰ Finding a person who committed a vile crime innocent, however, cuts against the grain for many people. The term "jury nullification" refers to the doctrine, rejected in most American jurisdictions, that the jury in a criminal case should be instructed that it may decline to apply the law when applying it would yield an unjust result.⁶¹ An appellate court has no power to review a jury's determination that the defendant is innocent,⁶² regardless of whether the jury properly applied the law. Therefore, a jury verdict of acquittal may "nullify" the law.

Because an appellate court may review a jury's determination that a defendant is *guilty*, the jury in theory cannot nullify the law as it may with a verdict of acquittal. When a jury returns a verdict of guilty but mentally ill in order to assure incarceration of a defendant who is actually legally insane, however, it is attempting to nullify the law. If the verdict goes unchallenged or is affirmed, nullification occurs.⁶³

60. See, e.g., *Keener v. State*, 254 Ga. 699, 702-03, 334 S.E.2d 175, 179 (1985). In *Keener* the Georgia Supreme Court emphasized this very point:

We take this opportunity, however, to make clear that when the trial court charges the jury on the defense of insanity at the time of the crime . . . and on guilty but mentally ill at the time of the crime, . . . the trial court must make clear to the jury in its charge that if they find the defendant did not have the mental capacity to distinguish between right and wrong (or acted because of delusional compulsion), they must find the defendant not guilty by reason of insanity and must not find the defendant guilty but mentally ill.

Id.

61. Schefflin & Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 LAW & CONTEMP. PROBS., Autumn 1980, at 51, 54-55; Van Dyke, *The Jury as a Political Institution*, III THE CENTER MAGAZINE, March/April 1970, at 17. Perhaps the best known American case in point is the 1735 trial of John Peter Zenger on charges of seditious libel. The state carried its burden of proving that Zenger indeed had committed the offense. Zenger's attorney, Alexander Hamilton, argued to the jury that they had the right to determine both the law and the facts. The jury responded by acquitting Zenger. See A BRIEF NARRATION OF THE CASE AND TRIAL OF JOHN PETER ZENGER 78 (J. Alexander ed. 1963); Parker, *Free Expression and the Function of the Jury*, 65 B.U.L. REV. 483, 499 n.70 (1985).

Even those who reject the proposition that the jury should be charged regarding its power to nullify recognize that jury nullification exists in fact as a power in the jury to acquit even though the evidence and the law establish the defendant's guilt. Schefflin & Van Dyke, *supra*, at 55; see Comment, *The Law of an Unwritten Law: A Common Sense View of Jury Nullification*, 11 W. ST. U.L. REV. 97, 97-98 (1983).

62. See *United States v. Dougherty*, 473 F.2d 1113, 1132 (D.C. Cir. 1972) (power of jury nullification "unreviewable and unreviewable"); Horowitz, *Jury Nullification: The Impact of Judicial Instructions, Arguments, and Challenges on Jury Decision Making*, 12 LAW & HUM. BEHAV. 439, 439-40 (1988).

63. If a jury deliberately rejects an insanity defense and returns a verdict of guilty but mentally ill, not because the defendant had not proven insanity, but because the jury wished to ensure that the defendant would be incarcerated, that verdict might well withstand appeal. The trier of fact's determination of this issue receives great deference. In Georgia, for example, the law presumes the sanity of the defendant, and the defendant must prove insanity by a preponderance of the evidence. *Murray v. State*, 253 Ga. 90, 91-92, 317 S.E. 2d 193, 195 (1984). Furthermore, "because jurors are not bound by the opinions on sanity of either lay or expert witnesses, the jury may reject defense testimony on insanity even if uncontradicted." *Id.* at 92, 317 S.E. 2d at 195 (emphasis added). Where the evidence of insanity is overwhelming, the jury may no longer rely on the presumption alone. *Stevens v. State*, 256 Ga. 440, 442, 350 S.E. 2d 21, 22 (1986). Should the jury nonetheless reject the insanity defense, the question on appeal in Georgia, for example, is "whether after reviewing the evidence in the light most favorable to the state, a rational trier of fact could have found that the defendant failed to prove by a preponderance of the evidence that he was insane at the time of the crime." *Keener*, 254 Ga. at 701, 334 S.E.2d at 178 (emphasis added) (footnote omitted). Although a

That insane defendants are sometimes found guilty but mentally ill can be seen in the handful of appellate decisions reversing on that ground.⁶⁴ Observers of the criminal justice system who are familiar with appellate procedure realize that only when the evidence of insanity is compelling and virtually uncontroverted will an appellate court reverse a verdict that rejected a defense of not guilty by reason of insanity.⁶⁵ Far more common are cases in which, despite almost overwhelming evidence of insanity, the court affirms a verdict that rejects that defense.⁶⁶ One must suspect, therefore, that the appeals resulting in an appellate determination that the defense of insanity was proven are but the tip of the iceberg.⁶⁷ If the death penalty may be applied when the defendant is found guilty but mentally ill, that raises the specter of the execution of a defendant who should be exonerated because his crime was not the product of his will.⁶⁸

D. Guilty but Mentally Ill Statutes and Legislative Intent To Allow Imposition of the Death Penalty

Of the twelve states that have a guilty but mentally ill statute, only Alaska and Michigan do not also have the death penalty.⁶⁹ Michigan, whose death penalty had been a dead letter for a century, officially abolished it by constitution in 1963,⁷⁰ some twelve years before it enacted the first guilty but mentally ill

rational trier of fact *could* reach one conclusion, the possibility remains, of course, that a rational trier of fact also could reach another, different conclusion. While there is, presumably, very little motivation to find an innocent person guilty, there may often be substantial motivation to find an insane person sane in order to find them guilty and to ensure incarceration.

64. See, e.g., *Stevens v. State*, 256 Ga. 440, 350 S.E.2d 21 (1986) (verdict of guilty but mentally ill reversed because defendant established defense of delusional compulsion); *People v. Palmer*, 139 Ill. App. 3d 966, 487 N.E.2d 1154 (1985) (verdict of guilty but mentally ill reversed for prosecution's failure to establish sanity beyond a reasonable doubt).

65. See *supra* note 63.

66. See, e.g., *Wilson v. State*, 257 Ga. 444, 449, 359 S.E.2d 891, 896 (1987) (evidence of insanity must be "overwhelming" to reverse jury's finding of sanity); *Harris v. State*, 256 Ga. 350, 354, 349 S.E.2d 374, 378 (1986) (same). Perhaps the most extraordinary case is *Milam v. State*, 255 Ga. 560, 341 S.E.2d 216 (1986), in which the defendant nearly simultaneously shot and killed two victims. As to the first killing, the jury found the defendant not guilty by reason of insanity, and as to the second, guilty but mentally ill. *Id.* at 560, 341 S.E.2d at 216. Noting that between killings the defendant stopped to reload his gun and warned another person present to stay out of the way, the court affirmed both verdicts. *Id.* at 563, 341 S.E.2d at 219.

67. Researchers disagree on the extent to which guilty but mentally ill verdicts displace not guilty by reason of insanity verdicts. Compare S. GOLDING & C. ROBERTS, *THE INTERFACE OF ETHICAL AND CLINICAL DECISIONMAKING: AN HISTORICAL AND EMPIRICAL ANALYSIS OF THE ATTRIBUTION OF CRIMINAL RESPONSIBILITY* 7-8 (1984) (unpublished manuscript available from Department of Psychology, University of Illinois at Champaign-Urbana) (controlled study of University of Illinois undergraduates found willingness of juries to displace insanity verdicts) with Robey, *Guilty But Mentally Ill*, 6 BULL. AM. ACAD. PSYCHIATRY & L. 374, 379-80 (1978) (study of actual cases in Michigan indicated little displacement).

68. This could occur even absent the availability of a guilty but mentally ill verdict. A jury might reject an insanity defense and simply find guilty a defendant it believed insane, in order to ensure her incarceration. But the existence of the guilty but mentally ill verdict surely increases the likelihood that the jury will reject a viable insanity defense in favor of a verdict of guilty but mentally ill. See *Keener v. State*, 254 Ga. 699, 334 S.E.2d 175 (1985) (court cautioning against juries entering a verdict of guilty but mentally ill despite finding that the defendant did not know right from wrong).

69. See McGraw, Farthing-Capowich & Keilitz, *supra* note 1, at 154-55 n.122.

70. MICH. CONST. art. 4, § 46 (1835, amended 1963). Michigan had limited its death penalty to crimes of treason in 1846. See F. ZIMRING & G. HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* 28 (1986).

statute. The Michigan statute provides, as do all guilty but mentally ill statutes, that the court may impose any sentence that could be imposed upon a defendant found simply guilty.⁷¹ Because Michigan does not have the death penalty, a defendant found guilty but mentally ill in Michigan cannot be sentenced to death. Michigan legislators thus had no need to consider whether a guilty but mentally ill verdict would be consonant with the death penalty. States that adopted the language of the Michigan statute may have done so without realizing that their own statutes needed to be adjusted to take into account the possibility of a death sentence.⁷² Therefore, one of the first issues to be determined is whether the legislature intended that the guilty but mentally ill verdict have the capacity to carry the death penalty. If that question is answered in the negative, no further inquiry is necessary.

Theoretically, inquiry into legislative intent becomes appropriate only when a statute is not clear on its face; that is, when the statutory language is clear and unambiguous, resort to legislative intent is both unnecessary and inappropriate.⁷³ One can argue that guilty but mentally ill statutes are clear and unambiguous with reference to the range of punishments available, because all guilty but mentally ill statutes provide that any sentence that lawfully may be imposed on a defendant found guilty may be imposed on a defendant found guilty but mentally ill.⁷⁴ Notwithstanding the apparent facial clarity of this provision, states that have the death penalty may have adopted this provision of the Michigan statute without fully considering its impact.⁷⁵ According to some commentators, imposing the death penalty on a defendant found guilty but mentally ill is patently inconsistent with the treatment and rehabilitative purposes of guilty but mentally ill legislation.⁷⁶

In many states, then, two questions are left open: (1) whether the legislature has given thoughtful consideration to the possibility that the death penalty could be imposed on a guilty but mentally ill defendant; and, (2) assuming that it has not, whether imposing the death penalty is consistent with the overall purpose of the legislation. The supreme courts of Illinois and Indiana have ruled expressly that the death penalty may be imposed on a guilty but mentally ill defendant.⁷⁷ The Georgia General Assembly has taken action that could be read to evidence a decision that guilty but mentally ill defendants may be sen-

71. MICH. COMP. LAWS § 768.36(3) (1982); see EMPIRICAL STUDY, *supra* note 15, at E-4.

72. Cf. *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2707 (1988) (O'Connor, J., concurring) (pointing out that Congress did not indicate whether it considered the eligibility of 15-year-olds for the death penalty when it passed the Comprehensive Crime Control Act of 1984, which lowers to 15 the age at which a defendant may be tried as an adult).

73. See *Blum v. Stenson*, 465 U.S. 886, 896 (1984).

74. EMPIRICAL STUDY, *supra* note 15, at E-4; see, e.g., IND. CODE ANN. § 35-35-1-5(a) (Burns 1983).

75. See *supra* notes 70-72 and accompanying text.

76. See, e.g., EMPIRICAL STUDY, *supra* note 15, at E-5; Giampetro, *The Guilty But Mentally Ill Statutes, Treatment Promises, and Capital Punishment*, 10 AAPL NEWSLETTER 24 (Sept. 1985).

77. *People v. Crews*, 122 Ill. 2d 266, 278, 522 N.E.2d 1167, 1174 (1988), *cert. denied*, 109 S. Ct. 3260 (1989); *Harris v. State*, 499 N.E.2d 723, 725-26 (Ind. 1986), *cert. denied*, 482 U.S. 909 (1987).

tenced to death.⁷⁸

When enacted in 1982, the Georgia guilty but mentally ill statute included "mentally retarded" under the definition of mentally ill and provided that a defendant found guilty but mentally ill could be sentenced in the same manner as any other defendant.⁷⁹ In 1986 considerable controversy arose over the execution of Jerome Bowden, who had been found guilty of murder and sentenced to death prior to the passage of the guilty but mentally ill statute, and who the state conceded was "mildly retarded."⁸⁰ Later, the death penalty imposed on Jerome Holloway, also allegedly retarded, focused renewed public attention on this problem.⁸¹ In response, the Georgia General Assembly removed "mentally re-

78. See Act of Apr. 7, 1988, No. 1313, 1988 Ga. Laws 1003, 1004, 1010 (codified at GA. CODE ANN. §§ 17-7-131(b)(1)(E), -131(j) (Supp. 1988)); *infra* notes 79-81 and accompanying text.

79. Act of Apr. 16, 1982, No. 1439, 1982 Ga. Laws 1476, 1482 (codified as amended at GA. CODE ANN. § 17-7-131(g)(1) (Supp. 1988)).

80. Bowden v. State, 239 Ga. 821, 829, 238 S.E.2d 905, 911 (1977), *cert. denied*, 435 U.S. 937 (1978); see Thurston, *Ban Urged on Death Penalty When Offender is Retarded*, Atlanta J., June 30, 1987, at 2, col. 3. Prior to a 1988 amendment, the Georgia statute read as follows:

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

GA. CODE ANN. § 17-7-131(a)(2) (Supp. 1987) (amended by Act of Apr. 7, 1988, No. 1313, 1988 Ga. Laws 1003, 1004, 1010) (codified at GA. CODE ANN. §§ 17-7-131(b)(1)(E), -131(j) (Supp. 1988)). In effect, whether a jury found a defendant guilty but mentally ill, or guilty but mentally retarded, the verdict would be guilty but mentally ill, and the defendant could be sentenced as if the verdict had been guilty.

In 1986, Jerome Bowden, who had been convicted in 1976 of murdering a woman while robbing her home and had been sentenced to death, was executed. Because Bowden had been classified by the state as mildly retarded, his execution was stayed at one point so that he could be retested to determine whether his IQ was high enough to authorize his execution; he "passed" the test. See Frazier, *Too Retarded to Die for Crimes? Laws Say No*, L.A. Times, Apr. 17, 1988, at 22, col. 1. His execution spurred an attack on the death penalty by advocates of the retarded. See Thurston, *Ban Urged on Death Penalty When Offender is Retarded*, Atlanta J., June 30, 1987, at 2, col. 3.

Two later cases, Spraggins v. State, 258 Ga. 32, 364 S.E.2d 861 (1988), and Holloway v. State, 257 Ga. 620, 361 S.E.2d 794 (1987), triggered renewed controversy. The Georgia Supreme Court stated in *Spraggins*:

We have not yet resolved the question of whether a defendant found to be guilty but mentally ill is eligible for a death sentence, in light of the statutory provisions concerning such a verdict, but we need not do so today, for in any event, we are not prepared to hold that the legislature of this state has created a meaningless verdict, or that the difference between a verdict of guilty and a verdict of guilty but mentally ill is inconsequential.

Spraggins, 258 Ga. at 34 n.2, 364 S.E.2d at 863-64 n.2. This statement prompted the Georgia General Assembly in 1988 to amend the guilty but mentally ill statute to provide that a defendant may be found guilty but mentally retarded, and that when that is the verdict, the defendant may not be sentenced to death. Act of Apr. 7, 1988, No. 1313, 1988 Ga. Laws 1003, 1004, 1010 (codified at GA. CODE ANN. §§ 17-7-131(b)(1)(E), -131(j) (Supp. 1988)). See Wood, *Bill Passes Barring Death Penalty for Retarded Inmates*, Fulton County Daily Rep., Mar. 10, 1988, at 1, col. 1. That the general assembly left the guilty but mentally ill verdict untouched and did not eliminate the death penalty as a possible sentence when a guilty but mentally ill verdict is rendered suggests that the legislature intended to allow the death penalty to be imposed.

81. Psychometric testing showed that Jerome Holloway had an IQ of 49, putting him intellectually in the bottom one-tenth of one percent of the population. *Holloway*, 257 Ga. at 622, 361 S.E.2d at 795-96 (1987) (remanding because defendant was denied independent psychiatric assistance on the questions of competency to stand trial, criminal responsibility, and mitigation of sentence).

tarded" from the definition of mentally ill and provided that the death penalty would not be imposed on a defendant found guilty but mentally retarded.⁸² Although the issue of whether the general assembly intended that a defendant found guilty but mentally ill could be sentenced to death has not reached the Georgia Supreme Court,⁸³ this legislative history does give support to the argument that the legislature considered the issue and concluded that a guilty but mentally ill conviction could carry the death penalty.⁸⁴

The Illinois Supreme Court reached this issue in *People v. Crews*.⁸⁵ William Crews, whose plea of guilty but mentally ill was accepted by the trial judge, who then sentenced him to death, argued "that the legislature did not intend for the death penalty to be available as a possible punishment for [guilty but mentally ill] offenders."⁸⁶ He relied both on a close reading of the text of the Illinois statute and on the general principle that sentencing a guilty but mentally ill offender to death "would be incompatible with the treatment alternatives that are prescribed for [guilty but mentally ill] offenders."⁸⁷ The court rejected his arguments, finding the statutory language on sentencing clear and controlling: "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."⁸⁸

Interestingly, the only other case to pose this question to a state supreme court is one in which, as in *Crews*, the trial judge accepted defendant's pleas of guilty but mentally ill and then sentenced him to death.⁸⁹ In *Harris v. State*⁹⁰ the Indiana Supreme Court rejected the defendant's contentions that the guilty but mentally ill statute gave a convicted defendant a right to treatment and that the right to treatment foreclosed application of the death penalty.⁹¹

The *Harris* court also ruled that imposing the death penalty on a defendant

82. Act of Apr. 7, 1988, no. 1313, 1988 Ga. Laws 1003, 1004, 1010 (codified at GA. CODE ANN. §§ 17-7-131(b)(1)(E) to -131(j) (Supp. 1988)). Georgia is the only state that expressly bans execution of the mentally retarded. See *Penry v. Lynaugh*, 109 S. Ct. 2934, 2955 (1989) (citing GA. CODE ANN. § 17-7-131(j) (Supp. 1988)). For a discussion of the application of guilty but mentally ill statutes to mentally retarded defendants, see Ellis & Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 442-44 (1985).

83. *Spraggins*, 258 Ga. at 34 n.2, 364 S.E.2d at 863 n.2.

84. The author does not mean to suggest that this is conclusive on the issue of legislative intent. The purpose of this Article, however, is to discuss the constitutionality of sentencing a guilty but mentally ill defendant to death. If that practice is unconstitutional, legislative intent is moot.

85. 122 Ill. 2d 266, 522 N.E.2d 1167 (1988).

86. *Id.* at 275, 522 N.E.2d at 1172.

87. *Id.* at 276, 522 N.E.2d at 1172.

88. *Id.* at 277, 522 N.E.2d at 1172 (quoting ILL. REV. STAT. ch. 38, § 1005-2-6(a) (1983)).

89. *Harris v. State*, 499 N.E.2d 723 (Ind. 1986), cert. denied, 482 U.S. 909 (1987). In at least one case, the jury found the defendant guilty but mentally ill, but nevertheless recommended that he be sentenced to death. See "*Mentally Ill*" and *Bound to Die*, N.Y. Times, Oct. 12, 1986, § 1, at 50, col. 1 (Delaware case). Defendant Reginald Sanders' appeal is currently before the Delaware Supreme Court. Henry Schwarzschild, director of the Capital Punishment Project of the American Civil Liberties Union, called the sentence "illogical and inhumanly perverse," and suggested that the matter almost certainly would end up before the United States Supreme Court. *Id.*

90. 499 N.E.2d 723 (Ind. 1986), cert. denied, 482 U.S. 909 (1987). Harris pled guilty but mentally ill to murder, kidnapping, and rape. *Id.* at 724.

91. *Id.* at 726.

found guilty but mentally ill does not offend the cruel and unusual punishment clause of the eighth amendment.⁹² The court did not consider the possibility that the guilty but mentally ill verdict is on a continuum and represents a finding somewhere between a verdict of not guilty by reason of insanity and a verdict of guilty. The court relied instead on one of its own earlier opinions in which it had held that the Indiana guilty but mentally ill statute "in reality adds absolutely nothing to a finding of guilty. It is *of no consequence whatever* that the jury or a judge finds a person mentally ill at the same time they find him to be guilty."⁹³

Insisting on the one hand that the guilty but mentally ill statute was meaningless, the court maintained on the other hand that Harris really was arguing that the guilty but mentally ill verdict should be treated as the equivalent of a verdict of not guilty by reason of insanity, or that his alleged mental illness was the equivalent of insanity.⁹⁴ The court did not discuss the possibility that mental illness of a lesser degree than legal insanity might result in diminished responsibility which, while it would not foreclose a guilty verdict, might foreclose imposition of society's most severe punishment.

E. Guilty but Mentally Ill Statutes and the Principle of Causation

To determine whether a guilty but mentally ill verdict indicates a finding of diminished responsibility, it is necessary to determine whether the import of the verdict is that the mental illness bore a significant causal relationship to the crime. If it did not, then the question of diminished responsibility never arises.⁹⁵ Unlike insanity defense statutes, guilty but mentally ill statutes typically do not state expressly that the mental illness must bear a causal relationship to the crime.⁹⁶ The Georgia statutory system offers a case in point.

The Georgia guilty but mentally ill statute defines "mentally ill" as follows: "Mentally ill" means having a disorder of thought or mood which sig-

92. *Id.* at 726-27.

93. *Id.* at 726 (quoting *Truman v. State*, 481 N.E.2d 1089, 1090 (Ind. 1985) (emphasis added)).

94. *Id.*

95. Whether a mentally ill defendant whose mental illness did not contribute to the commission of the crime can be executed is another question and beyond the scope of this Article. *See Ford v. Wainwright*, 477 U.S. 399, 409 (1986) (convicted murderer became insane subsequent to offense, trial, and sentencing; Court concluded eighth amendment prohibits execution of the insane). For a discussion of this issue, see Note, *Execution of the Insane*, 5 N.Y.L. SCH. J. HUM. RTS. 433, 436-58 (1988).

96. This may well be a deliberate legislative choice. Guilty but mentally ill statutes purport to address the problem of providing treatment for mentally ill offenders entering penal institutions; this purpose is served by correctly labeling a defendant as mentally ill regardless of whether the defendant's mental illness existed at the time of, or contributed to the commission of, the crime.

Guilty but mentally ill statutes typically do not ensure mental health treatment. *See McGraw, Farthing-Capowich & Keilitz, supra* note 1, at 187. In Georgia, for example, a defendant found guilty but mentally ill is evaluated before transfer to a penal institution. If she is found to be in need of immediate hospitalization, she is then transferred to a mental health facility. If the defendant is found at the initial evaluation not to be in need of immediate hospitalization, she is committed to a penal facility, and "shall be further evaluated and then treated, *within the limits of state funds appropriated therefor*, in such manner as is psychiatrically indicated." GA. CODE ANN. § 17-7-131(g)(1), (2), (4) (Supp. 1988) (emphasis added).

nificantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life. However, the term "mental illness" shall not include a mental state manifested only by repeated unlawful or antisocial conduct.⁹⁷

The statute then describes the plea and verdict as "[g]uilty but mentally ill at the time of the crime."⁹⁸ The statute nowhere specifies that the mental illness must have a causal effect on the crime's commission, although that requirement seems implicit in both the concept and form of the verdict.⁹⁹ This is in stark contrast to the insanity verdict, for which Georgia law expressly provides that the insanity must be a significant "cause" of the crime:

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

A person shall not be found guilty of a crime when, at the time of the act, omission, or negligence constituting the crime, the person, because of mental disease, injury, or congenital deficiency, *acted as he did because of* a delusional compulsion as to such act which overmastered his will to resist committing the crime.¹⁰⁰

Does a verdict of guilty but mentally ill necessarily import a finding that the mental illness was a causative factor in the crime's commission? Arguably, it does not. The Georgia statute does not expressly command the jury to find a causal relationship.¹⁰¹ Absent a charge by the court that the jury may return a

97. GA. CODE ANN. § 17-7-131(a)(2) (Supp. 1988).

98. *Id.* § 17-7-131(b)(1)(D).

99. It is worth noting that the verdict is guilty *but* mentally ill, not guilty *and* mentally ill.

100. GA. CODE ANN. § 16-3-2 to -3 (1984) (emphasis added).

101. Nor do the Illinois and the Indiana statutes. Illinois defines mental illness for purposes of the guilty but mentally ill plea and verdict as follows:

"[M]ental illness" or "mentally ill" means 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."

ILL. REV. STAT. ch. 38, § 6-2(d) (Supp. 1988). Like the Georgia statute, the Illinois statute does not set forth a causal relationship between the mental illness and the criminal act, although such a relationship is the ordinary import of the words. Unlike Georgia, Illinois requires that the "disorder of thought, mood, or behavior" be "substantial"; on the other hand, Georgia requires that the impairment be "significant" while Illinois does not. Illinois looks only to whether judgment is impaired, omitting reference to behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life. Finally, Illinois adds qualifying language—the impairment described is "not to the extent that [the defendant] is unable to appreciate the wrongfulness of his behavior or is unable to conform his conduct to the requirements of law." This qualifying language tracks, to a great extent, the *Model Penal Code* test, although it uses "substantial disorder of thought or mind" instead of "mental disease or defect." See *supra* text accompanying note 42. The Illinois statute would seem to state the obvious: that a defendant who is mentally ill is not, by definition, insane. In other words, the final clause adds nothing to the guilty but mentally ill statute (unless it is simply a reminder to the jury that the defendant is entitled to be found not guilty by reason of insanity if the evidence meets that standard). This is especially true when one considers that Illinois defines insanity as "the lack of a substantial capacity either to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of the law as a result of mental disorder or mental defect." ILL. REV. STAT. ch. 38, § 1005-1-11 (1982). The Illinois test for insanity tracks the *Model Penal Code*, which has a broader test for insanity than the *M'Naghten* test. If one is insane under

verdict of guilty but mentally ill only if it believes that the mental illness contributed to the commission of the crime, a jury might return a verdict of guilty but mentally ill without making that finding. A jury might find that the defendant's mental illness did not contribute to or even exist at the time the crime was committed, and that she is therefore guilty, but because she is nonetheless mentally ill, she should be afforded treatment.¹⁰² Such a finding would embody a conclusion that the defendant's responsibility for the crime was in no way diminished. The correlative proposition would be that punishment need not be lessened.

Even when a court charges a jury that these are permissible bases on which to return a verdict of guilty but mentally ill, the charge necessarily informs the jury that the guilty but mentally ill verdict is appropriate when the mental illness did contribute to the commission of the crime. Thus, a jury returning a verdict of guilty but mentally ill might mean by that verdict to announce its finding that the mental illness did contribute to the crime's commission.¹⁰³ Such a finding would entail a conclusion that the defendant's responsibility for the crime was diminished.¹⁰⁴ The correlative proposition then would be that punishment should be ameliorated.¹⁰⁵

Absent a special verdict, the possibility exists that a guilty but mentally ill

M'Naghten, one is insane under the *Model Penal Code* (and the Illinois) test. And if one is insane—that is, if one can neither appreciate the wrongfulness of his conduct nor conform his conduct to the requirements of law—then one is not, by definition, merely mentally ill within the meaning of the guilty but mentally ill statute.

Indiana's statute is very much like Georgia's; it defines mentally ill as "having a psychiatric disorder which substantially disturbs a person's thinking, feeling, or behavior and impairs the person's ability to function; 'mentally ill' also includes having any mental retardation." IND. CODE ANN. § 35-36-1-1 (Burns 1985). The Indiana Code sets forth as a possible verdict: "Guilty but mentally ill at the time of the crime." *Id.* § 35-36-2-3. Like the Georgia statute, the Indiana statute does not expressly require a causal relationship between the mental illness and the crime, in contrast to the state's insanity defense: "A person is not responsible for having engaged in prohibited conduct if, as a result of mental disease or defect, he was unable to appreciate the wrongfulness of the conduct at the time of the offense." *Id.* § 35-41-3-6.

102. Such a finding would be consonant with one of the purposes of guilty but mentally ill statutes. See *supra* note 96.

103. In Georgia, that would mean a jury would have found that the defendant suffered from a disorder that significantly impaired the defendant's judgment, ability to recognize reality, behavior, or ability to cope with the ordinary demands of life. Georgia follows the *M'Naghten* Rule, which addresses cognitive ability, as amplified by a delusional compulsion test. GA. CODE ANN. § 16-3-2 to -3 (1984). Georgia's guilty but mentally ill statute likewise addresses cognitive ability and volition. It simply reduces the test from the requirement that the defendant have no relevant cognitive ability (that is, be unable to tell right from wrong) and no volition (that is, be unable to control one's acts) to the requirement that cognitive ability and volition be significantly impaired. GA. CODE ANN. § 17-7-131(a)(2) (Supp. 1988).

This is reminiscent of the *Model Penal Code* approach, which reduces the test to whether the defendant lacks "substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." MODEL PENAL CODE § 4.01 (1985). But the *Model Penal Code* test, which if satisfied results in a verdict of not guilty by reason of insanity, is stricter; to satisfy it, a defendant must establish that he lacked substantial capacity. *Id.* To establish that he was guilty but mentally ill in Georgia, a defendant need show only that his capacity was "significantly impaired." GA. CODE ANN. § 17-7-131(a)(2) (Supp. 1988). Such a finding would not seem to foreclose the coterminous existence of "substantial capacity."

104. See *infra* notes 120-29 and accompanying text.

105. For a discussion of the purposes of punishment and their application in cases in which the defendant is deemed not fully responsible for the crime, see MODEL PENAL CODE § 4.01 comment n.12 (1985); Allen, *Criminal Law and the Modern Consciousness: Some Observations on Blameworthiness*, 44 TENN. L. REV. 735 (1977). The Appellate Court of Illinois has recognized that it is

verdict embodies a diminished responsibility finding. Admittedly, this is only a possibility. Nonetheless, because it is possible that a guilty but mentally ill verdict imports a finding of diminished responsibility, one must assume that it actually does.¹⁰⁶ Charges in criminal cases must be examined to determine the manner in which a reasonable jury might interpret them; such interpretations, the United States Supreme Court repeatedly has held, cannot be discounted.¹⁰⁷ Thus, because a reasonable jury might understand the court's charge to direct that a verdict of guilty but mentally ill be returned when the defendant's mental illness was a significant causal factor in the crime, a verdict of guilty but mentally ill must be read as incorporating that finding.¹⁰⁸

III. MENTAL ILLNESS AND DIMINISHED RESPONSIBILITY

A. Theories of Diminished Responsibility

"Diminished responsibility" is a term of art. It is not one, however, with a

"doubtful" that the mentally ill are deterred by criminal sanctions. *People v. McCumber*, 148 Ill. App. 3d 19, 24, 499 N.E.2d 139, 142 (1986).

106. See *Sandstrom v. Montana*, 442 U.S. 510, 526 (1979); *Street v. New York*, 394 U.S. 576, 585-86 (1969); *Reed v. State*, 238 Ga. 457, 460, 233 S.E.2d 369, 372 (1977). When it is not clear whether the verdict rests on grounds favorable or unfavorable to the defendant, the defendant must be given the benefit of the doubt. In *Street* the Supreme Court held:

The verdict against the appellant was a general one. It did not specify the ground upon which it rested. . . . [It] is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses . . . was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause. . . . It follows that . . . the conviction cannot be upheld.

Street, 394 U.S. at 585-86 (citing *Stromberg v. California*, 283 U.S. 359, 367-68 (1931)). In *Reed* the Georgia Supreme Court stated:

Under the charge as given, the jury was authorized to convict of either malice murder or felony murder. The jury did not specify under which of the two theories it found the appellant guilty, but simply returned a verdict of "guilty." The evidence in this case authorized a verdict of guilty of felony murder and the appellant must be given the benefit of the doubt. The supporting felony, armed robbery in this case, would be a lesser included offense and must be vacated.

Reed, 238 Ga. at 460, 233 S.E.2d at 372 (emphasis added).

107. In *Sandstrom*, for example, the Court rejected Montana's jury instruction that a person is presumed to intend the ordinary consequences of his acts:

We do not reject the possibility that some jurors may have interpreted the challenged instruction as permissive, or, if mandatory, as requiring only that the defendant come forward with "some" evidence in rebuttal. However, the fact that a reasonable juror *could* have given the presumption conclusive or burden-shifting effect means that we cannot discount the possibility that *Sandstrom's* jurors actually did proceed upon one or the other of these latter interpretations. And that means that unless these kinds of presumptions are constitutional, the instruction cannot be adjudged valid.

Sandstrom, 442 U.S. at 519 (emphasis added) (citations omitted). This is especially true in death penalty cases. See *Mills v. Maryland*, 108 S. Ct. 1860, 1870 (1988) (confusing verdict form).

108. See *supra* notes 106-07 and accompanying text. Professor Dressler would avoid stating the problem in terms of causation. "I do not suggest that we treat defendants more leniently merely because they suffer from some mental abnormality, or even because the abnormality is causally related to their behavior. When the abnormality impairs free will in a substantial and verifiable way, however, we ought to consider the abnormality." Dressler, *Commentary: Reaffirming the Moral Legitimacy of the Doctrine of Diminished Capacity: A Brief Reply to Professor Morse*, 75 J. CRIM. L. & CRIMINOLOGY 953, 960 n.47 (1984). This author does not disagree with the point that regardless of causation, the abnormality is relevant only to the extent it impairs free will. Absent a clarifying charge or a special verdict, however, a guilty but mentally ill verdict must be read to indicate findings of both causation and impairment of free will with reference to the criminal act at issue.

single, precise, and universally recognized meaning. Rather, it has two quite distinct meanings.¹⁰⁹ One meaning conveys what is more accurately described as "diminished capacity": the circumstance in which the defendant's abnormal mental condition prevented formation of some element of mens rea necessary to establish the crime at issue.¹¹⁰ When proven, diminished capacity results in conviction for a lesser degree of crime. This is not in the nature of an affirmative defense; it is the proffering of evidence by the defendant that establishes that the defendant did not have the necessary mens rea, and that the state therefore has failed to prove its case.¹¹¹

The other meaning of diminished responsibility is the sense in which it is used in this Article—that is, the condition of a legally sane but mentally abnormal individual whose mental abnormality bears a causal relation to the commission of a crime, but does not prevent formation of the necessary level of mens rea.¹¹² With this formulation in mind, it becomes apparent that the guilty but mentally ill verdict is the legislative enactment of a diminished responsibility verdict. The verdict is not a diminished capacity verdict; if it were, the defendant would be acquitted of a certain level of culpability. But he is not. The guilty but mentally ill statutes are universally clear: a defendant who is guilty but mentally ill is criminally responsible for his act.¹¹³ Furthermore, the statutes go on to provide that the defendant may be sentenced as otherwise provided for his crime.¹¹⁴

109. See *United States v. Pohlott*, 827 F.2d 889, 903-04 (3d Cir. 1987) (noting that "'diminished responsibility' exists in many European countries as a formal defense" but is largely unknown as such in the United States), *cert. denied*, 108 S. Ct. 710 (1988). For illuminating discussions of the theory, see Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827 (1977); Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1 (1984); Annotation, *Mental or Emotional Condition as Diminishing Responsibility for Crime*, 22 A.L.R.3d 1228 (1968). Some commentators use the terms "diminished responsibility" and "diminished capacity" interchangeably. See Diamond, *From Durham to Brawner, A Futile Journey*, 1973 WASH. U.L.Q. 109, 123 (1973) (subsection entitled "Diminished Responsibility (Capacity)"). Others use "partial responsibility" to mean what this Article calls "diminished capacity." See Lewin, *Psychiatric Evidence in Criminal Cases for Purposes Other than the Defense of Insanity*, 26 SYRACUSE L. REV. 1051, 1056 (1975) (contrasting partial responsibility with diminished responsibility).

110. See Morse, *supra* note 109, at 1-20; Annotation, *supra* note 109, at 1232. What this Article calls "diminished capacity," Professor Morse calls "the first variant of diminished capacity, . . . the 'mens rea' variant." Morse, *supra* note 109, at 1.

111. See *Pohlott*, 827 F.2d at 897; Morse, *supra* note 109, at 6; Annotation, *supra* note 109, at 1232; see also *United States v. Brawner*, 471 F.2d 969, 1000-02 (D.C. Cir. 1972) (en banc) ("Our doctrine has nothing to do with 'diminishing responsibility' of a defendant because of his impaired mental condition, but rather with determining whether the defendant had the mental state that must be proved as to all defendants.").

112. See Morse, *supra* note 109, at 20-28; Annotation, *supra* note 109, at 1232; see also Arenella, *supra* note 109, at 850 ("a finding of diminished responsibility does not negate the defendant's criminal responsibility; it merely mitigates his punishment because his mental disability makes him less culpable than the normal defendant who committed the identical criminal act").

This Article uses "mental abnormality" when explaining usage of the term "diminished responsibility" because this author would include both mental retardation and mental illness. Because this Article addresses the problems posed by the mentally ill, henceforth it will use the term "mental illness" instead of "mental abnormality."

113. See *supra* text accompanying note 74.

114. EMPIRICAL STUDY, *supra* note 15, at E-4; see, e.g., IND. CODE ANN. § 35-36-1-5(a) (Burns 1983).

In what respect, then, does a guilty but mentally ill verdict differ from a guilty verdict? First, a guilty but mentally ill verdict earmarks the defendant as a person in need of treatment for mental illness. One cannot, however, describe the statutes as establishing an entitlement to treatment since the state supreme courts have eschewed that construction, no doubt for economic reasons.¹¹⁵ Nonetheless, the defendant found guilty but mentally ill presumably enjoys a right to treatment greater than that of the defendant found simply guilty.¹¹⁶ Second, being found mentally ill softens the stigma of a guilty verdict. From a moral point of view, it is better to be sick than to be bad. Finally, the truth the guilty but mentally ill verdict speaks is that, although the defendant is sane enough to be criminally responsible, she is less responsible than she would be were she not mentally ill. That is why she is earmarked for treatment, as opposed to relegated to punishment, and why her conviction carries less stigma. And that is a factor that must be taken into account in sentencing.

This Article's thesis—that the guilty but mentally ill verdict is a diminished responsibility verdict, and for that reason a sentence of death is constitutionally disproportionate—is consonant with the history of the defense of diminished responsibility, which arose to avoid imposition of the death penalty on those sane but mentally ill.¹¹⁷ As late as the 1960s the plea of diminished responsibility

115. See *supra* note 26 and accompanying text.

116. Professors McGraw, Farthing-Capowich, and Keilitz note that "several courts have recognized a qualified statutory right to treatment." McGraw, Farthing-Capowich & Keilitz, *supra* note 1, at 166. The authors also point out, however, that grave doubt about the existence of any right to treatment has been expressed by, among others, the National Mental Health Association. *Id.* at 125 (citing NATIONAL MENTAL HEALTH ASSOCIATION, MYTHS & REALITIES: A REPORT OF THE NATIONAL COMMISSION ON THE INSANITY DEFENSE 34 (1983)).

117. *Id.* at 140-44. This argument, that a person who commits a crime in part because of the effect of mental illness bears diminished responsibility for his crime, which should be reflected in his sentence, is hardly novel. It has been traced to the seventeenth-century Dutch legal writer, Matthaeus, but its flowering in the common law system was at the hands of Sir George Mackenzie, who during the seventeenth century was the king's prosecutor in Scotland. See I N. WALKER, CRIME AND INSANITY IN ENGLAND 139 (1968). Mackenzie was hardly a bleeding-heart liberal; he is described as having "prosecuted covenanters and witches with equal fervor, and [having been] chiefly responsible for the use of torture to extract confessions from those he accused." *Id.* Mackenzie's argument that the punishment of the mentally ill should be eased is surprisingly adaptable to the twentieth century:

It may be argued that since the law grants a total impunity to such as are absolutely furious therefore it should by the rule of proportions lessen and moderate the punishments of such, as though they are not absolutely mad, are Hypochondrick and Melancholy to such a degree, that it clouds their reason.

Id. (quoting G. MACKENZIE, THE LAWS AND CUSTOMS OF SCOTLAND IN MATTERS CRIMINAL pt. I, tit. I, § 8 (2d ed. 1678)).

The notion of diminished responsibility has never gained acceptance in the United States. One California case, *People v. Wolff*, 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964), is widely viewed as being perhaps the only formal recognition of pure diminished responsibility in the United States. See, e.g., *United States v. Pohlot*, 827 F.2d 889, 904-05 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 710 (1988). In *Wolff* a jury found the defendant guilty of first-degree murder despite unanimous psychiatric testimony that the defendant was insane. On appeal the California Supreme Court reversed, holding the evidence insufficient to establish first-degree murder, because the defendant's abnormal mental state prevented him from realizing the "enormity of the evil," although it did not prevent him from forming the malice necessary to sustain a conviction of second-degree murder. *Wolff*, 61 Cal. 2d at 822, 394 P.2d at 976, 40 Cal. Rptr. at 288. The California Penal Code was amended subsequently to abolish this defense. Act of Sept. 10, 1981, ch. 404, 1981 Cal. Stat. 1592 (codified as amended at CAL. PENAL CODE § 28b (West 1988)).

ity was available in Scotland only to reduce a charge of murder to one of culpable homicide, and thus to prevent imposition of the death penalty.¹¹⁸ In contrast, the contemporary American plea of guilty but mentally ill may be entered to any criminal charge. This represents a legislative judgment that in all criminal proceedings a defendant's mental illness should be recognized formally. Guilty but mentally ill statutes also represent a legislative judgment that the normal range of sentencing is applicable to the crime, notwithstanding the defendant's mental illness. The defendant's mental illness will be considered, but it will not bar imposition of the most severe sanction applicable. Thus, if the permissible range of incarceration is from one to twenty years, the defendant found guilty but mentally ill may be sentenced to twenty years.¹¹⁹ In a particular case, the offense may justify imposition of the heaviest fine or the longest term of imprisonment provided for by law. Death, however, is qualitatively different.¹²⁰ As the last section of this Article will establish, the death penalty is constitutionally permissible, that is "proportionate," only when the defendant is fully responsible for his crime.

B. *The Import of a Diminished Responsibility Verdict*

Having established that a verdict of guilty but mentally ill must be read (absent a statement in the verdict to the contrary) as incorporating a finding that mental illness was a significant causative factor in the crime,¹²¹ it is necessary to determine whether such a verdict must be read as incorporating a finding that, as a result of mental illness, the defendant bore a diminished level of responsibility for the crime. Here, the most compelling analysis is also the simplest: What else is a jury to think? The jury is confronted with a defendant who claims to be insane and thus not responsible for the crime for which he is charged. The court instructs the jury that if it finds the defendant did commit the crime, but that he was insane under the applicable test in that jurisdiction, it should acquit him. If, however, the jury does not find that the defendant was insane and thus not responsible at all for the crime, but does find that the defendant was suffering from "mental illness," then the jury may find the defendant guilty but mentally ill. And of course, if the jury finds neither insanity or mental illness, but determines that the evidence establishes all the elements of the crime, then it may find the defendant simply guilty.¹²²

A common-sense view of such an instruction is that it sets forth a contin-

118. McGraw, Farthing-Capowich & Keilitz, *supra* note 1, at 145; Arenella, *supra* note 109, at 829-30 nn.15-16.

119. See *Rummel v. Estelle*, 445 U.S. 263, 274 (1980).

120. It is clear beyond peradventure that because the death penalty is "unique in its severity and its irrevocability," *Gregg v. Georgia*, 428 U.S. 153, 187 (1976), its imposition may be foreclosed even though the defendant is guilty of murder. See, e.g., *Enmund v. Florida*, 458 U.S. 782, 788-801 (1982) (death penalty unconstitutional for defendant who merely aided and abetted a robbery in the course of which a murder was committed).

121. See *supra* notes 101-08 and accompanying text.

122. For a discussion of Pennsylvania's pattern guilty but mentally ill instruction, see Murphy, *Legally Insane or Guilty but Mentally Ill: A Suggested Jury Instruction*, 88 DICK. L. REV. 344 (1984).

uum that ranges from insanity, resulting in a total lack of criminal responsibility; to mental illness, resulting in a partial lack of criminal responsibility; to mental stability, resulting in no diminishment of criminal responsibility. Nonetheless, both state supreme courts to reach this issue have ruled, in effect, that a guilty but mentally ill verdict is not a diminished responsibility verdict.¹²³

The analysis that leads to this result is deceptively simple. The courts simply reason, correctly, that a verdict of not guilty by reason of insanity imports a finding that the defendant was not criminally responsible for his act; on the other hand, a guilty verdict imports a finding that he was. At that point, the courts seem to feel constrained to equate the guilty but mentally ill verdict with either a not guilty by reason of insanity verdict or a guilty verdict. Thus, the Supreme Court of Indiana opined, "The [guilty but mentally ill] statute in reality adds absolutely nothing to a finding of guilty. It is of *no consequence whatever* that the jury or a judge finds a person mentally ill at the same time they find him to be guilty." ¹²⁴ Likewise, the Illinois Supreme Court, answering a contention that the death penalty constitutionally could not be imposed on one found guilty but mentally ill, responded that "mental illness, as that term is used with respect to [guilty but mentally ill] offenders, must not be equated with insanity and *does not relieve an offender of responsibility* for his criminal conduct."¹²⁵ The problem with this statement is that the defendant is not seeking to be treated as if he had been found not guilty by reason of insanity. He simply is asking the court to recognize that the guilty but mentally ill verdict does mean something regarding culpability. To respond that the guilty but mentally ill verdict does not mean the same thing as a verdict of not guilty by reason of insanity, and therefore must mean the same thing as a guilty verdict, is to ignore the defendant's point. The defendant is saying, "There are three potential verdicts; each must have a different meaning." The court is responding, "There are three potential verdicts; two of the three mean exactly the same thing." This construction of the verdict flies in the face of the normal rules of statutory construction, under which a statute is presumed not to be meaningless.¹²⁶

The more fundamental flaw in the court's analysis, however, is that it answered the wrong question. Once a jury returns a verdict of guilty but mentally ill, the question is not what the state legislature thought the verdict would mean,

123. *People v. Crews*, 122 Ill. 2d 266, 278, 522 N.E.2d 1167, 1174 (1988), *cert. denied*, 109 S. Ct. 3260 (1989); *Harris v. State*, 499 N.E.2d 723, 726-27 (Ind. 1986), *cert. denied*, 482 U.S. 909 (1987).

124. *Harris*, 499 N.E.2d at 726 (quoting *Truman v. State*, 481 N.E.2d 1089, 1090 (Ind. 1985)) (emphasis added).

125. *Crews*, 122 Ill. 2d at 278, 522 N.E.2d at 1174 (emphasis added).

126. *See Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982). Arguably, however, the guilty but mentally ill statute has meaning even if a guilty but mentally ill verdict is held not to bear any relationship to the level of criminal responsibility of a defendant. Its meaning, some argue, lies in the treatment provisions. The difficulty with this reasoning is twofold: First, there is no guarantee of treatment; second, if all the legislature wanted to effect was a system for providing mental health treatment to mentally ill defendants, it could do so easily without going to the extent of creating an entirely new verdict. One would hope that intake systems at prisons would make an attempt to identify mentally ill convicts. The argument that the guilty but mentally ill statutes are meant only to effect that identification and to encourage treatment fails, in part because the statutory scheme adopted is a singularly convoluted method of achieving that end.

or intended it to mean. The relevant inquiry is: "What did the jury mean by this verdict?" If a reasonable juror, having heard the evidence and the charge of the court, might conclude that a verdict of guilty but mentally ill would mean that the defendant was sane enough to be held responsible for her act, but that her act was in part a result of mental illness which rendered her less responsible than she otherwise would have been, it is immaterial that the state legislature did not intend the juror to reach that conclusion. As the Supreme Court has said repeatedly when determining the meaning to be ascribed to the charge of the court, "The question . . . is not what the State Supreme Court declares the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning."¹²⁷

It can hardly be gainsaid that a reasonable juror, instructed to return a verdict of guilty, not guilty, guilty but mentally ill, or not guilty by reason of insanity, would understand that to mean that she could find the defendant not responsible at all, as a result of insanity; responsible, but mentally ill such that her responsibility was diminished; or mentally healthy and fully responsible. If that is a reasonable construction of such a charge, then the reviewing court must indulge the assumption that it was the construction the jury put on the charge.¹²⁸ It follows that, regardless of how a state supreme court resolves the question of legislative intent, it must concede that a guilty but mentally ill verdict may represent a jury finding that the defendant, as a result of mental illness, bears diminished responsibility for his act.

The question then becomes whether the death penalty can be imposed following a verdict of guilty but mentally ill. A preliminary and corollary question might be: When a judge or jury first returns a verdict of guilty but mentally ill and then votes to impose the death penalty, does the imposition of the death penalty conclusively indicate that the verdict was not a diminished responsibility verdict? This corollary question must be answered in the negative. The sentence, whether it be judge or jury, inevitably is influenced heavily by what the law provides.¹²⁹ If the judge perceives, or the jury is told, that the law allows

127. *Mills v. Maryland*, 108 S. Ct. 1860, 1866 (1988) (quoting *Francis v. Franklin*, 471 U.S. 307, 315-16 (1985)).

128. See *Sandstrom v. Montana*, 442 U.S. 510, 526 (1979). This is especially true in death penalty cases. In *Mills* the Court explained:

With respect to findings of guilt on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict. In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds.

Mills, 108 S. Ct. at 1866 (citations omitted); see also *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion) ("[T]he risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.").

129. This principle is made abundantly clear in cases such as *Eddings v. Oklahoma*, 455 U.S. 104 (1982), in which the trial judge imposed the death penalty on an offender who had been 16 at the time of the crime, explaining that although he had considered the defendant's youth as a mitigating factor, he had not considered the defendant's turbulent upbringing because the law did not allow him to do so. *Id.* at 109. The United States Supreme Court subsequently explained that the law not only allowed him to consider that evidence in mitigation, it required him to do so. *Id.* at 113-14. Even more telling is the comment of the trial judge in *Lockett v. Ohio*, 438 U.S. 586, 594 (1978):

the death penalty to be imposed upon a guilty but mentally ill verdict, they may impose it—notwithstanding that they meant the verdict to be understood as a finding of diminished responsibility.¹³⁰ Once the guilty but mentally ill verdict is returned, the question is not whether the sentencer would impose the death penalty, but whether the Constitution allows it.

IV. THE DEATH PENALTY AND THE EIGHTH AMENDMENT

The eighth amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."¹³¹ With reference to the punishment that may be assessed for a crime, the eighth amendment has three aspects.¹³² First, some punishments are inherently cruel, and no doubt partly as a result, unusual as well. No one ever has supposed that our Constitution permitted crucifixion, for example, or drawing and quartering.¹³³ The Supreme Court, however, consistently has rejected the contention that execution is, in and of itself, inherently cruel and for that reason prohibited by the eighth amendment.¹³⁴

Second, the eighth amendment prohibits any punishment in certain circumstances. For example, the legislature is not free to criminalize a person's status. Put conversely, it would be cruel and unusual for a person to be subject to any criminal penalty simply for being a certain kind of person, such as a person who is addicted to drugs.¹³⁵

Finally, the eighth amendment limits the severity of the penalty that can be imposed for certain criminal acts. Put another way, the eighth amendment requires that the punishment be proportionate to the crime.¹³⁶ Proportionality, from a constitutional point of view, has two aspects: 1) the punishment must not be disproportionate to the crime, and 2) the punishment must not be dispro-

"[T]he judge said that he had 'no alternative, whether [he] like[d] the law or not' but to impose the death penalty." While the United States Supreme Court did not disagree with the trial court's perception of the case, it reversed the death sentence, finding that the Ohio statute unconstitutionally precluded consideration of relevant mitigating factors. *Id.* at 608.

130. See *supra* note 128.

131. U.S. CONST. amend. VIII. Most state constitutions have similar provisions. W. LAFAVE & A. SCOTT, *supra* note 23, at 177. The analysis of this provision in the federal constitution is equally applicable to state constitutions with similar wording. In the event that the United States Supreme Court should decide that the eighth amendment does not bar imposition of the death penalty on a verdict of guilty but mentally ill, state supreme courts, of course, would be free to conclude that their own state constitutions do work such a bar. See *Symposium: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 959 (1985); Comment, *Rediscovering State Constitutions for Individual Rights Protection*, 37 BAYLOR L. REV. 463 (1985); Comment, *Individual Rights and State Constitutional Interpretations: Putting First Things First*, 37 BAYLOR L. REV. 493 (1985).

132. W. LAFAVE & A. SCOTT, *supra* note 23, at 177. For a dated but insightful examination of the cruel and unusual punishment clause, see Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635 (1966).

133. See, e.g., *In re Kemmler*, 136 U.S. 436, 446 (1880).

134. See *Gregg v. Georgia*, 428 U.S. 153, 168-87 (1976).

135. See *Robinson v. California*, 370 U.S. 660, 666 (1962) (holding that California statute that made it a misdemeanor for any person to be addicted to narcotics violated eighth amendment).

136. *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion) (death is "grossly disproportionate and excessive punishment" for rape).

portionate to the level of culpability of the offender.¹³⁷

Although the first aspect of proportionality, that "the Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime,"¹³⁸ is a venerable doctrine,¹³⁹ it rarely is employed outside the context of the death penalty.¹⁴⁰ When the death penalty is at stake, however, this aspect of proportionality critically limits its exercise. In *Coker v. Georgia*¹⁴¹ the Supreme Court ruled that "a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment."¹⁴² Although the actual holding of *Coker* is relatively narrow, the opinion of the Court suggests that the death penalty may be disproportionate for any crime that does not involve the taking of human life:

Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death of or even the serious

137. *Id.* There is a third aspect of proportionality that is not constitutionally mandated. Many states provide that a death penalty will be disproportionate and therefore invalid if the crime for which it is imposed is a crime for which juries rarely impose capital punishment. For example, in *Gregg v. State*, 233 Ga. 117, 210 S.E.2d 659 (1974), *aff'd sub nom.* *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion), the Georgia Supreme Court held that a death penalty for armed robbery was disproportionate because defendants convicted of armed robbery were sentenced to death so rarely. In accordance with the Georgia death penalty statute, the court struck Gregg's death sentence. *Id.* at 127, 210 S.E.2d at 667 (citing GA. CODE ANN. § 27-2537(c)(3) (1973)). The Georgia statute subsequently was held constitutionally acceptable by the United States Supreme Court. *Gregg v. Georgia*, 428 U.S. 153, 204-07 (1976) (plurality opinion). The current Georgia statute provides for an automatic appeal to the state supreme court and directs the court to consider "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." GA. CODE ANN. § 17-10-35(a)(3) (1982). The Georgia Supreme Court has interpreted that clause to require, *inter alia*, that it ascertain whether the death penalty ordinarily is imposed for the crime at issue; if it is not, then the death penalty is disproportionate. See *Gregg v. State*, 233 Ga. 117, 127, 210 S.E.2d 659, 667, *aff'd sub nom.* *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion). Additionally, the court has stricken the death penalty as disproportionate in cases in which more than one offender is tried for the same crime and the prime actor does not receive a death penalty. See *Hall v. State*, 241 Ga. 252, 258-60, 244 S.E.2d 833, 838-39 (1978). Because Georgia's death penalty statute was one of the first validated by the United States Supreme Court, both the statute itself and this approach to proportionality have been copied widely. The United States Supreme Court, however, does not view this type of proportionality review, which it calls "comparative proportionality review," as constitutionally required. *Pulley v. Harris*, 465 U.S. 37, 42-51 (1984).

138. *Rummel v. Estelle*, 445 U.S. 263, 271 (1980).

139. This rule may be traced back at least to *Weems v. United States*, 217 U.S. 349, 367 (1910).

140. *Rummel*, 445 U.S. at 272. In *Rummel* the court rejected a disproportionality challenge raised by a defendant who was sentenced to life imprisonment under a Texas recidivist statute. *Rummel's* offenses were fraudulent use of a credit card to obtain \$80 worth of goods or services, passing a forged check in amount of \$28.36, and obtaining \$120.75 by false pretenses. Noting that "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare," *id.*, the Court ruled that *Rummel's* sentence did not offend the cruel and unusual punishment clause. *Id.* at 285. Three years later, a sharply divided Court distinguished *Rummel* on the basis of the liberality of the Texas parole system, and set aside a sentence of life imprisonment imposed under a recidivist statute on a defendant who had been convicted of his seventh nonviolent felony. *Solem v. Helm*, 463 U.S. 277, 300-03 (1983).

141. 433 U.S. 584 (1977) (plurality opinion).

142. *Id.* at 592.

injury to another person. The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair. We have the abiding conviction that the death penalty, which 'is unique in its severity and irrevocability,' is an excessive penalty for the rapist who, as such, does not take human life.¹⁴³

With reference to this aspect of proportionality—whether the severity of the crime merits imposition of the death penalty—the defendant found guilty but mentally ill stands on an equal footing with the defendant simply found guilty. The nature of the verdict—and what it means in terms of the defendant's responsibility—does not bear on the severity of the crime per se.¹⁴⁴

The second aspect of proportionality is another matter. This Article proposes that the second aspect of proportionality—the proposition that the punishment may not be disproportionate to the offender's *culpability*—prevents imposition of the death penalty on a guilty but mentally ill verdict. Two principles, both fundamental to a jurisprudential approach to the death penalty, must be borne in mind. One is that "American criminal law has long considered a defendant's intention—and therefore his moral guilt—to be critical to 'the degree of [his] criminal culpability.'"¹⁴⁵ The other is that because the death penalty is qualitatively different from any other penalty, there is "a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."¹⁴⁶

A. *Guilty but Mentally Ill, Personal Culpability, and the Death Penalty*

In *Thompson v. Oklahoma*¹⁴⁷ Justice O'Connor, in her concurrence, reiterated the principle that "'punishment should be directly related to the personal culpability of the criminal defendant.'"¹⁴⁸ At the age of fifteen, defendant Thompson participated in a brutal murder for which he was sentenced to death.

143. *Id.* at 598 (footnotes and citation omitted).

144. A crime is not rendered less serious by the mental state of the defendant. For example, if a woman drops a child to its death from a precipice, the child's death and the manner of the child's death are overwhelmingly horrific. If any act deserves a death sentence, surely this would. But what if the woman suffered from delusions that led her to believe that God had called for the child and had commanded her to deliver the child to angels by dropping the child off the precipice? The act is still horrific, but the actor is not morally—or criminally—responsible. Were the *act* a crime, it could carry a death sentence. But if the *actor* is not criminally responsible by virtue of insanity, the actor is not a person whom the law will punish. See *supra* notes 17-21 and accompanying text.

145. *Enmund v. Florida*, 458 U.S. 782, 800 (1982) (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975)).

146. *Barefoot v. Estelle*, 463 U.S. 880, 914 (1983) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)); see *Mills v. Maryland*, 108 S. Ct. 1860, 1866 (1988) ("In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds.").

147. 108 S. Ct. 2687 (1988) (plurality opinion).

148. *Id.* at 2698 (O'Connor, J., concurring) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987)). Justice Scalia disagrees with this point but has been unable to command a majority to reject it. Compare *Stanford v. Kentucky*, 109 S. Ct. 2969, 2980 (1989) (plurality opinion) (rejecting certain legal age limits as irrelevant to proportionality analysis) with *id.* at 2981 (O'Connor, J., concurring in part) ("[T]here remains a constitutional obligation imposed upon this Court to judge whether the

The crime itself could carry a death penalty; thus, the first aspect of proportionality was not implicated. The question before the Court was whether the eighth amendment barred the death penalty because, as a matter of law, a fifteen-year-old is not sufficiently mature and responsible to be as culpable as an adult, that is, sufficiently culpable to render the death penalty a proportionate punishment. The Court concluded that defendants cannot be sentenced to death for crimes committed when under the age of sixteen.¹⁴⁹ Justice Stevens, writing for the plurality, explained: "Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults."¹⁵⁰

What is generally true of minors—that they lack the capacity to control their conduct and to think in long-range terms—is a fortiori true of defendants found guilty but mentally ill. The *ratio essendi* of a verdict of guilty but mentally ill is that although the defendant had sufficient cognitive appreciation of his act and capacity to control his conduct to be criminally responsible, those very capacities were significantly impaired by mental illness. If the verdict speaks the truth, that will be true of every defendant found guilty but mentally ill. Not all minors, however, are less mature than adults. The Court recognized that this is the case. No one contends that minors *do* have less capacity to think in long-range terms and to control their conduct than adults, but only that they *may*.¹⁵¹ In contrast, the trier of fact has found, beyond a reasonable doubt, that the defendant found guilty but mentally ill *did* suffer from mental illness that impaired his capacity to appreciate or to control his conduct.

It is important to distinguish the reduced level of culpability produced by incapacity, such as youth or mental illness, and that produced by the failure to reflect, as in the felony murder doctrine. The Supreme Court has recognized that the level of a defendant's culpability is critical to the issue whether the death penalty can be imposed:

A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime. Deeply ingrained in our legal tradition is the idea

'nexus between the punishment imposed and the defendant's blameworthiness' is proportional.") (quoting *Thompson*, 108 S. Ct. at 2708).

In *Penry v. Lynaugh*, 109 S. Ct. 2934 (1989) (plurality opinion), decided the same day as *Stanford*, a majority agreed with Justice O'Connor that "[u]nderlying *Lockett* and *Eddings* is the principle that punishment should be directly related to the personal culpability of the criminal defendant." *Id.* at 2947.

149. *Thompson*, 108 S. Ct. at 2700. In *Stanford* the Court held that the Constitution does not forbid the execution of defendants who were over 16 at the time of the crime. *Stanford*, 109 S. Ct. at 2980.

150. *Thompson*, 108 S. Ct. at 2698 (quoting TWENTIETH CENTURY FUND TASK FORCE, REPORT ON SENTENCING POLICY TOWARD YOUNG OFFENDERS, CONFRONTING YOUTH CRIME 7 (1978)). The Court also noted that none of the state legislatures that had set an age below which the death penalty would not be applied had chosen an age below 16, and juries rarely sentenced minors under the age of 16 to death. *Id.* at 2695-97.

151. See *id.* at 2698 ("Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults.") (quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)) (emphasis added).

that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished.¹⁵²

The Court has struggled with the application of this principle to cases in which the defendant was convicted of felony murder and then sentenced to death. In *Enmund v. Florida*¹⁵³ the Court ruled that a defendant cannot be sentenced to death absent a finding of intent to murder.¹⁵⁴ In *Tison v. Arizona*¹⁵⁵ the Court clarified *Enmund*, ruling that a defendant need not harbor specific intent to commit a murder to be sufficiently culpable to receive the death penalty; the reckless disregard for human life that will ordinarily support a verdict of murder will also support a death sentence.¹⁵⁶

In a case involving a guilty but mentally ill verdict, however, the jury could find that the defendant had specific intent to commit a murder. The argument that a defendant found guilty but mentally ill bears diminished responsibility for her crime does not turn on whether she "intended" the crime within the meaning of the law. The argument is that the defendant's responsibility is diminished, *notwithstanding* that she harbored a culpable level of intent, because her mental illness affected her capacity to form that intent and to control her conduct. The verdict indicates a jury finding that the mental illness, not being so severe as to rise to the level of insanity, did not prevent intent from forming. This is not to say that it does not result in a diminished level of responsibility for the crime at issue.

Surely it cannot be contended seriously that a person who commits a murder partly as a result of mental illness is as culpable as a person who, laboring under no such disability, commits the identical crime. The only question, then, is the degree of difference between the two offenders. Is the mentally ill offender's culpability sufficiently different in quality to foreclose imposition of the death penalty?¹⁵⁷ When the trier of fact has found mental illness beyond a reasonable doubt, and embodied that finding in its verdict, the answer must be yes.¹⁵⁸

152. *Tison v. Arizona*, 481 U.S. 137, 156 (1987).

153. 458 U.S. 782 (1982).

154. *Id.* at 796-97.

155. 481 U.S. 137 (1987).

156. *Id.* at 157-58. *Quaere* whether this rule is limited to felony murder cases.

157. See Note, *Mental Illness as an Aggravating Circumstance in Capital Sentencing*, 89 COLUM. L. REV. 291 (1989) (pointing out that although death penalty jurisprudence formally recognizes mental illness as a mitigating factor, sentencers often use it as an aggravating circumstance, as, for example, when the defendant's mental illness supports a finding of future dangerousness); see also *Penry v. Lynaugh*, 109 S. Ct. 2934, 2949 (1989) (plurality opinion) (calling defendant's mental retardation a "two-edged sword"). The use of mental illness as an aggravating circumstance is arguably unconstitutional. The theory that mental illness results in diminished responsibility and renders the death penalty disproportionate underlies this position: "Allowing a sentencer to impose the death penalty on the basis of aggravating factors tainted by mental illness is constitutionally impermissible because it fails to separate criminals most deserving of death from offenders who are less culpable." Note, *supra*, at 300.

158. The *Penry* Court declined to rule that imposition of the death penalty on the mentally retarded invariably offends the eighth amendment. *Penry*, 109 S. Ct. at 2958. The Court, however, recognized that the eighth amendment commands that "punishment should be directly related to the personal culpability of the criminal defendant." *Id.* at 2947. Writing for the plurality, Justice

This conclusion is buttressed by the fact that any evidence of mental illness—even that far more minimal than is necessary to support a verdict of guilty but mentally ill—is cognizable as a mitigating circumstance. Some death penalty statutes expressly set forth mental illness or mental disturbance as a mitigating circumstance.¹⁵⁹ Even in states in which the death penalty statutes are silent, it is clear that the sentencer must be allowed to consider such evidence: "It is beyond dispute that in a capital case 'the sentencer [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'"¹⁶⁰ If, on the one hand, a verdict of guilty but mentally ill—which can be rendered only if the jury finds the mental illness beyond a reasonable doubt¹⁶¹—may carry a death penalty, and on the other hand, a sentencing body may choose not to impose the death penalty on the basis of a far lesser quantum of evidence of mental illness, then there is "a substantial risk that the death penalty [will] be inflicted in an arbitrary and capricious manner."¹⁶²

O'Connor did not categorically dismiss the argument that imposition of the death penalty on a mentally retarded person may be unconstitutional. Rather, she stated:

On the record before the Court today, however, I cannot conclude that all mentally retarded people of Penry's ability—by virtue of their mental retardation alone, and apart from any individualized consideration of their personal responsibility—inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty. Mentally retarded persons are individuals whose abilities and experiences can vary greatly. . . . *In light of the diverse capacities and life experiences of mentally retarded persons, it cannot be said on the record before us today that all mentally retarded people, by definition, can never act with the level of culpability associated with the death penalty.*

Id. at 2957 (emphasis added). This is not inconsistent with the thesis of this Article, which is not that mentally ill people can never act with the level of culpability associated with the death penalty, but rather that when the sentencer returns a verdict of guilty but mentally ill, the verdict represents a finding that the defendant did not do so. As for the mentally retarded, however, this author agrees with Justice Brennan that when the evidence mandates a finding that a person is mentally retarded as defined by the American Association on Mental Retardation, that person's culpability (responsibility) for criminal acts is diminished so as to render the death penalty disproportionate. *Id.* at 2960-63 (Brennan, J., concurring in part and dissenting in part).

159. The Kentucky statute, for example, sets forth as a mitigating circumstance that:

At the time of the capital offense the capacity of the defendant to appreciate the criminality of his conduct [or to conform the conduct] to the requirements of law was impaired as a result of mental illness or retardation or intoxication even though the impairment of the capacity of the defendant to appreciate the criminality of his conduct or to conform the conduct to the requirements of law is insufficient to constitute a defense to the crime.

KY. REV. STAT. ANN. § 532.025(2)(b)(7) (Michie/Bobbs-Merrill Supp. 1988). (The material in brackets appears to have been omitted erroneously from the annotated code.)

160. *Mills v. Maryland*, 108 S. Ct. 1860, 1865 (1988) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982)). The *Mills* Court remarked: "The corollary that 'the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence' is equally 'well established.'" *Id.* (quoting *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986)). In *Mills* the Court held that a jury must consider—that is, give weight to—mitigating evidence *even if* not all members of the jury agreed that the evidence offered in mitigation established a mitigating circumstance. *Id.* at 1868-70.

161. See, e.g., *Spivey v. State*, 253 Ga. 187, 188-89, 319 S.E.2d 420, 426 (1984) (noting that "the [reasonable doubt] standard of proof established by Georgia law is consistent with guilty but mentally ill provisions of other states, including Michigan, which first formulated such form of verdict in 1975").

162. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (plurality opinion). This range of options exacerbates the ever-present risk that the death penalty will be imposed in an arbitrary and capricious manner. The Court constantly seeks to control this risk, while recognizing that it cannot be elimi-

B. The Need for a Reliable Determination that Death is an Appropriate Punishment

"The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders."¹⁶³ If neither is well served, the death penalty is not an appropriate punishment.¹⁶⁴ When a defendant is found guilty but mentally ill, neither the goal of retribution nor the goal of deterrence is well served by sentencing that defendant to death.

Retribution must be distinguished from vengeance. Vengeance, which knows no bounds, is not an acceptable basis for punishment in a civilized society.¹⁶⁵ Retribution, on the other hand, assumes an equivalency of the individual's act and society's response. It is defined as "the dispensing or receiving of reward or punishment according to the deserts of the individual."¹⁶⁶ When the defendant's crime, no matter how heinous, is significantly attributable to the defendant's mental illness, imposing the death penalty exceeds civilized notions of equivalency.¹⁶⁷

Likewise, the value of the death penalty as a deterrent decreases dramatically when it is imposed upon a defendant found guilty but mentally ill. The defendant found guilty but mentally ill has been found not to be as capable of controlling his conduct as the defendant found simply guilty. Therefore, the utility of the death penalty as a control is lessened. As with juveniles under sixteen, "the likelihood that the . . . offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent."¹⁶⁸ The deterrent value of the death penalty is further reduced by the probability that few sentencers will choose to impose death on a defendant they have found to be guilty but mentally ill. Furthermore, if the death penalty rarely is imposed on defendants found guilty but mentally ill, that fact itself will tend to establish that death is a disproportionate penalty as applied to the guilty but mentally ill defendant.¹⁶⁹ In sum, under traditional pro-

nated completely. Thus Justice Stewart explained in *Gregg*: "*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to *minimize the risk of wholly arbitrary and capricious action*." *Id.* at 189 (referring to *Furman v. Georgia*, 408 U.S. 238 (1972)) (emphasis added).

Likewise, Justice Scalia recently has described death penalty law as seeking "*to strike a balance between complete discretion, which produces 'wholly arbitrary and capricious action,' and no discretion at all.*" *Penry v. Lynaugh*, 109 S. Ct. 2934, 2968 (1989) (Scalia, J., concurring in part and dissenting in part) (quoting *Gregg*, 428 U.S. at 189) (emphasis added).

163. *Gregg*, 428 U.S. at 183.

164. See *Thompson v. Oklahoma*, 108 S. Ct. 2687, 2699-2700 (1988) (plurality opinion) (prohibiting execution of a 15-year-old offender).

165. See *Ford v. Wainwright*, 477 U.S. 399, 408-10 (1986).

166. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1940 (1976).

167. One function the Court serves by requiring that the death penalty be proportionate to the offender's responsibility is "to protect the dignity of society itself from the barbarity of exacting mindless vengeance." *Ford*, 477 U.S. at 410.

168. *Thompson*, 108 S. Ct. at 2700.

169. Cf. *Enmund v. Florida*, 458 U.S. 782, 794 (1982) (unwillingness of juries to impose death sentence on nontriggerman felony murderer demonstrates society's rejection of capital punishment for mere accomplices).

portionality analysis, imposing the death penalty on a verdict of guilty but mentally ill is constitutionally disproportionate because in that circumstance the death penalty "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering."¹⁷⁰

V. CONCLUSION

The cruel and unusual punishment clause of the eighth amendment is not stagnant. Rather, its contours must reflect "evolving standards of decency."¹⁷¹ The most positive view of the guilty but mentally ill verdict is that it, too, reflects evolving standards of decency. To many of its champions the guilty but mentally ill verdict represents an effort to deal more fairly and more humanely with mentally ill criminals.¹⁷² The verdict allows the criminal justice system to identify defendants whose mental illness was a causative factor in their crime. To what end? The cynic's view is that the entire purpose of the verdict is to avoid the possibility that the trier of fact will find the defendant not guilty by reason of insanity.¹⁷³ The view that justifies the verdict, however, maintains that its purpose is to identify the mentally ill so that they can be treated and, ideally, rehabilitated. Neither of these views is consonant with imposition of the death penalty. Our society does not convict, much less sentence to death, the insane. Our society does not execute even those who were competent at the time of the crime, but are insane at the time of their proposed execution.¹⁷⁴ On the other hand, there is a disturbing level of cruelty in the specter of a system that treats a defendant's mental illness, rendering him a potentially useful and productive member of society, only to execute him.¹⁷⁵

It is chilling to contemplate the execution of a defendant who was mentally

170. *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion).

171. *Ford v. Wainwright*, 477 U.S. 399, 406 (1986); see also *Weems v. United States*, 217 U.S. 349, 378 (1910) ("The [eighth amendment] . . . may be . . . progressive and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."). As Judge Elbert P. Tuttle has written: "For myself, I do not hesitate to assert the proposition that the only way the law has progressed from the days of the rack, the screw and the wheel is the development of moral concepts . . ." *Novak v. Beto*, 453 F.2d 661, 672 (5th Cir. 1971) (Tuttle, J., concurring in part and dissenting in part), *cert. denied sub nom. Sellars v. Beto*, 409 U.S. 968 (1972).

172. See Mickenberg, *supra* note 14, at 995-96.

173. See *supra* note 15.

174. *Ford*, 477 U.S. at 410.

175. In *People v. Crews*, 122 Ill. 2d 266, 522 N.E.2d 1167 (1988), *cert. denied*, 109 S. Ct. 3260 (1989), the court affirmed a death sentence imposed following a verdict of guilty but mentally ill. The majority construed the treatment provisions of the statute as not applicable when the defendant was sentenced to death. *Id.* at 275, 522 N.E.2d at 1173. Justice Clark, joined by Justice Ward, concurred, but argued that the treatment provisions did apply:

He can do much good, or harm, in the time which remains to him. . . . I therefore see no inconsistency in statutorily providing a condemned prisoner with the opportunity for psychiatric treatment. No one would argue that the treatment of an ordinary mental patient is rendered futile by the fact that the patient will not live forever.

Id. at 296, 522 N.E.2d at 1181 (Clark, J., concurring). Justice Simon, on the other hand, dissented, arguing that "[a] sentence of death is completely inconsistent with the goals of the guilty but mentally ill statutory provisions—providing treatment for the mentally ill as well as punishing them for the crimes they committed." *Id.* at 299, 522 N.E.2d at 1182 (Simon, J., dissenting).

ill at the time of his crime. Such an execution would reek of "the barbarity of exacting mindless vengeance"¹⁷⁶ that the eighth amendment forbids—as well it should. The premise that a defendant who is guilty but mentally ill bears a diminished level of responsibility for his crime has been recognized for centuries, as has the correlative proposition that a civilized society will not subject such a defendant to the death penalty.¹⁷⁷ The Constitution's cruel and unusual punishment clause, which demands that, especially when life itself is at stake, the punishment be proportionate to the crime, embodies that principle. When the trier of fact finds beyond a reasonable doubt that the defendant was mentally ill at the time of the crime, and that the mental illness bore a causal relationship to the commission of the crime, then the defendant's mental illness is no longer simply evidence in mitigation. It is mitigating as a matter of law. The sentence of death is the most weighty judgment our legal system ever renders. A verdict of guilty but mentally ill simply will not support it.

176. *Ford*, 477 U.S. at 410.

177. *See supra* note 16.

