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ENTITLED The Insanity Plea: Issues and Alternatives

IS APPROVED BY ME AS FULFILLING THIS PART OF THE REQUIREMENTS FOR THE

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THE INSANITY PLEA: ISSUES AND ALTERNATIVES

BY

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A city official shoots and kills the mayor and another public official, and, after claiming diminished capacity, is charged with voluntary manslaughter.

A policeman shoots and kills an unarmed ghetto youth and successfully pleads not guilty by reason of insanity. But the state can not comply with the court order to treat his medical illness-they can't find any mental illness.

A jealous husband shoots and kills baseball star Lyman Bostock, and in exchange for a hard luck story and a computer scored psychological test, is given four months of psychiatric treatment and freedom.¹ What these three stories have in common is that they illustrate some of the problems of the insanity defense. But perhaps the most publicized and talked about story concerning the insanity defense happened nearly six years ago, and since that occurrence, the insanity defense has been at the forefront of public debate. In June of 1982, John Hinckley Jr., was acquitted of thirteen criminal counts stemming from his attempted assassination of President Ronald Reagan. This event had far-reaching ramifications for the insanity defense; not just because it was a crime against the President, but also because the American public had seen the event with their own eyes, countless times. They had seen John Hinckley commit the crime, now he was found not guilty. And the public's perception of the plea was quickly shown in an ABC poll taken on the day of the verdict. 76% of the American people did not feel that justice was done. 90% felt Hinckley should not be free if he recovered from the mental illness, but 75% felt sure that he would.² There are many different forms of the insanity plea. It can be used in civil proceedings, in contract cases, and in divorce proceedings. But the issue

is really only dealing with it in criminal matters, and more specifically using it as a way of escaping guilt for a crime that has been committed.

In this paper, I will first briefly discuss the evolution of the insanity plea, focusing on the different type of doctrines that have been advanced over the years. Secondly, I will look at Illinois as a case study to see the procedures and results of offering an insanity defense. And finally I will look at the different alternatives that have been offered, and use a policy evaluation method to try and determine the appropriate stance that should be taken in regard to the insanity defense.

I

The insanity defense has been with us, in some form or another, since biblical times. To believe in a defense for insanity, one must believe that "the criminal law exists to deter and to punish those who would, or who do choose to do wrong. If they can't exercise choice, they can't be deterred, and it's a moral outrage to punish them."³ But this has only been firmly established in law since 1843 and the famous English trial of Daniel McNaughten. McNaughten attempted to assassinate the British Prime Minister, Sir Robert Peel, but mistakenly shot and killed the Prime Minister's secretary, Edward Drummond. During the trial it was learned through the evidence that McNaughten was suffering from a disease that would now be classified as paranoid schizophrenia. And through the learnings of forensic psychiatrist Isaac Ray, the jury returned with a verdict of not guilty by reason of insanity. Soon after the House of Lords established what has become known as the M'Naghten Rule or right-wrong test.⁴ It states that the defendant

"can not be convicted if, at the time he committed the act, he was laboring, under such a defect of reason, from a disease of the mind, as to not know the nature and quality of the act he was doing; or if he did know it, as not to know what he was doing was wrong."⁵

Through case law and statutes this test has been adopted by sixteen states.⁶ Of course, there has been numerous criticisms concerning the M'Naghten test that must be briefly discussed. The first criticism of M'Naghten is the terms that it employs are too ambiguous. The word know can be thought of as being too restrictive or too vague. Regardless of which, most jurisdictions do not define these term to jurors, leaving jurors to fend for themselves. Another word that has come under some criticism is the word wrong. The basis for this dilemma is whether wrong constitutes a legal or moral wrong, or both. In England it has been established that if a defendant knew an act was legally wrong, than he is guilty. But the U.S., at this time, has not decided whether a person can plead insanity if he knew it was legally wrong but morally right.⁷

The most significant criticism of M'Naghten, and the one that I feel is the most important, is the question of volition versus cognition. M'Naghten takes into account the cognitive processes of thinking. That is, a person is judged insane if he can not clearly discern what is right or wrong, good or evil. Volition means action. M'Naughten ignores the impairment of volitional capacity, otherwise known as self-control. In a nutshell, a person is not considered insane by M'Naghten if the defendant knew his actions were wrong but were unable to control these actions. For example, a schizophrenic with hallucinations forcing him to kill his wife, would

not be judged legally insane. To combat this "problem" with the M'Naghten standard, many states supplemented M'Naghten with the irresistible impulse test. In Virginia for example, irresistible impulse meant, "a moral or homicidal insanity which consists of an irresistible inclination to kill or commit some other offense...in situations where the accused is able to understand the nature and consequences of his act and knows it to be wrong, his mind has become so impaired by disease that he is totally deprived of his mental power to control or restrain the act."⁸ In the 1886 case of *Parsons Vs. Alabama*(1886), the court decided that it was constitutional to supplement M'Naghten with the irresistible impulse test and at the present time four states have this broadened M'Naghten rule.⁹

As psychiatry became a modern day science, many people felt that M'Naghten was too restrictive. That judging a person solely on the criteria of right or wrong was not nearly enough in determining insanity. "The recognition that one's exercise of free will and moral responsibility, required for criminal liability, could be undermined by a wide range of mental disturbances beyond cognitive and volitional defects led, at least partially, to the adoption of the product test."¹⁰ In 1871, New Hampshire was the first state to reject M'Naghten and it took 73 years for New Hampshire's product rule to be clearly enunciated. Judge David Bazelon, in the case of *Durham Vs. U.S.*(1954), announced that "an accused is not criminally responsible if his unlawful act was the product of a mental disease or defect."¹¹ This wide, far-reaching standard became known as the Durham rule. Obviously there were problems with this liberal test. As with M'Naghten, the ambiguity of the words

were one criticism. In Durham's case the word product was debated, and as usual was never defined for the jurors. prosecutors went on to argue that while occasionally one can say that an act was a product of a mental disease, one can rarely, if ever say, that an act was not a product.¹² But an even bigger problem with Durham is that it gave psychiatrists greater leeway to give all relevant (what psychiatrists considered relevant) information concerning the character of the defendant. This left the jury without any instructions and entirely dependent on the expert testimony. As one critic put it, "Durham rested upon the assumption that the concern is simply with mental disorder rather than the question of when the disorder should be accorded the specific legal consequence of a defense to criminal conviction."¹³ In *Macdonald Vs. U.S.* (1967) the court tried to define Durham by stating that a mental disease or defect may differ for clinical and legal purposes and they also gave a working definition of mental disease or defect.¹⁴ At this time only one state, New Hampshire, abides by the principle of Durham. It is also ironic that Judge David Bazelon was the first to repudiate it in *U.S. Vs. Brawner* (1972), and later endorsed the American Law Institutes standard (ALI).¹⁵

The ALI's Modern Penal Code Standard has been characterized as a somewhat modernized combination of M'Naghten and the irresistible impulse test, has been adopted in twenty-four states, the District of Columbia, and in all of the Federal circuits. The ALI test states:

(1) "A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity,

either to appreciate criminality(wrongfulness) of his conduct or to conform his conduct to the requirements of law.

(2) As used in this article, the terms "mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct."¹⁶ It should be noted that most of the twenty-four states that use this test make some minor modifications. For example, omission of the second paragraph, deletion of the word substantial, and favoring either the word criminality or wrongfulness in this context.¹⁷ Again there has been criticism of the forementioned rule. One is the ambiguity of the word substantial, which of course is left to the jurors interpretation of that word during deliberation. After this test was adopted by virtually all of the U.S. Court of Appeals Judges, it was quickly repudiated by Congress in 1984, in favor of a more restrictive M'Naughten style statutory formula.¹⁸ This, of course, was a backlash to the John Hinckley incident that so troubled the public. As can be seen, each state has a different preconceived notion as to what constitutes a person being found criminally insane. I will defer discussion of states that have abolished the plea or have radically changed it, until the discussion of possible alternatives.

The intricacies of the plea must also be discussed. And the first question is that of burden of proof. Criminal law generally presumes that a defendant is sane unless the defendant raises the issue of insanity. Under federal law the prosecution must bear the burden of proving the defendant's sanity beyond a reasonable doubt. However in Davis Vs. U.S.(1895), the Supreme Court stated that this allocation of

burden of proof is not binding on the states.¹⁹ The states differ on this issue, with seventeen states following the federal government's lead and thirty-two others requiring the defendant to prove his insanity through a preponderance of the evidence.²⁰ The burden of proof has, of late, become a hotly contested issue. This, perhaps, came about after the Hinckley Trial, when a number of jurors felt that they were forced to acquit Hinckley because the burden was not and could not be reached by the prosecution. All it seems to take is one credible psychiatrist, with a psychological test, and doubt will sufficiently be raised in the mind of the jurors.²¹

The debate about the scope of expert testimony in an insanity defense strikes at the very heart of the problem. That being whether psychiatrists or mental health experts are able to accurately assess a person's mental state. Thomas Szasz, a noted psychiatrist, has repeatedly argued that there really is no such thing as mental illness, *per se*.²² Psychiatry, one must remember, is a very theoretical science. Psychiatrists can describe behavior and offer explanations, but that is all. Regardless of the ability of the psychiatrist to accurately assess a defendant, an expert opinion is usually prohibited from giving his or her opinion on the applicable law. However psychiatrists will usually paraphrase to get around this. For example, a psychiatrist, instead of concluding his remarks with the statement that the defendant was insane, might say that the defendant failed to appreciate the wrongfulness of his or her behavior at the time of the crime.²³

The final aspect to look at is the disposition of insanity acquitees. This section, I feel, is at the brunt of the defense's problem—at least in the public's view. In my

opinion, there would be no debate on the subject if people acquitted by the insanity defense were kept off the public streets or were cured. The prototype case of a man serving only four months in a hospital for a murder, or of someone being let out of a hospital seemingly cured, only to go out on a killing spree, are at the base of the American public's fears about the insanity defense. There seems to be three different options for dealing with defendants acquitted by the not guilty by reason of insanity charge. These options can be placed along a continuum, with the least restrictive option on one end and the most restrictive disposition on the other end. Under the least restrictive approach, which nineteen states currently subscribe to, the state must prove with clear and convincing evidence in a separate civil commitment proceeding, that the acquittee meets the general civil commitment criteria, which basically means dangerous.²⁴ The next solution along the continuum is mandatory commitment to a mental institution for the purpose of psychological evaluation. This period is usually around thirty days. After that time, a civil hearing is held, if the hospital finds the former defendant to be a subject for civil commitment. The third and most restrictive plan is advocated by twelve states and also has a mandatory commitment period. But this period is not for the purpose of evaluation, but instead constitutes a criminal commitment.²⁵ Some states limit the confinement period to the maximum criminal sentence that could have been sanctioned if the acquittee was found guilty. The District of Columbia offers another option, wherein the defendant must prove his sanity by a preponderance of the evidence at a hearing that is held every six months.²⁶ In the recent landmark case of

Jones Vs. U.S.(1983), the Supreme Court stated that it was also constitutional to hold a acquitted in a hospital longer than the maximum criminal sentence that would be allowed.²⁷

There have been a number of empirical studies done on the length of time one spends in the hospital, what type of people are usually committed etc., and I feel a brief overview is in order. Richard Pasework did a study that was published in the "Journal of Psychiatry and Law," and found that generally people are institutionalized for a significantly lesser period of time than if they would have been found guilty.²⁸ He also found that the length of hospitalization is directly related to the severity of the crime: murderers 32.9 months, rapists 21.2 months, and assault 11.1 months.²⁹ Educated, female, and married people all served less time. Also Pasework found that in a study of twenty-nine patients who committed murder, the activity of their counsel had a dramatic effect on the dates of their releases. Thirteen had active counsel and eleven were subsequently discharged; while the other sixteen did not have active legal counsel and only one was discharged.³⁰ Finally, Pasework, in a New York study, followed eighty-eight discharged males and found that twenty-one were rearrested, seven with the same offense and 25% of the arrests were crimes against the person(murder, assault, rape).³¹ Although this is one study, and I do not mean to overgeneralize, there seems to be numerous problems with these results and consequently with problems in our mental health system. The problem seems to signify the ignorance of the psychological profession concerning the matter of curing mentally ill patients. The

main purpose for hospitalization, instead of prison, is to rehabilitate or cure the offender. What these results show is that psychiatrists and officials seem to have no way of knowing whether someone is cured of their illness or not. For instance, Pasework shows that an active attorney has a far greater chance of securing release than a non-active attorney. It would be ridiculous for us to assume that active attorneys cause patients to be cured expediently. Another factor to look at is the more serious a crime, the greater length of stay for that patient in the hospital. This means that the more violent a crime, the more mentally deranged a patient is. This, of course, is untrue. What the hospitals are intentionally or unintentionally doing is providing a punitive type of treatment to the patient; ironically, doing exactly the opposite of what hospitals were intended to accomplish. Most importantly, there is a chance of a person getting released and going out and committing crimes. The number is nowhere near the public's perception of recurrent crime, but the problem is there. As noted lawyer William Winslade says, the percentage of cases of rearrested patients may be small, but there still is a significant number that has to be dealt with and solved.³² It should be noted that this problem is not solely the problem of the hospitals. Jails also experience many repeat felons after they had been released through parole.

Before I go on to Illinois law, I feel I should briefly explain the law dealing with the question of incompetence to stand trial. This question is much more prevalent than the insanity plea with there being forty-five incompetency pleas for every one insanity plea.³³ The law states that if a person is unable to understand the

proceedings of a trial then he will not be tried. A defendant who is found incompetent will have his trial delayed until he is seen as fit. In *Dusky Vs. U.S.* (1960), the Supreme Court said that a defendant is competent if he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and with a reasonable degree of rational understanding about the proceedings.³⁴ This means that if a person is using an insanity defense during the trial he is presumed to be able to fully understand the events and occurrences before him. The incompetency issue, however, can be raised at any time during the criminal process. But it is most often raised during the arraignment proceeding.³⁵ As I mentioned, if a defendant is found to be incompetent he is then placed into a hospital until he is perceived fit to understand the court proceedings. There is a good chance, however, that there will not be a trial when the defendant has recovered. For one, most of the witnesses may not be around to testify, or if they are present, many may have forgotten what actually occurred. The prosecution now must also show that there is a valid purpose for continuing the criminal proceedings. If a defendant had spent fifteen years in a hospital there may be no reason for the prosecution starting the proceedings again.

II

"Most importantly (the verdict) is designed to protect the public from violence inflicted by persons with mental ailments who slipped through the cracks of the criminal justice system." This quote was from Illinois Governor James Thompson introducing the guilty but mentally ill plea to the Illinois Assembly.³⁶ The law

entitled Ill. Rev. Stat. ch.38 6-2(c)(1981) significantly altered the insanity defense in Illinois.³⁷ It should be noted, however, that the guilty but mentally ill plea is not the sole criterion in determining insanity. Juries now have four possible verdicts from which to choose: guilty, not guilty, not guilty by reason of insanity, and guilty but mentally ill. Guilty but mentally ill basically provides the jurors the opportunity to find a defendant guilty, yet acknowledge his or her mental illness and need for treatment. The major intent of the guilty but mentally ill legislation is to help prosecutors convict defendants who would otherwise have been acquitted by reason of insanity. What is happening is that "while the guilty but mentally ill plea and verdict supplements rather than supplants the insanity defense, in the states that have enacted guilty but mentally ill legislation, it is often seen as having supplanted it in practice."³⁸ The defendant, if convicted by a guilty but mentally ill plea, is then sentenced as if he was not insane. But before serving time is examined by state appointed psychiatrists who will transfer, if they see fit, the defendant to a mental health facility. At that point he may be held at the hospital only until his sentence runs out. If he is, supposedly, cured, then he must continue the remainder of his sentence in the state's correctional institutions. Michigan was the first state to establish this verdict in 1975 and it has basically served as the prototype for Illinois(1981) and eleven other states who have adopted the guilty but mentally ill plea.³⁹

Illinois does also subscribe to the not guilty by reason of insanity plea. Illinois, like most other states, use the definition of insanity advocated by the ALI. in their

model penal code(with a few minor changes). This was made into law in 1975, Rev. Stat. Ch. 38 6-2(a).⁴⁰ According to this statute, a defendant must be proven insane by showing that the defendant "lacks substantial capacity, either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law as a result of a mental disorder or defect."⁴¹ If the jury does not feel that the defendant fits that definition of insanity, they may also consider the guilty but mentally ill plea. Whereas the not guilty by reason of insanity plea refers to a person as insane, the guilty but mentally ill plea uses the term mental illness. Mental illness is defined as a "substantial disorder of thought or mood, a behavior which afflicted a person at the time of the commission of the offense and which impaired that person's judgement, but not to the extent that he or she is unable to appreciate the wrongfulness of his or her behavior, or is unable to conform his conduct to the requirements of law."⁴² If the jury finds that the defendant is not insane, but is suffering from a mental illness, then the guilty but mentally ill plea should be enforced.

One major difference between the legal terms mental illness and insanity is that insanity can be found on the basis of a volitional impairment ("conform conduct to the requirements of the law"), however there is no volitional test in the mental illness definition. When the defendant has asserted his right to the insanity defense, and the judge feels it is warranted by the evidence, the jury will then be provided with a special guilty but mentally ill verdict form which requires finding beyond a reasonable doubt that the defendant committed the act charged, and was

not legally insane at the time of the act.⁴³ If the defendant is charged guilty but mentally ill, the Illinois Department of Corrections will conduct hearings into the defendant's psychological state, and through these results may decide to transfer custody to the Illinois Department of Mental Health and Developmental Disabilities.⁴⁴ There he will serve out his sentence if he remains mentally ill, or, if cured, be transferred back to the Department of Corrections. This procedure has withstood various constitutional attacks on grounds including, equal protection (People Vs. Kaeding 1983), and procedural due process (People Vs. Dewitt 1984). The one constitutional entity that may cause a problem for the guilty but mentally ill plea is the fundamental fairness principle, which seems to be threatened by the confusion that has been initiated by these two competing standards.⁴⁵

III

In this final section I will attempt to determine the best options concerning the insanity plea using Nagel's computer aided policy evaluation program.⁴⁶ This program is designed to give the strongest option after scoring each option or alternative relative to a particular criteria or goal. In this section, I will discuss four different aspects of the insanity plea: defining insanity, burden of proof in the trial, disposition of an acquitted defendant, and burden of proof in the disposition stage. In regard to defining insanity and the disposition of an acquitted defendant, I will make two computer files that will describe different alternatives and criteria for the two aspects. I will then score the different alternatives and decide on the best alternative. One problem with this program that I will try to avoid, is that of

subjectivity. When scoring particular items or putting different weights on criteria, there is inherently a problem with losing one's objectivity. However, throughout this section, I will try to inoculate any score or weight that has the slightest possibility of coming from the heart and not the mind.

The first file will be used to determine the test that should be used in defining insanity. One alternative, however, is to abolish the notion of insanity as a plea. Call for abolishment comes from both sides of the political spectrum. Former President Richard Nixon once said, "Abolition of the insanity defense is the most significant feature of the administrations proposed criminal code."⁴⁷ And noted liberal author and attorney Abraham Goldstein says, "the insanity defense exists only to commit guilty, not to help them escape penal sanctions...The insanity defense is caught up in some of the most controversial ideological currents of our time. The direction it takes depends, essentially, upon the place in social control one assigns to the criminal law as it competes with other methods of regulation by the state, to each of the themes underlying the criminal law, to the confidence one has that the mentally ill offender can be identified and treated, and the importance one allocates to the idea of blame."⁴⁸ There are numerous arguments for abolishing the plea, from Goldstein's socio-cultural explanation to the mere fact that it is a rich man's defense. Other arguments for abolishing the plea go straight to the heart of the issue. As psychiatrist Thomas Szasz wrote in his essay "The Myth of Mental Illness," there is no such thing as mental illness, and its only function is to disguise and thus render non-palatable the bitter pill of moral conflict in human relations.⁴⁹

The fact of the matter is, we as a society, cannot accurately ascertain how sick(mentally) a person actually is. There is just no basis in psychiatry to make a differentiation between a man who is personally blameworthy from the man who is not. This is why some criminals, John Hinckley are found insane, while others, equally as "mad,"(Charles Manson) are found sane and put in prisons. To say that John Hinckley is crazier than Charles Manson is insane in itself. As Norval Morris states, "what about the fact that no one of serious perception will fail to recognize both the extent of mental illness and retardation among the prison population."⁵⁰ And noted psychiatrist and lawyer William Winslade states that psychiatry is inherently theoretical; it can describe behavior and offer explanations about behavior, but it can't determine the truth about the state of mind of a patient. He goes on to point out that the prosecution contends that the accused is a person acting as an independent decision maker; while the defense is arguing that the defendant is a victim of forces beyond his own control.⁵¹ Neither, however, can be empirically proved.

When one speaks of abolishing the insanity plea, proponents of the plea talk about moral standards and the question of responsibility. How could you convict someone who is not responsible for their actions? To counter the responsibility argument, proponents of abolishing the insanity defense mention the 1975 case of U.S.Vs. Park. This case had literally nothing to do with the insanity defense but it did establish strict liability in some work places.⁵² By that I mean, a person can be convicted regardless of innocence or care. Basically saying, in some instances,

someone can be found guilty when they are not fully responsible.

However most abolitionists agree that we can't have the same type of punishment for someone who "knowingly" commits a crime to someone who does not. In strict liability cases there is a mitigation of punishment and in insanity pleas there is the question of mens rea. According to Black's Law Dictionary mens rea means, "A guilty mind, a guilty or wrongful purpose; a criminal intent. Guilty knowledge and willfulness."⁵³ The mens rea approach or mens rea limitation theory would limit the significance of mental impairment to the specific mental state, which is an element of the offense. At this time three states have abolished the insanity defense in favor of the mens rea approach: Montana, Idaho, and Utah.⁵⁴ According to Montana state law, the defendant's mental condition is admissible to negate the state of mind or mens rea, required as an element of the crime in question. In order to convict a defendant who has brought forth evidence that he was mentally deranged at the time of the crime, prosecutors must prove, beyond a reasonable doubt, that the defendant did have the mental capacity, or mens rea, to form the evil intent which is material to every crime.⁵⁵ For example, if Steve kills Bob, Steve can't escape conviction by pleading the insanity defense, claiming that he was suffering from paranoid schizophrenia at the time of the offense. Steve may, however, attempt to demonstrate, by expert mental health testimony, that he was so severely ill at the time of the offense that he could not have knowingly, purposefully, or intentionally killed Bob (no mens rea). Possibly because he thought Bob was a demon. By the mens rea approach, Steve might

escape conviction if the prosecution fails to prove, beyond a reasonable doubt, his intent to murder, i.e., prove the physical act and prove a guilty mind. As in most states, the laws also permit evidence of mental disorder to be raised at the time of sentencing as a mitigating factor.

Another option is that of diminished capacity, which was tried in California, and then quickly overturned. The Butler Committee recommended abolishing the insanity defense and adopt a rule of diminished capacity, which states that evidence of abnormal mental condition would be admissible to affect the degree of the crime for which the accused could be convicted.⁵⁶ For example, the charge of murder in the first degree may be reduced to second degree upon showing that the defendant lacked the capacity to premeditate.

The abolitionist position can be summed up by professor Norval Morris. "It is unthinkable that mental illness should be given a lesser reach than drunkenness. If a given mental condition(intent, recklessness) is required for the conviction of a criminal offense...in the absence of that mental condition there can be no conviction. This holds true whether the absence of that condition is attributable to blindness, deafness, drunkenness, mental illness, or retardation etc... But this states basic principle of criminal law-not a special defense."⁵⁷

Other than the obvious moral dilemma that would be presented if the plea was abolished, other pertinent questions arise about the effectiveness of the mens rea approach. James Wickham, an attorney with the Idaho Attorney General's Office, asserted that the Idaho Legislature "did not abrogate the common law

principle that the severely mentally ill are not responsible for otherwise criminal conduct. Indeed it broadened the cases in which the defendants will be acquitted, the experts who may testify, and conferred broad discretion to trial judges to formulate jury instructions on the questions."⁵⁸ The mens rea approach does seem to have the same sorts of problems as the insanity defense itself. The ambiguity of the words intent, negligence, and reckless are comparable to wrongfulness or substantial capacity. Will the mens rea approach be used more in regard to lesser offenses than the plea is used? Could this spur an increase in expert psychiatric testimony? No one is sure. Finally, one must remember that by abolishing the defense, it does not mean that psychologically ill patients are put in jail. It only means that there is a different course to the mental hospital.

The first file is to determine the test that should be used in defining insanity. Throughout common law history there have been mainly four alternatives that have predominated the field and I have discussed them in the previous pages: M'Naghten, Durham, ALI, and abolition or mens rea. Briefly, M'Naghten advocates the principle of right vs. wrong, and for this study I will not use the irresistible impulse test as a tag to the M'Naghten rule. Durham states that a defendant is not criminally responsible if his unlawful act was a product of a mental disease or defect. And suffice it to say that the ALI approach is a synthesis of Durham and M'Naghten, with the irresistible impulse test added on. The last alternative is that of abolishing the defense and using the mens rea approach. Differentiating between the M'Naghten rule and ALI is difficult, but the ALI standard is noteworthy,"in its use

of the word appreciate instead of the cognitive understanding suggested by the use of the word know in the M'Naghten rule; in its requirement that an insane defendant lack 'substantial capacity' thereby withdrawing from the seemingly more stringent requirement of the M'Naghten rule for a total lack of capacity to distinguish right from wrong; and finally, in its incorporation of an independent volitional or 'irresistible impulse' component into the standard of insanity by the requirement that an insane person lack substantial capacity to conform his conduct to the requirements of the law."⁵⁹

There are seven criteria used in this particular file. The first criteria is that of the morality of the problem(moral). By this I mean which alternative would inherently do the best job of separating the innocent from the guilty. Which alternative would keep those defendants not responsible for their actions out of jail and not labeled as guilty. The second criteria is the public's perception criteria. I feel it is important for the law to be conducive to the public's wishes and I feel it's also important to look at what the commoner feels the best approach would be to a particular problem. Predictability is the third criteria and this looks at which alternative would be the easiest for jurors to comprehend and therefore most easily help society determine how a defendant will be charged. There are two goals that I label as feasibility. The first is political feasibility and that means the criterion that discusses how likely the law or statute could be changed, and if it is seen as constitutionally feasible. Legal feasibility is basically how the alternatives will effect the system. For example, does the alternative inherently add more expert testimony

to the proceedings. The last two goals are symbolic. The conservative symbol advocates the notion of retribution. Basically saying, we can't forget the fact that the defendant, whether insane or not, committed a crime. And if one commits a crime, they should be punished. On the other hand, the liberal symbol advocates individual rights and the notion of responsibility. A liberal points out that a person should not be punished if he is not aware of a crime being committed.

Since there are four alternatives, I will score each criterion on a 1-4 scale, with 4 being the best alternative for that particular goal. Looking at the first goal (moral), it is obvious that abolishing the insanity plea would put the label of guilt on many people who are not responsible, and if not responsible, than perhaps innocent. This is not to say that the defendants will only be put in prisons and not hospitals, but it is to say the defendants will be labeled as guilty. The Durham test is the most broadly construed test for insanity. But I do not believe that this implies Durham would be able to separate the guilty from the irresponsible. I feel Durham would advocate using the plea more, and perhaps be used to let guilty people off on the plea. So while it would separate some irresponsible defendants from responsible defendants, it would also let guilty defendants use the insanity plea as an escape to the hospital instead of prison. Differentiating the last two alternatives on this particular criteria is difficult. The chief difference being the ALI uses a volitional test and that M'Naghten is significantly more restrictive. I am of the belief that if there is such a thing as being not responsible for a crime, then it logically follows that there are particular cases in which a person should not be held responsible if he can not

control his actions (volitional test). How could a person be found guilty if he had no control of his actions? The question of whether volition can be proved or disproved, and the question of whether there is such a circumstance need not be discussed here, as it is not applicable to this particular goal. Therefore, the modern penal code would find a defendant with a volitional problem innocent and thereby be able to separate an "innocent" offender more often than the M'Naghten principle.

The second criteria is the public's perception of the rule. As we now know most people do not truly understand the rules in their particular state. Some misperceptions are that the plea is used all the time, it is easy to be found innocent, and rarely, if ever, do the hospitals rehabilitate. The public seems to feel that the plea does not do a good enough job of separating the innocent from the guilty; who are just using this exception in our legal system to escape a criminal sentence. As I have shown, the modern penal code does the best job of separating the innocent, but this is not applicable to this criteria because the public does not view it as such. And while the public feels there should be some sort of test for insane people, they feel it should not be as broad as it is at the present moment. The strictest alternative is the M'Naghten alternative, and while many people do not know what this entails, it can be explained easily through the right-wrong test. Also it is rarely used at the present time, and by implementing this in the majority of states, the public may view it as a conservative step in the right direction. Implementing Durham would be the worst thing for the public because the public's hope is for restricting the test not broadening it. And the call for abolishing the plea, even at the time of the

Hinckley acquittal, was at a minimum, and has since subsided.⁶⁰ Thus, I feel the ALI test would score higher than abolishing the plea in this particular criteria.

Predictability is the third criteria, and I feel abolishing the plea is the strongest alternative for this goal. First of all, jurors will not have the problem of deciphering ambiguous terms, and while there still may be expert testimony, it will be limited. Abolishing the plea will also help attorneys and the public better know the possible outcomes of going to trial. The M'Naghten test would be the next best option considering it is the least ambiguous of the alternatives, and that it also restricts testimony to the question of right or wrong, nothing else. Durham, as it is used, is the alternative that advocates the most expert testimony and also has a far-reaching definition. This rule leaves the jury to fend for themselves.

Political feasibility is the criteria looking at the constitutional feasibility of the alternatives. And since the ALI standard is established in the majority of the states, and is the basic guideline for the federal law, it becomes obvious that this alternative is by far and wide the best. However, as I previously mentioned, the federal government has shifted its emphasis toward the M'Naghten rule and this has not suffered any constitutional defeat. The most important alternative to look at in this particular section is abolishing the plea. The question of the constitutionality of this particular plea has been questioned but not really answered. For instance, in the case of *In Re Winship*(1970), the court basically states that abolishing the plea would not be contrary to the due process clause of the fourteenth amendment.⁶¹ Given the state supreme court rulings in *State Vs. Strasbourg*(Washington 1910), *Sinclair Vs.*

State(Mississippi 1931), and State Vs. Lange(Louisiana 1929), it appears unlikely that provisions that completely disallow the issue of mental disturbance to be raised during a criminal trial would overcome constitutional objections. Of course the mens rea approach does allow testimony concerning mental disturbances. The only pertinent constitutional objection that has not, at this time, been tested is the theory of fundamental fairness.⁶² However, of all the alternatives, the mens rea approach(abolition alternative) would definitely be the most difficult to pass into law. It would radically change the legal system and both conservative and liberals alike would have a hard time dealing with that event. The goal of legal feasibility seems to center on the question of to what extent these definitions will effect expert testimony in the trial proceedings. Abolition of the defense will curtail expert testimony to only the question of the state of mind of the individual. And as with the predictability criteria, Durham would imply by its language the use of many experts, testifying on many different respects. And while M'Naghten and the ALI are basically equal in this respect, I will give a slight edge to M'Naghten, only because experts are not needed to discern any volitional requirements.

The first symbolic criteria is a conservative one. And even though I have previously discussed that abolishing the plea may not seriously curtail using insanity as a defense per se., and also that abolishing the plea does not mean a defendant will not go to a hospital and subsequently be let out, abolishing is still the strongest alternative for the conservative symbol. By saying one cannot use insanity as a total defense, the public is being told that if a crime is committed, a defendant

must face up to the crime. It is fairly easy to see that the remaining three alternatives run on a continuum from most restrictive to least, or M'Naghten to ALI to Durham. With the test that is most difficult to prove insanity, M'Naghten, being seen as the most conservative of the three alternatives.

The second symbol is the liberal symbol. This symbol basically views that a defendant must be responsible to be held accountable for a crime. Therefore, everything must be done to insure that a defendant has knowledge and forethought of a crime to be punished. The liberal views the insanity defense as necessary to keep the moral fiber of our legal system and of our country as strong as possible. Needless to say, abolishing the plea outright is usually the last thought on a liberal's mind, Szasz and Goldstein are exceptions to this rule. And although the Durham rule is the most broadly construed test, I feel liberals are against it because of the fact that it really does not work and thus only strengthens the opposition. In time the Durham or product test proved to be almost too liberal or radical, and was repudiated by the same man who initiated it. The ALI, because it is more broadly construed than M'Naghten and uses the volitional test, is definitely the preferred choice among liberals.

	Moral	Public p.	Predict	Feas. P	Feas. L.	Con.	Lib.
ALI	4	3	2	4	2	2	4
M'Naghten	3	4	3	3	3	3	3
Durham	2	1	1	2	1	1	2

Abolition	1	2	4	1	4	4	1
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weight=1

TOTAL

ALI 21

M'NAGHTEN 22

DURHAM 10

ABOLITION 17

At this point it looks as if M'Naghten would be the strongest alternative. But it would be naive for us to assume that each goal would be of equal importance for the alternatives. Since there are six different goals, I will increase the weight of the criteria on a 1-6 scale. I will attempt to describe my reasons for the different weights on the criteria, but this section is increasingly subjective. The seventh criteria of legal feasibility seems to be, far and wide, the least important of the criteria. The functioning of the court can change through a variety of means, and one mean does not have to be the insanity plea. If the amount of expert testimony is viewed as a problem, the definition of insanity will not directly offer a solution to the problem. With that in mind, I decided to eliminate that criteria. The strongest goal in this section is the moral criteria. And the reason I feel it is the strongest is that at the defining part of the trial proceeding, the most important issue is determining a man's sanity or insanity, whether he is responsible or irresponsible for his actions. The other tangible aspects, including punishment, is not relevant at this time. We

must be able to determine which alternative will best accurately ascertain a sane defendant from an insane defendant. If this fails, the whole process fails.

Another important aspect of these alternatives is predictability. Again, like the moral criteria, this lies at the very core of the problem and is an important criteria to accurately judge the best alternative. This goal is important because to understand a rule is imperative to be able to use it correctly and fairly. Usually it would be important for the two symbols to have equal weights as to not totally alienate the other branch. But in this particular file I must differ with the standard approach. The reason is simple. While there is an indirect relationship with the defining law and the conservative symbol of retribution and punishment, it is not a very strong factor at this time. Regardless of the alternatives, the punishment can be severe or weak and therefore it is really not necessary to worry about punishment at this time. On the other hand, the liberal symbol of responsibility is much more important at this juncture. For the primary reason that this plea is used to make sure that people not responsible for their actions not be punished.

The final two criteria, I feel are not overly important. Political feasibility has never struck me as a very important goal. Obviously, if something is blatantly unconstitutional or impossible to pass into law, then this criteria becomes imperative to look at. But the four alternatives have all been established into law and have been upheld on constitutional grounds. It is true that some alternatives are constitutionally stronger than the next, but I still fail to believe that this is a very important issue concerning these alternatives. The public perception goal I usually

feel is a very important criteria. But in this particular circumstance, I do not feel it is a very important aspect. As I have mentioned before, the public has many misperceptions about the plea. Most of these misperceptions deal with the disposition of the defendant. The definition of insanity is not what concerns the public. Also the differences between the definitions may be too difficult for the layman to understand, or even really care. With these thoughts in mind, I changed the weights of the criteria accordingly:

MORAL=6x	FEAS.P=3x
PREDICT=5x	CONS.=2x
LIBERAL=4x	PUB.P=1x

The revised primary analysis looks quite a bit different than the first scoring chart:

ALI 59
M'NAGHTEN 54
DURHAM 54
ABOLITION 43

As can be seen by comparing the two scores, ALI comes out the winner with the weighted scores and the Durham test moves up to tie M'Naghten. Abolishing the plea has now come in third in the first primary analysis and last on the second analysis, and therefore, does not seem to be the appropriate answer. It is apparent that M'Naghten and ALI are the two strongest alternatives and thereby warrant further discussion.

The next step is to see what it would take for M'Naghten to become the highest rated alternative under the weighted criteria. For that we look at the threshold analysis of the two alternatives.

CRITERIA :	<u>M'NAGHTEN</u>	<u>ALI</u>	<u>WEIGHT</u>
MORAL	2.83	2.17	1.0
PUB.P	9.0	-2.0	6.0
LIBERAL	3.25	1.75	-1.0
CONS.	5.50	-.5	7.0
FEAS.P	4.67	2.33	-2.0
PREDICT	4.00	1.0	10.0

Analyzing the threshold analysis, the first thing I notice is the weight category. Since I assigned weight from scores of 1-6 , any number out of that range would not be feasible to change. For instance, giving the predict criteria a weight of 10 or the conservative symbol a weight of 7 is definitely assigning too strong a weight for that criteria or any criteria for that matter. The only two goals that fall into the 1-6 scale are the moral criterion and the public perception criterion. It is interesting to note that both the moral and the public perception criteria fall on my extremes for the weight category, with moral having a weight of six and public perception having a weight of one. For M'Naghten to pull ahead, the extremes must be totally reversed. A change of weight of one or two may be appropriate, but to reverse the weights in

not feasible.

The scoring section of the threshold analysis offers more hope for the M'Naghten alternative. Like the weight section, I specifically scored the criteria on a particular scale, 1-4. Therefore anything out of that range would not be practical to look at. Public perception and the conservative symbol are the only two criteria that do not need to be dealt with under the threshold analysis. If one looks closely at the scores, it can be seen that the liberal criteria and the political feasibility criteria both need changes of two points to have M'Naghten come out ahead. For example, the liberal score for M'Naghten was a 2, and through the threshold analysis, a score of 3.25 is needed, a change of 1.25. The ALI score was a 3, and according to the threshold analysis, it must also change by a score of 1.25. In the political feasibility category the score must change by 1.5 to have a new winner. These changes, I feel, are a little too severe to warrant serious thought. However the moral and predictability categories are a different story. In the moral category, the change of scores is less than a point to make M'Naghten a winner, either M'Naghten going from 2-2.83 or ALI shifting from a 3 to a 2.17. Looking back at the moral criteria, however, I do not feel that a change is warranted. It is clear that ALI is a broader standard, and by that it can be easily inferred that more people will be found insane. Does this mean there is a better chance of separating innocent people from guilty people? No! But we can never know, and at least ALI will give more people the opportunity to prove their innocence than the M'Naghten standard would. The criteria labeled predictability would change the winner if M'Naghten moved from a

3 to a 4. Looking back at the scoring, we can see that the abolition alternative scored a 4, so is it feasible to change these scores? There are experts who feel that abolishing the plea will cause more problems than it is worth. As I have previously mentioned, the mens rea principle is difficult to comprehend. Also, expert testimony will still be used, and instead of trying to figure out if the defendant knew his act was right or wrong, the jury would instead have to figure out the state of mind of the individual. Both of these options can be very confusing.

In conclusion, I will stick to the primary analysis that says ALI is the best option. However, as can be seen in the threshold analysis, especially with regards to the predictability criteria, the spot at the front is not very secure to say the least. While ALI is the strongest, a state would not go terribly wrong by using the M'Naghten alternative.

The next file deals with the question of disposition. Basically meaning, what we should do with someone when he is found insane or mentally ill. This, in my view, lies at the very heart of the insanity issue. I do not believe there would be such a furor if an insane defendant was dealt with in a manner concurrent to a criminal. What I mean by this is that most people view the insanity defense as a plea that exonerates a criminal of his crimes and sets him free. Or if they are put into a hospital they are inevitably let out much quicker than a person who was found guilty of a crime. It is interesting to note that there are criminals out on parole committing recurrent crimes, yet there is not a major call for the abolishment

of the parole system. Yet when a person is released from a hospital and recommitts a crime, it becomes just another illustration about the faultiness of the criminal system.

Since this file deals with the question and problems of incarceration, it will also cut across the very theories regarding imprisonment and punishment. The questions are endless. Is it more important to rehabilitate than punish, or is rehabilitation just some idealistic rationalization for putting another human being behind bars? Does severely punishing people actually deter other people from committing crimes or even educate the public as to the probable results of committing a particular crime? Finally, how do we deal with the victims or the victim's families, are revenge and retribution feelings that are inhumane, or should they be given stronger considerations? These questions theorists have analyzed and argued for years. There is really no just solution for everyone. There are no significant empirical answers. Obviously, my opinions and feelings on the subject of punishment will strongly influence my grading of the weights and scores for this particular criteria. I will attempt to be as objective as possible. For if there is to be a solution to the problem of punishment and disposition of insanity acquittees, it must fall at a compromise between the polar views of rehabilitation and retribution. For to properly rehabilitate, the hope of freedom is necessary to achieve full rehabilitation. Freedom, therefore, becomes the ultimate goal. Also, a law should be made in regard to the present and the future and enforced accordingly. To decide that today we live in a, more or less, conservative country, and consequently should

focus incarceration on longer revenge oriented terms, is not going to work, when the country, undoubtedly, will shift to a liberal framework. Then the question that will be asked is why are we not concerned with rehabilitation.

The three alternatives I will use in this file are called guilty but mentally ill, voluntary commitment, and involuntary commitment. I have discussed how the guilty but mentally ill concept is used in the state of Illinois; but this alternative is a slight deviation of the one previously discussed. The basic principle is the same. That being, a person cannot leave a hospital, even if cured, until his sentence runs out or would subsequently be placed on parole. The difference is that this principle would apply to people acquitted by the insanity defense, not just people found mentally ill. Whereas, before this process would not be used if you were found legally insane, under this alternative it would apply. To sum this up, if you were found not guilty by reason of insanity, you would be put in a hospital (if the court feels it is necessary) and would not be able to leave the hospital until the sentence for the crime runs out. This would force the judge or jury to give a sentence, and for all practical purposes, even though the defendant was found insane, he would actually be treated as guilty. Thus, the only significant difference between being found guilty by reason of insanity, and by being found guilty in a normal proceeding is that the jury recommends to the judge hospitalization of the defendant. Also in this approach, the jurors or judge before sentencing would regard insanity as a mitigating circumstance in determining the length of the sentence. I should note that the state must keep the defendant in the hospital at least the length of the term. But it is not

to say that if a term runs out and the defendant is still found to be insane, he has to be released. As the Supreme Court ruled in U.S Vs. Jones--a defendant can be kept in a hospital longer than a comparable prison term.⁶³ The second alternative is what I term voluntary commitment. By this I mean, the minute a defendant is labeled not guilty by insanity, it becomes a separate civil commitment proceeding. And then the defendant can only be committed if the state proved, through a preponderance of the evidence, that the defendant is presently dangerous. So this states that the state in a civil proceeding has to initiate civil proceedings against the acquittee, the person found not guilty by reason of insanity is for all intensive purposes a free man.

The third alternative I coin involuntary commitment. This means that the defendant after being found not guilty is automatically put in an institution for up to sixty days for psychological evaluation. Then a hearing is held in a criminal court to determine whether involuntary civil commitment would be appropriate. If the evaluation results indicate that the acquittee is not a fit subject for commitment, he or she is released. On the other hand, if the acquittee is found to be dangerous, then the court can order detainment. The three alternatives differ in a number of aspects that should be reviewed. First of all, voluntary commitment takes the matter of disposition completely out of the courts hand and into the state's civil process, while involuntary and guilty but mentally ill leave the criminal courts as the sole judge of the disposition of the defendant. Also voluntary commitment does not force a psychological evaluation. Finally the guilty but mentally ill alternative will keep

someone in the hospital or jail even if they have been proved sane and not dangerous.

The seven criteria or goals for this file are, more or less, straight forward. The first four criteria deal with theories of punishment: deterring crime, rehabilitating the offender, revenge for the victims, and finally protecting society. The fifth criteria is again the public's perception. Again there is a criterion labeled moral, however this differs from the previous criteria in that this reasons that it is wrong to punish someone who is found innocent and thereby commit him against his will, when he is technically a free man. The last criteria is political feasibility. This again means the difficulties that may be encountered with regard to constitutional objections to the three alternatives.

Since there are only three alternatives, I will score the criteria on a 1-3 scale with three being the highest or most appropriate alternative for the particular criteria. The first criteria deals with the question of deterrence. And while deterrence has been discussed endlessly, as to what extent punishment curtails crime, I will assume at this point that there is some effect. Clearly, of the three alternatives, guilty but mentally ill has the potential for the severest sentence and punishment, making it the strongest alternative for deterring crime. Involuntary commitment would thereby be a stronger option for deterring crime than its less restrictive counterpart.

The second criteria is the process of rehabilitating the offender, and in this particular paper, rehabilitation means curing the offender of any psychological

problem. This criteria has become difficult to score. While the guilty but mentally ill provision will force a defendant to stay in a hospital or jail, this does not mean it is the most conducive alternative for rehabilitation. I am of the view that forcing treatment on a patient may have the reverse effect as the patient will begin to regress because of his punishment. However, the voluntary commitment alternative may let some mentally ill people slip through the system and go without treatment. Subsequently, the best alternative is the involuntary commitment option. Basically because this option forces psychological evaluation, but not automatic detainment and treatment.

Retribution or revenge is the third criteria and seemingly voluntary commitment does the least of the three alternatives to punish the offender. For many offenders there will not be any incarceration in a hospital or prison. Involuntary commitment, although stronger than voluntary, also leaves a lot to be desired as a credible plan for retribution. Involuntary commitment does not force incarceration, but simply puts the wheels in motion. There is a better chance for an individual to be locked up in a hospital, but it is still not certain. The final alternative is definitely the best in that it forces incarceration up to the sentence given by the jury. Protecting society is the next goal, and again the scoring runs along the same line as the retribution criteria. It seems perfectly reasonable to infer that the longer a defendant is incarcerated the greater the protection for society. To take this at an extreme, it seems perfectly reasonable to say that it is better to take a chance of incarcerating an innocent person than letting a dangerous person go free

in this particular instance.

The next criteria deals with the public's perception of the alternatives. As I mentioned before, disposition is the most important aspect of the insanity plea. If the public is not concerned with their welfare or safety then the insanity plea will not be a public problem. This is not to say that it still will not be a legal or moral problem, but it will not be in the public's eye, as it is now. As I have previously discussed, the guilty but mentally ill plea would usually incarcerate a defendant for the greatest length of time (voluntary and involuntary are indefinite). And I believe, at this time, in this conservative era, the public is willing to take insane people, lock them up, and throw away the key. Voluntary commitment is looked at as to lax a solution, and is quickly disregarded by the majority of the public. What makes this criteria so difficult to assess is that the public's perception of an issue is constantly fluctuating. In the sixties and seventies, before the Hinckley debacle, voluntary commitment was looked at as a solid approach to the problem.⁶⁴ If the public starts to attach more weight to liberal symbols, voluntary may become the best alternative, but at this time people are looking for something more severe.

The next criteria deals with the moral question of incarceration. We must remember that the people being committed have been found innocent of all charges. The guilty but mentally ill alternative leaves a lot to be desired for this particular goal. For one, to take a person who has been found innocent of all charges and then remand the individual to a hospital or prison without a hearing, has its problems. But the biggest moral problem with this alternative is how guilty but mentally ill

deals with the circumstances of a person being cured. If a defendant is cured, and yet has three years left on his sentence, he will be transferred to prison to wait out the remaining years of his sentence. If that is the case, why try to cure the individual at all? How will going to prison effect the well-being of the patient? Involuntary commitment has the same problem as the guilty but mentally ill alternative, and that being taking an innocent individual and forcing him into the custody of the authorities. The difference being a hospital and not a prison. Of the three options voluntary commitment is the strongest morally. The individual is treated as an innocent person and is only held in custody, if through civil proceedings, the state can prove his dangerousness.

The final criteria is the political feasibility of the alternatives, or how well they stand up to constitutional objections. At this time nineteen states use a voluntary commitment type of alternative and twelve states use an involuntary alternative. The other nineteen states use a wide variety of dispositional methods. However classifying the states is a bit of an overgeneralization, since each state has different variations, these include: different lengths of initial commitment, different provisions for conditional release, different allocations of responsibility for release decisions etc.⁶⁵ But the bottom line is that these two alternatives are being practiced in one form or another in the majority of states. The Jones Vs. U.S. case seems to signal a trend toward the restrictive end or toward an involuntary alternative.⁶⁶ Also by keeping the decision of disposition at the criminal level, the involuntary alternative has bypassed numerous constitutional objections dealing with unfair

civil commitment processes, as spelled out in the case of *Addington Vs.*

Texas(1979).⁶⁷ The guilty but mentally ill alternative is a different question. Since there is no such form on the books, there has not been any constitutional test. The best that can be done is to infer from cases dealing with the actual guilty but mentally ill provision. At this time the guilty but mentally ill provision has been attacked on equal protection and due process grounds, most notably in Illinois and Michigan. *People Vs. Mcleod*(1980) was a Michigan case that upheld the constitutionality of the guilty but mentally ill plea on both equal protection and due process grounds.⁶⁸ In Illinois, *People Vs. Kaeding*(1983) and *People Vs. Dewitt*(1984) upheld the provision on the same questions.⁶⁹ The question that has not been answered by the courts is whether the provision will be upheld under a fundamental fairness principle. The rationale being that there is confusion for the jurors in deciding between the not guilty by reason of insanity plea and the guilty but mentally ill plea.⁷⁰ These cases seem to imply that the guilty but mentally ill alternative that I have forwarded would have significant problems in dealing with constitutional questions and, even more importantly, having difficulty in getting the disposition system completely overhauled.

	<u>DETER</u>	<u>REHAB</u>	<u>RETRIB</u>	<u>PUB.S</u>	<u>PUB.P</u>	<u>MORAL.F</u>	<u>EAS.G</u>
GMI	3	2	3	3	3	1	1
INVOL	2	3	2	2	2	2	3

VOL	1	1	1	1	1	3	2
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PRIMARY ANALYSIS

GMI	16
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INVOL	16
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VOL	10
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As before, I feel that giving each criteria the same weight does not really tell the whole story. Since there are seven criteria, the weights are scored on a 1-7 scale. Whereas before, in the definition file, the emphasis was on responsibility and innocence, I feel the emphasis on the disposition file should be punishment. In my mind, even though an individual has been found innocent, a crime has been committed. Because of this, I feel protecting society is imperative in dealing with someone who has already committed a crime. If there is not any recurrent crimes, then there most likely will not be a problem with the plea itself. Along those same lines, retribution is another very important criteria. Although the defendants did not "know" what they were doing, I feel some punishment must still be involved. Victims are too easily forgotten, and often a revenge or retribution factor is needed to ease the psychological pain for the victim or for the victim's family. It just does not seem right for a person to commit a crime and then not pay.

On the other end of the spectrum is the moral dilemma posed by the insanity plea. Can we morally take someone who is not responsible for their actions and subsequently punish the acquittee. I feel it must be done. While it might not be

morally acceptable, it is a realistic necessity to keep people from using the plea for their own immoral ends. Also, it is needed to keep the public safe from lunatics who keep getting thrown back into society. Therefore, I will score the retribution goal higher than the moral goal.

The question of whether punishing an insane person deters others from committing a crime is difficult to answer. As in capital punishment, people argue endlessly on the effects of punishment. On the one end are the opponents of deterrence, who feel that if a person is truly insane then someone else being punished is of no way going to effect or deter the future act. People who plead insanity are delusional, not people who are going to look at a cost-benefit ratio. On the other side are the proponents of deterrence, who claim that we are not just a product of our hereditary, but more importantly our environment. And if we can teach people that there are no excuses when it comes to crimes, and punishment is inevitable, then it may be able to deter. Regardless of which, deterrence is an issue that can not be answered, and consequently, I will attach to it an average weight.

In the definition file, I felt that the public perception criteria was not an important criteria, in this circumstance I feel it has a bit more relevance. The alternative that is chosen has a direct bearing on the public at-large. The plea, itself, is in danger every time some murderer is found innocent by reason of insanity and subsequently is let out from a state hospital a few months later. If he kills, there becomes a public backlash(Hinckley) and the call for abolishing the plea rings through the air. Again, the political feasibility criteria is not terribly important.

None of the alternatives have been shown to be unconstitutional, and even if it were true that an alternative was to be found unconstitutional on some ground, it does not seem to difficult to revise the law. That, of course, does not mean amend the constitution, but instead tinker with the alternative.

I wrestled with the last criteria of rehabilitation. At first, I felt it was a very important goal because, perhaps, the most important goal in our penal system is to attempt to rehabilitate offenders. But when looking at the alternatives a little closer, it seemed to me that each alternative had basically the same ideals for rehabilitation. Each of the alternatives had a patient staying in the hospital until they were sufficiently cured. The difference in the alternatives is how the patients get to the hospital and where they are transferred after they have been cured. With that in mind, while rehabilitation is very important, the criteria is not. Thus, I changed the weights to:

PUB. SAF=7

PUB.PER=3

RETRIB.=6

POL.FEAS=2

MORAL=5

REHAB.=1

DETER.=4

With the new weights, the primary analysis looks like this:

GMI 69

INVOL 59

VOL 40

So at this point the guilty but mentally ill alternative is the strongest. A look

at the threshold analysis will tell why it is the strongest and if it is feasible for the voluntary or involuntary alternative to move ahead. The voluntary threshold analysis looks like this:

	GMI	VOLUNTARY	WEIGHT
DETER.	-3.75	7.75	-9.5
REHAB.	-25.0	28.0	-26.0
RETRIB.	-1.5	5.5	-7.5
PUB.SAF.	-.86	4.86	-6.5
PUB.PER.	-6.0	10.0	-10.5
MORAL	-4.4	8.4	18.5
POL.FEAS.	-12.5	16.5	15.5

As with the previous file, the first thing to look at are the weights. In this file the weights run from a 1-7 scale, and therefore any weight outside of that range does not make any sense to radically change. Also the scoring was on a 1-3 scale, so any scores out of that range are also not feasible to look at carefully. Looking at the analysis, there is not one category that falls in either range; basically stating that the voluntary alternative would have to undergo radical scoring changes to defeat the guilty but mentally ill alternative.

The other analysis is between the guilty but mentally ill provision and the involuntary alternative.

	<u>GMI</u>	<u>INVOLUNTARY</u>	<u>WEIGHT</u>
DETER.	0	5.0	-8.0

REHAB.	-10.0	15.0	13.0
RETRIB.	1.0	4.0	-6.0
PUB.SAF.	1.29	3.71	-5.0
PUB.PER	-1.0	6.0	-9.0
MORAL	-1.4	4.4	17
POL.FEAS.	-5.0	8.0	14

This analysis, while closer than the previous analysis, still shows that the guilty but mentally ill provision is far and wide the strongest. The two categories that do have numbers falling in the proper range are retribution and public safety. The guilty but mentally ill alternative scored a three on both of those categories; and for the involuntary alternative to become a winner, the score for guilty but mentally ill has to be one. The strongest feature of the guilty but mentally ill alternative, however, is that it will not release an offender until his sentence has ended. There can be no chance of an individual leaving a hospital early. And although it can be argued that the involuntary and voluntary alternative commitments are indefinite, there still is the problem of getting and keeping patients in the hospital for those two alternatives. Also, to say that the guilty but mentally ill alternative would be the worst solution for these goals, is ridiculous to assume.

Looking back at this file, it becomes apparent that the emphasis was on punishment. However, if a criteria was added that took into account stability for a law, the winner would not be so clear cut. As I mentioned, I fall into the period of conservative feelings toward criminals. This can be seen in my weighting of the public safety and

retribution goals. Yet an alternative is needed that would be accepted during the liberal years when individual's rights and rehabilitation are looked at with stronger regard. If this stability criteria was added, the involuntary alternative would become much stronger and challenge the guilty but mentally ill alternative. A compromise seems to be necessary, and for that I will turn my attention to the burden of proof controversy.

Jurors on the Hinckley trial felt that it was virtually impossible for the state to reach the burden of proof in regard to sanity. They felt, and wanted, the burden to be placed on the defense for justice to be properly served.⁷¹ With that in mind, I first felt another file would be necessary to determine the choices of whether prosecution or defense should be entrusted with the burden of a reasonable doubt at the trial stage, and a preponderance of the evidence at the dispositional and release stage. But the solution seems to center on a clear-cut choice. Is it more important to be "fair" to the defendant or to the public? In almost every instance, I will argue vehemently that a man is innocent until proven guilty, and it is always the state that has the burden of proving guilt. But in this instance, the defendant is the one who usually initiates the plea. In *Walton Vs. Malcom*, the court held that the law presumes a defendant to be sane.⁷² It is almost as if the supposed criminal is trying to bypass the normal proceedings and use another route. Hence, if a defendant wants to get out of the normal criminal proceeding, I feel he should bear the risk and the burden of proving his insanity. In the commitment and the release stage, a preponderance of the evidence is necessary, and again I feel that since it was the defendant's choice to

take the insanity route, he should have the burden squarely on his shoulders. Simply, the state is letting someone who has committed a crime forego jail or punitive punishment for a strictly rehabilitating one(excluding GMI). The defendant, not the state, has asked to be placed in the hospital ; and it would seem that the patient should have to prove to the state that he is not dangerous before he can be let out. In short, the state always has the burden of proof because of the innocent until proven guilty doctrine. But in the case of the insanity plea, this doctrine has been reversed. The defendant admits guilt, and thus it becomes his duty to prove his innocence or non-dangerousness.

In conclusion, changing existing laws is a sometime difficult and perplexing task. But the insanity plea is a doctrine that needs tinkering with, as the dicta in Powell Vs. Texas states, "we characterize the (insanity) defense as one of those doctrines which have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral,philosophical , and medical views of the nature of man-a process always thought to be a province of the state."⁷³ We have seen through the policy evaluation program that some tinkering is necessary to update the insanity plea with our conservative oriented society. There are many different viewpoints on the matter of the insanity plea and even though my alternatives in the files did not come close to covering every option, Ifelt it did give a rough estimate as to the different approaches that are involved. The results of the program indicates to me that the ALI standard is sufficient to define insanity. But I feel we must place the

burden of proof on the defendant who is claiming insanity, instead of the state. If the defendant is found insane, he should serve a mandatory 30 day sentence for the purpose of psychological evaluation. These results will then be used in a criminal proceeding to determine the state of health of the individual. Again the burden is on the defendant to show through a preponderance of the evidence that he is not dangerous to the public. If he is found dangerous, the individual will undergo psychological treatment until he can show in a criminal hearing that he is not a threat to society; again placing the burden on the defendant. This rough plan is, for the most part, being used in a minority of the states today. While the different specifics of the process should be left up to each state, the basic option that I have forwarded keeps the insanity plea as a viable option. But more importantly this option is better able to protect society, literally the best of both worlds.

- ¹Winslade, William, The Insanity Plea (New York: Charles Scribner, 1983), p.11.
- ²Hermann, Donald, The Insanity Defense (Springfield: Charles Thomas, 1983) p.5.
- ³Morris, Norval, Madness and the Criminal Law (Chicago: University of Chicago Press, 1982) p.22
- ⁴Keilitz, Ingo, The Insanity Defense and its Alternatives (U.S.: Library of Congress, 1984) p.14.
- ⁵Black, Henry, Black's Law Dictionary (St. Paul: West Publishing, 1979) p.889.
- ⁶Keilitz, p.16.
- ⁷Goldstein, Abraham, The Insanity Defense (New Haven: Yale University Press, 1967) p.63.
- ⁸Keilitz, p.16.
- ⁹Ibid., p.15
- ¹⁰Ibid., p.7.
- ¹¹Ibid.
- ¹²"Criminal Law 2nd Ed., p.343.
- ¹³Ibid., p.345.
- ¹⁴Ibid.
- ¹⁵Keilitz, p.7.
- ¹⁶"Criminal Law 2nd Ed., p.345.
- ¹⁷Keilitz, p.15
- ¹⁸Ibid., p.16.
- ¹⁹Ibid., p.17.
- ²⁰Ibid., p.25.
- ²¹Winslade, p.21.
- ²²Szasz, Thomas, "American Psychologist" (Vol. 15, 1960) p.115.
- ²³Keilitz, p.19.
- ²⁴Ibid., p.23.
- ²⁵Ibid.
- ²⁶Ibid.
- ²⁷Davison, Gerald, Abnormal Psychology 4ed. (New York: John Wiley and Sons, 1986) p.566.
- ²⁸Pasework, Richard, "Journal of Psychiatry and the Law" (Winter, 1981) p.847.
- ²⁹Ibid.
- ³⁰Ibid., p.848.
- ³¹Ibid.
- ³²Winslade, p.20.
- ³³Davison, p.568.
- ³⁴Criminal Law 2nd ed., p.350.
- ³⁵Ibid.
- ³⁶Cavanaugh, James, "George Washington Law" (March-May 1985) p.495.

- 37 American Criminal Law Review, pp. 84-85.
- 38 Frey, Roger, "Yale Law Journal" (Vol. 92 #3 January, 1985) p.542.
- 39 Keilitz, p.22.
- 40 Frey, p.542.
- 41 Ibid.
- 42 McGraw, Bradley, "Villanova Law Review" (Vol. 2, 1985) p.56.
- 43 Ibid., p.58.
- 44 Ibid.
- 45 Ibid., p.59.
- 46 Nagel, Stuart, "Policy Goal Percentaging Program" University of Illinois.
- 47 American Criminal Law Review, p.85.
- 48 Cavanaugh, P.495.
- 49 Szasz, p.115.
- 50 Morris, p.48.
- 51 Winslade, p.20.
- 52 Morris, p.49.
- 53 Black, p.904.
- 54 Keilitz, p.33.
- 55 Morris, p.56.
- 56 Ibid.
- 57 Ibid., p.58.
- 58 Keilitz, p.13.
- 59 Ibid., p.7.
- 60 Cavanaugh, p.495.
- 61 Morris p.57.
- 62 Keilitz, p.34.
- 63 Davison, p.567.
- 64 Keilitz, p.34.
- 65 Hermann, p.4.
- 66 Keilitz, p.23.
- 67 Ibid.
- 68 McGraw, p.61.
- 69 Ibid.
- 70 Ibid., p.62
- 71 Criminal Law Review, p.371.
- 72 Keilitz, p.27.
- 73 Hermann, p.86

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