ALASKA'S INSANITY DEFENSE AND THE "GUILTY BUT MENTALLY ILL" VERDICT

I. INTRODUCTION

In 1982, a jury found John Hinckley not guilty by reason of insanity ("NGRI") of attempting to assassinate President Ronald Reagan.[1] This verdict prompted nationwide attempts to limit insanity acquittals. In response to the nationwide trend and to a set of brutal murders committed by an insanity acquittee on leave from a state mental institution,[2] the Alaska legislature rewrote the state's insanity laws and adopted one of the strictest tests in the United States for establishing the defense of insanity.[3]

The test adopted by the Alaska legislature for the insanity defense drastically narrowed the definition of legal insanity,[4] shifted the burden onto the defendant to prove by a preponderance of the evidence that he was insane at the time of the crime,[5] and added an alternative

---

1. United States v. Hinckley, Crim. No. 81-306 (D.D.C. June 21, 1982). In *Hinckley,* the District Court for the District of Columbia applied the Model Penal Code's test of legal insanity, set out *infra* at note 4. *Hinckley,* Crim. No. 81-306. The court adopted that test in *United States v. Brawner,* 471 F.2d 969 (D.C. Cir. 1972). After Hinckley's acquittal, commentators criticized the federal test, contending that its application makes it too easy for a defendant to prove insanity. *See* P. LOW, J. JEFFRIES & R. BONNIE, THE TRIAL OF JOHN W. HINCKLEY, JR.: A CASE STUDY IN THE INSANITY DEFENSE 18-20, 118-22, 126-30 (1986).

2. *See* Strout, *The Alaska Insanity Defense — How Crazy Can You Get?,* ALASKA BAR RAG, Mar. 1986, at 14 n.1. The murderer, who had previously been found not guilty by reason of insanity ("NGRI"), was on temporary release from the Alaska Psychiatric Institute when he killed four teenagers.

3. *See* ALASKA STAT. § 12.47.010-.130 (1984 & Supp. 1986).

4. ALASKA STAT. § 12.47.010 (1984) (providing that a defendant is legally insane if at the time of the crime he "was unable, as a result of mental disease or defect, to appreciate the nature and quality of [his] conduct"). The old law in Alaska was equivalent to the Model Penal Code "substantial capacity" test. Under this test, a defendant was legally insane if "as a result of mental disease or defect, he lack[ed] substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." ALASKA STAT. § 12.45.083(a) (1980) (repealed 1982).

5. Insanity is an "affirmative defense." ALASKA STAT. § 12.47.010(a) (1984). According to ALASKA STAT. § 12.47.130(1) (1984), "affirmative defense" in title 12 has the meaning ascribed to it in ALASKA STAT. § 11.81.900(b)(1) (1983), which provides that:

> (A) some evidence must be admitted which places in issue the defense; and
> (B) the defendant has the burden of establishing the defense by a preponderance of the evidence.

verdict of "guilty but mentally ill" ("GBMI").[6] In contrast to a verdict of NGRI, by which the defendant is acquitted, a verdict of GBMI essentially is a guilty verdict. The GBMI verdict subjects the defendant to the same jail sentence as one found guilty of the offense. The only difference between the two verdicts is that the state must provide the GBMI defendant with psychiatric treatment.

The GBMI verdict originated in Michigan in 1975[7] as a legislative response to several highly publicized crimes committed by insanity acquittees[8] who had been released from state mental hospitals.[9] Eleven other states now use the GBMI verdict.[10] Although the GBMI verdict is controversial,[11] no state has found it unconstitutional and only one state has repealed the verdict.[12]

Critics of Alaska's present insanity laws believe that the legislature overreacted to public misconceptions about abuse of the insanity

---

ALASKA STAT. § 11.81.900(b)(1) (1983).

Under the old law, insanity was also called an "affirmative defense." ALASKA STAT. § 12.45.083(b) (1980) (repealed 1982). According to the Alaska Supreme Court, however, that provision required only that the defendant introduce *some evidence* of his mental state. Upon such a showing, the prosecution had the burden of proving, beyond a reasonable doubt, that the defendant was sane at the time of the crime. Alto v. State, 565 P.2d 492, 496 (Alaska 1977).

6. ALASKA STAT. § 12.47.030 (1984). There was no equivalent to this "guilty but mentally ill" ("GBMI") provision under the old law.

7. MICH. COMP. LAWS ANN. § 768.36 (West 1982).

8. *See* Brown & Wittner, *Criminal Law,* 25 WAYNE L. REV. 335, 356-57 (1979); Comment, *Guilty But Mentally Ill: An Historical and Constitutional Analysis,* 53 J. URB. L. 471, 472 (1976).

9. Until 1975, Michigan followed a policy of automatically committing insanity acquittees without allowing them a hearing to determine their sanity at the time of commitment. In People v. McQuillan, 392 Mich. 511, 221 N.W.2d 569 (1974), the Michigan Supreme Court held this procedure unconstitutional. According to the court, the due process and equal protection clauses of the fourteenth amendment required a hearing to determine the present sanity of a person acquitted under the Michigan scheme before he could be indefinitely committed to a mental hospital under the state's automatic commitment statute.

10. P. LOW, J. JEFFRIES & R. BONNIE, *supra* note 1, at 130. Illinois and Indiana already had GBMI laws at the time of the Hinckley trial. ILL. ANN. STAT. ch. 38, para. 115-2(b) (Smith-Hurd Supp. 1986); IND. CODE ANN. § 35-36-2-3 (Burns 1985). In 1982, GBMI statutes were adopted by Alaska, Delaware, Georgia, Kentucky, and New Mexico. ALASKA STAT. § 12.47.030 (1984); DEL. CODE ANN. tit. 11, § 408 (Supp. 1986); GA. CODE ANN. § 17-7-131 (Supp. 1986); KY. REV. STAT. ANN. § 504.120 (Baldwin 1986); N.M. STAT. ANN. § 31-9-3 (1984). Since then, Pennsylvania, South Carolina, South Dakota, and Utah have adopted GBMI provisions. 18 PA. CONS. STAT. § 314 (Purdon 1983); S.C. CODE ANN. § 17-24-20 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 23A-7-2 (Supp. 1986); UTAH CODE ANN. § 77-13-1 (Supp. 1986).

11. *See infra* text accompanying notes 81-85.

12. Connecticut adopted and repealed the law in 1983. CONN. GEN. STAT. ANN. § 53-a-13 (West Supp. 1983) (repealed 1983).

defense and that the new standard, especially the GBMI alternative, is confusing, unfair, and possibly unconstitutional.[13] Several arguments are made challenging the constitutionality of Alaska's insanity laws. The first of these arguments is that the present narrow definition of legal insanity unconstitutionally deprives defendants of the insanity defense.[14] Additionally, opponents charge that the GBMI verdict denies due process, violates equal protection, and constitutes cruel and unusual punishment.[15] No Alaska court has directly addressed these arguments, although GBMI defendants have challenged the laws twice in the Alaska Court of Appeals.[16] The Alaska Supreme Court has yet to interpret the revised insanity laws.

This note analyzes criticisms of Alaska's insanity laws and concludes that the laws are constitutional and fair to defendants. In addition, this note suggests ways to administer the GBMI verdict more efficiently and thereby to quiet some of the criticism. While admitting that the parameters of the GBMI verdict are undefined, this note asserts that the present insanity laws provide an adequate and legitimate way to narrow the class of defendants acquitted by reason of insanity and to assure that mentally ill prisoners receive treatment.

II. THE PRESENT LAW

A. The Insanity Defense

Alaska's present insanity laws provide two possible routes to a NGRI verdict. First, the defendant cannot be held responsible for acts committed while legally insane. If the trier of fact finds that, at the time of the crime, the defendant fell within the definition of legal insanity, it must enter a verdict of NGRI.[17] Second, a defendant must be found NGRI if, after he presents sufficient evidence of diminished mental capacity, the state cannot prove beyond a reasonable doubt

13. *See* Strout, *supra* note 2, at 14.

14. *See* Note, *Guilty But Mentally Ill: Broadening the Scope of Criminal Responsibility,* 44 OHIO ST. L.J. 797, 811 (1982).

15. Strout charges that Alaska's GBMI verdict "violates basic precepts of constitutional law." Strout, *supra* note 2, at 14. Other commentators who have attacked the constitutionality of the GBMI verdict have based their arguments on alleged violations of the due process and equal protection clauses of the fourteenth amendment and the cruel and unusual punishment prohibition of the eighth amendment. *See, e.g.,* Note, *supra* note 14, at 811-14; Note, *Criminal Responsibility: Changes in the Insanity Defense and the "Guilty But Mentally Ill" Response,* 21 WASHBURN L.J. 515, 546-50 (1982).

16. Patterson v. State, 708 P.2d 712 (Alaska Ct. App. 1985) (reversing conviction because of confusing jury instructions, thereby avoiding the constitutional issues), *appeal docketed,* No. S-1316 (Alaska Mar. 5, 1986); Hart v. State, 702 P.2d 651 (Alaska Ct. App. 1985) (finding that defendant did not have standing to argue that the statute violated his constitutional rights).

17. ALASKA STAT. § 12.47.010 (1984).

that the defendant possessed the requisite intent for the crime charged or for a lesser included offense.[18]

1. *Legal Insanity.* A court must acquit a defendant who at the time of the crime "was unable, as a result of mental disease or defect, to appreciate the nature and quality of [his criminal] conduct."[19] "Conduct" includes "an act or omission and its accompanying mental state."[20] Although the Alaska Supreme Court has yet to construe Alaska's latest definition of legal insanity, the court of appeals has analyzed the statute's construction on two occassions. In *Hart v. State,*[21] the defendant was convicted of first degree assault and found GBMI pursuant to an agreement with the state.[22] On appeal, Hart challenged the constitutionality of the insanity defense.[23] Although neither party expressly requested a construction of the insanity definition, the Alaska Court of Appeals implied that a "truly broad reading" of the revised statute would be proper.[24]

In *Patterson v. State,*[25] which is presently on appeal to the Alaska Supreme Court, a defendant once again challenged the revised insanity laws as unconstitutional.[26] The Alaska Court of Appeals, following the language in *Hart,* broadly interpreted the phrase "to know the nature and quality" of one's conduct. The court stated that the phrase did not refer to knowing only the physical aspects of an act, for example, knowing that one is firing a gun, but rather referred to knowing all aspects of an act, including the likely consequences to the actor and others.[27]

For evidence of legislative intent, the court of appeals decided not to use the legislative committee reports.[28] Instead, the court accepted the broad interpretation given to the similar language of the prior definition of insanity by the Alaska Supreme Court in *Chase v. State.*[29] In

18. *Id.* § 12.47.020.

19. *Id.* § 12.47.010.

20. ALASKA STAT. § 11.81.900(b)(5) (1983). The insanity provisions in title 12 do not contain a definition of "conduct." When the Alaska Court of Appeals interpreted Alaska Stat. 12.47.010 (1984), it adopted the definition contained in title 11. *See Hart,* 702 P.2d at 655.

21. 702 P.2d 651.

22. *Id.* at 652.

23. For a discussion of Hart's constitutional arguments, see *infra* notes 169-70 and accompanying text.

24. *Hart,* 702 P.2d at 655.

25. 708 P.2d 712 (Alaska Ct. App. 1985), *appeal docketed,* No. S-1316 (Alaska Mar. 5, 1986).

26. *Id.* at 712.

27. *Id.* 716-17.

28. *See* 1982 ALASKA HOUSE JOURNAL supp. 63, at 5-6 (June 1, 1982).

29. 369 P.2d 997, 999-1002 (Alaska 1962). For a discussion of *Chase,* see Note, *Criminal Insanity,* 8 UCLA-ALASKA L. REV. 152 (1970).

Chase, the Alaska Supreme Court affirmed a trial court instruction that a defendant is insane if he is incapable of "knowing the nature and quality of his act *and* of distinguishing between right and wrong in relation to the act."[30] In construing this definition the supreme court held that knowing the nature and quality of an act meant the "capacity to understand or realize the . . . consequences of conduct, and whether such conduct is wrong."[31] The *Patterson* court reasoned that, when the legislature reenacts statutory language that has already been judicially construed, the legislature is presumed to have been aware of the earlier construction and to have intended to use the language in the same way as the judiciary.[32]

The *Patterson* court interpreted the *Chase* court's definition of the phrase "to know the nature and quality" of one's conduct as meaning the ability to foresee the consequences of one's acts and to evaluate their effects, rather than meaning merely the awareness of physical acts.[33] The court also relied on *Chase* in construing the meaning of that phrase to include the defendant's inability to distinguish between right and wrong conduct.[34] Thus, the court of appeals construed the present statutory definition of insanity as essentially equivalent to the former broad definition established in *Chase.* The state has appealed and has asserted that the court of appeals erred by including the ability to distinguish between right and wrong in the definition notwithstanding the legislature's manifest intent to the contrary.[35]

---

30. *Chase,* 369 P.2d at 1002 (quoting trial court) (emphasis that of supreme court).

31. *Id.* at 1001-1002.

32. *Patterson,* 708 P.2d at 716.

33. *Id.* at 717.

34. *Id.* at 717 n.3. Note that, as interpreted by the court of appeals in *Patterson,* the present test is a modification of the traditional *M'Naughten* test, whereby

> every man is to be presumed to be sane. . . . [T]o establish a defense on the ground of insanity, it must be clearly proved that at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.

M'Naughten's Case, 8 Eng. Rep. 718, 722 (1843). The Alaska insanity defense does not include the "irresistible impulse" test, which has been added by many jurisdictions that use the *M'Naughten* test. Under this addition, a defendant is deemed insane if he is unable to conform his conduct to the requirements of the law. *See, e.g.,* GA. CODE ANN. § 16-3-3 (1984).

35. Brief for Petitioner at 1, State v. Patterson, No. S-1316 (Alaska docketed Mar. 5, 1986). The state relies on the committee report which states:

> this legislation enacts one branch of the *M'Naughten* test of insanity. That portion of the *M'Naughten* test which defines legal insanity as including situations where the defendant did not know the wrongfulness of his conduct is specifically rejected by this legislation and excluded from the revised definition of legal insanity.

Another significant change in Alaska's insanity defense is the requirement that the defendant prove by a preponderance of the evidence that he was insane at the time of the crime.[36] Under the former law, the state had the burden of proving sanity beyond a reasonable doubt.[37] This shift in the burden of proof is constitutionally sound. In *Leland v. Oregon,*[38] the United States Supreme Court held that a state could require a defendant to prove insanity beyond a reasonable doubt as long as the statute did not diminish the state's burden of proving beyond a reasonable doubt both the mens rea and the actus reus of the crime.[39] Alaska's law, which requires the state to bear both these burdens,[40] satisfies the *Leland* test.

2. *Diminished Capacity with Lack of Mens Rea.* The second insanity defense available under present Alaska law arises when the state cannot prove mens rea for the offense charged or for a lesser included offense.[41] If the defendant's evidence of diminished mental capacity prevents the state from proving beyond a reasonable doubt that the defendant possessed the requisite intent for the crime charged, the trier of fact must determine if the evidence supports conviction for a lesser included offense.[42] If the trier of fact does not find the defendant guilty of a lesser included offense, the defendant must be found NGRI.[43]

1982 ALASKA HOUSE JOURNAL supp. 63, at 6 (June 1, 1982).

36. ALASKA STAT. § 12.47.030(1) (1984); *see supra* note 5.

37. *See supra* note 5.

38. 343 U.S. 790 (1952).

39. *Id.* at 799, *cited in Hart,* 702 P.2d at 656.

40. *See* ALASKA STAT. § 11.81.600 (1983) (providing that the minimal requirements for criminal liability include a "voluntary act or . . . omission" done with "a culpable mental state").

41. ALASKA STAT. § 12.47.020 (1984).

42. *Id.* § 12.47.020(c). If the defendant is convicted of a lesser included offense, he will automatically be considered GBMI. *See infra* note 51 and accompanying text.

A lesser included offense is one "necessarily included in the offense charged." ALASKA R. CRIM. P. 31(c). According to one definition, an offense is "necessarily included" if it is impossible to commit the greater offense without having committed the lesser, "necessarily included" offense. Another approach requires that the facts charged in the indictment must have provided the defendant actual notice of possible lesser included offenses. The Alaska Supreme Court has acknowledged both definitions but has failed to choose between them. *See* Elisovsky v. State, 592 P.2d 1221, 1225-26 (Alaska 1979). For a detailed analysis of lesser included offenses in Alaska, see Note, *Lesser Included Offenses in Alaska:* State v. Minano, 3 ALASKA L. REV. 199 (1986).

43. ALASKA STAT. § 12.47.020 (1984). This section provides:

> When the trier of fact finds that all other elements of the crime have been proved but, as a result of mental disease or defect, there is a reasonable doubt as to the existence of a culpable mental state that is an element of the crime, it shall enter a verdict of not guilty by reason of insanity.

B. The Guilty But Mentally Ill Verdict

The most controversial change in Alaska's insanity laws was the adoption of the GBMI verdict.[44] A GBMI defendant in Alaska is subject to the same jail sentence as a mentally competent defendant found guilty of the same offense.[45] The Department of Corrections, however, must prescribe and provide treatment to the GBMI defendant until he no longer suffers from mental illness.[46] When treatment ends, the GBMI defendant must serve the remainder of his sentence.[47] A defendant undergoing treatment is ineligible for furlough or parole.[48]

There are several ways in which a factfinder may reach a verdict of GBMI. The trier of fact may find GBMI any defendant who raises the affirmative defense of insanity.[49] Even if the defendant does not raise the insanity defense at trial, the court may find him GBMI in a postconviction hearing. In order to institute a postconviction hearing, the defendant, the prosecuting attorney, or the court must question the mental health of the defendant.[50] Finally, if the state does not prove mens rea for the offense charged, but the defendant is convicted of a lesser included offense, the defendant will automatically be considered GBMI of the lesser included offense.[51]

III. CRITICISM OF ALASKA'S INSANITY LAWS

A. The Insanity Defense

The significance of the GBMI verdict in a particular jurisdiction is directly related to the definition of "legal insanity" adopted by that

---

Id.

This mens rea defense may be the only constitutionally required component of an insanity defense. *See infra* notes 62-80 and accompanying text.

44. ALASKA STAT. § 12.47.030 (1984) provides:

> A defendant is guilty but mentally ill if, when the defendant engaged in the criminal conduct, the defendant lacked, as a result of mental disease or defect, the substantial capacity either to appreciate the wrongfulness of that conduct or to conform that conduct to the requirements of law. A defendant found guilty but mentally ill is not relieved of criminal responsibility for criminal conduct.

Id.

45. ALASKA STAT. § 12.47.050(a) (Supp. 1986).

46. *Id.* § 12.47.050(b).

47. *Id.* § 12.47.050(c).

48. *Id.* § 12.47.050(d).

49. ALASKA STAT. § 12.47.040 (1984).

50. *Id.* § 12.47.060(a).

51. *Id.* § 12.47.020(b),(c). Under section 12.47.020(b), the defendant is NGRI if the state fails to prove the mens rea necessary for conviction of the offense charged. Section 12.47.020(c) provides, in turn: "If a verdict of not guilty by reason of insanity is reached under (b) of this section, the trier of fact shall also consider whether the defendant is guilty of any lesser included offense."

jurisdiction. A state that broadly defines insanity will have a correspondingly small category of defendants who will be found GBMI. Conversely, in a state where legal insanity is very difficult to prove, a mentally ill person is more likely to be found GBMI.[52] Opponents of Alaska's present laws criticize the state legislature for placing Alaska in the second category. Because the legislature narrowed the insanity defense almost to the point of nonexistence,[53] opponents argue, many people who could have proved insanity under the old law are no longer eligible for acquittal by reason of insanity and are subject to a GBMI verdict.[54] This argument, which implies that Alaska has effectively eliminated the NGRI verdict and is incarcerating people who deserve an acquittal by reason of insanity, is unfounded for two reasons. First, the new definition of insanity has not effectively eliminated the NGRI defense. The Alaska Court of Appeals has interpreted the current definition of legal insanity broadly.[55] Second, mentally ill defendants who are being incarcerated under the GBMI verdict do not have as broad a right to the insanity defense as this criticism implies. Much discretion resides with the states on how to define legal insanity. Alaska has not abused that discretion or violated any federal or state constitutional provisions.[56]

The committee reports indicate that the Alaska legislature intended the present insanity standard to be narrow.[57] Those reports

52. *Compare* MICH. COMP. LAWS ANN. § 768.21a(1) (West 1982) (broad definition, applying in situations in which, as a result of mental illness or mental retardation, defendant lacked "substantial capacity either to appreciate the wrongfulness of the conduct or to conform his conduct to the requirements of law") *with* S.D. CODIFIED LAWS ANN. § 22-1-2(18A) (Supp. 1986) (narrow definition, applying where, at the time of the act charged, the defendant was "incapable of knowing its wrongfulness").

53. *See* Note, *supra* note 14, at 811. One commentator argues that:

> Alaska . . . has made the most radical change. . . . In effect, the law requires conviction of all but those who suffer from the most extreme forms of mental illness. . . . This approach is particularly subject to constitutional attack. It narrows legal insanity almost to the point of nonexistence and may unconstitutionally deprive defendants of the insanity defense.

Id.

54. In fact, the previous definition of insanity in Alaska, the Model Penal Code's "substantial capacity" test, is the standard now used for determining whether a defendant is GBMI. *See* ALASKA STAT. § 12.45.083(a) (1980) (repealed 1982), quoted *supra* at note 4. This switch was the basis for an equal protection argument discussed *infra* notes 165-70 and accompanying text.

55. *See infra* notes 59-61 and accompanying text.

56. *See infra* notes 62-80 and accompanying text.

57. *See* 1982 ALASKA HOUSE JOURNAL supp. 63, at 5-6 (June 1, 1982).

suggest that the phrase to know "the nature and quality of [one's] conduct"[58] refers only to the defendant's knowledge of the *physical* aspects of his actions — for example, whether he knew he was firing a gun. Despite the apparent legislative intent, the Alaska Court of Appeals relied on an Alaska Supreme Court opinion written before the revisions to the insanity laws to construe the phrase as referring to the defendant's knowledge of all aspects of an act, including the likely consequences to the actor and others.[59] The court of appeals also implied that a defendant who lacked the capacity to know whether his act was right or wrong would be deemed insane.[60] Apparently, the Alaska Court of Appeals viewed the present definition of insanity as equivalent to a liberal reading of the *M'Naughten* test.[61] Pending the Alaska Supreme Court's decision in *Patterson*, the broad interpretation by the Alaska Court of Appeals stands.

An interpretation of the insanity definition that is as narrow as the legislature apparently intended would be constitutional. The United States Supreme Court seems reluctant to recognize a constitutional right to *any* specific insanity defense.[62] In fact, three states, Idaho, Montana, and Utah have actually abolished a separate insanity defense and now allow evidence of mental illness to be introduced only to negate the element of mens rea.[63] Although the constitutionality of an insanity defense of the type used in Idaho, Montana, and Utah has never been decided by the United States Supreme Court, in *State v. Korell,* the Montana Supreme Court held that the Montana statute met the minimum constitutional requirements for an insanity defense.[64]

---

58. ALASKA STAT. § 12.47.010(a) (1984).

59. Patterson v. State, 708 P.2d 712, 717 (Alaska Ct. App. 1985); *see supra* notes 25-35 and accompanying text.

60. *Patterson*, 708 P.2d at 716. The court relied on Chase v. State, 369 P.2d 997 (Alaska 1962), for the proposition that the ability to distinguish between right and wrong is included in the idea of knowing the nature and quality of one's conduct. *See supra* note 34.

61. *Patterson*, 708 P.2d at 717; *see supra* note 35 and accompanying text.

62. *See* Powell v. Texas, 392 U.S. 514, 536 (1968) ("Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms.").

63. IDAHO CODE § 18.207 (Supp. 1986); MONT. CODE ANN. § 46-14-102 (1985); UTAH CODE ANN. § 76-2-305 (Supp. 1986). *See also The Insanity Defense: Hearings on S. 818, S. 1106, S. 1558, S. 2669, S. 2672, S. 2678, S. 2745, and S. 2780 Before the Senate Comm. on the Judiciary,* 97th Cong., 2d Sess. (1982) (proposal to add the GBMI verdict and abolish the insanity defense in favor of the mens rea approach under federal law).

64. State v. Korell, 690 P.2d 992 (Mont. 1984); *see also* Note, State v. Korell: *Montana Sees No Insanity in the Constitution,* 21 WILLAMETTE L. REV. 944 (1985).

The defendant in *Korell* argued that abolition of a separate insanity defense violated the due process clause of the fourteenth amendment and the prohibition against cruel and unusual punishment in the eighth amendment.[65] Relying on *Leland v. Oregon*[66] and *In re Winship,*[67] the Montana court upheld the constitutionality of the statute.[68] In *Leland,* the United States Supreme Court held that the due process clause does not require any particular insanity defense or allocation of burden of proof.[69] In *Winship,* the Court ruled that in order to satisfy the due process clause, a state must prove beyond a reasonable doubt every element of the offense charged.[70] The Montana Supreme Court concluded that the logical extension of the United States Supreme Court's holdings in *Leland* and *Winship* was that a state may abolish a separate insanity defense without violating the due process clause, as long as the state allows the defendant to produce evidence of his mental state in order to establish a reasonable doubt about the existence of mens rea.[71]

The defendant in *Korell* also argued that the state's lack of a separate insanity defense constituted cruel and unusual punishment.[72] The defendant relied on *Robinson v. California,*[73] in which the United States Supreme Court held that classifying drug addiction as a crime punished a defendant's status, rather than any act, and thus violated the eighth amendment.[74] The *Robinson* Court also noted in dicta that any law that made mental illness a criminal offense would probably also be considered cruel and unusual punishment.[75] While acknowledging the wisdom of *Robinson,* the *Korell* court reasoned that punishing a defendant for a criminal act committed while he is mentally ill is not the equivalent of punishing him for being mentally ill. The *Korell* court found the case similar to *Powell v. Texas,*[76] where the United States Supreme Court found that a statute prohibiting public intoxication punished the act of public drunkenness, not the status of being an

65. *Korell,* 690 P.2d at 998.
66. 343 U.S. 790 (1952).
67. 397 U.S. 358 (1970).
68. *Korell,* 690 P.2d at 1002.
69. *Leland,* 343 U.S. at 798-801; *see also* Powell v. Texas, 392 U.S. 514, 536 (1968).
70. *Winship,* 397 U.S. at 364.
71. *Korell,* 690 P.2d 992, 1000.
72. *Id.* at 1001.
73. 370 U.S. 660 (1962).
74. *Id.* at 667.
75. *Id.* at 666.
76. 392 U.S. 514 (1968).

alcoholic, and thus did not violate the eighth amendment.[77] The *Korell* court concluded that the Montana statute punished criminal acts, not the state of mental illness.[78]

The above discussion shows that little foundation exists for the argument that by narrowly defining legal insanity a state unconstitutionally deprives defendants of the insanity defense. The only constitutional requirement for the insanity defense is that the state must prove mens rea beyond a reasonable doubt.[79] Because Alaska requires the factfinder to render a NGRI verdict if the defendant presents evidence of diminished mental capacity and the state fails to prove mens rea,[80] Alaska assures defendants of their constitutional right to an insanity defense.

B. The GBMI Verdict

Opponents of GBMI legislation throughout the country have criticized the verdict as being unfair to defendants. Critics claim that GBMI causes juror compromises,[81] discourages defendants from raising the insanity defense,[82] fails to guarantee the prisoner anything to which he is not already entitled,[83] and does not result in the actual treatment of the GBMI prisoner.[84] Opponents have also argued that the verdict violates the due process and equal protection clauses and constitutes cruel and unusual punishment.[85]

1. *GBMI Does Not Cause Juror Compromise.* Critics of GBMI claim that the verdict confuses juries and that such confusion often results in jury compromise and disregard for the NGRI verdict.[86] Some critics fear that juries are unable to draw a distinction between "mental illness" and "insanity."[87] Others believe that conflict between the desire to provide treatment and the desire to ensure that violent individuals will be incarcerated may lead juries to elect a verdict of

77. *Id.* at 532.
78. *Korell,* 690 P.2d 992, 1001.
79. *See supra* notes 69-71 and accompanying text.
80. *See* ALASKA STAT. § 12.47.020 (1984), quoted *supra* at note 43.
81. *See infra* notes 86-88 and accompanying text.
82. *See infra* notes 98-99 and accompanying text.
83. *See infra* notes 105-07 and accompanying text.
84. *See infra* notes 110-11 and accompanying text.
85. *See infra* text accompanying notes 114-18.
86. *See, e.g.,* Note, *supra* note 15, at 550-51.
87. *See* Fentiman, *Guilty But Mentally Ill: The Real Verdict is Guilty,* 26 B.C.L. REV. 601, 639 (1985); Comment, *The Constitutionality of Michigan's Guilty But Mentally Ill Verdict,* 12 U. MICH. J.L. REF. 188, 195-96 (1978); Note, *supra* note 15, at 550-51.

GBMI when the evidence more reasonably supports a finding of legal insanity.[88]

The difficulty in ascertaining the basis for a jury's verdict makes a direct response to these arguments impossible. If these concerns are well founded, it would seem that there should have been a substantial decline in the number of successful insanity defenses in Alaska since the adoption of the GBMI verdict. Unfortunately, any measurement of the impact of the GBMI verdict on the use of the insanity defense in Alaska is difficult. Only five or six insanity acquittals occurred annually before 1982 under the previous insanity defense.[89] The infrequency with which insanity acquittals were returned prior to 1982 would make it difficult to establish that a change in the number of insanity acquittals resulted from anything more than chance.

Despite the inherent difficulties in assessing the impact of the GBMI verdict, an empirical study conducted by the state of Michigan seven years after the state's adoption of the GBMI verdict produced useful information. The Michigan study is especially helpful in isolating the effects of the availability of the GBMI verdict on jury decisions because Michigan did not change the definition of insanity when it adopted the GBMI verdict.[90] The results of the Michigan study indicated that little change in the successful use of the insanity defense occurred after the adoption of the GBMI verdict. This suggests that juries will not use the GBMI verdict to convict defendants who otherwise would have been found NGRI.[91] A survey of prosecutors in several states that adopted the GBMI verdict led to a similar conclusion. The majority of these officials believed that most GBMI defendants in their states would have been found guilty, rather than NGRI, in the absence of a GBMI alternative.[92]

---

88. *See* Comment, *supra* note 8, at 492; Comment *supra* note 87, at 196-98; Note, *supra* note 15, at 550.

89. Comment, *supra* note 8, at 508.

90. MICH. COMP. LAWS ANN. § 768.21a (West 1982).

91. Special Project, *Evaluating Michigan's Guilty But Mentally Ill Verdict: An Empirical Study,* 16 U. MICH. J.L. REF. 77 (1982). The special project's authors compared a group of GBMI convicts with a group of NGRI acquittees to assess potential affinities among them. They concluded that "at least a majority of the GBMI defendants would have been found guilty in the absence of the GBMI statute." *Id.* at 100.

92. Slobogin, *The Guilty But Mentally Ill Verdict: An Idea Whose Time Should Not Have Come,* 53 GEO. WASH. L. REV. 494, 510 n.73 (citing NATIONAL CENTER FOR STATE COURTS, THE "GUILTY BUT MENTALLY ILL" PLEA AND VERDICT: AN EMPIRICAL STUDY: FINAL REPORT SUBMITTED TO THE NATIONAL INSTITUTE OF JUSTICE, UNITED STATES DEPARTMENT OF JUSTICE 2-3 (working draft Nov. 15, 1984)). According to the National Center for State Courts, 78% of the 74 state prosecutors polled believed that most offenders would have been found guilty, as opposed to NGRI, if the GBMI alternative had not been available. *Id.*

The purpose of the GBMI verdict is not to reduce insanity acquittals by encouraging juries to convict the insane, but rather to achieve greater social control over dangerous, mentally ill prisoners who nonetheless would have been convicted.[93] Implementation of procedural safeguards designed to ensure that these prisoners receive treatment while in jail and, if necessary after release,[94] should decrease the likelihood of repeated criminal manifestation of their mental illness.

In rebuttal to the argument that the GBMI alternative confuses juries, one proponent of the GBMI verdict claims that the verdict actually clarifies a juror's reasoning by forcing him to consider carefully the causal nexus between the mental illness and the offense.[95] For example, if a person suffers from a delusion that his spouse is a devil, he might plead insanity for the crime of attacking his wife. If, however, he has no mental illness other than that delusion, he is not excused for attacking a stranger because no causal relation between the illness and the offense then exists.[96] Jurors should realize, therefore, that finding some manifestation of mental illness does not necessarily compel the conclusion that the defendant was legally insane with respect to the crime.[97]

2. *GBMI Does Not Discourage Use of the Insanity Defense.* One critic fears that because a GBMI convict in Alaska is ineligible for parole or furlough,[98] a defendant may decide not to raise the issue of his mental state to avoid the possibility of a GBMI verdict.[99] The fact that a defendant in Alaska may be subject to a GBMI verdict even if he does not raise the insanity defense should alleviate concern over this possibility. A posttrial motion by the prosecutor or the court may result in the rendering of a GBMI verdict.[100] If a seriously mentally ill defendant chooses to forgo use of the insanity defense at trial, either the court or the prosecutor is likely to move for a posttrial GBMI hearing.

A defendant should not forgo raising the insanity defense simply because a GBMI verdict will preclude parole or furlough. The ban on parole and furlough continues only so long as the GBMI defendant

93. *See* Note, *Guilty But Mentally Ill: A Critical Analysis,* 14 RUTGERS L.J. 453, 464-65 (1983) (concluding, however, that the potential benefits of the GBMI verdict are not sufficient to call for its adoption).

94. *See, e.g.,* ALASKA STAT. § 12.47.050(e) (1984).

95. *See* Slovenko, *Commentaries on Psychiatry and Law: "Guilty But Mentally Ill,"* 10 J. PSYCHIATRY & L. 541, 542-43 (Winter 1982).

96. *Id.* at 543.

97. *Id.*

98. ALASKA STAT. § 12.47.050(d) (Supp. 1986).

99. *See* Strout, *supra* note 2.

100. *See* ALASKA STAT. § 12.47.060 (1984).

requires treatment.[101] Because a prisoner's mental condition is a relevant factor in a parole[102] or furlough[103] decision, a GBMI prisoner is in no worse a position than a mentally ill prisoner who received an ordinary guilty verdict. Neither prisoner will be released while he is still dangerous. Moreover, without guaranteed treatment, the mental condition of the non-GBMI prisoner is likely to remain unchanged,[104] while the treated GBMI prisoner may improve and become eligible for an earlier release.

3. *The GBMI Verdict Serves a Distinctive Purpose.* Another criticism of the GBMI verdict is that it offers the GBMI convict no greater access to treatment than that guaranteed in the absence of the GBMI statute.[105] The Alaska Supreme Court has held that a prisoner in the custody of the Department of Corrections has the right to receive psychiatric treatment.[106] Alaska law provides, furthermore, that "nothing in [the GBMI provisions] limits the discretion of the court to recommend, or of the Department of Corrections to provide, psychiatrically indicated treatment for a defendant who is not adjudged guilty but mentally ill."[107]

A GBMI verdict thus appears to be meaningless in the sense that a prisoner technically enjoys the same right to treatment regardless of whether a GBMI verdict is returned. Theoretically, however, a GBMI prisoner is *guaranteed* treatment pursuant to a presumption of need,[108] while an ordinary prisoner has the right to treatment only

101. ALASKA STAT. § 12.47.050(d) (Supp. 1986) "provides that a defendant *receiving treatment* is not eligible for parole or furlough. Alaska Stat. § 12.47.050(b) (Supp. 1986) provides that a prisoner must receive treatment "until [he] no longer suffers from a mental disease or defect that causes [him] to be dangerous to the public peace or safety." *Id.* These subsections strongly imply that once a prisoner's treatment is successfully completed and he ceases to pose a danger to society, he will regain his eligibility for parole and furlough.

102. ALASKA STAT. § 33.16.100(a)(3) (1986) (the granting of parole is at the discretion of the parole board, which must consider, among other factors, whether the prisoner will pose a threat of harm to the public).

103. *Id.* § 33.30.091(1), (10) (the granting of furloughs is at the discretion of the Commissioner of the Department of Corrections, who must consider safeguards to the public and any other factors he deems appropriate).

104. *See infra* note 108 and accompanying text.

105. *See* Note, *supra* note 93, at 463. ("In summary, the new verdict adds little to the guarantee of treatment that is presently available outside the guilt adjudication process."); *see also* NATIONAL MENTAL HEALTH ASS'N, MYTHS AND REALITIES: A REPORT OF THE NATIONAL COMMISSION ON THE INSANITY DEFENSE, at 32-33 (1983).

106. Rust v. State, 582 P.2d 134, 143 & n.34 (Alaska 1978).

107. ALASKA STAT. § 12.47.055 (1984).

108. ALASKA STAT. § 12.47.050(b) (Supp. 1986) ("The Department of Corrections *shall* provide mental health treatment to a defendant found guilty but mentally ill."(emphasis added)).

upon request or by direction of the Department of Corrections. Because a mentally ill prisoner might not believe he needs help or might be discouraged by his peers from requesting aid, the GBMI verdict assures that a mentally ill offender actually receives the treatment to which he is legally entitled.

Another distinctive feature of the GBMI verdict is that it is far less stigmatizing than the ordinary guilty verdict. By rendering a GMBI verdict, the trier of fact acknowledges that, although culpable, the GBMI offender may not be culpable to the same degree as an offender who committed the crime with a sound mind. Perhaps the idea that a GBMI verdict is less stigmatizing derives from the observation that the verdict generally results from a jury determination that the GBMI defendant differs from the ordinary guilty defendant, rather than from a postconviction medical diagnosis prescribing psychiatric care. Because a GBMI conviction does not result in a lesser sentence and psychiatric treatment is available to *all* prisoners upon reasonable request, the fact that defendants frequently plea bargain for a GBMI verdict suggests that they perceive the GBMI verdict as preferable to a guilty verdict.[109]

4. *Abolishing the GBMI Verdict Is Not the Solution for Inadequate Treatment.* Critics of the GBMI verdict assert that the verdict lulls the jury into believing that the defendant will receive all necessary treatment during his period of incarceration. Unfortunately, GBMI defendants frequently do not receive the treatment to which they are statutorily entitled.[110] Particularly in Alaska, where mental health treatment generally remains scarce and of poor quality, the charge that GBMI inmates receive inadequate treatment appears meritorious.[111]

---

109. *See* NATIONAL MENTAL HEALTH ASS'N, *supra* note 105, at 33. Attorney William Meyer, Director of the Center for Forensic Psychiatry of Michigan, told the Commission that most GBMI convicts in Michigan plea bargained for the GBMI conviction. According to Meyer, these persons are mostly sex offenders with strong cases against them and very little chance of being found NGRI. Meyer stated that:

> It appears to us that what they're doing is they are pleading "guilty but mentally ill" in an attempt to somehow soften the effect on their friends and family and even themselves of their criminal behavior, that somehow, although it doesn't excuse them from their criminal behavior because they still have to go to prison and so on, in their minds it might excuse them.

Id.

110. A Michigan study showed that 75% of those found GBMI in that state receive no treatment. *The Insanity Plea on Trial,* NEWSWEEK, May 24, 1982, at 56-60.

111. *See* Strout, *supra* note 2, at 14. One commentator explains:

> Another major issue for the practitioner . . . is the dearth of treatment programs available in Alaska. Clients who have been to [the Alaska Psychiatric Institute] would rather be in jail; community-based programs are nearly non-existent. Private institutions are prohibitively expensive. Our jails are

While the accessibility and scope of the treatment available to GBMI inmates are legitimate concerns, the problem of inadequate treatment does not affect the validity of the GBMI statute. As both Michigan and Indiana courts have recognized, a declaration of unconstitutionality is not the proper remedy for the denial of treatment guaranteed under the GBMI statute. The grant of a writ of mandamus against the Department of Corrections[112] or relief under civil rights laws[113] is sufficient to remedy the unlawful denial of the GBMI prisoner's right to treatment. Similarly, if Alaska lacks the resources to treat GBMI prisoners, the solution lies not in abolishing the GBMI verdict, but in reforming Alaska's mental health system.

5. *The GBMI Verdict Is Constitutional.* The main arguments against the GBMI verdict, most of which were raised and circumvented in *Hart*[114] and *Patterson,*[115] are that the verdict infringes upon defendants' constitutional rights by denying them due process,[116] imposing cruel and unusual punishment,[117] and violating the equal protection clauses of the United States and Alaska Constitutions.[118]

a. Due process. The due process argument is that a defendant adjudged GBMI is denied procedural due process because, at any time during the period of incarceration, the state may subject him to involuntary psychiatric treatment without a hearing to determine his present mental state.[119] The test for determining whether procedural due process has been denied is twofold. First, the asserted interest is only protected if it falls within one of the fourteenth amendment categories of protected interests—"life, liberty, or property."[120] Second, if the interest falls within fourteenth amendment protection, the state must employ adequate procedural safeguards in any action that might result in the impairment of that interest.[121] In *Mathews v. Eldridge,*[122] the

currently full of people who should more appropriately be treated in hospitals.

Id.

112. *See, e.g.,* Stader v. State, 453 N.E.2d 1032, 1036 (Ind. Ct. App. 1983); People v. Toner, 125 Mich. App. 439, 441, 336 N.W.2d 22, 23 (1983); People v. Willsie, 96 Mich. App. 350, 355, 292 N.W.2d 145, 147 (1980).

113. *See Stader,* 453 N.E.2d at 1036 (stating that the proper mechanism for them to use in challenging the conditions of their custody is a federal civil rights action).

114. 702 P.2d 651 (Alaska Ct. App. 1985).

115. 708 P.2d 712 (Alaska Ct. App. 1985).

116. *See* Note, *supra* note 15, at 548.

117. *See* Note, *supra* note 14, at 814.

118. *See Hart,* 702 P.2d at 653; Comment, *supra* note 8, at 490.

119. *See* Note, *supra* note 15, at 548 (citing Vitek v. Jones, 445 U.S. 480 (1980)).

120. Mathews v. Eldridge, 424 U.S. 319, 332 (1976).

121. *Id.* at 333.

122. 424 U.S. 319.

Supreme Court promulgated a balancing test for determining whether procedures are fair within the context of due process. The strength of the individual interest and the risk of error in the state action are weighed against the strength of the state's interest and the burden on the state of providing additional safeguards.[123]

Although a prisoner's liberty is greatly impaired by incarceration, he retains certain liberty interests that the state may not freely disregard. In *Vitek v. Jones,*[124] the Supreme Court held that the involuntary transfer of a prisoner to a mental hospital for psychiatric treatment involves protected liberty interests distinguishable from mere freedom from confinement.[125] Specifically, the prisoner is faced with the stigma of being found mentally ill and the threat of forced behavior modification.[126] The interests implicated by the involuntary transfer of a GBMI inmate are protected under the fourteenth amendment. The state, therefore, must show that the necessary procedural safeguards accompany the decision to transfer an inmate.

In *Vitek,* the Court found that the involuntary transfer of an ordinary prisoner for psychiatric treatment without a hearing to determine his present mental state failed the balancing test for procedural fairness.[127] Proponents of the due process argument assert that the involuntary transfer of a GBMI inmate for psychiatric treatment without a hearing on his present mental state constitutes a situation analogous to that in *Vitek.*[128] The persuasive factor in *Vitek,* however, was the high probability of the state's erroneously treating a mentally competent prisoner because that prisoner had never had a hearing to determine his mental state.[129] Another consideration underlying the ruling in *Vitek* was that the prisoner received notice of the transfer too late to challenge the move effectively.[130]

A GBMI prisoner is not in the same position as an ordinary inmate who is transferred to a mental hospital. The GBMI prisoner has already had the benefit of a proper judicial hearing to determine his mental capacity at the time of the crime. The possibility of erroneously subjecting a GBMI prisoner to unnecessary treatment, therefore, is unlikely. The GBMI prisoner also has received sufficient notice of the state's intention to treat his mental illness. Finally, the strength of the GBMI prisoner's interest in avoiding the stigma of mental illness is not comparable to that of the ordinary prisoner. Any stigma probably

123. *Id.* at 335.
124. 445 U.S. 480 (1980).
125. *Id.* at 494.
126. *Id.*
127. *Id.* at 494-95.
128. *See* Note, *supra* note 15, at 548.
129. *Vitek*, 445 U.S. at 495.
130. *Id.* at 496.

attached to the GBMI prisoner with the pronouncement of the verdict.

When the *Mathews* analysis is applied to the involuntary transfer of a GBMI prisoner, it becomes clear that saving the state the cost of one more hearing for the GBMI inmate, along with the state's interest in treating mentally ill criminals, outweighs the probability of erroneously treating a GBMI inmate. These state interests also outweigh the inmate's interest in participating in a second hearing on his mental state prior to a transfer to a psychiatric hospital. The GBMI verdict, therefore, contains adequate safeguards and passes the test for procedural fairness under the due process clause.

b. Cruel and unusual punishment. Two arguments can be made in support of the proposition that the GBMI verdict constitutes cruel and unusual punishment. The first argument is that the verdict may subject a competent prisoner to forced psychiatric treatment. The second argument runs as follows: GBMI inmates may receive inadequate treatment compared to those committed to mental hospitals.[131]

In *Rummel v. Estelle,*[132] the United States Supreme Court reaffirmed that the test to determine whether a punishment is "cruel and unusual" under the eighth amendment is to decide whether the punishment is in proportion to the crime.[133] If the crime and the punishment lack proportionality, the sentence may violate the eighth amendment. The Supreme Court also expressed in *Rummel* an unwillingness to find statutorily prescribed punishments, other than capital punishment, cruel and unusual.[134] The Court stated that "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare."[135]

Whether treatment constitutes cruel and unusual punishment depends on the particular facts of each case.[136] If a competent prisoner receives unnecessary treatment, he can argue that his treatment is cruel and unusual punishment. Such an argument, however, does not render the entire GBMI statute vulnerable to attack on eighth amendment grounds.[137] Similarly, while a prisoner may be able to show that

131. *See* Note, *supra* note 14, at 814.
132. 445 U.S. 263 (1980).
133. *Id.* at 271.
134. *Id.* at 272. The *Rummel* Court held that life imprisonment was not a disproportionate punishment for a defendant convicted under a statute requiring a life sentence upon a third felony, even though the particular defendant had been convicted of three minor felonies.
135. *Id.*
136. *Id.* at 268.
137. *Cf. id.*

he is being treated less adequately in jail than his civilly committed counterpart in a mental hospital,[138] such a showing does not justify invalidating the entire statute. The legislature contemplated that all prisoners would be treated adequately.[139] If the Department of Corrections fails to meet its statutory obligations, the proper remedy would be to apply for a writ of mandamus against the Department to compel adequate treatment.[140]

c. Equal protection. Another argument made against the GBMI verdict is that the verdict violates the equal protection clause of the United States Constitution by treating GBMI defendants differently from other defendants on the basis of mental illness.[141] The equal protection clause requires that similarly situated individuals be treated similarly.[142] The level of review of state action depends on the criteria used by the state in categorizing people or on the interest implicated by the classification. If the classification is based on a "suspect category"[143] or implicates a "fundamental right,"[144] the federal test is one of strict scrutiny — the classification must be necessary to promote a compelling government interest.[145] Otherwise, the federal test demands a rational relationship between the classification and some legitimate state objective.[146]

The Supreme Court has never held that mental illness constitutes a suspect category, and arguably will never do so. Thus, GBMI legislation will not be examined under the "compelling government interest" standard. In *City of Cleburne v. Cleburne Living Center,*[147] the

138. *See* Estelle v. Gamble, 429 U.S. 97, 104 (1976) (holding that deliberate indifference to serious medical needs of prisoners constitutes cruel and unusual punishment under the eighth amendment).

139. *See* ALASKA STAT. § 12.47.050(b) (Supp. 1986).

140. *See* People v. Sorna, 88 Mich. App. 351, 362, 276 N.W.2d 892, 897 (1979).

141. Courts that have addressed this argument on the merits have rejected it. *See, e.g.,* Taylor v. State, 440 N.E.2d 1109 (Ind. 1982); People v. Rone, 109 Mich. App. 702, 311 N.W.2d 835 (1981); People v. McLeod, 407 Mich. 632, 288 N.W.2d 909 (1980).

142. Plyler v. Doe, 457 U.S. 202, 216 (1982) (citing F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

143. Suspect categories are generally those "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

144. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 n.3 (1976) (giving as examples of fundamental rights those of a uniquely private nature, such as the right to vote, the right of interstate travel, rights guaranteed by the first amendment, and the right to procreate).

145. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985).

146. *Id.*

147. 473 U.S. 432.

Court refused to regard mental *retardation* as a suspect category in part because it sought to avoid the general extension of suspect category status to mental *illness.*[148] The Supreme Court also has treated as "fundamental" rights only those rights explicitly or implicitly guaranteed by the Constitution, for example, voting, access to courts, and travel.[149] The classification of the GBMI defendant as one who requires special treatment, therefore, does not implicate a fundamental right under the federal Constitution. Thus, if challenged under the equal protection clause of the United States Constitution, this classification will be examined under the rational relationship standard.

Although neither *Hart*[150] nor *Patterson*[151] acknowledged the possibility of an equal protection analysis claim under the Alaska Constitution,[152] it deserves mention that equal protection analysis under the Alaska Constitution differs from that under the federal Constitution.[153] The Alaska Supreme Court has frequently criticized the rigid, two-tiered federal test, which purports to apply strict scrutiny in cases involving suspect categories or fundamental rights and a rational relationship test in all other cases.[154] For equal protection challenges arising under the Alaska Constitution, Alaska has adopted a more flexible, "sliding-scale" test that creates a continuum of levels of scrutiny, which vary with the interests involved.[155]

In *Alaska Pacific Assurance Co. v. Brown,*[156] the Alaska Supreme Court refined Alaska's approach to equal protection challenges by articulating a three-part framework.[157] First, the court must determine what weight is to be given to the interest impaired by the challenged

148. *Id.* at 442-47. The *Cleburne* Court noted that the mentally retarded are substantially similar to "other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large." The Court feared that classification of the mentally retarded as a suspect, or "quasi-suspect," category would lead to the extension of this constitutional distinction, not only to the mentally ill, but to the aged, the disabled, and the infirm. *Id.* at 445.

149. G. GUNTHER, CONSTITUTIONAL LAW 788 (11th ed. 1985).

150. 702 P.2d 651 (Alaska Ct. App. 1985).

151. 708 P.2d 712 (Alaska Ct. App. 1985).

152. Alaska's equal protection guarantee is found in ALASKA CONST. art. I, § 1: "[A]ll persons are equal and entitled to equal rights, opportunities, and protection under the law . . . ." *Id.*

153. For a detailed study of equal protection under the Alaska Constitution, see Wise, *Northern Lights — Equal Protection Analysis in Alaska,* 3 ALASKA L. REV. 1 (1986).

154. *See, e.g.,* State v. Erickson, 574 P.2d 1, 11 (Alaska 1978).

155. *See* Alaska Pac. Assurance Co. v. Brown, 687 P.2d 264, 269 (1984) (citing *Erickson,* 574 P.2d 1).

156. 687 P.2d 264.

157. *Id.* at 269.

law, and then, in light of the weight of that interest, must specify the appropriate level of review. "The nature of this interest is the most important variable in fixing the appropriate level of review."[158] The more important is the interest, the stricter is the standard of review and the greater is the state's burden to justify its legislation.[159] The standards of review range from the equivalent of the federal rational relationship test to the equivalent of the federal strict scrutiny test.[160] Second, the court must ascertain the purposes served by the law.[161] "Depending on the level of review determined [under the first part of the framework], the state may be required to show only that its objectives were legitimate, at the low end of the continuum, or, at the high end of the scale, that the legislation was motivated by a compelling state interest."[162] Finally, the court must examine the fit between the means chosen by the legislature and the purposes of the law. The higher is the level of review, the closer must be the fit.[163]

GBMI defendants in Alaska conceivably could develop three equal protection arguments. First, those who are found GBMI under the present definition could claim that it is irrational to classify them differently from those who were found insane under the prior law. Second, those adjudged GBMI of an offense could claim that to classify them differently from those simply found guilty of the same offense is irrational. Third, those found GBMI could claim that the definitions of mental illness and insanity are indistinguishable and that attempts to distinguish GBMI prisoners from those found NGRI are irrational.[164] These arguments will first be analyzed under the federal Constitution. A discussion of how a challenge under the Alaska Constitution might alter the analysis follows.

When Alaska revised its insanity laws and adopted the GBMI verdict,[165] the prior definition of insanity became the definition of

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 269-70.

164. In most states, a defendant has to raise the insanity defense before he can be found GBMI. This fact raises another equal protection argument, namely, that those who plead insanity should not be treated differently from those who do not plead insanity. *See* People v. Jackson, 80 Mich. App. 244, 263 N.W.2d 44 (1977). Subjecting the former group, but not the latter, to the possibility of a GBMI conviction might be a violation of the equal protection clause. Since in Alaska, however, a defendant can be found GBMI without raising the insanity defense, *see supra* notes 50-51, this argument is not applicable.

165. ALASKA STAT. § 12.47.010-.030 (1984).

mental illness for purposes of the GBMI verdict.[166] The constitutionality of this change was challenged in *Hart.*[167] In *Hart,* the defendant contended that he would have been found insane under the old law and that a verdict of guilty under the current law therefore violated equal protection. The court did not reach the merits of Hart's argument because it found that Hart would not have qualified as being insane under the old law.[168] The court, however, acknowledged that the relevant equal protection question is whether the state's differentiating between defendants with the same level of mental illness rationally relates to a legitimate government purpose.[169] The court did not mention what the standard might be under the Alaska Constitution.

The *Hart* court acknowledged that defining the point at which a person's mental condition justifies exculpation from criminal acts is a job reserved for the legislature.[170] Thus, defining legal insanity is a legitimate legislative responsibility. Any time the legislature enacts new criminal legislation or revises a law, people who previously would have been found innocent might now be adjudged guilty under the same facts. As long as the law is constitutional and is not applied in an ex post facto manner, changing the law rationally relates to the legitimate lawmaking function of the legislature.

Another conceivable equal protection argument is that the state's distinguishing between defendants found GBMI and those found guilty of the same offense violates the equal protection clause. At first glance, this claim appears to be especially meritorious in Alaska, the only state where the general parole provisions do not apply to GBMI offenders.[171] The equal protection clause, however, does not demand identical treatment, but only that any differentiation between GBMI

166. Until 1982, the statutory definition of insanity in Alaska was the Model Penal Code's "substantial capacity" test. *See* ALASKA STAT. § 12.45.083 (1980) (repealed 1982), quoted *supra* at note 4. This test is now the definition of mental illness required for a finding of GBMI. *See* ALASKA STAT. § 12.47.030(a) (1984).

167. 704 P.2d 651.

168. The court in *Hart* acknowledged that there were three classes of persons exempt from criminal responsibility under Alaska's previous insanity defense:

1. those unable as a result of mental disease or defect to appreciate the nature and quality of their conduct;
2. those unable as a result of mental disease or defect to appreciate that their acts were wrong; and
3. those irresistably compelled to commit the acts.

Under the new insanity defense, only those in the first category are expressly exempted. The *Hart* court noted that "theoretically" those in the other two classes could contend that their constitutional rights had been violated. *Id.* at 658.

169. *See supra* notes 147-49 and accompanying text.

170. *Hart,* 702 P.2d at 659.

171. *See* Slobogin, *supra* note 92, at 511 n.79.

and ordinary prisoners bear some relevance to a legitimate state purpose.[172] The GBMI classification is designed to punish criminals and to assure that those criminals whose behavior is caused by a level of mental illness insufficient to constitute an excuse receive treatment.[173] Crime prevention is a legitimate state purpose. Denying parole or furlough to inmates whose mental illness makes them dangerous to society is rationally related to this purpose.[174] GBMI inmates become eligible for these privileges once they are no longer "dangerous to the public peace or safety."[175] The classification continues, therefore, only as long as is necessary to achieve the stated purpose. Thus, restricting the release of GBMI inmates does not violate equal protection.

Finally, defendants in Alaska could argue that distinguishing between the insane and the mentally ill violates equal protection because the definitions of insanity and mental illness are based on similar behavioral characteristics. This argument, though not yet addressed in Alaska, has failed in other courts.[176] Although no bright line exists between legal insanity and the types of mental illness that do not excuse criminal conduct, the general consensus is that only some mentally ill people are eligible for acquittal.[177] Although application of the definition of legal insanity may prove difficult, the state need not excuse every mentally ill criminal. Acquitting only those with the most severe mental illnesses, while providing treatment to jailed prisoners who suffer from less severe illnesses, is rationally related to the goal of ensuring treatment for those whose criminal conduct is inexcusable.

Due to the absence of controlling precedent, it is impossible to predict exactly what level of scrutiny Alaska courts would apply when reviewing the constitutionality of the GBMI verdict under the equal protection clause of the Alaska Constitution. The determining factor will be the weight accorded the impaired interest.[178] The asserted individual interest—the right of a prisoner who has committed a crime under the influence of mental illness to be free from mandatory treatment intended to help him and to be free from restrictions on release applicable only while he remains dangerous—appears to be relatively

172. *See* Note, *supra* note 14, at 813.

173. *See* Note, *supra* note 15, at 548.

174. *See* People v. McLeod, 407 Mich. 632, 663-64, 288 N.W.2d 909, 919 (1980) (finding that stricter probationary terms for GBMI inmates are rationally related to government's purpose of deterring future crimes by GBMI offenders).

175. *See supra* note 101 and accompanying text.

176. *See, e.g.*, People v. Sorna, 88 Mich. App. 351, 360, 276 N.W.2d 892, 896 (1979). One commentator has pointed out that distinguishing between "mental illness" and "insanity" will be more difficult in states using the broad Model Penal Code test of insanity and substantially easier where the test is a stricter one, as in Alaska. *See* Note, *supra* note 15, at 550-51 n.254.

177. *See supra* notes 95-97 and accompanying text.

178. *See supra* note 159 and accompanying text.

weak. The level of review, therefore, is likely to approximate the federal rational relationship standard.[179]

Under equal protection analysis in Alaska, the prisoner's interest will be balanced against a very important state interest—preventing repeated criminal conduct by mentally ill offenders.[180] The fit between the means and the ends is also very close.[181] Only a prisoner found mentally ill in a trial is subject to differentiation, and treatment continues only as long as the prisoner remains dangerous.[182] In light of the above discussion, it seems highly unlikely that a successful equal protection challenge to the GBMI statute can be made under the Alaska Constitution.

IV. SUGGESTIONS FOR IMPROVEMENT

While Alaska's insanity laws are neither patently unfair nor unconstitutional, the following changes would help to clarify the legal status of mentally ill offenders and to assure that the law provides GBMI prisoners with all necessary treatment. First, Alaska must improve the quality and availability of mental health care.[183] Second, defendants should have adequate notice of who will be deemed NGRI and who will be found GBMI. To provide this notice, the Alaska Supreme Court's opinion in *Patterson* should resolve the conflict between the Alaska legislature[184] and the court of appeals[185] regarding the scope of the insanity defense. Furthermore, the statute should provide for hearings and examinations to determine and document that officials are properly administering treatment to prisoners. The public then would be more likely to perceive the GBMI verdict as fair and effective.

The highest priority for those concerned about the treatment of mentally ill defendants in Alaska should be to reform the state's mental health care system. Adequate psychiatric treatment at an earlier stage of illness might reduce the number of crimes committed by mentally ill offenders. Quibbling over the final disposition of mentally ill defendants is senseless if none of the alternatives will afford the treatment necessary to cure these defendants and to prevent future crimes. Only after adequate mental health care is available in Alaska can GBMI prisoners receive the treatment they require.

---

179. *See id.*
180. *See supra* note 162 and accompanying text.
181. *See supra* note 163 and accompanying text.
182. *See supra* note 101 and accompanying text.
183. *See supra* note 111 and accompanying text.
184. *See* 1982 ALASKA HOUSE JOURNAL supp. 63, at 5-6 (June 1, 1982).
185. *See supra* notes 59-61 and accompanying text.

Another pressing problem with the present insanity defense is that defendants lack notice of who will be considered NGRI. Although the Alaska legislature apparently intended a narrow definition of the defense,[186] the court of appeals has interpreted the statute broadly.[187] The state's appeal of *Patterson* provides an opportunity for the supreme court to resolve this conflict and to determine the scope of the statute. Although defendants and practitioners presently are uncertain about the wisdom of pleading insanity, interpretation by the court should resolve the controversy and provide fair notice of the definition of legal insanity in Alaska.

Finally, with respect to the controversial GBMI verdict, more stringent procedural safeguards would make the GBMI verdict fairer in the eyes of mentally ill defendants. A mandatory psychratric evaluation before treatment or a postconviction judicial hearing to determine the prisoner's mental state would alleviate concerns that competent prisoners are being treated unnecessarily.[188] These safeguards would also check some of the Department of Corrections' discretion to decide which GBMI prisoners must receive treatment.[189] Periodic hearings and examinations to ensure that GBMI inmates are being treated adequately also would allow prisoners or interested parties to enforce the prisoners' right to treatment.[190] These steps admittedly will increase the costs of a program that already suffers from insufficient funding.[191] To allocate money to the GBMI program efficiently, the legislature must balance the need for these procedural safeguards with the added expense.

V. CONCLUSION

The 1982 revision of the Alaska insanity defense and the addition of the GBMI verdict fell within the authority of the legislature. The GBMI statute legitimately achieves stricter social control over mentally ill offenders by acquitting only the most severely afflicted defendants and by mandating treatment for the less severely afflicted. For several reasons, the statute needs more stringent procedural safeguards. Efforts should also be made to improve Alaska's treatment of mentally ill offenders. These efforts should be directed at enhancing

186. *See* 1982 ALASKA HOUSE JOURNAL supp. 63, at 5-6 (June 1, 1982).
187. *See* Patterson v. State, 708 P.2d 712, 717 (Alaska Ct. App. 1985).
188. *See supra* note 119 and accompanying text.
189. *See supra* notes 46-47 and accompanying text.
190. *See supra* notes 112-13 and accompanying text.
191. *See supra* note 111.

the quality and increasing the availability of mental health care in the state.

Suzan E. DeBusk