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COMMENT

COMPETENCY TO STAND TRIAL AND THE INSANITY DEFENSE IN WYOMING--SOME PROBLEMS

The insanity defense has been a source of debate, confusion, and consternation at least since 1843 and *Daniel M'Naghten's Case*.¹ Though an issue in only a small percentage of all criminal trials,² the insanity defense has generated a cornucopia of literature³ suggesting changes ranging from substantive alteration in the test of insanity and procedural changes at trial, to abolition of the defense.

In a recent case involving the insanity defense, the Wyoming Supreme Court concluded:

This case exemplifies that society might better protect itself by a revision of our present laws and procedure when a defendant asserts the plea of insanity upon the trial of a case.⁴

Assuming that a "revision of our present laws" is both imminent⁵ and desirable, this comment will attempt to describe some of the present problems and to anticipate the problems involved in some of the available alternatives.

COMPETENCY TO STAND TRIAL: INSANITY AS A BAR TO A FULL ADJUDICATION OF THE CRIMINAL CHARGE

1. *Competency and Responsibility Distinguished*

Although the exculpation from criminal accountability is the dominant and probably most widely recognized aspect

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1. Queen Victoria was so dismayed by the acquittal of would-be assassins that she called a special session of the House of Lords to clarify the decision in M'Naghten's case. Out of this special session of the House of Lords came what we today call the M'Naghten test. R. SLOVENKO, *PSYCHIATRY AND LAW* 77 (1973).
2. A. MATTHEWS, *MENTAL DISABILITY AND THE CRIMINAL LAW* 30 (1969).
3. See, e.g., H. WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* (1954); T. SZASZ, *LAW, LIBERTY, AND PSYCHIATRY* (1963); A. GOLDSTEIN, *THE INSANITY DEFENSE* (1967); H. FINGARETTE, *THE MEANING OF CRIMINAL INSANITY* (1972); R. SIMON, *THE JURY AND THE DEFENSE OF INSANITY* (1967); R. SLOVENKO, *PSYCHIATRY AND LAW* (1973); Katz & Goldstein, *Abolish the Insanity Defense—Why Not?*, 72 *YALE L.J.* 853 (1963); Monahan, *Abolish the Insanity Defense?—Not Yet*, 26 *RUTGERS L. REV.* 719 (1973); Morris, *Psychiatry and the Dangerous Criminal*, 41 *S. CAL. L. REV.* 514 (1968).
4. *Reilly v. State*, 496 P.2d 899, 905 (Wyo. 1972).
5. In reality the potential of an impending revision of the Wyoming Statutes relating to the insanity defense is more than a bare assumption. As this issue goes to press, the Wyoming legislature is considering legislation which includes many of the subjects discussed in this comment.

of insanity as it affects a criminal case, the mental capacity of a defendant to stand trial is also subsumed under the "insanity defense" rubric. In Wyoming, the mental capacity or competency of a defendant to stand trial is styled a plea—"not triable by reason of present insanity."⁶ This competency plea, like the exculpatory plea of "not guilty by reason of insanity" is to be made at the arraignment stage of the criminal proceedings, although there is allowed a good-cause delay in entering both pleas.⁷ The equality of statutory status given both pleas, however, is misleading.

The test of the defendant's competency to stand trial is set out in the Wyoming statutes:

The test of the capacity to stand trial shall be whether the defendant has the capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to cooperate with his counsel to the end that any available defense may be interposed, although on some other subject his mind may be deranged or unsound.⁸

This test comports with the competency test approved in *Dusky v. United States*.⁹ It is obvious "that this is by no means the same test as those which determine criminal responsibility at the time of the crime."¹⁰ The plea of "not triable by reason of present insanity" is not a defense to the criminal charge—it is a bar to full adjudication of the charge.¹¹ Furthermore, while styled a plea in the Wyoming Statutes, the incompetency of the defendant, as measured by the *Dusky* test, is not really an answer to the criminal charge.

2. Duty to Determine Competence

It is well established that conviction of a defendant incompetent to stand trial is a violation of due process.¹² "A

6. WYO. STAT. § 7-240(b) (1957).

7. WYO. STAT. § 7-240(a) (1957).

8. WYO. STAT. § 7-241(C) (Supp. 1973).

9. 362 U.S. 402 (1960).

10. *Pate v. Robinson*, 383 U.S. 375, 389 (1965) (Harlan, J., dissenting).

11. WYO. STAT. § 7-240 (1957) provides in part: "All pleas of insanity as a defense or a bar to prosecutions for the commission of crimes shall be filed . . ." (emphasis added).

12. *Bishop v. United States*, 350 U.S. 961 (1956).

person cannot be tried, sentenced or punished for a public offense while insane."¹³ Rather than being an answer by the defendant to the criminal charge, it is the "*threshold issue* in any case . . . whether an accused is mentally competent to waive his constitutional rights and plead to the charge or stand trial"¹⁴ (emphasis added).

Solicitous of the constitutional right to a fair trial¹⁵ and due process considerations,¹⁶ the mechanics of insuring that this threshold issue of competency is determined have been fashioned accordingly. An affirmative duty has been placed upon the trial judge.

[T]he trial court's duty flows from the constitutional requirements of due process, *Pate v. Robinson*, 383 U.S. 375, as well as from 18 U.S.C.A. § 4244. And if any information coming to the attention of the court raises a bona fide doubt of the defendant's competency to waive his constitutional rights or plead or stand trial, it is the inescapable duty of the court to conduct a due process hearing to determine competency and to make appropriate findings.¹⁷

Given its due process justification, the validity of this duty imposed upon a trial court seems unquestionable.

This affirmative duty of the trial judge to determine competency as a threshold issue is, however, not reflected in the present Wyoming Statutes.¹⁸ Further, it seems that a Wyoming judge attempting to effectively fulfill this duty might be hindered by the statutory scheme.

3. *Problems—Competency to Plead Competency?*

As described above, in Wyoming the competency issue is a plea to be raised at the arraignment stage of the proceed-

13. WYO. STAT. § 7-239 (1957).

14. *Wolcott v. United States*, 407 F.2d 1149, 1150 (10th Cir. 1969), *cert. denied*, 396 U.S. 879 (1969).

15. See *Pate v. Robinson*, *supra* note 10, at 385.

16. *Bishop v. United States*, *supra* note 12.

17. *United States v. Bettenhausen*, 499 F.2d 1223, 1228 (10th Cir. 1974).

18 U.S.C. § 4244 (1970) provides for an examination regarding competency on the motion of the U.S. Attorney, defendant's counsel, or by the court's own motion if there is any doubt as to competency "after arrest and prior to the imposition of sentence"

18. WYO. STAT. § 7-239 *et seq.* (1957).

ings, or later by leave of court.¹⁹ The competency plea compels the trial judge to commit the defendant to the Wyoming State Hospital "or other suitable institution" for an examination.²⁰ This examination is to investigate the defendant's present mental capacity to stand trial in light of Wyoming's expanded version of the *Dusky* test.²¹

If the examination indicates the defendant is capable of standing trial as guided by our competency test, the "court shall proceed on the criminal charge"²²—the competency issue having been determined by the examination. If, however, the examination concludes that the defendant is incompetent to stand trial, a hearing is required, at which the competency issue is to be determined.²³

The triggering device to the procedure for determining the competency issue is the plea of "not triable by reason of present insanity." Without this plea there is no procedure for determining the competency issue—and herein lies the problem.

Our present law provides that the "defendant or someone in his behalf" may plead "not guilty by reason of insanity."²⁴ However, the statute does not stipulate who may plead the competency issue—"not triable by reason of present insanity."²⁵ The Wyoming Rules of Criminal Procedure provide that in addition to other allowable pleas, "[a] defendant may plead . . . not triable by reason of present insanity . . ."²⁶ (emphasis added).

19. WYO. STAT. § 7-240(b) (1957).

20. WYO. STAT. § 7-241(A) (Supp. 1973). This commitment for purposes of psychiatric examination is required also for the responsibility plea—"not guilty by reason of insanity."

21. WYO. STAT. § 7-241(C) (Supp. 1973).

22. WYO. STAT. § 7-241(C) (ii) (Supp. 1973). The finality of this examination is illustrated by *Cosco v. State*, 503 P.2d 1403 (Wyo. 1972), cert. denied, 411 U.S. 971 (1973).

23. WYO. STAT. § 7-241(C) (i) (Supp. 1973). If the hearing determines the defendant incompetent to stand trial, the defendant must be committed to the state hospital until certified competent. WYO. STAT. § 7-241(C) (iii) (Supp. 1973).

24. WYO. STAT. § 7-240(a) (1957).

25. WYO. STAT. § 7-240(b) (1957). This section provides: "A plea of 'not triable by reason of present insanity' may be entered at the time of arraignment of defendant; provided that the court may permit such plea to be made at a later time for good cause shown . . ."

26. WYO. R. CRIM. P. 15.

If literally true that it is the defendant who must raise the competency issue by pleading "not triable by reason of present insanity," the competency issue is rendered circuitous. As noted by the Supreme Court, "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial."²⁷ It is similarly contradictory to assert that a defendant who may be incompetent must assert his right to have the competency issue determined by pleading "not triable by reason of present insanity." A scheme which would require an incompetent defendant to take the initiative in having his own incompetency determined is perfectly circular.

On its face, the present Wyoming law suffers from this circuitry. However, in practical terms it is assumed that *defendant's counsel* would enter a plea of "not triable by reason of present insanity" on behalf of a client whose competency is in doubt. Though not explicitly allowed by our present law, defense counsel's initiative in making this plea for his client avoids this circuitry. This procedure would allow the court to assume its duty regarding the determination of the competency issue.

One can, however, postulate a situation in which avoidance of the circular circumstance posed by our present law would be more difficult. Suppose a defense attorney has a client whose competency the attorney questions. Suppose further that the client adamantly opposes his attorney entering a plea²⁸ of "not triable by reason of present insanity." The quandry presented to defense counsel in this hypothetical is obvious.

Defense counsel could inform the court of his predicament. In so doing, he places the onus on the court. If defense counsel's doubts as to the competency of his client are suf-

27. *Pate v. Robinson*, *supra* note 10, at 384.

28. ABA CANONS OF PROFESSIONAL ETHICS No. 7. Ethical Consideration 7-7 provides: "A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken."

ficient to raise a "bona fide doubt of the defendant's competency"²⁹ in the court's mind, the court must shoulder its duty to determine competency.³⁰ Assuming that the court is put on notice of this bona fide doubt prior to the arraignment, the statute prevents any determination of the competency issue at this time.³¹

Restrained at this point, the court would await the arraignment. At the arraignment, in order to fulfill its duty to determine competency, the court would "plead" the defendant "not triable by reason of present insanity." This plea would be entered by the court, despite the fact that the defendant refuses to allow his attorney to plead incompetency.³²

The "plea" having been entered by the court, the court could then order the defendant examined and the competency issue would be decided. It is only through this strained use of the competency plea that the court could assume its duty to determine competency.

4. *Alternative*

Wyoming seems to be the only jurisdiction in which determination of the competency issue is expressly conditioned upon a *plea* of incompetency. There are, however, several states which, like Wyoming, permit the issue of competency to be raised only at or after the arraignment of the defendant.³³

29. United States v. Bettenhausen, *supra* note 17.

30. See text p. 231 *supra*.

31. Our statutes provide for a commitment for examination regarding competency "where any plea of insanity is made . . ." WYO. STAT. § 7-241(A) (Supp. 1973). A plea of "not triable by reason of present insanity" can only be made at the arraignment stage of the proceedings. WYO. STAT. § 7-240(b) (1957). Further, the arraignment is the District Court's first jurisdictional step in our process—the preliminary examination and initial appearance held before the Justice Court. WYO. R. CRIM. P. 5 & 7.

32. This action by the court is not inconceivable. In Lynch v. Overholser, 369 U.S. 705, 707 (1962), the defendant, represented by counsel, tried to withdraw a plea of not guilty and plead guilty. "The trial judge refused to allow the change of plea, apparently on the basis of the Hospital's report that petitioner's commission of the alleged offense was the product of mental illness."

33. See, e.g., N.Y. CRIM. PRO. LAW § 730.30 (McKinney 1971); PA. STAT. ANN. tit. 19, § 1352 (1964); VA. CODE ANN. § 19.1-229 (Interim Supp. 1974); KY. R. CRIM. P. 8.06.

In some jurisdictions³⁴ the competency question is indeed a threshold issue. In these states, resolution of the competency issue seems permissible prior to the arraignment or even prior to the preliminary examination.³⁵ No particular time being fixed for a competency determination, judges in these jurisdictions do not face the problem of having to await any particular stage of the process to undertake their duty to resolve the question of competency.

While Wyoming's plea of incompetency presents the circuitry inherent in requiring a defendant to "plead" his own incompetency,³⁶ these jurisdictions obviate the problem of who may raise the competency issue. Some of these jurisdictions avoid the potential circuitry in Wyoming's plea of incompetency by simply not addressing who may raise the competency question.³⁷ In these jurisdictions there must be a competency determination if there is any doubt as to the defendant's mental capacity to stand trial. By not delineating the source of this doubt or how this doubt must be expressed, these states impliedly seem to allow the court to initiate competency determining proceedings on its own—without having to await any formal initiative taken by the defendant or his counsel. Indeed, several states explicitly allow the competency issue to be raised by the court on its own motion.³⁸

Adoption by Wyoming of a statute similar to those just discussed would solve the problems involved as to who may raise the competency issue and in fixing the competency issue to one particular stage of the proceedings. However, a fur-

34. See, e.g., CAL. PENAL CODE § 1368 (West 1970); MO. ANN. STAT. § 552.020 (Supp. 1974); NEB. REV. STAT. § 29-1823 (Supp. 1972); N.M. STAT. ANN. § 41-13-3.1 (1953); ORE. REV. STAT. § 161.360 (1973); VT. STAT. ANN. tit. 13, § 4814 (1974); ch. 198, § 6, [1974] Wash. Laws 3rd Ex. Sess. 451.

35. In some jurisdictions, a competency determination is provided for when there is doubt as to competency "at any stage of the proceedings." See N.M. STAT. ANN. § 41-13-3.1 (1953). Similarly representative language is found in the California statute: "If at any time during the pendency of an action and prior to judgment a doubt arises as to the sanity [competency] of the defendant, the court must order the question as to his sanity [competency] to be determined . . ." CAL. PENAL CODE § 1368 (West 1970).

36. See text p. 233 *supra*.

37. See, e.g., CAL. PENAL CODE § 1368 (West 1970); NEB. REV. STAT. § 29-1823 (Supp. 1972); ORE. REV. STAT. § 161.360 (1973).

38. See, e.g., MO. ANN. STAT. § 552.020 (Supp. 1974); N.M. STAT. ANN. § 41-13-3.1 (1953); ch. 198, § 6, [1974] Wash. Laws 3rd Ex. Sess. 451; VT. STAT. ANN. tit. 13, § 4814(a) (4) (1974).

ther problem exists with respect to the timing of the competency issue. While the statutes mentioned seem to allow determination of competency at any stage, at what stage or stages of the proceedings is the competence of the defendant a necessary prerequisite?³⁹

The competency of a defendant is unquestionably necessary for a constitutionally valid trial and conviction.⁴⁰ Although generally termed competency "to stand trial," a defendant must also be competent to enter a constitutionally valid plea of guilty.⁴¹ Consequently, the competency of a defendant seems a necessary prerequisite when the defendant is called upon to plead—at the arraignment. A determination of competency in advance of the arraignment seems appropriate, especially in a case where doubt arises as to competency prior to the arraignment.

The question remaining is the necessity of raising and determining the competency issue prior to or at the preliminary hearing. Good reason exists for suggesting that it should be necessary for a defendant to be competent at the preliminary examination as well as the pleading and trial stages.

In Wyoming, the preliminary examination is an extremely important step in the criminal justice process. There being no grand jury requirement in Wyoming,⁴² the importance of the preliminary examination is magnified. "In all cases triable in the district court, except upon indictment, the defendant *shall be entitled* to a preliminary examination."⁴³ (emphasis added).

39. Certainly no one would argue that competency is necessary for a valid arrest.

40. Bishop v. United States, *supra* note 12; Pate v. Robinson, *supra* note 10. See WYO. STAT. § 7-239 (1957).

41. Pate v. Robinson, *supra* note 10.

42. WYO. CONST. art. 1, § 9: "Hereafter, a grand jury may consist of twelve men, any nine of whom concurring may find an indictment, but the legislature may change, regulate or abolish the grand jury system."

WYO. STAT. § 7-92 (1957): "No grand jury shall be summoned or required to attend at the sittings of any district court of this state, unless the same shall be ordered by the district court or the judge thereof in vacation or recess of said court, and directed by it or him to be summoned."

43. WYO. R. CRIM. P. 7(a). Rule 7(a) supersedes Wyoming Statutes § 7-124 (1957), which provided exceptions to the necessity of a preliminary examination for felony cases.

The preliminary examination has been deemed a "critical stage" of the criminal proceeding so that the right to counsel is constitutionally necessary.⁴⁴ The defendant must be allowed "reasonable time and opportunity to consult counsel."⁴⁵ "Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution."⁴⁶

Though the right to counsel at the preliminary hearing is unquestionable, the practical effects of this right seem diminished if the defendant is incompetent.⁴⁷ The value of this right to counsel seems open to question if the defendant lacks "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding."⁴⁸ A defendant's beneficial utilization of this right to counsel is dubious if he is unable "to cooperate with his counsel to the end that any available defense may be interposed."⁴⁹ The incompetency of the defendant at the preliminary hearing may render nugatory the beneficial assistance the right to counsel is supposed to afford.⁵⁰

44. *Coleman v. Alabama*, 399 U.S. 1 (1970).

45. WYO. R. CRIM. P. 7(a).

46. *Coleman v. Alabama*, *supra* note 44, at 9.

47. There is, however, some indication by the Supreme Court that perhaps competency is not necessary at the preliminary examination. In describing some of the functions of counsel at the preliminary hearing, it was said, "Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail." *Coleman v. Alabama*, *supra* note 44, at 9.

If the Court was speaking of a psychiatric examination regarding competency, the implication is that a defendant need not be competent at the preliminary examination. However, the Court may have contemplated a psychiatric examination regarding insanity as a defense, in which case nothing has been said regarding competency.

48. *Dusky v. United States*, *supra* note 9, at 402.

49. WYO. STAT. § 7-241(C) (Supp. 1973).

50. Worthy of consideration in this context is the potential impact of a recent California Supreme Court decision. In *Gordon v. Justice Court*, 12 Cal. 3d 323, 525 P.2d 72, 115 Cal. Rptr. 632 (1974), the court condemned as constitutionally infirm the utilization of non-lawyer justices of the peace to try misdemeanor cases involving possible jail sentences. The court noted that "[s]ince our legal system regards denial of counsel as a denial of fundamental fairness, it logically follows that the failure to provide a judge qualified to comprehend and utilize counsel's legal arguments likewise must be considered a denial of due process." Justice of the peace conduct preliminary examinations as well as try misdemeanors in Wyoming. WYO. STAT. § 7-409(a) (Supp. 1973). It could be argued that legal education is required of those who conduct preliminary hearings. Since the right to counsel attaches at the preliminary hearing as well as trial, the same sort of logical nexus exists for requiring legally qualified judges in order to "comprehend and utilize counsel's legal argument," at the preliminary hearing.

Assuming that Wyoming could sense the necessity of a competent defendant in order to effectuate the right to counsel at the preliminary hearing,⁵¹ adoption of a statute similar to those allowing a competency determination at any stage of the proceeding could accomplish this end. However, some question could arise as to the validity of raising and determining competency at the preliminary examination under this kind of statute.

While providing for a resolution of the competency issue at any stage of the proceedings, these statutes describe the court as the prime actor in the process.⁵² Superimposed on Wyoming's court system, it could be argued that the competency question should not be decided at the preliminary hearing because the preliminary hearing is conducted by the commissioner (justice of the peace), not the court.⁵³

The jurisdictional problem manifested by this kind of potential argument has been obviated in two states clearly allowing for competency determination at the preliminary hearing. New Mexico avoids this problem by providing for a transfer of the competency issue to the district court, if it is not already there.⁵⁴ Missouri expressly allows the commissioner as well as the court to determine the competency issue.⁵⁵

Adoption of a statute similar to those in New Mexico or Missouri would cure the problems discussed in the present Wyoming law, and would allow for competency determina-

51. Like Wyoming, there are several other jurisdictions in which the competency of the defendant presumably cannot be raised at the preliminary examination. These states allow raising and determining the competency issue only after an information or indictment—i.e. after the preliminary hearing. *See, e.g.*, ARK. STAT. ANN. § 43-1301 (Supp. 1973); ARIZ. R. CRIM. P. 11.2; ME. REV. STAT. ANN. tit. 15, § 101 (Supp. 1974); NEV. REV. STAT. § 178.405 (1973); N.H. REV. STAT. ANN. § 135:17 (Supp. 1973); N.D. CENT. CODE § 29-20-01 (1974); OHIO REV. CODE ANN. § 2945.37 (Baldwin 1974); OKLA. STAT. ANN. tit. 22, § 1162 (1958); S.D. COMPILED LAWS ANN. § 23-38-2 (1967).

52. *See, e.g.*, CAL. PENAL CODE § 1368 (West 1970).

53. WYO. R. CRIM. P. 7(a).

54. N.M. STAT. ANN. § 41-13-3.1 (1953) provides *inter alia* that "[i]f the question [competency] is raised in a court other than the district court, the proceeding shall be suspended and the cause transferred to the district court."

55. MO. ANN. STAT. § 552.020 (Supp. 1974) provides for a resolution of the competency issue "[w]henever any judge or magistrate has reasonable cause to believe that the accused has a mental disease or defect excluding fitness to proceed"

tion at or prior to the preliminary hearing should a court decide competency is necessary at this stage of the proceeding.⁵⁶

THE DEFENSE OF INSANITY: INSANITY AS AN
EXCULPATION FROM CRIMINAL ACCOUNTABILITY

1. *In Perspective*

The substantive proposition that one is not responsible for a criminal act done while insane in the legal sense is a troublesome aspect of the criminal law and not without critics.⁵⁷ The metamorphosis of an otherwise criminal act by something so difficult to define and comprehend as insanity is also perplexing conceptually. Though problematic, the idea embodied in the insanity defense is not a convolution of the common law and *Daniel M'Naghten's Case*. Historical antecedents of the insanity defense existed considerably prior to Daniel M'Naghten's acquittal by reason of insanity.⁵⁸

Though troublesome and an important point of departure for commentators, the significance of the insanity defense in fact may be exaggerated. As noted previously, it is thought that the defense of insanity is involved in only a small percentage of all criminal trials.⁵⁹ In Wyoming only 2 of 102 defendants who pleaded not guilty by reason of insanity in a two year period were found by the state hospital

56. It should be noted that under the New Mexico statute a competency determination at or prior to the preliminary examination would seem to require a stay of proceedings in justice court, transfer to the district court for determination of competency, and then transfer back to the justice court for completion or commencement of the preliminary hearing. Under the Missouri statute the commissioner (justice of the peace) seemingly could stay or continue the preliminary examination until after competency is determined.

57. "Probably no branch of the criminal law has been the subject of so much criticism and controversy as the defense of insanity." H. WEIHOFEN, *supra* note 3, at 1.

58. "[I]t may be that Mohammedan law was the first to recognize insanity as a defense to crime." J. BIGGS, *THE GUILTY MIND* 40 (1967).

Furthermore, M'Naghten's acquittal was not a novelty in English law. "The first recorded insanity acquittal in English law occurred about a thousand years ago, under a rule sparing from execution a killer who 'falls out of his sense or wits.'" Dershowitz, *Abolishing the Insanity Defense: The Most Significant Feature of the Administration's Proposed Criminal Code—An Essay*, 9 CRIM. L. BULL. 434, 436-37 (1973).

59. A. MATTHEWS, *supra* note 2, at 30.

to be insane at the time of the crime.⁶⁰ These two defendants were not tried; rather they were transferred to mental hospitals in other states.⁶¹ Only 74 of 102 were tried; and only one of the defendants was acquitted by reason of insanity.⁶²

Nevertheless, there are some who suggest abolishing what we know as the insanity defense. Chief among the arguments for abolition seems to be the idea that the defense is based on outmoded ethical considerations of punishment only for those acts done with freedom of will.⁶³ Secondly, it is suggested that the defense is unrealistic when viewed against present psychiatric capabilities.⁶⁴ However convincing these arguments are perceived, it is precisely the longevity of the insanity defense which has led courts to retain it.⁶⁵

Assuming that a wholesale abrogation of the insanity defense will not be a result of any impending revision of Wyoming law,⁶⁶ there are some aspects of our law in which changes may be contemplated and made.

60. W. Lanthorn, *Disposition of Court Observation Cases at Wyoming State Hospital, 1970-72, July, 1973* (unpublished thesis in University of Wyoming Coe Library), at 20.

61. *Id.* at 23.

62. *Id.* at 24.

63. "The concept of lack of 'free will' is both the root of origin of the insanity defense and the line of its growth." *United States v. Brawner*, 471 F.2d 969, 986 (D.C. Cir. 1972).

64. For a summary of arguments for abolition of the defense, see *Morris, Psychiatry and the Dangerous Criminal*, *supra* note 3, at 544-47.

65. Three cases are often cited as preventing the abolition of the insanity defense. *State v. Strasburg*, 60 Wash. 106, 110 P. 1020 (1910); *Sinclair v. State*, 161 Miss. 142, 132 So. 581 (1931); and *State v. Lange*, 168 La. 958, 123 So. 639 (1929). However, only *Strasburg* dealt with an attempt at wholesale abolition of the defense.

The *Strasburg* court faced what appears to be the first legislative attempt to abolish the defense. In declaring the statute unconstitutional the court noted that the sanity of the defendant "is and always has been a question of fact for the jury to determine, as much so as any other question of fact bearing upon the responsibility of the accused for the occurrence of the act relied upon as constituting the offense charged." *State v. Strasburg*, *supra* at 1022-23.

Abolition of the defense by judicial rather than legislative action was considered and rejected as beyond the court's power in *United States v. Brawner*, *supra* note 63, at 985-86.

66. Abolition of the insanity defense does not seem to be a step doomed to fail, however. "The Supreme Court has never imposed a single insanity formula in either state or federal courts; indeed, the High Court has never clearly decided whether the Constitution requires that there be any insanity defense at all." *Dershowitz, Abolishing the Insanity Defense: The Most Significant Feature of the Administration's Proposed Criminal Code—An Essay*, *supra* note 58, at 437.

Though refusing to effect an abolition through judicial action, *United States v. Brawner* intimates that abolition of the defense may be possible through legislative enactment or constitutional amendment. *United States v. Brawner*, *supra* note 63, at 985-86.

2. *The Standard*

Although the standard for determining the competency of a defendant is prescribed by the Wyoming Statutes,⁶⁷ the standard for determining insanity sufficient to exculpate a defendant from criminal accountability is a creature of the courts. Since at least 1916 and *Flanders v. State*,⁶⁸ Wyoming has followed the M'Naghten Rule.

The jury instruction approved in *Flanders* also contained what is commonly referred to as the "irresistible impulse" or volitional test of insanity. This volitional test requires that the defendant have "sufficient will power to control his acts,"⁶⁹ in addition to the M'Naghten requirement of knowing the "nature and consequences"⁷⁰ of the act and that the act was wrong.

However, there seems some question of the status of the "irresistible impulse" test in Wyoming as the court evidently doubts having adopted the volitional alteration to the M'Naghten Rule.

Although we refer to Wyoming as having adopted the M'Naghten Rule, in at least two cases a modification has been *suggested* by this court, *State v. Riggle*, 76 Wyo. 1, 298 P.2d 349, 367, rehearing denied, 76 Wyo. 1, 300 P.2d 567, certiorari denied, 325 U.S. 981, 77 S.Ct. 384, 1 L.Ed.2d 366; *Flanders v. State*, 24 Wyo. 81, 156 P. 39, 44, rehearing denied, 156 P. 1121, by the inclusion of the so-called 'irresistible impulse' or 'uncontrollable act' test.⁷¹ (emphasis added).

67. WYO. STAT. § 7-241(C) (Supp. 1973).

68. 24 Wyo. 81, 156 P. 39, 44 (1916).

If the jury was satisfied beyond a reasonable doubt that, notwithstanding such mental condition, he knew and understood the nature and consequences of his act, and knew that it was morally wrong or forbidden by law, and, furthermore, that he had sufficient will power to control his acts, then such partial insanity would not constitute a legal excuse for his act.

The Wyoming court hinted at the M'Naghten Rule in discussing the presumption of sanity eight years earlier. *State v. Pressler*, 16 Wyo. 214, 92 P. 806, 809 (1907).

69. *Flanders v. State*, *supra* note 68.

70. *Id.*

71. *Reilly v. State*, *supra* note 4, at 904. There is another case which "suggests" that "irresistible impulse" is a part of our law. In *Cirej v. State*, 24 Wyo. 507, 161 P. 556, 557 (1916), the court objected to only part of an instruction on the sanity issue—the portion not objected to consisting of the necessity of having "sufficient will power to govern his action."

Perhaps the court only "refer[s] to Wyoming as having adopted the M'Naghten Rule" because the cases dealing with the standard have not expressly "adopted" a standard, but rather found no error in jury instructions containing a standard.⁷² There also seems to be no case in which the court has been urged to change the standard used in Wyoming—whether that standard be M'Naghten plus irresistible impulse or M'Naghten *sans* the volitional aspect.

Had Wyoming specifically "adopted" the M'Naghten Rule, the court would be faced with a relatively momentous step in embracing a proposal for an alternative standard. The prior case law in Wyoming does not however seem to pose such a structured circumstance; and a court-made change in our standard would not seem a paroxysm in the development of our case law.⁷³

The apparent lack of finality in the court's discussions of the standard for insanity in Wyoming could also be salutary in any legislative attempt to adopt a standard. A legislature desirous of adopting an alternative standard could arguably feel that it would not be overruling, by statute, a clearly established judicial standard. The capacity of a legislature to adopt a standard other than M'Naghten seems beyond question, as there are at least twelve states⁷⁴ which have

72. Perhaps the closest the Wyoming court has come to adopting a standard expressly is *Flanders v. State*, *supra* note 68, at 44. After paraphrasing a jury instruction containing the M'Naghten and "irresistible impulse" tests, the court opined: "That, in substance, we believe to be the rule of law in such cases."

73. If faced with an argument for a change in the insanity standard, the Wyoming court could allow for a change in the insanity standard without adopting a different standard and without expressly having to overrule prior cases. Such a change in the standard was accomplished in *State v. Grimm*, 195 S.E.2d 637, 647 (W. Va. 1973). Rather than expressly overrule the M'Naghten Rule and expressly adopt the American Law Institute test, the court noted that the M'Naghten Rule "has been justifiably criticized." The court continued, "We do not adopt any rigid language for the trial courts to use in instructing or charging the jury in such cases, but simply recommend that they adopt an approach based on the Model Penal Code referred to herein and dispense with the more limited test of right and wrong followed in the M'Naghten Rule." The court then noted it would approve of an instruction which was in essence the American Law Institute-Model Penal Code test.

74. ALASKA STAT. § 12.45.083 (1972); CONN. GEN. STAT. ANN. § 53a-13 (1972); IDAHO CODE § 18-207 (Supp. 1973); ILL. ANN. STAT. ch. 38, § 1005-1-11 (Smith-Hurd 1973); MD. ANN. CODE art. 59, § 25(a) (1972); MO. ANN. STAT. § 552.030 (Supp. 1974); MONT. REV. CODES ANN. § 95-501 (1969); N.Y. PENAL LAW § 30.05 (McKinney 1967); ORE. REV. STAT. § 161.295 (1973); UTAH CODE ANN. § 76-2-305 (Supp. 1973); VT. STAT. ANN. tit. 13, § 4801 (1974); WIS. STAT. ANN. § 971.15 (1971).

adopted versions of the American Law Institute-Model Penal Code test.⁷⁵

3. *Burden of Proof*

The Wyoming Statutes provide:

[T]he prosecution shall prove beyond a reasonable doubt both the commission of the offense charged and the sanity of the defendant at the time of the commission of the offense; provided that the state shall be aided by the presumption that the defendant is sane until evidence to the contrary is presented; and the burden of first going forward and entering evidence of insanity shall be upon the defendant.⁷⁶

This statutory scheme for burden of proof on the sanity issue is a codification of *State v. Pressler*,⁷⁷ and places Wyoming among that one-half of the states which also require the state to prove the defendant's sanity beyond a reasonable doubt.⁷⁸ Obviously, the other states require the defendant to prove his insanity,⁷⁹ the degree of proof generally being by a preponderance of the evidence.⁸⁰

A. Presumption of Sanity

The existence of a presumption of sanity seems univers-

75. MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962): "(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 the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law."

76. WYO. STAT. § 7-242(a) (1957).

77. *Supra* note 68, at 809.

78. Twenty-six states are listed as placing the burden of proof on the prosecution. *Pope v. State*, 478 P.2d 801, 812-13 n.24 (Alaska 1970). *See Annot.*, 17 A.L.R.3d 146 (1968). However, Wisconsin now places the burden of proof on the defendant. *See State v. Bergenthal*, 47 Wis. 2d 668, 178 N.W.2d 16, 26 (1970).

79. Twenty-four states are listed as placing the burden of proof on the defendant. *Pope v. State*, *supra* note 78, at 812 n.23. *See Annot.*, 17 A.L.R.3d 146 (1968). As noted above, Wisconsin is now among these states, bringing their number to twenty-five.

80. Several states which place the burden of proof on the defendant provide that the defendant prove his insanity "by the greater weight of the credible evidence" or "to the reasonable satisfaction of the jury." *State v. Bergenthal*, *supra* note 78, at 26; *Riggins v. State*, 226 Ga. 381, 174 S.E.2d 908, 910-11 (1970); and *Clayton v. State*, 45 Ala. App. 127, 226 So. 2d 671, 672 (1969).

Though such standards may seem synonymous with "by a preponderance" there is at least one court which thinks "to the reasonable satisfaction of the jury" is a higher standard of proof than "by a preponderance." *State v. Johnson*, 267 S.W.2d 642, 644 (Mo. 1954).

ally recognized.⁸¹ Beyond this recognition, however, there seems to be little agreement.⁸² Courts differ on the effect of the presumption, the quantum of evidence necessary to erase or rebut the presumption, and who decides if the presumption has been rebutted or erased.

Perhaps the major question involving the presumption of sanity is whether the effect of the presumption is substantive or procedural. If its effect is substantive, the presumption of sanity is a proposition "of substantive law governing the entire proceeding."⁸³ If the presumption's effect is procedural, the presumption of sanity "is simply a rule stating that the defendant has the burden of producing evidence (or of proving) his insanity at the time of the offense."⁸⁴

In Wyoming the presumption of sanity seems to be clearly a procedural device requiring the defendant to first come forward with evidence of his insanity at the time of the crime. This procedural effect given the presumption in Wyoming also eliminates any necessity of the state producing evidence on the sanity issue in its case in chief. In Wyoming the sanity of the defendant "is presumed, in the first instance, to exist, and has the force of evidence sufficient, if uncontradicted, to establish the sanity of the defendant. That is, it makes a *prima facie* case, and nothing more"⁸⁵

The substantive effect given the presumption of sanity in other jurisdictions means that "the presumption abides with the state throughout the case and continues even after the defendant has made a sufficient showing to procure insanity instructions."⁸⁶ Consequently, a substantive role given the presumption purposes "that the presumption of sanity

81. "All of the courts in this country are in agreement that there is a presumption that all persons are sane and responsible for their acts at the time of the commission of a criminal offense." *Bradford v. State*, 234 Md. 505, 200 A.2d 150, 152 (1964).

82. At least one court has been unable to agree on the effect to be given the presumption of sanity. *Commonwealth v. Vogel*, 440 Pa. 1, 268 A.2d 89 (1970).

83. C. McCORMICK, *EVIDENCE* § 346, at 830 (2d ed. 1972).

84. *Id.* at 830.

85. *State v. Pressler*, *supra* note 68, at 809.

86. *State v. Wilson*, 85 N.M. 552, 514 P.2d 603, 606 (1973).

does not disappear and is not extinguished by evidence tending to show insanity."⁸⁷

A concomitant of the presumption and a reason for characterizing it as procedural in Wyoming is the fact that the presumption of sanity exists only "until evidence to the contrary is presented."⁸⁸ Evidence presented by the defense of the defendant's insanity "erases the initial presumption of sanity."⁸⁹

As affected by the presumption of sanity, the Wyoming scheme seems to be as follows: (1) "[A]ided by the presumption that the defendant is sane,"⁹⁰ the state produces no evidence on the sanity issue in its case in chief, but rather undertakes to prove the commission of the offense. (2) The defense then introduces evidence of the defendant's insanity at the time of the offense. (3) In its case in rebuttal, the state then assumes its burden of proof on the sanity issue. By virtue of the procedural device of the presumption of sanity, the sanity *vel non* of the defendant seems not to be at issue until the defense assumes "the burden of first going forward and entering evidence of insanity."⁹¹

Though this is the path apparently intended for the introduction of evidence on and proof of the sanity issue, it does not seem to be mandatory. In *Gerard v. State*⁹² a different design was found permissible. In *Gerard* the state introduced lay testimony which evidently "bore on the defendant's sanity at the time of the offense,"⁹³ in its case in chief. The defendant then introduced expert testimony that "the defendant was insane at the time of the commission of the alleged offense, which views the State did not *thereafter* controvert."⁹⁴

87. *Id.* at 606. See also, *State v. Daniels*, 106 Ariz. 497, 478 P.2d 522, 527 (1970).

88. Wyo. STAT. § 7-242(a) (1957). See *Reilly v. State*, *supra* note 4, at 902.

89. *Gerard v. State*, 511 P.2d 99, 102 (Wyo. 1973).

90. Wyo. STAT. § 7-242(a) (1957).

91. Wyo. STAT. § 7-242(a) (1957). See *Hollander v. State*, 296 N.E.2d 449, 452 (Ind. 1973). "It is only when the defendant challenges the presumption with evidence of insanity that a question of fact is presented to the trier of fact."

92. *Supra* note 89.

93. *Id.* at 102.

94. *Id.* at 102.

The role assumed by the presumption of sanity in *Gerard* is indefinite at best. Because the state first breached the sanity issue, the presumption did not operate to put upon the defendant "the burden of first going forward and entering evidence of insanity."⁹⁵ Similarly, the presumption of sanity did not operate as a prima facie case for the state, as evidence bearing on the sanity issue was entered in the state's case in chief. Finally, there was no presumption to be erased by defense evidence of insanity because the state in effect did not utilize the presumption of sanity.

B. A Change in the Burden of Proof?

Whatever the impact of *Gerard*, it is certain that Wyoming imposes on the state the burden of proving the defendant's sanity beyond a reasonable doubt⁹⁶—whether that burden arises before or after the introduction of evidence on the sanity issue by the defendant. Assuming an impending revision of our present law, it is conceivable that a change in the burden of proof would be considered.

A state's original imposition of the burden of proof on the sanity issue on the state or the defendant and the degree of proof necessary to sustain this burden do not seem to be of constitutional dimension. *Leland v. Oregon*⁹⁷ sustained a state placing the burden of proving insanity on the defendant *beyond a reasonable doubt*.

The *Leland* court noticed that Oregon had required the defendant to prove his insanity since 1864, and had not opted for the rule of *Davis v. United States*⁹⁸ placing the burden of proof on the prosecution.⁹⁹ *Davis v. United States* was dispositive of the burden of proof as to sanity only in the federal jurisdiction; and some states did not choose to adopt it.¹⁰⁰ Recognizing that "beyond a reasonable doubt" is a relatively

95. WYO. STAT. § 7-242(a) (1957).

96. See *State v. Pressler*, *supra* note 68, at 809; *Flanders v. State*, *supra* note 68, at 44; *Rice v. State*, 500 P.2d 675, 676 (Wyo. 1972); *Reilly v. State*, *supra* note 4, at 902.

97. 343 U.S. 790, 799 (1952).

98. 160 U.S. 469, 484 (1895).

99. *Leland v. Oregon*, *supra* note 97, at 796.

100. *Id.* at 797.

higher standard of proof than that normally attached to the defendant's burden of proof on this issue, *Leland* nevertheless found that Oregon had not violated the constitution by imposing this standard on the defendant.¹⁰¹

Twelve years after *Davis v. United States*, when originally faced with the choice of imposing the burden of proof on the state or the defendant, Wyoming could have decided that the defendant should have to prove his insanity. However, *State v. Pressler*¹⁰² decided to impose that burden of proof on the state—where it has remained.¹⁰³ As *Leland* makes clear this initial choice involves no constitutional restraints. A potential question however, is the ability of a state to renege on that original choice and impose the burden of proof of the sanity issue on a different party. *Leland* provided no guidance on this question, since Oregon had not changed its original imposition of the burden of proof, but rather the degree of proof required.¹⁰⁴

C. Colorado and Wisconsin

A subsequent change in the imposition of the burden of proof of the sanity issue has been effected or attempted in at least two states—Colorado and Wisconsin. Like Wyoming, both states had initially imposed the burden of proof on the state rather than the defendant.¹⁰⁵

In Colorado, the impetus to change the original placement of the burden of proof came from the legislature and was rebuked by the judiciary. In *People ex rel. Juhan v. District Court*, Colorado was faced with a legislative enactment which would "require a defendant who enters a plea of not guilty by reason of insanity to establish, by a preponderance of evidence, the fact of insanity."¹⁰⁶

In holding this statute unconstitutional, the *Juhan* court reaffirmed a number of Colorado cases requiring the state to bear the burden of proof on the sanity question.

101. *Id.* at 798-99.

102. *Supra* note 68.

103. WYO. STAT. § 7-242(a) (1957).

104. *Leland v. Oregon*, *supra* note 97, at 796.

105. *State v. Esser*, 16 Wis. 2d 567, 115 N.W.2d 505, 516 (1962); *Ingles v. People*, 92 Colo. 518, 22 P.2d 1109, 1111 (1933).

106. 165 Colo. 253, 439 P.2d 741, 743 (1968).

As thus interpreted by the judiciary over the years the due process clause of the state constitution includes the doctrine that the state must prove guilt beyond a reasonable doubt, and that the accused cannot be required by legislative enactment to prove his insanity or any other defense by a preponderance of the evidence.¹⁰⁷

The longevity of the requirement that the state shoulder the burden of proof of sanity seemed a significant fact in the *Juhan* decision. The court characterized this requirement as "a 'fundamental' doctrine by *long continued adherence thereto*, which has brought that concept within the coverage of the due process clause of the state constitution. . . ."¹⁰⁸ (emphasis added). The *Juhan* decision seems to posit a due-process-equals-history rationale for upholding a state's original imposition of the burden of proof.

Unlike Colorado, the stimulus for a change in the imposition of the burden of proof in Wisconsin from the state to the defendant originated with the judiciary. Two years prior to the *Juhan* decision, *State v. Shoffner* initially allowed for a change in the placement of the burden of proof in Wisconsin.¹⁰⁹

Perhaps the primary basis for the *Shoffner* decision was the argument over the adequacy or inadequacy of the insanity standard used in Wisconsin by virtue of *State v. Esser*.¹¹⁰ The *Shoffner* court noted "we have not been convinced that the *Esser* definition, coupled with the rule imposing upon the state the burden of proof beyond a reasonable doubt, is producing unjust results, and we are not convinced that the *Esser* definition should be changed."¹¹¹ Nevertheless, *Shoffner* pre-

107. *Id.* at 745.

108. *Id.* at 745. The *Juhan* court vehemently dismissed *Leland v. Oregon* as inapposite. The court stated that it was construing due process *viz.* Colorado: "We are not in the least concerned with what it meant in the state of Oregon in 1864, or any time thereafter."

109. 31 Wis. 2d 412, 143 N.W.2d 458 (1966).

110. *Supra* note 105, at 522. "The term 'insanity' in the law means such an abnormal condition of the mind, from any cause, as to render the defendant incapable of understanding the nature and quality of the alleged wrongful act, or incapable of distinguishing right and wrong with respect to such act."

Three judges in the *Shoffner* case supported the adoption of the American Law Institute definition. *State v. Shoffner*, *supra* note 109, at 464.

111. *State v. Shoffner*, *supra* note 109, at 463-64.

scribed a procedure whereby a defendant could be tried under the American Law Institute (ALI) test if he chose to do so.¹¹²

The position of the burden of proof was evidently viewed by the *Shoffner* court as an integral part of the standard or definition of insanity. Under the *Shoffner* procedure,¹¹³ a defendant could elect to be tried under the ALI test only if he "assume[d] the burden of proof on the insanity issue . . ." ¹¹⁴ In 1969, this transposition of the burden of proof was made law in Wisconsin by a statute adopting the ALI test of insanity and placing the burden of proof on the defendant.¹¹⁵

D. Implications for Wyoming

Assuming an attempt to transpose the burden of proof of sanity from the state to the defendant and analogizing from the Colorado and Wisconsin experiences in this context, several implications and conclusions are available. Conceptually, the Colorado and Wisconsin cases pose an important issue: whether the question of the position of the burden of proof is to be viewed as *sui generis*, as in *Juhan*; or as a concomitant and outgrowth of the test for insanity applicable in the jurisdiction, as in *Shoffner*. Perhaps determinative of this conceptual question is the manner in which the issue is framed: whether the question of the position of the burden of proof is raised as a distinct and general proposition—as in *Juhan*—or in conjunction with the question of which insanity standard is to be applied—as in *Shoffner*.

An attempt by Wyoming's legislature to alter the position of the burden of proof without suggesting an alternative insanity standard would be problematic under either the

112. *Id.* at 464.

113. "Accordingly, we direct that where a defendant pleads not guilty by reason of insanity, presents evidence that as a result of mental disease or defect . . . he lacks substantial capacity to conform his conduct to the requirements of law, desires to be tried under the American Law Institute definition of the defense, and is willing to carry the burden of proof on the issue, he is to be permitted to waive such provisions of sec. 957.11 (1) and (2), Stats., as place the burden of proof on the insanity issue on the state, and have the jury instructed in terms of the American Law Institute definition." (emphasis added). *State v. Shoffner*, *supra* note 109, at 465.

114. *State v. Shoffner*, *supra* note 109, at 464.

115. WIS. STAT. ANN. § 971.15 (1971).

Juhan or *Shoffner* conceptions of the issue. Since the position of the burden of proof of sanity in Wyoming was clearly established in 1907,¹¹⁶ a court faced with this legislative action could find that the imposition of this burden on the state had become a constitutional right on the basis of the *Juhan* reasoning. Also troublesome is the prospect of a legislature statutorily overruling a long established judicial rule.

Under the *Shoffner* rationale, this legislative action could also be difficult. A Wyoming court could decide that it is our version of the M'Naghten Rule which imposes the burden of proving the defendant's sanity on the state; and that without a change in the test there can be no change in the position of the burden of proof.

A legislative attempt to change both the insanity standard and the position of the burden of proof is presumably possible. If it is true that the Wyoming court has not clearly and specifically adopted an insanity standard, the spectre of a legislature overruling judicially created rules would seem diminished. The *Shoffner* conception of the burden of proof being an adjunct of the standard could be utilized to validate this action.

The Wyoming court could, however, decide that legislative adoption of a standard is not untoward legislative action, and nevertheless invalidate a change in the burden of proof on the basis of the *Juhan* reasoning. Conceiving of the placement of the burden of proof as distinct from the issue of the standard to be applied, the *Juhan* reasoning could be applied to defeat a change in the position of the burden.¹¹⁷

3. Procedure at Trial

Following the commitment and examination of a defendant who pleads not guilty by reason of insanity,¹¹⁸ the Wyo-

116. *State v. Pressler*, *supra* note 68.

117. If the legislature should adopt the American Law Institute-Model Penal Code standard, a court could buttress its *Juhan* reasoning with the Model Penal Code provisions on burden of proof. MODEL PENAL CODE § 1.12 (Proposed Official Draft 1962). Though styled an affirmative defense, the defendant under the Model Penal Code has only the burden of first going forward with evidence of insanity—just as he must do so under Wyoming's present law.

118. WYO. STAT. § 7-241 (A) (Supp. 1973). "In all cases where any plea of insanity is made, the judge shall forthwith order the commitment of the defendant to the Wyoming state hospital or other suitable institution for observation and examination"

ming Statutes provide: "there shall be . . . a *single trial* upon the issue of the commission of the crime, and at such trial the defendant may present any defenses he may choose, including that of insanity at the time of the commission of the alleged offense."¹¹⁹ (emphasis added). At this "single trial" "both the commission of the offense charged and the sanity of the defendant at the time of the commission of the offense"¹²⁰ must be proved.

This statute requiring the consolidation of issues in a "single trial" is an amended version of the statute in force until 1951. Prior to 1951, the Wyoming Statutes required two trials—one on the issue of defendant's sanity and the other on the commission of the offense. In a case where the defendant had pleaded not guilty by reason of insanity, the pre-1951 statute required that:

The Court shall thereafter order a trial of the defendant upon such plea only, which trial shall be by jury in the same manner as criminal cases are tried. If upon such trial, the defendant be found sane, such finding or verdict shall be final and conclusive, and said defendant shall then be tried for the offense charged in the same manner as if said plea had not been made, either before the same jury, or before a new jury, in the discretion of the court.¹²¹

Viewed from this pre-1951 perspective, the words "single trial" in the present statute take on added significance. However, the difficulties engendered by the "single trial" procedure become apparent only when this procedure is viewed in its relationship with the mandatory psychiatric examination of the defendant and the testimony of the examining expert at trial.

A. The Problem

Like several other jurisdictions, Wyoming requires a court-ordered psychiatric examination of a defendant relying

119. Wyo. STAT. § 7-242 (1957).

120. Wyo. STAT. § 7-242(a) (1957).

121. Ch. 83, § 3 [1939] Wyo. Sess. Laws (amended 1971). See *State v. Rouse*, 58 Wyo. 468, 134 P.2d 1116 (1943).

on the defense of insanity.¹²² Though challenged on Fifth Amendment and due process grounds, the constitutional validity of these examinations is universally recognized.¹²³ However, "The difficult question is whether inculpatory statements or confessions of the accused respecting the crime charged, made during the psychiatric interview and examination, may be introduced in evidence."¹²⁴

Plainly, the psychiatric expert needs to ask questions about the facts surrounding the alleged crime and the subjective feelings of the defendant in order to form an opinion as to the mental condition of the defendant at the time of the offense. Also clear is the necessity of a defendant responsively answering these questions in order for the examination to be complete and thorough. "Psychiatric examinations are greatly dependent upon testimonial utterances of the person examined."¹²⁵

The response given to the psychiatric expert's questions are likewise necessary and helpful in order for the trier of fact to determine the basis for the expert's opinion. These responses, as related by the expert, could also aid the trier of fact in its own determination of the issue of defendant's sanity.

In addition to their usefulness on the issue of defendant's mental condition, the statements made by a defendant during a psychiatric examination may also provide some credible indications of guilt. In answering the questions posed during the psychiatric examination a defendant may admit the com-

122. WYO. STAT. § 7-241(A) (Supp. 1973). Other states which require this examination are: Arkansas, ARK. STAT. ANN. § 43-1301 (Supp. 1973); Colorado, COLO. REV. STAT. ANN. § 39-8-2(1) (1963); Idaho, IDAHO CODE § 18-211(1) (Supp. 1973); Kansas, KAN. STAT. ANN. § 22-3219(2) (Supp. 1973); Montana, MONT. REV. CODES ANN. § 95-505(1) (Supp. 1974); Oregon, ORE. REV. STAT. § 161.315 (1973); South Dakota, S.D. COMPILED LAWS ANN. § 23-37-2 (1967).

123. "In recent years when statutes requiring or permitting court order for psychiatric examination of an accused have been attacked as transgressing the privilege against self-incrimination, the attacks have been rejected uniformly." *State v. Whitlow*, 45 N.J. 3, 210 A.2d 763, 770 (1965). See *State v. Riggle*, 76 Wyo. 1, 298 P.2d 349, 373-74 (1956); *State v. Spears*, 76 Wyo. 82, 300 P.2d 551, 563 (1956); *State v. Myers*, 220 S.C. 309, 67 S.E.2d 506, 507 (1951); *Parkin v. State*, 238 So. 2d 817, 819 (Fla. 1970); *People v. Schranz*, 50 Mich. App. 227, 213 N.W.2d 257, 261 (1973).

124. *State v. Whitlow*, *supra* note 123, at 770.

125. *Parkin v. State*, *supra* note 123, at 822.

mission of the crime or incriminate himself with respect to the crime. It is this additional potential of the expert's testimony on the sanity issue which gives rise to difficulty.

Clearly if such statements by the accused are introduced through the examining expert's testimony for the purpose of showing the basis of the expert's opinion or as evidence of mental condition, such statements are competent evidence. If introduced for these purposes, the testimony of the expert relating statements made by the defendant is not hearsay. These statements are not being introduced "as evidence of the factual truth which may be contained in them."¹²⁶

However, the characterization of the *purpose* for the expert's testimony does not describe its possible *effect*. If the trier of fact is to determine both the commission of the crime and the sanity of the defendant in a simultaneous trial of these issues, the potential effect of expert testimony containing admissions or incriminating statements is obvious and troublesome.

By his testimony on the sanity issue, the expert may pre-empt or buttress a jury finding of guilt-in-fact. By responding to questions at a court-ordered examination of his mental condition, a defendant may inculcate himself in the crime charged because of the potential effect of the examining expert's testimony. The implications of the Fifth Amendment protection against self-incrimination in this context have not gone unnoticed.¹²⁷

To vitiate this potential effect of statements made by the accused, it has been suggested that a limiting instruction be given the jury. Though these statements are admissible, the jury is instructed that "Their function or probative force, however, is limited to the sanity issue and may not be used

126. *Id.* at 822.

127. See, e.g., Berry, *Self-Incrimination and the Compulsory Mental Examination: A Proposal*, 15 ARIZ. L. REV. 919 (1973); Note, *Requiring a Criminal Defendant to Submit to a Government Psychiatric Examination: An Invasion of the Privilege Against Self-Incrimination*, 83 HARV. L. REV. 648 (1970); Comment, *Compulsory Mental Examinations and the Privilege Against Self-Incrimination*, 1964 WIS. L. REV. 671.

as substantive evidence of guilt."¹²⁸ In effect the jury is told that an inculpatory statement is not incriminating: the efficacy in fact of such a limiting instruction is at least arguable.¹²⁹ "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction . . ."¹³⁰

B. Wyoming

*State v. Riggle*¹³¹ illustrates that both the purpose for which a defendant's statements are used and their effect may be unrelated to the sanity issue. In *Riggle* the accused told the examining expert that he had served time in the state penitentiary. The prosecutor then used this revelation to the expert as a basis for impeaching the defendant's reputation for truth and veracity.

The Wyoming court noted:

True, it does not appear that the defendant had been warned that evidence might be used against him. But it does not appear that any compulsion was used when defendant made the statement. It was merely a collateral fact, not an admission of his guilt of the crime charged herein, and no warning was necessary if, as a matter of fact the evidence was voluntarily made as appears to be true in the case at bar.¹³²

The court went on to note that the insanity plea makes relevant a wide variety of evidence. "The plea of insanity made relevant all the incidents of defendant's life from the cradle to the time of trial."¹³³

In *State v. Spears*,¹³⁴ a similar view was taken by the court.

A defendant in a criminal case is not required to plead insanity; but when he does so, by his plea, he

128. *State v. Whitlow*, *supra* note 123, at 770; *State v. Obstein*, 52 N.J. 516, 247 A.2d 5, 13 (1968).

129. *Bruton v. United States*, 391 U.S. 123, 126 (1968).

130. *Krulwitsch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring), *quoted in* *Bruton v. United States*, *supra* note 129, at 129.

131. *Supra* note 123.

132. *Id.* at 364.

133. *Id.* at 368-69.

134. 76 Wyo. 82, 300 P.2d 551 (1956).

submits himself to the examination prescribed by statute and *thereby permits the results of such examination to be presented to the court.*¹³⁵ (emphasis added).

The Wyoming court does not appear to have dealt with an admission or a statement implicating the defendant in the crime charged in the expert's testimony. However, implicit in *Riggle* and *Spears* is the suggestion that, by pleading insanity the defendant engages in some sort of waiver with respect to his responses to questions in the mandatory psychiatric examination. This kind of analysis seem to place a premium on the plea of insanity.

As a consequence, it is possible that some day a defendant may plead insanity and then refuse to respond to questions during the court-ordered psychiatric examination.¹³⁶ This circumstance would render nugatory the very real assistance the expert could provide on the question of defendant's sanity, and pose a difficult question for the court.

In order to preserve the beneficial assistance the court-ordered examination can provide, the court could condition the testimony of the defendant's expert on the defendant responding to questions in the court-ordered psychiatric investigation.¹³⁷ However, this kind of leverage would obtain only if the defendant were sufficiently affluent to have engaged his own psychiatric expert.

Barring this situation, the court would face a set of difficult options: (1) The court could allow the case to go to trial and there permit the state to prove defendant's refusal to respond to the examiner's questions. Akin to comment on defendant's failure to testify, the constitutional propriety of

135. *Id.* at 564.

136. See, e.g., *Parkin v. State*, *supra* note 123, at 818; *French v. District Court*, 153 Colo. 10, 384 P.2d 268, 269-70 (1963).

137. *Parkin v. State*, *supra* note 123, at 822. "In answer to the question certified to us by the District Court, we hold that, where a defendant in a criminal case serves notice that she will rely upon the defense of insanity and the court over her objections orders her to give testimonial response to the court-appointed psychiatrists under pain of forfeiting the testimony of her privately-engaged psychiatrist, the defendant's rights to freedom from self-incrimination are not invaded."

this option seems extremely doubtful.¹³⁸ (2) The court could accept the defendant's refusal to respond, negating the potential of expert assistance on the sanity question. The court would seemingly have to resign itself to a trial of the sanity issue based entirely on lay testimony. (3) The court could attempt to deny the defendant's utilization of the insanity defense at trial unless he responds to the questions posed in the court-ordered examination. An exercise of this option would appear doomed to failure. In *French v. District Court*,¹³⁹ the court was faced with this situation:

A person accused of crime who enters a plea of not guilty by reason of insanity, cannot be compelled to carry on conversations against his will under the penalty of forfeiture of the defense for failure to respond to questions or for a refusal to 'cooperate' with persons appointed to examine him. The statute which prescribes the procedure to be followed upon the entry of a plea of not guilty by reason of insanity cannot operate to destroy the constitutional safeguards against self-incrimination.¹⁴⁰

C. A Solution—The Bifurcated Trial

Viewed from one perspective, it is the court-ordered psychiatric examination which creates the problems just discussed. Without examination, these problems would not exist. However, the insight the expert can provide into the difficult and complex issue of the accused's mental condition at the time of the offense is invaluable. And, as previously noted, courts have been unwilling to find anything constitutionally wrong with the examination itself. It is not the original reception of a defendant's statements which creates difficulty—it is their subsequent use at trial. Viewed from this perspective, the defendant's disclosures at the psychiatric examination create problems because of the context in which these disclosures are presented—in a simultaneous trying of both the guilt and sanity issues.

138. *State v. Whitlow*, *supra* note 123, at 774. The *Whitlow* court noted that *Griffin v. California*, 380 U.S. 609 (1965) and *Malloy v. Hogan*, 378 U.S. 1 (1964); cast grave doubt on proof of defendant's refusal to respond to questions at the court-ordered psychiatric examination.

139. 153 Colo. 10, 384 P.2d 268 (1963).

140. *Id.* at 270.

The obvious alternative to Wyoming's "single trial" procedure is a trial in which the issues of guilt and sanity are separated. This separation of issues is commonly called a "bifurcated" trial and is provided for by statute in California, Colorado and Wisconsin.¹⁴¹ Similar to Wyoming's pre-1951 statute, Colorado requires the issue of sanity to be tried first, and the guilt issue second, with provision for a second jury.¹⁴² In California and Wisconsin, the guilt issue is determined first and the sanity issue second.¹⁴³

This separation of guilt and sanity can effectively preempt the problems discussed in the single trial procedure. The problem of a defendant's admissions or incriminating statements being admitted for the purpose of showing the basis of expert testimony or as evidence of mental condition, but having the potential effect of helping to establish guilt, is avoided. Because the guilt issue has been determined without evidence of sanity or is reserved for a second jury to determine, the potential prejudicial effect of defendant's inculpatory statements at the psychiatric examination is nullified. Similarly, a defendant who may fear the subsequent use and effect of his answers to questions posed in a psychiatric interview would have little or no reason to refuse answering these questions since these statements could not affect a jury finding of guilt.

As one court has noted, this severance of the guilt and sanity issues,

is provided in order to protect the accused from prejudice which might arise in the minds of a jury trying both the issue of guilt and of mental condition. Separate trials of these issues are provided to safeguard, so far as possible, against the prejudice likely to arise by reason of the wide variety of evidence which might be competent on the issue of insanity and which would not be admissible upon the trial of the not guilty plea.¹⁴⁴

141. California, CAL. PENAL CODE § 1026 (West 1970); Colorado, COLO. REV. STAT. ANN. §§ 39-8-3 & 39-8-4 (1963); Wisconsin, WIS. STAT. ANN. § 971.175 (1971).

142. COLO. REV. STAT. ANN. §§ 39-8-3 & 39-8-4 (1963).

143. CAL. PENAL CODE § 1026 (West 1970); WIS. STAT. ANN § 971.175 (1971).

144. *Trujillo v. People*, 150 Colo. 235, 372 P.2d 86, 88 (1962).

D. Problems in Separating Guilt and Sanity

Again assuming a revision of present Wyoming law, it is possible that Wyoming would return to the idea embodied in the pre-1951 statute—a severance of the guilt and sanity issues for purposes of trial. This separation of issues could be seen as a prejudice-preventing device and embraced as a part of any impending review of Wyoming law. Although the bifurcation of a trial involving the insanity defense can rectify some problems, it should not be looked upon as a panacea. “Bifurcated trial procedures have been challenged on due process grounds wherever they have been employed.”¹⁴⁵

As two eminent commentators point out,¹⁴⁶ a significant facet of the debate over bifurcated trials is the way in which the insanity defense is perceived. The end result of establishing the fact of legally sufficient insanity at the time of the offense is the exculpation of the accused from criminal sanctions. The question is whether this lack of criminal responsibility is the issue to be determined or only a result of this determination. Professors Louisell and Hazard indicate that the insanity of the defendant may be viewed as bearing on the *capacity* of the defendant to commit a crime or on the *responsibility* of the defendant for committing a crime.¹⁴⁷ This dichotomy may be significant in determining the severability of sanity from guilt.

If insanity relates to the *capacity* to commit crime, then insanity must be considered in determining the “guilt” of the defendant.¹⁴⁸ A person incapable of committing a crime because of his insanity cannot be “guilty” of a crime. Consequently, “guilt” and sanity are inseparable.

If, on the other hand, insanity relates to the *responsibility* of the defendant for a crime, insanity need not be considered

145. Comment, *Due Process and Bifurcated Trials: A Double Edged Sword*, 66 NW. U.L. REV. 327, 328 (1971). Compare *State v. Shaw*, 106 Ariz. 103, 471 P.2d 715 (1970) with *State v. Hebard*, 50 Wis. 2d 408, 184 N.W.2d 156 (1971).

146. Louisell & Hazard, *Insanity as a Defense: The Bifurcated Trial*, 49 CALIF. L. REV. 805 (1961).

147. *Id.* at 805-06.

148. *Id.*

in determining a defendant's "guilt."¹⁴⁹ By virtue of this analysis, a person can be "guilty" of a crime if he is insane, but he cannot be held responsible. Therefore, it is possible to separate "guilt" and sanity.

Notwithstanding the usefulness of this capacity-responsibility dichotomy, the ability to separate "guilt" from sanity and the validity of bifurcated trials can be decided on the basis of the relationship between insanity and intent. Arizona has invalidated its bifurcated trial procedure, while Wisconsin's was upheld on the basis of the intent-insanity relationship.¹⁵⁰

In *State v. Shaw*¹⁵¹ Arizona's bifurcated trial procedure was deemed violative of due process because of the court's view that insanity precludes intent. The Arizona procedure, like California and Wisconsin, required that guilt be determined first and sanity second, evidence of insanity being restricted to the second stage of the trial.

The Arizona court reasoned that:

To prohibit the introduction of any or all the evidence bearing on proof of insanity at the trial of guilt or innocence would deprive a defendant of the opportunity of rebutting intent, premeditation, and malice, because an insane person could have none.¹⁵²

The court proposed that this prohibition of evidence of insanity at the guilt stage "gives rise to a presumption of intent, premeditation, or malice which runs counter to the common-law and constitutional concepts of criminal law."¹⁵³ Continuing, the *Shaw* court reasoned that since "The second trial is limited solely to the question of legal insanity,"¹⁵⁴ this "presumption of intent" becomes conclusive and is "in violation of due process, as was pointed out in *Morissette v. United States*, 342 U.S. 246"¹⁵⁵ Bolstering and perhaps com-

149. *Id.*

150. *Arizona, State v. Shaw, supra* note 145; *Wisconsin, State v. Hebard, supra* note 145.

151. *Supra* note 145.

152. *Id.* at 724.

153. *Id.*

154. *Id.*

155. *Id.*

elling the *Shaw* decision is an Arizona statute requiring that "In every crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence".¹⁵⁶

Criticizing the *Shaw* logic, the Wisconsin court upheld the bifurcated trial against constitutional challenge in *State v. Hebard*.¹⁵⁷ The Wisconsin court did not find the *Shaw* view of the intent-insanity relationship persuasive. The *Hebard* court does not view insanity as negating intent. "[A] court finding of legal insanity is not a finding of inability to intend; it is rather a finding that under the applicable standard or test, the defendant is to be excused from criminal responsibility for his acts."¹⁵⁸ Under this view, the preclusion of insanity evidence at the guilt trial is permissible.¹⁵⁹

Under the *Hebard* rationale, intent can be determined without reference to insanity because insanity relates only to the defendant's responsibility. Under the *Shaw* reasoning, intent cannot be determined without reference to insanity because insanity precludes intent.

Whether initial formulations or *post hoc* justifications, the conflicting views of the insanity-intent relationship represented by *Shaw* and *Hebard* could provide guidance should the Wyoming Legislature decide to reinstate the bifurcated trial. Faced with a constitutional challenge to a statute requiring a bifurcated trial and prohibiting evidence of insanity at the trial of the guilt issue, the Wyoming court could arguably subscribe to either the *Shaw* or *Hebard* rationales.

Presented with such a challenge, the Wyoming court could dismiss *Shaw* as inapposite because Wyoming has no statute requiring a "union or joint operation of act and intent."¹⁶⁰ Although the necessity of some kind of *mens rea*

156. ARIZ. REV. STAT. ANN § 13-131 (1956).

157. *Supra* note 145.

158. *Id.* at 163.

159. See *Curl v. State*, 40 Wis. 2d 474, 162 N.W.2d 77 (1968), cert. denied, 394 U.S. 1004 (1969).

160. ARIZ. REV. STAT. ANN. § 13-131 (1956).

requirement has recently been affirmed in *State v. Stern*,¹⁶¹ the Wyoming court could assert the inappropriateness of viewing insanity as precluding capacity to commit crime or form criminal intent. Viewing insanity as relevant only to the question of the accused's criminal responsibility, a separation of guilt and sanity could be upheld on the basis of *Hebard*.

Alternatively, it could be argued that Wyoming views the sanity and guilt issues as inseparable. A cogent argument could be made that since the state must prove the defendant's sanity as well as the commission of the crime, the sanity of the accused is an integral part of the guilt determination.¹⁶² In order to remain logically consonant with the burden of proof, it could be posited that Wyoming necessarily views insanity as affecting the capacity of the defendant to commit crime or form intent. Therefore, it could be concluded that guilt and insanity are inseparable at the trial on the basis of *Shaw*.

E. A Proposal

Wyoming could, however, avoid the problems posed by a separation of guilt and sanity and yet prevent the prejudicial potential of a unitary trial in cases involving the insanity defense. Rather than determining the "guilt" of the defendant, the first stage of the trial could be structured to determine only the identity of the person who committed the act charged, i.e., guilt-in-fact. The resolution of the sanity issue and the establishment of the *mens rea* required could then be left to the second stage of the trial.

Whether the Wyoming court would view insanity as affecting the capacity of a defendant to commit a crime or affecting only the responsibility of the defendant is of little consequence in this kind of procedure. The procedure pro-

161. 526 P.2d 344 (Wyo. 1974).

162. *Bradford v. State*, 234 Md. 505, 200 A.2d 150, 154 (1964). "Those jurisdictions which take the view that the prosecution has the burden of proving the sanity of the accused assert that the fundamental rule of law requiring the State to prove the guilt of the defendant beyond a reasonable doubt should logically extend to the issue of criminal responsibility."

posed does not attempt to separate "guilt" from sanity. The capacity or responsibility of a defendant with respect to the crime charged and also the "guilt" of the defendant are determined by the whole procedure—not one particular stage.

Similarly, the problem of intent and insanity as manifested in *Shaw* and *Hebard* is effectively by-passed by this procedure. Since both intent and insanity are determined in the second stage without reference to a trial of defendant's "guilt," it is irrelevant whether insanity is viewed as negating intent or precluding criminal responsibility.

Finally, this procedure could remedy the problems in expert testimony which might implicate the defendant in the crime charged. Since the first stage would determine only the identity of the perpetrator or guilt-in-fact, there is no need of any kind of evidence of mental condition. The expert would testify at the second stage only if it had been proved in the first stage that the defendant committed the acts charged. Consequently, the admissions or inculpatory statements related in the second stage by the expert would be stripped of their potentially prejudicial effect.

CONCLUSION

This comment has attempted to describe some of the problems in Wyoming's present laws relating to competency to stand trial and the defense of insanity. The writer hopes to have shed some light on the problems involved in presently existing alternatives to Wyoming law, predict the relative difficulty of implementing these alternatives in Wyoming, and propose a workable alternative to the bifurcated trial.

In writing and researching this comment, the writer has concluded that any impending revision of Wyoming law in this area should be comprehensive. The interdependency of most of the aspects discussed has become more and more apparent. Any piecemeal approach to a revision of Wyoming law in this area would be short-sighted if not calamitous.

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