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Insanity, Bifurcation and Due Process: Can Values Survive Doctrine

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In Sanchez v. State the Wyoming Supreme Court held the State's bifurcated trial procedure for the determination of guilt and sanity unconstitutional. In this article, Professor Gallivan attempts to go beyond the Sanchez decision by discussing problems which a bifurcated procedure must address. In addition to the Sanchez decision, reference is made to the experiences of other jurisdictions and their attempts at handling this problem.

INSANITY, BIFURCATION AND DUE PROCESS: CAN VALUES SURVIVE DOCTRINE

*Gerald M. Gallivan**

FOREWORD

The genesis of this article was the decision of the Wyoming Supreme Court in *Sanchez v. State* holding unconstitutional the bifurcated trial procedure where both pleas of not guilty and not guilty by reason of insanity are entered.

There is a tendency in legal writing to be relentlessly deductive. The preoccupation with authority and footnotes, and the tracing of the geneology of doctrines are merely symtomatic of this malaise. They are not totally descriptive either of the style or its effect upon the quality of criticism.

While there is an undoubted value in critical appraisal of the internal logic of a court's decisional process, such a concentration of concern may circumscribe the problem too narrowly, leaving critical elements of the problem outside and neglected. Accepting uncritically a court's statement of the problem, relevant doctrines and issues, may preclude a more comprehensive and, therefore, more valid appraisal of the decision.

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Criminal law has certainly achieved the status of a specialty, but an unfortunate aspect of any specialty is a tendency to leave matters to supposed specialists. If war is too important to leave to generals, then criminal law should be a concern of every lawyer. Besides its central position in the relationship between citizen and government, which demands the serious attention of every thoughtful citizen, its symbolic importance may be even greater. Government has been the object of criticism and distrust in recent years, and more recently the legal profession itself has been drawing fire. In the public mind, the criminal law is representative of the relationship between government, lawyers and private individuals. Fairness and the appearance of fairness are perhaps equally important.

It is the hope of this writer that the discussion which follows avoids the hypertechnical, while it attracts and retains the interest of the average reader of this journal. The problem is indeed complicated because of the number of relevant factors to be considered, but lawyers are problem solvers and generalists who are accustomed to go behind form, to penetrate obscurantist language, to cast aside irrelevancies, to arrive at the core of the problem and, finally, to solve it. At least, that is what we believe we do and that is what we tell the public.

INTRODUCTION

The Wyoming Supreme Court in *Sanchez v. State*[1] recently struck down as unconstitutional Section 7-242.5(a) of the Wyoming Statutes which provides:

> When a defendant couples a plea of not guilty with a plea of not guilty by reason of mental illness or deficiency, there shall be a sequential order of proof before the same jury in a continuous trial. First, evidence shall be heard and a special verdict taken on whether the defendant in fact committed the acts charged in the alleged criminal offense. If by special verdict the jury finds that the defendant did in fact commit such acts, then evidence shall be heard on the remaining elements of the alleged criminal offense and on the issue of the mental responsibility of the defendant. In

1. *Sanchez v.* State, 567 P.2d 270 (Wyo. 1977).

> addition to other forms of verdict submitted to the jury, the court shall submit a verdict by which the jury may find the defendant not guilty by reason of mental illness or deficiency excluding responsibility.

Sanchez was charged with rape and attempted rape. Prior to trial, Sanchez moved for a single trial on all elements of the crimes including mental responsibility. The motion was denied. At trial, during the first procedural phase, the prosecution presented all of its evidence except for testimony as to mental responsibility. At the close of the first phase the jury returned special verdicts finding that Sanchez committed the acts charged. In the second phase of the trial, the defense presented evidence that Sanchez was mentally ill and had lacked substantial capacity to appreciate the wrongfulness of his acts at the time of the alleged offenses; the prosecution's evidence agreed as to the mental illness but did not relate it to Sanchez's capacity at the time of the offenses. At the end of the second phase, the jury found Sanchez guilty of both offenses and mentally responsible at the time the offenses were committed.

On appeal, Sanchez argued that the bifurcated procedure of Section 7-242.5(a) results in less than a full presentation of the elements of a criminal offense, and gives rise to a presumption of criminal intent, and ultimately results in a denial of due process.

After an extended discussion, the court held that the bifurcated trial procedure for the adjudication of guilt and insanity under Section 7-242.5(a) violated due process under article 1, section 6 of the Wyoming Constitution and the fourteenth amendment to the United States Constitution, both on its face and as applied to Sanchez.[2] Additionally, the court found that the statute failed to meet due process requirements when applied to "general intent" crimes such as rape, and when applied to "specific intent" crimes such as attempt to commit rape.[3]

This article deals with the issues raised by the *Sanchez* decision under five headings: (1) Bifurcation; (2) Problems and

2. *Id.* at 273.
3. *Id.* at 278.

values relating to bifurcation in criminal trials; (3) The approaches to the problem made by three jurisdictions cited in the *Sanchez* opinion; (4) Analysis of the *Sanchez* decision, and (5) Problems which remain after *Sanchez*.

BIFURCATION

Bifurcation is nothing more than a procedural device, analytically a pure form without substantive impact and value free in terms of whether it is "pro prosecution" or "pro defense." It does not necessarily make a trial more complicated; for instance, it eliminates the necessity of cautionary jury instructions of using certain evidence for limited purposes only, while disregarding the same evidence for others.[4] It is neither constitutionally mandated nor constitutionally suspect.[5] It is both a common and a rare phenomenon depending upon jurisdiction and issue.[6]

Bifurcation is a term without a single definition.[7] At a minimum, it describes a sequential order of proof punctuated by the return of successive "special verdicts" by the same

4. "Bifurcated criminal trials, where pleas of not guilty and not guilty by reason of insanity have been raised, have been traditionally justified on the grounds that they: (1) present a clear-cut delineation of the issues, thus preventing jury confusion; (2) promote a truer understanding of the issues; (3) eliminate appeals to the jury's sympathy; (4) prevent compromise verdicts; and (5) save time if the defendant is found not guilty at the first trial." (Footnote omitted). Note, *Bifurcated Criminal Trial Procedure, Where First Trial is on Guilty or Innocence and Second Trial is on Defense of Legal Insanity, is held Violative of Due Process*—State v. Shaw, 106 Ariz. 103, 471, P.2d 715 (1970). 22 SYRACUSE L. REV. 823, 824 (1971).

5. *See* Spencer V. Texas, 385 U.S. 554 (1967), *reh. denied*, 386 U.S. 969 (1967), wherein the failure to afford a bifurcated trial in an habitual criminal prosecution was held not to be violative of due process. The Court commented: "Two-part jury trials are rare in our jurisprudence; they have never been compelled by this Court as a matter of constitutional law, or even as a matter of federal procedure." *Id.* at 568. *Compare* Gregg v. Georgia, 428 U.S. 153 (1976) wherein the Georgia scheme for the imposition of capital punishment was upheld. In the companion cases, statutes which failed to afford a second stage at which aggravating and mitigating factors were considered were struck down. Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).

6. In Wyoming, a bifurcated procedure is now required for the imposition of the death penalty under Section 6-54.2, 1977 WYO. SESS. LAWS Ch. 122, § 1. Prior to the enactment of the above statute a bifurcated trial was required in proceedings under the habitual criminal statute. WYO. STAT. §§ 6-9 to 6-11 (Supp. 1975). It is this writer's view that a bifurcated procedure would be similarly required under WYO. STAT. § 6-133 (Supp. 1975) when the punishment for grand larceny is sought for a second conviction for petit larceny. While bifurcation in connection with the insanity defense has been attempted in only a few jurisdictions, the procedure is not at all unusual in the administration of habitual offender statutes. *Compare* Comment *Due Process and Bifurcated Trials: A Double-Edged Sword*, 66 NW. L. REV. 327 (1971) *with* Note, *The Pleading and Proof of Prior Convictions in Habitual Criminal Prosecutions*, 33 N.Y.U.L. REV. 210 (1958).

7. *Compare* the statement of Mr. Justice Thomas dissenting in Sanchez v. State, *supra* note 1, at 281:

> It may be that the words "bifurcated trial" accurately describe the procedure provided in § 7-242.5(a), W.S. It appears that the words were

jury within one continuous proceeding. It also has been applied to a series of proceedings before different juries returning what could be styled "general verdicts", some of which could terminate the proceeding.[8]

Nothing should turn upon the characterization of a given procedure as "bifurcated." Neither its advisability nor acceptability can be ascertained without reference to the function it performs in a given setting.

In the discussion which follows it is fundamental that the Wyoming bifurcated trial procedure[9] was reflective of an attempt to resolve a conflict between a number of competing values. The principal source of insight into the legislative intent behind the enactment of the above statute is a law review comment,[10] authored by Craig Newman, then a senior law student and the principal draftsman of the statute.[11] The significance of this "legislative history" can not be underestimated in a state such as Wyoming where legislative history or evidence of legislative intent is largely unavailable.[12]

It is essential to recognize that almost any choice of procedure will have an impact upon the problems discussed. To the extent that the policy choice is frankly recognized and constitutionally permissible, developments in this area of the law merely represent normal development in adjusting the balance between societal interest in the fair conviction of the guilty and the respect for individual rights inherent in the American system. A principal thesis of this paper is that a significant number of procedural choices have been made in this area without conscious deliberation as to their effects upon the substantive issues.

adopted from the opinion in State v. Shaw, supra. "Bifurcated trial" cannot describe both the Arizona procedure discussed in State v. Shaw and the procedure provided in § 7-242.5(a), however, because these procedures are different.

8. "A bifurcated trial or split trial as opposed to a unitary trial, sometimes means complete separate trials before same or different juries resulting in partial determinations of controversy." State *ex rel.* La Follette v. Raskin, 34 Wis.2d 607, 150 N.W.2d 318, 322 (1967).
9. WYO. STAT. § § 7-242.1 *et seq.* (Supp. 1975).
10. Comment, *Competency to Stand Trial and the Insanity Defense in Wyoming—Some Problems*, 10 LAND & WATER L. REV. 229 (1975).
11. The author of this article collaborated with Mr. Newman in both the drafting of the statute and the outline of the comment, but the responsibility for the final product was his. It should be noted as well that Mr. Newman also testified before the legislative committee considering the amendment of the insanity statutes.
12. There is no official record of either committee proceedings or legislative debate. The act was adopted without substantial amendment to the sections relevant here and represented such a substantial change in procedure that prior statutory and case law contributes little.

The decision to choose one procedure over another is by no means a simple one. The reason for this is not to be found in notions of judicial economy nor in supposed simplification of procedure. Rather, procedural decisions involve an evaluation of numerous values to be protected, and because of potential conflict between the values, a process of affording priority of one over another must be frankly recognized and then justified. The following section deals with problems and values which are encountered in consideration of the "bifurcated" trial procedure.

PROBLEMS AND VALUES

1. *The Nature of the Insanity Defense*

Classically, crime is a compound concept consisting of both a forbidden act and a "bad" mental state.[13] Additionally, a crime requires a prescribed penalty.[14] Insanity as a defense can relate either to the mental state or to punishment.

Under the prevailing view insanity is a term that describes a legal[15] incapacity to form the intent required under the definition of the crime.[16] As such, insanity is inconsistent with a finding of the required *mens rea*, while sanity can be said to be an element of any crime. (The proposition is probably broader than this in that it is believed that insanity would also be a defense to an absolute liability crime.)[17]

An alternative view of the defense of insanity is that insanity is merely an excuse which precludes the imposition of punishment but does not preclude a finding of guilt.[18]

Proponents of the view that sanity is an element of guilt seem to believe that the legal defense of sanity or insanity must comport with the findings of medical science. There is

13. "The basic premise that for criminal liability some *mens rea* is required is expressed by the Latin maxim *actus not facit reum nisi mens sit rea* (an act does not make one guilty unless his mind is guilty). LAFAVE & SCOTT, CRIMINAL LAW § 27, at 192 (1972) [hereinafter cited as LAFAVE & SCOTT].
14. *Id.* § 2, at 8.
15. The choice of styling this incapacity as "legal" rather than "factual" anticipates the discussion which follows. It is a legal incapacity in the same sense that females under a certain age *cannot* consent to sexual intercourse, whether they actually consent or not. A person who is insane under the applicable test is said to be incapable of the required *mens rea* no matter what his actual intent was.
16. Louisell & Hazard, *Insanity as a Defense: The Bifurcated Trial*, 49 CAL. L. REV. 805 (1961) [hereinafter cited as Louisell & Hazard].
17. LAFAVE & SCOTT § 36, at 270.
18. Louisell & Hazard at 805-06.

a stress upon the essential relationship between the raw ability to form the required mental state and to state the insanity defense in terms of that ability.[19] On the other hand, those who see insanity as excusing the defendant find no inconsistency in determining that defendants fully intended the results of their acts and yet should not be held responsible for them.[20]

It would seem that there is no necessary requirement that the legal definition of insanity comport with medical definitions of insanity. The relationship between the required intention and the defendant's ability to form that intention is probably more a legal question than a medical question.[21]

The consequences of choosing one formulation over another are seldom completely appreciated, even though they have had a significant impact in decided cases. Where insanity is defined as an inability to form the required *mens rea* it must follow that sanity is an element of the crime. More importantly, it is logically impossible for a jury to return a finding of guilty without deciding the issue of sanity. In statutory schemes that define guilt as including sanity yet permit a finding of guilt while excluding evidence on sanity, the necessary effect of the procedure is to preclude defendant's presentation of evidence at a critical stage on a critical issue, and thereby deny him due process.[22]

In the alternative formulation whereby insanity is not an element of guilt but an excuse which precludes in infliction of any punishment, the dilemma is apparently resolved. In the guilt stage a jury may be permitted to find all the elements of the crime including *mens rea* without any finding as

19. "If an individual is insane he would not be able to intend an act, nor would he be able to premeditate or have malice aforethought." State v. Shaw, 106 Ariz. 103, 471 P.2d 715, 721 (1970).
20. After citing State v. Shaw, *supra* note 19, the Wisconsin Supreme Court stated: "For, as we see it, 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." State v. Hebard, 50 Wis. 2d 408, 184 N.W.2d 156, 163 (1971).
21. *See generally* United States v. Brawner, 153 U.S.App.D.C. 1, 471 F.2d 969 (D.C. Cir. 1972) wherein the United States Court of Appeals for the District of Columbia Circuit rejected further application of the Durham rule and adopted the formulation of the Model Penal Code of the American Law Institute. The court commented that the standard in McDonald v. United States, 114 U.S.App.D.C. 120, 312 F.2d 847 (D.C. Cir. 1962) "was useful in the administration of justice because it made plain that clinical and legal definitions of mental disease were distinct." At 978. *See also* Morris, *Criminal Insanity*, 43 WASH. L. REV. 583, 587 (1968).
22. State v. Shaw, *supra* note 19; *see also* State v. Esser, 16 Wis.2d 567, 115 N.W.2d 505, 515 (1962).

to sanity. At the second stage the jury will hear evidence going to the sanity issue and will be instructed that the insanity issue should be considered separately and is not a component of guilt; therefore, a finding of insanity will not be inconsistent with a finding of guilt.[23]

This resolution of the dilemma is less than perfect bebecause it permits a formal finding of guilt, albeit withholding punishment, in the case of an insane defendant. In so far as conviction is equated with public condemnation, the situation approximates denunciation of an individual for being sick.[24]

It will be seen in the discussion of the particular experiences of other jurisdictions which follows below that the implications of choosing one formulation over another have gone largely unnoticed and pose difficult problems when they arise. It was the opinion of the author of the *Land and Water Law Review* comment that the Wyoming bifurcation procedure made it irrelevant whether insanity is viewed as negativing intent or precluding criminal responsibility.[25]

2. The Burden of Proof in Criminal Cases

It has long been the tradition in this country that the burden of proof in criminal cases has been proof beyond a reasonable doubt. The United States Supreme Court has elevated this traditional notion to the status of constitutional command in *In re Winship*.[26] Although it is clear that the prosecution must meet this burden relative to every element of the crime charged, the status of the insanity defense has been unclear because there is no consensus as to whether sanity is an element. This may be due to a failure to treat the question of sanity explicitly in those terms. Approximately half of the jurisdictions place the burden of proof to show sanity upon the prosecution, while the remainder treat insanity as a matter of defense placing the burden upon the defendant to show insanity according to different levels of proof.[27] The

23. Wisconsin Jury Instructions Criminal 600-CPC.
24. *See* Robinson v. California, 370 U.S. 660, 666 (1962) wherein the Court commented that "a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."
25. *Supra* note 10, at 262.
26. 397 U.S. 358 (1970).
27. WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 212-13 (1954).

federal standard placing the burden on the prosecution to show sanity beyond a reasonable doubt was settled as long ago as 1895 in *Davis v. United States.*[28] In *Leland v. Oregon*,[29] however, an Oregon statute requiring the defendant to prove his insanity beyond a reasonable doubt was upheld since the Court could not say that such a policy on the burden of proof "violates generally accepted concepts of basic standards of justice."[30] After these two decisions it was assumed that the states were free to allocate the burden both of going forward and of the risk of non-persuasion according to their perceptions of fairness, justice, economy and even their evaluation of the genuineness of the defense.[31]

The case of *Mulaney v. Wilbur*,[32] amplifying the impact of *In re Winship*, casts severe doubt upon the continued validity of the foregoing proposition. In that case the Maine statute was struck down for impermissibly requiring the defendant to carry the burden of proof on the mitigating factor of heat of passion or sudden provocation in order to reduce murder to manslaughter. The commentators generally predicted, after *Mulaney*, that statutes which cast the burden upon the defendant to show his insanity by any standard of proof faced a doubtful future.[33] As Mark Twain would have put it, reports of the death of such statutes were greatly exaggerated. The Supreme Court found, in *Patterson v. New York*,[34] that the New York statutory scheme was constitutionally acceptable, although in its general outline it is barely distinguishable from the Maine statute struck down in *Mulaney*.

In Wyoming the burden of proving sanity beyond a reasonable doubt has been placed upon the prosecution by case and statute. This proposition was reiterated in the 1975 enactment of Section 7-242.5(b) of the Wyoming Statutes.[35]

28. 160 U.S. 469 (1895).
29. 343 U.S. 790 (1952).
30. *Id.* at 799.
31. *See, e.g.*, State v. Esser, *supra* note 22; State v. Shoffner, 31 Wis.2d 412, 143 N.W. 2d 458 (1966).
32. 421 U.S. 684 (1975).
33. *See, e.g.*, Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299 (1977).
34. ___ U.S. ___, 97 S.Ct. 2319 (1977).
35. WYO. STAT. § 7-242.5(b) (Supp. 1975); *see also* Sanchez v. State, *supra* note 1, at 277-78.

3. The Problem of Self-incrimination

It is part of the tradition of the criminal law and procedure in this country that no man may be compelled to accuse himself in any criminal case. The fifth amendment to the Constitution of the United States is reflected in article I, section 7 of the Wyoming Constitution and is independently enforceable against the state through the fourteenth amendment of the United States Constitution under *Malloy v. Hogan*.[36]

It is inevitable that psychiatric investigation of the accused's sanity or insanity will involve inquiring into his actions and state of mind at the time of the commission of the alleged offense.[37] Section 7-242.4(a) of the Wyoming Statutes makes this explicit: "A person is not responsible for criminal conduct if at the time of the criminal conduct, as a result of mental illness or deficiency, he lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." It is equally apparent that truthful responses by the accused, if admissible to show the commission of the acts charged, would be very valuable to the prosecution's case. Apparently for this reason there have been defendants who either acting upon their own decision or upon advice of counsel have refused to discuss the actual incident or anything supposedly relevant to the case with the court-appointed psychiatrist.[38] Such a state of affairs obviously reduces the value of the examination to both sides. It may preclude a full presentation of the best evidence available whether from a prosecution or a defense standpoint. On the other hand, it may make possible the presentation of surprise testimony if the defendant chooses to testify about the evidence for the first time at trial. In order to protect this aspect of the defendant's privilege against self-incrimination and in order to assure a full disclosure to the examining psychiatrist, Section 7-242.4(e) provides that no such statement made by the defendant is admissible in evidence in any criminal proceeding on any issue other than that of the mental condition of the defendant.

36. 378 U.S. 1 (1974).
37. Aronson, *Should the Privilege Against Self-incrimination Apply to Compelled Psychiatric Examinations?*, 26 STAN. L. REV. 55 (1973).
38. *E.g.*, State *ex rel.* LaFollette v. Raskin, 34 Wis.2d 607, 150 N.W.2d 318 (1967).

4. The Doctor-patient Privilege

The consultation which results when defendant is compelled to submit to a psychiatric examination in conjunction with the entry of a plea of not competent to stand trial or a plea of not guilty by reason of insanity at the time of the crime is not noticeably different from consultation with a psychiatrist or psychologist for purposes of medical treatment. The interview and testing procedures in each case require a special kind of confidence in the doctor and willingness to discuss the most intimate personal facts.[39] In addition, should the individual be found in need of psychiatric treatment, it is quite probable that the process of treatment will be under the same doctor or at the same institution.[40] In the case of incompetence to stand trial the treatment process should start immediately and terminate in a finding of competency and a consequent trial.[41] In the case of a finding of insanity at the time of the crime, commitment to an institution for treatment will not follow unless there is a finding of present need for psychiatric care and a commitment for that purpose.[42] In either event the connection between the initial interview and possible treatment is sufficiently direct to require some consideration of the doctor-patient privilege.

At the present time the courts generally have not extended this privilege to the kind of interview now under consideration.[43] In some cases there is a blanket prohibition against the use of the privilege in criminal cases. In other instances the distinction is made between interviews which are merely examinations for purposes of the plea and examinations which are part of the treatment process.[44]

The justifications for the preservation of the fifth amendment privilege are similar to the reasons supporting some kind of protection in this area of patient-psychiatrist contact. The most important justification for a limited protection is the part that such a protection may play in guarantee-

39. State v. Shaw, *supra* note 19, at 717.
40. Although WYO. STAT. § 7-242.1 (Supp. 1975) provides that either the Wyoming State Hospital or any other facility designated by the court may be used, almost invariably the state hospital is chosen.
41. WYO. STAT. § 7-242.3 (Supp. 1975).
42. WYO. STAT. § 7-242.6 (Supp. 1975).
43. State v. Shaw, *supra* note 19, at 717; State v. Riggle, 76 Wyo. 1, 298 P.2d 349, 372 (1956).
44. State v. Shaw, *supra* note 19, at 717.

ing an open and successful interview process. The law seems generally settled that a compulsory psychiatric examination is within the police power of the state.[45] This result is bolstered by reference to doctrines of waiver when the defendant chooses to place his mental state at issue. On the other hand, it would be consonant with that justification to limit the doctrine of waiver as to the use of the results of such examination to a decision on a specific issue, and to preclude its use as to other issues.

Although it does not expressly deal with the doctor-patient privilege, the Wyoming statute reflects some of these considerations in that it restricts the use of the resulting medical testimony to the second phase, that is, the evidence is available only with regard to the issue to which his implied waiver may be said to relate.[46]

5. Practical and Economic Realities

Wyoming is a large and sparsely settled state where many areas have no immediately available psychiatric services. Although Section 7-242.3[47] provides that the district court may order an examination by examiners other than the Wyoming State Hospital, *i.e.*, any designated examiner of a mental health center, in practice the examinations are almost done by commitment to the state hospital. The reason for this may be more than mere familiarity; it may be economic. Although it may be urged that the indigent defendant is entitled to a private examination paid for by the county under Section 7-9.2[48] in lieu of examination by the State Hospital, the entire scheme of Section 7-242.1 *et seq.*[49] seems to contemplate the examinations by the state hospital as the ordinary procedure. The difficulty inherent in this procedure is the requirement that a copy of the report go to both the accused and the prosecuting attorney.[50] Without a restriction on use at the guilt stage this compulsory examination amounts to the most sweeping discovery for the prosecution.

45. Aronson, *supra* note 37, at 56; *contra*, *e.g.*, French v. District Court, 153 Colo. 10, 384 P.2d 268 (1963).
46. WYO. STAT. § 7-242.4(e) (Supp. 1975).
47. WYO. STAT. § 7-242.3 (Supp. 1975).
48. WYO. STAT. § 7-9.2 (Supp. 1975).
49. WYO. STAT. §§ 7-242.1 to 7-242.6 (Supp. 1975).
50. WYO. STAT. § 7-242.4(c) (Supp. 1975).

It is at least arguable that a well-heeled defendant would be able to obtain his own examination prior to the making of such a plea without running the risk of such disclosure. To the extent that there would be an invidious discrimination between the well-off and the indigent defendant one could argue a basic denial of due process; but, it is submitted that the present scheme does much to ameliorate that disparity of treatment.

6. Constitutional Tensions and Unconstitutional Conditions

It has been propounded above that the defendant has significant fifth amendment interests in not supplying the prosecution with admissions of his conduct during any psychiatric examination where the admissions could be used by the state against him in establishing the facts of the crime and his participation. If the defendant's admissions were not available it might well be that the state would be unable to meet its burden of proof. The fifth amendment has struck the balance between the state and the individual in such a way that he can not be compelled to be the means by which his conviction is obtained.

The defense of insanity is perhaps less well received but it is recognized in every jurisdiction that a person who is found to be insane at the time of the crime can not suffer punishment. Moreover, in some states, including Wyoming, sanity is an element of the crime upon which the state bears the burden of proof. Viewed in that light the defendant has a right not to be convicted unless sanity can be proven.

There can arise a tension between these two rights if the defendant is required, in order to assert his insanity defense, to place before the jury evidence of his involvement in the alleged crime which would otherwise be unavailable to the state. If that is the structure of the case the practical result is the placing of a condition upon the assertion of the insanity defense, that is, the defendant is compelled to waive the fifth amendment privilege. Such a condition on the assertion of constitutional rights was explicitly condemned in *Simmons v. United States.*[51] It can be acknowledged that his constitutional tension has been tolerated and even sanctioned in

51. 390 U.S. 377 (1968).

those states which use the unitary trial procedure. A possible remedy is the use of cautionary jury instructions about the permissible use of such testimony, but this remedy would not seem to be accepted under the court's opinion in *Sanchez*. Moreover, Section 7-242.3(h)[52] seems to provide a near substantive use immunity which would absolutely preclude the use of such statement in any unitary trial procedure on any issue other than that of the mental condition of the accused.

EXPERIENCE WITH BIFURCATION IN OTHER JURISDICTIONS

Where bifurcation has occurred, it has typically been a legislative response to a perceived problem.[53] Almost inevitably,[54] challenges to the legislative scheme have arisen in the judicial system with differing results.[55]

The point that will be stressed in the discussion which follows is that proponents and opponents of the given scheme of bifurcation do not even seem to be speaking the same language. The proponents have generally concentrated upon the resolution of a particular problem or set of problems and fashioned an answer to the question thus posed. When in the context of a particular litigation, new elements are introduced (such as the problems and values previously discussed), the incompleteness, if not the inappropriateness, of the solution must be confronted. Out of this confrontation different resolutions may be found.

One court may take the procedure and its restrictions as absolute, find that it frustrates significant if not constitutionally protected interests, and thereupon strike down the procedure in its entirety.[56]

Another court may take a similar procedure, recognize significant problems and yet preserve the outlines of bifurcation by engrafting upon it a complex set of evidentiary rules

52. WYO. STAT. § 7-242.3(h) (Supp. 1975).
53. *But see* People *ex rel.* LaFollette v. Raskin, *supra* note 8, where the court authorized a bifurcated trial procedure in the absence of statute in order to protect the defendant's privilege against self-incrimination. *See also* Holmes v. United States, 124 U.S.App.D.C. 152, 363 F.2d 281 (D.C. Cir. 1966).
54. "Bifurcated trial procedures have been challenged on due process grounds wherever they have been employed." Comment, *Due Process and Bifurcated Trials: A Double-Edged Sword*, 66 NW. L. REV. 327, 328 (1971).
55. Apart from State v. Shaw, *supra* note 19, it is believed that the decision in *Sanchez* is the only instance of a bifurcation statute being held unconstitutional.
56. *See* the text accompanying notes 60-67, *infra*.

that may significantly frustrate the original legislative purpose.[57]

Still another court may preserve its scheme of bifurcation over significant objection by fashioning a redefinition of insanity and its relation to guilt, so as to avoid the principal constitutional difficulty.[58]

The authority of these decisions outside their jurisdiction ought to be subject to question for reasons other than their internal logic and apparently conflicting results. Because they deal with essentially different schemes of bifurcation, concentrate upon different values (while neglecting others), and perhaps turn ultimately upon questions of state law, their due process message is limited.[59]

A brief review of three other jurisdictions may still be fruitful for the insights that their experience sheds on the difficulties of any solution. The cases provide concrete examples of a prime thesis of this article: that quick, easy answers to the obvious problem will have effects on issues not then before the court. The ultimate wisdom of any answer given can only be judged after a comprehensive view of its total effect.

Arizona — Legislative Oversight and Judicial Rigidity.

In 1968 the Arizona legislature adopted a bifurcated trial procedure wherein two trials were to be held "unless good cause for a single trial is shown". Under this statute the first trial was to determine the issue of guilt or innocence and, if appropriate, the degree of the crime. If the defendant were found guilty at the first trial, a second trial was to be held at which the jury was to consider the defense of insanity and, if appropriate, the defendant's present mental condition with regard to commitment to a mental institution.[60]

The fly in the ointment was provided by the reference and incorporation of Section 13-131 of the Arizona Statutes which section provides:

57. *See* the text accompanying notes 68-75, *infra*.
58. *See* the text accompanying notes 76-78, *infra*.
59. "Since no other states have statutory provisions similar to ours, we must determine the constitutionality of this section on the basis of the general requirements of due process." Sanchez v. State, *supra* note 1, at 274.
60. ARIZ. REV. STAT. ANN. § 13-1621.01 (Supp. 1977).

> In every crime of public offense there must exist a union or joint operation of act and intent, or criminal negligence. The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots nor lunatics or affected with insanity.[61]

At the risk of being obvious, the above section is logically incompatible with the bifurcated trial procedure. It is as elemental as the following set of propositions. The first trial results in a finding of guilt or innocence; yet, an element of the crime and, therefore, of guilt is "the sound mind and discretion of the accused". But, the question of sanity is not decided until the second trial and evidence of insanity is not admissible at the first trial. Therefore, the defendant may be found guilty at the first trial without the opportunity to be heard on an essential component of guilt, *i.e.*, sanity.

In *State v. Shaw*[62] the Arizona Supreme Court was faced with the constitutionality of this procedure and reached the conclusion that such a procedure was violative of due process. After noting apparent inconsistencies in the statute, the court viewed the problem as one in which two alternatives would be possible. Under one interpretation the court would permit evidence of insanity at the first trial but found that this interpretation would emasculate the act in such a way that it would not be carrying out the purpose for which it was intended. Additionally such an interpretation would cause "the procedure in the second trial to be duplication and redundant".[63]

The court then viewed the second alternative as one in which no evidence of insanity would be permitted at the first trial. Quite properly, it seems, the court found such a procedure would be violative of due process in that the jury would be required to decide such issues as intent, premeditation and malice aforethought without any evidence going to the issue of sanity. After adopting the view that "if an individual is insane he would not be able to premeditate or have malice of

61. ARIZ. REV. STAT. ANN. § 13-131 (1956).
62. State v. Shaw, *supra* note 19.
63. *Id.* at 721.

forethought," the court found such a restrictive evidentiary rule to be violative of due process.[64]

The validity of the foregoing reasoning is subject to question. The reason offered for rejecting the first alternative under which no evidence of insanity could be heard at the first trial is a supposed legislative intent that such evidence be separated from the guilt stage. It should be noted that the Arizona Revised Statutes contains no indication of such an intent, nor is any authority cited in the opinion as to the purpose of the legislation. From the prominence of California authority cited, particularly the article by Louisell and Hazard,[65] it appears that the similarity between the Arizona and California statutes led the court to assume that the legislative purpose was identical. However, the California courts, when faced with this problem, avoided the constitutional question by broadening the scope of admissible evidence at the first trial.[66] Citing California dissenting opinions and law review articles critical of the California decisions, the Arizona court invoked the legislative intent to preclude a rule of broader admissibility and to lead it into the second alternative which it could easily find unconstitutional.[67]

It would appear that the Arizona court is a captive of its own logic. By giving a priority to the supposed legislative purpose of restricting insanity evidence to a second stage after guilt had been determined, and by an uncritical acceptance of the legislative definition of guilt as including sanity, the result is predictable, if not mandatory.

Alternative resolutions of the problem are clearly possible. The California solution has already been noted and will be discussed below. If the legislative intent to segregate all evidence as to mental state and restrict it to the second stage is to be strictly observed, the court could have pared down the guilt stage (as was attempted in Wyoming). If two statutes unite to reach an unconstitutional result but neither is unconstitutional by itself and if only one provision is to be struck down, there should be some principled basis for the choice. The conflict between the definition of guilt as including san-

64. *Id.*
65. Louisell & Hazard, *supra* note 16.
66. *See* the text accompanying notes 71-75, *infra.*
67. State v. Shaw, *supra* note 19, at 725.

ity and the bifurcation statute could be resolved by striking down either. In the case of the definition of guilt, a Wisconsin approach could be taken and the statute and its legislative intent preserved. Unaccountably, no reason for the implicit choice is given.

California — Legislative "Reform" and Judicial Ingenuity

The State of California may be designated the leader in the law of insanity and the bifurcated trial because of its relatively long experience and the sheer volume of cases decided. It is beyond the scope of this article to detail that body of law in all its complications. For our purposes the main outlines may be drawn in general terms, which will sufficiently illuminate the problems in the area.

The author admits his indebtedness to an excellent discussion of the California experience contained in an article by Professors David W. Louisell and Geoffrey C. Hazard, Jr.,[68] cited in *Sanchez.*[69] The article is extremely valuable for its clear organization and insight into the basic problems which are considered in this paper.

California's basic bifurcation statute was enacted in 1927 as part of the reforms devised by the Commission for the Reform of Criminal Procedure.[70] The legislative intent behind bifurcation is ample and clear in this case. The Commission saw the abuse of the insanity defense in terms of permitting evidence at the trial of guilt which would be otherwise inadmissible, indicating that the defense of insanity was being used not because of its inherent worth but as a tactic to get certain evidence before the jury. Primarily, the scope of evidence admissible under the insanity plea permitted the defendant to portray almost without limit his entire life history, flavored with all its tragedies. The Commission saw this evidence as not only irrelevant to the issue of guilt, but potentially prejudicial to the prosecution in its tendency to arouse sympathy for the defendant.

The legislative resolution of the problem was cast in terms of the already discussed Arizona solution, *i.e.*, to divide

68. Louisell & Hazard, *supra* note 16.
69. Sanchez v. State, *supra* note 1, at 274.
70. *See* CAL. PENAL CODE § 1026 (West 1970).

the procedure between guilt and sanity and to restrict the evidence of insanity to the second stage of the proceeding. The Commission and the legislature failed to note the essential contradiction posed by the penal code section which provided in pertinent part, "All persons are capable of committing crimes except those belonging to the following classes: . . . Lunatics and insane persons . . . ."[71] By this formulation, it would seem that a person could not be capable of any crime if he were shown to be insane and, therefore, that sanity is an element of guilt.

The above noted evidence restriction which would permit a finding of guilt at the first stage while denying the defendant the opportunity to introduce evidence on the question of insanity would seem a clear violation of due process.

A second and perhaps more subtle evidentiary problem arises with regard to issues of required mental state not reaching the insanity issue. For instance, in the case of a defendant charged with first degree murder the facts of the case may raise issues as to whether the defendant acted with the required intent or whether he acted with premeditation. The conclusion that the defendant did not possess a required mental state may flow either from the proposition that he did not so act on the occasion in question although he was capable of it, or from the proposition that the defendant did not so act because he was incapable of it. Clearly, psychiatric testimony that the defendant was insane is relevant if insanity is defined as an incapacity to form the required intent. Moreover, from a logical standpoint the most compelling evidence that a defendant did not have a required mental state is that he was incapable of entertaining that mental state.[72]

In 1949, some twenty-two years after the institution of the bifurcated trial procedure and after foregoing other opportunities to confront the issues,[73] the California Supreme Court decided the case of *People v. Wells*,[74] remarkable for its ingenuity in meeting the serious issues previously mentioned while avoiding the problem of the unconstitutionality of the

71. *See* CAL. PENAL CODE § 1026 (West 1970).
72. *See* People v. Wells, 33 Cal.2d 330, 202 P.2d 53, 71 (1949) (dissent).
73. People v. Leong Fook, 206 Cal. 64, 273 P. 779 (1928); People v. Troche, 206 Cal. 35, 273 P. 767 (1928).
74. People v. Wells, *supra* note 72.

statute. The *Wells* decision may be summarized in the following brief and somewhat inconsistent statements:

1. The procedural form of the statute was retained by formally limiting evidence of insanity to the second stage, but the decision permitted evidence at the first stage going to the mental state of the defendant if that evidence was directed to a mental state not contained within a narrow definition of the M'Naghten test.

2. The court permitted a showing at the first stage that the defendant *did not* have the required mental state, but he would not be permitted to show that he could not, if that incapacity was due to a failure to meet the M'Naghten test.

3. The court thereby preserved the defendant's right to contest essential elements of the crime at the guilt stage, but in so doing it obviously frustrated the principal legislative purpose by opening up the first stage to exactly the evidence that the legislature thought it had relegated to the second stage.[75]

The end result of the *Wells* decision is of course the construction of a bifurcated trial procedure radically different from that described in the statute. The logical inconsistencies by which the result was achieved are apparent and not the concern of this article.

The choice presented to the court was one of emphasis upon different portions of the legislative scheme. The court could have concentrated upon the legislative intent to absolutely restrict psychiatric testimony to the second stage. Such a construction probably would have required holding the bifurcation statute unconstitutional, at least in cases where the defendant attempted to demonstrate a lack of specific mental states. This was the course chosen by the Arizona Supreme Court. On the other hand, the court could make room within the general scheme for the admissibility of psychiatric evidence at the first stage and formally preserve the bifurcated trial structure. This is what the court did, even at the price of some sacrifice of legislative intent and some possibility of the same evidence being offered at both stages. It is submitted that this latter course is, in a real sense, a more conservative

75. Louisell & Hazard, *supra* note 16.

approach in that it defers as far as possible to the legislative judgment without the sacrifice of the defendant's constitutional rights. At the same time it leaves open to the legislature the possibility of modification or amendment of the statute within the principals which the opinion suggests.

The complications of the California bifurcated trial approach can not be viewed apart from its substantive law, particularly with regard to malice aforethought and diminished capacity. The worst that can be said about it is that legislative intent is apparently frustrated and the procedure is duplicative—a reasonable price to pay for a procedure which permits a fair hearing on the substantive issues involved.

Wisconsin—Legislative Inaction and Judicial Initiative

Unlike the other jurisdictions which have already been mentioned, the course of development in Wisconsin has largely been through court decision without the intervention by the legislature.

The most significant decision in this area was the Wisconsin Supreme Court decision in *State ex rel. LaFollette v. Raskin.*[76] In that case the defendant moved to have the issue of his criminal responsibility under a plea of not guilty determined first and the proof adduced in a sequential manner so that the jury would not be informed of his special plea of insanity and no psychiatric testimony would be taken thereon until a verdict of guilty had been returned on the issue of his guilt or innocence. The trial court granted the motion and review was had in the Supreme Court by way of a Writ of Prohibition. The principal contention of the state was that statutory law precluded a bifurcated procedure because it provided that a plea of insanity should be tried with the plea of not guilty. The court saw the principal issue to be the question of a fair trial in the context of a case where the defendant is required to undergo a compulsory mental examination, especially in relation to the privilege against self-incrimination. The court stressed that the success of the mental examination depended upon it being complete and not restricted in order to protect the defendant's right against self-incrimination and

76. 34 Wis.2d 607, 150 N.W.2d 318 (1967). A bifurcated trial statute was subsequently enacted in Wisconsin, WIS. STAT. § 971.175 (1970).

that to not turn upon a waiver of his rights. The bifurcated trial procedure was seen as an appropriate and adequate method of protecting the defendant's fifth amendment rights. In dealing with the proposition that the defendant's plea of insanity or that his responses constituted a waiver, the court refused to infer a waiver from such meager circumstances. Furthermore, the court viewed such a waiver doctrine as placing an impermissible price on the assertion of that defense. The conclusion that followed from a consideration of these essential rights in the context of a fair trial was that the statute could not be applied to require a unitary trial where the effect would be an unfair trial. Finally, the court found it unlikely that prejudice could be avoided in a unitary trial by cautionary instructions to the jury.

The process of decision by the Wisconsin Supreme Court demonstrates that the primacy afforded basic rights of the defendant may be viewed to require a bifurcated trial not only in the absence of an authorizing statute but even where there is statutory authority which would seem to preclude the alternative.

The Wisconsin bifurcation scheme is made easier by its view that insanity is not related to the defendant's incapacity to entertain a mental state required by the crime, but is an excuse which, from a sense of jurisdiction, precludes the imposition of punishment. As such it is less directly connected to medical concepts than the majority view which treats insanity as an incapacity to form the required mental state.

> Almost universally, however, the courts provide a standard by which the jury is instructed to measure whether the degree of relationship between the mental illness of the accused and his offensive conduct is sufficient to relieve him from responsibility. We refer to this standard as the definition of the defense of insanity. It is not a definition of mental illness or medical insanity, but a definition of the defense, a legal and not a medical concept.[77]

The line which the Wisconsin court has drawn between the two stages of trial which follows from its definition of insanity has not resolved all problems. Most recently, in a series

77. State v. Esser, 16 Wis.2d 567, 115 N.W.2d 505, 515 (1962).

of cases,[78] defendants have urged that psychiatric testimony should be admissible to show a diminished capacity and to negative a required mental state. The effect of such a defense, if successful, would result in conviction of a lesser offense and not total acquittal. Nevertheless the court seems to view the insanity defense as an all or nothing process to be determined at the second stage, and the evidence supporting it inadmissible at the guilt stage. The parallel to problems facing the California courts is obvious, but thus far Wisconsin has resisted that authority. The force of defendants' argument that such evidence is relevant to the determination of such issues as specific intent and premeditation does not seem to be dispelled by characterizing the insanity defense as a *legal* excuse. Even within that formulation, intent and other varieties of *mens rea* are factual issues on which it seems the jury is entitled to the best evidence.

A SHORT NOTE ON THE ANALYSIS OF COURT OPINIONS

The analysis of court decisions may proceed upon a variety of levels. At the extremes, one approach concentrates upon what the court says while its opposite evaluates what the court does.

The former may be considered more legalistic, in that it is the traditional approach of law schools and legal literature. It is characterized by an acceptance of the court's statements of the issues and the applicable doctrines. The method of reasoning is deductive, and the result is inevitable if the logic is valid. It treats legal principles as real forces and the judges as impartial technicians merely applying the law they find — doing what they must despite their personal wishes. If it is therefore less moral it is seen as less arbitrary, *i.e.*, judicial and not legislative. It may also be seen as more conservative, in that it seems to respect the line between courts and legislatures resisting judicial activism, and more democratic insofar as it defers to the expressed will of the representatives of the people when the case turns upon statutory interpretation.

The second mode of analysis of court decisions, in concentrating upon the effect of a court ruling, is seen as more

78. Hughes v. State, 68 Wis.2d 159, 227 N.W.2d 911 (1975); Note, *First Degree Murder—Evidence of Diminished Capacity Inadmissible to Show Lack of Intent*, 1976 WIS. L. REV. 623.

realistic. While it finds some acceptance in legal circles it is probably more typical of other law related disciplines such as political science, and undoubtedly is closer to the public's view of the judicial process. Its genesis can be traced to the theoretical, for it can surely be demonstrated that the entire body of judge made law can not be traced to *a priori* principles. The development of law was not unrelated to its environment, and the perceived needs of society undoubtedly affected the making of new law, even if the courts pretended to find law rather than invent it. Even conceding that the principles that decide such cases should be objective and neutral as opposed to subjective and personal predilections, the recognition of the judge's critical role in the unavoidable determination of relevant considerations inevitably leads to a view of the judicial process as more subjective. It is a short step to a distrustful cynicism that sees law as a product of judicial prejudice and scoffs at the notion that we are a government of laws and not men.

Whether the truth may lie between the two extremes, or whether the truth is a strange amalgam because the judges who are absolutely free under the second alternative believe they are restrained under the first, theory has a necessarily greater significance in a constitutional setting.

Where the question before the court is one involving an area where there is no law, so that the court must either find it or make it. The choice of theory can be seen as merely an explanation of a rationalization. However, where there is law already because the legislature has spoken, and the question is one of the constitutionality of the legislation, a holding of unconstitutionality is a displacement of legislative judgment. The process of reasoning is necessarily jurisdictional because the ability of the court to declare the law unconstitutional depends upon its finding that the statute can not be the law because it is in conflict with fundamental law.

It will be in this light that the legitimacy of the *Sanchez* court's reasoning will be analyzed.

ANALYSIS OF SANCHEZ DECISION

A reading of *Sanchez* reveals at least five explicit holdings

and one implicit holding. The implict holding, however, is critical to the setting for the explicit holdings and will be discussed here first.

Basic to the procedural setting of *Sanchez* was the ruling of the trial court that the proceeding be bifurcated even though the defendant filed a "Motion for Trial on All Elements of Crime" wherein he requested a "single trial" on all the elements of the crimes[79] involved, including mental responsibility. On this point, the court wrote:

> As we will later more fully discuss, a defendant in Wyoming does not have this choice [to be tried in a unitary or a bifurcated proceeding] under our statute. As a matter of fact, the court in the instant matter refused to permit the trial of all the issues at one time.[80]

The court never returned to this point in its opinion.

This ruling of the trial court is critical to the disposition of the case. If the denial of the defendant's motion were held to be error, and thus defendant had a right to a unitary trial, there would be no occasion to discuss the complexities of a bifurcated trial in this case, because the problems would not recur on retrial. On the other hand, the assumption that the trial court was correct involves more than a simple conclusion that Section 7-242.5(a)[81] is mandatory and that "shall" means "shall". The result is that the defendant can be prevented from foregoing the arguable benefits of a procedure designed to protect his rights. If the statute is seen as conferring a procedural right upon a defendant who asserts pleas of not guilty and not guilty by reason of insanity, the issue becomes whether he can waive that right.

From a practical standpoint, the issue may be phrased not in terms of whether the trial judge was right in denying defendant's motion, but whether he could have been wrong in granting it. It is submitted that the Wyoming Supreme Court could have easily found waiver of any such right where defendant moved for a unitary trial and defendant would probably not have been heard to argue that he was denied

79. Sanchez v. State, *supra* note 1, at 272.
80. *Id.* at 277.
81. WYO. STAT. § 7-242.5(a) (Supp. 1975).

due process as a consequence of his own motion. Therefore, the implied holding that the statute did not permit defendant to waive its protections sets the stage for the explicit holdings in the case.

In *Sanchez*, the court explicitly held that the bifurcated trial procedure for the adjudication of guilt and insanity under Section 7-242.5(a) violated due process under article I, section 6 of the Wyoming Constitution and the fourteenth amendment to the United States Constitution (1) on its face,[82] (2) as applied to Sanchez,[83] (3) as applied to general intent crimes[84] and (4) as applied to specific intent crimes.[85] The court additionally held that the statute unconstitutional (apparently under the void-for-vagueness doctrine) on the ground that reasonable men might differ as to its meaning.[86]

The necessity for all of these holdings might be open to some question, and if so the answer turns upon the slippery term "unconstitutional on its face." If the fullest meaning is assigned to that term, that is that the law is a nullity (as would seem implicit in the court's language of "deletion of this section,"[87]) then the remaining holdings are unnecessary to the disposition of the case. The question, however, is of more than theoretical interest. Consider the defendant who is tried under the now unconstitutional procedure without objection, a procedure so constitutionally infirm as to be void on its face, arguably should be within the province of the plain error rule obviating the necessity for contemporaneous objection. Alternatively, suppose defendant objects but is unable to show the prejudice the court found in *Sanchez*. If the holding of unconstitutionality on its face is dispositive and requires reversal, the additional holding of unconstitutional as applied is unnecessary to the disposition, and the impact of the first holding frees a future appellant from showing particular prejudice. If the requirement of particular prejudice is preserved, the content of the term void "on its

82. Sanchez v. State, *supra* note 1, at 273, 280.
83. *Id.*
84. *Id.* at 278: "We must, therefore, hold that with respect to general intent crimes, such as rape, § 7-242.5(a), supra, fails to meet the requirements of due process."
85. *Id.* "We, therefore, conclude that § 7-242.5(a), supra, fails to satisfy due-process requirements with respect to specific-intent crimes, such as the instant alleged attempt to commit rape."
86. *Id.*
87. *Id.* at 280.

face" as opposed to "as applied" diminishes to the vanishing point. It would follow that a defendant could be afforded due process under a totally unconstitutional proceeding unless he could show the kind of particular prejudice that would render a statute constitutional "on its face" unconstitutional as applied to him.

Although the holding of unconstitutionality "as applied" is stated as an alternative to the holding of facial unconstitutionality, no clear line can be drawn between them either in their supportive rationales or the court's treatment of the questions, since the basis for the holding of facial unconstitutionality is inextricably interwoven with the practical difficulties of this case. In turn, the practical difficulties of the case give rise to the court's discussion and the holdings relating to specific and general intent crimes.

The twin holdings relating to general intent and specific intent crimes may be taken to encompass the entire span of crimes (or at least those requiring a *mens rea*) where insanity is a possible defense, however difficult it may be to categorize a crime as one or the other. The interrelationship between the subsidiary holdings is subtle and peculiar. The court stated:

> Even if we could construe the statute as providing the requisite certainty with respect to specific intent offenses, since the distinction between act and intent is at least theoretically greater, we would then be forced to say that the § 7-242.5(a) procedure was applicable to some criminal defendants, but not to others. We do not believe that this division by type of crime is sanctioned by due process requirements, especially since the decision as to what is a specific as opposed to general intent crime would often be as uncertain as the admissibility-of-evidence question.[88]

The above quote appears without footnoted authority and without further explication. Its meaning is at least subject to speculation which the invocation of "due process requirements" does not dispel. The notion that a bifurcated trial procedure must apply across the board or not at all discounts, at a theoretical level, the function that bifurcation might serve in one setting, but not in another. If this senti-

88. *Id.* at 278.

ment reflects a sort of leveling view that defensive advantage or tactics, or even defenses themselves, ought to be available despite the nature of the crime, it ignores the existential relationship between elements of the crime and appropriate defenses, which may often be nothing more than opposite sides of a coin, *e.g.*, drunkenness is a defense where it negatives a specific intent that is an element of a crime, but not otherwise.[89]

INTERPRETATION OF A VAGUE STATUTE— THE EXHAUSTION OF POSSIBILITIES

Although the court found the statute to be impermissibly vague, and that reasonable men must necessarily guess at its meaning, neither appellant, appellee, nor amicus made that argument. The structure of the decision does not require a holding of void for vagueness, if the remainder of the court's logic is sound, that is if all permissible interpretations are unconstitutional. The remainder of the opinion would seem to render the "holding" of void-for-vagueness mere dictum because it purports to explore the possible interpretations of the statute, find them two in number and pronounce both of them violative of due process. If the latter analysis is wrong or incomplete, however, the decision must stand on the novel proposition, that a procedural statute may be found void for vagueness, a proposition that should not be accepted without examination.

In initially approaching the question of the constitutionality of Section 7-242.5(a), the court directs the reader's attention to familiar "principles of due process" which are commonly grouped under the void-for-vagueness doctrine.

> A *procedural* as well as a penal statute violates an essential principle of due process if "men must necessarily guess at its meaning and differ as to its application." See *State v. Gallegos*, *supra*, at 968; *Day v. Armstrong*, *supra*, at 147 and *Lanzetta v. State of New Jersey*, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888, 890.[90]

This proposition appears to be a remarkable leap in the law well beyond the facts and stated rationales of the cases

89. WYO. STAT. § 6-16 (1957).
90. Sanchez v. State, *supra* note 1, at 274 (emphasis added).

cited. All of the cases cited deal with criminal statutes and none of them contain any reference to the possibility of vagueness in procedural statutes.

Day v. Armstrong[91] dealt with a Wyoming statute which made criminal certain kinds of activity relative to the use of streams and channels within the state. At the point in the opinion to which this court refers, the only reference to vagueness is in terms of guidelines given the citizen as to what conduct is forbidden; there is no reference to the method by which he is to be tried.

Similarly in *State v. Gallegos*,[92] the principles of *Day v. Armstrong* are summarized. Gallegos was charged with a violation of the child protection act in that he did "cause, encourage, aid or contribute to the endangering of the child's health, welfare, or morals." It was this phrase which the court found to be unconstitutionally vague.

Finally, in *Lanzetta*[93] the United States Supreme Court found a statute unconstitutionally vague which provided that "[a]ny person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or in any other State, is declared to be a gangster . . . ." It should be noted that in each of the above cases the vagueness found to be unconstitutional related solely to the definition of the proscribed conduct. In reviewing the principles announced in *Gallegos*, it is clear that the vagueness complained of is that found in the substantive law.

> 1. The requirement of a reasonable degree of certainty in legislation, especially in the criminal law, is a well-established element of the guarantee of due process of law.
>
> 2. No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.
>
> 3. All are entitled to be informed as to what the state commands or forbids.

91. 362 P.2d 137 (Wyo. 1961).
92. 384 P.2d 967 (Wyo. 1963).
93. Lanzetta v. New Jersey, 306 U.S. 451 (1963).

> 4. A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.
>
> 5. The constitutional guarantee of equal rights under the law (see Art. 1, § § 2 and 3, Wyoming Constitution) will not tolerate a criminal law so lacking in definition that each defendant is left to the vagaries of individual judges and juries.[94]

A more expansive reading of the void-for-vagueness doctrine as contained in decisions of the United States Supreme Court can be formulated in terms of three questions often considered by the Supreme Court:

> 1. Does the statute in question give fair notice to those persons potentially subject to it?
>
> 2. Does it adequately guard against arbitrary and discriminatory enforcement? and
>
> 3. Does it provide sufficient breathing space for First Amendment rights?[95]

In contrast with the factual circumstances of the cases cited above and the apparent reasons behind the rules stated, all of which deal with the substantive criminal law, the instant case applies the doctrine to matters purely procedural.[96] It should be noted that the conduct involved in this case, *i.e.*, rape and assault with intent to rape, is clearly condemned by statute.

In finding that the statute is impermissibly vague and that "reasonable men must necessarily guess at the meaning of Section 7-242.5(a)", the court applies the standard available to laymen as to the guidelines of their conduct to judges conducting criminal trials. It would seem that the standard to be applied, "reasonable men", contemplates laymen who desire guidance in their conduct as to what is permitted and what is forbidden. This would be more consonant with the justifications cited above. The notion that a law outside that

94. State v. Gallegos, *supra* note 93, at 968.
95. LAFAVE & SCOTT § 11, at 85.
96. The furthest extension of this doctrine which the author was able to discover was its application to non-criminal statutes or ordinances which imposed duties and proscribed conduct but without criminal penalty. Annot., 40 L.Ed.2d 823 (1975).

context might be invalidated whenever a court should determine that it is vague would give the judiciary a free hand to strike down obnoxious laws without reference to the protection afforded to the general public under the traditional and limited view of the vagueness doctrine. Moreover, it seems to discount the obligation of judges to "endeavor by every rule of construction to ascertain the meaning of and give full force and effect to the legislative product unless it violates a specific constitutional provision."[97]

The transition in the court's opinion from the language of vagueness to its attempted construction of the statute is abrupt. There is no explanation whether its analysis of the statute is alternative to the finding that reasonable men must guess at its meaning or whether the analysis is a demonstration of its vagueness. The structure of the court's discussion that follows would support either conclusion.

Before considering this portion of the court's opinion in detail, a brief description of its general outline should be helpful. Basically, the court proceeds along two alternative interpretations, each of which it will find violative of due process. Under the first which could be labeled the "minimum evidence" approach, the statute is read to limit the elements of the crime proveable at the first stage. A further restriction is accomplished by concluding that evidence which may relate to other elements should not be admissible. With the evidence thus severely restricted, there would be almost no proof at the first stage. Under the second or "maximum evidence" approach, if evidence other than that relating only to acts were admitted, the court believes that a presumption of intent would arise in the minds of the jury, and that they would reach a verdict of guilty despite instructions to the contrary and before hearing any of defendant's evidence as to mental state. At that point any prejudgment is unlikely to be undone by evidence at the second stage.

The actual structure of the court's discussion ending in the conclusion of the unconstitutionality of Section 7-242.5 (a) is extended and complicated, but its basic outlines seem to be contained in the following summation:

97. 1 SUTHERLAND, STATUTORY CONSTRUCTION § 21.16, at 96 (4th Ed. 1972).

> We are faced, then, with two possibilities. First, § 7-242.5(a) . . . can be construed as calling for a strict dichotomy between evidence going to "acts" per se and evidence going to intent or other criminal-offense elements. This interpretation places an impossible burden on the trial courts and fails to give the requisite regularity of procedure with respect to the admissibility of evidence. Second, the provision can be construed as permitting, expressly or implicitly, the introduction of evidence, other than that relating only to "acts" per se, during the first procedural phase. This, in turn, may give rise to a presumption of intent in general-intent crime situations (*Rhodes v. State*, supra), and, therefore, be a more obvious violation of due process of law (*State v. Shaw*, supra).
>
> We must, therefore, hold that with respect to general-intent crimes, such as rape, § 7-242.5(a) . . . fails to meet the requirements of due process.[98]

The method of argument, as opposed the actual structure, is thus classicly simple. Section 7-242.5(a) can only mean A or B. If it means A, it falls because it "places an impossible burden on the trial courts and failed to give the requisite regularity of procedure with respect to the admissibility of evidence". If it means B, it falls because it "may give rise to a presumption of intent in general—intent crime situations, and, therefore, be a more obvious violation of due process of law." (In a succeeding paragraph, the court states that similar analysis applies to specific intent crimes.)

It is elemental logic that the validity of this method of argument depends upon the validity of the logical inference underlying each supposition and upon whether A and B exhaust all the possibilities. In the detailed discussion below, the general order of the court's opinion is followed. While it generally states possibilities in the alternative, thereby structuring the alternative arguments simultaneously, the reader should easily assign the points made to the appropriate argument.

Initially the court, in determining the appropriate scope of each stage of the proceeding, views the problem as soluble in terms of categorizing the elements of the crime. "Section 7-242.5(a) . . . requires that these various elements be com-

98. Sanchez v. State, *supra* note 1, at 278.

partmentalized as either 'acts charged in the alleged criminal offense' (stage 1) or alternatively, 'remaining elements of the alleged criminal offense,' (stage 2)."[99] It is not immediately apparent why there would be the same line drawn between the various elements of the crime as would have to be drawn to segregate the physical acts and the identity of the perpetrator from the required mental state and the effect of insanity and/or diminished capacity. The problem posed by this approach is reflected in the conclusions of the court that "only carnal knowledge would seem to fit within the literal meaning of the phase [sic] 'acts charged in the alleged criminal offense', since the concept of force would go to the defendant's intent and the elements of consent would go to the prosecutrix' intent and conduct."[100] This division of the elements is open to a number of questions, not the least of which is the determination that the elements of consent on the part of the *victim* is necessarily relegated to stage two, where the principal issue is the mental state of the *defendant.*

The second step which the court takes in determining the appropriate scope of the first stage is even more an attempt to determine the scope of evidence permitted at the first stage. The court first notes: " '[A]cts charged in the alleged criminal offense' may include more than that which is commonly perceived as 'acts'. Where there is proof of the 'acts constituting the offense charged' a presumption of intent arises".[101] The court then states that "the language of § 7-242.5(a) . . . may *permit* admission of evidence during the first procedural phase relating to the defendant's use of force and the victim's want of consent."[102] The court then accepting *arguendo* the appellee's interpretation and strictly limiting first-phase evidence to the acts charged, envisions a situation where the only evidence permitted would be the fact of sexual intercourse and the identification of the defendant. Under such a view there could be no evidence of attendant circumstances which in any way, expressly or *implicitly*, went to the defendant's general intent to commit rape or to the prosecutrix' consent or lack thereof, since that too *implicitly* relates to the defendant's general intent. Rec-

99. *Id.* at 275.
100. *Id.*
101. *Id.*
102. *Id.* (emphasis added).

ognizing that it is fundamental law that the prosecution must establish each essential element of a crime beyond a reasonable doubt, the court opines that "any trial court would be hard pressed to allow a jury to find that the state had proved carnal knowledge beyond a reasonable doubt, given the paucity of such evidence. This would result in the first phase procedure contained in § 7-242.5(a) . . . being a reduction to a 'swearing' contest."[103]

Basic to a logical analysis of the foregoing is the recognition that a fundamental rule of evidence has been turned on its head. Basically the admissibility of evidence turns upon a question of whether it is admissible for the purpose offered and not upon whether it may be used for an inadmissible purpose. In cases where the evidence is subject to an impermissible use the normal practice is to admit the evidence and protect the interest of the adversary not by an objection to its admission but by a request at the time of the offer for an instruction that the jury is to consider the evidence only for the allowable purpose.[104] In the context of this case, therefore, whatever the scope given to the first procedural phase, the fact that testimony as to acts might yield an inference of the defendant's intent (a matter properly considered during the second phase) does not render the evidence inadmissible but only authorizes the giving of a cautionary instruction.

Inextricably involved in the court's reasoning is the proposition that where there is proof of the acts constituting the offense charged a presumption of intent arises, which proposition the court found in *Rhodes v. State*.[105] The former statement goes without any further analysis but the real meaning of such a term shall not pass without examination. The court can not mean that a true presumption is created mandatorily in the sense that the jury must find such an intent and would be so instructed, nor that the jury would be instructed to reach such a conclusion in the absence of counterproof showing that the defendant had no such intent. At most, it means that the jury could be instructed that they may conclude under the circumstances that the defendant

103. *Id.* at 276.
104. MCCORMICK, EVIDENCE § 59, at 135-6 (2d ed. 1972); *see also* WYO. R. EVID. 105.
105. Rhodes v. State, 462 P.2d 722 (Wyo. 1969).

had such an intent, but the question of intent remains a question of fact for the jury upon which the prosecution bears the burden of proof beyond a reasonable doubt.[106] (Alternatively the inference would be available to the prosecution in order to meet a motion for a judgment of acquittal based on the insufficiency of evidence.)

The court utilizes the language of presumption of intent in conjunction with the probability of the prosecution producing all of its evidence in the first procedural phase to find that "this would allow a jury to determine guilt without the benefit of evidence going to the issue of insanity and would result in giving sanction to the constitutional affirmities inherent in such a procedure",[107] citing *State v. Shaw*.[108] The validity of this proposition is dependent upon a view that the jury will disregard the explicit instruction of the court to limit its consideration to the question properly before it in the first phase, and the belief that a jury will reach a verdict of guilt before it has heard the evidence going to the mental state of the defendant and before the court has submitted that question to it. If the court's analysis were unavoidable, if the rules of evidence were as they assume, if a true presumption of intent arose upon the introduction of proof as to acts, and if juries may be presumed to ignore their order, then it may be said that the state imposes an impossible burden on the trial court. The foregoing statement contains its own rebuttal. Given the fundamental purposes of the act *i.e.*, the preservation of defendant's fifth amendment rights and the intent not to prejudice the presentation of a defense as to whether he committed the acts charged by introduction of admissions occuring during the compelled psychiatric examination, the questions of evidence regulation presented to the court are not really so complex, nor are they all or nothing propositions. Some difficult evidentiary rulings will confront a trial court but the requisite regularity that the court seeks will be no more difficult than those which the courts will face under Rule 403 of the Wyoming Rules of Evidence which permits the exclusion of relevant evidence on grounds

106. LAFAVE & SCOTT § 28, at 203.
107. Sanchez v. State, *supra* note 1, at 276.
108. State v. Shaw, *supra* note 19.

of unfair prejudice, confusion of the issues, or misleading the jury.[109]

The supposed dilemma posed by the court can not be said to exhaust the possibilities nor can the extremes posed be said to be necessary deductions from the state. The first alternative posed by the court, which seems to be translatable into a scheme where almost no evidence would be presented in the first phase, depends upon the erroneous view that no evidence is permitted which might yield an inference proper only to the second phase. The proper rule, of course, is that the evidence may be admitted for limited purposes with appropriate instructions to the jury. The court will be called upon to determine whether the evidence offered is truly relevant to the purpose of the first phase, but that ruling is no more difficult than any other ruling on relevancy.

The second form of the dilemma is really a fear that the prosecution will introduce all of its evidence except psychiatric testimony during the first phase and that the jury even though instructed to the opposite will deliberate and reach a conclusion as to questions not given them. The language of presumed intent is only an expression of mistrust of the function of juries.

In assessing the supposed prejudical impact of the bifurcated procedure it might be useful to contrast that procedure with the ordinary order of proof in the unitary trial under the former Wyoming procedure. Formerly the prosecution presented evidence on all the elements of the crime, except insanity, during its case-in-chief and was entitled to rely upon the presumption of sanity, "until evidence to the contrary is presented; and the burden of first going forward and entering evidence on insanity shall be upon the defendant . . . ." [110] Factually this meant that usually the defendant commenced proof of insanity during the defense case and the prosecution introduced its case if any during rebuttal. Under the bifurcated procedure the order of proof will look approximately the same with the exception that the jury will return a verdict after the first phase limited to the question of whether

109. WYO. R. EVID. 403.
110. WYO. STAT. § 7-242(a) (1957).

the defendant committed the acts charged. The actual order of proof thereof is not significantly different under either procedure. The supposed advantage of primacy will always be with the prosecution because of the burden of proof and the burden of going forward. The defect in the procedure upon which the appellant relied in the instant case principally related to his inability during the first procedural phase to cross-examine the state's witnesses relevant to issues properly considered in the second phase, and the psychological disadvantage of calling the state's witnesses during the second phase for purposes of cross-examination. Secondly, the appellant claimed a psychological disadvantage from the fact that the jury had already returned a verdict finding that the defendant had committed the acts charged which presumably preconditioned them to return a verdict of guilty and finding the defendant sane at the end of the second phase. It should be noted first that in contradistinction to the procedure in *State v. Shaw*, the Wyoming procedure did not preclude the presentation of defenses going toward specific intent or diminished capacity but only delayed their consideration. The force of the appellant's argument is therefore considerably less and rests only upon immeasurable psychological influence. In assessing the significance of these specified influences, they can not be isolated from the normal psychological advantages that the prosecution has in every case which are exacerbated by the details of the particular crime and the apparent reluctance of juries to accept the insanity defense which they assume will put the defendant back on the streets.

In contrast with the court's acceptance of this psychological impact upon the jury and its belief in this case that the jury will disregard instructions occasions the Wyoming Supreme Court has expressed on a number of cases its faith in the jury to abide by cautionary instructions and instructions on the limitation as to the use of potentially inflammatory evidence.[111]

It is submitted that the *Sanchez* opinion did much more than free prosecutors, defense lawyers and trial judges from the difficulties of the bifurcated trial. In the course of its

111. Mr. Justice Thomas stated in dissent, "[i]t is impossible for me to accept the assumption that juries in the courts of the State of Wyoming will not follow the instructions given them by the trial court." Sanchez v. State, *supra* note 1, at 281.

sweeping opinion, the broad language of the court may have created numerous problems for all of the above, and made legislative change mandatory and much more difficult.

PROBLEMS AFTER SANCHEZ

The slipperiness of the term "unconstitutional on its face" was noted above,[112] as it related to the requirement of objection to the bifurcated procedure and the necessity for a showing of prejudice.

In *Flores v. State*,[113] the court reversed a conviction of first degree murder in which the death penalty was imposed and which was tried pursuant to the bifurcated trial procedure without objection. The trial was held before the *Sanchez* opinion. The majority viewed the issue principally as a problem of retroactivity and had little difficulty in applying *Sanchez* to cases on direct appeal. Significantly, the court stated:

> We cannot make a disposal of this case by casting upon the defendant the burden of objecting at the time of the trial because, as suggested in Sanchez, 567 P.2d at 280, we will not consider the fact that the defendant had not objected to the introduction of evidence during the first phase because of "the confusion inherent in this statutory procedure" and the lack of standards upon which to base either objections or rulings thereon.[114]

The majority did not concern itself with any requirement to show prejudice—no mere oversight in light of the spirited dissent by Mr. Justice Raper on exactly that point.

After *Flores*, the question may still persist whether a court may accede to a defendant's request for bifurcation in an appropriate case. Perhaps, *Flores* means that the procedure is so flawed that it may never be constitutionally used, no matter at whose instance. That kind of reasoning should extend to the legislature if they attempt only a minor amendment. The question of the sufficiency of the change will depend upon a close analysis.

112. *See* the text accompanying note 88, *infra*.
113. Flores v. State, ___ P.2d ___ (No. 4685 decided Dec. 14, 1977) (Wyo. 1977).
114. *Id.*

Procedural problems abound in the statutory scheme that remains after the bifurcation was removed by *Sanchez*. A more or less chronological consideration follows.

At the time of the entry of a plea of not guilty by reason of mental illness or deficiency, the court shall order the defendant examined.[115] If the defendant is to be tried at a unitary trial procedure where his admissions to the examiner may be heard by the jury before it renders any verdict, the privilege against self-incrimination poses problems.

The role of defense counsel is not made easier. Given this kind of danger, advice to the defendant to maintain total or selective silence during the examination may be within the range of competence. With the benefit of hindsight the failure to so advise may subject defense counsel to criticism where the prosecution's case on other elements *e.g.*, identity is weak.

The silence of a defendant in an examination is arguably admissible if there is no fifth amendment privilege. Together with motions of easy waiver through the making of the plea itself, the consent to interview or even a quasi-Miranda warning at the hospital, the psychiatrist might become the best cop on the block. One partial solution that should be rejected out-of-hand is defense counsel's presence at the interview. Besides the time and cost, the presence of a third party would likely destroy the effectiveness of the interview.

The solution, of course, is already contained in Section 7-242.4(e) in the form of a restriction on the use of the fruits of the examination:

> No statement made by the defendant in the course of any examination or treatment pursuant to this section and no information received by any person in the course thereof is admissible in evidence in any criminal proceeding on any issue other than that of the mental condition of the defendant.[116]

The problem created by *Sanchez* is that this section is inextricably connected to bifurcation, unless the examiner is permitted to testify to his conclusions but barred from re-

115. WYO. STAT. § 7-242.4(c) (Supp. 1975).
116. WYO. STAT. § 7-242.4(e) (Supp. 1975).

vealing their basis by reference to the interview. As noted above, the design of this section was to afford a limited privilege, congruant with the defendant's privilege against self-incrimination.

It does not seem consistent with the language of *Sanchez* to give this section a strict reading and permit the evidence to be given in a unitary proceeding on the issue of mental condition, but cautioning the jury not to consider it on any other issue. A principal prop of the *Sanchez* decision was the mistrust of juries. A jury that can not postpone a verdict of guilty until asked to return it can not be expected to ignore the defendant's admissions on the issue of whether he performed the act charged.

Even if the language of *Sanchez* makes the legislatively created privilege incompatible with the judicially mandated unitary trial, it does not seem possible that the court could strike down a privilege. It is one thing to find a procedure constitutionally defective, but it is of a different order to strike down a protection akin to the fifth amendment. If the ultimate balancing of interests is between that kind of privilege and the difficulty in administering a bifurcated trial, the outcome ought to be predictable.

CONCLUSION

Problems in this area of the law are difficult. The appropriate analogy is not the seamless web, but the unbroken circle. The points do touch on one another. Resolutions attempted have generally been unsatisfactory, because of being insufficiently comprehensive. The several court decisions discussed are less subject to criticism for their internal logic than for their incompleteness.

To return to the theme, law is problem solving and often not merely the problem submitted. "When you can think of a thing that is logically connected to another without thinking of the other" is not a definition of a legal mind. It is a description of ineptitude and a guarantee of more problems. It would seem that *Sanchez* requires a general rethinking of the entire area and not patchwork amendment.