1972

Psychiatry v. Law in the Pre-Trial Mental Examination: The Bifurcated Trial and Other Alternatives

Recommended Citation

Psychiatry v. Law in the Pre-Trial Mental Examination: The Bifurcated Trial and Other Alternatives, 40 Fordham L. Rev. 827 (1972).
Available at: http://ir.lawnet.fordham.edu/flr/vol40/iss4/4

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.
COMMENTS

PSYCHIATRY v. LAW IN THE PRE-TRIAL MENTAL EXAMINATION: THE BIFURCATED TRIAL AND OTHER ALTERNATIVES

I. INTRODUCTION
A. Psychiatry v. Law

Both law and psychiatry are frequently concerned with the evaluation, prediction, and control of human behavior. However, law is also concerned with the protection of individual citizens from arbitrary intrusions by society or its agents. The conflict between the disciplines engendered by the consideration of this additional goal is clearly manifested in the substantive and procedural law of criminal responsibility, competency to stand trial, and civil commitment.

A recent New York Court of Appeals case, Lee v. Erie County Court, highlights many of the practical difficulties resulting from the conceptual differences between the two disciplines. Charged with a murder that occurred two days after his release from a mental institution, the defendant pleaded not guilty by reason of insanity. He cooperated in the court directed psychiatric examination but was found guilty despite the fact that two of the three psychiatrists testifying found him to be insane at the time the alleged crime was committed.


2. For the legal ramifications of mental disability in other areas than the criminal law see R. Allen, E. Ferster & H. Weihofen, Mental Impairment and Legal Incompetency (1968) (guardianship, estate planning, etc.); S. Brakel & R. Rock, The Mentally Disabled and the Law (rev. ed. 1971) [hereinafter cited as Brakel & Rock] (rights of hospitalized individuals, domestic relations, personal and property rights, etc.).


4. "When one considers the enormous conceptual gulf that lies between proximate cause and multiple causality, jural responsibility and psychic determinism, advocacy and psychotherapy, stare decisis and the scientific method, one is almost driven to conclude that law and psychiatry share about the same degree of ideological kinship as does the Mafia with the Women's Christian Temperance Union . . . ." Readings, supra note 1, at ix (italics omitted).

5. 27 N.Y.2d at 435, 267 N.E.2d at 453, 318 N.Y.S. at 707. The two court appointed
The appellate division reversed, ordered a new trial, and subsequently sustained a prosecution motion for another psychiatric examination in preparation for the second trial. Defendant refused to cooperate fully in this second examination. As a result, the examining psychiatrists could make no determination of his mental condition at the time of the crime. Defendant contended that his privilege against self-incrimination would be violated if he was forced to respond to a psychiatrist's questions concerning his mental state at the time of the alleged murder, and that the psychiatric examination was a critical stage of the prosecution entitling him to the presence of counsel.

Faced with admittedly complex issues, the court of appeals attempted to balance the competing premises of law and psychiatry as the following four holdings illustrate: First, the court found that prior case law demanded the application of the privilege against self-incrimination to mental examinations, but to avoid crippling the psychiatric value of such examinations, the court held that a defendant waives his privilege when he asserts a plea of not guilty by reason of insanity. Second, in order for the trier of fact to obtain the full benefit of the psychiatrist's diagnosis, the examiner should, when testifying, be allowed to "make any explanation reasonably serving to clarify his diagnosis" but "[t]his is not to say . . . that any admission as to the crime in question can be considered by the jury in their determination of whether the defendant committed the acts which constitute the crime charged." Third, the defendant is entitled under the sixth amendment to counsel at this critical stage but, since there is little likelihood that an effective psychiatric examination could be conducted under the withering influence of continued legal objections by defendant's psychiatrists testified for defendant Lee. A third psychiatrist's testimony that Lee was sane was based on hospital records rather than an interview. This doctor was retained on the morning of the day he testified. People v. Lee, 29 App. Div. 2d 837, 838, 287 N.Y.S.2d 607, 608-09 (4th Dep't 1968) (mem.).

6. 29 App. Div. 2d 837, 838, 287 N.Y.S.2d 607, 609 (4th Dep't 1968). The reversal and new trial were based on the grounds that the People had not proven sanity beyond a reasonable doubt and because the verdict was against the weight of the evidence. Id.


8. 27 N.Y.S.2d at 436, 267 N.E.2d at 454, 318 N.Y.S.2d at 708.
9. Id. at 437-38, 267 N.E.2d at 455, 318 N.Y.S.2d at 709.
10. Id. at 443, 267 N.E.2d at 458, 318 N.Y.S.2d at 714; see notes 69-70 infra and accompanying text.
12. 27 N.Y.S.2d at 441, 267 N.E.2d at 457, 318 N.Y.S.2d at 712.
fendant's counsel, the role of counsel is limited to that of silent observer.\textsuperscript{14} Fourth, the court held that if the defendant refuses to cooperate, he may not be deprived of his plea of insanity or his right to produce non-psychiatric evidence of insanity, but the court may exclude psychiatric testimony offered by the defendant.\textsuperscript{15}

Since the result of this weaving of "psychiatric" and "legal" logic may "create an impossible task for Trial Judge and jury"\textsuperscript{16} in some cases, Judge Breitel suggested that "a bifurcated trial on the separate issues of legal insanity and the merits should be considered."\textsuperscript{17} This comment will examine some of the practical and conceptual problems of the current unitary procedures for pre-trial mental examinations, analyze the bifurcated trial as a possible solution to some of these problems, and discuss alternative solutions. The scope of the discussion is limited to procedures directly affecting the criminal defendant, criminal responsibility and competency to stand trial. Procedures for the civil commitment of the mentally ill are not considered.

B. The Legal Background

Court ordered pre-trial mental examinations occur as the result of two distinct legal concepts: (1) that some defendants are of such mental condition at the time of the alleged crime that they should not be held responsible for acts which would otherwise be criminal—the insanity defense;\textsuperscript{18} and (2) that some defendants are of such mental condition that they cannot meaningfully participate in their defense and that it would be unfair to try such people—incom-

\textsuperscript{14} Id. at 444, 267 N.E.2d at 459, 318 N.Y.S.2d at 715.
\textsuperscript{15} Id. at 442, 267 N.E.2d at 457, 318 N.Y.S.2d at 713. The court ruled that if the defendant wished to call psychiatrists on his own behalf, he would first have to satisfy the court, in a preliminary hearing, that he had cooperated with a court-ordered mental exam where one had been sought by the prosecution. Besides excluding the defendant's psychiatric testimony, the trial court would be permitted to instruct the jury: (1) that the defendant failed to cooperate; and (2) that there was a presumption of sanity and that the jury must consider whether the presumption was rebutted by defendant's non-psychiatric proof. Id. at 442-43, 267 N.E.2d at 457-58, 318 N.Y.S.2d at 713. Dissenting in part, Judge Breitel pointed to the contradictions involved in permitting non-psychiatric testimony while excluding from jury consideration defendant's "medical (expert) testimony," especially since "nonco-operation may be evidence of insanity just as much as it may be evidence of a feigned issue of insanity." Id. at 448-49, 267 N.E.2d at 462, 318 N.Y.S.2d at 719 (dissenting opinion); see Krash, The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia, 70 Yale L.J. 905, 921 (1961) [hereinafter cited as Krash]. As to non-psychiatric testimony, see note 59 infra.
\textsuperscript{16} 27 N.Y.2d at 449, 267 N.E.2d at 462, 318 N.Y.S.2d at 719 (Breitel, J., dissenting in part).
\textsuperscript{17} Id.
\textsuperscript{18} The literature on the insanity defense is quite extensive. See A. Goldstein, The Insanity Defense (1967) [hereinafter cited as Insanity Defense] for a recent comprehensive discussion of the insanity defense with thorough bibliographical notes. A more recent bibliographical listing can be found in Brakel & Rock, supra note 2, at 423-29, which cites 205 cases and over 90 commentaries on criminal responsibility and incompetence to stand trial.
petency to stand trial. Legal insanity is usually phrased in terms of (1) the defendant’s inability to understand the nature and consequences of his act, or (2) if he did understand it, his inability to distinguish right from wrong with reference to it. Theoretically, legal insanity goes to the issue of “guilt” or


20. This is the famous test from M’Naghten’s Case, 8 Eng. Rep. 718 (1843). The American Law Institute’s (ALI) suggested rule qualifies and adds to M’Naghten: “(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law. (2) As used in this Article, the terms ‘mental disease or defect’ do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.” Model Penal Code § 4.01 (Proposed Official Draft 1962).

A tabulation published in 1967 categorizes thirty states and Great Britain as using the M’Naghten test alone; eighteen states, the federal system, and the military court system as using, in addition to M’Naghten, a verbal formula which includes in the definition of legal insanity those people who, as a result of mental disease or defect, were unable to conform their conduct to the requirements of law (reflecting partially the influence of the ALI rule); and the District of Columbia, Maine, New Hampshire, and the Virgin Islands as using the Durham rule: “[A]n accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.” Durham v. United States, 214 F.2d 862, 874-75 (D.C. Cir. 1954) (Bazelon, J.) (footnote omitted) Insanity Defense, supra note 18, at 45, 67 & 241 n.1. For discussions of the above mentioned rules see Insanity Defense 45-66, 67-99, 80-96; R. Perkins, Criminal Law 858-78 (2d ed. 1969) [hereinafter cited as Perkins]. The criteria of mental responsibility in foreign countries is discussed in Model Penal Code § 4.01, app. A at 162-69 (Tent. Draft No. 4, 1955); Report of the Royal Comm’n on Capital Punishment, Cmnd. No. 8932, app. 9, at 407-08, 411-13 (1953). New York h
“innocence” and refers to defendant’s mental condition at the time of the alleged crime. Incompetency to stand trial, on the other hand, involves a different standard: The defendant’s ability to understand the nature of the proceedings against him and to assist in his own defense.\(^1\) The incompetence refers to the defendant’s mental state at the time of the proceedings against him rather than at the time of the alleged crime. In recent years, the courts,\(^2\) legislatures,\(^2\) and commentators\(^4\) have insisted on the adherence to these conceptual differences because the existing confusion of the two ideas resulted in the commitment of defendants who were capable of standing trial, but who may or may not have been otherwise mentally ill.\(^2\)

- - -

adopted a variation on the M’Naghten and ALI rules, excluding the “conformity” formula of ALI, but expanding M’Naghten by requiring only “substantial incapacity” and by indicating that defendant’s “appreciation” of his conduct is part of the test rather than just “mere surface knowledge or cognition.” Denzer & McQuillan, Practice Commentary to N.Y. Penal Law § 30.05 (McKinney 1967).

21. The test for incompetency to stand trial is whether the defendant “has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.”\(^2\) Dusky v. United States, 362 U.S. 402 (1960) (per curiam). Under the new Criminal Procedure Law, New York has brought itself into accord with the definition in Dusky: “Incapacitated person” means a defendant who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense.” N.Y. Crim. Proc. Law § 730.10 (McKinney 1971). It may be noted that the New York definition uses the disjointive “or” which might be relevant if, for example, it were possible for a defendant to consult effectively with his lawyer but still be lacking in a “rational understanding of the proceedings against him.” From a conceptual viewpoint, defendant’s “rational understanding” should be relevant only in so far as it affects his ability to effectively consult with his counsel. But see 81 Harv. L. Rev., supra note 19, at 458, for justifications for a dual test including rational understanding.


24. E.g., Guzman, supra note 19, at 21-24; Lewin, Incompetency to Stand Trial: Legal and Ethical Aspects of an Abused Doctrine, 1969 Law & the Social Order 233 [hereinafter cited as Lewin]. “Although courts pay lip service to the distinction between the fact of mental illness and the legal conclusion of mental incompetency, this distinction is seldom actually kept.” Id. at 239. For a collection of other commentators making similar observations see id. n.31.

25. Readings, supra note 1, at 380. Ass’n of the Bar of the City of New York, Mental Illness, Due Process and the Criminal Defendant 82-83 (1968) [hereinafter cited as Mental Illness, Due Process (1968)]; Hess & Thomas, supra note 19, at 713; Lewin, supra note 24, at 239-42. In Michigan, following a medical audit investigation identifying the confusion of standards, 200 patients were returned to trial during two months, some of whom were long time inmates. Lewin, supra note 24, at 241-42. In 1961, records in Michigan’s Ionia Hospital indicated that defendants were being committed because of “hostile and aggressive
Though legal insanity and incompetence to stand trial are conceptually discrete, they are closely related in several practical ways. A great number of those who might ultimately assert the insanity defense are siphoned away from the criminal process through the concept of incompetence. Both concepts usually involve pre-trial psychiatric examinations, and since those asserting the insanity defense will usually be examined for competence, the psychiatrist's conclusions on both issues are frequently determined at the same examination. The pre-trial mental examination will be crucial to the defendant's freedom or to society's disposition of the defendant under both concepts.28

II PROBLEMS ARISING UNDER THE CURRENT PROCEDURE

A. Constitutional Infirmities of the Pre-Trial Mental Examination to Determine Sanity

1. The Fifth Amendment Privilege Against Self-Incrimination

The privilege against self-incrimination protects an "accused's communications, whatever form they might take, and the compulsion of responses which are also communications . . . "27 Although the accused may be forced to respond to court orders which make him the source of real or physical evidence, e.g., fingerprints,28 defendant's testimonial and communicative responses are clearly protected.29

To be effective, the mental examination usually requires an interview with the defendant. This is especially true if the examination is to determine defendant's mental state at some previous time—as in the case of determining criminal tendencies" and other reasons not directly probative of incompetency. Comment, Criminal Law—Insane Persons—Competency to Stand Trial, 59 Mich. L. Rev. 1078, 1082-83 (1961) [hereinafter cited as 59 Mich. L. Rev.].

26. See Danforth, supra note 19, at 490. "Statutes which permit or require pre-trial mental examination of an accused have been found in the District of Columbia and every state. The Federal Rules of Criminal Procedure also provide for such examination. Many state statutes, however, are not clear as to whether the examination is to determine competency to stand trial or responsibility at the time of the alleged crime or both." Id. at 490 n.4. Apparently the New York Criminal Procedure Law has either eliminated the sanity examination or entered the ranks of those statutes where the proper purpose of the authorized examination is unclear. Section 658 of the Code of Criminal Procedure authorized an examination "if the defendant [made] a plea of insanity to the indictment . . . ." Law of June 14, 1939, ch. 861, § 658, [1939] N.Y. Laws 162d Sess. 2190. However, this section has been carried over into Article 730 of the Criminal Procedure Law which authorizes a mental examination "for the purpose of determining if [defendant] is an incapacitated person." N.Y. Crim. Proc. Law § 730.10(3) (McKinney 1971). Since "incapacitated person" is defined in terms of competency to stand trial, Id. § 730.10(1), a literal interpretation of the statute should not permit an examination to determine the defendant's state of mind at the time of the crime charged.


28. Id. at 764 (dictum); United States v. Kelly, 55 F.2d 67 (2d Cir. 1932); F. Inbau, Self-Incrimination (1950); 8 J. Wigmore, Evidence § 2265(1), (4), (6) (McNaughton rev. 1961).

29. 384 U.S. at 763-64; 8 Wigmore, supra note 28, § 2263.
The examinee responds to the questions put to him, and his answers help form the psychiatrist's opinion of the mental state of the defendant at the time of the alleged crime. The incriminatory nature of defendant's responses becomes apparent through an analysis of the elements of criminal conduct. Both common law and statutory codifications of criminal law generally require two elements for a crime: an overt act, the actus reus; and a culpable mental state, the mens rea. It is also a fundamental principle of criminal law that the prosecution must prove beyond a reasonable doubt every element of the crime charged. Therefore, generally speaking, the prosecution must show that the defendant performed the unlawful overt act and that he did so with the required unlawful intention. If the prosecution fails to show that the defendant performed the overt act with an unlawful intention, or if the defendant can introduce sufficient evidence to raise a reasonable doubt in the jury as to whether he had the unlawful intention, the defendant is entitled to acquittal. Without the mens rea there is, by definition, no crime.

From the perspective of this analysis, it is fairly easy to see that the defendant's introduction of the insanity "defense" is an attempt to show that he never committed the crime charged since he was incapable of entertaining the required unlawful intent. Rather than being a "confession and avoidance," it...
denies one of the elements of the crime itself. Consequently, in a court ordered pre-trial mental examination, responses made to an examiner who will later appear as a prosecution witness may help to incriminate the defendants since they provide a basis for the prosecution's attempt to persuade the jury that the requisite mental element of the crime was present.

Furthermore, if the court ordered pre-trial sanity examination is to have any value under the unitary system of trial, the psychiatrist must be allowed to testify, whether for defense or prosecution. New York, in accord with the developing trend, has held that "to prevent the psychiatrist from giving the punishment for his crime." Louisell & Hazard 805-06 (emphasis deleted). Under such a formulation, the insanity defense would be a "confession and avoidance," the defendant would be admitting the factual allegations of the charge but attempting to avoid the usual legal consequences by asserting his mental disorder at the time of the crime. See Report of the Royal Comm'n on Capital Punishment, supra note 20, at 79, 98; Abolish the Insanity Defense 854. This view seems more consistent with English criminal terminology than American, since English juries return a verdict of Guilty But Insane. See S. Glueck, supra note 1, at 35-38. Those states which require the prosecution to prove sanity beyond a reasonable doubt emphasize through their procedure the connection between mens rea and insanity at the time of the crime. The procedure of those states placing the burden of proof as to insanity upon the defendant offers no contradiction to the view that insanity is a confession and avoidance. See note 46 infra. It is possible, however, to plead both not guilty and not guilty by reason of insanity even in jurisdictions which require the defendant to bear the burden of proof, indicating that the defendant does not have to admit the facts of the charge in order to assert his insanity defense. Furthermore, in most jurisdictions, the verdict of not guilty by reason of insanity does not include a specific finding that the defendant committed the overt act and that he would be guilty but for his insanity defense. Also, some cases of mental disorder would be consistent with a theory of avoiding punishment (A intends to kill B, but is laboring under a religious delusion); while others would clearly negate the required intent (A intends to shoot B but does not appreciate the permanent consequences). Therefore, while it may be sounder policy to regard the insanity defense as a confession and avoidance, the current terminology of criminal law presents formidable obstacles to such a view. But the two formulations of the insanity defense, (1) as negating an essential element of crime, or (2) as avoiding punishment, seem to be reflections of the present inconsistency in the criminal law. This comment argues that the conceptual terminology of the criminal law supports the former view, while the practical outcome of an insanity defense supports the latter. If this is so, promoting one view over the other approaches, in effect, arguing as to whether "a glass is half empty or half full." It is submitted that discussion should focus upon the policies underlying the insanity defense and the wording and practice of the criminal law should be altered to conform to the conclusions reached.

37. See note 36 supra.
39. Some courts have indicated that even under the narrow M'Naghten criteria a psychiatrist should not be restricted in his testimony. See People v. Wolff, 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964) (In Bank); People v. Wells, 33 Cal. 2d 330, 202 P.2d 53, cert. denied, 338 U.S. 836 (1949); People v. Haun, 71 Ill. App. 2d 262, 217 N.E.2d
basis of his opinion would vastly limit the value of psychiatric examinations. But in avoiding the procrustean attempt to mold psychiatric testimony into legal pigeonholes, the court must throw upon the jury the formidable task of weighing any admission of the defendant divulged by the psychiatrist-witness only in their evaluation of the medical conclusions and not “in their determination of whether the defendant committed the acts which constitute the crime charged.” While the appropriate instruction to the jury might protect the defendant’s privilege against self-incrimination in a theoretical sense, practically speaking the result is a severe infringement of the privilege because of the likelihood that the jury will be unable to avoid the implications of the psychiatrist’s testimony on the issue of whether the defendant committed the actus reus.

To avoid the conclusion that the privilege against self-incrimination obtains at a pre-trial mental examination, some courts have advanced the contention that defendant’s responses should be considered “real evidence” rather than “testimony,” and thus beyond the scope of the privilege. This contention seems

40. Lee v. Erie County Ct., 27 N.Y.2d at 441, 267 N.E.2d at 457, 318 N.Y.S.2d at 712 (citation omitted).
41. Id. at 441–42, 267 N.E.2d at 457, 318 N.Y.S.2d at 712–13.
42. Cf. Bruton v. United States, 391 U.S. 123 (1968); Jackson v. Denno, 378 U.S. 368 (1964); United States v. Bennett, No. 24,387 (D.C. Cir., Jan. 19, 1972); Sims v. United States, 405 F.2d 1381 (D.C. Cir. 1968); Nash v. United States, 54 F.2d 1006 (2d Cir. 1932). In Bennett, the psychiatrist testified that the defendant’s sanity was evidenced by his “very good recollection of the events of the alleged events [sic]. He recalls minutely what happened prior to the offense, of the alleged offense, and following it. He expressed his own version of the story, his feelings about it . . . .” United States v. Bennett, supra at 10–11, quoting record at 224–25. “Obviously, a limiting instruction cannot be expected to remove all traces of prejudice where the jury is told, in effect, that the defendant confessed to his crime.” Id. at 14 (dictum) (footnote omitted) (the court found the limiting instruction an unsatisfactory solution but opted for a bifurcated trial on remand, thus avoiding a precise holding on the limiting instruction. Id. at 19). See Model Penal Code § 4.09 (Proposed Official Draft 1962); Mass. Ann. Laws ch. 233, § 23B (Supp. 1971); Judicial Conference of the District of Columbia Circuit, Report of the Committee on Problems Connected With Mental Examination of the Accused in Criminal Cases, Before Trial 111 n.1 (1965).
clearly a result-oriented distortion rather than a true appraisal of the defendant's participation in the psychiatric examination. The New York Court of Appeals specifically rejected this view in *Lee*: "In formulating an opinion on a defendant's mental capacity, the physicians must draw from both physical and verbal responses. Inasmuch as these responses are relevant on a material element of the crime, mens rea, we are unable to analogize them to the mere exhibition of one's body."{44} Given the traditional view of the privilege against self-incrimination, the nature of the psychiatric examination, and the connection between the defendant's mental capacity and the existence of a crime, it is difficult to argue with the *Lee* conclusion that the fifth amendment applies to pre-trial psychiatric examinations involving defendant's mental condition at the time of the alleged crime.{45}

However, though the definition of crime dictates the application of the fifth amendment to psychiatric examinations, the court so holding must face the very practical problem of dealing with the defendant who would stand on his privilege and refuse to cooperate with the examination. To allow the defendant to choose the only psychiatrist who may testify on the basis of an in-depth interview, and to force any prosecution expert to rely on records, etc., would weight the scales at trial in favor of the defendant in those jurisdictions requiring the prosecution to prove legal sanity beyond a reasonable doubt.{46}

---

{44} 27 N.Y.2d at 439, 267 N.E.2d at 456, 318 N.Y.S.2d at 713-14 (indicating that the burden would be "insurmountable" in New York since the prosecution must prove sanity beyond a reasonable doubt). The defendant is everywhere presumed sane. *Insanity Defense*, supra note 18, at 111, citing H. Weihofen, Mental Disorder as a Criminal Defense 214 (1954) [hereinafter cited as Weihofen]. In roughly half of the states both the production burden and the persuasion burden are on the defendant. *Insanity Defense* 111-12; 21 Am. Jur. 2d Criminal Law § 52 (1965). In the other half, the defendant has the initial production burden which is satisfied by the introduction of "some evidence" of insanity and the prosecution has the persuasion burden. *Insanity Defense* 112, citing Weihofen 219-28, 241; 21 Am. Jur. 2d Criminal Law § 52 (1965). In most states
The Lee court, like several others, handled this possibility by holding "that the privilege is waived when a defendant interposes his insanity defense." \(^1\) Practically speaking this may be a reasonable compromise, but it leaves much to be desired constitutionally. The constitutional infirmity lies latent in the following language from an earlier New York case quoted with approval in Lee:

It must be remembered that the orders for the examination and observation were based upon the defendants' claim that they should escape punishment by reason of their mental condition at the time of the commission of the acts charged . . . . Under those circumstances defendants may not both advance their claims and then seek to make the rules for the determination of those claims. \(^2\)

But since unlawful intent is an essential element of the crime, the import of the court's logic is that one cannot simultaneously assert that he is "not guilty" of the crime charged and that he is entitled to the privilege against self-incrimination. \(^3\)

If the defendant asserted that he should not be punished because he could not possibly have committed the actus reus, e.g., because he was out of the country when the crime was committed, no court would indulge the notion that the defendant could not assert both his alibi defense and his privilege against self-incrimination. Given the fact that crimes are defined in terms of both overt act and unlawful intent, there would seem to be little analytical difference between the denial of the right to assert the insanity defense and the alibi defense. Practically speaking, however, the difference is overwhelming since an alibi can be checked by independent field work, whereas the merits of a defendant's insanity defense are almost exclusively within his control. Faced with the resulting imbalance at trial \(^4\) if the defendant chooses to stand on his privilege, the New York

which place the burden on the defendant, he is required to prove his insanity by a preponderance of the evidence. Id.


49. For discussions of unconstitutional conditions on the exercise of rights see Hale, Unconstitutional Conditions and Constitutional Rights, 35 Colum. L. Rev. 321 (1935); Danforth, supra note 19, at 500-01; Merrill, Unconstitutional Conditions, 77 U. Pa. L. Rev. 879 (1929); Note, Unconstitutional Conditions, 73 Harv. L. Rev. 1595 (1960).

50. See note 46 supra.
court ignored the connection between capacity and mens rea that it had stressed earlier and conditioned the insanity defense upon a waiver of the privilege against self-incrimination. In light of Supreme Court decisions holding that there is a presumption against the waiver of a fundamental constitutional right by an accused and that a sanction or penalty cannot be imposed upon a defendant for the exercise of a constitutional right, it would seem that the "constructive waiver" avenue of achieving balance at trial is constitutionally blocked.

Even accepting the waiver theory, the court's problems do not end here. There is still the possibility that the defendant may persist in his refusal to cooperate. Now what? May a defendant be held in contempt; or does he lose his right to assert his insanity defense; or to introduce certain evidence of his mental condition; or must he now bear the burden of proof as to his insanity? A contempt order based on the exercise of the constitutional privilege against self-incrimination has been held unconstitutional unless accompanied by full immunity with regard to any crimes disclosed by the defendant's testimony; and several state courts have indicated that the defendant cannot be compelled to respond at a pre-trial mental examination. Striking the insanity defense deprives the accused of due process since he is prevented from introducing evidence that would show he committed no crime. New York decided to prevent Lee from introducing any psychiatric evidence on the issue of his mental state at the time of the crime, but left open the option of introducing non-psychiatric evidence. But if strik-

51. Lee v. Erie County Ct., 27 N.Y.2d at 439, 267 N.E.2d at 455-56, 318 N.Y.S.2d at 710; see note 44 supra and accompanying text.
52. 27 N.Y.2d at 441, 267 N.E.2d at 457, 318 N.Y.S.2d at 712.
53. E.g., Glasser v. United States, 315 U.S. 60 (1942).
55. At least one commentator has questioned whether "balance of power" at trial is properly one of the considerations in determining the scope of a constitutional privilege. See 83 Harv. L. Rev., supra note 31, at 667-68; note 46 supra and accompanying text.
56. Malloy v. Hogan, 378 U.S. 1, 8 (1964); Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964). Of course, it may be argued that if defendant has waived his privilege, Malloy or Murphy would not apply. However, the severe strain that a contempt citation would place on the "constructive waiver" theory is suggested by the New York court's refusal to allow the generally milder sanction of striking the insanity defense. Lee v. Erie County Ct., 27 N.Y.2d at 442, 267 N.E.2d at 457-58, 318 N.Y.S.2d at 713; cf. French v. District Ct., 153 Colo. 10, 384 P.2d 268 (1963); Haskett v. State, 263 N.E.2d 529 (Ind. 1970).
57. See, e.g., People v. Strong, 114 Cal. App. 522, 300 P. 84 (Dist. Ct. App. 1931) (after defendant had in fact answered); People v. English, 31 Ill. 2d 301, 201 N.E. 455 (1964) (defendant can be compelled to submit to an examination but cannot be compelled to answer); People v. Dickerson, 164 Mich. 148, 129 N.W. 199 (1910).
59. 27 N.Y.2d at 442, 267 N.E.2d at 457-58, 318 N.Y.S.2d at 713. For example, relatives
ing the insanity defense represents an infringement of the defendant's right to due process, then excluding his most persuasive and pertinent evidence supporting that defense would appear to be only a slightly less severe infringement of that same right. Furthermore, as noted above, this compromise leads to the paradoxical situation where medical testimony is precluded and non-medical testimony included.

Shifting the burden of proof might seem a practical compromise, but this policy would further deny the correlation developed earlier between insanity and mens rea. It would also favor the defendant of means over the indigent defendant who would find the price of an independent psychiatric examination prohibitive. Even if the law avoided placing a price upon the exercise of constitutional rights by offering free independent psychiatric consultation to all defendants, the courts would find themselves with a severe case of déjà vu: Witnessing again the battle of the psychiatric experts that the pre-trial psychiatric hearing was originally designed to prevent.

and friends of the defendant might testify as to defendant's conduct indicating mental disorder and to their opinion as to his sanity. See, e.g., Pate v. Robinson, 383 U.S. 375, 378-84 (1966).

Defendant's constitutional right to a fair trial includes the right to produce competent and relevant evidence. E.g., State v. Strasberg, 60 Wash. 105, 110 P. 1020 (1910); 16 Am. Jur. 2d Constitutional Law § 579 (1964). The psychiatrist's testimony is both competent and relevant to the question of the defendant's innocence, and therefore the defendant's right to due process of law should include the right to produce such testimony.

See note 15 supra and accompanying text.


See Krash, supra note 15, at 921 n.80; Note, Pre-Trial Mental Examination and Commitment: Some Procedural Problems in the District of Columbia, 51 Geo. L.J. 143, 154-55 (1962) [hereinafter cited as 51 Geo. L.J.]; cf. State v. Shoffner, 31 Wis. 2d. 412, 143 N.W.2d 458 (1966) (holding the defendant would be entitled to the benefit of the ALI test rather than M'Naghten if the defendant accepted the burden of proof). Placing the burden of proof on the defendant was upheld against constitutional attack in Leland v. Oregon, 343 U.S. 790 (1952). Contra, People ex rel. Juhan v. District Ct., 165 Colo. 253, 439 P.2d 741 (1968) (en banc), holding that a statute imposing the burden of proof as to insanity upon the defendant was violative of the state constitution which provided: "No person shall be deprived of life, liberty or property, without due process of law." Colo. Const. art. 2, § 25; accord, U.S. Const. amend. V.

See notes 32-35 supra and accompanying text.


It might be argued that the defendant has caused all of these difficulties by his failure to cooperate and that, since he is responsible, some penalty should be assessed against him to restore the balance at trial. However, this statement refutes itself—how can a defendant be presumed "responsible" for his non-cooperation when the very purpose of the examination may be to determine his competence to make such decisions, and he may not even be "responsible" for the criminal acts charged? Furthermore, the non-cooperation itself might be evidence of mental incapacity as well as evidence of malingering.

At present it would seem that the collision of the pre-trial sanity examination and the fifth amendment has not yet produced a new synthesis of psychiatry and law, or even a valid compromise, but rather a series of accommodations flawed with constitutional and practical difficulties.

2. The Sixth Amendment Right to Counsel

The sixth amendment guarantees the right to counsel in a criminal case. In United States v. Wade the Supreme Court held that such right obtained at any critical "stage of the prosecution, formal or informal, in court or out, where the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself." Though the courts have usually rejected the right of a defendant to have counsel present at a pre-trial mental examination, recent decisions have been more responsive, and it is certainly possible to view the pre-trial insanity...
examination as a "critical stage" of the prosecution within the meaning of *Wade*. In light of the fifth amendment questions discussed above, there is a basis for viewing the psychiatric examination as a "prosecution" stage since it can help the government establish the mens rea element of the crime. Practically speaking, there is little doubt that the pre-trial mental examination, whether for insanity, incompetency, or both, is a crucial stage in the confinement (if not "prosecution") of the defendant since the determination here will most likely account for the ultimate disposition of the defendant.

Once again, deciding that a constitutional right obtains necessitates a further balancing of disciplines. If counsel is to be present in his customary adversary role, the function of the psychiatric examination will clearly be endangered. The *Lee* majority allowed defendant's counsel to be present, but merely as an observer. This avoids a paralysis of the psychiatric interview technique, but to what extent counsel's silent presence may still impinge somewhat on the interview's effectiveness remains to be seen. However, the dissenting judges in *Lee* evidently felt that the paralysis was legal rather than psychiatric and urged that, while defendant may have waived his fifth amendment privilege against self-incrimination, he did not waive or limit his equally important sixth amendment right to counsel at the examination. Though the effects of this legal-psychiatric compromise may not be as devastating as those involving self-incrimination, it is hardly a satisfactory solution.

---


74. As to the psychiatrist hearing being a stage in the prosecution see *Lewin*, supra note 24, at 245; Comment, Right to Counsel at Pretrial Mental Examination of an Accused, 118 U. Pa. L. Rev. 448, 453-54 (1970) [hereinafter cited as 118 U. Pa. L. Rev.].

75. In this comment "confinement" will refer to the curtailment of defendant's freedom either in a prison or a mental health institution. "Incarceration" will be used to denote confinement in a prison and "commitment" to indicate confinement in a mental health institution. "Control" will indicate any curtailment of defendant's liberty or restriction on his rights whether a confinement or not, for example, probation, commitment, or incarceration.


78. 27 N.Y.2d at 444-45, 267 N.E.2d at 459, 318 N.Y.S.2d at 715. The district attorney was also allowed to be present. Id.


80. For example, counsel as a silent observer is unable to prevent damage at the interview. His role is limited to minimizing the effect of any damaging answers later on.

81. 27 N.Y.2d at 446-47, 267 N.E.2d at 460-61, 318 N.Y.S.2d at 717 (Fuld, C.J. & Burke, J., dissenting in part); Id. at 447-48, 267 N.E.2d at 461, 318 N.Y.S.2d at 718 (Breitel, J., dissenting in part).
Having permitted defendant’s counsel to be present at the psychiatric examination, the *Lee* court added that it was “only fair to allow the District Attorney the same right.”

Since the defendant is now in the position of answering detailed questions about his past history in the presence of a prosecutor and without the active participation of counsel, further questions of self-incrimination arise. Even assuming the defendant has waived his privilege with regard to his mental capacity at the time of the crime charged, has he waived his privilege with regard to the “fruit” of any leads revealed to the prosecutor at the examination, or to incriminating admissions concerning events other than the crime charged?

The *Lee* court held that the district attorney would not be permitted to use the psychiatric examination “as a source of evidence which would be relevant on the issue of guilt.” Theoretically, this would “poison” any evidentiary fruit of the psychiatric examination but, like the limiting instruction to the jury, would seem to place the defendant in severe practical danger. The consequence of this holding with regard to crimes other than the one charged is unclear.

These problems seem especially relevant considering that the defendant may be less circumspect in his answers because of his possible mental illness.

### B. Conceptual Infirmities of the Pre-Trial Mental Examination to Determine Sanity

In addition to the formidable constitutional problems, the current procedure for resolving an insanity “defense” also suffers from conceptual difficulties. Simply stated, the crux of this problem is that the defendant who attempts to show that he is “not guilty” by reason of insanity will usually be confined whether he is “convicted” or “acquitted.”

Most jurisdictions have statutes providing for the commitment of those found not guilty by reason of insanity.

---

82. Id. at 444, 267 N.E.2d at 459, 318 N.Y.S.2d at 715.
84. 27 N.Y.2d at 442, 267 N.E.2d at 457, 318 N.Y.S.2d at 713.
85. See note 42 supra and accompanying text.
86. Suppose, for example, a defendant suspected of several crimes is charged with only one. If he relates information regarding the other crimes to the psychiatrist in the presence of the prosecutor, will he receive transactional immunity? Will he receive immunity from the use of the evidentiary fruits of these statements?
87. Furthermore the defendant, often uneducated, “will seldom understand the far-reaching significance of the questions put to him by a trained psychiatrist. Questions calling for seemingly innocuous answers can be aimed at eliciting the most damaging responses.” 51 Geo. L.J., supra note 63, at 162 (footnote omitted) (quoted in *Lee v. Erie County Court*, 27 N.Y.2d at 447, 267 N.E.2d at 461, 318 N.Y.S.2d at 717). The defendant may also be under the influence of drugs. See note 31 supra.
88. E.g., N.Y. Crim. Proc. Law § 330.20 (McKinney 1971); see *Insanity Defense*, supra note 18, at 143, and sources cited in *Insanity Defense* 260-61 n.1. Brakel & Rock categorize 29 states as providing for mandatory commitment under certain conditions, and an additional 16 states as providing for discretionary commitment. Of the five remaining states, two provide for commitment in some way, and only three states have no statutory provisions at all. Brakel & Rock, supra note 2, at 430 Table 11.1.
89. See note 88 supra.
The defendant's sanity at the time of the crime, therefore, is actually irrelevant with regard to separating accused persons into traditional categories of "guilty" or "not guilty", i.e., separating those whom the state has the right to confine because of their criminal acts from those who must be allowed to go free. What distinction exists between those "convicted" and those "acquitted" by reason of insanity lies not in the traditional dichotomy of incarceration versus freedom, but in what type of confinement will be utilized. Currently the defense "discriminate[s] between the cases where a punitive-correctional disposition is appropriate and those in which a medical-custodial disposition is the only kind that the law should allow." To say that the medical treatment is not "punishment" and that the confinement is intended "for the defendant's own good" is to confuse labels with analysis, and motive with effect. "Commitment procedures, however labelled, constitute a sanction, so far as the person confined is concerned, in the form of deprivation of liberty, at least to the extent that commitment is without regard to his 'wishes.' Commitment to a mental hospital is frequently for a longer period than the incarceration following a verdict of "guilty," and confinement in a mental hospital, even a civil hospital, has been held to be as great a deprivation of liberty as incarceration in a jail or prison. Since conceptually the insanity "defense" negates the essential element of mens rea, and shows that by definition no crime occurred, what the insanity "defense" really does is "to authorize the state to hold those 'who must be found not to possess the guilty mind mens rea,' even though the criminal law demands that no person be held criminally responsible if doubt is cast on any material element of the offense charged."

Since it is quite reasonable to control, and perhaps confine, persons who have performed acts proscribed by the criminal law (the actus reus) even though (or perhaps, especially if) their acts were the product of mental illness, it would seem logical to alter the conceptions of criminal responsibility rather than to eliminate control of those who assert the insanity "defense." As it now stands, the traditional concepts of "guilty" and "innocent" no longer are able to perform the function that society and the law require of them. A defendant may be quite "innocent" in both a moral and legal sense and still be a proper subject for governmental confinement or control.

Despite the conceptual contradictions outlined above, it may still be argued that, in practice, the present structure of the insanity issue performs a valuable function in that it does separate defendants into two categories for disposition:

---

90. See Abolish the Insanity Defense, supra note 36, at 864.
93. See Readings, supra note 1, at 383; T. Szasz, Psychiatric Justice 23 (1965) (indicating psychiatric treatment can be a "life sentence.")
95. See text accompanying notes 32-35 supra.
96. Abolish the Insanity Defense, supra note 36, at 864.
those who will receive “punitive-correctional” confinement and those who will receive “medical-custodial” confinement. However, it is questionable whether a jury is the proper arbiter of this decision, and whether the decision should hinge upon the current definitions of legal insanity. The issue of “insanity” is really one of “sentencing.” Will the aims of society, including the rehabilitation of the defendant, be better served by “punitive-correctional” confinement, by “medical-custodial” confinement or by some other form of control?

Moreover, the conceptual maze surrounding the insanity defense is further confounded by the fact that a defendant acquitted by reason of insanity may find himself in the same institutional facility as a defendant who is found guilty and then thought to be in need of mental care. This may be determined by the crime charged, a finding of dangerousness, or a statutory authorization of confinement in either mental health or correctional facilities. For example, in New York a defendant who is acquitted by reason of insanity is not only liable to confinement despite his “acquittal,” but is also liable for confinement in a “punitive-correctional” facility if he is found to be “dangerously mentally ill.” While this result may be reasonable, conceptually and practically it would seem to make a charade of the jury deliberations on the issue of mental illness. In a significant number of cases, the defendant will eventually be placed in the same confinement facility no matter how the jury determining guilt or innocence decides the issue of mental disorder.

C. Constitutional Infirmities of the Pre-Trial Mental Examination to Determine Competency

As mentioned above, defendant’s mental condition at the time of the crime charged and his competency to stand trial are frequently evaluated at the

97. See Kuh, supra note 67, at 790-95, 813-15, for a cogent analysis of the function of the jury with regard to the insanity issue under modern criminal procedure.
98. See text accompanying note 170 infra.
103. See note 101 supra. “If the commissioner [of Mental Hygiene] is of the opinion that the defendant is dangerously mentally ill, he may transfer him to an appropriate institution operated by the department of correction in the manner prescribed by section eighty-five... of the mental hygiene law.” N.Y. Crim. Proc. Law § 330.20(6) (McKinney 1971). Under section 85, the defendant would be entitled to a hearing on the issue of his dangerousness but is not entitled to a jury determination of that issue. N.Y. Mental Hygiene Law § 85(4) (McKinney 1971). He is, however, entitled to a rehearing and review of the court’s determination of his dangerousness, and this review is tried before a jury. Id. The initial finding of dangerousness cannot authorize retaining the defendant in the department of correction institution for more than six months. Id. § 85(4). Extensions may be sought if the defendant remains dangerous, but these extensions are subject to the same procedural safeguards as the original authorization. Id. § 85(4-a). The first extension cannot be for more than one year and subsequent extensions cannot be for more than two years. Id. §§ 75-74.
Thus, when an insanity defense is interposed, a pre-trial mental examination triggers the full range of constitutional problems discussed above, whether it is denominated an "incompetency" examination or an "insanity" examination. Any solution to the problems of the insanity defense which does not also effectively deal with the issues involved in the far more prevalent pre-trial competency examination will be a "paper" solution only. In addition to these considerable difficulties, the pre-trial mental examination to determine defendant's competency has considerable problems in its own right.

Whether or not the defendant is competent to stand trial should rest on his ability to understand the nature of the proceedings against him and whether he is able to assist in his defense in a rational manner. One of the practical problems with the pre-trial competency examination is that the examining personnel sometimes apply the legal insanity standard rather than the competency standard. If the defendant is found incompetent to stand trial he is placed in the custody of a mental institution until such time as he is capable of standing trial. At this point it must be remembered that the defendant has merely been charged with a crime; there has been no judicial investigation or determination of his commission of a crime. Also, the incompetency examination may be the result of a prosecution motion, or the court's own motion, as well as a defense motion. As a result, it is possible for a defendant to be confined pursuant to a prosecution motion for a pre-trial mental examination, even though he is innocent of the overt acts constituting the crime charged. He will also be confined despite the prosecution's inability to prove beyond a reasonable doubt all the elements of the crime charged.

---

104. See 51 Geo. L.J., supra note 63, at 144-45.
105. See note 19 supra and accompanying text.
106. Lewin, supra note 24, at 239. "Although courts pay lip service to the distinction between the fact of mental illness and the legal conclusion of mental incompetency, this distinction is seldom actually kept." Id. This may be because the court has not made clear exactly what standard should be applied, or because the examiner does not understand whatever standard the court has articulated, or because the medical examiner is influenced in his decision by his belief that the defendant is a more fit subject for mental "treatment" than correctional "treatment." See id. at 237-43; Robey, Criteria for Competency to Stand Trial: A Checklist for Psychiatrists, 122 Am. J. Psychiatry 616 (1965); Vann & Morganroth, Psychiatrists and the Competence to Stand Trial, 42 U. Det. L.J. 75 (1964); 59 Mich. L. Rev., supra note 25, at 1081-83. See also 51 Geo. L.J., supra note 63, at 169-74.
109. For a discussion of the role of defense counsel with regard to the motion for a hearing on the incompetency of a defendant see Lewin, supra note 24, at 244-57.
110. Several commentators have spotlighted the tendency of prosecutor's to use the incompetency issue as a strategic weapon leading to the disposition of the criminal charges without trial since a finding of incompetency leads to confinement. See, e.g., Lewin, supra note 24, at 257-69; Slovenko, Psychiatry, Criminal Law, and the Role of the Psychiatrist, 1963 Duke L.J. 395, 412. The prosecution may also move for an incompetency examination as a tactic to gain information to help it rebut an anticipated insanity defense. Krash, supra note 15, at 911; Lewin 272-74.
111. See Foote, supra note 19, at 846 (Professor Foote's article seems to be the germinal one with regard to the reform of competency procedures). The defendant may
In most instances the resulting confinement is indeterminate—being measured solely by an improvement in the defendant's mental competency. Though the measuring rod should be the defendant's ability to effectively participate in his defense against the crime charged, it frequently is the much broader test of whether the defendant has recovered from any mental illness from which he suffers. Thus, the same confusion of standards occurring at the original competency examination follows the institutionalized defendant and prevents him from returning for trial. Furthermore, as several commentators have pointed out, the prospect of facing trial once recovered is not conducive to the incompetent defendant's mental improvement.

These factors and the general difficulty of treating mental illness combine to encroach upon the defendant's rights to a speedy trial and due process of law. His confinement may never end. If it does, it will likely be years before he is brought to trial and in the interim he will have been confined without the government's ever proving that he has done something to forfeit his freedom also be prevented from asserting any legal defense that he might have to the crime such as suppression of evidence or statute of limitations. E.g., United States v. Barnes, 175 F. Supp. 60 (S.D. Cal. 1959), in which a military court which convicted four defendants of murder was declared without jurisdiction ten years later. The defendants were then indicted by the civilian government but the court found that the ten year delay constituted a denial of the right to a speedy trial as to three of the defendants and their cases were dismissed. The fourth defendant was returned to an institution for the criminally insane on the grounds that he was not competent to participate in the proceedings, i.e., in the dismissal. There was no finding that he was dangerous. New York has moved to remedy this situation somewhat: An incapacitated person "may make any motion authorized by this chapter which is susceptible of fair determination without his personal participation." N.Y. Civ. Proc. Law § 730.60(5) (McKinney 1971). Accord, Model Penal Code § 4.06(3) (Proposed Official Draft 1962).

Though an improvement, the statute's emphasis on the defendant's "personal participation" would seem to make the provision subject to the same criticism discussed above with regard to the general doctrine of incompetency. See text accompanying notes 120-22 infra.


116. See Ennis, Civil Liberties and Mental Illness, 7 Crim. L. Bull. 101, 125 n.79 (1971) [hereinafter cited as Ennis].

117. Hess & Thomas, supra note 19, at 713-15 (over half the persons committed to the Michigan State Hospital at Tonia will spend the rest of their lives there).

118. In 1965, nearly twenty percent of the 1,040 inmates committed to Matteawan as incompetent to stand trial had spent twenty years at the institution with charges still pending. Mental Illness, Due Process (1968), supra note 25, at 214-15 Table 8. See also Insanity Defense, supra note 18, at 147-70.
and entitle society to exert its power over him. Finally, the confinement resulting from his incompetency may in fact be longer than his sentence would have been had he been found both competent and guilty.\textsuperscript{119}

The justification asserted for all of this is that it is basically unfair to try a defendant who does not have sufficient capacity to properly assist in his own defense, and therefore the trial of such a defendant would be in violation of his right to due process.\textsuperscript{120} However, nothing seems clearer than the fact that a defendant's right to due process is violated not by \textit{trial} but by \textit{conviction}.\textsuperscript{121} It is very difficult to see the violation of due process in trying the defendant and finding him not guilty, either because the prosecution is unable to make its case against him beyond a reasonable doubt, or because he has a valid defense to the charge. The violation of due process will only occur in those cases in which the prosecution is able to secure a conviction. Concentrating its sole attention on the latter of these two possibilities, the law "protects" the defendant by confining him indefinitely in a situation where any improvement in his mental condition results not in freedom but in a trial with the attendant possibility of further confinement in another institution. While his rights are being thus protected, the defendant runs the risk that the delay in his trial may dissipate the availability of witnesses and beneficial testimony that would be accessible to him with a speedy trial.\textsuperscript{122} Once again, the meeting of law and psychiatry\textsuperscript{123} seems to produce conceptual and practical contradictions.

\textsuperscript{119} Ennis, supra note 116, at 120; 59 Mich. L. Rev., supra note 25, at 1088-89; Note, Hospitalization of Mentally Ill Criminals in Pennsylvania and New Jersey, 110 U. Pa. L. Rev. 78, 91 (1961). See examples noted in United States ex rel. Schuster v. Herold, 410 F.2d 1071, 1079 (2d Cir.), cert. denied, 396 U.S. 847 (1969). The New York Criminal Procedure Law which went into effect in 1971 has acted to meet this problem by providing that the aggregate commitment "must not exceed two-thirds of the authorized maximum term of imprisonment for the highest class felony charged in the indictment or for the highest class felony of which [defendant] was convicted." N.Y. Crim. Proc. Law § 730.50(3) (McKinney 1971). This provision is either ineffective or unclear in its application with regard to an incompetent who is charged with a class A felony since the maximum term in this category is life imprisonment, N.Y. Penal Law § 70.00-2(a) (McKinney 1967).


\textsuperscript{121} Cf. Pate v. Robinson, 383 U.S. 375 (1966).

\textsuperscript{122} For cases dealing with the issue of speedy trial for an incompetent defendant see Marshall v. United States, 337 F.2d 119 (D.C. Cir. 1964); Williams v. United States, 250 F.2d 19 (D.C. Cir. 1957) (7 year delay because of defendant's incompetency held violative of right to speedy trial); United States ex rel. Woltersdorf v. Johnston, 317 F. Supp. 66 (S.D.N.Y. 1970); Cook v. Ciccone, 312 F. Supp. 822 (W.D. Mo. 1970) (twenty-five months at a federal prison facility without treatment held violative of defendant's constitutional rights); Wister v. Settle, 193 F. Supp. 318 (W.D. Mo. 1961); People v. Delfs, 31 Misc. 2d 655, 220 N.Y.S.2d 535 (Dist. Ct. Nassau County 1961); cf. United States ex rel. Hill v. Johnston, 321 F. Supp. 818 (S.D.N.Y. 1971) (dictum). In United States ex rel. Daniels v. Johnston, 328 F. Supp. 100 (S.D.N.Y. 1971), the court rejected a speedy trial argument on behalf of an incompetent defendant who had been confined over eight years but found that the defendant had been denied substantive due process of law and had been denied equal protection of
The "traditional" bifurcated trial is perhaps best exemplified by the California procedure. Originally introduced to reduce the possibility of confusing and sidetracking the jury with the psychiatric testimony necessitated by the insanity defense, the procedure calls for a split trial: the first trial on the law. As to the speedy trial contention the court held that a delay in trial occasioned by mental incompetence does not deprive the defendant of his sixth amendment right to speedy trial. United States v. Smalls, 438 F.2d 711 (2d Cir.), cert. denied, 403 U.S. 933 (1971); United States ex rel. Thomas v. Pate, 351 F.2d 910 (7th Cir. 1965), cert. denied, 383 U.S. 962 (1966); United States v. Davis, 365 F.2d 251, 255 (6th Cir. 1966); Howard v. United States 261 F.2d 729 (5th Cir. 1958); Germany v. Hudspeth, 209 F.2d 15 (10th Cir.), cert. denied, 347 U.S. 946 (1954); Barfield v. Settle, 209 F. Supp. 143 (W.D. Mo. 1962).

Several commentators have suggested that there is no special reason to consult psychiatrists on the issue of incompetence to stand trial and that the issue might be better determined by a jury, the court, or defense counsel. See T. Szasz, Psychiatric Justice, 255-59 (1965); Ennis, supra note 116, at 119; Slovenko, The Psychiatric Patient, Liberty, and the Law, 13 U. Kan. L. Rev. 59, 69-70 (1964). But see 81 Harv. L. Rev., supra note 19, at 469. No attempt is made in this comment to analyze this issue.

The split trial was held not violative of due process in People v. Daugherty, 40 Cal. 2d 876, 256 P.2d 911, cert. denied, 346 U.S. 827 (1953). An early Wisconsin version of the split trial was upheld in Bennett v. State, 57 Wis. 69, 14 N.W. 912 (1883). Other states also have statutory split trial procedures on the issue of insanity. E.g., Colo. Rev. Stat. Ann. §§ 39-8-1 to 39-8-4 (1964); Tex. Code Crim. Proc. art. 46.02 (Supp. 1971). Arizona operated under a statute authorizing a bifurcated trial (Ariz. Rev. Stat. Ann. § 13-1621.01 (Supp. 1971)) until the recent case of State v. Shaw, 106 Ariz. 103, 471 P.2d 715 (1970), cert. denied, 400 U.S. 1009 (1971), which found the procedure authorized by the statute to be a violation of due process of law. See text accompanying note 140 infra. Other jurisdictions have judicially implemented bifurcated trials. E.g., Holmes v. United States, 363 F.2d 281 (D.C. Cir. 1966) (construing the Federal Rules of Criminal Procedure, the court held the issue of bifurcation to be essentially one of controlling the submission of the issues to the jury—part of court's common-law rights); State ex rel. La Follette v. Raskin, 34 Wis. 2d 607, 150 N.W.2d 318 (1967) (a defendant who can show incriminating responses to examiner's questions at court ordered mental examination is entitled to a sequential order of proof on the issues of guilt and insanity in spite of statutory language authorizing only unitary trial). Louisiana abandoned a bifurcated trial in 1932, evidently because of the burden of selecting a double jury in non-populous regions. See Bennett, Louisiana Criminal Procedure—A Critical Appraisal, 14 La. L. Rev. 11, 22-23 (1953). For a discussion of the bifurcated trial procedures existing in the various states in 1961 see Louisell & Hazard, supra note 36, at 824-29.

Split trials or their equivalent are also used in areas of law other than the insanity defense. Insurance coverage is sometimes tried separately from the issue of negligence or damages; a reversal which grants a new trial on one issue while affirming another creates a split trial; evidence of prior convictions is frequently segregated from the issue of guilt under statutes imposing a greater sentence for recidivists. See State ex rel. La Follette v. Raskin, 34 Wis. 2d 607, 615, 150 N.W.2d 318, 322 (1967).

See Louisell & Hazard, supra note 36, at 806-08.

If incompetent, the defendant does not go to trial, just as under the unitary system. Cal. Penal Code § 1368 (West 1970).
issue of defendant's guilt, excluding the issue of his possible insanity; and the second trial on the issue of insanity. Besides the advantage of avoiding jury confusion by trying issues unrelated to the psychiatric testimony first, the split trial also affords more protection to the defendant's fifth amendment privilege against self-incrimination. Since psychiatric testimony will not be introduced in the first trial, there is no danger that the jury will consider testimonial admissions made by the defendant in the psychiatric interview. The jury must be satisfied beyond a reasonable doubt on the basis of the other available evidence that the defendant committed the overt act charged and that he possessed the requisite intent (apart from insanity). When the psychiatric testimony is introduced at the second trial, there has already been a showing that, but for the insanity defense, defendant would be convicted.

Of course, even at this point there is still a sacrifice of the self-incrimination privilege since defendant's admissions to the psychiatrist may be used to help convince the jury that he is not legally insane—that he was capable of entertaining the required mens rea. But the compromise here is held to a minimum, given the connection between mens rea and the commission of crime as currently defined.

Though the bifurcated trial procedure offers relief from some of the problems besetting pre-trial mental examinations, it has problems of its own. The connection between mens rea and psychiatric testimony of an impaired mental state still haunts the procedure in certain cases, as was amply demonstrated by the California decision of People v. Wells and the recent Arizona decision of State ex rel. La Follette v. Raskin, 34 Wis. 2d 607, 323-24 (1957) (providing a concise summary of the tortuous history of the bifurcated trial in Wisconsin).


128. State ex rel. La Follette v. Raskin, 34 Wis. 2d 607, 622-23, 150 N.W.2d 318, 326 (1967); Dix, Mental Illness, Criminal Intent, And The Bifurcated Trial, 1970 Law and Social Order 559, 573-75 [hereinafter cited as Dix]; 51 Geo. L.J., supra note 63, at 155-56; Comment, Compulsory Mental Examinations and the Privilege Against Self-Incrimination, 1964 Wis. L. Rev., 666.


131. 33 Cal. 2d 330, 202 P.2d 53, cert. denied, 338 U.S. 836 (1949). The problems presented by the Wells decision have been emphasized in Louisset & Hazard, supra note 36. However, the publication of this cogent indictment of the split trial procedure antedates the...
The Wells decision held that evidence of mental impairment was admissible in the first trial on the issue of "guilt" when offered to disprove that the defendant had the required specific intent at the time of the crime. If the crime charged was defined in terms of a special mental state, therefore, much of the testimony that would have otherwise been excluded by the bifurcated trial was now admitted to show that the defendant did not in fact entertain that special state of mind. However, if the evidence tended to show that the defendant was not capable of forming a criminal intent at the time, this testimony would still be excluded from the first trial and reserved for presentation at the second trial on the issue of insanity.

Justice Carter dissented in Wells, urging that it is logical contradiction to exclude testimony that defendant couldn't have committed the crime but to allow testimony tending to show a partial impairment of his capacity to commit a crime. While this criticism avoids the fact that the defendant is only prevented from offering evidence of total incapacity at the first trial and will be allowed to present it at the second, it does point to the objection that the evaluation of the testimony will be different at each trial and that the line of application of the fifth amendment to the states, and the article ignores the beneficial effect of the split trial on problems of self incrimination.

---

v. Shaw. The Wells decision held that evidence of mental impairment was admissible in the first trial on the issue of "guilt" when offered to disprove that the defendant had the required specific intent at the time of the crime. If the crime charged was defined in terms of a special mental state, therefore, much of the testimony that would have otherwise been excluded by the bifurcated trial was now admitted to show that the defendant did not in fact entertain that special state of mind. However, if the evidence tended to show that the defendant was not capable of forming a criminal intent at the time, this testimony would still be excluded from the first trial and reserved for presentation at the second trial on the issue of insanity.

Justice Carter dissented in Wells, urging that it is logical contradiction to exclude testimony that defendant couldn't have committed the crime but to allow testimony tending to show a partial impairment of his capacity to commit a crime. While this criticism avoids the fact that the defendant is only prevented from offering evidence of total incapacity at the first trial and will be allowed to present it at the second, it does point to the objection that the evaluation of the testimony will be different at each trial and that the line of application of the fifth amendment to the states, and the article ignores the beneficial effect of the split trial on problems of self incrimination.

---


132. "Some crimes require a specified intention in addition to the intentional doing of the actus reus itself,—an intent specifically required for guilt of the particular offense, as in larceny, burglary, assault with intent to commit murder, using the mails with intent to defraud, or criminal attempt." Perkins, supra note 20, at 762 (emphasis deleted) (footnotes omitted). As used by the court in Wells, "specific intent" refers not only to this type of intent but also to the mental states of malice aforethought and premeditation. 33 Cal. 2d at 343, 202 P.2d at 61. Perkins suggests the term "special mental element" be used as inclusive of "specific intent" as described above, and any other mental requirement which is different from, and generally greater than, the intent to perform the actus reus, such as malice aforethought. Perkins 751. In the interest of greater precision "special mental element" will be used here. See Perkins 750-51, 762-64.

133. 33 Cal. 2d at 350-51, 202 P.2d at 66. Wells, a prisoner, had been convicted under a California statute providing the death penalty for assaults by prisoners under life sentence. The statute called for a showing that the circumstances attending the assault indicated "malice aforethought" and evidence of Wells' mental condition at the time of the assault was introduced and characterized as indicating that Wells did not in fact entertain the required intent but rather was motivated by unreasonable fear. Id. at 356-57, 202 P.2d at 69.

134. See note 132 supra.

135. 33 Cal. 2d at 350-51, 202 P.2d at 66.

136. Id. at 360, 202 P.2d at 71-72 (Carter, J., dissenting).

137. It is quite probable that there is a "gap" between the two trials. Evidence Inadmissible at the first trial because it is of that type which tends to show that defendant could not have entertained the required intent may not be enough to satisfy the jury at the second trial that the defendant meets the McNaghten criterion of legal insanity. However, if this evidence were considered on the issue of special mental state, it might have been persuasive enough to convince the jury that, while defendant was not legally insane, he did not entertain the special mental state. So, while it may be true that defendant will get his evidence
demarcation between the two types of psychiatric evidence is certainly very hard to trace. Also, admitting such evidence would create duplication of effort, and defeat the original purpose of clarifying the issues for the jury.

Excluding evidence of partial mental impairment in the first trial would restore the clean severance of issues. But in State v. Shaw the Supreme Court of Arizona held that this would deprive the defendant of due process—it would inhibit him from showing that he did not commit the crime because he did not have the requisite intent. The Shaw court rejected the Wells distinction between psychiatric evidence showing lack of intent on a particular occasion and that showing incapacity for intent on that occasion. It concluded that the Arizona legislature's intent would be thwarted by the introduction of psychiatric evidence at the first trial. Since enforcing the legislative intent would exclude the evidence and thus violate due process, the court declared the Arizona bifurcated trial statute unconstitutional. Again, it is the connection between defendant's mental condition and the definition of crime that hinders the full effectiveness of the bifurcated trial.

However, there is a split in authority throughout the country on the controlling issues in the Wells and Shaw decisions. Some jurisdictions do not admit evidence probative of mental disorder except to show full incapacity relieving defendant completely from responsibility for the crime charged. The constitutionality of rejecting evidence probative of mental disorder as irrelevant except as it applies to the issue of legal insanity was upheld in Fisher v. United States.

This rule is characterized as a rejection of the doctrine of "diminished capacity," but since such a rule is usually interpreted as rejecting more than is implied in the term "diminished capacity," it might be clearer to refer to this rule as the Fisher rule. In a jurisdiction operating under the Fisher rule, the argu-

considered at one of the two trials, each trial will consider such psychiatric evidence on different issues. The logic of the Wells decision seems to presume that evidence tending to prove total incapacity and evidence tending to indicate a factual lack of the special mental state in the particular case are mutually exclusive categories.

138. See Louisell & Hazard, supra note 36, at 822, 830.
139. Id. at 829-30.
141. Id. at 112, 471 P.2d at 724.
142. Id. at 110-11, 471 P.2d at 722-23.
143. Id. at 113, 471 P.2d at 725.
144. Id.
145. See 22 A.L.R.3d 1228 (1968) ; Brakel & Rock, supra note 2, at 392-96; Perkins, supra note 20, at 881-82.
146. 328 U.S. 463 (1946).
148. Given the present structure and terminology of the criminal law, evidence of defendant's mental disorder might be introduced for a variety of purposes: (1) to show that defendant did not have the capacity to commit the crime because his mental disorder prevented him from forming the general mens rea or guilty mind required. This is the insanity
ments for the introduction of psychiatric evidence at the first trial could be rejected and a bifurcated trial procedure would not suffer the partial loss of effectiveness that has resulted from the Wells decision in California.\textsuperscript{149}

It is submitted, however, that the Wells decision is correct and that the effectiveness of the bifurcated trial procedure should not be increased at the expense of the defendant's right to due process. There are other methods of reconciling this tension. The California decisions which have partially reduced the effectiveness of the bifurcated trial procedure have involved a statute which required the prosecution to prove a special state of mind—"premeditation," or "malice aforethought."\textsuperscript{100} These special states of mind require something more than the general mens rea element of most crimes, and more than a specific intent as the intent to kill.\textsuperscript{151} By contrast, New York's penal code has elim-
nated the gradations of first and second degree murder and has eliminated the ambiguous language of "premeditation" and "malice aforethought" in defining the mens rea requirement for murder. This new definition would reduce the tension between due process and a bifurcated trial in New York since the capacity to commit murder—to form an intent to cause death—would be identical with the New York criterion for mental disorder as a defense. Except through legal fiction, there is no such identity under statutes such as California’s: A defendant might be capable of forming an intent to cause death but not capable of "premeditation," or "malice aforethought," or some other special mental state. The distinction in Wells (between capacity to form and the factual existence of a culpable mental state) was applied to special states of mind. By eliminating "premeditation" and "malice aforethought" and using only a specific intent, such as intent to cause death, the pertinence of the Wells distinction is considerably reduced, if not obviated, since the required mental state has lost most of its "specialness."

As a possible due process violation, such a definition would leave only the argument apparently accepted in State v. Shaw, that psychiatric evidence is relevant to indicate lack of the general mens rea element. However, to consider this contention as charging a deficiency peculiar to the bifurcated trial is misleading. Due process requires that evidence tending to show that defendant's conduct and state of mind did not correspond to the definition of the crime charged should be considered on the issue of whether or not a crime was committed.

The court spoke of this element as a "specific" intent (33 Cal. 2d 350, 202 P.2d at 65) and apparently distinguished assault (see Cal. Penal Code § 240 (West 1970)) from assault with malice aforethought in the case of a prisoner for life. See Cal. Penal Code § 4500 (West 1970). However, assault also requires "intent," though not a "special intent." People v. Carmen, 36 Cal. 2d 768, 228 P.2d 281 (1951). If simple assault requires only a general mens rea in connection with an attempt to inflict bodily injury, and malice aforethought requires an intent to inflict great bodily injury, there is a difference between the two intents involved. But Wells offered psychiatric evidence tending to show that he had an unreasonable fear of being attacked. This type of evidence would distinguish between malice aforethought and simple intent only if malice aforethought included something like "ill will."


153. N.Y. Penal Law § 30.05 (McKinney 1967); see note 20 supra.

154. 106 Ariz. 103, 471 P.2d 715 (1970), cert. denied, 400 U.S. 1009 (1971). "To prohibit the introduction of any or all the evidence bearing on proof of insanity at the trial of guilt or innocence would deprive a defendant of the opportunity of rebutting intent, premaditation, and malice, because an insane person could have none." Id. at 112, 471 P.2d at 724. Whether the court intended its argument to apply to evidence introduced to negate general mens rea, and thus show defendant to be not guilty, or to apply only to evidence introduced to reduce the degree of the crime, is not clear. "There is no provision [at the second trial], nor realistically could there be, to determine also intent, premaditation, or malice in reduction of the degree of the crime." Id. In the discussion in the text, Shaw is considered authority for the broader holding: Evidence of insanity can negate general mens rea. See text accompanying note 140 supra.
As long as evidence is considered on all issues to which it is relevant, there is no violation of due process merely because the consideration was bifurcated. If evidence is introduced that is probative of incapacity to commit crime because of mental disorder, it is, in effect, being considered also on the issue of defendant's factual state of mind at the time of the alleged crime, because a factual lack of intent follows logically from the defendant's incapacity. Since "lack of capacity" would seem to be a term coined to indicate the factual lack of mens rea because of mental disorder, the reverse should also be true: Evidence probative of a factual lack of mens rea because of mental disorder is also considered on the defendant's capacity to commit crime.

Under current law, the great differences between considering the evidence of mental disorder at the first trial, on the issue of whether defendant in fact harbored the requisite general mens rea; or at the second trial, as to whether he was capable of harboring it, is that different standards may be used in interpreting the evidence in each case and that different verdicts might follow a successful defense in each case. The former may be considered without relation to some particular "test" and may lead to a verdict of simply not guilty if successful, whereas the latter would be considered in relation to the jurisdiction's test of incapacity (M'Naghten, etc.) and would lead to not guilty by reason of insanity if successful. The not guilty would presumably lead to freedom while the not guilty by reason of insanity would usually lead to confinement. But these results also follow from a unitary procedure. Evidence of mental disorder introduced to show defendant did not in fact have the requisite intent is tested against the jurisdiction's standard of incapacity and, if persuasive, leads to a not guilty by reason of insanity verdict and confinement. Thus, the "intent-in-fact versus incapacity" argument, rather than indicating a peculiar liability of the bifurcated procedure, challenges the standards of mental disorder as a defense and the authorization of confinement in those cases where lack of the mens rea element is phrased in terms of lack of "capacity."

To summarize, the traditional bifurcated trial, though it is still plagued by the insanity-mens rea connection, does answer some of the objections to the unitary procedure: (1) defendant's admissions will not be before the jury trying the preliminary issues; (2) the introduction of psychiatric evidence at the first trial could probably be limited to those crimes involving special


156. Cf. People v. Farolan, 214 Cal. 396, 5 P.2d 893 (1931) (the jury first found defendant guilty and then deadlocked on the issue of insanity; a second jury was impaneled to try the insanity issue alone and found defendant sane). See 21 Am. Jur. 2d Criminal Law § 47 (1965).

157. See generally Dix, supra note 128, at 570-72.

158. See note 88 supra and accompanying text.

159. See note 128 supra and accompanying text.
states of mind; a jurisdiction which adheres to the Fisher rule can eliminate the introduction of psychiatric evidence at the first trial; a jurisdiction finding a violation of due process in the Fisher rule can reduce the necessity of introducing psychiatric evidence at the first trial by the elimination, where possible, of special states of mind in the definition of crimes.

B. Split Trial by Issues: Non-Psychiatric—Psychiatric

Granting that the traditional bifurcated trial is flawed by limitations required by due process, nevertheless it does provide more protection with regard to self-incrimination. It would seem, therefore, "the underlying idea has sufficient merit that the procedure should not be summarily dismissed as unsalvageable." One commentator's variation would retain the bifurcated trial but would rearrange slightly the distribution of the issues. Notice would be required of any defendant who intended to introduce evidence of mental impairment and these issues, whether of complete legal insanity or of partial impairment negating a special state of mind, would be determined at the second trial. "The first trial would involve such issues as commission of the acts by the defendant . . . and the existence of any other circumstances that might be essential to liability. In addition, the first phase would include a determination of state of mind if this would not require the use of evidence of mental illness." If the jury at the first trial resolved these questions of liability against the defendant, he would be "held over" for the second trial; but at this point, presumably, there would be no verdict of "guilty." The evidence of mental disorder would be introduced at the second trial and evidently could be considered as to factual state of mind or as to lack of capacity. However, the procedure needs further clarification on this point. If the crime charged involved a special state of mind, the jury might find: (1) that the defendant was otherwise guilty but did not have the capacity to form the general mens rea,

160. See note 134 supra and accompanying text.
161. See notes 148-49 supra and accompanying text.
162. See notes 150-53 supra and accompanying text.
163. Dix, supra note 128, at 573.
164. Id. at 575-76. "Rather than dividing the procedure between [sic] the traditional 'insanity' defense on one hand and everything else on the other, the trial might be split between those issues involving proof of mental illness and those that do not." Id. at 575.
166. Dix, supra note 128, at 575. "For example, it is likely that in many burglary trials the question of whether the defendant entertained an intent to commit a felony when he entered the premises could be resolved without reference to psychological abnormality." Id.
167. This could be accomplished, for example, by the use of an interrogatory to the jury asking for a "yes" or "no" answer to the question: "Did the defendant perform the acts charged?" Cf. State ex rel. La Follette v. Raskin, 34 Wis. 2d 607, 627, 150 N.W.2d 318, 328 (1967); note 181 infra and accompanying text. Appropriate instructions could explain the necessity for a finding beyond a reasonable doubt and otherwise focus the question just as they do now.
producing a verdict of not guilty by reason of insanity; (2) that the defendant had the capacity to form and actually harbored the general mens rea but did not actually harbor the special state of mind, producing a verdict of guilty to a lesser offense; or (3) that the defendant had the capacity to form the general mens rea but did not in fact do so, producing a verdict of not guilty. Such a verdict might be based on non-psychiatric evidence, in which case the defendant would be not guilty regardless of any mental disorder or, under the Shaw rule, on psychiatric evidence. If the not guilty verdict was the result of defendant's mental disorder it would be in direct competition with the verdict of not guilty by reason of insanity and the policy of controlling those acquitted for insanity.\footnote{168} Therefore, the jury in the second trial should only be allowed to consider the evidence of mental disorder to reduce the degree of the crime committed, or to render a verdict of not guilty by reason of insanity. The not guilty verdict should be reserved to those cases where, apart from the evidence of mental disorder, the jury believes the defendant did not have the required mens rea.

This modification would preserve the bifurcated trial's advantage in the area of self-incrimination and reduce its liabilities in the area of duplication of effort.\footnote{169}

IV. ALTERNATIVE SOLUTIONS

The current gropings toward a satisfactory procedure suggest that whatever the definitions used, society is interested in asking three distinct questions through its criminal law. First, has the defendant performed some overt act which society has prohibited? Second, assuming that the defendant has performed the act, has he done so under conditions which dictate that society exert its control over his freedom? Third, assuming the first two questions have been answered in the affirmative, in what way should society exert its control in order to best accomplish its purposes?

The problem, surrounding psychiatry and law, both practically and conceptually, is that the traditional definition of criminal conduct straddles all three questions and the resulting criminal procedure sometimes runs like an entry in a three-legged race. The first two questions go to the central issue of whether or not the person's acts form a sufficient basis for the exertion of society's control. The third question corresponds more or less to the concept of "sentencing."\footnote{170} Society, through its current policy of confining those acquitted by reason of insanity,\footnote{171} has manifested an intention to confine those who commit proscribed acts because their legal mental capacity is either partially or fully

\footnote{168} If evidence of mental disorder may prove lack of capacity or negate the required general mens rea element, the same proof could lead to two different verdicts.

\footnote{169} In practice, the duplication of effort in a jurisdiction providing for both a bifurcated trial and the admissibility of evidence of mental disorder to negate intent "is probably not as serious as one might assume from the theoretical possibilities," Louisell & Hazard, supra note 36, at 830 n.82, because of stipulations by counsel that evidence offered at the first trial might be presumed to be given at the second if before the same jury.

\footnote{170} But see 83 Harv. L. Rev., supra note 31, at 666.

\footnote{171} See note 88 supra and accompanying text.
impaired. This being so, it should be recognized that both of these psychiatric issues relate to the third question—to the disposition of “controlled” defendants.

The main function of the jury trial has been to separate the “guilty” from the “not guilty”—which, in theory, corresponds to separating those over whom the government could lawfully and properly exert its control from those who must be allowed to remain free. One of the jury’s functions is to prevent an over-reaching government from using the criminal law to improperly exert its power over the freedom of the people. One of the objects of the criminal law should be to provide guidelines so that the jury can intelligently make the determination between those who may properly be controlled and those who may not. To protect the rights of the individual citizen, the law requires that the distinction between these groups be drawn “beyond a reasonable doubt.”

The first guideline which the law offers the jury creates no problem: Has the defendant performed the prohibited act, the actus reus? (Was it the defendant who did it? Was it the prohibited act?) If society wished to control all those who performed the prohibited act, psychiatry would create no problems since there would be no mental element to consider. It would, therefore, be impossible to confuse the question of mental capacity with the more fundamental question of who is to be controlled. However, society does not wish to exercise its control over all those who have performed the overt act: For example, those who kill in self-defense or by non-negligent accident are allowed to remain free. To distinguish between those defendants who are to be confined for having performed the overt act and those who are not to be confined, the law has further defined crime with the addition of a second element—the mens rea or guilty intention. This is the source of the confusion since, as has been discussed previously, mens rea is no longer an efficient tool for separating those who are to be controlled from those who are to be left free. If defendant is able to show that he did not have the required intent because he was mentally incapable of forming it, he is confined anyway. The policy of defining crime in terms of mens rea allows the introduction of psychiatric evidence bearing upon this threshold question of who will be controlled when it is not relevant here—but rather on the issue of what control should be exercised.

A. Sequential Order of Proof

Even within the current statutory limitations, the judiciary may have a means of improving the situation as indicated by the call of the Wisconsin court for

172. J. Frank, Courts on Trial 109 (1950). See also Duncan v. Louisiana, 391 U.S. 145, 151 (1968); Thompson v. Utah, 170 U.S. 343, 350 (1898); Ex parte Milligan, 71 U.S. (4 Wall) 2 (1866); People v. Dunn, 157 N.Y. 528, 52 N.E. 572 (1899).
173. See Insanity Defense, supra note 18, at 84-87.
176. See notes 88-97 supra and accompanying text.
a "sequential order of proof" in the face of a statute calling for a single trial.\textsuperscript{178} The judiciary has the power to control the presentation of evidence at trial\textsuperscript{179} and to request special findings of fact from the jury.\textsuperscript{180} These powers could be utilized, in an appropriate instance, to break up the trial before a single jury\textsuperscript{181} into three or four distinct stages, each separated by a special jury verdict on the issues presented at that stage.

The first stage should be on the issue of defendant's commission of the overt act. All evidence not relevant to the commission of the overt act would be excluded at this point. The jury would be requested to return a "Yes" or "No" answer to the question: "Did the defendant perform the act charged?" The jury would have to retire to discuss their special finding just as they do now. If the finding was "No," the defendant would be released and a verdict of Not Guilty entered. If the finding was "Yes," the trial would proceed to the next stage before the same jury.

In the second stage the prosecution would have to prove beyond a reasonable doubt that the defendant had the required mens rea apart from any defense of mental disorder. Evidence of mental disorder would again be excluded. Following the presentation of the evidence, the jury would again be asked for a special finding: either Not Guilty or "Guilty in the absence of a defense." It might be explained to the jury that the verdict was not yet a finding of Guilty and that the defendant still had an opportunity to offer exculpatory evidence at the next stage.

The third stage would consider the issues involving psychiatric testimony. Depending on the jurisdiction's holdings with regard to the consideration of mental disorder to reduce the grade of the crime,\textsuperscript{182} the issue at this stage would be either the grade of the crime, the criminal incapacity of the defendant, or both. After the presentation of evidence the jury could be asked to return one of the following verdicts: Guilty; Guilty to a lesser offense; or Not Guilty by Reason of Insanity. In this way defendant's evidence of psychological abnormality may be considered on all issues to which it is relevant without jeopardizing his plea of not guilty.

Such a procedure would eliminate the possibility that an admission to a psychiatrist could influence a jury in its finding with regard to the commission

\textsuperscript{178.} State v. Raskin, 34 Wis. 2d 607, 150 N.W.2d 318 (1967); see note 124 supra.
\textsuperscript{179.} Wills v. Russell, 100 U.S. 621, 626 (1879); State v. Raskin, 34 Wis. 2d 607, 150 N.W.2d 318 (1967); see 53 Am. Jur. Trial § 116 (1945).
\textsuperscript{181.} The sequential order of proof would seem to be the essential ingredient in both the traditional bifurcated trial (see note 124 supra and accompanying text), and the variation suggested by Professor Dix. See note 163 supra and accompanying text. This is clear when the same jury tries both stages of the bifurcated trial. However, the concept seems susceptible to greater exploitation than the bifurcated trial procedures or the Wisconsin decision suggest. See State v. Raskin, 34 Wis. 2d 607, 150 N.W.2d 318 (1967).
\textsuperscript{182.} See note 148 supra.
of the overt act and thus offer more protection to the defendant's right against self-incrimination than the current procedures do. However, the privilege against self-incrimination would remain susceptible of violation to the extent that the prosecution used defendant's statements to the psychiatrist as the basis for expert opinion tending to show that defendant had the required mens rea.

Since a "sequential order of proof" would require a finding that the defendant committed the overt act, the procedure would eliminate the procedural gap (and latent possibility of gross injustice) which currently allows defendants to be confined without a specific verdict on their commission of the overt act. With a finding on the overt act in the first stage in the process, the jury would be logically entitled to rely on the fact of the defendant's commission of the act in judging his mental condition. In those procedures trying the insanity issue first, it does not seem proper to rely on the fact of the commission of the act as evidence of insanity if the defendant denies having performed it. Since the commission of the overt act is frequently the major evidence indicating defendant's mental instability, it would seem proper to have that issue resolved against him before allowing a jury to consider it as evidence of his insanity.

B. Elimination of Mens Rea

One possible statutory solution would be to eliminate mens rea entirely and to define all crimes merely in terms of overt acts. Presumably, the jury would decide only if the defendant had performed the act, and those who were not intended to be controlled would be released at the "disposition" or "sentencing" stage. While this avoids the confusion of mens rea, it takes out of the hands of the jury the full determination of who is properly subject to control by society. Some of the people passed on to "disposition" would be those who traditionally did not come under the criminal law, i.e., those who performed the act through accident, authority of law, etc. Such defendants would have to depend partly on the discretion of experts rather than the judgment of their peers, and this procedure would seem to sacrifice too much of the individual's valuable protection against government overreaching. The problem posed by the juncture of psychiatry and law, therefore, is to offer the jury a guideline which will enable it to further distinguish between those to be controlled because of their overt acts and those who will remain free in spite of them—while structur-

---

183. See note 42 supra.
184. See note 38 supra and accompanying text.
185. See Insanity Defense, supra note 18, at 144.
186. See note 127 supra.
ing the guideline so as to preclude the relevancy of evidence of mental disorder at this initial stage.

C. Modification of Mens Rea

This goal might be accomplished fairly easily by modifying the traditional definitions of mental culpability so as to simply exclude the relevance of psychiatric evidence. For example, New York might add to its Penal Law section defining criminal culpability the proviso: "The culpable mental state defined herein includes that state of mind which is the result of mental disease, defect or genetic abnormality." Though this definition is not completely satisfactory from a purely logical point of view, it accomplishes the desired result and avoids logical inconsistencies in the resulting procedures. The insanity "defense" would be abolished and the issues it involves recognized as pertinent to the disposition of the confined accused rather than to whether he should be confined or not. Since the very definition of crime would exclude the relevance of psychiatric issues, there would be no such testimony offered to the jury and the original purpose of the bifurcated trial would be retained. Furthermore, the complications inherent in the current trial-connected mental examination would be eliminated since any statements made in such a procedure would reflect only on the defendant's disposition after conviction and not on the threshold decision of whether or not a crime was committed by the defendant.

A convicted defendant might be more likely to cooperate with the examination since the chances of its working to his disadvantage would be considerably reduced. If a defendant continued to balk, his refusal would not be so crucial since he might be observed over a more extended period of time by mental health personnel and a decision could be made based upon this observation. Also, since the defendant's mental state at the time of the crime would have greatly reduced relevancy, if any at all, the necessity of defendant's verbal

190. N.Y. Penal Law § 15.05 (McKinney 1967).
191. The current choice exercised by a jury between the verdicts of guilty and not guilty by reason of insanity determines what type of confinement a defendant will receive. Note 88 supra. However, in choosing these verdicts the jury also determines the criterion for release from confinement. If the defendant is found guilty, he will be released when his time is up regardless of his mental condition, although the government may introduce civil commitment proceedings if warranted. If the defendant is acquitted by reason of insanity, his resulting confinement does not terminate at the end of a set period but is contingent upon the defendant's mental condition. If the insanity defense were abandoned other arrangements would have to be made for determining the criterion of the defendant's release from confinement. If desired, the criterion for release could still hinge on the defendant's mental condition at the time of the crime. The psychiatrists examining the defendant for the purpose of making the proper disposition could attempt to discover the defendant's mental state at the time of the crime, just as they do now, and could use this as the basis for determining the criterion for release. It would seem more appropriate to attack this problem directly under a new procedure and to formulate another method of deciding this important question. However, the modification of the mens rea concept would seem workable whether or not the release procedures were reformed.
cooperation in determining his disposition would also be greatly reduced. The main issues would be his current state of mental health and his potential dangerousness.\textsuperscript{192}

Under the present procedures, only those defendants who are able to convince a lay jury that they come within the legal definition of insanity are permitted the sentencing option of confinement to a "mental" institution rather than a "correctional" institution. It does not seem that society's interest is best served by this confusion of a sentencing decision with a control decision. It might very well be that a person who cannot establish that he fits within the insanity rule, whatever that may be, would be more likely to conform his conduct to society's norms after confinement in an institution using predominantly "mental health" techniques. Conversely, as the current New York law recognizes,\textsuperscript{193} it might best serve society's interests to place a defendant "acquitted by reason of insanity" in an institution utilizing "correctional" techniques rather than "mental health" techniques.\textsuperscript{194}

The correct question would seem to be: "What disposition of this defendant will best reduce the possibility of future criminal actions by this defendant and others?"; rather than "What was the mental state of this defendant at the time of the overt act?" And this question should be asked with regard to nearly every defendant who will be confined after trial, not only those who have convinced a jury that they are not "responsible." In a post-conviction setting, the psychiatrists would be able to utilize the full range of their discipline\textsuperscript{195} without usurping a judgment that should be left to representatives of community thought.

This "Bifurcated Procedure"—first, trial by jury to determine the question of whether defendant has done something to allow society to confine him, and then examination by psychiatric and penal experts to determine the appropriate type of confinement—would seem to best allow the harmonious interplay of law and psychiatry without having either discipline encroach upon the recognized

\textsuperscript{192} The criteria used to distinguish between types of confinement would obviously be significant and it may be that establishing such criteria and reviewing decisions made under this procedure should be the domain of the law and the court. See Dershowitz, Two Models of Commitment: The Medical and the Legal, The Humanist, July/Aug. 1971, at 19. The examiners should not be permitted to act arbitrarily, but the legal criteria should have a high degree of correlation to medical knowledge.


\textsuperscript{194} Furthermore, phrasing the dispositional alternatives in terms of "punitive-correctional" versus "medical-custodial" may not do justice to the factual possibilities facing a defendant. It could very well be that a prison will have better treatment facilities than a hospital. See Insanity Defense, supra note 24, 186 at 18.

\textsuperscript{195} Dr. Daniel Schwartz, forensic psychiatrist at Downstate Medical Center, Brooklyn, New York, has categorized the psychiatrist's role in the criminal process into three stages: (1) competency; (2) determining sanity at the time of the crime; (3) advising the court as to the disposition of the convicted defendant. According to Dr. Schwartz it is only the last stage, that of post-conviction disposition, that affords the psychiatrist a logical and useful role. Lecture, The New School, Dec. 17, 1971.
expertise of the other. The law would still offer protection against overreaching government with its privilege of self-incrimination intact, and psychiatry would still perform its proper function of matching a treatment with a defendant without having to draw the fine lines between legally defined categories as required by the law. If desirable, the second stage could be under court control, with the experts reporting their findings to the judge. The second stage could be reviewable if further protection was desired.

D. The Constitutionality of Modifying Mens Rea

Though the proposal may not have been offered in connection with the constitutional problems of pre-trial mental examinations, the "[a]bandonment of the insanity defense is hardly a novel proposal or an isolated one." Some commentators have expressed doubt concerning the constitutionality of such a procedure, since three state courts have overturned statutes which had the effect of curtailing or abolishing the insanity defense. It is submitted, however, that these cases are based on much narrower holdings than is generally recognized and do not stand for the proposition that a statute effectuating the abandonment of the insanity defense is per se unconstitutional. In each of the three cases, the statutes involved were overturned on the


197. See Brakel & Rock, supra note 2, at 378; Perkins, supra note 20, at 885; Welhoven, supra note 46, at 477-80.


199. See, e.g., Brakel & Rock, supra note 2, at 378-79; Insanity Defense, supra note 18, at 222-23; Perkins, supra note 20, at 885-88.

200. The Louisiana statute provided for a bifurcated trial with the insanity issue tried first before a Lunacy Commission composed of the superintendents of three state institutions or their designees: "The findings of the Commission or of a majority of its members shall, . . . constitute the report of the Commission of Lunacy. If said report be that the accused is presently insane, or was insane at the time of the commission of the crime, he shall forthwith be committed to the criminal ward of a hospital for the insane, there to remain until discharged in due course of law. But if the report be that the accused is presently sane and was sane at the time of the commission of the crime, said findings of sanity shall be final, and the accused shall be forthwith returned to the parish in which the offense was committed and
basis of the state rather than the federal constitution.\textsuperscript{201} Thus, they provide no direct precedent on the status of the insanity defense vis-à-vis the federal constitution. But the holdings were based partially on violations of the due process clause of the state constitutions which, as in most states, were derived from the fifth amendment.\textsuperscript{202} Therefore, despite the fact that state court decisions arriving at squarely contradictory results in interpreting "due process" have been allowed to stand,\textsuperscript{203} the decisions may warrant consideration from the federal analogy.

tried upon the question of guilt or innocence, and insanity shall not thereafter be urged as a defense." No. 17, [1928] La. Acts Ex. Sess. 34, 35.

The Mississippi statute provided that "the insanity of the defendant at the time of the commission of the crime shall not be a defense against indictments for murder and the courts shall so instruct the jury in trials for murder, but evidence tending to prove the insanity of the defendant at the time of the commission of the offense may be offered by the defendant in mitigation of the crime. In the event the jury shall find the defendant guilty as charged in the indictment, but insane at the time of the commission of the crime, they shall so state in their verdict, and shall fix the penalty at imprisonment in the state penitentiary for life . . . ." Law of April 3, 1928, ch. 75, § 1, [1928] Miss. Laws 92. If the jury disagreed on the insanity issue the judge could impose the life sentence. In either case "the trial judge may, in his discretion, certify to the governor that in his opinion the mental condition of the prisoner is such that he should not be confined in the penitentiary, in which event the governor shall cause an investigation to be made . . . and if satisfied that the mental condition of the defendant is such that he should not be confined in the penitentiary he shall order the transfer of such prisoner to one of said institutions for the care of the insane . . . ." Id. § 2; see Sinclair v. State, 161 Miss. 142, 156, 132 So. 581, 582-83 (1931) (per curiam).

The Washington statute provided: "It shall be no defense to a person charged with the commission of a crime, that at the time of its commission, he was unable by reason of his insanity, idiocy or imbecility to comprehend the nature and quality of the act committed, or to understand that it was wrong; or that he was afflicted with a morbid propensity to commit prohibited acts; nor shall any testimony or other proof thereof be admitted in evidence;" and "[w]henever, in the judgment of the court trying the same, any person convicted of a crime shall have been at the time of its commission unable by reason of his insanity, idiocy or imbecility, to comprehend the nature and quality of his act, or to understand that it was wrong, or shall be at the time of his conviction or sentence insane or an idiot, or imbecile, such court may in its discretion direct that such person be confined for treatment in one of the state hospitals for the insane or in the insane ward of the state penitentiary, until such person shall have recovered his sanity. In determining whether any person convicted [meets the above criteria] the court may take counsel with one or more experts in the diagnosis and treatment of insanity . . . ." Law of Oct. 21, 1909, ch. 249, §§ 7 & 31, [1909] Wash. Laws 890.


From this perspective, the most salient feature of the overturned statutes is that none of them altered the definition of crime or criminal liability.\textsuperscript{204} While mens rea, as traditionally defined, remained an essential element of crime, the legislatures decreed that the defendant would not be permitted to demonstrate to a jury of his peers that one of the elements essential to the commission of crime was absent in his case.\textsuperscript{205} The precise issue litigated, therefore, was not whether the concept of mens rea could be redefined by the legislature so as to make insanity irrelevant, but whether the legislature could prevent the defendant from proving to a jury that his conduct did not correspond to the definition of the crime charged. This can be seen from the phrasing of the issue in the leading case of \textit{State v. Strasburg}:\textsuperscript{206} "Can the legislature under our [state] constitution so circumscribe inquiry touching the question of the guilt of the accused as to exclude all consideration by the jury of his insanity at the time of committing the act?"\textsuperscript{207} Faced with this issue, the courts correctly found a violation of procedural due process and overturned the statutes.\textsuperscript{208} No doubt such a result would also be mandated by the federal constitution.

If, as proposed here, a statute altered the concept of criminal liability so as to make mental disorder irrelevant, a different question would be presented for constitutional scrutiny. It is well established that the legislature has the power to define crime\textsuperscript{209} and that the will of the legislature in this respect is absolute so long as constitutional safeguards are not infringed.\textsuperscript{210} If the legislature has the power to redefine mens rea so as to make mental disorder irrelevant, there would be no procedural denial of due process since it is fundamental that courts have the power to exclude information that is irrelevant to the crime charged.\textsuperscript{211}

But due process also requires that governmental action shall be consistent with the fundamental principles of liberty and justice which lie at the base of our political institutions.\textsuperscript{212} The question then presented is whether the suggested modification of the concept of mens rea violates this fundamental fairness. The validity of the statute under this standard should be determined by its practical operation and effect and not by the labels involved.\textsuperscript{213}

It would seem that this question has already been answered in another form that the meaning of 'due process of law' shall be the same in each of the fifty states." People ex rel. Juhan v. District Ct., supra, at 260-61, 439 P.2d at 745.

\textsuperscript{204} See note 200 supra.
\textsuperscript{205} Id.
\textsuperscript{206} 60 Wash. 106, 110 P. 1020 (1910).
\textsuperscript{207} Id. at 116, 110 P. at 1023 (emphasis added).
\textsuperscript{208} State v. Lange, 168 La. 958, 964-65, 123 So. 639, 642 (1929); Sinclair v. State, 161 Miss. 142, 153, 132 So. 581, 582 (1931) (per curiam); State v. Strasburg, 60 Wash. 106, 121, 110 P. 1020, 1024 (1910).
\textsuperscript{209} E.g., Ex parte United States, 242 U.S. 27, 42 (1916).
\textsuperscript{210} Central Lumber Co. v. South Dakota, 226 U.S. 157 (1912); People v. West, 106 N.Y. 293, 295, 12 N.E. 610, 612 (1887).
\textsuperscript{211} 31A C.J.S. Evidence § 158 (1964).
in those cases upholding the constitutionality of mandatory commitment following acquittal by reason of insanity.\textsuperscript{214} Such statutes have been upheld despite the fact that the commitment may be based upon a finding of insanity at the time of the crime without any finding or hearing as to current mental state;\textsuperscript{215} despite the fact that the defendant will be confined in a correctional institution rather than a civil hospital;\textsuperscript{216} and despite the fact that the resulting confinement may greatly exceed the maximum sentence that could be imposed upon a defendant adjudged “guilty.”\textsuperscript{217} These holdings indicate, a fortiori,\textsuperscript{218} that the exertion of government control over a defendant who would be found guilty but for the defense of insanity does not violate the “fundamental fairness essential to the very concept of justice.” Even if the above holdings were reversed and found to be violations of due process (as some of them may warrant), the infringement of the constitutional standard would seem to lie in the procedures used to deprive the defendant of his liberty rather than in the basic application of the criminal law to defendants acting as a result of mental disorder. In most jurisdictions\textsuperscript{219} the criminal law is currently applied with constitutional sanction to those suffering from mental disorders since it is only the defendant whose mental disability prevents him from knowing right from wrong\textsuperscript{220} who qualifies for commitment rather than incarceration.\textsuperscript{221}

Of course, the protection of “fundamental fairness” should not dissolve once the government has shown a proper and just basis for the initial exercise of its authority. The denial of due process may occur as easily and with as harmful results at the post-conviction as well as at the pre-conviction stage. A statute authorizing the abandonment of the insanity defense through a modification of the concept of mens rea would have to provide for a procedure which would guarantee the convicted defendant a rational disposition and a rational criterion for release.\textsuperscript{222} However, taken in conjunction with such a procedure, a statute

\textsuperscript{214.} E.g., Ex parte Slayback, 209 Cal. 480, 288 P. 769 (1930); Ex parte Clark, 86 Kan. 539, 121 P. 492 (1912); Northfoss v. Welch, 116 Minn. 62, 133 N.W. 82 (1911); People ex rel. Peabody v. Chanler, 133 App. Div. 159, 117 N.Y.S. 322 (2d Dept.), aff'd mem., 196 N.Y. 523, 89 N.E. 1109 (1909); State ex rel. Thompson v. Snell, 46 Wash. 327, 89 P. 931 (1907).

\textsuperscript{215.} E.g., State ex rel. Thompson v. Snell, 46 Wash. 327, 89 P. 931 (1907).

\textsuperscript{216.} E.g., Ex parte Brown, 39 Wash. 160, 81 P. 552 (1905).

\textsuperscript{217.} E.g., Ragsdale v. Overholser, 281 F.2d 943, 947 (D.C. Cir. 1960).

\textsuperscript{218.} Or in plain English rather than Latin: “We have swallowed the camel, why strain out the gnat?” Sinclair v. State, 161 Miss. 142, 193, 132 So. 581, 596 (1931) (Smith, C.J., dissenting).

\textsuperscript{219.} See note 20 supra.


\textsuperscript{221.} “[A]n accused may have a mental disorder or deficiency and in some cases still be mentally competent to be held legally responsible for his crime.” Mims v. United States, 375 F.2d 135, 142 (5th Cir. 1967) (footnote omitted).

making mental disorder irrelevant to crime would be fundamentally fair and should withstand a constitutional attack based on denial of due process of law.

The validity of abolishing the insanity defense has also been attacked on other constitutional grounds, namely primarily as impinging upon the right of trial by jury. The jury trial challenge, like the procedural due process argument, is valid only if the statute prevents an accused from having a jury of his peers decide upon the presence or absence of all elements essential to guilt. If the statute eliminates the correlation between mental disorder and mens rea by modifying the definition of criminal liability, the defendant will be afforded a jury trial on all essential factual elements. It seems clear that this challenge ultimately depends upon the outcome of the substantive due process argument discussed above.

It would appear that a statute which effectuated the abolition of the insanity defense could not be declared unconstitutional per se. The constitutional standard of due process through fundamental fairness should be applied to the entire procedure provided for by such a statute rather than artificially concentrating on only one link in the chain of procedures affecting the defendant. Tested by such a standard, the validity of the procedure would vary from statute to statute, and a properly drafted statute should withstand a properly applied due process test.

V Effect on Incompetence to Stand Trial

It is suggested that the same approach would best reconcile the problems of the pre-trial mental examination for incompetency to stand trial. The first question that should be asked is whether or not there is sufficient basis in the defendant's conduct for society to exert its control over him. This question

223. An equal protection argument was advanced and received favorably by a plurality of judges in Sinclair v. State, 161 Miss. 142, 167, 132 So. 581, 586 (1931). However, those favoring this viewpoint interpreted the statute before them as providing for a straight life sentence in a prison for a defendant found insane at the time of the crime as compared to a twenty year sentence for a sane defendant. Id. at 167, 132 So. at 587. On these facts, a plurality in Sinclair also found a violation of the prohibition against cruel and unusual punishment. Id. at 164, 132 So. at 585-86. Both findings would seem to be properly limited to the statute at bar and would have limited relevance to a statute which did not predetermine the disposition. The cruel and unusual punishment objection would seem to limit only the disposition of a convicted defendant rather than bearing directly upon the constitutionality of abandoning the insanity defense. The current tests of mental incapacity permit the imprisonment of defendants suffering from mental disorder, and this result follows, except under the Durham type test, even if the overt act was caused by the mental disorder. See note 20 supra. See also State v. Tyler, 77 Wash. 2d 726, 466 P.2d 120 (1970) (en banc), holding that, to qualify as a defense, insanity must not be self induced. Id. at 739, 466 P.2d at 128. Thus insanity itself does not prevent the application of the criminal law to the defendant.


should be answered by a jury. If the jury answers "Not Guilty," then the defendant should be released regardless of his competency to stand trial. If he is thought not a fit subject for unconditional release, further proceedings should be introduced under appropriate civil commitment laws,\textsuperscript{227} not under criminal laws, since it has not been proven to a jury's satisfaction that his actions were criminal. If defendant is found "Guilty" by the jury and incompetent to stand trial by the court, he should be committed to an appropriate institution—presumably a mental institution. At this point at least there has been some showing that the state has a sufficient basis for the confinement and this judgment has been made by the defendant's peers and not an "expert" or administrator.

Whether the defendant is actually incompetent or not, he has lost nothing at this particular stage. However, once he returns to competence the issue of the "fairness" of his trial once again becomes relevant. If he had been able to properly assist in his defense, he might have been able to help convince the jury to return a not guilty verdict.\textsuperscript{228} At this point the defendant should be entitled to a second trial,\textsuperscript{229} or at least a hearing to determine whether or not his incompetence at the initial trial made any significant difference. Even if he is accorded a second trial, it must be remembered that the prosecution would probably be able to preserve much more of its case having gone through the first trial than under the current procedure where the prosecution may not have prepared a case against the defendant at all.\textsuperscript{230} The second possibility of a "hearing" rather than a trial raises questions of due process. However, it is submitted that this proposition should be carefully considered, since the possibilities of the defendant's being prejudiced by being incompetent would seem relatively small under the modern practice of representation by counsel.

This procedure increases the work of the prosecution but not intolerably nor without reason. If an incompetent defendant is going to be confined by the state for extended period of time, he is certainly entitled to a prosecution showing and a jury verdict that it is being done justly, the same as a competent defendant gets. Despite the fact of the defendant's incompetence it is suggested that, even under a "hearing" system, the defendant would receive greater "due process" protection than he does under the "fair trial" doctrine as it now stands.\textsuperscript{231} There is no doubt that a defendant's rights would be best preserved under a system which provided a "re-trial" for every incompetent defendant who regained competency. But the incidence of actual prejudice may not warrant an automatic "free trial" guarantee to all defendants. Of those defendants returning to competency, many would probably find that the prosecution had no further interest in retrial, and these would be released just as they are under the current procedure. If the prosecution wished to avoid the release of a defendant who had returned to competency, the defendant would be entitled to a hearing on the

\textsuperscript{227} E.g., N.Y. Mental Hygiene Law § 70 (McKinney 1971).
\textsuperscript{228} See Foote, supra note 19, at 842; 81 Harv. L. Rev., supra note 19, at 456, 458.
\textsuperscript{229} The second trial "solution" was rejected in Mental Illness, Due Process (1968), supra note 25, at 115 n.104, perhaps because of the expense involved. Cf. Eizenstat, supra note 19, at 400.
\textsuperscript{230} See note 110 supra and accompanying text.
\textsuperscript{231} See notes 107-19 supra and accompanying text.
issue of whether a new trial should be granted or the initial trial given binding effect. The hearing would attempt to determine which defendants still facing prosecution might actually have been prejudiced by their incompetency at the initial trial and award new trials only to these.

If this procedure were combined with that described for the insanity issues, the reluctance of the examining psychiatrist to find the defendant competent would be diminished because the defendant could be returned to psychiatrists for mental care if necessary after conviction. A psychiatrist who felt that a defendant would profit from “mental health” treatment rather than incarceration could present that point fully at the disposition stage and would not be put in the position of improving the defendant’s mental health only to serve the legal process rather than the defendant’s own needs. Finally, the fact that there has already been such a strong showing of the basis for governmental authority might create a situation in which an incompetent defendant would view his improvement in mental health as a method of securing a “second chance” rather than a method of exposing himself to the jeopardy of an initial finding of guilt.

VI CONCLUSION

Pre-trial mental examinations to determine sanity and competence are the result of an accommodation between the disciplines of law and psychiatry and consequently compromise the defendant’s constitutional rights and the psychiatrist’s proper role vis-à-vis both the defendant and society. It is submitted that the source of this accommodation is the confusion in the current procedures with regard to the stage in the criminal process at which evidence of mental impairment is relevant. To clear up this confusion, procedures should be developed which would focus the jury’s deliberations initially on the sole question of whether or not defendant’s conduct is such that the criminal law will subject him to government control over his freedom. This issue should be determined by a jury trial on the merits before the defendant is subjected to lengthy confinement or control, regardless of whether or not he is competent to stand trial. By isolating the initial question of control over the defendant, reducing jury confusion over psychiatric testimony, and protecting to a greater extent the defendant’s privilege against self-incrimination, the traditional bifurcated trial has much to offer and deserves judicial consideration. Furthermore, variations on the basic idea of the bifurcated trial suggest that it would be possible to retain the benefits of this procedure and to reduce somewhat its liabilities.

Finally, though the merits of a bifurcated trial procedure warrant, on balance, judicial implementation, it would seem that a more consistent and effective method of dealing with the problems introduced by pre-trial mental examinations would be the legislative abolition of the relevancy of psychiatric evidence in the trial stage, with a resulting “bifurcated procedure” rather than a trial. The first stage of the procedure should consist of a jury determination of liability to government control while the second stage should be a determination by psychiatric and penal experts, under court supervision if desired, as to what type of control would best effectuate society’s goals.

232. See note 106 supra and accompanying text.
233. See note 115 supra and accompanying text.